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What MDL and Class Action Have in Common

Howard M. Erichson

Fordham University School of Law, erichson@law.fordham.edu

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RESPONSE

What MDL and Class Actions Have in Common

*Howard M. Erichson**

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In *Monopolies in Multidistrict Litigation*,¹ Elizabeth Chamblee Burch looks at leadership counsel in multidistrict litigation (“MDL”) through the lens of repeat-player power and monopolization. She shows that a small number of lawyers dominate the market for membership on plaintiff steering committees and for lead counsel, liaison counsel, and other leadership roles. The dominance of these repeat players, she explains, allows them to fashion approaches that benefit themselves and each other in one MDL after another. To demonstrate that monopoly power benefits “producers” (MDL leadership counsel) and harms “consumers” (individual plaintiffs), Burch points to particular types of settlement terms that these lawyers routinely insert in the deals they negotiate. These settlement provisions, she argues, offer advantages to leadership counsel and to defendants rather than to the plaintiffs whose interests the lawyers purportedly represent. Burch’s powerful article—which refuses to accept the status quo and refuses to bow to powerful forces on all sides of mass litigation—makes an

* Professor, Fordham University School of Law.

1. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017).

important contribution by offering a fresh perspective on threats to justice in the current MDL system of mass dispute resolution.²

In laying out her argument about lawyer monopolies in MDL, Burch draws a sharp contrast between MDL and class actions. “[W]ithout certification,” Burch writes, “multidistrict proceedings lack the judicial, competitive-market, and institutional checks that can help safeguard and legitimize class outcomes.”³ As to judicial checks, she points out the procedural safeguards built into the class action process. Among other things, class actions require a certification of cohesiveness,⁴ judicial approval of settlement,⁵ and a right to opt out of money-damages class actions.⁶ Burch emphasizes that MDL transferee judges, when appointing MDL lead lawyers, are not bound by an adequate-representation requirement.⁷ As to competitive-market checks, she explains that the distinctive processes of class counsel fee awards and class members’ opt-out rights encourage competition. “In Rule 23(b)(3) classes,” she writes, “because only class counsel stand to gain attorneys’ fees, a host of competing attorneys who are otherwise boxed out of that fee award have incentives to solicit and assist class members in opting out. Appellate courts stand ready to reverse collusive deals and chastise self-dealing attorneys.”⁸ In contrast to class actions, Burch worries, “these safeguards crumble in non-class, multidistrict proceedings.”⁹

2. Importantly, Burch recognizes that MDL functions in many cases as a system of mass dispute resolution, not merely as a system of pretrial processing. The MDL statute holds out the bland appearance of a venue transfer provision that authorizes transfer of actions to a single federal district court for pretrial handling, with instructions to remand the actions to their original courts for trial after the conclusion of coordinated discovery and other pretrial matters. See 28 U.S.C. § 1407. In reality, as Burch understands, MDL is not mostly about processing cases for trial in the transferor courts. Disputes often are resolved on a wholesale basis by comprehensive settlements negotiated by MDL committee lawyers under the supervision and encouragement of MDL transferee judges. Much of what happens in MDL—discovery, pretrial motion practice, bellwether trials, mediation—is aimed at bringing out the information lawyers and parties need for a comprehensive negotiated resolution. See Burch, *supra* note 1, at 72 (noting that only 2.9% of MDL actions are remanded to their original districts); see also Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. (forthcoming 2017) (framing the MDL judge’s role in terms of generating information so that the parties can negotiate appropriate resolutions).

3. Burch, *supra* note 1, at 71.

4. See Fed. R. Civ. P. 23(a)(2)–(4), 23(b).

5. See Fed. R. Civ. P. 23(e).

6. See Fed. R. Civ. P. 23(c).

7. Burch, *supra* note 1, at 71. See Fed. R. Civ. P. 23(a)(4) (adequate representation as a requirement for class certification); *Hansberry v. Lee*, 311 U.S. 32 (1940) (adequate representation as a constitutional due process requirement for the binding effect of a class action judgment).

8. Burch, *supra* note 1, at 71.

9. *Id.*

Burch makes a persuasive argument about the risks of small-group power in MDL, but in so doing, she overstates the contrast between MDL and class actions. Rather than emphasizing what is different between the two, I suggest that there is value in thinking about the problem she describes as one that occurs, in slightly different ways, in both of these types of aggregate litigation. In the MDL setting, Burch offers strong evidence of a repeat-player phenomenon in counsel selection, presents a convincing account of settlement terms that serve the interests of the repeat-player attorneys, and draws a plausible connection between the two. MDL leadership lawyers' ability to monopolize global settlement negotiations somewhat explains self-serving settlement terms, and the cartel of repeat-player lawyers further explains "why non-lead attorneys (particularly those playing the long game) do not object."¹⁰

The parallels between MDL and class actions relate both to the problem Burch describes and to the solutions Burch offers. The problem of lawyers' monopoly power to negotiate resolutions on behalf of large numbers of claimants is structurally similar in both settings but manifests itself differently. That is, the particular settlement terms that lawyers use in non-class MDL settlements differ somewhat from the terms that lawyers use in class settlements, but in both contexts, settlement terms are self-serving in similar ways. As to potential solutions, despite differences in the power of an MDL transferee judge and the power of a class action judge, judicial safeguards play a critical role in each setting.

I. WHAT MDL AND CLASS ACTIONS HAVE IN COMMON

A. Problems of Settlement Monopoly Power

"Leaders face systematic temptations at multiple points to serve themselves and act disloyally toward plaintiffs," Burch writes.¹¹ She articulates the dangers that arise when a small group of MDL lawyers controls the negotiation of a settlement that could resolve the claims of thousands of claimants. The lead plaintiffs' lawyers face temptations to strike deals that will bring money into the fund from which their common benefit fees will be paid and to include terms that will maximize the comprehensiveness of the resolution, even if the terms disserve the interests of some of the claimants.¹² They have the

10. *Id.* at 89.

11. *Id.* at 125.

12. Of the closure provisions Burch includes in her discussion, some are more problematic than others. Walkaway provisions and case census provisions, for example, can be effective means

opportunity to accomplish this because their fee incentives align, in important respects, with the interests of the defendant.

In this regard, MDL non-class settlement negotiations powerfully resemble the negotiation of settlement class actions. A *settlement class action*, also known as a *settlement-only class action*, is a class action certified solely for the purpose of turning a negotiated resolution into a court judgment that binds an entire class. While MDL mass, non-class settlement negotiations look in certain ways like every class settlement negotiation, they bear the strongest resemblance to such settlement class actions. Lawyers who represent particular plaintiffs (whether as litigants in the MDL or as putative class representatives) attempt to strike deals with defendants not only on behalf of the lawyers' individual clients, but also on behalf of the entire group of similarly situated claimants. These lawyers know that if they succeed in striking a deal to resolve the claims of the entire group, they stand to be richly compensated. However, if they fail to strike a deal—that is, if they refuse to agree to terms that appeal to the defendant—they stand to lose a significant portion of their fees. In the case of a settlement class action, would-be class counsel must strike a deal that satisfies the defendant or else risk losing the class action franchise.¹³ This is because, in a settlement class action, the class has not been certified to go to trial. In the case of an MDL non-class settlement negotiated by lead lawyers, striking a wholesale deal with the defendant enhances both the certainty and the amount of the common benefit fees to be awarded to the negotiating lawyers.

In her article, Burch catalogues MDL settlement terms that serve the interests of defendants and lead plaintiffs' lawyers rather than the interests of individual claimants.¹⁴ In *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, I undertook a similar cataloguing of class settlement terms that serve the aligned interests of defendants and class counsel rather than the interests of

of assuring sufficient peace for defendants while leaving plaintiffs with an opportunity to make individual decisions about whether to accept or reject the offered terms. As the required participation rate approaches one hundred percent, however, such provisions become increasingly coercive and may encourage unethical conduct by lawyers angling to ensure that every client says yes. See Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KANSAS L. REV. 979 (2010). Mandatory recommendation and withdrawal terms likewise put lawyers in the ethically troubling position of pushing for every client to say yes for the sake of a comprehensive deal rather than delivering loyal representation to each client. See Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265 (2011). For a useful discussion of settlement terms that bring closure in both troubling and less troubling ways, see D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. (forthcoming 2017).

13. See Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951 (2014).

14. See Burch, *supra* note 1, at 124–55.

class members.¹⁵ The reason to create such a compendium of settlement terms is two-fold. First, the catalogue may alert judges to problematic settlement features, thus facilitating judicial protection of claimants. Second, the catalogue may be the best way to illustrate the problem of self-serving conduct by lawyers negotiating mass settlements. One cannot demonstrate systematically the unfairness of mass settlements by looking simply at dollar amounts of settlements. This is because, in the absence of any baseline for determining the “real value” of unadjudicated claims and in the face of infinite variability in the legal, factual, procedural, and tactical strengths of claims, the dollar amounts of particular settlements do not reveal whether negotiating lawyers served their own interests at the expense of the interests of individual claimants. Certain kinds of settlement terms, however, suggest self-serving behavior by lawyers because the terms add little or no value for claimants yet serve the aligned interests of the negotiating lawyers and defendants. This is where Burch focuses her attention with regard to MDL settlements, and this is where I focused my attention with regard to class action settlements.

The problem of settlement terms driven by attorney self-interest is structurally similar in both types of aggregate litigation. In the MDL setting, Burch points to settlement features that expand the number of claimants encompassed by the deal, shrink the overall cost for the defendant, discourage objections, and expand the common benefit fees for the lead plaintiffs’ lawyers.¹⁶ In the class action setting, I point to similar settlement features that exaggerate value, expand the number of claimants encompassed by the deal, discourage objections, and maximize class counsel fees.¹⁷ In MDL settlements, Burch points to recommendation, withdrawal, walkaway, case-census, reverter, and fee provisions. In class settlements, I point to spurious injunctive relief, coupons, cy pres, claims procedures, reversions, class definitions, class representative bonuses, revertible fee funds, and clear sailing agreements. The specifics differ, but the structure of the problem—and the devices that negotiating lawyers use to serve their own interests—are remarkably similar.

Burch correctly sees this as a principal-agent problem. She writes that “transactions may have become too efficient, without sufficient safeguards to ensure that the efficiencies further principals’—not agents’—collective interests.”¹⁸ In both class settlement

15. Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859 (2016).

16. See Burch, *supra* note 1, at 124–55.

17. Erichson, *supra* note 15, at 873–903.

18. Burch, *supra* note 1, at 86.

negotiations and MDL global settlement negotiations, the negotiators for the plaintiffs are agents neither selected nor controlled by the principals. Burch recognizes that a client's inability to choose its own advocate constitutes a structural similarity between class actions and MDL: "[n]either clients nor their attorneys freely consent to multidistrict litigation or the subsequent selection of lead counsel. . . . This non-voluntary aspect makes selecting lead lawyers akin to appointing class counsel."¹⁹ It is worth noting that the problem in MDL takes on even greater significance because the principal-agent relationship itself is shaky. MDL lead lawyers have at best an indirect and ambiguous principal-agent relationship with plaintiffs who are not the clients of the lead lawyers. In this regard, the position of MDL leadership counsel differs from the role of class counsel in class actions certified for litigation,²⁰ although it is similar to the position of would-be class counsel attempting to negotiate a settlement class action.²¹

B. Safeguards against Abuse of Settlement Monopoly Power

Faced with a structurally similar problem, MDL and class actions employ different safeguards against problematic mass settlements. Where class actions rely primarily on formal judicial safeguards, MDL non-class settlements rely primarily on disclosure and consent. Even so, these safeguards overlap more than may appear at first glance.

The first safeguard is careful selection of lawyers to bear the responsibility and power of working on behalf of the entire group. Contrasting MDL's open-textured approach to appointment of leadership positions with the class action rule's explicit requirement of adequate representation and provisions regarding appointment of class counsel, Burch suggests that this difference sets MDL apart from class actions: "[w]hen transferee judges select lead lawyers, they rarely attend to adequate representation, focusing instead on financial means, expertise, and cooperation—factors that empower repeat players but may stifle competition."²² However, I wonder whether this difference is more formal than real. MDL judges care about the financial resources

19. Burch, *supra* note 1, at 125.

20. See Fed. R. Civ. P. 23(g)(4) (making explicit that class counsel's duty runs to the class as a whole).

21. When MDL lead lawyers seek a global settlement with a defendant on behalf of a mass of claimants despite the lack of power to litigate those claims to resolution, they especially resemble lawyers appointed as interim class counsel for purposes of negotiating a settlement on behalf of a putative class. See Fed. R. Civ. P. 23(g)(3) (permitting appointment of interim class counsel).

22. Burch, *supra* note 1, at 71.

of lead lawyers, but so do class action judges. As a practical matter, a lawyer's resources may be essential to adequate representation in both types of aggregate litigation. Expertise similarly matters to adequate representation in both types of litigation. Although cooperation likely plays a larger role in MDL than in class action appointments, the ability to work with others may advance the cause in both settings. The ability to "play well with others" surely offers upsides for accomplishing high quality work, even as it also presents the cartel problems that Burch identifies.

Another safeguard is judicial review of settlements. Rule 23 builds such review into class action procedure as a condition for any negotiated class action resolution to bind the class.²³ The MDL statute does no such thing. Burch writes that, "unlike class settlements that require judges to ensure that they are fair, reasonable, and adequate, judges have little say in 'private' global deals that leaders design."²⁴ She is correct that unlike class action judges, MDL transferee judges lack the power to reject negotiated non-class resolutions that the litigants choose to accept. On this reasoning, I have sometimes criticized MDL judges for claiming the power to "approve" or "reject" non-class settlements.²⁵ Recently, however, Andrew Bradt and D. Theodore Rave offered a compelling way to conceptualize the judge's role with regard to non-class settlements in MDL.²⁶ Even though the judge lacks any formal legal power to decide whether a non-class settlement should be given binding effect, the judge nonetheless is well-positioned to opine on the fairness of a settlement as a way to provide information to the claimants as they decide whether to participate in the proposed deal.²⁷ Thus, despite differences in the formal powers of judges over different types of settlements, it goes too far to declare that judges have "little say" over non-class settlements in MDL. In terms of the safeguards of judicial appointment of counsel and judicial review of settlement, the similarities between MDL and class actions are as important as the differences.

23. Fed. R. Civ. P. 23(e).

24. Burch, *supra* note 1, at 71.

25. See, e.g., Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015 (2013).

26. Bradt & Rave, *supra* note 2.

27. See *id.*

II. WHAT MDL AND CLASS ACTIONS DO NOT HAVE IN COMMON

Despite the structural similarity between monopoly power over MDL settlements and monopoly power over class action settlements, there are important differences in the particulars.

Class actions, as Burch points out, offer formal judicial-procedural safeguards that exist only informally in MDL. Whereas MDL judges may weigh in on settlements as a matter of discretion and as a source of information to the settling parties,²⁸ the class action rule builds in a formal requirement: it demands that judges provide notice, hold a hearing, and make findings of fairness and adequacy as a prerequisite to the binding effect of any class settlement.²⁹ Whereas MDL judges may consider the adequacy of lawyers appointed to leadership positions, the class action rule again builds in a formal requirement: it allows class certification only after a judicial finding of adequate representation,³⁰ which is also a necessary condition for any class action settlement or judgment to have a binding effect.³¹

I share some of Burch's concerns that MDL settlements put claimants in a position akin to that of absent class members but without the same formal protections. More than a decade ago, I wrote the following on the difference between class and non-class proceedings in the wake of the Supreme Court's rejection of a pair of asbestos settlement class actions:

Indeed, one irony of *Amchem* and *Ortiz* is that the Supreme Court was so protective of the interests of mass tort plaintiffs, so concerned that absent class members would not be treated fairly, that as a practical matter it sent most mass tort plaintiffs into non-class collective representation where they are treated much like absent class members but without the safeguards of class action procedure.³²

But even in the absence of formally equivalent structures, MDL judges for mass disputes play an increasingly similar role to that of class action judges.

Also, it is worth remembering that the reason for the additional formal safeguards in class actions is that class actions bind non-parties, while MDL adjudications bind only those who are parties to lawsuits that have been transferred to the MDL, and MDL non-class settlements bind only those who affirmatively consent to the settlement after proper

28. *See id.*

29. *See* Fed. R. Civ. P. 23(e).

30. *See* Fed. R. Civ. P. 23(a)(4).

31. *See* *Hansberry v. Lee*, 311 U.S. 32 (1940); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

32. Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1774 (2005).

disclosure. For the most part, parties bound by MDL judgments and settlements are those who have hired lawyers and filed lawsuits. Class action judgments and settlements, by contrast, bind all those who fall within a certified class and who did not opt out. The power to bind non-parties makes runaway class lawyers more dangerous than runaway MDL lead lawyers. The opportunity to bind claimants to a deal, despite their lack of consent, is precisely what makes settlement class actions so appealing to defendants and to putative class counsel.

In other words, rather than thinking of class actions and MDL in terms of *greater* and *lesser* safeguards, it makes more sense to think of them as encompassing *different* safeguards. Class actions, because they bind non-parties, emphasize formal judicial safeguards such as class certification, formal appointment of class counsel, and formal review of proposed settlements. MDL non-class settlements, because they bind only affirmative settlement participants, offer the protection of client consent backed by lawyers' ethical responsibility of disclosure.³³ Thus, even as Burch calls attention to the dangers of MDL settlements and the absence of formal procedural safeguards in MDL, it is important not to lose sight of the parallel problems in class actions where, despite safeguards, the risks remain significant.

But perhaps the most important distinction between class actions and MDL is one that underscores the significance of Burch's argument. Unlike MDL, class certification relies on a finding of class cohesion sufficient to permit classwide adjudication. Leaving aside the problem of settlement class actions, class certification empowers class counsel and class representatives to litigate their claims collectively at trial, and thus to negotiate in the shadow of such potential adjudication. The class certification process focuses the court's attention on whether the class claims are cohesive enough to permit classwide adjudication. A case proceeds as a class action only if its proponents show that the claims meet the requirements of commonality, typicality, adequacy of representation, and—for money damages class actions under Rule 23(b)(3)—predominance of common issues over individual issues.³⁴ When a judge finds such cohesion and certifies a class for purposes of litigation, the class and its lawyer obtain the settlement leverage that results from the empowerment to achieve classwide adjudication. Thus, when a settlement deal is struck after a court has certified a class for

33. See ABA Model Rule of Prof. Conduct 1.8(g).

34. See Fed. R. Civ. P. 23(a)(2)–(4), 23(b)(3); *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011) (rejecting a Rule 23(b)(2) employment discrimination class action in part for lack of commonality); *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997) (rejecting a Rule 23(b)(3) asbestos settlement class action in part for lack of class cohesion).

purposes of litigation, there is reason to be somewhat less skeptical about whether the deal reflects real leverage on behalf of the plaintiffs.

MDL neither demands such cohesion nor provides claimants the right to a collective adjudication. The MDL statute combines the language of venue transfer³⁵ with the language of consolidation.³⁶ Rather emphatically, it is neither a joinder provision³⁷ nor a provision for representative litigation.³⁸ Although it creates a setting that facilitates the negotiation of collective resolutions, MDL is not designed with collective adjudication in mind.

In the end, the difference between MDL and class actions is not about the risk that individual claimants might get the short end of the stick while the lawyers make out like bandits. That risk exists in *both* MDL and class actions. Nor is the difference that the judge has a large role to play in one but not the other. In both MDL and class actions, the judge plays an important role in protecting against unfair settlements. But in terms of empowerment, class actions—when certified for purposes of litigation—offer an upside that MDL does not match, which is the power of the lead lawyers to pursue collective adjudication on behalf of the entire group of claimants. Because MDL is theoretically a more modest form of aggregation, it appropriately lacks a finding of sufficient cohesion to permit representative litigation and adjudication. And without the power to pursue claims to collective adjudication, MDL lead lawyers lack the leverage that lawyers have in litigation class actions.

Burch identifies important problems in how MDL resolves mass disputes. She sets up the problem as a contrast to class actions, which as a formal matter have stronger judicial and procedural safeguards than MDL. I have suggested here that class actions can be viewed as raising a parallel set of problems to the ones Burch discusses. Although class actions and MDL differ in significant ways, these differences cannot be reduced to a story of monitored class counsel versus unmonitored MDL counsel. Rather, the similarities between MDL and class actions run deep, and the differences between them cut in multiple directions as they relate to the problem of self-serving lawyer conduct and inadequate resolutions for claimants.

35. Compare 28 U.S.C. § 1407, with 28 U.S.C. § 1404 (venue transfer).

36. Compare 28 U.S.C. § 1407, with Fed. R. Civ. P. 42(a) (consolidation).

37. Compare 28 U.S.C. § 1407, with Fed. R. Civ. P. 20 (permissive joinder), and Fed. R. Civ. P. 19 (compulsory joinder).

38. Compare 28 U.S.C. § 1407, with Fed. R. Civ. P. 23 (class action).