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Foreword Symposium: Multidistrict Litigation and Aggregation Alternatives: Foreword

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Symposium: Multidistrict Litigation and Aggregation Alternatives

Foreword

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On March 30, 2001, a somewhat surprising discussion took place among two judges, two plaintiffs' lawyers, a defense lawyer, and a legal scholar. The occasion was a *Seton Hall Law Review* symposium on federal multidistrict litigation ("MDL"). What made the discussion surprising was not what the participants said of their experiences with MDL, but rather the extent to which they discussed things other than MDL. Much of the discussion addressed state court litigation beyond the reach of MDL, and federal court aggregation techniques other than MDL. While the presenters left no doubt that MDL retains a central role in the resolution of mass litigation, it was clear that the only way to understand MDL's role in mass dispute resolution is to view it in light of the available aggregation alternatives in both federal and state courts.

Multidistrict litigation transfer is a procedural mechanism for pulling related cases together. In 1968, Congress enacted the multidistrict litigation statute, 28 U.S.C. § 1407, which permits transfer of related actions pending in multiple federal districts to a single district court for consolidated pretrial handling.[1] The procedure has proved useful in

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[*] Professor of Law, Seton Hall University. I wish to thank all of the participants in the Symposium for their presentations and papers. Thanks also to Professor Timothy Glynn, Nicole Maroulakos, and Kevin Fumai for their organizational work, and above all to *Seton Hall Law Review* Editor-in-Chief Paul Matey, who deserves primary credit for planning this Symposium.

[1] The multidistrict litigation statute provides, in part:

> When civil actions involving one or more common questions are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .

securities, antitrust, civil rights, mass disasters, product liability, and other areas of widespread related litigation. Under the statute, the power to transfer actions and to select an MDL transferee judge is reposed in the Judicial Panel on Multidistrict Litigation ("JPML"), a seven-judge panel appointed by the Chief Justice of the United States.[2] Multidistrict litigation currently carries two critical limitations. First, MDL proceedings address only pretrial matters; actions that are not resolved before trial must be remanded to their original district courts, a point the Supreme Court recently drove home in *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes and Lerach*.[3] Second, MDL transfer is limited to actions pending in federal district courts, and thus reaches neither state court actions nor unfiled claims.[4]

The papers in this Symposium issue of the *Seton Hall Law Review* reflect the contributions of four of the symposium participants. The papers offer quite different perspectives on aggregate litigation, but each in its way advances the idea that MDL's role is best understood in light of alternative or complementary aggregation mechanisms.

Professor Deborah Hensler's paper emphasizes the connections and distinctions between class actions and MDL in mass tort litigation, with her usual thoroughness in empirical research.[5] Taking a detailed look at data from the docket of the Judicial Panel on Multidistrict Litigation, and combining that statistical analysis with on-line research and telephone interviews concerning each of the mass product cases that came before the JPML in the 1990s, Professor Hensler makes several interesting findings. First, while the number of motions considered by the JPML rose each decade since the inception of MDL in 1968, the number in mass product defect cases rose much more dramatically, and the percent of transfer motions in mass product cases granted by the JPML rose significantly in the 1990s.[6] Second, the percent of MDL mass product cases with class action allegations rose dramatically from the 1970s to the 1990s.[7] Third, most of the mass product defect and catastrophic accident cases that came

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28 U.S.C. § 1407(a) (1994).

[2] *See* 28 U.S.C. § 1407(d).

[3] 523 U.S. 26 (1998). As several of the Symposium participants discussed, a bill that would amend section 1407 to permit MDL transferee judges to retain certain claims for trial was passed by the House of Representatives in December 2000. Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. (2001).

[4] Federal court actions filed after an initial MDL transfer may be transferred to the MDL judge as "tag-along" actions, but unlike a class action, MDL does not itself reach claims that remain unfiled.

[5] Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001).

[6] *See id.* at 895-99.

[7] *See id.* at 900-01.

before the JPML in the 1990s were resolved collectively, either by class action settlements or by group settlements outside the class action framework.[8] Naturally, cases in which MDL transfer was granted resulted in collective resolution far more often than cases in which MDL transfer was denied.[9] Her paper demonstrates the importance of looking at the whole picture of aggregate litigation. While most scholars and policy-makers looking at mass torts have focused their attention on mass tort class actions, Professor Hensler demonstrates the important role MDL played in facilitating the growth of mass tort litigation during the era when class certification was considered inappropriate for such cases, and its continuing importance in cases that include class allegations.[10] "Collective resolutions were rarely obtained when parties did not obtain class certification *or* MDL status," she finds. "[W]here collective resolution attempts failed, mass litigation collapsed."[11]

Judge Alfred Wolin, of the United States District Court for the District of New Jersey, writes about the judge's role in developing and implementing "procedures to prevent the paralysis that could flow from an avalanche of litigation."[12] Defining MDL's purpose as promoting efficiency, eliminating redundancy, and preventing conflicting rulings, he relates his experience as a judge handling complex litigation, especially his role as MDL judge in the massive Prudential Insurance Company sales practices litigation.[13] Picking up on the same theme as Professor Hensler—the relationship between MDL and class certification—Judge Wolin makes the important point that at the outset of litigation, even after cases have been transferred to MDL, it is difficult for the MDL judge to determine whether the litigation will be suitable for class certification. Whether the MDL ultimately will result in class certification, or will be handled using more limited pretrial consolidation, the judge must go through the same initial preparation.[14] Describing the initial conference and initial scheduling Order in the Prudential litigation, Judge Wolin's paper emphasizes the overriding importance of communication between counsel and the court in aggregate litigation.[15]

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[8] *See id.* at 901-02.
[9] *See id.* at 902-03.
[10] *See id.* at 904-05.
[11] Hensler, *supra* note 5, at 905.
[12] Alfred M. Wolin, *Comment*, 31 SETON HALL L. REV. 907, 907 (2001).
[13] *See In re* Prudential Ins. Co. Sales Practice Litig., 106 F. Supp. 2d 721 (D.N.J. 2000).
[14] See Wolin, *supra* note 12, at 907-08.
[15] *See id.* at 908.

Andrew Berry adds the perspective of a prominent defense attorney.[16] In his paper, he considers several unintended consequences of aggregation. He notes that from the perspective of a defendant facing mass litigation, the desire for a class settlement is driven in large part by stock prices and financial reporting requirements, specifically the need to give investors the comfort that comes from putting liability risks in the past.[17] Next, he looks at the connection between aggregation procedures and substantive legal claims, noting that the procedural requirements for class actions have driven plaintiffs to recast personal injury claims as claims for medical monitoring.[18] Finally, he considers government actions to recoup money spent treating injuries caused by third-party tortfeasors, suggesting that such actions tend to follow funded mass tort settlements.[19]

Paul Rheingold, a leading mass tort plaintiffs' lawyer and author of a major treatise on mass tort litigation,[20] contributes a paper on mass tort litigation in the state courts.[21] In his view, recent events have revealed both the limits of federal MDL management of mass tort litigation, and the potential for management of such litigation by state courts.[22] Mr. Rheingold challenges the common presumption that federal courts should be the central forum for resolving aggregated mass tort litigation. His paper addresses consolidated management of cases within a single state, coordinated handling of cases in multiple state courts, and coordinated handling of cases in state and federal court. He shows that a number of states have established either codified or ad hoc procedures for managing related cases, creating state-wide processes that mimic federal MDL.[23] Interestingly, Mr. Rheingold observes that despite the advance of statewide aggregation, mass torts are more often resolved on a national basis, due to defendants' greater willingness to settle nationally than state-by-state.[24] In theory, a state court class action can resolve mass litigation on a nationwide basis,[25] but such state court nationwide class actions are rare.[26] Turning to interstate cooperation, Mr. Rheingold describes the coordination of

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[16] Andrew T. Berry, *Comments on Aggregation: Some Unintended Consequences of Aggregative Disposition Procedures*, 31 SETON HALL L. REV. 920 (2001).

[17] *See id.* at 921-22.

[18] *See id.* at 922-23.

[19] *See id.* at 923-24.

[20] PAUL D. RHEINGOLD, MASS TORT LITIGATION (1996 & Supp. 2000).

[21] Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910 (2001).

[22] *See id.*

[23] *See id.* at 911-13.

[24] *See id.* at 913.

[25] *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

[26] *See* Rheingold, *supra* note 21, at 914.

Pennsylvania, New Jersey, and New York state court proceedings in the diet drugs litigation, largely through the efforts of plaintiffs' lawyers seeking to avoid the federal diet drugs MDL in the Eastern District of Pennsylvania.[27] In the diet drugs litigation, coordinated state court litigation proceeded alongside the federal MDL, and Mr. Rheingold suggests that such two-front litigation may be the wave of the future.[28] As to federal-state cooperation, Mr. Rheingold notes that recently plaintiffs' lawyers and state judges have been less willing to allow the federal MDL to control the course of coordinated litigation, and he contrasts Judge Pointer's experience in the breast implant litigation with Judge Bechtle's experience in the diet drugs litigation a few years later.[29] Mr. Rheingold concludes that "state court processing of mass tort litigation is increasing in volume and is increasingly successful in meeting the goals of aggregating and disposing of litigation in a fair and timely method."[30]

In addition to the contributions of Professor Hensler, Judge Wolin, Mr. Berry, and Mr. Rheingold, attendees of the Symposium heard from two other participants. Dianne Nast, a leading plaintiffs' class action attorney, spoke of her experiences in the blood products MDL, as well as in the *Castano* tobacco litigation, which was not transferred to MDL. Among other things, she made the important point that access to justice varies among different aggregative techniques, and that MDL without class certification may not suffice if representative litigation is needed. Judge Marina Corodemus, of the New Jersey Superior Court, described New Jersey's experience with intra-state aggregation of mass tort litigation, explaining that state judges often look to the federal Manual for Complex Litigation rather than reinventing aggregation procedures. Judge Corodemus also pointed out the under-utilization of courtroom technology, which holds great potential for complex litigation, noting that state courts generally do not enjoy the same resources as federal courts.

A third of a century after its introduction, multidistrict litigation continues to play a central role in mass litigation. Much nationwide litigation—whether in mass torts, securities, antitrust, or other areas—is resolved under the supervision of a federal district judge assigned the task of consolidated pretrial management by the Judicial Panel on Multidistrict Litigation. MDL, however, cannot be understood without reference to alternative or complementary aggregation procedures, especially the class action. Claims can be aggregated by class action without the need of MDL transfer, and the class action is a more thorough and aggressive aggregation

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[27] *See id.* at 914-16.
[28] *See id.* at 915-16.
[29] *See id.* at 917.
[30] *Id.* at 918.

procedure than MDL both because it extends through trial and because it reaches unnamed class members. Conversely, claims can be aggregated by MDL without the need for class action, as Professor Hensler points out with regard to the history of mass tort litigation. In this regard, it is important to bear in mind Ms. Nast's concern that for plaintiffs whose claims are small, MDL cannot substitute for class actions in terms of providing access to justice. Finally, if litigation has been transferred to an MDL judge, that judge has the power to render decisions on class certification and on class settlement approval. Class settlement negotiations often occur under the auspices of the MDL court, and may be pursued by the lead counsel and steering committees named by the MDL judge. Thus, while class action may in some cases offer an alternative to MDL aggregation, the class action option also enhances the MDL judge's power.

Nor can MDL be understood without reference to state court litigation. MDL, by definition, reaches only federal court cases.[31] Mass litigation often involves lawsuits filed in both federal and state court, and many of those state court cases are not removable to federal court[32] or simply are not removed, leaving them unreachable by the MDL transfer mechanism. As Mr. Rheingold discusses in his paper and as Judge Corodemus explained at the Symposium, many state courts have developed their own procedures for consolidating related cases within the state, and some have taken the next step of working toward interstate judicial coordination. As plaintiffs continue to pursue large-scale litigation in the state courts, MDL judges must keep an eye on the state court litigation, and as both Judge Corodemus and Judge Wolin emphasized, state and federal judges must continue to develop avenues of state-federal judicial cooperation.

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[31] *See* 28 U.S.C. § 1407(a) (1994).

[32] *See* 28 U.S.C. § 1441 (1994).