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A HUB-AND-SPOKE MODEL OF MULTIDISTRICT LITIGATION

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INTRODUCTION

Decades ago, Francis McGovern developed the idea of "maturity" in mass torts.[1] Mass controversies need time to develop—time for the parties to learn the contours of the litigation, the answers to contested legal, scientific, or evidentiary questions, the strengths and weaknesses of the various claims—before any lasting global resolution can be reached.[2] But we don't have to sit around and wait for natural maturation. Litigation is not like an eighteen-year-old scotch. Procedure can help speed the process by which mass torts mature. Multidistrict litigation (MDL) is one of those procedures.[3]

Consolidating mass tort cases in front of a single MDL judge for pretrial proceedings can contribute to maturation.[4] The MDL judge can oversee common discovery, avoid wasteful duplication of effort or counterproductive races to judgment, and create conditions for the development and exchange of information that can help the parties value their cases.[5] The strategic use of bellwether trials can establish data points based on real jury outcomes to inform settlement negotiations. All of this can accelerate the point at which the parties know enough about the litigation to be able to craft a resolution that will stick. And having all (or nearly all) of the players together in a single forum can set the stage for a global resolution, which may benefit all involved.[6]

Indeed, MDL consolidation has been an enormously successful strategy for efficiently managing and resolving many mass tort cases. This has been particularly true for cases involving single-event mass disasters or defective products sold by a single defendant, even when thousands of plaintiffs are involved. Large controversies, such as the BP oil spill, the NFL concussion litigation, the Volkswagen "clean" diesel scandal, the Vioxx litigation, and numerous product liability cases have been successfully resolved through global settlements negotiated in MDLs.

But in some mass torts—"mega mass torts" involving multiple defendants and multiple products and activities over extended periods of time (e.g., asbestos, silicone gel breast implants, opioids)—global resolution has proven elusive.[7] The single MDL judge handling these mega mass tort cases can become a bottleneck. There are only so many motions one judge can decide, so many discovery disputes one judge can resolve, and so many bellwether trials one judge can conduct. Delays can stretch out as other cases languish in the queue. In the asbestos litigation, for example, aggregating the cases into an MDL for discovery, conducting individual trials, and seeking global settlement led to a twenty-year hiatus from which no global resolution emerged.

Here, we propose a "hub-and-spoke" model of MDL case management for these sorts of mega mass torts that takes advantage of the nationwide scope of the federal judiciary to relieve pressure at the bottleneck. The idea is to initially consolidate all related cases in a single MDL (the hub) for common discovery and pretrial management, during which the MDL judge will identify sensible groupings of parties and claims for strategic disaggregation as test cases. Those test cases will then be remanded to other federal judges (the spokes) to allow the litigation to move forward through further pretrial development, bellwether trials, and potential piecemeal settlements. The

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test cases can then proceed in parallel with the cases still in the hub MDL to speed the process of maturation, much in the same way that a computer can handle complex tasks faster through parallel processing than through serial processing.[8] The hub MDL judge may also retain jurisdiction over a common issue or party (such as punitive damages or, in the opioid litigation, a "negotiation class"[9]) to provide a forum for a potential global resolution should the information generated in the spokes make one possible.

The theory behind the hub-and-spoke model is that this type of mega mass tort MDL is too varied for either a simultaneous trial or a single, simultaneous global settlement. At the same time, without aggregation in an MDL, the unconsolidated mass tort would result in massive duplication of discovery, uneven outcomes for plaintiffs and defendants, the potential for inconsistent judgments, and reduced chances for equitable settlements. Without giving up the benefits of aggregation, the hub-and-spoke model seeks to transform a single unmanageable litigation into multiple manageable litigations, but to do so strategically, in much the same way that a trial judge might sever parties or issues in a single case into more digestible components.

The key to the model is to put the MDL transferee judge—not the Judicial Panel on Multidistrict Litigation (JPML)—in charge of quarterbacking the strategic disaggregation. Having overseen the initial common discovery, decided motions, potentially tried some bellwether cases, and gotten a handle on the contours of the litigation, the MDL judge is best positioned to identify rational groupings of cases to recommend to the JPML for remand. The MDL judge will have a better sense of which bellwether cases will generate the most useful information and be the most likely to drive the litigation towards resolution. The JPML would thus play a secondary, supervisory role and not attempt to slice and dice the litigation on its own. The Panel's buy-in to the model, however, is essential, as only the Panel has the power to remand cases from an MDL.

This process of systematic aggregation followed by strategic disaggregation can speed the maturation of mega mass torts. The hub-and-spoke model offers advantages over both total aggregation and no aggregation. It can enhance horizontal equity for both plaintiffs and defendants and increase the chances for finality in mega mass torts through a variety of settlement structures.

We begin in Part I by describing the bottleneck that can develop in mega mass torts and discuss the different approaches taken by judges handling the asbestos and silicone gel breast implant cases. In Part II, we describe the hub-and-spoke model of MDL case management and some of the advantages it holds over other approaches to mega mass tort litigation. Finally, in Part III we examine the hub-and-spoke model in action in the *National Prescription Opiates* MDL. Francis served as a special master in the opioids litigation, and at his suggestion, Judge Dan Polster has explicitly adopted and begun to implement a hub-and-spoke approach.

I. BOTTLENECKS IN MEGA-MASS TORTS

In mega mass torts the MDL judge can sometimes become a bottleneck.[10] This is no knock on MDL judges. There are only so many motions, discovery disputes, and bellwether trials one human being can decide, even with the help of magistrate judges, law clerks, and special masters.

Even if we had superhuman MDL judges, however, legal constraints on the MDL judge's authority contribute to the bottleneck. Under *Lexecon v. Milberg Weiss*, the MDL judge does not have the power to try transferred cases, thus limiting the pool of cases for potential bellwether trials to those filed directly in the MDL.[11] But those cases might not be the ones where trial will yield the most useful information. They might not be a representative sample of the whole or

include the full range of parties or types of claims.[12] Without the parties' consent to a *Lexecon* waiver or the creative use of inter-district assignments,[13] the MDL judge may not be able to use bellwether trials to generate all of the information the parties need to reach a broader settlement.

In mega mass torts, there may be too many moving pieces for an MDL judge to manage all alone, and simply gathering all of the players in one place may not be enough to yield a lasting global resolution. The asbestos litigation is poster child for these types of cases and shows what can happen when the MDL judge becomes a bottleneck. The bottleneck is not inevitable, however. In the silicone gel breast implants litigation, the MDL judge adopted an approach to mega mass tort litigation that presaged the hub-and-spoke model we describe here.

II. THE HUB-AND-SPOKE MODEL OF CASE MANAGEMENT

Our hub-and-spoke model for MDL case management in mega mass torts draws on the lessons of the asbestos and breast implants litigation. More so that simply aggregating cases, the hub-and-spoke model takes full advantage of the national scope of the federal court system to handle our largest controversies. Bringing more judges into the process can alleviate pressure at the bottleneck. But by keeping coordination in the hub, the benefits of aggregation are not lost.

A. How it Works

The hub-and-spoke model of MDL case management is one of systematic aggregation followed by strategic disaggregation. It proceeds in five basic steps:

(1) Aggregate mass tort cases into a single MDL (the hub),
(2) Commence common discovery and pretrial case management,
(3) Identify similarities and differences among plaintiffs, defendants, causes of action, and remedies,
(4) Strategically disaggregate the mass tort by remanding test cases to transferor courts (the spokes),
(5) Maintain the hub MDL as a forum for potential global or partial settlements.

B. Advantages Over Other Models

The hub-and-spoke model may not be needed in every mass tort MDL. But for mega mass torts, it holds several advantages over other alternatives.

1. Over Total Aggregation

Aggregation maximalists insist that total aggregation is the only option for mass torts.[14] But we developed the hub-and-spoke model in response to problems we've observed with total (or near total) aggregation in some cases. As the asbestos litigation demonstrated, some mega mass torts are simply too varied for a single, global resolution and too large for a single judge to manage without becoming a bottleneck. Even if a "control freak" judge manages to cajole the parties into a global settlement by, for example, withholding adjudication as transaction costs mount, the deal is unlikely to stick.[15] By strategically breaking these mega cases up into manageable pieces, the hub-and-spoke model can help open the bottleneck and prevent them from becoming black holes.

The hub-and-spoke model also offers some specific advantages over total aggregation. Enlisting the help of spoke judges to conduct bellwether trials in transferor districts can increase

the pool of cases eligible for bellwether treatment. The transferor judges in the spokes are not constrained by *Lexecon*, so bellwether cases can be selected for their informational value not simply because they were directly filed in the MDL or because the parties are willing to consent to trial there.[16] There can also be value in trying bellwether cases in front of several different judges with a diversity of perspectives.[17] Those judges may be more familiar with the local state law applicable in diversity suits than the distant MDL judge, and the cases would be tried in front of juries from different parts of the country.[18] As a result, trying bellwether cases in the spokes might, in some situations, provide the parties with better data points to inform their settlement negotiations. Finally, strategic disaggregation of the litigation into discrete, manageable pieces may set the stage for multiple smaller settlements of substantial portions of the litigation in lieu of an ephemeral global resolution.

2. Over No Aggregation

If aggregation causes a bottleneck in mega mass torts, why use judicial mechanisms like MDL to aggregate at all? Why not just leave it to the marketplace of litigation where parties have access to disaggregated decisionmakers?

The arguments in favor of aggregation are well-rehearsed.[19] To name a few: it avoids wasteful duplication of discovery; it avoids the potential for inconsistent judgments; it creates economies of scale for plaintiffs, defendants, and courts alike; and it may set the stage for global settlements that leaves all parties better off. Indeed, the pressures toward aggregation within or outside the formal procedural system may be inexorable.[20]

Here we highlight two additional arguments for initial aggregation of mega mass torts in MDLs, even if later disaggregation is expected. In other words, we explain why the hub-and-spoke model is superior to no aggregation or a laissez-faire approach to the litigation market.

First, MDL consolidation facilitates collective action. While plaintiffs' lawyers have been known to complain bitterly when their cases are swept up into a distant MDL, being forced to work with other plaintiffs' lawyers in the MDL helps solve a collective action problem.[21] By setting up a leadership structure and a common benefit fund, the MDL judge can reduce freeriding and better incentivize lead lawyers to invest in work that will benefit all of the plaintiffs.[22] MDLs attract sophisticated lawyers with the means to invest in the litigation on something approaching the same scale as the defendants, which is particularly important in a mega mass tort where it may be years before plaintiffs see any recoveries and their lawyers see any return on investment.[23] And those lawyers will often be repeat players with the experience and wherewithal to play for rules and maximize the value of whole series of cases.[24]

Contrast that with a world of no MDL aggregation where many plaintiffs may be represented by lawyers who cannot match the defendants' resource- and repeat-player advantages. While the defendants play the odds and play for rules, one-shot lawyers may settle strong cases or push weak ones to trial without taking into account the effect those decisions would have on the rest of the plaintiffs' cases.[25] And the lawyers who can go toe-to-toe with the defendants will lack the proper incentive to invest in common benefit work because other lawyers will freeride on their efforts.[26] Substantive outcomes will surely be skewed by this mismatch.

Second, the hub-and-spoke MDL model can avoid some of the inequities of disaggregated litigation. Judicial resources are finite and can easily be overwhelmed by a mega mass tort. But mass tort litigation is not an efficient market where the price mechanism efficiently sorts cases such that the highest value users of the judicial system have first access to court procedures. The

asbestos litigation is replete with nightmare stories of plaintiffs litigating nonmalignant pleural thickening claims while other plaintiffs die of mesothelioma with their cases still languishing in the queue. And there is a real risk in many mega mass torts that the defendants' assets will be exhausted before many plaintiffs' claims are heard.[27]

Systematic initial aggregation in an MDL can help rationalize—and ration—the process of adjudication in a mega mass tort. Consolidating all of the cases in an MDL effectively stays the bulk of the litigation. Instead of plaintiffs racing each other to courthouses all over the country, the hub MDL judge can make a conscious decision about which cases to focus on first—whether it's those with the most severe injuries, those with the strongest claims, or those that will yield the most useful information to help the parties reach a broader settlement. Once the hub MDL judge has identified rational groupings of parties and claims, remand to the spokes can recapture many of the benefits of disaggregated litigation and drive the tort toward maturity more quickly and equitably. And if, as the tort matures, global or partial settlements become feasible and attractive to the parties, the hub MDL remains available as a forum to consummate the deal.

3. Over Aggregation Followed by Automatic Disaggregation

A superficial reading of the MDL statute might suggest that the JPML should automatically remand the cases en masse once common discovery is complete or at some other moment when pretrial proceedings are deemed to have concluded.[28] That was never the intent of the statute's drafters who fully expected most cases to be resolved within the MDL forum, and who crafted the statute to give the JPML and MDL judge maximum flexibility to manage the litigation toward efficient resolution.[29] But legislative intent aside, the hub-and-spoke model is superior to mass or automatic remands once cases have reached a certain point of pretrial development in the MDL.

The whole point of the hub-and-spoke model is to disaggregate the litigation strategically, not mindlessly. Automatic mass remand would just be a return to chaos. Though initial consolidation would have succeeded in avoiding the costs of duplicative discovery, mass remand would recreate the inequities of disaggregated litigation and frustrate efforts at settlement.

Professor Burch has offered a more thoughtful alternative for disaggregating multidistrict litigation.[30] She argues that MDL judges should set benchmarks for episodic remands. Burch suggest three key intervals at which presumptive remands might be appropriate: (1) at the beginning of the MDL for plaintiffs whose claims fall outside the categories the lead lawyer plan to develop, (2) after the close of common discovery, but before case-specific summary judgment motions, and (3) in the wake of a global settlement for those plaintiffs who do not wish to settle.[31] While we agree that episodic remands may be useful in some cases, we think that the hub-and-spoke model of strategic remands will be preferrable at least in some mega mass tort cases.

In mega mass torts, at least, remands at the outset of the MDL, once the lead lawyers have been appointed and identified the initial claims and theories they will pursue, will often be premature. Flooding these cases back into the federal courts sacrifices equity and risks recreating a race to the courthouse, particularly in mega mass torts where total claims might exhaust the defendant's assets. And disaggregating before it is clear whether a global resolution is possible could be a missed opportunity. As we explained above, one advantage to consolidating mega mass tort litigation in an MDL in the first place is that, as a practical matter, it temporarily stays the bulk of the litigation, giving the parties and the judge an opportunity to analyze the litigation as a whole and figure out the best way to move forward. The threat of exit is, of course, an important tool to ensure the loyalty of lead lawyers.[32] And it would be unfair to hold plaintiffs whose claims the

lead lawyers never plan to pursue hostage. But the plaintiffs are stronger together, and premature disaggregation could defeat the purpose of the collective venture to begin with.

Remands at the end of common discovery may be more appropriate, but again we suspect that a more strategic approach will often be superior. In large part, our preference stems from a desire to facilitate settlement. MDL, like the U.S. legal system as a whole, leaves ample opportunity for and provides significant assistance to negotiated, rather than adjudicated, outcomes.[33] One of the purposes of the Federal Rules of Civil Procedure, the discovery process, and, indeed, judicial case management is to encourage parties to take advantage of the unlimited potential solutions in negotiation rather than the limited recourse inherent in the legal process. Adjudication allows for a limited number of outcomes, whereas the end game for negotiation has few restrictions.

Strategic, rather than automatic or presumptive episodic remand, strikes us as more likely to facilitate settlement. Retaining the bulk of cases in the hub MDL while test cases are tried in the spokes preserves opportunities for the parties to reach a variety of different settlement structures—global or partial. By contrast, remanding mega mass tort cases en masse at the close of common discovery could recreate the queue and arbitrary trial order in transferor courts. If they are consigned to waiting, plaintiffs might as well wait in the MDL where settlement seems more likely.

Of course, if it becomes clear that settlement will not be forthcoming, even after information is developed in the spokes, the hub MDL judge should shift gears and accelerate the rate of remands, just like Judge Robreno did in the asbestos litigation. But even so, the disaggregation should follow a thoughtful strategy, considering effects on plaintiff equity. Judge Robreno, for example, held onto claims for punitive damages in the MDL, so that they wouldn't drain the defendants' resources before other plaintiffs had a chance at compensation.[34]

We have no quarrel, however, with Burch's suggestion of post settlement remands. It is possible that the ready availability of remand for plaintiffs who decline a settlement offer in the MDL might make it harder to achieve global peace because more plaintiffs opt for remand over settlement. But the negotiating parties should ensure peace through attractive settlement terms, not by leaving non-settling parties in limbo in the MDL.[35]

III. OPIOIDS AS A TEST CASE

[This section discusses Judge Polster's adoption of a hub-and-spoke model by strategically remanding bundles of bellwether cases to flesh out different issues and combinations of parties in the opioid litigation. The JPML endorsed the strategy.]

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[1] Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989).

[2] Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1843-45 (1995).

[3] 28 U.S.C. § 1407.

[4] Aggregation for pretrial proceedings is often appropriate at a much earlier stage of maturity than aggregation for settlement or trial. *See* Advisory Committee on Civil Rules, Report on Mass Tort Litigation 21 (Feb. 15 1999).

[5] *See* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1290-91 (2017).

[6] *See, e.g.*, D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183 (2013) (examining conditions under which global resolution can create a peace premium); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 760-63 (1997).

[7] *See, e.g.*, McGovern, *Mass Torts for Judges*, *supra* note 2, at 1836-38 (discussing characteristics of "mega mass torts").

[8] *See* Suggestion of Remand, at 3 & n.3, In re Nat'l Prescription Opiate Litig., MDL No. 2804 (J.P.M.L. Nov. 19, 2019) ("'Parallel processing' is a mode of operation in which a process is split into parts, which are executed simultaneously by different processors. In contrast, "serial processing" employs a single processor, which executes the entire process in a linear sequence. Parallel processing is usually far more efficient. Applied here, parallel processing of the Opiate MDL calls for more than one trial judge working at the same time on different parts of the case.")

[9] *See* Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. __ (forthcoming 2020).

[10] For an exploration of bottlenecks in a very different context, see JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY (2014).

[11] 523 U.S. 26 (1998).

[12] On the challenges of choosing the right cases for bellwether trials, see, for example, Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 592 (2008)

[13] Like when Judge Eldon Fallon sat by designation in the Southern District of Texas to try remanded *Vioxx* cases. *See* Alex Berenson, *A Mistrial is Declared in 3rd Suit over Vioxx*, N.Y. TIMES (Dec. 13, 2005).

[14] *E.g.*, David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002).

[15] McGovern, *Mass Torts for Judges*, *supra* note 2, at 1844-45.

[16] On some of the complications presented by directly filed cases, see Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759 (2012).

[17] *See, e.g.*, Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008).

[18] *See* Burch, *Remanding*, *supra* note **Error! Bookmark not defined.**, at 407-09.

[19] For one of our earlier analyses, see Rave, *Anticommons*, *supra* note 6.

[20] *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlements: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1569 (2004).

[21] *See, e.g.*, Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristoly-Myers Squib and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251, 1312-14 (2018).

[22] *See, e.g.*, Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014).

[23] *See* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952 (2017).

[24] Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 93-98 (2019). Repeat players come with dangers too, of course. *See id.* at 78, 100-01; Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017). But we suspect that, on balance, they add more value than they siphon off in agency costs.

[25] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 100-04 (1974).

[26] *See* Zachary D. Clopton & D. Theodore Rave, *Opioid Cases and State MDL*, 70 DEPAUL L. REV. __ (manuscript at 16) (forthcoming 2021).

[27] *See, e.g.*, Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002).

[28] 28 U.S.C. § 1407(a).

[29] *See* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 839 (2017). A close reading of § 1407(a) makes it clear that the cases can be remanded at any time during the pretrial process, that not all cases need to be remanded at the same time, and that the JPML can even carve off portions of cases for early remand.

[30] Burch, *Remanding*, *supra* note **Error! Bookmark not defined.**, at 422-23; Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 690-93 (2013).

[31] *See* BURCH, *supra* note **Error! Bookmark not defined.**, at 210-14; Burch, *Remanding*, *supra* note **Error! Bookmark not defined.**, at 422-23.

[32] *See* Burch, *Disaggregating*, *supra* note 30, at 681. *See generally* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000);

Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337.

[33] See Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009).

[34] Robreno, *supra* note **Error! Bookmark not defined.**, at 145-46.

[35] *See* D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175 (2017).