

It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation

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Repeat players in multidistrict litigation (MDL) get a bad rap. When thousands of cases from all over the country are consolidated for pretrial proceedings, it's no wonder that the judge assigned to manage the litigation picks experienced lawyers to lead the effort. But critics argue that the small group of elite lawyers who show up again and again in leadership positions on the plaintiffs' side of MDLs can collude with each other and with repeat players on the defense side to restrict competition and shape the rules of the game to their advantage—all to the detriment of the one-shotter clients that they represent. Those criticisms have gotten louder as MDL has grown to make up more than one-third of the federal civil docket and encompass some of the nation's largest controversies, such as the opioid epidemic, the BP oil spill, the NFL concussion litigation, and many defective product cases. In this Article, we challenge this narrative, drawing on Marc Galanter's seminal explanation for why the "haves" come out ahead in litigation. Although the risks the "haves" pose are real, we argue that repeat players add significant value when they represent one-shotter plaintiffs and that such value may be worth running the risks. We show how MDL's unique structure—its formal commitment to individualism but functional operation as a tight aggregation—allows repeat-player plaintiffs' lawyers to "play for rules" more effectively than either class action suits or traditional one-on-one litigation. And with potential reforms to MDL procedure on the agendas of both Congress and the Advisory Committee on Civil Rules, we urge policymakers and scholars not to lose sight of the significant benefits to plaintiffs of having repeat players on their side.

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INTRODUCTION

In litigation, as in most other circumstances, it is better to be a “have” than a “have not.” Marc Galanter taught us this over forty years ago in his famous essay, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*.¹ Galanter explained that the haves’ most important advantage is not their greater resources, but rather their status as repeat players.² Repeat players benefit from enormous structural advantages in litigation over “one-shotters.”³ In addition to their experience and ability to spread costs across many cases, repeat players can “play for rules.”⁴ In other words, repeat players have the incentive and ability to try to shape the rules of the litigation game in their favor at a systemic level. One-shotters, by contrast, care primarily about the outcomes of their particular cases, not about the effects their cases will have on others in the legal system.⁵ Because one-shotters do not anticipate litigating again, they have little incentive to make the investments or tradeoffs necessary to try to shape the rules of the game. Thus, according

1. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc’y REV. 95 (1974).

2. *Id.* at 97–98.

3. *Id.*

4. *Id.* at 98–103.

5. *Id.* at 100–03.

to Galanter, over time, we should expect the litigation playing field to tilt in favor of repeat players.⁶

Consider, for example, a products liability case in which a single plaintiff sues an enormous corporation. That corporation has built-in advantages because it is a repeat-player. Not only will the corporate defendant be better-resourced in this particular case than an individual plaintiff (likely represented by a lawyer working for a contingent fee), the corporation has spillover benefits from its ability to play for rules in other, similar products liability cases and in the litigation system more generally. In other words, without belaboring what we have by now internalized as obvious (due in no small part to Galanter's essay), the individual has the deck stacked against him from the start. And that deck will be stacked even further against future one-shotters like him down the road.

But what if the individual litigant can also act like a have? That is, what if that individual litigant can join together with others, pool resources, and hire lawyers who are as much repeat players in the system as the defendant? Does having these haves on the plaintiffs' side level the playing field in a way that redounds to the one-shotters' benefit? Or are these hired haves more likely to collude with the haves on the other side to enrich themselves at the expense of the one-shotters?

Scholars are currently hashing out this question in the context of federal multi-district litigation, or MDL, which has grown at an astonishing rate in recent years to make up over one-third of the entire federal civil docket.⁷ Indeed, some of the most significant nationwide controversies have found their way into MDL—consider the opioid epidemic, the Volkswagen clean-diesel scandal, the BP oil spill, and pretty much every major defective-product scandal. All of them have become MDLs.⁸ MDL creates the possibility for one-shotter litigants to have haves on their side; that is, MDL provides a mechanism for forcing thousands of individual plaintiffs to litigate together in a centralized pretrial proceeding before a single judge.⁹ Once this centralization occurs, the judge appoints a “steering committee” of lawyers to manage the litigation on the plaintiffs' side. And, as important empirical work by Elizabeth Chamblee Burch and Margaret S. Williams demonstrates, those steering committees tend to be populated by repeat players—well-resourced plaintiffs' lawyers who are experienced in the art of MDL and show up in these proceedings again and again.¹⁰

6. *Id.* at 103–04.

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

8. See Andrew D. Bradt, *Multidistrict Litigation and Adversarial Legalism*, 53 *GA. L. REV.* (forthcoming 2019) (manuscript at 6) (on file with authors).

9. See 28 U.S.C. § 1407 (2012).

10. See Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 *CORNELL L. REV.* 1445, 1458–63 (2017).

Perhaps surprisingly given Galanter's influence, many scholars are not sanguine about this development. Quite the contrary is true.¹¹ These scholars argue that MDL presents a massive principal-agent problem and that repeat play exacerbates it.¹² Their concern is that the repeat players on both sides of MDLs get a little too cozy with one another, and with the MDL transferee judges who themselves are repeat players in the MDL system.¹³ Due to certain features of modern MDL practice, the repeat-player plaintiffs' lawyers in particular may find that the way to get ahead in MDL generally is to get along with other repeat players, even if that means stifling objections to practices that might hurt their one-shooter clients.¹⁴ As a result, some critics say, the repeat-player plaintiffs' lawyers effectively make up a sort of cartel that suppresses competition in the market for legal services.¹⁵

All of these repeat players' incentives align when it comes to settling the litigation—the plaintiffs' lawyers get paid, the defendants get peace, and the MDL judge gets the cases off of her docket and the dockets of all of the judges whose cases were transferred to her for pretrial proceedings. But without a competitive check, there is a risk that the repeat players will sell out individual plaintiffs.¹⁶ In the repeat players' zeal to wind up the litigation, they may strike a deal that benefits everyone except the one-shooters—the plaintiffs—who may find themselves presented with a lousy settlement offer that they have little option but to accept. To demonstrate this risk, critics point to MDL settlements

11. See, e.g., S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 392–95 (2013); Brooke D. Coleman, *A Legal Fempire?: Women in Complex Civil Litigation*, 93 IND. L.J. 617, 640 (2018); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1035–36 (2016); Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 355–73 (2014); Howard M. Erichson, *What MDL and Class Actions Have in Common*, 70 VAND. L. REV. EN BANC 29, 29–31 (2017); Myriam Gilles, *Tribal Rituals of the MDL: A Comment on Williams, Lee, and Borden, Repeat Players in Multidistrict Litigation*, 5 J. TORT L. 173, 173–76 (2012); John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIG. 26, 30 (2012); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011); Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. 129, 157 (2018) [hereinafter Mullenix, *Policing MDL*]; Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 117–18, 128 (2015); Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141, 142 & n.5 (2012); cf. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131–35 (2010) (arguing that MDL lead lawyers can collude with each other and the defendant to the detriment of claimants and peripheral lawyers).

12. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 74 (2017) [hereinafter Burch, *Monopolies*]; Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 95 (2015) [hereinafter Burch, *Judging*]; see also Burch & Williams, *supra* note 10, at 1522–23. See generally ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* (2019) (arguing that backroom settlements in MDLs advantage lawyers at the expense of plaintiffs).

13. Burch, *Monopolies*, *supra* note 12, at 79.

14. See *id.* at 122–24.

15. See *id.* at 73–74.

16. See *id.*

that couple closure provisions, which are designed to make it difficult for individual plaintiffs to reject the offer, with provisions that increase the fees of lead lawyers.¹⁷

In this Article, we seek to provide a counterweight to this narrative, which is fast becoming conventional wisdom among many academics who are now focusing on MDL because of its newfound prominence.¹⁸ By returning to Galanter's original insight, we argue that this narrative underplays the benefits to plaintiffs of having repeat players on their side. In short, we argue that although the risks that MDL critics highlight are real, repeat players also add value. And that added value may be worth the risks, particularly when accompanied by a judicial mindset that is attentive to those risks—a mindset for which we have advocated in earlier work.¹⁹

In our view, the cartel analogy has several problems. Most critically, aggregate litigation is not a typical consumer market in which more competition reliably leads to lower prices and higher quality. This is because plaintiffs are not just buyers of legal services, but also sellers of peace to the defendant. The value of plaintiffs' product goes up the more they present a united front because defendants will often pay a premium for a comprehensive settlement that puts the whole litigation behind them. Too much competition and friction on the plaintiffs' side may create an expensive roadblock to effective negotiation with the defendant. It suggests that plaintiffs cannot deliver on their most valuable asset: closure. Paradoxically, competition can sometimes make MDL plaintiffs worse off.

Plaintiffs are, of course, not only sellers; they are also buyers in the sense that they purchase legal services from plaintiffs' lawyers. Some competition among plaintiffs' lawyers in the legal-services market is undoubtedly a good thing—those lawyers should fight for the plaintiffs' business. Indeed, there may be more competition than critics acknowledge as barriers to entry are relatively low. But if those lawyers cannot function as a team, they will not be able to deliver the most valuable product that the plaintiffs have to sell. Moreover, the lawyers who emerge on top ought to be the ones who have the most experience in, and resources to devote to, MDL. There's a reason a plaintiff might be wary of an inexperienced lawyer taking her claim into the lion's den—namely, the lion that will surely be representing the other side. If one is walking into the lion's den, it's best to do so with another lion.

We do not mean to say that concentration of power is an unmitigated good; to the contrary, as we have argued before, there are good reasons to be concerned

17. *Id.* at 74, 88–89, 107–11; *see also* Burch & Williams, *supra* note 10, at 1511–14.

18. *See* Mullenix, *Policing MDL*, *supra* note 11, at 137 (noting the “general lack of interest in MDL proceedings for much of the historical arc of the [MDL] statute because this procedural mechanism for aggregating cases lay dormant or underutilized”).

19. *See* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017) [hereinafter Bradt & Rave, *The Information-Forcing Role*] (arguing that MDL judges should serve as “information-forcing intermediaries,” signaling to claimants about the fairness of proposed settlements and flagging potential disloyalty by their lawyers).

about the potential for self-dealing lawyers in MDLs.²⁰ And having repeat players represent one-shotters may exacerbate those risks. Our argument in this Article is simply that cooperation among repeat players on the plaintiffs' side adds value, and that breaking up the "cartel" would have costs. Repeat players add value in large part by leveraging their experience and access to capital to level the playing field against defendants, who will almost always be repeat players, as will their teams of BigLaw attorneys. And to some degree, the fact that these repeat players on the plaintiffs' side face potential conflicts of interest generated by prior litigation, those conflicts may work to plaintiffs' advantage. Indeed, the apt analogy may be investment banks in initial public offerings; the best ones are all conflicted—that's why they continue to get rehired. It's the prior experience that gives them the expertise to best represent their clients.

That plaintiffs can benefit from enlisting repeat players on their side is hardly a new insight. We would scarcely need to repeat it had the narrative not shifted so far in the other direction and had defense-side interests not seized on that rhetoric to push for changes in federal procedural rules and statutes to undercut plaintiffs in MDL. One-shotter plaintiffs have long sought out experienced specialists to represent them. But, as Galanter explained, there are limits to how much these specialists can do to level the playing field.²¹ A repeat-player lawyer representing one-shotters cannot play for rules as effectively as a repeat-player defendant because the plaintiffs' lawyer is not supposed to make tradeoffs among his clients. He cannot play his series of cases as if his one-shotter clients were a single repeat player.²² Galanter suggested that class actions might do more to level the playing field.²³ Under modern doctrine, though, class actions have become all but unavailable in some cases like mass torts—precisely because of the risk that class counsel will make tradeoffs among absent class members.²⁴

But MDLs are not the same as class actions. One important contribution of this Article is to show how MDL's unique structure enables repeat players on the plaintiffs' side to play their cases more effectively. Unlike class actions, structurally MDL is not a representative litigation in which a single lawyer is given the authority to represent a class of absentees. MDL is more complicated than that. It has, as we have written before, a "split personality."²⁵ Formally, MDL preserves the individual nature of each consolidated case and, by respecting the autonomy of each individual litigant, MDL avoids many of the doctrinal tripwires and due process objections that hang up class actions. But on the ground, MDL operates

20. *Id.* at 1298.

21. Galanter, *supra* note 1, at 115–19.

22. *See id.* at 117.

23. *Id.* at 143.

24. *See, e.g.,* Ortiz v. Fibreboard Corp., 527 U.S. 815, 843–45 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

25. Bradt & Rave, *The Information-Forcing Role* *supra* note 19, at 1269–73; *see also* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1296 (2018). [hereinafter Bradt & Rave, *Aggregation on Defendants' Terms*]

in many ways like a powerful aggregation in which plaintiffs' control over their cases is limited. It is this play in the joints that allows repeat-player-MDL lawyers to do more than mere specialists can. Because the norms of individualized litigation do not fully penetrate at the ground level, MDL's split personality gives repeat-player lawyers some leeway to make the kinds of tradeoffs among their cases that they need to play for rules effectively. At the same time, MDL's structural commitment to the individual nature of each case—and the ultimate requirement that individual plaintiffs agree to any resolution of their cases—provides an imperfect set of constraints on how far repeat players can go.

All in all, we are presented with a paradox: the features that make repeat-player lawyers the most effective advocates for the plaintiffs in the aggregate—the ability to make tradeoffs and play for rules—potentially create the biggest risks for the plaintiffs as individuals. Increasing MDL's commitment to individual control on the ground might do more to constrain repeat players and alleviate the principal-agent problem. But doing so would come at a cost to one-shotter plaintiffs because it would reduce the effectiveness of the repeat players that represent them. In short, a single-minded focus on minimizing agency costs may defeat the purpose of the enterprise to begin with.

To demonstrate this, in Part I we lay out the dangers of repeat-player lawyers on the plaintiffs' side, drawing on the work of MDL skeptics. In Part II, we take on those skeptics and present our case for why those dangers might be overstated, and how and why repeat-player lawyers add value on the plaintiffs' side. In Part III, we explain how MDL's unique structure enables repeat-player plaintiffs' lawyers to play more effectively than in either individual litigation or Rule 23 class actions, and we identify the limited constraints that this structure places on repeat-player activity.

We do not wish to minimize the risks that repeat players pose to their one-shotter clients. But, particularly in a climate where powerful repeat players on the defense side have recently proposed a slew of "reforms" to the core of how MDL works,²⁶ our primary aim in this Article is to shift the conversation about repeat-player plaintiffs' lawyers in MDL to one that recognizes that there are benefits as well as risks. Otherwise, we worry that defense-side interests may use concerns about repeat players as a stalking horse for rule changes that would leave plaintiffs much worse off by crippling their most powerful allies. In short, it's good for plaintiffs in MDL to have some haves on their side.

I. THE DANGERS OF THE REPEAT-PLAYER CARTEL

If you looked only at the text of the MDL statute, you might conclude that all that MDL does is take a set of uncoordinated lawsuits filed around the country and transfer them temporarily to a single district court for pretrial proceedings.²⁷ And, in those pretrial proceedings, uncoordinated lawyers from around the

26. See, e.g., Fairness in Class Action Litigation Act of 2017 (FICALA), H.R. 985, 115th Cong § 5.

27. See 28 U.S.C. § 1407(a) (2012).

country are thrust together in a kind of one-time, temporary arranged marriage for joint discovery until the cases are remanded for trial. But several scholars have shown that a small cadre of repeat-player lawyers and firms dominate MDL practice in mass torts on the plaintiffs' side.²⁸ The risk is that these repeat-player plaintiffs' lawyers may cooperate both with each other and with repeat-player lawyers on the defendant's side to the detriment of the one-shotters in the system—the individual plaintiffs.²⁹ By forming a sort of cartel, critics argue, the repeat players are able to suppress competition among lawyers on the plaintiffs' side, which leaves the individual plaintiffs vulnerable to sweetheart settlements that maximize closure and fees for the repeat players at the expense of recoveries for the individual plaintiffs.³⁰

In section A, we review the extent of repeat play in MDLs. In section B, we explain how these repeat players supposedly function as a cartel. And in section C, we catalog the ways in which critics claim that the dominance of repeat players can hurt plaintiffs.

A. EVIDENCE OF CARTELIZATION

When the Judicial Panel on Multidistrict Litigation (JPML) creates an MDL, it consolidates similar cases filed in federal courts all over the country before a single federal judge for coordinated pretrial proceedings.³¹ The vast majority of the cases are resolved through dispositive motion or settlement at the pretrial stage, but if they are not resolved they must be remanded back to the districts where they were filed for trial.³² Because an MDL can involve thousands of cases and hundreds (or even thousands) of lawyers, out of sheer necessity the MDL judge will appoint a handful of lawyers to manage the pretrial phase of the litigation on behalf of all plaintiffs. Though leadership structures vary, these court-appointed lawyers are typically organized into a plaintiffs' steering committee (PSC) that

28. Burch, *Monopolies*, *supra* note 12, at 99; Burch & Williams, *supra* note 10, at 1471; *see also* Gilles, *supra* note 11, at 173–74 (arguing that lead lawyers have developed strategies to “corral” nonlead lawyers); Silver & Miller, *supra* note 11, at 109–10 (arguing that the plaintiffs’ steering committee’s client is the judge, not the claimants, and that “obedience is the prudent course for non-lead lawyers”); Williams, Lee & Borden, *supra* note 11, at 146 (noting the tendency of the plaintiffs’ bar to be dominated by a small number of elites). That lawyers and other intermediaries cooperate and aggregate cases outside of the formal joinder or class-action procedures has been long recognized. *See, e.g.*, Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000) [hereinafter *Erichson, Informal Aggregation*]; Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

29. *See* Burch, *Monopolies*, *supra* note 12, at 79; Burch & Williams, *supra* note 10, at 1298.

30. Burch, *Monopolies*, *supra* note 12, at 87–89.

31. *See* 28 U.S.C. § 1407(a)–(b).

32. *See* *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 30 (1998) (holding that an MDL court cannot try transferred cases and must instead remand them for trial); Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014) (finding that remand is rare and that over 97% of cases are resolved in the MDL court); *see also* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2277 (2008) (noting that most MDLs are resolved through global settlements in the MDL court).

makes most of the important strategic decisions in the litigation and typically leads settlement discussions with the defendant, and a plaintiffs' liaison committee, which is in charge of communicating and coordinating with the plaintiffs and their individually retained counsel.³³

Most of these leadership positions go to repeat players. In a pathbreaking empirical study, sampling all products liability and sales practices MDLs pending as of May 2013, Burch and Williams identified the repeat-player lawyers and the network that connects them.³⁴ This sample included seventy-three MDLs encompassing over 312,500 cases.³⁵ It is a good representation of what goes on in MDLs involving products liability, which account for the lion's share of cases consolidated in MDLs, including many of the highest profile cases.³⁶

Repeat-player lawyers (those who have appeared in two or more MDLs) held 62.8% of all leadership positions on the plaintiffs' side of the MDLs that Burch and Williams studied.³⁷ And lawyers from repeat-player law firms (those that have two or more lawyers previously appointed to an MDL leadership position) made up 78% of leadership positions.³⁸ Fifty lawyers held leadership positions in five or more MDLs, and those fifty lawyers filled 30% of all available leadership positions.³⁹ Seventy law firms held leadership positions in five or more MDLs, and lawyers from those seventy firms filled almost 54% of all available leadership positions.⁴⁰

Repeat play was present on the defense side, too. Repeat-player law firms held 82.3% of defense-side leadership positions.⁴¹ The defendants themselves in these cases—for example, major pharmaceutical and medical-device companies—are often repeat MDL players as well.⁴²

Further, Burch and Williams found that the top five repeat-player plaintiffs' lawyers consistently occupied the most powerful leadership positions within PSC structures.⁴³ They argue that these five lawyers had "far more impact" on the design of global settlements than other repeat players.⁴⁴

With so many repeat players interacting in a system over time, critics fear that they may come to view their relationships with other repeat players as more

33. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004).

34. Burch & Williams, *supra* note 10, at 1470, 1532–37 tbls.A1, A2 & A3.

35. *Id.*

36. *Id.*; see also Samuel Issacharoff, N.Y. Univ. Sch. of Law, Address at Duke University School of Law: Snapshot of MDL Caseload Statistics (Oct. 8, 2015), https://law.duke.edu/sites/default/files/centers/judicialstudies/snapshot_md_l_caseload_statistics.pptx [<https://perma.cc/AT36-2R8U>] (noting that products liability cases comprise 92% of all pending MDL actions).

37. Burch & Williams, *supra* note 10, at 1471.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1472.

42. *Id.* at 1453.

43. Burch, *Monopolies*, *supra* note 12, at 80.

44. *Id.* at 80–81.

important than their relationships with their one-shooter clients.⁴⁵ Or worse, they may attempt to entrench themselves and frustrate potential competitors by forming a tacit, or perhaps even explicitly collusive, cartel. Burch argues that, “By designing and replicating beneficial practices, as well as imposing social and financial sanctions on rivals, repeat players may use cartel-like understandings and enforcement mechanisms to disable other firms from competing and to make their own next leadership appointment more likely.”⁴⁶

B. HOW THE CARTEL SUPPOSEDLY WORKS

In this cartel model, the best strategy for plaintiffs’ lawyers in MDLs is to get along to get ahead. They can achieve greater financial success by suppressing their competitive instincts and playing the long game than by pulling out all the stops to maximize recoveries for their current clients.⁴⁷

The model assumes that plaintiffs’ lawyers in MDLs aspire to leadership positions.⁴⁸ Being on the court-appointed PSC or liaison committee is a lucrative proposition. MDL judges typically award lead lawyers common-benefit fees to compensate them for the pretrial work they do that benefits all of the plaintiffs in the MDL.⁴⁹ That money usually comes from taxing the contingency fees that plaintiffs will pay, if their cases are successfully resolved, to the nonlead lawyers they have hired directly.⁵⁰ For example, an MDL judge might order that 6% of each plaintiff’s recovery be set aside in a common-benefit fund (reducing the nonlead lawyer’s contingent fee from, say, 40% to 34%), out of which the judge will pay the lead lawyers for common-benefit work. These common-benefit fees can be substantial, running into the tens or even hundreds of millions of dollars.⁵¹ So it is easy to understand why MDL leadership positions are coveted.

45. *See id.* at 122–24, 135; *see also* Burch, *Judging*, *supra* note 12, at 95 (“Although having some experienced repeat attorneys in key positions could benefit plaintiffs by offsetting repeat play on the defense side, repeat play can also create fertile soil for collusion, reciprocity concerns, and incentives to protect one’s deal making or collaborative reputation at the expense of uniquely situated clients. Both repeat players and aspiring repeat players have rational economic incentives to protect their reputations and develop reciprocal relationships to form funding coalitions, receive client referrals, share information, and streamline tasks like document review.” (footnotes omitted)).

46. Burch, *Monopolies*, *supra* note 12, at 73 (footnote omitted); *see also id.* at 122–24.

47. *Id.* at 71, 81, 122, 135.

48. *See id.* at 122; *see also* Burch & Williams, *supra* note 10, at 1526 (“Attorneys on the social network’s periphery might further their own interests by cooperating with questionable practices; this could earn them trust from the current group leaders and position them for future leadership roles as well as the lucrative common-benefit fees that accompany them.”).

49. *See, e.g.*, Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374–75 (2014); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.12 (2004). The process for awarding common-benefit fees in MDLs is hardly uncontroversial. For some thoughtful critiques, *see*, for example, Burch, *Judging*, *supra* note 12, at 102–11, and Silver & Miller, *supra* note 11, at 109.

50. *See* Fallon, *supra* note 49, at 376.

51. In the Vioxx MDL, for example, the common-benefit fee award was more than \$315 million. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 662 (E.D. La. 2010). For information on common-benefit fee awards in a sample of mass tort cases, *see* Burch, *Monopolies*, *supra* note 12, at 131–32 tbl.3.

The way to get selected for a leadership role in an MDL, the theory goes, is to be cooperative and build relationships with other repeat-player lawyers. This is because judges often appoint consensus slates to the PSC, which are frequently orchestrated through “backroom deals” among repeat players.⁵² Even when judges hold competitive selection processes—so-called “beauty contests”—they typically consider experience, financial resources, and the ability to work well with others as important criteria for appointment.⁵³ As Chief Judge Lee Rosenthal has described MDL, “You’ve launched this airplane, but this airplane is designed not to be able to land. You need other people to bring it down.”⁵⁴

As a result, lawyers who aspire to future leadership positions may have more to gain in the long run from cultivating relationships with other repeat-player plaintiffs’ lawyers than from maximizing the size of their one-shotter clients’ recoveries in any given case.⁵⁵ Thus, repeat players may develop and enforce cooperative norms within and across MDLs.⁵⁶ Those norms can suppress dissent and competition. Indeed, because the same lawyers appear in so many different MDLs, they can make tradeoffs across proceedings.⁵⁷ Making a big stink in one MDL can get a lawyer shut out of leadership opportunities in the next big case.⁵⁸ Conversely, if Richard agrees to support Dianne for a plum leadership role in the hip-implant litigation, she may agree to support him for a plum assignment in the painkiller litigation.

Once appointed to a PSC, lead lawyers have a set of “carrots and sticks” that they can use to get other lawyers to cooperate.⁵⁹ Lead lawyers can reward cooperative lawyers by sending lucrative common-benefit work their way.⁶⁰ They can punish uncooperative lawyers by withholding common-benefit work or by reporting uncooperative behavior to the judge—a significant threat as the judges, too, are repeat players, and they frequently consult other judges about lawyers they are

52. See Burch, *Monopolies*, *supra* note 12, at 81–83; see also Burch, *Judging*, *supra* note 12, at 93–94.

53. See Burch, *Monopolies*, *supra* note 12, at 83; see also Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 392–93 (2014) (describing the need for expertise and the “ab[ility] to work cooperatively with others for the greater good of the . . . MDL”).

54. Symposium, *The Rest of the Story: Resolving the Cases Remanded by the MDL*, 75 LA. L. REV. 341, 361 (2014) [hereinafter *LSU Symposium*].

55. See Burch, *Monopolies*, *supra* note 12, at 122; Burch & Williams, *supra* note 10, at 1526.

56. See Burch, *Monopolies*, *supra* note 12, at 122–24; Burch & Williams, *supra* note 10, at 1465–69, 1523–26.

57. See Burch, *Monopolies*, *supra* note 12, at 122; see also Gilles, *supra* note 11, at 178.

58. Indeed, Burch and Williams explain:

In-group attorneys spoke with us freely only on the condition of anonymity, for defecting in one proceeding could prompt financial repercussions in concurrent and future proceedings. After all, when judges defer to attorneys to pick their own leaders through the consensus method and appoint lead lawyers to serve on fee-allocation committees, they can give repeat players substantial enforcement tools.

Burch & Williams, *supra* note 10, at 1525.

59. See Burch, *Monopolies*, *supra* note 12, at 122; see also Burch & Williams, *supra* note 10, at 1530.

60. See Burch, *Monopolies*, *supra* note 12, at 122.

considering appointing to leadership positions.⁶¹ And lead lawyers can influence the judge in setting the common-benefit fee tax and allocating those fees.⁶²

MDL lawyers also appear to be reluctant to criticize each other in public. Although they will complain incessantly about each other off the record, lawyers rarely object during leadership selection or even when lead lawyers ask the judge to increase their common-benefit fees.⁶³ This silence, critics say, is the “best evidence” of the social and financial sanctions that enforce cooperative norms within the cartel.⁶⁴

Of course, in any given MDL there are far more nonlead lawyers than lead lawyers.⁶⁵ But the cartel model posits that these peripheral lawyers do not provide a sufficient competitive check on the lead-lawyer cartel for two primary reasons. First, the assumption is that most of these lawyers aspire to leadership positions in future MDLs and the lucrative common-benefit fees that go along with them.⁶⁶ Thus, they have an incentive to suppress dissent and cooperate with even questionable practices and corner cutting by the lead lawyers to make it more likely that they’ll be tapped to join the club in the future.⁶⁷

Second, lead lawyers can use their control over global settlement negotiations with the defendant to co-opt nonlead lawyers and suppress competition.⁶⁸ Because they value peace, defendants often prefer to resolve all of the claims in an MDL through a single global settlement agreement. Non-class-action global settlements in MDLs are often structured as deals between the defendant and the

61. *See id.*; *see also id.* at 83 (“To assess cooperation, judges often request short applications and call other judges to ask about uncooperative and disruptive attorneys.” (footnote omitted)); *LSU Symposium*, *supra* note 54, at 347 (quoting experienced MDL Judge Eldon Fallon: “So, I do get a lot of calls from a lot of judges asking me about cases. I make the calls too if I don’t know the person, if I haven’t heard of them, if I haven’t seen a case that they’re involved in, or if I have and I want to get some input. I will call a judge in that area and say, ‘Tell me about this person.’”).

62. *See Burch, Monopolies*, *supra* note 12, at 84–85.

63. *See id.* at 122–24; *see also Burch & Williams*, *supra* note 10, at 1525. There are, of course, exceptions, as Burch and Williams acknowledge. *See id.* at 1527 n.315. For example, attorney Lance Cooper was highly critical of the lead lawyers in the GM ignition switch litigation. *See, e.g.*, Alison Frankel, *Lance Cooper Lost Big in Attack on GM Lead Counsel – But Did MDL Process Win?*, REUTERS (Feb. 11, 2016, 4:01 PM), <https://www.reuters.com/article/fidUS148810579520160211> [<https://perma.cc/K6SS-H45D>]; Barry Meier, *Lawyer for Plaintiffs Suing G.M. Steps Up Criticism of Another*, N.Y. TIMES (Feb. 7, 2016), <https://www.nytimes.com/2016/02/08/business/lawyer-for-plaintiffs-suing-gm-steps-up-criticism-of-another.html>. And in the *Zimmer Durom Cup* litigation, there was a vigorous fight among repeat players on the plaintiffs liaison committee during which the firm with the largest inventory of cases objected to a settlement that repeat players Mark Lanier and Chris Seeger negotiated. *See Transcript of Proceedings at 20–29, 61–62, In re Zimmer Durom Cup Litigation*, No. 2:09-cv-04414-SDW::DW (D.N.J. May 13, 2016) (order regarding settlement agreement). *But see Burch, Monopolies*, *supra* note 12, at 91, 102–05 (pointing to *Zimmer Durom* as an example of an anticompetitive settlement).

64. Burch, *Monopolies*, *supra* note 12, at 122–24.

65. *See Judith Resnik et al., Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996) (analyzing the roles of individually retained plaintiffs’ attorneys in mass litigation).

66. *See supra* note 48 and accompanying text.

67. *See Burch, Monopolies*, *supra* note 12, at 122; *see also Burch & Williams*, *supra* note 10, at 1525–26.

68. *See Burch, Monopolies*, *supra* note 12, at 92–93.

plaintiffs' lawyers, not the plaintiffs themselves.⁶⁹ The PSC and the defendant will negotiate a master settlement agreement that typically takes the form of a global offer to all of the lawyers in the MDL to settle their case inventories.⁷⁰ Thus the nonlead lawyers must become parties to the settlement if they want any of their clients to be able to participate. And these master settlement agreements often include terms that require participating lawyers to recommend the settlement to all of the clients in their inventories.⁷¹ The idea is to tie the financial incentives of the nonlead lawyers to the success of the global deal. The lawyers are either "all in" as to their entire inventory of cases or they are completely shut out.⁷²

Many of these master settlement agreements also contain powerful closure provisions that some argue suppress competition and dissent as a way to make sure that the global settlement is the only deal in town. These closure provisions may include giving the defendant an option to walk away from the deal if too few plaintiffs (for example, fewer than 95%) sign on or requiring participating lawyers to withdraw from representing non-settling plaintiffs.⁷³

Sometimes these settlements even include terms that target competition directly. They may require participating lawyers to refrain from advertising for new clients with claims against the defendant.⁷⁴ They may prohibit lawyers from taking referral fees.⁷⁵ And they may reduce settlement payments to claimants who had not hired a lawyer as of the settlement date, thereby discouraging

69. See *id.* at 90–91. Burch and Williams trace the evolution of this settlement structure throughout the deals in their dataset, beginning with the Propulsid settlement in 2004. See Burch & Williams, *supra* note 10, at 1496 & tbl.6–1509 & fig.8.

70. See Rave, *Closure Provisions*, *supra* note 7, at 2190.

71. The most notorious and controversial example (at least within the academic literature) is the Vioxx settlement. See Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-01657 (E.D. La. Nov. 9, 2007). In *Vioxx*, the settlement that the PSC negotiated with the defendant was structured as a deal between the defendant and the plaintiffs' lawyers. Any lawyer who wanted to participate had to agree to recommend the settlement to all of her clients. *Id.* § 1.2.8.1. If any client did not want to settle, the participating lawyer was required to withdraw from representing that client and to forgo any financial interest in that client's case, including any referral fee for sending the client to another lawyer. *Id.* § 1.2.8.2. And the defendant reserved the right to walk away from the deal if fewer than 85% of the plaintiffs signed on. *Id.* § 11.1.1.2. For competing takes on the Vioxx settlement, compare Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 301 (2011), with Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952–57, 1962–65 (2017), and Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 219. As Burch and Williams demonstrate, several other settlements have taken similar approaches. See Burch & Williams, *supra* note 10, at 1500 tbl.7, 1507–09 & fig.8; see also Rave, *Closure Provisions*, *supra* note 7, at 2191–93 (discussing variations in lawyer-recommendation provisions).

72. See Burch, *Monopolies*, *supra* note 12 at 92–93; Rave, *Closure Provisions*, *supra* note 7, at 2191–92.

73. See Burch, *Monopolies*, *supra* note 12, at 94–107; Burch & Williams, *supra* note 10, at 1504–08.

74. See Burch, *Monopolies*, *supra* note 12, at 93.

75. See, e.g., Settlement Agreement § 1.2.8.2, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-01657 (E.D. La. Nov. 9, 2007) (requiring participating lawyers to forgo any financial interest in non-settling clients' claims); see also Rave, *Closure Provisions*, *supra* note 7, at 2198–99 (explaining how this disrupts the referral market).

lawyers from representing latecomers.⁷⁶

In short, lead lawyers can use settlement structures to attempt to bring potential competitors among nonlead lawyers into the fold. Indeed, according to Burch and Williams, every publicly available non-class MDL settlement in their data set includes at least one closure provision that restricts the market for legal services.⁷⁷ When these settlement practices are combined with a high degree of repeat play and the cooperative norms that develop among repeat players, the theory goes, they may permit lead lawyers to act like a cartel and suppress competition.⁷⁸

C. HOW THE CARTEL SUPPOSEDLY HURTS PLAINTIFFS

Repeat play and the lack of competition can exacerbate the principal-agent problem inherent in aggregate litigation, leaving the one-shotter plaintiffs more vulnerable. The big risk here is familiar from the class-action literature.⁷⁹ The repeat-player lead lawyers may cut a deal with the repeat-player defendant to settle all of the plaintiffs' claims at a discount in exchange for generous common-benefit fees.⁸⁰ And, because the lead-lawyer cartel has succeeded in suppressing competition on the plaintiffs' side, no one will object or attempt to peel off plaintiffs with high-value claims to take them to trial or negotiate a separate settlement.⁸¹ The defendant gets the closure it desires. The lead lawyers collect a premium for delivering peace. And the individual plaintiffs—especially those with high-value claims—get, for lack of a better word, screwed.

As evidence that this is happening, critics point to publicly available, non-class master settlement agreements that both: (1) include closure provisions that make it hard for plaintiffs to reject the deal (like requiring lawyers to withdraw from representing non-settling claimants), and (2) have terms that increase lead lawyers' common-benefit fees above the rate set by the judge or require participating state-court plaintiffs (who are beyond the MDL judge's jurisdiction) to consent to the common benefit tax.⁸² Indeed, according to Burch and Williams, “[a]ll

76. See Burch, *Monopolies*, *supra* note 12, at 104–05.

77. See *id.* at 91–94; Burch & Williams, *supra* note 10, at 1500 & tbl.7. *But see* Rave, *Closure Provisions*, *supra* note 7, at 2177 (explaining that “closure strategies operate in different ways with different effects on claimants’ choices and welfare”).

78. See Burch, *Monopolies*, *supra* note 12, at 122–24.

79. For some classic expositions of the principal-agent problem in class actions, see, for example, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337; Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65 (2003).

80. See Burch, *Monopolies*, *supra* note 12, at 74, 87.

81. See *id.* at 122–24; Burch & Williams, *supra* note 10, at 1458–59; *cf.* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 168 (2003) (“What high-value damage claimants need is not so much a ‘day in court’ as the prospect of a different bargaining agent whose self-interest is not tied up with the sale of class members’ rights en masse so as to achieve maximum claim preclusive effect.”).

82. See Burch, *Monopolies*, *supra* note 12, at 108–11, 119–21; Burch & Williams, *supra* note 10, at 1509–14.

of the examined settlements featured at least one provision that encouraged closure and finality (which benefits the defendant), and nearly all settlements contained some provision that increased lead plaintiffs' lawyers' . . . fees."⁸³ They argue that these settlement terms, along with terms that reduce payouts to late-filing plaintiffs and terms that allow unclaimed funds to revert to the defendant, principally benefit the defendant and repeat-player lawyers, but not necessarily the plaintiffs.⁸⁴

Defendants, of course, don't care about the size of the common-benefit fees if they are coming out of the plaintiffs' share, but they know that the lead lawyers do.⁸⁵ So bargaining over fees gives the defendant leverage to extract something else of value.⁸⁶ The implicit trade is increased common-benefit fees in exchange for lower payments to plaintiffs or more stringent claims-eligibility criteria.⁸⁷ And the repeat-player dealmakers use powerful closure provisions to cram the deal down on the one-shotter plaintiffs and their individual lawyers.

The most prominent critics are forthright about the limits of their claims. Burch readily admits that we cannot know whether or how much plaintiffs are being shortchanged in these settlements.⁸⁸ Nor is there any viable way to demonstrate whether repeat players generate "better" or "worse" outcomes for plaintiffs, as there are no alternative settlements negotiated by different lawyers that we could use to compare.⁸⁹ Indeed, most non-class settlements in MDLs are confidential.⁹⁰

But Burch points to the expected economic effects when a market is controlled by a cartel: higher prices and lower outputs.⁹¹ Here, those higher prices take the form of inflated common-benefit fees. And lower outputs take the form of "inadequate representation through discounted payouts to claimants, stricter evidentiary requirements, or more coercive participation measures."⁹²

83. Burch & Williams, *supra* note 10, at 1451.

84. *See id.* at 1489; *see also* Burch, *Monopolies*, *supra* note 12, at 88–89.

85. *See* Burch & Williams, *supra* note 10, at 1490.

86. *See id.*

87. *See id.*; Burch, *Monopolies*, *supra* note 12, at 135.

88. *See* Burch, *Monopolies*, *supra* note 12, at 127, 130; Burch & Williams, *supra* note 10, at 1489–90.

89. *See* Burch, *Monopolies*, *supra* note 12, at 130; Burch & Williams, *supra* note 10, at 1451.

90. Burch compares common-benefit fees with plaintiff recoveries in the settlements about which she was able to find publicly available information and finds the ratios in some of them (*Propulsid*, *Ortho Evra*, and *Nuva Ring*) alarming. *See* Burch, *Monopolies*, *supra* note 12, at 127–32 & tbl.3. She observes:

Put simply, if the information that lead lawyers are willing to make visible so readily appears to enrich them and the defendants with whom they broker the deal, one is left to wonder what the private aspects must look like. Plainly, the concern is that the gains unlocked in exchange for delivering peace may be common-benefit fees—not enhancements for claimants.

Id. at 129–30.

91. *See id.* at 135.

92. *Id.*

We think, and argue below, that this description of the market probably overstates the degree of cartelization, understates the amount of competition, and overstates the coerciveness of settlement agreements. Nevertheless, these critics raise legitimate concerns. Burch's central insight, that one-shotter plaintiffs are vulnerable to all of the other repeat players in multidistrict litigation, is correct. And, as we have argued elsewhere as well, we need to be wary of instances in which the repeat players are more worried about their dealings with each other than with the one-shotter plaintiffs.⁹³ In other words, Galanter's prediction holds true in MDL: the haves will come out ahead. But even if we assume critics are right about the state of the market in MDL, it's better for the have nots to have some haves on their side. The agency costs imposed by their repeat-player lawyers are not the only things plaintiffs need to worry about in MDLs. They also need to worry about the repeat players on the other side—the defendants.

II. THE HAVES CAN HELP, IF THEY ARE ON YOUR SIDE

Although these critics' insights are trenchant, by focusing on competition (or the lack thereof) among plaintiffs' lawyers, we think they may be underestimating the other half of the picture.⁹⁴ As we explain in section A, one-shotter plaintiffs don't only have to worry about their relationship with the repeat-player lawyers who represent them. They also have to worry about their position vis-à-vis the repeat-player defendant. And in that relationship, repeat-player plaintiffs' lawyers can add significant value, as we explain in section B. But, as we explain in section C, the paradox is that the very characteristics that make repeat-player plaintiffs' lawyers an effective counterweight to the defendant are the ones that most threaten the position of individual one-shotter plaintiffs within the aggregate. All told, although aggregation in the hands of repeat-player lawyers inevitably carries risks, it also presents one-shotter plaintiffs with important opportunities to level the playing field with repeat-player defendants.

A. THE CARTEL ANALOGY IS INAPT

Although we agree that there is always a danger that lead lawyers may not act in the best interests of the claimants they represent, we disagree that lead lawyers in MDL are best analyzed as a cartel. Ordinarily, we worry about cartels or monopolies because they hurt consumers.⁹⁵ Without competition, producers can raise prices and

93. See Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1281–84, 1298.

94. To be sure, Burch recognizes that repeat players in MDL can generate positive effects for plaintiffs. See, e.g., Burch, *Judging*, *supra* note 12, at 95; Burch, *Monopolies*, *supra* note 12, at 85–86; Burch & Williams, *supra* note 10, at 1467–69. But across her articles, she places far more emphasis on the risks that repeat players present than the benefits they offer.

95. See FTC, THE ANTITRUST LAWS, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/LT5X-9MEC>] (“[F]or over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”) (last visited Oct. 1, 2019).

restrict services, leading to an inefficient allocation of resources and redistributing wealth from consumers to producers.⁹⁶ This is what critics are worried about in MDL: that the lead-lawyer cartel provides plaintiffs with inferior legal services by either settling too cheaply or agreeing to claims-eligibility criteria that are too strict, or both—and that they are doing so at an inflated price in the form of common-benefit fees that ultimately come out of the plaintiffs' pockets.⁹⁷ Competition is what gives consumers choices and keeps producers in line. Without competition, the consumers—the one-shotter plaintiffs—are getting the short end of the stick.

But aggregate litigation is structured differently from an ordinary consumer market. It is better understood as two interrelated markets: (1) the market for claims, and (2) the market for legal services. We can't analyze one market without considering its effect on the other.

In the market for claims, the plaintiffs are the sellers. What they have to sell to the defendant is peace or, more formally, preclusion.⁹⁸ Most of the time, this sale takes the shape of a voluntary transaction—a settlement.⁹⁹ The plaintiffs agree to forever release their claims in exchange for a settlement payment from the defendant. But if the parties cannot agree on the terms of trade, a judge or jury will set the price at which a forced sale of claims occurs.¹⁰⁰

In the second market, the market for legal services, the plaintiffs are the buyers. They purchase legal services from lawyers to help them negotiate the voluntary or involuntary sale of their claims to the defendant in the first market.

The critical thing to recognize in this two-market picture of aggregate litigation is that, in the market for claims, there is only one purchaser. The defendant is what economists would call a monopsonist. A monopsony is simply the inverse of a monopoly: instead having only one seller, a monopsony is a market where there is only one buyer.¹⁰¹ That's what we have in the market for claims in aggregate litigation. The plaintiffs cannot sell their claims elsewhere if the defendant's offering price is too low—after all, only the defendant is allegedly liable to them, so only the defendant has an interest in buying what the plaintiffs have to sell. Competition on the seller side in a market in which there is only one buyer can

96. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 15–26 (5th ed. 2016).

97. Burch, *Monopolies*, *supra* note 12, at 87.

98. See Nagareda, *supra* note 81, at 151–52; see also William B. Rubenstein, *A Transactional Model of Adjudication*, 89 *GEO. L.J.* 371, 372, 419 (2001) (describing the transactional nature of complex, multi-party litigation).

99. See Marc Galanter & Mia Cahill, "*Most Cases Settle*": *Judicial Promotion and Regulation of Settlements*, 46 *STAN. L. REV.* 1339 (1994).

100. The plaintiff's entitlement to her claim thus operates under a liability rule, allowing the defendant to force a sale at a court-determined price. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1092 (1972). That price could, of course, be zero if the judge dismisses the case on a pretrial motion or the jury finds for the defendant at trial.

101. ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* 1 (2010) ("Technically, monopsony exists when there is but one buyer of a well-specified good or service.").

put sellers at a disadvantage.¹⁰² The monopsonist has buyer power—and therefore leverage—in its dealing with rival sellers.¹⁰³

When facing a monopsonist, sellers would do better if they could join forces to present a united front—that is, form a cartel that acts as a single seller.¹⁰⁴ Aggregating their claims gives plaintiffs countervailing power in their dealing with the defendant, much like forming a union gives employees countervailing power when dealing with the only employer in town.¹⁰⁵ In other words, the plaintiffs (as a group) would be better off if the market for claims looked like a bilateral monopoly—a single seller selling to a single buyer—instead of a one-sided monopsony.¹⁰⁶

There are at least two reasons for this. First, working together increases the plaintiffs' ability to offer the defendant closure or peace. And peace can generate value for both sides in the litigation.¹⁰⁷ Defendants are often willing to pay a premium to put the whole litigation behind them—to end the uncertainty, the risk of adverse selection (that is, overpaying to settle weak claims while plaintiffs hold the strong ones out for trial), and the negative publicity and concomitant drag on stock price that goes along with mass litigation.¹⁰⁸ So plaintiffs'

102. *See id.* at 41.

103. *Id.*; *see also* PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER: A GLOBAL ISSUE 1–15 (2017) (discussing the harmful consequences of buyer power).

104. *See* BLAIR & HARRISON, *supra* note 101, at 124–26; CARSTENSEN, *supra* note 103, at 162.

105. *See, e.g.*, Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 542 (2018).

106. A brief disclaimer is in order. We are not making any claim that a countervailing cartel on the plaintiffs' side leads to a more efficient outcome in mass litigation than monopsony. Indeed, it is not clear that a monopsony in the market for legal claims leads to the same sort of inefficient reduction in the quantity purchased that we would expect in, say, a labor market monopsony because, unlike prospective employees, plaintiffs are not really competing with each other to sell their claims. *See* BLAIR & HARRISON, *supra* note 101, at 43–45 (describing the welfare effects of monopsony). From the defendant's perspective, one plaintiff's claim is not a substitute for another's. We think it is an interesting question whether a bilateral monopoly does a better job than monopsony of making sure that litigation outcomes accurately reflect the substantive law. Some scholars like Sergio Campos and David Rosenberg implicitly suggest that the answer is yes. *See* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1079–81 (2012); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 852–53 (2002). But it is beyond the scope of our project to try to answer that question here.

Nor are we claiming that empowering plaintiffs' lawyers in mass litigation leads to some socially optimal outcome. It could be that the substantive law is too plaintiff-friendly, and empowering plaintiffs' lawyers to facilitate aggregation only amplifies the errors in the substantive law. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 478. The best we can say about social welfare here is that bilateral monopolies tend to have fewer distorting effects on allocative efficiency than either monopolies or monopsonies. *See* BLAIR & HARRISON, *supra* note 101, at 136. Our point is simply that monopsony gives the defendant the upper hand in dealing with the plaintiffs in MDL.

107. *See, e.g.*, Nagareda, *supra* note 81, at 164; D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1185 (2013) [hereinafter Rave, *Governing the Anticommons*].

108. Rave, *Governing the Anticommons*, *supra* note 107, at 1193–98. For an example of the peace premium in action, *see* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 413–18 (2014).

claims may be worth more bundled together for sale in a single transaction.¹⁰⁹ The peace premium realized in a global settlement of all claims increases the size of the pie.

Second, working together increases the plaintiffs' leverage against the defendant. By aggregating their claims, plaintiffs can pool resources, share risk, coordinate litigation strategy, disable holdouts, and present a unified negotiating position—all things that offset some of the defendant's repeat-player advantage.¹¹⁰ A countervailing monopolist can extract more out of a monopsonist than uncoordinated sellers can.¹¹¹ So forming a cartel of sorts increases the plaintiffs' collective share of the pie.

But plaintiffs generally cannot work together on their own. In litigation of any substantial size, plaintiffs are simply too dispersed and uncoordinated to form a litigation cartel.¹¹² Mass tort victims, for example, are not generally part of any preexisting group. Most of the time, they aren't even aware of each other.¹¹³ They are, after all, one-shotters. Plaintiffs in mass litigation must rely on lawyers to coordinate their claims. Lawyers are the ones who investigate potential mass harms and advertise the availability of legal recourse.¹¹⁴ Lawyers are the ones who collect inventories of cases and create referral networks.¹¹⁵ Lawyers are the ones who coordinate discovery efforts and litigation strategy.¹¹⁶ In short, lawyers are the intermediaries who make cooperation on the plaintiffs' side of mass litigation possible, particularly the kind of cooperation that occurs within the consolidated pretrial proceedings of an MDL.¹¹⁷

109. Rave, *Governing the Anticommons*, *supra* note 107, at 1195, 1201.

110. *Id.* at 1192–93.

111. CARSTENSEN, *supra* note 103, at 162.

112. See Rave, *Governing the Anticommons*, *supra* note 107, at 1198–99 (noting that the dispersal of rights to control legal claims among individual plaintiffs forms an anticommons dynamic).

113. Plaintiffs do sometimes form victims' groups after some triggering event like the initiation of mass litigation. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1023–24 (1993); Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 919–21. Modern technology may also facilitate even more communication among large groups of claimants. See Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 119–21 (2011); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 849–50 (2017).

114. Hensler & Peterson, *supra* note 113, at 1025–26.

115. See, e.g., Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 534–39; Samuel Issacharoff, "Shocked": *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1928 (2002).

116. See Erichson, *Informal Aggregation*, *supra* note 28, at 388–96.

117. Lawyers are not the only actors who could play this sort of intermediary role, of course, and the pressures for aggregation are largely independent of the formal consolidation rules in litigation. As Samuel Issacharoff and John Witt have demonstrated, interpreters and other nonlawyers emerged as claims brokers who helped aggregate industrial accident claims long before class actions or MDL were invented. Issacharoff & Witt, *supra* note 28, at 1592–95. First-party insurers may also play a similar role as subrogees of injured plaintiffs. See Nathaniel Donahue & John Fabian Witt, *Tort as Private Administration*, 105 CORNELL L. REV. (forthcoming 2019) (manuscript at 30–32), available at <https://ssrn.com/abstract=3349858> [<https://perma.cc/K34U-ZTHV>]. The important point here is that effective

That brings us to the market for legal services. What might look like healthy competition in that market, considered in isolation, begins to look more like a collective-action problem in the related market for claims. Competition among lawyers on the plaintiffs' side of an MDL makes coordination of the plaintiffs' claims more difficult. The more competing lawyers there are in the mix, the more difficult it is to coordinate a coherent litigation strategy and negotiating position. And the potential for free riders and holdouts increases. Some lawyers will underinvest in developing their clients' cases, hoping that they can piggyback on a global settlement negotiated by the lead lawyers.¹¹⁸ Others may threaten to hold up a global settlement in which the defendant demands a high participation rate unless they get a side payment.¹¹⁹ Just as too many cooks can spoil the broth, too many competing lawyers can decrease the plaintiffs' collective leverage in negotiating the sale of their claims.

Whereas competition is an unmitigated good in most consumer markets, competition in the market for legal services on the plaintiffs' side of an MDL may actually reduce the value of the legal services that the plaintiffs are buying. That is the case if it undercuts plaintiffs' leverage in the market for claims and suggests that their most valuable asset—total peace—may be impossible to produce.¹²⁰ Thus, there is a tradeoff in aggregate litigation that isn't present in the typical consumer market.

Given the interrelationship between the two markets, the problems with the cartel analogy come into focus. If the goal is to protect the one-shotter plaintiffs, we cannot simply maximize competition in the market for legal services without considering the impact that would have on the market for claims. Antitrust policy tolerates collaboration among competitors when it leads to benefits for consumers.¹²¹ This is a fundamental point. One-shotter plaintiffs need to work together to deal effectively with a repeat-player defendant. And cooperation among their lawyers is the way that happens.

To be clear, we are not saying that we don't have to worry about cartelization by plaintiffs' lawyers in MDL. Quite the contrary: there is always a risk of self-dealing when we empower agents, and that risk increases when external competitive checks are weakened.¹²² The lead lawyers may settle too cheaply in exchange for generous common-benefit fees. Or they may allocate settlement proceeds in

coordination depends on intermediaries, and plaintiffs' lawyers have largely filled that role in modern mass tort practice.

118. See, e.g., Burch, *Judging*, *supra* note 12, at 103–04.

119. See Rave, *Governing the Anticommons*, *supra* note 107, at 1199.

120. See *id.* at 1201.

121. See Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 163–64 (2005).

122. The problem is ubiquitous and not limited to aggregate litigation. Cartels developed as counterweights to monopsonistic buyers can exploit their market power over their own participants. CARSTENSEN, *supra* note 103, at 168. To take just one example, milk cooperatives have cut sweetheart deals with milk processors at the expense of the dairy farmers they represent. See *id.* at 169. For elaboration on the fundamental problem, see D. Theodore Rave, *Two Problems of Fiduciary Governance*, in FIDUCIARY GOVERNMENT 49, 49–51 (Evan J. Criddle et al. eds., 2018).

ways that underpay outlier claims. Critics are right to point out the dangers of too little competition. The lawyers may take too big a share of the pie for themselves, and they may give some plaintiffs too much while others get too little.

But if we are intervening to protect the one-shotters from the repeat players, we should not handicap the one-shotter plaintiffs as a group in their dealings with the repeat-player defendant. We need strategies that address the agency problem and distributional risks without decreasing the size of the pie or the plaintiffs' collective share of the pie.¹²³ In other words, we need to find ways to keep repeat-player plaintiffs' lawyers faithful to the one-shotter plaintiffs they represent without undermining the value they create through coordination.

B. REPEAT PLAYERS ADD VALUE

The typical defendants in mass litigation—Big Pharma, Big Tobacco, Big Anything—are repeat players. And they are typically represented by repeat-player defense lawyers that specialize in defense of complex cases.¹²⁴ As Galanter explains, these repeat players on the defense side have built-in advantages over the typical one-shotter plaintiffs in mass litigation—consumers, patients, accident victims, and the like.¹²⁵

Beyond just their usual resource advantage, repeat-player defendants have structural advantages over one-shotters. First, they can draw on their experience with the litigation system.¹²⁶ Second, they can take advantage of economies of scale. Faced with a mass of cases, their incremental cost to defend any additional case is relatively low.¹²⁷ Third, they have existing relationships with institutional incumbents (for example, the courts, the lawyers, and the various adjuncts to mass litigation practice like mediators and claims administrators) and have incentives to develop credibility and a bargaining reputation.¹²⁸ Fourth, they can play the odds. Because they care about the bottom line across all of the cases against them, not the outcome of any individual case, repeat-player defendants can rationally take gambles on individual cases that are calculated to maximize gain over the whole series of cases.¹²⁹ Fifth, and finally, they can play for rules. They have the incentives and resources to lobby for favorable changes in the legislative or rule-making process.¹³⁰ And they can influence the development and application of rules through precedent by settling—even at a short-term loss—cases likely to lead to unfavorable precedent, and litigating cases likely to lead to favorable precedent (perhaps all the way to the U.S. Supreme Court).¹³¹ Given these

123. See Rave, *Governing the Anticommons*, *supra* note 107, at 1214–19.

124. Burch & Williams, *supra* note 10, at 1471–72.

125. Galanter, *supra* note 1, at 98–103.

126. *See id.* at 98–99.

127. *Id.* at 98.

128. *Id.* at 99.

129. *Id.* at 99–100.

130. *Id.* at 100.

131. *Id.* at 100–03. To take just one illustrative example, after the Ninth Circuit held in 2007 that the arbitration clause in AT&T's cell phone contract was unconscionable because it contained a class-action

advantages, Galanter's theory predicts that rules and outcomes will tend to skew in favor of repeat-player defendants over time.¹³²

Adding repeat players on the plaintiffs' side can help balance the power in mass litigation. Repeat-player plaintiffs' lawyers who specialize in MDL and aggregate litigation and appear over and over again in leadership positions can bring experience to rival that of defendants and their lawyers. They know how to litigate complex cases, how MDLs work, and the informal and unwritten rules, customs, and best practices that develop in any practice area, but particularly in MDLs, where formal rules and appellate precedents are sparse.¹³³

Indeed, specialization can add significant value. Numerous studies have shown that lawyers who specialize in a particular practice area obtain superior results for their clients compared to non-specialists.¹³⁴ This is true in medical malpractice,¹³⁵ asbestos,¹³⁶ *qui tam*,¹³⁷ criminal defense,¹³⁸ and even Supreme Court practice.¹³⁹ There is no reason to think it would be any less true of lawyers who specialize in

waiver, AT&T opted not to seek certiorari. It even filed an amicus brief asking the court to *deny* its codefendant T-Mobile's certiorari petition in *T-Mobile USA, Inc. v. Laster*. See 553 U.S. 1064 (2008) (cert. denied); Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party, *T-Mobile USA, Inc. v. Laster*, 553 U.S. 1064 (2008) (No. 07-976), 2008 WL 534808. The reason? AT&T had developed a brand-new consumer-friendly arbitration clause that would present a much more favorable set of facts for the Supreme Court to declare that the Federal Arbitration Act preempts state law that deems class action waivers unconscionable. Four years later, the Supreme Court did exactly that in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)—a major victory for businesses seeking to avoid class-action exposure to consumer claims. See Aaron Bruhl, *AT&T's Long Game on Unconscionability*, PRAWFSBLAWG (May 5, 2011), <https://prawfsblawg.blogs.com/prawfsblawg/2011/05/atts-long-game-on-unconscionability.html> [<https://perma.cc/E82Y-RHKB>].

132. Galanter, *supra* note 1, at 103–04.

133. See Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 789–90 (2017) (emphasizing the ad hoc procedural nature of MDLs); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1687–89, 1691–93 (2017) (same).

134. See Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 859 & n.260 (2011).

135. See, e.g., FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 201, 216 (1993) (finding that medical malpractice specialists negotiated settlements that were nearly twice as large as the sums obtained by non-specialists in similar cases); Catherine T. Harris, Ralph Peebles & Thomas B. Metzloff, *Does Being a Repeat Player Make a Difference? The Impact of Attorney Experience and Case-Picking on the Outcome of Medical Malpractice Lawsuits*, 8 YALE J. HEALTH POL'Y L. & ETHICS 253 (2008); Catherine T. Harris et al., *Who Are Those Guys? An Empirical Examination of Medical Malpractice Plaintiffs' Attorneys*, 58 SMU L. REV. 225, 248 (2005) (finding that in North Carolina medical malpractice, “[a]ttorney attributes are at least as important as case attributes”).

136. See JAMES S. KAKALIK ET AL., *RAND, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES* xi (1984) (finding that lawyers' asbestos-related experience helped determine whether their clients would recover).

137. See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1298–1300 (2012).

138. See David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1149–50, 1166–72 (2007).

139. See Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 145 (2013); see also Susan Brodie Haire, Roger Hartley & Stefanie A. Lindquist, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 LAW & SOC'Y REV. 667, 678 (1999) (finding similar outcomes in federal circuit courts).

MDL. Some of this added value comes, no doubt, from the depth of knowledge and experience that specialists develop. But some of it may also come from the fact that specialists are generally repeat players in a field and can reap the other advantages that repeat players have.¹⁴⁰

Repeat-player MDL lawyers have access to the capital needed to litigate complex cases on a contingency-fee basis. A single science-heavy case, like a drug-defect case for example, often requires extensive expert testimony and could cost upwards of \$250,000 to litigate up to the point of trial.¹⁴¹ The costs of bellwether trials, which typically carry higher stakes because their results will inform settlement values in other cases, can easily run into the millions of dollars.¹⁴² The capital outlays required to be on a plaintiffs' steering committee in an MDL are orders of magnitude higher.¹⁴³ And lawyers will not begin to see a return on those investments until the case is over—if they get anything at all. Repeat-player plaintiffs' lawyers and firms have access to the resources and financing to make these sorts of outlays and to invest in litigation on a scale that approaches the defendants' investment. One-shotter lawyers with less experience and fewer resources, by contrast, may be forced to settle claims too cheaply or abandon the litigation entirely because they are unable or unwilling to essentially bet their own firms on the case.

Repeat-player plaintiffs' lawyers also have the incentive and ability to invest in aggregating cases to take advantage of economies of scale. By building an inventory of cases, repeat-player lawyers can spread costs across many cases and lower the start-up costs associated with any individual case. The marginal cost of adding an additional plaintiff's case to a large inventory will not approach the \$250,000 that it might cost to litigate it individually. And aggregating cases increases the plaintiffs' lawyer's bargaining leverage with the defendant.¹⁴⁴

140. We must be careful to note that the repeat players on the plaintiffs' side of an MDL are not monolithic. They may have different business models and therefore different approaches to mass litigation. For instance, some may specialize in collecting large inventories of clients, others may focus on taking cases to trial, while still others seek leadership roles in the MDL. This is one reason why we are skeptical of the cartelization story, as we discuss below. See *infra* notes 240–44 and accompanying text. Although it is tempting to say that these lawyers' strengths would complement one another, and indeed they might in many instances, this may also be the source of significant strategic conflict that may pose risks for claimants. One area for additional study—both empirical and theoretical—is how different kinds of repeat players on the plaintiffs' side interact with one another. Indeed, one of our goals with this Article is to push the debate into a more fine-grained interrogation of the benefits and risks that repeat players create. We are grateful to Steve Burbank for pressing us on this point.

141. See Baker, *supra* note 71, at 1952.

142. For example, plaintiffs' lawyers spent more than \$1 million on each bellwether trial in the Vioxx litigation. See *LSU Symposium, supra* note 54, at 344–45 (remarks of Judge Fallon). On bellwether trials generally, see Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008), and Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

143. See *LSU Symposium, supra* note 54, at 344 (remarks of Judge Fallon) (“In Vioxx, the plaintiffs’ committee had to come out of pocket with \$41 million in order to handle the case.”).

144. On the advantages of aggregation, see, for example, Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744–48 (1997).

Repeat-player plaintiffs' lawyers also have relationships with institutional incumbents that they can use to their clients' advantage. They know the judges. They know the lawyers on the defense side. They know what to expect from both. They know the other plaintiffs' lawyers and they understand the complicated networks of referrals and informal aggregation that consolidate cases on the plaintiffs' side of a mass litigation.¹⁴⁵ They also know the various vendors and adjuncts that play such a large role in MDLs: the claims administrators, special masters, mediators, common-benefit-fee accounting firms, and third-party financiers.¹⁴⁶

Repeat-player plaintiffs' lawyers have the incentives to develop credibility and a bargaining reputation. Credibility and reputation are important assets in litigation. Indeed, as Ronald Gilson and Robert Mnookin have explained, hiring repeat-player lawyers with established reputations allows one-shotter litigants to credibly commit to pursuing a reasonable and cooperative strategy in litigation instead of a wasteful scorched-earth strategy of resisting every discovery request and contesting every motion.¹⁴⁷ This can lower costs for both sides, as defendants will not need to pursue a scorched-earth strategy in response.¹⁴⁸ And repeat-player lawyers can develop another kind of valuable credibility—a reputation for vetting cases to screen out the weak ones.¹⁴⁹ These repeat players' very involvement in the litigation can signal to the court, the defendant, and other players that these are high-quality cases, which may translate into higher settlement values.¹⁵⁰

Finally, repeat-player plaintiffs' lawyers can play for rules so that the MDL playing field is not inherently tilted toward defendants. Repeat players have the incentives to invest in lobbying legislatures and rulemakers. They participate on the Federal Civil Rules Advisory Committee.¹⁵¹ They had major input into the drafting of the *Manual For Complex Litigation*, which is still the go-to resource for federal MDL judges.¹⁵² They form organizations like the American Association for Justice and the Pound Civil Justice Institute to attempt to think through big-picture issues, develop media strategies, and influence policymaking.¹⁵³ They participate in federal and state rulemaking processes, American Law

145. See *supra* notes 114–17 and accompanying text.

146. See Burch & Williams, *supra* note 10, at 1467–68.

147. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 513, 537–41 (1994).

148. See *id.* at 537–41.

149. See Engstrom, *supra* note 137, at 1257–58.

150. *Id.*; see also Williams et al., *supra* note 11, at 145.

151. See U.S. COURTS, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, CHAIRS AND REPORTERS (2018), https://www.uscourts.gov/sites/default/files/2017_committee_roster.pdf [<https://perma.cc/6HL8-R7LD>] (listing the 2017 members of the Committee); U.S. COURTS, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, CHAIRS AND REPORTERS (2017), https://www.uscourts.gov/sites/default/files/2016_committee_roster_0.pdf [<https://perma.cc/ZM6X-E27B>] (listing the 2016 members of the Committee).

152. See Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 903–05 (2017) [hereinafter Bradt, *A Radical Proposal*].

153. See *What We Do*, AM. ASS’N FOR JUST., <https://www.justice.org/what-we-do> [<https://perma.cc/PV3H-DPMS>] (formerly Association of Trial Lawyers of America); *Who We Are*, POUND CIV. JUST. INST., <http://www.poundinstitute.org/content/who-we-are> [<https://perma.cc/2TNA-3UVL>].

Institute (ALI) projects, and less formal efforts to develop best practices.¹⁵⁴ They show up at, or sometimes sponsor, bench-and-bar and academic conferences on aggregate litigation. And they attempt to work together to coordinate litigation strategies, both in MDLs and in parallel state court proceedings. Because they have an interest in how the rules of the game develop over time that their one-shotter clients lack, repeat-player plaintiffs' lawyers counter repeat-player defendants in all of these forums. Certainly, the U.S. Chamber of Commerce and other defense-side interests are not sitting on their hands—they are fully engaged, too.¹⁵⁵

None of this, incidentally, would have come as a surprise to those who drafted and developed the MDL statute in the 1960s. The primary goal of those drafters, mostly federal judges, was to provide a mechanism to efficiently process the rapidly growing number of mass claims they feared would engulf the federal courts, particularly in products liability cases.¹⁵⁶ But they also recognized that facilitating coordination on the plaintiffs' side would level the playing field with better-resourced defendants. Those defendants recognized this dynamic, too, and they opposed the MDL statute tooth and nail.¹⁵⁷ They had seen how the benefits of centralization, including coordinated discovery, plaintiffs' steering committees, and coordinated settlements, had played out in plaintiffs' favor during the massive electrical-equipment antitrust litigation that presaged the creation of the MDL statute, and they understood the threat to their strategic position that the MDL statute posed.¹⁵⁸ The judges, for their part, believed that this opposition was intended to preserve defendants' litigation advantages and frustrate courts' ability to process claims, and they expressed as much in their private correspondence with one another.¹⁵⁹ In their view, the MDL statute was necessary not only to protect the federal courts from an oncoming "litigation explosion," but also to facilitate private enforcement of the substantive law through more efficient litigation.¹⁶⁰ And they even predicted the development of a specialized bar to handle MDL cases on the plaintiffs' side.

154. Burch and Williams are critical of high-level (plaintiff and defense) repeat players' participation on the Duke Law Center for Judicial Studies' editorial board tasked with creating an "MDL Standards and Best Practices" guide. Burch & Williams, *supra* note 10, at 1517 & n.279. Imagine what the Best Practices guide they discuss would look like if the plaintiff-side repeat players hadn't been there!

155. Indeed, defense-side interests are currently engaged in a concerted, multipronged effort to shape the MDL process in their favor. They have proposed legislation in Congress. See Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (1st. Sess.). They have proposed MDL-specific amendments to the Federal Rules of Civil Procedure. See LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES (2017), http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_md_cases_8-10-17.pdf [<https://perma.cc/A8L4-QFY4>] [hereinafter LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING]. They even launched a website touting the need for new rules for MDLs. See *About*, LAWYERS FOR CIVIL JUSTICE, www.Rules4MDLs.com [<https://perma.cc/B3B3-HUAM>] (last visited Oct. 1, 2019).

156. See Bradt, *A Radical Proposal*, *supra* note 152, at 839.

157. *Id.* at 876–79, 887–89.

158. *Id.* at 861–62.

159. *Id.* at 876–77.

160. *Id.* at 839, 890, 907–08.

In short, as the creators of MDL predicted, repeat-player plaintiffs' lawyers add value. Without their help, one-shooter plaintiffs in mass litigation would be overmatched by repeat-player defendants. And the presence of repeat players who can play for rules on the plaintiffs' side helps keep the playing field from tilting too far in the defendants' direction.

C. THE PARADOX OF REPEAT PLAY

The biggest thing that differentiates the haves in litigation from the have nots is the ability to treat cases in the aggregate and make tradeoffs among them. Repeat players can play the averages and accept the risk of loss in individual cases to maximize the chances of winning across a whole series of cases.¹⁶¹ This allows them to take a risk-neutral, optimizing approach to any given case. One-shooters, by contrast, understandably care very much about the outcome of their individual cases and little about the outcome of any other cases, whether they are within the same MDL or not.¹⁶² Accordingly, one-shooters are more likely to take a risk-averse approach to their cases and accept the greater certainty of a less favorable outcome rather than risk losing big.¹⁶³

Similarly, repeat players can make tradeoffs among cases when they play for rules. By "rules" or "precedents," we do not mean only published appellate decisions (though those are, of course, important). Like Galanter, we mean something much broader: that is, the effect that the outcomes of some adjudicated cases have on future cases.¹⁶⁴ In this sense, a favorable jury verdict, or even a decision on a summary judgment motion or *Daubert* motion, would count as a "precedent" because it will affect how the parties expect future cases to be resolved.¹⁶⁵

Because repeat players care about the impact that one case's resolution will have on an entire series of cases, they can trade short-term losses in individual cases for positive rule developments that will bear on their other current and future cases.¹⁶⁶ One-shooters, by contrast, care much more about the outcomes

161. Galanter, *supra* note 1, at 99–100.

162. Although it may be the case that modern communications technology facilitates networking among plaintiffs, see, for example, Cabraser & Issacharoff, *supra* note 113, at 849–50, and Burch, *supra* note 113, at 120–121, that such networks have come to exist does not change the fundamental dynamic that a plaintiff will care most about her own claim.

163. See Galanter, *supra* note 1, at 99–100.

164. *Id.* at 96.

165. This is the theory behind bellwether trials, which are now a regular feature of MDL practice. See Fallon, Grabill & Wynne, *supra* note 142; Lahav, *supra* note 142. Galanter excludes settlements from his definition of precedent, though, as he acknowledges, there may be situations in which settlement outcomes in some cases impact the settlement value of future cases. Galanter, *supra* note 1, at 101 n.17. Settlements, like jury verdicts, yield at least some information about how much some parties think claims are worth, and, over time, going rates may develop for certain claim characteristics. See Adam S. Zimmerman, *The Bellwether Settlement*, 85 *FORDHAM L. REV.* 2275, 2277–79 (2017). For private settlements to have that sort of precedential effect, there must be some network through which information about prior settlements can flow—yet another reason why repeat players in that network have advantages over one-shooters. See Donahue & Witt, *supra* note 117 (describing development of going rates and rules of thumb for settlements among claims brokers and insurers); Issacharoff & Witt, *supra* note 28, at 1592–96 (same).

166. Galanter, *supra* note 1, at 100–03.

of their own individual cases than the impact those outcomes will have on the rules applied to other cases. Thus they are much less likely to accept a low-ball settlement offer to avoid making bad precedent for other similarly situated one-shotters.¹⁶⁷ This ability to make tradeoffs among cases means that repeat players can systematically skew the rules in their side's favor by selectively settling cases likely to yield unfavorable precedents and litigating cases likely to lead to favorable precedents.

The ability to make these tradeoffs among cases sets up a conflict of interest when repeat players represent one-shotters in litigation. Repeat-player lawyers might want to play the odds and play for rules, but the one-shotters they represent aren't playing the long game.¹⁶⁸ Paradoxically, then, the things that make repeat-player plaintiffs' lawyers the most effective against repeat-player defendants pose the greatest threat to individual plaintiffs within the aggregate. What is best for the group may not be best for the individual. A repeat-player plaintiffs' lawyer representing an inventory of cases may wish to dismiss a relatively weak case scheduled for trial rather than risk a loss that will reduce the settlement value of the rest of the cases. But the one-shotter plaintiff whose case is scheduled for trial would rather roll the dice with the jury than accept nothing at all with a voluntary dismissal. And the legal ethics rules generally do not permit the repeat-player lawyer to play his inventory of one-shotters as if they were a single repeat-player client.¹⁶⁹ The need to protect individuals within the aggregate thus forms a structural disadvantage for one-shotter plaintiffs, even those represented by repeat-player lawyers.¹⁷⁰

This type of conflict is ubiquitous and unavoidable any time repeat-player lawyers represent one-shotter clients. The same conflict arises in public-interest litigation. When a public-interest organization engages in impact litigation, the repeat-player organization's ideological and law-reform goals may diverge from the interests of the one-shotter clients selected as the nominal plaintiffs.¹⁷¹ Conversely, "occasional pro bono attorneys" can do serious damage to the long-term law-reform projects of "professional public interest litigators" when they push the interests of their one-shotter clients without considering the impact a

167. *Id.*

168. *Id.* at 117.

169. *See, e.g., id.*; MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2018); Erichson & Zipursky, *supra* note 71, at 282–83; Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 726, 732 (2011).

170. Galanter, *supra* note 1, at 118 ("The existence of a specialized bar on the [one-shotter] side should overcome the gap in expertise, allow some economies of scale, provide for bargaining commitment and personal familiarity. But this is short of overcoming the fundamental strategic advantages of [repeat players]—their capacity to structure the transaction, play the odds, and influence rule-development and enforcement policy.").

171. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing how the NAACP Legal Defense Fund's litigation efforts to end racial school segregation may have conflicted with the interests of the individuals it was representing).

potential loss may have on big-picture rule development.¹⁷² Even a lawyer's desire to develop or maintain a reputation can create a conflict. A lawyer may eschew hardball tactics that would help a current client in order to preserve a professional reputation that will attract future clients.¹⁷³ Yet in these instances, it is the lawyer's status as a repeat player, capable of dealing with opposing repeat players on an equal footing, that makes hiring that lawyer attractive in the first place.

Repeat play also exacerbates the principal-agent problem inherent in legal representation. There is always a danger that lawyers' interests will not align perfectly with their clients' interests. Agents are always tempted to shirk, even if just out of laziness. But a repeat-player lawyer who regularly overcharges or underserves a repeat-player client will quickly find himself out of business, as the client won't send future work his way.¹⁷⁴ There are far fewer constraints on repeat-player lawyers who represent one-shotter clients because those clients, by definition, don't have future work to offer the lawyers. Repeat-player lawyers do, of course, care about their reputations. Maintaining a reputation as a diligent and loyal lawyer can be important in attracting new clients, and vice-versa.¹⁷⁵ But for lawyers who represent one-shotters, reputation is not as strong a bonding mechanism as the prospect of receiving more work from a current repeat-player client. And one-shotter clients may face serious information deficits when it comes to choosing their lawyers to begin with.¹⁷⁶ Thus, as Galanter observes, repeat-player lawyers may feel more loyalty to the other repeat players within the system that provides their source of business than to their transient clientele.¹⁷⁷

172. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1632–33 (1997). For an illustrative discussion of the conflicts that can emerge among repeat-player public interest organizations and private lawyers, see Michael A. Olivas, *From a "Legal Organization of Militants" into a "Law Firm for the Latino Community": MALDEF and the Purposive Cases of Keyes, Rodriguez, and Plyler*, 90 DENV. U. L. REV. 1151, 1153–54, 1156 (2013). Olivas argues that Latinos often lost out in education reform litigation driven by other interest groups until the Mexican American Legal Defense Fund established itself as a powerful repeat player. *See id.*

173. Gilson & Mnookin, *supra* note 147, at 551.

174. *See* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 900–03 (1990) (describing how in-house counsel at major corporations can monitor outside lawyers).

175. *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 66–67 (2004). *See generally* AVINASH K. DIXIT, LAWLESSNESS IN ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE (2004) (describing the importance of reputation as a non-legal governance mechanism).

176. *See* Engstrom, *supra* note 134, at 859–65.

177. Galanter, *supra* note 1, at 117 (“For the lawyer who services [one-shotters], with his transient clientele, his permanent ‘client’ is the forum, the opposite party, or the intermediary who supplies clients.”). Judges may monitor common-benefit funds for excessiveness, and the current edition of the *Manual for Complex Litigation* contains numerous suggestions for doing so. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.62 (2004). But Silver and Miller argue that when judges are the gatekeepers for common-benefit fees, lawyers may begin to view judges as their “clients.” Silver & Miller, *supra* note 11, at 151.

Again, the features of repeat play that make repeat-player plaintiffs' lawyers powerful and effective counterweights against defendants pose the greatest threat to their one-shotter clients. Their experience, knowledge of the system, relationships with institutional incumbents, concern for their reputations, and ability to think long term and play for rules empower them to face off against repeat-player defendants, but also weaken their ties to their one-shotter clients.

We can't eliminate the principal-agent problem inherent to legal representation. Nor should we expect lawyers to be selfless. To encourage plaintiffs' lawyers to invest in becoming repeat players, we need to make it worth their while. That is, if we want them to make the kinds of investments needed to match the defendant's repeat-player advantage, we need to make room for a certain amount of repeat-player profit.¹⁷⁸ We need to give them a stake in playing again and again.

It is true, of course, that empowering repeat players to aid the one-shotters against the defendant also empowers them to help themselves at the one-shotters' expense.¹⁷⁹ But that tradeoff is inevitable. The question is simply whether repeat players add more value than they siphon off through self-dealing. We should not allow our focus on the principal-agent problem to blind us to the value that repeat players add. Doing so risks handicapping principals in the name of protecting them. After all, you only have a principal-agent problem when it makes sense to hire an agent.¹⁸⁰

In the end, repeat-player plaintiffs' lawyers' conflicts of interest may be a feature, not a bug, in MDL. Part of what the one-shotter plaintiffs pay for when hiring repeat players is the knowledge and relationships that come from prior engagements. Perhaps the better analogy is not to a cartel, but to investment banks in initial public offerings. All the best ones are conflicted. That's why they keep getting hired.¹⁸¹

III. MDL'S SPLIT PERSONALITY ENABLES EFFECTIVE REPEAT PLAY

Galanter posited that class actions may help level the playing field between the haves and the have nots.¹⁸² A class action can place a repeat-player defendant in the strategic position of a one-shotter by raising the stakes of the litigation to the

178. Galanter explains: "Lawyers should not be expected to be proponents of reforms which are optimum from the point of view of the clients taken alone. Rather, we would expect them to seek to optimize the clients' position without diminishing that of lawyers." Galanter, *supra* note 1, at 118–19; *cf.* Rave, *Governing the Anticommons*, *supra* note 107, at 1216 n.122 ("It may be necessary to pay the bundler a share of the surplus—quite possibly a large share—to encourage investment in overcoming the transaction costs of aggregation . . .").

179. We do not disagree with Burch on this point. *See, e.g.*, Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1263–64.

180. D. Theodore Rave, *Institutional Competence in Fiduciary Government*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 418, 420 (D. Gordon Smith & Andrew S. Gold eds., 2018).

181. *See* Hamid Mehran & René M. Stulz, *The Economics of Conflicts of Interest in Financial Institutions*, 85 J. FIN. ECON. 267, 274–75 (2007); Andrew Ross Sorkin, *When a Bank Works Both Sides*, N.Y. TIMES (Apr. 8, 2007), <https://www.nytimes.com/2007/04/08/business/yourmoney/08deal.html> (first quoting Morgan Stanley vice chairman for investment banking Robert Kindler: "We are all totally conflicted – get used to it," and then quoting then-Delaware Vice Chancellor Leo E. Strine Jr.: "The idea that you get someone who's unconflicted and has no experience is an idiotic notion").

182. Galanter, *supra* note 1, at 143.

point at which the defendant can no longer afford to play the odds.¹⁸³ And a class action can transform dispersed one-shotter claimants into something akin to a repeat player without the transaction costs of organization.¹⁸⁴ Indeed, some scholars, such as David Rosenberg, have argued that a mandatory class action is the only way to level the playing field in mass tort litigation.¹⁸⁵ Complete aggregation of all of the plaintiffs' claims would allow the lawyer for the class to play the odds and make tradeoffs among plaintiffs, thereby matching the defendant's repeat-player advantage.¹⁸⁶ And in Rosenberg's scheme, there is no competition on the plaintiff's side to threaten the value of the complete closure the plaintiffs have to sell.

But the kind of class action that Rosenberg envisions does not work doctrinally for a broad swath of cases in which the defendant's repeat-player advantage is most pronounced. Rule 23, as interpreted by the Supreme Court, does not permit mandatory class actions in most cases seeking monetary damages; all plaintiffs, including outliers, have a right to opt out of the class.¹⁸⁷ And mass tort class actions have often stumbled on Rule 23(b)(3)'s predominance requirement, which, as the Supreme Court explained in *Amchem Products, Inc. v. Windsor*, "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."¹⁸⁸ In mass tort cases, most courts have come to conclude that differences among plaintiffs, in terms of personal characteristics, timing and extent of injury, applicable state law, and other factors, are often too significant to achieve the necessary cohesion for class certification.¹⁸⁹ The point of this

183. *Id.* Indeed, the stakes are raised to the point at which defendants often argue that merely certifying a class action can "blackmail" them into settling nonmeritorious claims—they aren't willing to roll the dice on an all-or-nothing jury verdict and risk even a small chance of a catastrophic loss. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1997); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1879–81 (2006). *But see* Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (refuting the "blackmail" argument).

184. Galanter, *supra* note 1, at 143; *see also* Rave, *Governing the Anticommons*, *supra* note 107, at 1239; Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2127–29 (2000). Indeed, a low-cost aggregation method like the class action may be the only way that most negative-value claims are litigated at all.

185. Rosenberg, *supra* note 106, at 852–53.

186. Rosenberg argues that any rational plaintiff would agree to the tradeoffs that come with mandatory class treatment *ex ante* because it maximizes the deterrence and insurance functions of tort litigation, even if, *ex post*, a badly injured claimant with a high-value claim would prefer individual control over his or her claim. *Id.* at 831–33.

187. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 843–45 (1999).

188. 521 U.S. 591, 623 (1997).

189. *See, e.g.,* Bradt & Rave, *Aggregation on Defendants' Terms*, *supra* note 25, at 1262–66 (describing courts' general approach to proposed mass-tort class actions). Of course, courts have not always applied the predominance requirement to require the degree of class cohesion that a strict reading of *Amchem* might suggest, particularly in settlement class actions. *See, e.g., In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 434 (3d Cir. 2016) ("We are nonetheless more inclined to find the predominance test met in the settlement context." (internal quotation marks omitted)).

cohesion requirement is to prevent class counsel from making tradeoffs among class members. And instances in which such tradeoffs are predictable pose the kinds of structural conflicts of interest that prevent class certification.¹⁹⁰ In short, class-action doctrine requires a degree of cohesion that makes certification unrealistic in many situations in which plaintiffs' lawyers need to make tradeoffs to match the defendant's repeat-player advantage.

MDL is different. Because of the unique way it is constructed, MDL allows plaintiffs to capture some of the advantages of repeat play without triggering the doctrinal tripwires of the class action. But it also precludes the kind of forced cohesion that a mandatory class action would demand. MDL operates in a space between complete aggregation and disconnected individual lawsuits, and its ability to oscillate between those two poles presents both opportunities and risks. In this Part, we first elaborate on this defining feature of MDL, situating it among other litigation structures. We then explain why MDL's unique structure enables plaintiffs to capture some of the benefits of repeat play while also potentially limiting some of the dangers. Finally, we explain why, among available alternatives, MDL may provide the most promising middle ground for those seeking to protect plaintiffs who will inevitably find themselves litigating within some form of aggregation.

A. THE TWO FACES OF MDL

One of the defining features of MDL is its split personality.¹⁹¹ Unlike a class action, an MDL is not a representative litigation. Formally, an MDL is a collection of individual cases, temporarily consolidated in front of a single judge for pretrial proceedings. There are no absentees.¹⁹² Each plaintiff has hired a lawyer and filed his or her own complaint.¹⁹³ Each case is individually docketed and remains governed by the same law that would apply had it not been consolidated.¹⁹⁴ Unless a class action is certified within the MDL, a claimant must affirmatively opt in to any settlement agreement.¹⁹⁵ And at the conclusion of pretrial proceedings, the cases will be remanded to the districts where they were originally filed for trial.¹⁹⁶ In practice, however, MDL functions as a powerful aggregating force.¹⁹⁷ Plaintiffs cannot escape, or opt out of, the pretrial proceedings.¹⁹⁸

190. See *Amchem*, 521 U.S. at 627; PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a)(1) & cmt. d (AM. LAW. INST. 2010).

191. Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1269–73.

192. Bradt, *A Radical Proposal*, *supra* note 152, at 914.

193. *Id.*

194. See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 762 (2012).

195. See Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1271.

196. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 29 (1998).

197. Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1270.

198. See Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1716 (2017) [hereinafter Bradt, *Something Less*]; see also Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 995 (2012).

Court-appointed lead lawyers make most of the important strategic decisions.¹⁹⁹ And few cases are ever actually remanded for trial—historically only about three percent.²⁰⁰ Instead, most are resolved through settlements negotiated by the lead lawyers in the MDL court.²⁰¹

In other words, some aspects of MDL are more like class actions whereas other aspects are more like individual litigation. For example, MDL requires individual litigants to effectively litigate together during consolidated pretrial proceedings, and the MDL judge often decides procedural and substantive legal issues in opinions that bind the whole group.²⁰² At the same time, there are no formal absentees in an MDL—individuals are represented by lawyers of their choosing and retain the right to reject a settlement offer and opt for trial after remand. As a result, it is better to think of MDL as oscillating between the two poles of aggregation and individualism depending upon the particular issue in play. It's MDL's ability to move between these two poles, in some cases depending on the transferee judge's enthusiasm for aggregated case management, that gives MDL its unique magic, or, as some might say, black magic; it is a shape-shifter that can adapt to the circumstances of particular cases and contexts.

This split personality is part of what makes MDL work. MDL's formal adherence to individual litigation norms allows it to sidestep many of the stumbling blocks of the mass tort class action.²⁰³ It's what allows a single district court to oversee a nationwide aggregation of claims without worrying about whether the parties would be amenable to personal jurisdiction in that district with respect to all of the claims.²⁰⁴ It's what allows for aggregate proceedings, even when the laws of fifty different states will apply to the plaintiffs' claims.²⁰⁵ And it's what gets around some of the due process objections to binding absentees to the strategic decisions of lead lawyers without judicial findings of cohesion and adequate representation.²⁰⁶

199. See Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1271–72.

200. Burch, *supra* note 32, at 400–01.

201. See, e.g., Marcus, *supra* note 32, at 2277–79.

202. See, e.g., Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 KAN. L. REV. 219, 225 (2017).

203. See Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1270.

204. See Bradt & Rave, *Aggregation on Defendants' Terms*, *supra* note 25, at 1296–99. So long as the cases were originally filed in districts where personal jurisdiction was proper, the courts make no inquiry into whether personal jurisdiction would be proper in the transferor court where the cases are consolidated into an MDL. See generally Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165 (2018) (discussing the basis for personal jurisdiction in MDL).

205. See Bradt & Rave, *Aggregation on Defendants' Terms*, *supra* note 25, at 1304 (“[T]he ‘fifty-state-law problem’ . . . is no obstacle to aggregation in MDL . . . there is no pressure to alter the choice-of-law rules that would otherwise apply in order to facilitate aggregation.”).

206. See Bradt, *A Radical Proposal*, *supra* note 152, at 914–15.

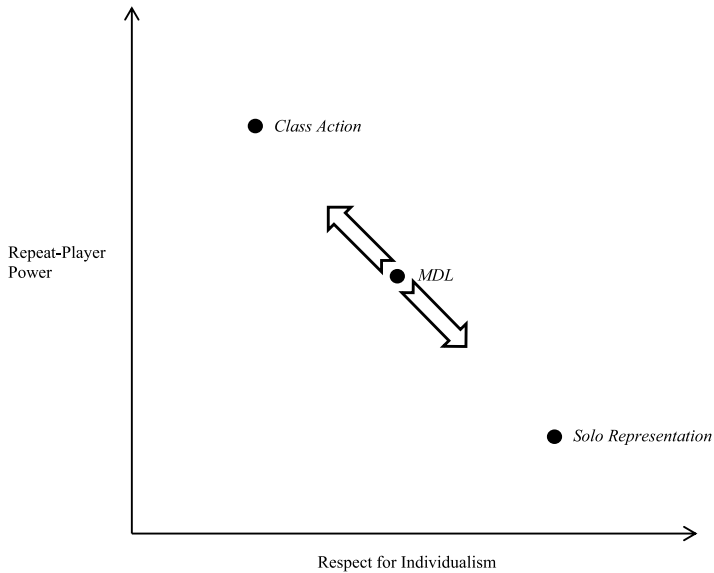


Figure 1: MDL's Oscillation and Repeat-Player Power

MDL's split personality also allows plaintiffs to capture many of the benefits of repeat play while paying enough lip service to individualized litigation norms to maintain legitimacy. Because it is not a representative litigation, coordination in MDL does not depend on, or require, the degree of cohesiveness needed for a class action. There is no formal certification inquiry where the judge must find that common issues predominate over individual issues and that the class is cohesive enough that a single lawyer can adequately represent all of the plaintiffs. To consolidate cases in an MDL, the JPML need only find that they share a common question of fact and that consolidation will promote convenience, justice, and efficiency.²⁰⁷ There is no need for cohesion because, formally at least, individual control is what is supposed to protect plaintiffs within an MDL.²⁰⁸ Each case is separate. Each plaintiff has an individual lawyer–client relationship with a lawyer who has a duty to look out for her best interests. And no case may be settled without the individual plaintiff's informed consent.²⁰⁹ In short, the norms of individual litigation permeate MDL and are formally respected by its structure.²¹⁰

207. See 28 U.S.C. § 1407(a) (2012).

208. Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1264. Of course, MDLs may include putative class actions. In such cases, the formal requirements of Rule 23 purport to protect represented absentees. But when cases are filed individually and consolidated into MDLs, such formal protections are thought to be unnecessary because the plaintiffs are not formally absent.

209. See MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2018) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement . . . unless each client gives informed consent . . .").

210. See Bradt & Rave, *Aggregation on Defendants' Terms*, *supra* note 25, at 1299; Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1271. It is worth noting that the MDL statute was

But repeat players may keep those individualized norms from fully “penetrating” in practice.²¹¹ As Galanter explains, not all rules announced from on high by rulemakers or appellate courts are effective at the ground level.²¹² For a rule to penetrate—to become more than a symbolic commitment—requires interpretation, enforcement resources, and buy-in by the players on the ground.²¹³ One of the many advantages that repeat players have over one-shotters is knowing which rules are likely to penetrate and having the incentives to invest in securing the penetration of rules that benefit them (and conversely preventing penetration of unfavorable rules).²¹⁴

In MDL, repeat-player plaintiffs’ lawyers often make tradeoffs among their cases in practice, even though the rules and norms of individual litigation tell them not to do so.²¹⁵ There are so many opportunities for lawyers to make tradeoffs that it would be impossible to list them all.²¹⁶ Tradeoffs range from working up cases in a sequence that benefits the group, even if it leaves a plaintiff with months left to live at the end of the line, to hiring an expert to prove one theory of causation instead of a different expert with a slightly different theory that might be better tailored to a handful of cases.²¹⁷

Two examples will serve to illustrate. MDL lawyers often voluntarily dismiss relatively weak cases scheduled for bellwether trials rather than risk an adverse verdict that would impair the settlement value of the rest of the cases.²¹⁸ An

developed contemporaneously with the 1966 version of Rule 23. Bradt, *Something Less*, *supra* note 198, at 1720–31. There was little interaction between the committees drafting the two provisions, but in the one meeting that representatives of the two committees did have, the judges supporting the MDL statute vociferously opposed the right to opt out of either the class action or MDL. *Id.* at 1727–29. These judges believed that forced aggregation was absolutely necessary at the pretrial phase to achieve the litigation efficiencies they sought. *Id.* By contrast, those drafting the class-action statute included an opt-out right to attempt to mollify those, like committee member John Frank, who worried that defendants would collude with corrupt plaintiffs’ lawyers to sell out the class. See Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1501 (2017).

211. See Galanter, *supra* note 1, at 103.

212. See *id.* at 97.

213. See *id.* at 103.

214. See *id.*

215. See, e.g., Moore, *supra* note 169, at 728–33.

216. The ALI recognizes the inevitable tradeoffs that lead lawyers face in aggregate representation and proposes that lead lawyers’ fiduciary duties are more capacious than the type of loyalty demanded in one-on-one representation. ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. f (AM. LAW. INST. 2010); see also Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1988–90 (2011) (arguing that lead lawyers should bear trustee-like fiduciary duty to maximize group recovery, not agent-like fiduciary duties to avoid tradeoffs among clients).

217. See Erichson, *Informal Aggregation*, *supra* note 28, at 432–33; PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. f (AM. LAW. INST. 2010) (“For example, a lawyer representing many plaintiffs pursuant to separate retainer agreements may have the option of trying one of the cases first. The lawyer should select the case with the greatest potential to increase the value of the entire group of claims By doing so, the lawyer would not violate the fiduciary duty, even though the choice may involve a trade-off.”).

218. In the Cook Medical Pelvic Repair System litigation, for example, the plaintiffs voluntarily dismissed with prejudice all four cases selected for bellwether trials and twenty-four of the thirty cases

effective repeat player will take the long view and play for rules in the form of a trial precedent that is beneficial to the group as a whole, rather than prioritize the short-term gain of a single plaintiff. A voluntary dismissal in exchange for nothing will rarely be in the best interest of an individual plaintiff; even a plaintiff with a long-shot claim would prefer to roll the dice at trial. But “rules” include all influences that the outcome of one case will have on other cases, not just issue preclusion or stare decisis. And avoiding a loss at a bellwether trial may be critical to preserving the negotiating position of the rest of the claimants in litigation. Of course, a voluntary dismissal sends a signal too—that at least some of the consolidated cases may be weak—but that signal is not as powerful as an adverse jury verdict on negligence or general causation that might occur if the plaintiffs take a weak case to trial. All of the plaintiffs have an interest in the lead lawyers putting their best foot forward in bellwether cases. If plaintiffs’ lawyers couldn’t make these sorts of tradeoffs—if they couldn’t play for rules—then they would cede that power and advantage to the defendant.

Similarly, plaintiffs’ lawyers in MDL often sign on to aggregate settlements that require them to recommend the deal to their entire inventory of cases if they want any of their clients to participate.²¹⁹ Such inventory settlements pose a risk to individual clients with outlier claims. Plaintiffs with abnormally strong or high-value claims, or those who might want to take their cases to trial for non-monetary reasons, may be shortchanged by a settlement calibrated to the average claim.²²⁰ And lawyers who can only collect a contingency fee by delivering all the cases in their inventory may be tempted to pressure outlier plaintiffs to go along.²²¹ But defendants often condition any deal on obtaining complete participation. Otherwise they would leave themselves open to adverse selection—the possibility that the plaintiffs’ lawyer, who knows more about the relative strength of each plaintiff’s case, will funnel the weakest claims into the settlement and save the strongest to take to trial—and would need to hold money back from the settlement to deal with what they expect to be the strongest cases.²²² A lawyer who can credibly commit not to engage in this sort of cherry-picking can command a peace premium.²²³ In short, the lawyer’s ability to make tradeoffs across the group of plaintiffs—to play their cases like a series instead of individually—makes the lawyer a more effective advocate for the group of plaintiffs as a whole.

selected to be worked up for discovery. Of the remaining six cases in the discovery pool, the plaintiffs’ lawyers moved to withdraw as counsel in four of them. *See* Pretrial Order #59, *In re Cook Med., Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, No. MDL 2440, 2015 WL 3385719, at *1 (S.D. W. Va. May 19, 2015) (No. 59).

219. *See, e.g.*, Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 297 (2015); Rave, *Closure Provisions*, *supra* note 7, at 2191–93.

220. *See* Nagareda, *supra* note 81, at 167.

221. *See, e.g.*, Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 993 (2010) [hereinafter Erichson, *The Trouble*].

222. *See* Rave, *Governing the Anticommons*, *supra* note 107, at 1252.

223. *Id.* at 1204.

Formally, MDL lawyers should not make these sorts of tradeoffs. A pristine view of the legal ethics rules prohibits a lawyer from dismissing a client's case unless it is in the best interests of *that* client, not some other clients.²²⁴ Similarly, a lawyer should not recommend a settlement offer to a client unless the lawyer believes that it is a good deal for *that* client, not simply a good deal for the group.²²⁵ And formal attempts to relax these rules, like the ALI's proposal to allow clients to pre-commit to be bound by a vote on whether to accept an aggregate settlement, have gained little traction.²²⁶

But there is significant play in the joints in how these rules are interpreted and applied on the ground. Repeat-player lawyers are often able to come up with plausible justifications for how these sorts of actions are in the best interest of *all* of their clients, not just most of them.²²⁷ Perhaps the voluntarily dismissed plaintiff's case was so weak that it wouldn't justify the time or cost to take to trial.²²⁸ Or the inventory settlement really was a good deal for the clients with the strongest claims, who, despite their claims being worth more, still couldn't afford to risk getting nothing after a costly individual trial, which might require additional lengthy rounds of individualized discovery after remand.²²⁹

Without the class action's structural requirement of class cohesion, MDL lawyers can aggregate claims that class-action lawyers could not. But that also means that MDL lawyers can find themselves in a position to make tradeoffs among clients with diverging interests. And the constraints of legal ethics rules designed for one-on-one litigation may not fully penetrate when it is in the repeat-player lawyers' interests to see that they don't—because that would both weaken their

224. See, e.g., Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys' Fiduciary Obligations and Professional Responsibility Duties*, 44 LOY. U. CHI. L.J. 511, 513, 528, 530 (2012).

225. See, e.g., Erichson, *The Trouble*, *supra* note 221, at 1008, 1015–17; Erichson & Zipursky, *supra* note 71, at 283–84.

226. See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b) (AM. LAW INST. 2010). West Virginia appears to be the only state so far that has amended its ethics rules to embrace the ALI approach. See W. VA. RULES OF PROF'L CONDUCT r. 1.8 cmt. 17 (2015).

227. See Needham, *supra* note 224, at 526–27 (explaining that, because of cognitive biases, “[c]laimants’ lawyers can convince themselves that they are not taking advantage of their clients even when they are actually doing so”).

228. Or perhaps that plaintiff receives a side payment from the lawyers for agreeing to voluntarily dismiss the case. We have heard rumors that this sometimes happens, and it might mitigate some of the unfairness of sacrificing that plaintiff's claim for the benefit of the group. But it would be difficult to square with the ethics rules, which prohibit lawyers from making payments to their clients. See MODEL RULES OF PROF'L CONDUCT r. 1.8(e) (AM. BAR ASS'N 2018). This may be yet another example where repeat players see to it that rules designed for individual litigation do not fully penetrate at the ground level of MDL practice.

229. See, e.g., Baker, *supra* note 71, at 1952 (“The defendant will not be overly concerned with the outlier nonsettling claimant. If that claimant hopes to go to trial, any trial date may be years off and the anticipated cost of litigating his or her science- or medicine-intensive case may exceed \$250,000. Even a claimant with a strong claim may have difficulty finding a contingent fee lawyer eager to gamble that much money and time on the client's case.”).

hand against the defendant and jeopardize their ability to get paid.²³⁰

The failure of individualized norms to fully penetrate within MDL may actually be a good thing from the plaintiffs' perspectives if it allows their lawyers the leeway they need to be effective repeat players. Legal ethicists take up arms when MDL lawyers make tradeoffs among their clients.²³¹ But it is the ability to play the odds and play for rules that makes repeat-player plaintiffs' lawyers effective counterweights to the repeat-player defendant. As in other contexts, MDL's split personality—its formal commitment to individualized litigation norms and the simultaneous failure of those norms to fully penetrate at the ground level—allows for effective aggregation of claims in the hands of an empowered representative where more formal mechanisms like the class action have failed.

It is, of course, a tenuous compromise. There is always a tradeoff because enabling repeat-player lawyers to play the odds and play for rules also enables them to play for themselves at the plaintiffs' expense. We can try to increase the penetration and enforcement of individualized litigation norms as a way to limit agency costs and protect individual plaintiffs. But doing so comes at a cost to the effectiveness of plaintiffs' lawyers vis-à-vis the defendant. The more plaintiffs' lawyers have to treat their clients as individuals, the greater the defendant's repeat-player advantage becomes. In short, repeat play may be a feature, not a bug, and MDL's split personality enables repeat players to play more effectively.

B. THE CONSTRAINING FORCE OF INDIVIDUALISM

Although they do not fully penetrate at the ground level, the norms of individual litigation, which MDL formally honors, do place some constraints on the repeat players that operate within the MDL structure. MDL's split personality leaves some leeway for repeat-player plaintiffs' lawyers to make tradeoffs among cases and to structure the game to make a profit. But it does not give them a free hand to sell out their clients or exploit individual plaintiffs.

MDL, it bears repeating, is not a representative litigation, and the lead lawyers do not have legally conferred monopoly control over the plaintiffs' claims.²³² They cannot unilaterally seize control of the litigation as self-appointed champions. Nor can defendants play would-be lead lawyers off against each other to settle all of the claims with the lowest bidder. In other words, there is little opportunity in an MDL for the collusive practice known as a "reverse auction," in

230. As Upton Sinclair memorably put it: "It is difficult to get a man to understand something, when his salary depends upon his not understanding it!" UPTON SINCLAIR, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED 109 (Univ. of Cal. Press 1994) (1934).

231. See, e.g., Erichson, *The Trouble*, *supra* note 221, at 1006–22; Erichson & Zipursky, *supra* note 71, at 281–84; Moore, *supra* note 169, at 728–33; Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 409–11 (2008); Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 167–74, 177 (1999); Needham, *supra* note 224, at 514–16.

232. Cf. Nagareda, *supra* note 81, at 164 (describing class certification as conferring a monopoly on class counsel by procedural rule).

which the defendant cuts a deal with the class-action lawyer willing to take the smallest settlement, which they then shop around for an inattentive judge willing to certify a settlement class action that would bind the rest of the plaintiffs.²³³ In an MDL, the JPML—not the forum-shopping litigants—picks the judge, and that judge appoints the lead lawyers before any settlement is on the table. And in an MDL, each plaintiff has hired his or her own lawyer and filed his or her own case.²³⁴ These structural features of MDL, and the commitment to the individual nature of each consolidated case that they reflect, are more constraining on repeat-player lawyers than critics acknowledge. And they make it hard for repeat players to form a collusive cartel at the plaintiffs' expense.

Ultimately, the success of any global settlement in an MDL will depend on obtaining the consent and buy-in of individual plaintiffs.²³⁵ These plaintiffs have positive-value claims and legal representation. Their lawyers are thus in a position to push back against decisions made by the PSC. Indeed, these lawyers may have significant leverage if they represent enough plaintiffs to trigger the walkaway provisions that defendants usually insist on including in any settlement.²³⁶ And even if their current lawyers want to settle, non-settling plaintiffs have claims that should be attractive to new lawyers. MDL's structural respect for the individual nature of each case thus makes it relatively easy for a determined dissenter to walk away from any global settlement. And that gives outside lawyers—either those on the periphery or new entrants—significant leverage and the ability to compete with lead lawyers.

This ability to say no—plus the prospect of finding another bargaining agent to negotiate the sale of claims to the defendant—imposes real limits on incumbent lawyers' ability to make tradeoffs to the detriment of high-value claimants or to line their own pockets at plaintiffs' expense.²³⁷ These constraints are far from perfect. For example, there are often large information asymmetries between the repeat-player lawyers and the one-shotter clients that may limit clients' ability to evaluate their lawyers' performance and loyalty.²³⁸ And the failure of these constraints to fully penetrate at the ground level is part of what empowers repeat-player lawyers to be effective counterweights to the defendant. But there is more dissent and competition in MDL than critics acknowledge.

233. See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–73 (1995).

234. See *supra* notes 191–210, and accompanying text.

235. Rave, *Closure Provisions*, *supra* note 7, at 2176.

236. See *id.* at 2181; Rave, *Governing the Anticommons*, *supra* note 107, at 1200.

237. See Nagareda, *supra* note 81, at 169. As John Coffee and Samuel Issacharoff have explained, this threat of “exit” is an important governance mechanism for keeping lead lawyers in line. See Coffee, *supra* note 79, at 376–77; Issacharoff, *supra* note 79, at 367–70. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (laying out the theory of exit and voice as governance mechanisms).

238. See Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1280–84.

The market for legal services in MDL is difficult to cartelize. Successful cartels generally involve a small number of players who collectively control a large share of the market with available mechanisms for sanctioning their members, who will always be tempted to cheat.²³⁹ MDLs, however, are composed of many parties and many lawyers with many different business models. Large MDLs routinely involve hundreds of lawyers. And coordinating and enforcing a cartel among so many players is challenging. This is particularly so with plaintiffs' lawyers, who tend to be a competitive bunch.

Some repeat-player lawyers, as critics have pointed out, may suppress their competitive tendencies because they aspire to leadership positions in future MDLs, and raising a big stink in one MDL will effectively disqualify a lawyer from being selected as a leader in another.²⁴⁰ Lead lawyers can reward cooperators with lucrative common-benefit work and can punish defectors by cutting off the flow of work and shutting them out of future PSC appointments.²⁴¹ The way to get appointed to a PSC, the argument goes, is to play the long game, stifle dissent, and get along to get ahead.²⁴²

But not every lawyer in an MDL aspires to be on a PSC or wants to do common-benefit work. Different law firms have different business models.²⁴³ Some firms carefully screen cases to build up an inventory of high-value claims to take to trial. Other firms aggregate as many cases as possible to file in the MDL in the hopes of a global settlement. Others act as lead generators and refer cases to aggregators. Still others file exclusively in state court.²⁴⁴ All of these business models generate different incentives for the lawyers involved, and those incentives do not necessarily point to suppressing dissent in order to gain a seat at the leadership table.

Indeed, the market for legal services in MDL does not appear crippled by the anticompetitive effects of cartelization. According to Burch and Williams, the top seventy repeat-player plaintiffs'-side law firms controlled 78% of the available leadership positions in their dataset.²⁴⁵ Seventy competitors with less than 80% of the market share does not strike us as a particularly high degree of market concentration. For comparison, six firms control more than 79% of the domestic air-travel market.²⁴⁶ Further, according to Burch and Williams, more than one-

239. See HOVENKAMP, *supra* note 96, at 192–93.

240. Burch, *Monopolies*, *supra* note 12, at 122; see *supra* Section I.B.

241. Burch, *Monopolies*, *supra* note 12, at 122.

242. See *supra* Section I.B.

243. See Hensler & Peterson, *supra* note 113, at 1042–43.

244. This strategy will be more difficult after *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), which limits state courts' ability to exercise personal jurisdiction over nationwide aggregations of claims. See Bradt & Rave, *Aggregation on Defendants' Terms*, *supra* note 25, at 1291–94.

245. Burch & Williams, *supra* note 10, at 1471. Burch and Williams ranked firms according to the number of appearances their lawyers made in MDL leadership positions in the cases in their dataset. See *id.* at 1471, 1537 tbl.A3.

246. According to the Bureau of Transportation Statistics, from January 2018 to December 2018 the top six domestic airlines by market share were: Southwest (17.8%), American (17.8%), Delta (16.9%), United (15%), Alaska (6.1%), and Jet Blue (5.6%) for a total of 79.2%. *Airline Domestic Market Share*

third (37.2%) of the leadership positions on the plaintiffs' side of MDLs go to *non-repeat* players.²⁴⁷ So there appears to be a substantial number of new market entrants. And some MDL judges make a conscious effort to include new and more diverse lawyers on PSCs or subcommittees alongside the repeat players.²⁴⁸ Even if we just focus on the top five repeat players that Burch and Williams argue have outsized influence on settlement, that's still five competitors.²⁴⁹ Antitrust law would not find this level of market concentration particularly concerning.²⁵⁰

That so many law firms are involved in MDLs and so many new firms seek and obtain leadership positions within them should not be surprising because barriers to entry are relatively low. As Richard Nagareda has explained, incumbent law firms cannot easily control access to clients in mass litigation, who tend to be spread out all over the country.²⁵¹ Nor can they control access to information about the merits of the litigation, as pleadings must be filed publicly in court and the discovery process allows new entrants to compel the disclosure of additional information.²⁵² Although recruiting clients and developing cases may entail a substantial investment, entry into the mass litigation market requires few sunk costs.²⁵³ A firm attempting to enter the market need not invest in laying train tracks or purchasing custom machinery. The lawyers and paralegals that a firm must hire to recruit clients and develop cases can be easily redeployed to other areas of litigation or can be fired if the attempted entry fails.²⁵⁴ Indeed, the growth of third-party litigation financing may lower the barriers to entry even further and enable new lawyers to access the capital needed to get a seat on the PSC.²⁵⁵

One strategy that repeat-player lead lawyers might use to suppress competition is to attempt to co-opt nonlead lawyers by including powerful closure provisions in the global settlements that they negotiate with defendants.²⁵⁶ The point of these closure provisions—like the ones in the controversial Vioxx settlement, which

January 2018 – December 2018, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/> [<https://perma.cc/FN4J-4N5K>] (last visited Oct. 1, 2019).

247. Burch & Williams, *supra* note 10, at 1471.

248. See *LSU Symposium*, *supra* note 54, at 345–46 (remarks of Judge Fallon) (describing how he instructs the PSC to create subcommittees: “On the subcommittees, I’d like new people. I’d like to see diversity in age. I’d like to see diversity in sex. I’d like to see diversity in ethnic background and so forth.”). Though, as in so many other parts of society, there is still a long way to go on many metrics of diversity. See, e.g., Coleman, *supra* note 11, at 635–37.

249. See Burch & Williams, *supra* note 10, at 1451.

250. See generally HOVENKAMP, *supra* note 96, at 696–711. Out of 1221 available leadership positions, the top four repeat-player lawyers in Burch and Williams’s dataset appeared in 21 (1.72%), 21 (1.72%), 19 (1.56%), and 14 (1.15%) positions respectively. See Burch & Williams, *supra* note 10, at 1536 tbl.A2. That works out to a not-so-alarming, four-firm concentration ratio of 6.15%. See HOVENKAMP, *supra* note 96, at 697–98.

251. Nagareda, *supra* note 81, at 171.

252. *Id.*

253. *Id.* at 170–72.

254. *Id.* at 171–72.

255. See, e.g., Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561, 582–83 (2014); Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. 1268, 1312–18 (2011).

256. Burch, *Monopolies*, *supra* note 12, at 93.

required participating lawyers to recommend the deal to their entire inventory and to withdraw from representing any non-settling client—is to effectively get the major players out of the business of suing the defendant.²⁵⁷ And there are good reasons to be concerned about coercive or anticompetitive closure provisions, which Burch says are present in every publicly available non-class MDL settlement in her dataset.²⁵⁸

But not all of these closure provisions are as coercive or powerful as critics suggest. There are important differences between terms like walk-away provisions and case-census provisions on the one hand and lawyer-recommendation provisions and lawyer-withdrawal provisions on the other. It is not so easy to conclude that they all restrain competition and benefit repeat-player lead lawyers and defendants at one-shotter claimants' expense.²⁵⁹ These settlement terms operate in different ways and have different effects on claimant choice and the competitive landscape.²⁶⁰ The details matter, as these settlement terms interact in complex ways. Not every walk-away provision—or even every lawyer-recommendation provision—coerces plaintiffs or suppresses competition.²⁶¹

The closure provisions that have attracted the most controversy are the ones that require participating lawyers to withdraw from representing non-settling clients.²⁶² Defendants negotiate for these terms to prevent lawyers from funneling their weak cases into the settlement and cherry-picking the strongest to take to trial. And the need to find a new lawyer if a plaintiff does not want to settle is, indeed, a significant imposition on the client. But how coercive this sort of lawyer-withdrawal provision is depends on the availability of other lawyers who are willing and able to take the non-settling client's case. If new market entrants stand ready to collect the strongest cases that found the settlement inadequate and take those claims to trial (or press for a better settlement), then plaintiffs with strong claims have a real choice.²⁶³

The more troubling closure provisions, then, are the ones that attempt to alter the market for legal services by targeting new entrants. For example, provisions that require participating lawyers to forgo any financial interest in non-settling

257. See D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 508–09 (2016) [hereinafter Rave, *When Peace*].

258. Burch, *Monopolies*, *supra* note 12, at 91–94; Burch & Williams, *supra* note 10, at 1451.

259. *Contra* Burch, *Monopolies*, *supra* note 12, at 94–104.

260. For more detail on the variations among closure provisions in MDL settlement and the way they work, see Rave, *Closure Provisions*, *supra* note 7.

261. To take just one example from the Burch and Williams dataset, the lawyer-recommendation provision in the Yaz ATE settlement seems to require lawyers to do exactly what ethical lawyers should do on behalf of their individual clients. See ATE Master Settlement Agreement § 1.02(D), *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-2100-DRH (S.D. Ill. Aug. 3, 2015) (No. 3786-1) (“Counsel for each Claimant shall individually evaluate their client’s participation in this Program, and shall recommend participation in the Program to all clients for whom they believe participation is appropriate.” (emphasis added)). For more elaboration, see Rave, *Closure Provisions*, *supra* note 7, at 2191–93.

262. See, e.g., Erichson & Zipursky, *supra* note 71, at 280–81.

263. See Rave, *Closure Provisions*, *supra* note 7, at 2196.

clients' cases may disrupt the referral market.²⁶⁴ If a lawyer cannot take a referral fee, then the lawyer has no financial incentive to help a non-settling client find new representation; indeed, the only way the lawyer can get paid anything for work done on that client's case is by convincing the client to participate in the settlement. But in the Burch and Williams dataset, only the Vioxx settlement targeted the referral market in this manner.²⁶⁵ And although some settlements required participating lawyers to state that they had no present intention of soliciting new clients with similar claims against the defendant and to refrain from advertising for such clients, those provisions, of course, only apply to *participating* lawyers, not new entrants.²⁶⁶

We do not wish to minimize the danger here. There are good reasons to be concerned when lead lawyers design settlements to alter the market for legal services or coerce plaintiffs into participating. As we have argued elsewhere, these sorts of settlements demand close scrutiny from MDL judges.²⁶⁷ But we cannot condemn attempts to influence the market for legal services across the board without considering their effect on the closely related market for claims.²⁶⁸ Although we should be wary of closure provisions that undercut competing lawyers' incentives to challenge the deal, closure provisions that disable strategic holdouts can also work to plaintiffs' advantage in the market for claims if they make it possible for their lawyers to offer peace to the defendant and secure a premium in return.²⁶⁹

MDL's formal structure as a collection of individual cases imposes real limits on how far lead lawyers can go in imposing collective treatment on unwilling plaintiffs. Even with closure provisions, these settlements cannot transform a sprawling mass of individual claims with hundreds of lawyers involved into something approaching a mandatory class settlement. And few of them have even been as aggressive as the Vioxx settlement.²⁷⁰

The limits of these settlements in suppressing competition are yet another reflection of how MDL's structural commitment to individualism limits the power of repeat players. Repeat players can structure settlements to encourage participating lawyers to try to persuade their clients to sign onto a deal that may make tradeoffs and may pay the lawyers generously. But there is a limit to how far they can go because ultimately the plaintiffs can say no and find other lawyers to take their cases.

In short, although the norms of individual litigation have not fully penetrated in MDL and repeat-player plaintiffs' lawyers can and do make tradeoffs among cases and massage the rules of the game in their favor, MDL's structural

264. *Id.* at 2198–99.

265. *See id.* at 2199–2200.

266. *Id.* at 2197–98; *see also* Baker, *supra* note 71, at 1959–60 (explaining that the “no present intention” language does not create any legally enforceable obligation).

267. Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1298.

268. *See supra* Section II.A.

269. Ravee, *Closure Provisions*, *supra* note 7, at 2199–2200; Rave, *Governing the Anticommons*, *supra* note 107, 1193–1201.

270. *See* Rave, *Closure Provisions*, *supra* note 7, at 2199–2200.

commitments to individualism provide real, if imperfect, constraints on how far repeat players can go in disadvantaging one-shotters for their own gain.

C. MDL'S TENUOUS MIDDLE GROUND

MDL strikes a delicate balance. Its split personality allows aggregation where other mechanisms like the class action have failed and allows the repeat-player plaintiffs' lawyers within it to make the tradeoffs they need to be effective counterweights to the defendant. At the same time, MDL leaves one-shotters vulnerable to the lawyers who represent them. And its structural commitment to individualism provides an imperfect set of constraints on the ability of repeat players to self-deal and to sell out individual claimants.

MDL has not necessarily achieved the optimal balance. It is, in many ways, an ad hoc adaptation to a particular set of institutional constraints—not the system that anyone would consciously design to protect the interests of one-shotters or achieve optimal litigation outcomes. Indeed, MDL's architects were acutely aware of the limited scope of what they could achieve in attempting to create a mechanism for aggregating nationwide litigation in the federal courts. They initially seemed to prefer a "radical *forum non conveniens* statute" that would have transferred related cases to a single court for *all* purposes.²⁷¹ But they settled on a seemingly modest "limited transfer" structure that formally retained many of the features of individual litigation as a means of selling the statute politically in Congress and obtaining buy-in from incumbent repeat players in both the plaintiff and defense bars.²⁷²

But MDL appears better than many available alternatives—particularly for cases like mass torts, in which claim values are often high and can vary substantially. A mandatory class action, like the one Rosenberg envisions, would give plaintiffs collectively greater leverage and enable their lawyers to be more effective repeat players against the defendant.²⁷³ But Rosenberg's mandatory class action (quite consciously) does little to protect individual plaintiffs within the aggregate who might have outlier claims. In Rosenberg's view, it is fair to bind all plaintiffs, even those with abnormally strong claims, to the results of a mandatory class action because *ex ante*—before plaintiffs are aware of the varying strengths of their claims—they all would have preferred the extra leverage and deterrent effect that come with a mandatory class action.²⁷⁴ In other words, the plaintiffs'

271. See Bradt, *A Radical Proposal*, *supra* note 152, at 878.

272. See *id.* at 839–40. Because of their experience with complex litigation and the electrical-equipment cases, the judges who developed the MDL statute understood that with MDL they were getting more than half a loaf when it came to consolidation. *Id.* at 838–40. Hence their desire to make the statute applicable in as many instances as possible, and their resistance to any formal rulemaking that would limit the flexibility and discretion of either the JPML or MDL transferee judges. See *id.* Ultimately, MDL was intended to be—and is—a powerful consolidation device—and one with the primary goal of efficiency, not the protection of individuals within the mass. See *id.*

273. See Rosenberg, *supra* note 106, at 847–53.

274. *Id.* at 840–43. Rosenberg's argument for mandatory class actions also depends on his view that the goal of tort law should be to maximize social welfare by achieving optimal deterrence and insurance to "minimize the sum of accident costs." See *id.* at 831–32.

hypothetical consent behind a veil of ignorance justifies allowing class-action lawyers to make tradeoffs among their claims *ex post*.

Class-action doctrine has roundly rejected using a Rosenberg-style mandatory class action for damages claims like mass torts precisely because it fails to acknowledge the individual nature of each claim.²⁷⁵ But the mechanisms that class-action law uses to protect individuals within the aggregate limit the availability of even the opt-out class action as an aggregation device in many cases. The class cohesiveness that Rule 23(b)(3) requires aims to eliminate opportunities for class-action lawyers to make tradeoffs among class members.²⁷⁶ But it does so largely by prohibiting the formation of a class in situations in which tradeoffs are predictable.²⁷⁷ The idea is to create a class—and empower the class-action lawyer to play the cases within it like a repeat player—only when there are few major tradeoffs to be made among class members. Of course, that means that class actions are largely unavailable in mass torts.²⁷⁸

With no predominance or cohesion requirement, MDL lacks the class action's structural assurance that tradeoffs will not occur. But it also allows for aggregation in a much wider range of circumstances. MDL is thus well-suited to handle mass torts. Where the class action relies on courts to protect individuals by allowing aggregation only when the class's interests are cohesive enough that they can be adequately represented by a single lawyer, MDL relies ultimately on individual plaintiffs' control over their claims. Individual consent is the governance mechanism in MDL.²⁷⁹ But, as we explained above, these norms of individual autonomy have not fully penetrated at the ground level in MDL.²⁸⁰ And repeat-player plaintiffs' lawyers in MDLs use the resulting play in the joints to make the kinds of tradeoffs they need to be effective counterweights to the defendant, but also potentially to benefit themselves at their clients' expense.

To be sure, MDL lawyers cannot be as effective repeat players as class counsel could be in Rosenberg's mandatory class action. MDL lawyers must work within MDL's structure with its formal commitment to the individualized nature of each case, which both limits their ability to play the cases like a series and provides imperfect protection for the individual plaintiffs. But without either the judicial checks of the class action or the client monitoring of one-on-one representation, MDL lawyers have significant flexibility to act like repeat players.

We might be tempted to try to increase individual plaintiff autonomy and control in MDL—to increase the penetration of individual-litigation norms—as a way to protect one-shotter plaintiffs from their repeat-player lawyers. But

275. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856–57 (1999).

276. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 626–27 (1997).

277. See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a)(1) (AM. LAW INST. 2010); Issacharoff, *supra* note 79, at 385–86; Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 581.

278. See, e.g., David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1281 (2007).

279. See Bradt & Rave, *The Information-Forcing Role*, *supra* note 19, at 1264–65.

280. See *supra* notes 211–14 and accompanying text.

maximizing individual autonomy in an attempt to minimize agency costs would not necessarily work to plaintiffs' advantage.

If Rosenberg's mandatory class action, with lawyers fully empowered to make tradeoffs among class members, is one end of the spectrum, individual arbitration may be the opposite end (Figure 2). It is, after all, a respect for individualism and formal autonomy that leads courts to enforce arbitration agreements in contracts of adhesion. There are few agency costs in individual arbitration because the repeat-player defendants who write the terms of these arbitration clauses use class-action waivers to entirely cut out repeat-player lawyers on the plaintiffs' side.²⁸¹ And courts take respect for individualism and formal autonomy to the extreme when they enforce these class-arbitration waivers without regard to the fact that they leave one-shotters vulnerable to the defendant counterparty.

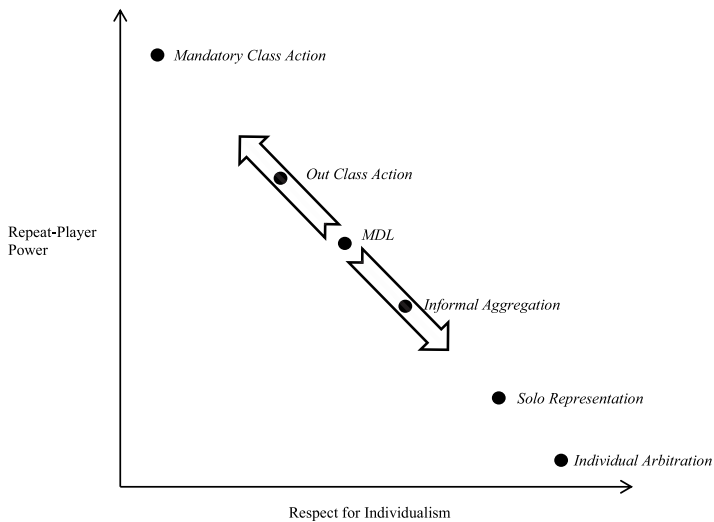


Figure 2: Respect for Individualism and Repeat-Player Power

AT&T Mobility LLC v. Concepcion is a perfect illustration.²⁸² In that case, the Court found that AT&T's "consumer-friendly" arbitration process was better for each individual claimant than a class action. It was cheaper, quicker, and likely to prompt a full recovery without the need to pay a large fee to a class-action lawyer.²⁸³ Pursuing a class action when the defendant had already set up a superior

281. See, e.g., D. Theodore Rave, *Settlement, ADR and Class Action Superiority*, 5 J. TORT L. 91, 109 (2012) [hereinafter, Rave, *Settlement, ADR*].

282. 563 U.S. 333 (2011).

283. *Id.* at 352 ("Indeed, the District Court concluded that the Concepcions were better off under their arbitration agreement with AT&T than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'").

system for efficiently processing the plaintiffs' claims looked like the repeat-player, class-action lawyer selling out the one-shotters in the class.²⁸⁴ Thus the Court had no qualms about enforcing the class-action waiver and requiring all claimants to arbitrate individually. Of course, next to no one actually filed a claim in individual arbitration.²⁸⁵ Without a repeat player on the plaintiffs' side to do the work of advertising, aggregating, and investing in the litigation, the one-shooter plaintiffs received no recovery and the repeat-player defendant got off scot-free.²⁸⁶

A similar emphasis on individual autonomy in MDL as a means to limit the power of repeat-player plaintiffs' lawyers may end up handicapping plaintiffs. We may be far away from a world where plaintiffs' lawyers abandon the MDL playing field because they cannot make any money. Individual arbitration of negative-value consumer claims is an extreme example. But legal representation is expensive, and aggregation is essential to the economic viability of a mass tort practice. Indeed, a striking proportion—more than 25%—of the cases in federal court are already pro se.²⁸⁷ Elevating values of individual control as a means to protect one-shooter plaintiffs from one set of repeat players—pushing MDL down the slope in Figure 2—risks leaving them vulnerable to another set of repeat players without any powerful allies on their side.

Too much emphasis on the agency-cost side of the equation risks allowing the perfect to become the enemy of the good. Indeed, some have argued that this is what happened with the mass tort class action: the Supreme Court's insistence on class cohesion to protect absent class members effectively eliminated the availability of the class-action mechanism in a broad swath of cases.²⁸⁸ Sometimes agency costs are the price you pay to have a powerful agent on your side.

MDL as it currently functions is a middle ground. MDL's split personality allows plaintiffs to reap some of the advantages of repeat play while its formal respect for individualism acts as an imperfect check on repeat-player self-dealing.

284. Rave, *Settlement, ADR*, *supra* note 281, at 92–93, 110.

285. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2812–13 (2015) (finding that between 2009 and 2014, a time period during which AT&T had between 85 and 120 million subscribers, consumers made 134 claims against AT&T in its arbitration process—an average of 27 per year).

286. See Rave, *When Peace*, *supra* note 257, at 517; Rave, *Settlement, ADR*, *supra* note 281, at 123; cf. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 429–30 (2005) (predicting this result).

287. Judith Resnik, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1916–17 (2017) (citing *Judicial Business*, U.S. COURTS, <https://www.uscourts.gov/report-names/judicial-business> [<https://perma.cc/7MY4-8WPD>] (last visited Oct. 1, 2019) (providing various data sets related to the federal courts)); see also U.S. COURTS, TABLE C-13, U.S. DISTRICT COURTS—CIVIL PRO SE AND NON-PRO SE FILINGS, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2018, https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2018.pdf [<https://perma.cc/DKY6-BV8X>] (last visited Oct. 1, 2019) (showing that, as of September 2018, 27% of federal civil cases were pro se).

288. See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) (“In the case of *Amchem*, the perfect was the enemy of the good: the multibillion-dollar settlement, rejected by the Supreme Court, was lost forever, and thousands of claimants who would gladly have traded their pristine due process rights for substantial monetary compensation have been consigned to the endless waiting that characterizes asbestos bankruptcies.”).

The need to get so many players, who ultimately are free to walk away, onboard with any global resolution can make it difficult for repeat players to effectively collude at the one-shotters' expense. And it helps to keep barriers to entry relatively low. But the same need to respect the individual nature of the aggregated cases and to build consensus around any global resolution also keeps the lawyers on the plaintiffs' side from being as effective repeat players as a more complete aggregation, like Rosenberg's mandatory class action, would allow.

CONCLUSION: REPEAT-PLAYER RHETORIC AND "REFORM"

With MDL's explosive growth in recent years, self-proclaimed "reformers" have offered an array of suggestions to improve MDL procedure, at least from their perspective.²⁸⁹ Legislation tinkering with the nuts and bolts of MDL was introduced in Congress and passed the House of Representatives in 2017 before dying in the Senate.²⁹⁰ And the Advisory Committee on Civil Rules has created a subcommittee to study several proposals to craft new Federal Rules of Civil Procedure specific to MDL.²⁹¹ The general thrust of these proposals is that MDLs operate in a sort of "rules-free" zone, where judges are "making it up as they go along," crafting "ad hoc procedures," and twisting arms to broker global settlements.²⁹² Proposals for more formal rules and less judicial ad hocery are therefore gaining steam.

It should come as no surprise that these proposals originated from, and heavily favor, defense-side, repeat players.²⁹³ Indeed, this may be the most direct way that powerful repeat players can play for rules—by literally writing them and then getting them enacted into law.²⁹⁴ And, based on Stephen Burbank and Sean Farhang's incisive work on the political economy of procedural retrenchment, it is not surprising that proponents of these new measures turned their attention to the Rules Committee when legislative victory looked unlikely.²⁹⁵

289. See Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 *FORDHAM L. REV.* 87, 104–05 (2018) [hereinafter Bradt, *The Looming Battle*].

290. See Fairness in Class Action Litigation Act (FICALA) of 2017, H.R. 985, 115th Cong. § 5 (1st Sess.). Congress did not hold any hearings, and the bill passed without a single Democratic vote either in the Judiciary Committee or the House as a whole. H. REP. NO. 115–25, at 6 (2017); 163 *CONG. REC.* H1999–2000 (daily ed. Mar. 9, 2017).

291. ADVISORY COMM. ON CIVIL RULES, *Report of the Advisory Committee on Civil Rules*, in *MINUTES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MEETING OF JANUARY 4, 2018*, at 27, 29–30 (Apr. 10, 2018).

292. See Bradt, *The Looming Battle*, *supra* note 289, at 89–90; LAWYERS FOR CIVIL JUSTICE, *REQUEST FOR RULEMAKING*, *supra* note 155, at 1–3.

293. There was a brief nod to plaintiffs in the House Report, suggesting that the MDL "prevent[s] plaintiffs with trial-worthy claims from timely getting their day in court." H.R. REP. NO. 115–25, at 3 (2017). But the reforms are clearly directed toward improving defendants' positions.

294. Howard M. Erichson, *Searching for Salvageable Ideas in FICALA*, 87 *FORDHAM L. REV.* 19, 20 (2018) [hereinafter Erichson, *Searching*] ("[R]eform ideas have a way of reappearing, particularly when driven by a constituency with much at stake and plenty of resources to push an agenda.").

295. STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 18–20* (Sheridan Books, Inc. 2017). If history holds, success in the Rules Committee may also prove elusive.

Most of the recently suggested changes to MDL appear to be attempts by defense-side interests to press a momentary political advantage.²⁹⁶ These include proposals requiring evidentiary verification of a plaintiff's allegations within forty-five days of filing or transfer, mandatory interlocutory appeal of rulings by the MDL transferee judge, and prohibiting trials in the MDL court without consent of all parties.²⁹⁷

Each of these changes appears to be designed to play to defendants' repeat-player, structural advantages and to eliminate plaintiffs' advantages. To see how, consider each in turn. Mandatory evidentiary verification of a plaintiff's claim (which is typically not required as part of any claim outside of an MDL until summary judgment) capitalizes on individual plaintiffs' relative lack of resources and lack of access to discovery.²⁹⁸ The short time frame to come up with evidence limits the advantages of proceeding as a group and reinforces plaintiffs' one-shotter status. Mandatory interlocutory appeal enhances the defendants' resource advantage because they are more able to weather delays as cases ping pong between appellate and trial courts. And requiring consent of all parties for the MDL court to try cases that would otherwise be within its jurisdiction makes it harder for the plaintiffs' side to play for rules by advancing cases that are more likely to produce successful trial outcomes.²⁹⁹ All told, these proposals reveal that repeat players on the defense side appear to keenly understand their advantages and are actively seeking to amend statutes and formal rules in ways that would make it harder for repeat players on the plaintiffs' side to counter them effectively.

All of this momentum for "reform" has seemingly come at a time when the dominant narrative in the academic literature on MDLs has focused on the dangers of repeat players on the plaintiffs' side and the ways they exacerbate the agency problems that are inevitable in mass litigation. One concern about emphasizing the problems with repeat players without acknowledging their benefits is that it creates rhetorical ammunition for those supporting changes to the rules that will leave plaintiffs worse off. They can attack the source of repeat players' power while claiming that they are trying to protect one-shotter plaintiffs from their self-dealing lawyers. Indeed, defense-side interests have already seized on rhetoric about the dangers of repeat-players in their campaign to "reform" the MDL process.³⁰⁰

296. Not that there is anything inherently wrong with that. Repeat-player defendants, like any other interest group, are entitled to seek laws through the democratic process that will benefit them. But our consistent perspective throughout this Article has been to intervene in a debate about one-shotter plaintiffs' vulnerability to one set of repeat players, and our point is simply that we should not ignore their vulnerability to a different set of repeat players.

297. Fairness in Class Action Litigation Act (FICALA) of 2017, H.R. 985, 115th Cong. § 5 (1st Sess.).

298. Erichson, *Searching*, *supra* note 294, at 26–27.

299. See Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185, 192 (2018).

300. For example, in their proposal to the MDL Rules Subcommittee, the defense-side group Lawyers for Civil Justice argues that: "The 'repeat player' problem in MDL cases is related to the FRCP's shortcomings . . . [It] exists because only a small, exclusive group of people is allowed to learn how the game is played." LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE ADVISORY

Our goal in this Article has not been to minimize or ignore the risks created by repeat players, but instead to refocus the discussion to also consider their benefits. The presence of repeat-player lawyers on the plaintiffs' side helps to level the playing field in MDL. And in considering reforms to MDL, policymakers should not lose sight of those benefits. Whether repeat players add more value than they subtract in agency costs, we quite frankly do not—and perhaps cannot—know. The primary evidence critics cite in support of their claims that plaintiffs get a raw deal are closure provisions in settlements that appear slanted toward defendants. It may very well be that some of these provisions are unfair or coercive. But the details matter, and sometimes they may reflect a fair exchange by the plaintiffs of the most valuable asset they have to sell—total peace—for a premium the defendant is willing to pay in order to get it.³⁰¹ When criticizing any form of aggregate litigation, the crucial question is always “compared to what?” And we do not have some counterfactual set of settlements reached without repeat players at the helm to use as a comparator. But we are confident that repeat players can add significant value. And attempting to minimize the agency costs that they pose without accounting for the value they add risks leaving the one-shotter plaintiffs worse off.

In our view, we should not rush to make major changes to the MDL process in the name of protecting one-shotter plaintiffs until we have some way of determining whether the risks of repeat players outweigh the benefits. Our position is not that special rules should never be applied to MDL. After deliberation informed by empirical data, some targeted rules might be appropriate. But those rules should take into account the benefits that repeat players provide and not treat the potential agency costs as a stalking horse for changes that benefit the other repeat players in the system—the defendants—and leave plaintiffs worse off.

Indeed, there may have been considerable wisdom in the MDL statute's drafters' decision to eschew specific procedural rules for MDL and instead create a flexible system that places discretion in the hands of the JPML and MDL transferee judge.³⁰² The drafters were well aware that defense-side repeat players, who had lobbied so hard against the statute's passage, could come to dominate any rulemaking process. They knew that MDLs would come in all shapes and sizes,

COMMITTEE ON CIVIL RULES AND ITS MDL/TLPF SUBCOMMITTEE 5 (2018), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_-_ten_observations_about_md1_rulemaking_4-6-18.pdf [<https://perma.cc/69NE-ZE4P>]. Lawyers for Civil Justice has also created a social-media campaign centered around its website: www.rules4mdls.com. Its associated Twitter account quotes Burch (out of context) on MDLs: “[F]ew rules, little oversight, multi-million dollar common-benefit fees, and a push for settlement can tempt a cadre of repeat players to fill in the gaps in ways that further their own self-interest.” Rules4MDLs (@rules4MDLs), TWITTER (June 22, 2018, 5:30 AM), <https://twitter.com/rules4mdls/status/1010137832135020544> [<https://perma.cc/A5V3-EF34>]. Though perhaps they overestimated the enthusiasm of social-media denizens for rules. As of August 2019, @rules4MDLs could boast only 348 followers. See Rules4MDLs (@rules4MDLs), TWITTER, <https://twitter.com/rules4mdls?lang=en> [<https://perma.cc/J7VS-ERPC>] (last visited, 2019).

301. See *supra* Section III.A; Rave, *Closure Provisions*, *supra* note 7, at 2199–2200.

302. See *supra* notes 156–60 and accompanying text.

and that the judges managing them would need the flexibility to tailor procedures to the needs of the individual cases. As a result, the prescient federal judges behind the MDL statute focused on a set of suggestions and best practices in the *Manual for Complex Litigation*, rather than any hard-and-fast rules.³⁰³ The primary safeguard in MDL is thus the MDL judge.

Strong judicial case management and supervision can mitigate some of the problems and risks that repeat-player lawyers create without the need for any formal rule changes. If repeat players on the plaintiffs' side add value, as we have argued that they do, then simply eliminating or reducing repeat play will not serve the interests of the one-shotters. Nor will watering down the benefits of repeat play by facilitating dissent for its own sake on the plaintiffs' side. A more fruitful means of protecting one-shotters might be something more akin to a regulatory response to a natural monopoly. Instead of breaking up a cartel that is creating value, we should regulate it to protect those vulnerable to its pathologies while retaining its advantages. Indeed, Galanter points out that institutional passivity contributes to the advantage held by repeat players.³⁰⁴ More active judicial supervision can help counteract some of that effect.

In particular, as we have argued elsewhere, we think judges can play an information-forcing role to help one-shotter clients monitor their repeat-player lawyers.³⁰⁵ This role is important throughout the litigation as MDL judges oversee the exchange of information in discovery and generate information about claim values by ruling on motions and conducting bellwether trials.³⁰⁶ But we think this role is most critical at the settlement stage, when the one-shotter plaintiffs have to make the decision whether to opt in to a deal negotiated by the repeat players.³⁰⁷ Accordingly, we think that judges should review even nonclass global settlements in MDLs for fairness and offer a public, nonbinding evaluation of the deal in order to give one-shotter clients an easily digestible signal about their lawyers' performance.³⁰⁸ We think information-forcing is a promising strategy because it targets the one-shotters and gives them some of the information that they need to monitor their repeat-player lawyers and identify instances in which these lawyers might be favoring themselves at the one-shotters' expense.³⁰⁹

Of course, MDL judges are often repeat players, too. And some may argue that judges' interests align more with the other repeat players in getting a deal done and clearing their dockets than with the one-shotter plaintiffs. But this is another area in which we think repeat play is more of a

303. See Bradt, *The Looming Battle*, *supra* note 289, at 92–99; Andrew Bradt, *The Stickiness of the MDL Statute*, 37 REV. LITIG. 203, 204 (2018) (noting that the drafters “intended that the newly created [JPML would] operate with maximum discretion”).

304. Galanter, *supra* note 1, at 119–21.

305. Bradt & Rave, *The Information-Forcing Role*, *supra* note 19.

306. *Id.* at 1302–03, 1307.

307. See *id.* at 1306–07.

308. *Id.* at 1284–88.

309. *Id.* at 1284.

feature than a bug. Experience counts, and there are dangers when the judge is the least-experienced person in the room.³¹⁰ Repeat-player judges are needed to keep the repeat-player lawyers on both sides in line. And if repeat-player judges take their information-forcing role seriously, then in some sense at least, one-shotter plaintiffs will have another "have" looking out for their interests.

In concluding his essay, Galanter explained, "If rules are the most abundant resource for reformers, parties capable of pursuing long-range strategies are the rarest."³¹¹ In other words, having repeat players on your side may be more important (and more rare) than even having more favorable substantive law. There is no doubt that repeat play comes with risks. But losing allies that can pursue long-range strategies and work to see that those strategies are implemented on the ground is an awfully high price to pay for the sake of addressing a principal-agent problem. Surely defendants would like nothing more than to see the most powerful plaintiffs' lawyers hamstrung in the name of protecting plaintiffs.

310. This is not to say that the JPML should not continue its project of recruiting a new and more diverse stable of MDL judges. Quite the contrary: that project is essential for several reasons, not the least of which is to ensure that newer judges develop the kind of experience we are talking about. But those judges should get up to speed on some of the many smaller MDLs so that they are prepared to keep the repeat players in the mega cases in line.

311. Galanter, *supra* note 1, at 150.