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THE RESPONSIBILITIES OF LEAD LAWYERS AND JUDGES IN MULTIDISTRICT LITIGATIONS

Charles Silver*

Recent developments in multidistrict litigations (MDLs) raise important questions about the responsibilities of lead attorneys¹ and judges. Increasingly, lead attorneys seem to use their control of settlement negotiations to enhance their compensation. In a prior article co-authored with Professor Geoffrey P. Miller, I argued that this conduct violates lead lawyers' fiduciary responsibilities.² But judges approve of this behavior instead of reining it in.

Judge Eldon E. Fallon, who presides over the massive *Vioxx* MDL,³ found my critique unconvincing. In an order on common benefit fees and costs, he explained why, in his view, the self-enriching actions of the lead attorneys in that MDL were appropriate.⁴ He also criticized a proposal Professor Miller and I set out for selecting and compensating lead lawyers in MDLs.⁵ When doing so, he relied on a draft study by Carolyn A. Dubay, formerly a researcher at the Federal Judicial Center (FJC), who also found our proposal wanting.⁶

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1. In this Article, I use the phrases "lead lawyers" and "lead attorneys" to describe lawyers formally appointed to positions of authority in MDLs, and the phrases "disabled lawyers" and "disabled attorneys" to describe lawyers denied such appointments. A third category includes lawyers not formally appointed to positions of authority who perform and are compensated for common benefit work, i.e., legal services deemed to be of value for all plaintiffs with cases in an MDL. For convenience, I include disabled lawyers who perform common benefit work in the lead attorney category. For descriptions of the positions of authority in MDLs, see *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 10.2 (2004).

2. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 *VAND. L. REV.* 107 (2010).

3. Order & Reasons, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Oct. 19, 2010).

4. *Id.* at 3–8, 12–15 & nn.15–16.

5. *Id.* at 3 n.4.

6. CAROLYN A. DUBAY, *FED. JUDICIAL CTR., TRENDS AND PROBLEMS IN THE APPOINTMENT AND COMPENSATION OF COMMON BENEFIT COUNSEL IN COMPLEX MULTIDISTRICT LITIGATION: AN EMPIRICAL STUDY OF TEN MEGA MDLS* 7–8, 59–62 (July 2010) (on file with the *Fordham Law Review*). Given the role I played in sparking the Federal Judicial Center's interest in MDLs, I am reminded of Gore Vidal's observation that "no good deed goes unpunished." See *infra* Part IV.

In this Article, I respond to the criticisms made by Judge Fallon and Dubay. The analysis builds on my work with Professor Miller and also on the article in this issue that I co-authored with Professor Lynn A. Baker.⁷ I encourage readers to become familiar with those writings before tackling this one.

I. BACKGROUND ON MULTIDISTRICT LITIGATIONS

An MDL is created when the Judicial Panel on Multidistrict Litigation (JPML) transfers related cases pending in diverse federal district courts to a designated forum for consolidated pretrial motions and discovery. When the cases are ready for trial, the MDL judge is supposed to send them back to their original forums.⁸ Remands are so uncommon, however, that MDLs have been compared to “black holes.”⁹ Cases sent into MDLs rarely escape their grip.

After the JPML transfers cases to an MDL forum, lawyers who were formerly litigating separately must coordinate their efforts. They must establish a governance structure that will divide tasks, assign responsibilities, monitor performance, and make decisions. They must also decide whether fees and costs will be shared and, if so, on what terms.

In theory, lawyers could create governance structures themselves. In practice, MDL judges usually take charge of this task. They empower a small number of lead lawyers to exercise managerial authority on the plaintiffs’ side and relegate the rest of the lawyers to passive positions. I use the label “disabled lawyers” to describe lawyers denied lead counsel positions because their ability to act for their clients in the MDL is limited.

Lead attorneys enjoy plenary and, in many respects, exclusive control of the litigation. Although they report to and receive input from disabled attorneys, they are independent actors who operate subject to no one’s control. Disabled lawyers cannot tell lead attorneys what to do; nor can they fire them for disobedience. If disabled lawyers dislike the way lead lawyers are performing, their only recourse is to complain to the trial judge, who, for a variety of reasons, is unlikely to be sympathetic.

Plaintiffs also have little control of lead lawyers. Although a lawyer must normally follow a client’s lawful marching orders as given, there is no evidence that lead attorneys look to their clients for instructions when deciding how to handle MDLs. For example, when, as sometimes happens, bellwether trials occur in MDLs, lead lawyers decide which cases will be tried (or recommended to the MDL judge as candidates for trial) without asking the plaintiffs whether they favor bellwether trials or agree with the choice of cases. The same is true when lead attorneys initiate global

7. See Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833 (2011).

8. 28 U.S.C. § 1407(a) (2006); see *infra* note 70.

9. See, e.g., Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 & n.21 (2008); Brent M. Rosenthal, *Toxic Torts and Mass Torts*, 63 SMU L. REV. 845, 851 (2010); Gary Wilson et al., *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85, 104 & n.108, 112 (2000).

settlement negotiations. They do not ask plaintiffs for permission to negotiate.

Lead attorneys in MDLs closely resemble lawyers who litigate class actions. Both enjoy considerable independence from the persons they represent. No class member can tell class counsel what to do, not even the named plaintiff.¹⁰ In practical effect, a lawyer representing a class is an independent actor or a trustee, not an agent. The same is true of lawyers assigned to managerial positions in MDLs.

Judges recognize the similarities between class actions and MDLs. They refer to MDLs as “quasi-class actions,” and they borrow freely from class action jurisprudence managing MDLs.¹¹ For example, when compensating lead attorneys or reimbursing their expenses, judges draw upon restitutionary doctrines that evolved in class actions.¹² They also take note of the size of fee awards in class actions when deciding how much lead attorneys in MDLs should be paid.¹³

II. ARE LEAD ATTORNEYS FIDUCIARIES?

The fiduciary duty requires an agent to act solely for a principal’s benefit when acting on the principal’s behalf. The duty prohibits an agent from using his or her powers to benefit a third party or for personal gain. Ordinary attorneys are fiduciaries. Attorneys who handle class actions are fiduciaries too. There are differences between ordinary attorneys and class counsel, of course, an important one being that an ordinary lawyer is an agent while an attorney representing a class more closely resembles a trustee. The assertion that both lawyers are fiduciaries has merit, even so, because both lawyers must ignore their own interests when representing others. As explained in the article Professor Baker and I co-authored, this means that both lawyers may properly enhance their compensation only as a side-effect of increasing their entrustors’ recoveries.¹⁴

Given that both lawyers who represent individual claimants and lawyers who handle class actions are fiduciaries, it would be surprising to discover that lead lawyers in MDLs were not. Yet, insofar as legal doctrine is concerned, the matter is uncertain. Although commentators argue that lead attorneys are fiduciaries and should be treated as such, solid authority for

10. FED. R. CIV. P. 23(g)(1) advisory committee’s note (“Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to ‘fire’ class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court’s approval of a settlement would be in the best interests of the class as a whole.”). Class actions brought under the Private Securities Litigation Reform Act of 1995 (PSLRA) are an exception to this observation. See 15 U.S.C. §§ 77z-1, 78u-4 (2006). In these cases, large investors appointed to lead plaintiff positions exercise real control of class counsel. *Id.*

11. See Silver & Miller, *supra* note 2, at 110 & n.7 (detailing the historical background of the “quasi-class action”); *id.* at 110–11, 114–18.

12. *Id.* at 109–10, 122–30.

13. *Id.*

14. Baker & Silver, *supra* note 7, at 1836–42.

the proposition is surprisingly scarce. The MDL statute does not address the matter and the common law is undeveloped.¹⁵

Consider the statement of lead lawyers' responsibilities that appears in the *Manual for Complex Litigation* (the *Manual*), which requires lead attorneys to "act fairly, efficiently, and economically in the interests of all parties and parties' counsel."¹⁶ The decision to recognize disabled lawyers and claimants separately makes sense, for the fortunes of both rest in lead attorneys' hands. Even so, the language used in the *Manual* falls short of stating the fiduciary standard. The phrase "all parties and parties' counsel"¹⁷ includes the lead attorneys. The *Manual* might therefore imply that lead attorneys can consider their own interests and can put their own interests on par with those of claimants and disabled lawyers. The fiduciary duty requires a lawyer to ignore his or her own interests. It does not permit a lawyer to engage in self-enriching behavior as long as a client is treated "fairly."

Relying on the passage in the *Manual* discussed above, the *Principles of the Law of Aggregate Litigation* (the *Principles*), which the American Law Institute (ALI) published in 2010, concludes that lead attorneys in MDLs are fiduciaries.¹⁸ However, it does not examine the ambiguity just pointed out. It also later states that "[t]o promote adequate representation, judges may . . . enforce fiduciary duties on named parties and their attorneys."¹⁹ This seems to imply that it is up to MDL judges to decide whether lead attorneys are fiduciaries or not.

Illustration 4 to § 1.05 in the *Principles* suggests that this implication was not intended. It assumes that "Lawyers I, O, and P [represent hundreds of clients with asbestos-related claims],"²⁰ that the clients' cases are consolidated in an MDL, and that the MDL judge "appoints Lawyer T, who also has cases there, to the position of Lead Counsel."²¹ It then states flatly that "Lawyer T becomes a fiduciary to all plaintiffs and lawyers in the consolidated proceedings and may not use her position to enrich herself at their expense."²²

The *Principles* also recognizes that lead attorneys are fiduciaries of a certain kind. Some fiduciaries are forbidden from helping one beneficiary

15. See 28 U.S.C. § 1407.

16. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 10.22.

17. *Id.*

18. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04 reporter's notes cmt. a (2010) (observing that "[c]lass counsel is a [] fiduciary to a client[, the named plaintiff,] who is also a fiduciary [to other class members]," and that "[a] similar relationship obtains between lead attorneys and other lawyers in a multidistrict litigation"). I was an Associate Reporter on the *Principles* and bore primary responsibility for Chapter One. However, like other American Law Institute (ALI) projects, the *Principles* was a collaborative undertaking. The entire project, including Chapter One, benefited enormously from comments and contributions made by all the Reporters and by other members of the ALI, including Professor Howard M. Erichson, the organizer of this Symposium.

19. *Id.* § 1.05(c)(3) (emphasis added).

20. *Id.* § 1.05 illus. 2, 4.

21. *Id.* § 1.05 illus. 4.

22. *Id.*

at the expense of another. Normally, lawyers fall into this group. By subordinating one client's interests to another's without informed consent, a lawyer would act disloyally. Other fiduciaries are allowed to make tradeoffs. Trustees are the exemplars of this group. A trustee may use entrusted assets to send one beneficiary to college even though less money will be available to help another beneficiary as a result. When making tradeoffs among beneficiaries, trustees need only be reasonable and fair. The *Principles* suggests that lead attorneys resemble trustees more than lawyers or other agents. Their responsibility is to "pursu[e] the good of all," which, if need be, they may do by making tradeoffs that are reasonably "likely to maximize the value of all claims in the group."²³

In one respect, then, the *Principles* is good authority for the position I espouse. It states unequivocally that lead attorneys are fiduciaries. In another respect, though, the *Principles* has no authority at all. The ALI can identify what its members regard as good practices and doctrines, but the organization has no power to make law. Moreover, on the point at issue, the Reporters' Notes to § 1.05 cite no statutory or common law authority. In this respect, the *Principles* resembles the *Manual*, which cites no authority either. Both volumes thus show plainly that the law governing lead lawyers' responsibilities is immature.

Given the dearth of authority directly on point, judges may take guidance from other bodies of law. If they do, they will quickly conclude that lead attorneys are fiduciaries. Mass tort lawyers are fiduciaries,²⁴ and so are lawyers who represent plaintiff classes.²⁵ These examples are the most analogous to lead counsel.

Lead lawyers are certainly fiduciaries to their signed clients. In an MDL, therefore, the question is not whether lead attorneys are fiduciaries—they are—but to whom their responsibilities extend. In particular, it is important to know whether they must treat non-client claimants as well as they treat their clients. The basis for an affirmative answer is clear. To the extent that lead attorneys displace disabled lawyers, they assume disabled lawyers' duties, including the fiduciary duty to refrain from exploiting clients.

23. *Id.* § 1.05 cmt. f. The argument that lead attorneys resemble trustees more than agents draws support from several facts, including the inability of entrustors to select lead attorneys, fire them, or control them, and the absence of market mechanisms that ordinarily encourage agents to perform well. See Tamar Frankel, *Fiduciary Duties*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 127–28 (Peter Newman ed., 1998).

24. See, e.g., *Huber v. Taylor*, 469 F.3d 67, 81 (3d Cir. 2006) (finding that "the Defendants," who represented a group of plaintiffs with asbestos claims, "were acting as the Plaintiffs' attorneys," and that "[i]t is well-settled law, regardless of jurisdiction, that attorneys owe their clients a fiduciary duty" (citing *Akron Bar Ass'n v. Williams*, 819 N.E.2d 677, 680 (Ohio 2004))).

25. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.12 ("[A]n attorney acting on behalf of a putative class must act in the best interests of the class as a whole." (citing FED. R. CIV. P. 23(g)(2)(A) advisory's committee note; 2 GEOFFREY C. HAZARD, JR. & W WILLIAM HODES, THE LAW OF LAWYERING § 38.4, at 38-7 (3d ed. 2002)); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 n.12 (1st Cir. 2009) (citations omitted) ("Class counsel are fiduciaries to the class.").

Otherwise, MDL procedures would alter plaintiffs' substantive rights by allowing lead attorneys to take advantage of them.

First principles also support the conclusion that lead attorneys are fiduciaries. In contractual principal-agent relationships, a fiduciary duty is implied when an agent armed with "open-ended management power" can help a principal or act to a principal's detriment.²⁶ The fiduciary duty protects the principal from exploitation by allowing the principal to demand ex post judicial review of the agent's behavior.²⁷ In MDLs, lead attorneys possess immense power and discretion. Consequently, non-client claimants are at risk of being exploited and require the protection the fiduciary duty provides. The ALI's *Principles* takes this position. Section 1.05 encourages judges to ensure passive parties are adequately represented in all aggregate proceedings and it identifies the fiduciary duty as a tool to further this goal.²⁸

To this point, the discussion of lead attorneys' responsibilities has focused on non-client claimants whose retained lawyers are disabled. Because disabled lawyers also have interests at stake in MDLs, one must also ask whether lead lawyers have fiduciary responsibilities to them. That disabled lawyers are at risk of being exploited is clear. In the *Vioxx* MDL, the lead attorneys asked for \$388 million in common benefit fees, 8% of the \$4.85 billion recovery.²⁹ This eye-popping sum was to come from the pockets of disabled lawyers, whose contractual fees would be cut so that lead attorneys could be paid. The possibility of over-reaching is clear. First, Judge Fallon awarded \$73 million *less* than the lead attorneys requested, showing that, in his opinion, they over-valued their services by almost 20 percent.³⁰ Second, the lead attorneys may have used their control of settlement negotiations to prevent disabled lawyers from complaining. The settlement agreement they negotiated required all disabled lawyers to waive their objections to the common benefit fee tax as a condition for enrolling clients.³¹ Because disabled lawyers had to do what their clients wanted, those whose clients were better off settling were forced to submit. Plainly, the lead attorneys may have strategized to the disabled lawyers' disadvantage.

The fiduciary duty can protect disabled lawyers while still permitting lead attorneys' to do their jobs. Although a fiduciary duty would prevent lead attorneys from using their control of settlement negotiations to enrich themselves at disabled lawyers' expense, it would leave them completely free to do so by increasing claimants' recoveries. This is what they are supposed to use their powers to do. The duty would also allow lead

26. Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 215.

27. *Id.*

28. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 18, § 1.05(b), (c)(3).

29. *See* Order & Reasons, *supra* note 3, at 9.

30. *Id.* at 37.

31. *See* Master Settlement Agreement § 1.2.4, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007) (requiring waiver of objections).

attorneys to apply to the MDL court for common benefit compensation, just as lawyers do in successful class actions.

III. THE LEAD ATTORNEYS' ACTIONS IN THE *VIOXX* MDL

The business model for MDLs and similar state court consolidations constantly evolves. Techniques that are completely unprecedented first emerge as experiments by judges and lead attorneys. Innovations that further the central players' interests are quickly adopted in other proceedings, even if the practices seem dubious. Because appellate courts rarely interfere with trial judges' management of MDLs, questionable practices can persist for years.³²

Consider practices relating to common benefit fees and expenses. Very little authority addresses these practices, and almost none of it comes from appellate courts. Although MDL judges force disabled lawyers to cover lead lawyers' fees and expenses, the legal basis for these coercive transfers is unclear.³³ The MDL statute says nothing about compensation. Federal judges' inherent power to manage their dockets, which empowers them to fine lawyers who act improperly, provides no basis for orders that force innocent lawyers to give up millions of dollars. The strongest justification is provided by the restitutionary theory that supports fee awards in class actions, but that theory does not work in MDLs, for reasons Professor Miller and I explained.³⁴

Despite these shortcomings and the enormity of the stakes, appellate courts have provided little guidance. When Judge Fallon awarded \$315 million in common benefit fees in *Vioxx*, the only Fifth Circuit authority he could cite was a 1977 case, *In re Air Crash Disaster*.³⁵ There, the trial judge ordered two lawyers to pay the lead attorneys \$270,000 after the lawyers refused the trial judge's offer to share the workload in the MDL.³⁶ In a confusing and haphazardly reasoned opinion that provides little authority for current practices, the Fifth Circuit affirmed.³⁷

Recognizing that the legal basis for common benefit fee and cost awards is questionable, MDL judges and lead attorneys have sought to lend these forced transfers a consensual veneer.³⁸ They first attempted to do so by promulgating form contracts for disabled lawyers to sign.³⁹ The contracts

32. On the rarity of appellate review of MDL judges' management decisions, see Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643, 1645 (2011) (observing that "[t]he MDL system creates [a] sort of 'kingly power' in trial judges" and that "there is no appellate jurisdiction over most interlocutory MDL orders").

33. Silver & Miller, *supra* note 2, at 126–35 & nn.85–89 (discussing the practice and citing various cases where such orders were issued).

34. *Id.* at 109, 121–30.

35. 549 F.2d 1006 (5th Cir. 1977).

36. *See id.* at 1008, 1010–11.

37. *Id.* at 1021.

38. Silver & Miller, *supra* note 2, at 135.

39. *Id.* at 134–35.

were shams, however, because disabled lawyers' consent was coerced.⁴⁰ They could not bargain over terms, decide which lead lawyers to employ, or refuse to sign without penalty.⁴¹ The form contracts were offers disabled lawyers could not refuse.⁴²

The form contracts did not even lock in the price of common benefit work for the disabled lawyers who signed them. In the *Guidant* MDL, the court promulgated form agreements setting the price of common benefit work at 4% of the gross monetary recovery.⁴³ The same judge later set aside 18.5% of the \$240 million recovery for the lead attorneys.⁴⁴ In *Vioxx*, the contracts specified a 2% levy for fees.⁴⁵ The lead attorneys nonetheless demanded 8% of the \$4.85 billion settlement and eventually received 6.5% from the court.⁴⁶

In my opinion, the actions that led to the fee increases in *Guidant* and *Vioxx* were opportunistic. In both MDLs, the lead attorneys used their control of settlement negotiations to increase the amount of money available for common benefit fees and to prevent disabled lawyers from complaining. Yet, in neither MDL were the lead attorneys' actions condemned. To the contrary, they were reviewed and approved. Because *Vioxx* presents the cleaner example and also offers Judge Fallon's responses to my complaints, I focus on it here.

As explained, Judge Fallon initially entered an order promulgating fee and cost sharing contracts that set common benefit fees at 2% of the gross recovery.⁴⁷ Provisions in the *Vioxx* Master Settlement Agreement (MSA) later (1) expressly superseded that order, (2) raised the cap on common benefit fees to 8%, (3) required that the entire 8% be placed in escrow, (4) made disabled lawyers (rather than claimants) liable for the entire amount, and (5) required disabled lawyers and their clients to waive any and all objections to the MSA as a condition for enrolling in the settlement.⁴⁸

40. *See id.* at 135.

41. *See id.*

42. This is, of course, a reference to the famous line from *The Godfather*. THE GODFATHER (Paramount Pictures 1972) ("I'm gonna make him an offer he can't refuse."). For a thorough study of the many lessons *The Godfather* has for aggregate litigation, see Richard A. Nagareda, *Closure in Damage Class Settlement: The Godfather Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141.

43. Pretrial Order No. 6 at 3–4, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB) (D. Minn. Feb. 15, 2006).

44. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 451076, at *1 (D. Minn. Feb. 15, 2008). The order set aside \$10 million in cost reimbursements, only \$3.5 million of which was slated to cover the managerial attorneys' out-of-pocket expenses. *Id.*

45. *See Order & Reasons*, *supra* note 3, at 5.

46. *See id.* at 9, 36–37.

47. Pretrial Order No. 19 at 3, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Aug. 4, 2005) (creating a "full participation option" for disabled lawyers who signed form contracts within ninety days and setting common benefit compensation at 2% for fees and 1% for costs). To keep the discussion simple, I ignore costs.

48. Master Settlement Agreement, *supra* note 30, §§ 9.2.1, 9.2.3 (raising the limit on common benefit fees, overriding Pretrial Order 19, and identifying lawyers' contingent fees as the source of funding); *id.* § 9.2.2 (authorizing an award of common benefit expenses); *id.* § 1.2.4 (requiring waiver of objections).

Why these provisions appeared in the MSA is a mystery. Judge Fallon's order setting the 2% cap did not contain language allowing lawyers or parties to override it by agreement. Therefore, the proper way to modify the order was to ask Judge Fallon to revise it. That approach had a downside, however. Had the lead lawyers filed a motion requesting an increase in common benefit fees, disabled lawyers would have been entitled to contest it, to make an opposing evidentiary presentation, and, had Judge Fallon ruled against them, to appeal. Had the lead attorneys filed a motion to raise the common benefit fee after the MSA was announced, they would also have had no leverage over the disabled lawyers or their clients, their services no longer being required.

The presence of fee-related provisions in the MSA also seems odd for another reason: no one—not even the lead lawyers' own signed clients—authorized or instructed the lead attorneys to bargain with the defendant over common benefit fees. The order appointing the plaintiffs' steering committee authorized it to pursue “settlement options pertaining to any claim or portion thereof.”⁴⁹ This seems clearly to have meant claims the plaintiffs had against the defendant, not claims the plaintiffs or their lawyers had against each other.⁵⁰ Common benefit fees fall into the latter category. Nor were negotiations over common benefit fees needed to resolve any plaintiff's claim. The lead attorneys seem to me simply to have chosen to make a matter of interest solely to plaintiffs and their lawyers the subject of settlement negotiations with the defendant.

To appreciate the oddity of this decision, imagine that a lawyer representing a single plaintiff in a personal injury case negotiated a settlement that overrode the existing contingent fee agreement, increased the lawyer's fee by 400%, and made the client waive any and all objections to the lawyer's actions as a condition for getting a payment. Imagine further that the lawyer did all this without telling the client in advance, obtaining the client's consent, or explaining the conflict of interests. The breach of the lawyer's fiduciary duty, the lawyer's lack of authority, and the impropriety of negotiating fees with the defendant would all be self-evident. I believe one should reach the same conclusions when evaluating the behavior of the lead attorneys who negotiated the *Vioxx* MSA.

The only explanation I can think of for the decision to negotiate common benefit fees with the defendant is that the lead attorneys saw an opportunity

49. Pretrial Order No. 6 at 3, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La., Apr. 8, 2005).

50. Further evidence of the speed with which MDL practices evolve can be found in an order entered in the state court consolidation of *Kugel Mesh* cases in Rhode Island. Assented to Assessment Order, *In re All Individual Kugel Mesh Cases*, No: PC-2008-9999 (R.I. Super. Ct. Aug. 11, 2009). The order expressly authorizes the lead attorneys to negotiate a “payment from [the] defendants . . . separate from and in addition to any payment made to any plaintiff, which separate payment(s) is intended to be for common benefit attorneys['] fees and expenses.” *Id.* at 2. This authorization denies claimants adequate representation by building a strong conflict into their relationship with the lead attorneys. For present purposes, though, the important point is that someone recognized that lead attorneys lack authority to negotiate common benefit fees with defendants and moved to correct the problem by including the identified language in the appointment order.

to prevent disabled lawyers from objecting. As mentioned, section 1.2.4 of the *Vioxx* MSA provided that any lawyer who enrolled even a single client in the settlement was “deemed to have agreed to be bound by all of the terms and conditions” in the MSA, including the provisions relating to common benefit fees.⁵¹ Because the settlement was a good deal for many claimants, disabled lawyers were whipsawed. The law in all jurisdictions required them to communicate the settlement offer to their clients, to advise all clients for whom the offer was a good deal to accept it, and to enroll any client who wished to participate. Yet, to enroll even one client, a disabled lawyer had to waive any and all complaints he or she personally had relating to common benefit fees. To protect themselves, disabled lawyers would have had to violate their duties to their clients. As far as I know, none did.

Like the form contracts previously promulgated by the court, the *Vioxx* MSA seems to me to have been designed to foster the false impression that disabled lawyers freely consented to the 400% common benefit fee increase. The lead attorneys sought to capitalize on this impression when they applied for \$388 million (8% of the gross recovery) in common benefit fees. The demand was reasonable, they argued, because instead of “us[ing] the MDL work-product, pay[ing] the [2%] assessment, and tak[ing] the chance of trying their case to verdict before a jury,”⁵² all but a few claimants “voluntarily chose to participate in the Settlement Agreement with Merck, which agreement clearly denotes the 8% assessment.”⁵³ Professor Miller and I rated this argument “laughable.”⁵⁴ The fiduciary duty requires lawyers to refrain from using their powers to enrich themselves. It does not recognize the possibility that a client might reject a settlement offer as a reason for allowing a lawyer to act opportunistically when negotiating on a client’s behalf. The law could not be otherwise. Clients can always reject settlement offers. A contrary rule would therefore allow plaintiffs’ attorneys to engage in self-enriching behavior in all settlement negotiations.

Judge Fallon knew our position, but he sided with the lead attorneys anyway.⁵⁵

The [2%] fee assessment agreements were reasonable and appropriate to create a fund to compensate common benefit attorneys for the consolidated MDL discovery work that was contemplated at that early stage of the litigation. When circumstances changed as a result of the

51. Master Settlement Agreement, *supra* note 30, § 1.2.4.

52. Plaintiffs’ Liaison Counsel’s Memorandum in Support of Motion for Award of Plaintiffs’ Common Benefit Counsel Fees and Reimbursement of Expenses at 48, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Jan. 20, 2009).

53. *Id.*

54. Silver & Miller, *supra* note 2, at 135.

55. Judge Eldon E. Fallon also attacked us *ad hominem*. See Order & Reasons, *supra* note 3, at 15 n.16 (noting that Professors Silver and Miller were “paid consultants to a group of attorneys in the *Vioxx* MDL who have questioned or challenged aspects of the settlement, including the fee assessment” (quoting Silver & Miller, *supra* note 2, at 107 n.*)). More evidence that no good deed goes unpunished.

extensive discovery, numerous trials, and through negotiation and implementation of a global opt-in settlement, it became necessary to reevaluate the reasonable compensation for the common benefit attorneys who accomplished those tasks. The claimants and their attorneys acknowledged those changed circumstances when they accepted the terms of the Settlement Agreement which supplanted the [Pretrial Order (PTO)] 19 assessments. Settlement Agreement § 9.2.1. Moreover, the Court's equitable and managerial authority and duty to award fair common benefit fees or to adjust contingent fees exists independent of contractual agreement, and the Court's authority to do justice by reducing attorneys' fees necessarily encompasses the corollary authority to increase fees where appropriate.⁵⁶

This passage is rife with mistakes.

First, if the 2% agreements were real contracts rather than shams, then the fact (assuming it is one) that the lead attorneys did more work than they expected was simply their bad luck. All contingent percentage fee agreements assign the lawyer the risk associated with effort. Having set the fee, the lawyer must live with it, even when the workload is unexpectedly great.⁵⁷ The lead attorneys were stuck with the fees their signed clients agreed to pay. Why they were not also stuck with the fees *they* put in the 2% agreements Judge Fallon did not say.

Second, Professor Miller and I never denied that the lead attorneys could properly have asked Judge Fallon for a raise. To the contrary, we expressly stated that “[t]o get around the agreements, . . . the lead attorneys might have sought orders increasing the amounts set aside for common benefit compensation,”⁵⁸ and we cited the *Bextra* MDL as an instance in which the lead lawyers employed this straightforward approach.⁵⁹ Our complaint was that the lead attorneys abused their control of the settlement negotiations. Judge Fallon's observation that he would have given them a raise, had they asked, has no bearing on this point.

Third, Judge Fallon's inference that claimants and disabled lawyers acknowledged the merit of the lead attorneys' demand for a raise is wholly unwarranted. Insofar as the claimants were concerned, the decision to enroll showed only that they preferred settling to continuing to fight. The common benefit fee provisions were irrelevant to them because the money came out of their lawyers' pockets, not theirs. Insofar as the disabled

56. Order & Reasons, *supra* note 3, at 14 n.15 (citing *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *11–12 (D. Minn. Mar. 7, 2008)).

57. A lawyer can ask a client to renegotiate, and the lead attorneys could have renegotiated the 2% agreements with the disabled lawyers. They didn't, presumably because they knew that many, most, or all of the disabled lawyers would refuse to pay them more. The lead attorneys' failure to negotiate directly with disabled lawyers is another indication that the disabled lawyers' "consent" to the fee increase was coerced.

58. Silver & Miller, *supra* note 2, at 132 (citing Pretrial Order No. 8A: Amendment to Order Establishing Common Benefit Fund at 4, *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, MDL No. 1699 (N.D. Cal. July 7, 2008)).

59. See Pretrial Order No. 8A, *supra* note 58; Silver & Miller, *supra* note 2, at 132 & n.86.

lawyers were concerned, one can infer nothing at all. The decision to settle was the claimants', not theirs. Disabled lawyers were legally bound to do what their clients wanted, regardless of their personal wishes.

To see the flaw in Judge Fallon's reasoning, one need only recognize its potential to legitimate *any* provision the lead attorneys might have put into the MSA. They might have commandeered 100% of disabled lawyers' fees. They might have required enrollees to send letters recommending them for the Nobel Peace Prize. According to Judge Fallon's logic, a claimant's desire for a settlement check would legitimate these provisions and others even more egregious. It cannot be right to allow lead attorneys to use the threat to withhold settlement checks to gain unlimited leverage over claimants and disabled lawyers.

The basic point is simple. As Judge Fallon recognized and as Professor Miller and I pointed out, the lead attorneys could properly have obtained a fee increase by requesting one from the court. Consequently, they need not have included any provisions relating to the amount of common benefit fees in the MSA. But they did. A possible explanation, which seems right to me, is that they used their control of the settlement negotiations to pre-empt the opposition they expected disabled lawyers to mount.

By putting their fees on the table when bargaining with the defendant, the lead attorneys may have jeopardized the claimants' interests too. Knowing that the lead attorneys wanted its help, Merck would rationally have sought to exchange cooperation on fees for concessions on other relief. Defendants have often used this tactic to buy off attorneys in class actions. Merck would have been foolish not to have employed it.

In an ordinary personal injury representation, a contingent fee lawyer's sole object when bargaining with a defendant is to obtain the most money possible for the client. By maximizing the client's recovery, the lawyer also maximizes the fee. The harmony of interest between the lawyer and the client is substantial, and the defendant has no control of the lawyer's compensation. Lead attorneys should maintain the same laser-like focus when bargaining for global resolutions in MDLs. No one needs to know how much a defendant thinks a group of lead attorneys should be paid. (A candid defendant would say "nothing," anyway.) Injecting fees into the discussion also creates an enormous conflict between claimants and their representatives, saddling claimants with inadequate representation and denying them due process of law. Lead attorneys should use settlement negotiations solely to maximize the value of plaintiffs' claims. They should resolve the size of common benefit fees by means of real agreements with other plaintiffs' attorneys or by seeking fee awards from MDL judges, who can set them after holding evidentiary hearings in orders subject to appellate review.⁶⁰

60. In Silver and Miller, *supra* note 2, at 160–69, I argue for a fee setting mechanism similar to those set out in the PSLRA. The sentence in the text is not meant to contradict that recommendation.

IV. DUBAY'S CRITIQUE

When I began to study judicial management practices in MDLs, I was struck by the scarcity of data. I wanted to know basic facts, such as which lawyers were appointed to lead positions, how many signed clients they had, how much they requested in common benefit fees, and how much they received. Neither the JPML nor any other public body collected this information. Settlement administrators had some of it, but they would not share. I therefore decided to focus on the three recent MDLs—*Guidant*, *Vioxx*, and *Zyprexa*—that were the source of the emerging quasi-class action approach to MDL management and to learn about them from published opinions and orders, newspaper stories, academic writings, and similar materials.

Before abandoning my search for data, I contacted Thomas Willging, a researcher at the FJC who did empirical studies of mass torts lawsuits, class actions, and attorneys' fees. I had long admired his work and had relied on it many times. Willging, who has since retired, told me the FJC had no data on MDLs. I encouraged him to make them the focus of a future FJC study.

Within months, the seed sprouted. In October 2008, Willging let me know that the FJC planned to look at attorney fee awards in selected MDLs. Thereafter, the tree quickly bore fruit. Preliminary drafts of studies appeared in remarkably short order, including a paper Carolyn Dubay presented at the 2010 Conference on Empirical Legal Studies.⁶¹ These studies have great potential to lift the veil that has long hidden the internal workings of MDLs from view.

I do not know how Judge Fallon came to have a copy of Dubay's report before it was published, but I am not surprised that he did. Because federal judges take FJC studies seriously, the network of persons interested in MDLs distributed Dubay's report far and wide. Because Dubay also disagreed with Professor Miller and me on certain points, it was natural for Judge Fallon to rely on her work when criticizing us.⁶² Unfortunately, because Judge Fallon used her draft report as he did, to respond to him I must criticize Dubay in print. That seems harsh, given that her report is just a draft. I hope Dubay will forgive me for critiquing her preliminary thoughts.

In most respects, Dubay is on the same page with Professor Miller and me. We focused on products liability MDLs, so does Dubay. We studied *Guidant*, *Vioxx*, and *Zyprexa*; she examined those MDLs plus seven more. She identified three issues as "critical" ones for the next edition of the *Manual* to address:

First, as to the appointment of common benefit counsel, guidance should be developed for district courts on whether attorneys without cases

61. See DUBAY, *supra* note 6; see also Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision To Transfer and Consolidate Multidistrict Litigation*, presented at 5th Annual Conference on Empirical Legal Studies, available at <http://ssrn.com/abstract=1633703>.

62. Order & Reasons, *supra* note 3, at 3 n.4.

pending in the MDL may serve as common benefit attorneys. Second, as to the compensation of common benefit counsel, guidance on the use of common benefit compensation committees is needed in light of potential conflict of interest issues that have arisen in existing MDLs. Third, as to the determination of proper assessment rates for common benefit fee awards, guidance is needed on whether and in what circumstances differing assessment rates are fair and appropriate.⁶³

Professor Miller and I addressed all three subjects at length. Like us, Dubay also emphasized the “lack of uniformity and transparency” that is characteristic of MDLs, noting that “[d]ecisions are rarely published, rarely appealed, and oftentimes records relating to fees are filed under seal.”⁶⁴

However, when it comes to policy recommendations, Dubay’s object differs from ours. She wants to make MDLs work better for judges, while also making them more transparent and uniform. Because she was an employee of the FJC, her desire to please judges is understandable. Although Professor Miller and I recognize the judiciary’s legitimate interest in avoiding duplication, our object is to improve the quality of the representation claimants receive within the context of court-ordered aggregation. We also want to restore judicial neutrality and to ensure that MDL procedures are lawful. Because we are less concerned than Dubay about pleasing judges, judges are likely to find her recommendations more palatable than ours.

The passage below reflects this difference in philosophy. In it, Dubay criticizes the proposal Professor Miller and I offered, which would give control of MDLs to plaintiffs’ lawyers with valuable inventories of cases. Those lawyers would then hire other attorneys to perform common benefit work, the cost of which would be divided among all lawyers with cases in an MDL in proportion to their clients’ recoveries. The controlling lawyers would thus pay for common benefit work directly, would pay more than disabled attorneys, and would bear the full risk of loss if the cases were dismissed. They would therefore benefit by hiring lawyers capable of performing common benefit work at the best combination of quality and price. When it comes to managing plaintiffs’ affairs, judges would have about the same level of involvement in MDLs as they do in securities class actions brought under the Private Securities Litigation Reform Act of 1995.⁶⁵

Dubay disagrees with us over the advisability of putting lawyers with valuable inventories of cases in charge. She argues that

[h]aving a large stake in [an] MDL does not guarantee good communication skills, the effective use of attorney time, or even the best lawyering. Instead, the role of the MDL judge demands the ability to effective[ly] coordinate not only the many cases within the MDL, but state cases as well. Moreover, the most experienced and effective

63. DUBAY, *supra* note 6, at 6.

64. *Id.* at 13.

65. Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); *see supra* note 10.

attorney may have few cases in the MDL, or may represent claimants with only economic injuries. As a zealous advocate, an effective plaintiff's lawyer may have vigorously opposed consolidation in the MDL, or taken advantage of opportunities presented in parallel state court proceedings beyond the control of the MDL court and its orders.⁶⁶

The first and third sentences in this passage reflect the influence of the "nirvana fallacy," the idea that a proposal must be rejected unless it is perfect. The right question is not whether a proposal "guarantees" that claimants will receive loyal, high quality representation (judicial control does not guarantee this either), but whether it makes this result more likely and does so at acceptable cost. Because our proposal takes advantage of markets (which tend to direct cases to good attorneys) and incentives (which encourage lawyers with large inventories to represent clients well), we think it deserves a try.

The second and fourth sentences reflect Dubay's focus on "the role of the MDL judge." She dislikes our proposal because, instead of allowing MDL judges to pick lawyers who can be relied on to help effectuate judges' objectives, it might give control to troublemakers who dislike forced consolidation and actively seek to circumvent it. Dubay never sees the choice of cooperative lawyers as a difficulty, even though due process problems arise when lawyers whose loyalties run to judges first and claimants second gain control of MDLs. Her desire to make MDLs work better for judges also blinds her to the corrosive impact that involvement in plaintiffs' affairs has on judges' neutrality. The loss of neutrality does not bother MDL judges, whose desire for global resolutions causes them to want as much control of plaintiffs' lawyers as they can get. Consequently, it also does not bother Dubay.

When awarding common benefit fees in *Vioxx*, Judge Fallon need not have sided with Dubay or with us. He chose the lead attorneys and set their compensation terms long before our article appeared. Even so, he discussed our proposal in dicta and, not surprisingly, he sided with Dubay.

Having a large number of cases in the MDL often indicates skill at advertising, but does not guarantee the best lawyering or even the selection of those best suited to handle the matter in a cooperative endeavor which is crucial for MDL proceedings. . . . [T]he efficient and successful resolution of an MDL is dependent on coordination and cooperation of lead counsel for all sides. . . . In an MDL setting where there can be a thousand plaintiffs' attorneys it not only takes a good lawyer to qualify for lead or liaison counsel but one who has the diplomatic skills to coordinate the efforts of a diverse group. Selecting lead and liaison counsel by a neutral party such as an MDL judge may not be the best method but as between it and the selection by other counsel it is the better way. Moreover, the selection of lead counsel by their fellow attorneys would involve intrigue and side agreements which would make Macbeth appear to be a juvenile manipulator. Frequently, recommendations by attorneys for positions on leadership committees are

66. DUBAY, *supra* note 6, at 59.

governed more on friendship, past commitments and future hopes than on current issues.⁶⁷

This passage is interesting for many reasons. First, it reflects the unjustified hostility many judges have toward lawyers who advertise. Advertising educates people about their rights, makes it easier for them to find representation, facilitates competition, and enhances the public's opinion of lawyers. It works for lawyers the same way it works for other professionals and service providers, such as doctors, dentists, pharmacists, and hospitals, all of which advertise extensively. Judges should neither complain about it nor treat lawyers who advertise as second-class attorneys.

Second, when discussing the characteristics of lead attorneys that are "crucial for MDL proceedings,"⁶⁸ Judge Fallon means crucial for judges who want global settlements, not for claimants who want to maximize their recoveries. His desire for "cooperative" lawyers with "diplomatic skills" who will contribute to "the efficient and successful *resolution* of an MDL" reflects his immersion in a culture that glorifies settlements and deplors trials.⁶⁹ Judge Fallon implicitly dismisses the possibility that what plaintiffs need most is a team of aggressive lawyers who will get their cases ready for trial in the shortest possible time. Yet, this is what the MDL statute anticipates,⁷⁰ and it is also what due process requires. As the Supreme Court observed in *Amchem Products, Inc. v. Windsor*, a plaintiff who cannot threaten a defendant with a loss at trial cannot obtain fair value for a claim in settlement.⁷¹ The lawyers in charge of an MDL should be strongly motivated to get plaintiffs' cases ready for trial.⁷²

Third, Judge Fallon's concern about intrigues, side agreements, and other machinations involving lawyers competing for lead positions undoubtedly reflects conduct he has witnessed or heard about in MDLs.⁷³ What he fails

67. Order & Reasons, *supra* note 3, at 3 n.4.

68. *Id.*

69. *Id.* (emphasis added).

70. The Multidistrict Litigation Act, 28 U.S.C. § 1407(a) (2006), authorizes transfers for "consolidated pretrial proceedings" and provides that each transferred action "shall be remanded . . . to the district from which it was transferred" when pretrial proceedings are concluded. *See also* *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (holding that the MDL court had to remand cases when pretrial proceedings were complete and could not preside over the trial of a transferred case).

71. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (observing that "permitting class designation despite the impossibility of litigation" would deny class members adequate representation because, when bargaining for settlement, "class counsel . . . would be disarmed").

72. Judge Fallon might respond to the statements in this paragraph by pointing out that he presided over a series of bellwether trials in the *Vioxx* MDL. Bellwether trials can be helpful sources of information, but they are no substitute for a realistic threat to remand all cases consolidated in an MDL for trials in their original forums. A plausible argument can be made that MDL judges should set firm deadlines by which pretrial preparations must be completed so that cases can be remanded, and otherwise leave parties to handle settlement negotiations as they wish. Negotiations would then occur in the shadows of predicted trial results, as they should.

73. Dubay describes instances in which lawyers vying for lead positions formed or were excluded from coalitions competing for control. DUBAY, *supra* note 6, at 31.

to notice or mention is that judges encourage these behaviors by making lead counsel positions profit centers. In context, the omission is remarkable. Judge Fallon failed to recognize the connection between existing MDL management procedures and unseemly competition for lead counsel positions when writing an order that awarded a group of lead attorneys \$315 million.

He may see the connection now. After the *Vioxx* Fee Allocation Committee (FAC) submitted its final recommendation for dividing the \$315 million fund among attorneys who performed common benefit work, dissatisfied lawyers submitted a boatload of objections.⁷⁴ They complained that the lead attorneys, who staffed the FAC, rewarded themselves far too lavishly;⁷⁵ that the FAC's scoring system was arbitrary, skewed in favor of the lead attorneys, and opaque;⁷⁶ that the FAC compensated some lawyers at rates exceeding \$2000 an hour while basing other lawyers' awards on hourly rates below \$25;⁷⁷ that the FAC punished certain lawyers who objected to its preliminary recommendations by cutting their payments; and that certain lead attorneys exceeded their powers by disbursing fee money without formal authorization from the court.⁷⁸ I do not know whether these complaints are valid, but the conflicts and the potential for abuse that exist when lead lawyers set their own compensation could not be more apparent.

No less apparent is the fact that current arrangements make lead counsel positions extraordinarily profitable. The FAC's proposed allocation would give the three law firms that supplied the lead and liaison counsel \$111 million.⁷⁹ This enormous sum will come on top of the millions in fees the

74. Many disgruntled lawyers filed objections to the Fee Allocation Committee's (FAC) proposed allocation. For brief accounts and links to some of the complaints, see David Bario, *Fierce Fight Erupts Over \$315 Million Vioxx Attorneys Fee Fund*, AM. LAW. LITIG. DAILY (Feb. 24, 2011), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202483003077>; Dionne Searcey, *The Vioxx Endgame: It's All About the Fees*, WALL ST. J. L. BLOG (March 3, 2011 6:01 PM ET), http://blogs.wsj.com/law/2011/03/03/the-vioxx-endgame-its-all-about-the-fees/?mod=google_news_blog.

75. Motley Rice's Objection to the Vioxx Fee Allocation Committee's Common Benefit Fee Recommendation at Parts I-II.A., *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Feb. 4, 2011) [hereinafter *Motley Rice's Objection*].

76. *See id.*

77. *Cf. id.* Parts I, II.B.

78. *See* Co-Lead Counsel's Memorandum in Support of Motion for Additional Discovery Pursuing Side Deals Related to the Fund Awarded by this Court's Order of October 19, 2010 at 11-20, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Feb. 28, 2011), available at <http://online.wsj.com/public/resources/documents/022811becnelfiling.pdf> (arguing that certain lead attorneys improperly disbursed common benefit funds without court approval).

79. Order, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Jan. 20, 2011), available at <http://vioxx.laed.uscourts.gov/Orders/012011.or.pdf>. The law firms and the recommended amounts are Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. (\$40.9 million), Herman, Herman, Katz & Cotlar, L.L.P. (\$32.5 million), and Seeger Weiss (\$40.9 million). In addition, the law firm of Ashcraft & Gerel, LLP, which some objectors claim is associated with the liaison counsel, is slated to receive \$9 million. The total shared by firms associated with the Lead and Liaison Counsel could therefore exceed \$120 million. *See* Joint Objection of Eric Weinberg, Chris Placitella and Cohen, Placitella and Roth to the Fee Allocation Committee's Jan. 20, 2010 Recommendation at 34, *In re Vioxx Prods. Liab.*

firms will receive from their signed clients. By making compensation of this magnitude available, judges encourage lawyers to use all possible means, no matter how devious, to obtain lead counsel positions.

Although most of the objections filed in *Vioxx* concern the FAC's fee recommendations, some suggest that incentives created by judicial control of common benefit fees corrupted the manner in which the lead attorneys conducted the MDL. For example, the Motley Rice law firm alleges that the six bellwether cases its lawyers prepared for trial were "pushed aside for lesser cases selected by individuals who positioned themselves for a vast overpayment of [fees from the] common fund."⁸⁰ In other words, Motley Rice contends that, when selecting *Vioxx* cases for bellwether trials, the lead attorneys were more concerned about fattening their lodestars than maximizing the value of plaintiffs' claims. I do not know whether this is true, but I can say that the allegation is plausible because the lodestar method, which rewards time expended, creates perverse incentives. If lead lawyers were paid contingent percentage fees, they would gain by selecting the strongest cases for bellwether trials. But lead attorneys are paid by the hour, at least in part. Consequently, they may gain by selecting weaker bellwether cases in which they have invested larger amounts of compensable time. Motley Rice's complaint is plausible because judges base common benefit fee awards in MDLs on time expended and hourly rates.

The proposal Professor Miller and I designed would preserve the good incentives that flow from contingent percentage fee arrangements. It would also replace the political convention mentality that currently prevails in MDLs with an ordinary business model of the sort that operates and works well in joint ventures and law firms. Lawyers who are good at bringing in business will team up with lawyers who are good at delivering legal services of other types, including lawyers who are good at negotiating and structuring mass settlements. The cost of common benefit work will be shared on a pro rata basis but will not be a separate source of income for lead attorneys. There will be problems, the main one being the possibility of kickbacks from common benefit lawyers to the lead lawyers who engage them. If the problems can be addressed, the proposal will restore a desirable degree of order to the plaintiffs' side of MDLs. Instead of enriching themselves by unseemly means, lead attorneys who want to enhance their compensation will have to increase claimants' recoveries.

CONCLUSION

A real need exists to stretch judicial resources by aggregating related claims and lawsuits. Neither this Article nor the article I co-authored with Professor Miller constitutes an attack on aggregation per se. But aggregate

Litig., MDL No. 1657 (E.D. La. Feb. 2, 2011) (asserting that "the firm that received the third-highest hourly rate, Ashcraft & Gerel, LLP (\$1325/hr.) is in partnership with FAC member Russ Herman, seventh-rated at \$1102/hr.").

80. *Motley Rice's Objection*, *supra* note 75, at Part II.B.

proceedings can be conducted in many ways, some of which trample so heavily on parties' or lawyers' rights as to be unlawful. Judicial management techniques that interfere with the enforcement of substantive legal rights and obligations are especially concerning. They achieve economies of scale by preventing the civil justice system from doing its job, which requires that parties represented by loyal advocates be able to try cases at reasonable cost and with reasonable dispatch.

Professor Milton Handler identified this problem in a famous article published many years ago. He argued that class action settlements were "legalized blackmail" because judges enmeshed defendants in endless and expensive litigation, effectively preventing them from ever vindicating themselves at trial.⁸¹ Defendants could either settle or bear high litigation costs indefinitely. Judge William G. Young recently made the analogous point with respect to plaintiffs caught up in MDLs, pointing out that that "[o]nce trial is no longer a realistic alternative, . . . [settlement] bargaining focuses . . . on ability to pay, the economic consequences of the litigation, and the terms of the minimum payout necessary to extinguish the plaintiff's claims."⁸² Due process is denied when any party, plaintiff or defendant, loses merits-based bargaining leverage in settlement negotiations because a judge is employing a procedure that prevents a case from being tried.

The American civil justice system is miraculous. Because of it, our nation is uniquely devoted to the rule of law and the vindication of legal claims. But we must understand the miracle, if we are to preserve it. Structurally, the civil justice system works because parties represented by loyal advocates are able to try cases in front of judges and juries that are honest, independent, and neutral. MDL practices that saddle plaintiffs with conflicted attorneys, that make trials practically impossible, or that involve judges deeply in the management of plaintiffs' representation, put the miracle at risk.

81. Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971). I describe Milton Handler's view and other versions of the class action blackmail thesis in Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

82. *DeLaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 155 (D. Mass. 2006).