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Achieving Procedural Goals through Indirection: the Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements

MORRIS A. RATNER*

ABSTRACT

*Non-class aggregate settlement practices have outpaced the development of legal doctrine in multidistrict litigations (MDLs). Forced to improvise, trial courts have sought a firm foundation for exercising authority over these private, contractual settlements, specifically to justify and guide court control over attorneys' fees. By imposing across-the-board limits on contingency fees recoverable by individually-retained counsel, MDL trial courts have effectively rewritten fee contracts between lawyers and clients in tens of thousands of cases. The trial courts in three recent proceedings—*Vioxx, Guidant, *and* Zyprexa*—grounded fee cap orders in their "inherent authority" to regulate members of the bar to enforce ethics rules. But the fee-capping decisions in these cases stray dramatically from the ethics doctrine that purportedly informs them. This boundary-pushing reliance on ethics serves procedural goals,* i.e., *making room for enhanced attorneys' fees to court-appointed common benefit counsel who achieved global settlements. Unresolved tension within the MDL governance regime regarding the extent to which MDL aggregation converts individual litigation to group litigation partly explains this misuse of ethics doctrine, one which potentially delays the development of clear answers to difficult questions about MDL aggregation procedures and specifically about the proper use of the attorneys' fee lever as an MDL case management tool. Those questions can and should be answered by Congress or by trial court judges directly as procedural questions, rather than indirectly as ethics questions.*

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I. INTRODUCTION

Unlike the current federal rule of procedure governing class actions,[1] the multidistrict litigation (MDL) statute 28 U.S.C. § 1407 provides no direction to trial courts regarding the treatment of attorneys' fees in MDLs resolved by global settlement. Courts overseeing non-class aggregate settlements have thus improvised to define a doctrinal foundation for exercising authority over fees, and specifically for allocating fees among layers of counsel who prosecute such cases,[2] including the lawyers plaintiffs choose to prosecute their individual cases and the lawyers appointed by MDL trial courts to perform work for the benefit of all plaintiffs.[3] The recent attorneys' fee decisions in the product liability MDLs *Vioxx*,[4] *Guidant*,[5] and *Zyprexa*[6] are instructive. In each of these proceedings, transfer and coordination of related cases in the federal system to a single judge for pre-trial purposes resulted in non-class aggregate settlements, providing the MDL trial courts with an opportunity to decide how much to pay court-appointed common benefit counsel. This question naturally caused courts to worry about the amounts that individual plaintiffs were contractually obligated to pay their individually-retained attorneys. Because of this scrutiny, each trial court imposed

1. FED. R. CIV. P. 23(h).

2. *See* Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 300-304, 328, 355 (1996) [hereinafter Resnik, Curtis & Hensler] (referring to and identifying the "layers of lawyers" who prosecute MDLs).

3. The term "individually-retained lawyers" refers to lawyers retained by individual plaintiffs to handle their claims. The term "court-appointed common benefit counsel" refers to lawyers appointed by the MDL trial courts to perform common benefit work on behalf of all MDL plaintiffs.

4. *See In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 557-62 (E.D. La. 2009). Judge Eldon Fallon capped contingent fee arrangements between over 50,000 plaintiffs participating in the $4.5 billion non-class aggregate settlement and their individually-retained attorneys at 32%, with the possibility of an upward departure in rare cases. *See id.* The *Vioxx* litigation and settlement involved personal injury claims related to Merck's prescription pain killer Vioxx, which was withdrawn from the market after data from a clinical trial indicated that use of it increased the risk of heart attacks. *See generally id.* Judge Fallon also awarded 6.5% to court-appointed common benefit counsel, which was included in the 32% cap. *In re* Vioxx Prods. Liab. Litig, 760 F. Supp. 2d 640, 661 (E.D. La. 2010).

5. *See generally In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174 (D. Minn. Mar. 7, 2008). Judge Donovan Frank set aside approximately 15% of a $240 million settlement fund to compensate attorneys who performed common benefit work with regard to approximately 4,000 lawsuits, and, also, initially capped contingency fees of individually-retained counsel at 20%, subject to appeal to a special master for an upward departure based on certain limited factors. *See id.* at *9, *14. Judge Frank eventually modified the fee orders to cap the total fee payment of any plaintiff, accounting for the common benefit fee, at the lesser of 37.18%, the contractually negotiated fee percentage, or the state-imposed limit. *See In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 2008 WL 3896006, at *8 (D. Minn. Aug. 21, 2008).

6. *See In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490-491 (E.D.N.Y. 2006). Judge Jack Weinstein capped contingency fees of individually-retained counsel for approximately 8,000 plaintiffs at 20% for plaintiffs receiving a $5,000 lump sum payment and 35% for plaintiffs receiving more, but allowed for departures based on the unique facts of each case, in this $700 million non-class aggregate settlement of personal injury claims against defendant Eli Lilly & Company relating to the prescription drug Zyprexa which was used to treat schizophrenia and/or bipolar disorder.

caps on contingency fees that could be charged by individually-retained lawyers.[7] In each case, the courts claimed multiple sources of authority to impose such caps, including: the court's equitable power to promote fairness among litigants; powers implied by the MDL statute; the terms of the MDL global settlement agreements, which empowered the trial courts to review fees; and the court's "inherent authority" to regulate counsel to prevent unethically excessive fees, and thus to maintain the integrity and esteem of the bar.

After briefly describing these distinct justifications for imposing fee caps in Section II, this Article focuses in Section III on the trial courts' grounding of the contingency fee caps in their "inherent authority" to enforce ethical prohibitions against excessive fees; as demonstrated below, ethics doctrine is ill-suited as a basis for the fee caps, because it envisions particularized inquiries, and functions to define only what is unreasonably excessive, without answering the more precise procedural questions[8] the courts' intervention in attorneys' fees entailed. The procedural issues the ethics doctrine leaves unanswered include questions regarding precisely how the fee lever—i.e., the payment of common benefit fees —should be used to promote the "just and efficient"[9] management of transferred and coordinated actions, including goals long recognized and pursued by harnessing attorneys' fees in class actions,[10] such as facilitating aggregation both by making it profitable for counsel to represent the class,[11] and by aligning the interests of class counsel and the absent class members through the methods used to calculate fees.[12] These procedural choices can be made either via statutory

7. *See supra* notes 4-6.

8. *See* Howard M. Erichson, *Foreword—Civil Procedure and the Legal Profession*, 79 FORDHAM L. REV. 1827, 1832 (2011) ("What's the difference between a proceduralist and an ethicist? In their examinations of civil litigation, both proceduralists and ethicists look at problems transsubstantively . . . and both ask not what the outcomes should be but how we should get there. But they are interested in different *hows*. The proceduralist asks how the litigation process should work; the ethicist asks how the lawyer should conduct herself.") (emphasis added); *see also* Resnik, Curtis, & Hensler, *supra* note 2 at 308-09 (noting as a trend in the world of process a "convergence of rules of procedure and rules of ethics").

9. 28 U.S.C. § 1407(a) (2006).

10. *See* Fed. R. Civ. P. 23(h) Advisory Committee's note ("Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions . . . . Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process.").

11. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."); Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 253 (1985) (identifying one of the key questions to be answered in connection with the development of standards and criteria utilized in determining court-awarded attorneys' fees the question of whether lawyers can be "encouraged to work efficiently and pursue settlement at the earliest opportunity and at the same time be compensated adequately to give them the incentives that lie at the heart of the fund-in-court doctrine and statutory fee provisions").

12. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 20 (3rd ed.) (2010) ("To align plaintiff counsel's interests with those of the class . . . consider

reform or via the development of case law that squarely addresses them.

Section IV considers why the trial courts resorted to using ethics doctrine to justify their decisions allocating fees among layers of MDL counsel, locating professional ethics within the broader MDL governance regime. That regime includes: Congressional preferences expressed in federal legislation;[13] the pronouncements, practices and norms of judicial institutions such as the Judicial Panel on Multidistrict Litigation ("JPMDL"),[14] and federal trial and appellate courts; and competing norms within the plaintiffs' bar. The MDL governance regime is principally animated by a tension as to whether and to what extent MDL administrative aggregation converts individual litigation into group litigation warranting extraordinary court interventions. Professional rules and norms have been invoked in fee-capping decisions by trial courts in part to mediate this basic conflict, in the absence of greater and more direct resolution of the basic procedural tension either by Congress or by trial courts. But, as discussed in Section V, below, indirection comes at a price. To the extent they depend on ethics doctrine designed for more limited application, the fee cap orders do not fill the doctrinal gap in the MDL governance regime. Stated another way, the ethics doctrine invoked in the trial courts' contingency fee cap orders does not justify a more widely available basis for ensuring the proper allocation and reasonableness of MDL attorneys' fees. Via statutory reform or case law, the procedural questions MDL attorneys' fee orders implicate regarding the nature of MDLs as an aggregation and case management device and the role of attorneys' fees in facilitating its use must be confronted. Shaped by the answers to these procedural questions, a test for the award and allocation of attorneys' fees among layers of counsel involved in MDL proceedings should be clearly articulated and consistently applied, to enhance the legitimacy of non-class aggregate settlements effectuated in MDLs.

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linking the award of attorney fees to the value of the funds distributed to the class . . . .") *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf.

13. 28 U.S.C. § 1407.

14. 28 U.S.C. § 1407(a)-(e) defines the Judicial Panel on Multidistrict Litigation (the "JPMDL" or "Panel"), including its core functions and procedures. Since the statute was enacted, the Panel has operated fairly autonomously. *See* Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 315 (2009) [hereinafter Richards, *JPML Selection of District and Judge*] ("Although the scope of the JPML's duties is narrow, it exercises broad discretion in the execution of those duties."). There is no right of appeal from a decision of the Panel to deny a transfer and coordination motion. Transfer and coordination orders are otherwise appealable only by extraordinary writ. 28 U.S.C. § 1407(e). *See* 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, 2281 (2008) [hereinafter Marcus, *Toward a Maximalist Use*] ("The makeup of the Panel creates a puzzle for review of its decisions; it consists of seven circuit and district judges, no two from the same circuit. With this configuration, it would be odd for review of the Panel's decisions to lie with a three-judge panel of a court of appeals. Instead, the [MDL] statute attempts to insulate the actions of the Panel against any review.").

II. PROCEDURES ADOPTED IN RECENT MDLS AND THE DOCTRINAL JUSTIFICATIONS UNDERLYING THEM

MDL transfer and coordination has traditionally been viewed as a more limited form of aggregation than representative litigation under Fed. R. Civ. P. 23. MDL plaintiffs formally retain a higher degree of autonomy: they choose their own lawyers on terms they individually negotiate; they file, at least initially, in jurisdictions of their choice; and they retain the right to have their cases remanded back to the transferor jurisdiction for trial.[15] However, over the past two decades, as class treatment of mass torts involving personal injuries has been used more sparingly, and as the systemic urge to aggregate has increasingly found release in MDL practice,[16] MDLs have developed features typical of class actions: counsel are appointed by trial courts to perform common benefit work;[17]

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15. 28 U.S.C. § 1407(a); *see* Lexecon, Inc. v. Milberg Weiss Bershad Heins & Lerach, 523 U.S. 26, 40-41 (1998) (finding the language of § 1407 precludes a transferee court from utilizing 28 U.S.C. § 1404(a) to make "self-assignments" and thereby retain transferred cases beyond pretrial proceedings).

16. *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 334 (3d Cir. 2011) (Scirica, J., concurring) ("[S]ome observers believe there has been a shift in mass personal injury claims to aggregate non-class settlements . . . . This is significant, for outside the federal rules governing class actions, there is no prescribed independent review of the structural and substantive fairness of a settlement including evaluation of attorneys' fees, potential conflicts of interest, and counsel's allocation of settlement funds among class members."); *see also* Thomas E. Willging & Emery G. Lee, III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 798 (2010) ("In recent years, the MDL process has played an increasingly important role in the management and resolution of products-liability litigations."); Margaret S. Williams, Richard A. Nagareda, Joe S. Cecil, Thomas E. Willging, Kevin M. Scott & Emery G. Lee, III The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation: an Empirical Investigation 18 (Aug. 3, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1443375 (using empirical data to confirm and expand upon Professor Richard Marcus's observation that MDL practice is "maximalist," in that it interprets the statutory authorization liberally); Marcus, *Toward a Maximalist Use, supra* note 14 (describing genesis and growth of MDL practice); John G. Heyburn, II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2232 (2008) ("As the class action mechanism has evolved and, to some extent, become less available or desirable, some litigants may be turning to the MDL processes as a way of achieving some of the benefits or advantages formerly available under Rule 23.").

17. *See* MANUAL FOR COMPLEX LITIGATION §§ 10.22, 10.224, 22.62 (4th ed. 2004) [hereinafter MANUAL]. There is no precise definition of "common benefit work," though, as the phrase implies, it involves work done for the common benefit of all MDL plaintiffs, rather than merely for the specific clients who retained a particular lawyer. Common benefit work thus includes, for example, discovery on issues common to MDL plaintiffs generally, as well as MDL-wide briefing, argument, and global settlement negotiations. *See id.* Common benefit work excludes such individual-plaintiff-specific items as determining whether a particular plaintiff used a defendant's product, or was injured by it; responding to discovery requests directed at individual plaintiffs; and helping individual plaintiffs decide whether to accept and then pursue claims within the guidelines established by global settlements. *See id.* Categories of common benefit work can be gleaned from the sections of the MANUAL explaining how MDL counsel should be organized. *See, e.g.*, *id.* at § 10.224 (defining the duties of "lead" counsel in multiparty litigation). In specific MDL proceedings, common benefit work includes the work done in performance of the responsibilities assigned to such counsel in the orders appointing them, and/or in orders defining compensable common benefit work. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, Pretrial Order #6, at 2-8 (E.D. La. April 8, 2005) *available at* http://vioxx.laed.uscourts.gov/Orders/vioxxpto6withA.pdf (describing duties of Plaintiffs' Steering Committee as including, by way of example, conducting "discovery on behalf of plaintiffs in all actions which are consolidated with the instant multidistrict litigation," acting as "spokesperson for all plaintiffs at pretrial proceedings and in response to any inquiries by

highly managerial judges closely supervise the litigation; and MDL often leads to aggregate settlements that resolve categories of litigation whole-cloth. Practice has outpaced the development of doctrine supporting these dramatic developments. Nowhere is this more visible than in judicial treatment of attorneys' fees,[18] both for court-appointed counsel and for attorneys hired directly by plaintiffs.[19]

A. PROCEDURAL STRUCTURE OF RECENT MDLS

The *Vioxx*, *Guidant* and *Zyprexa* matters followed similar procedural trajectories. In each matter, news that a drug or medical device caused personal injuries prompted widespread filings of lawsuits in state and federal courts by plaintiffs who hired lawyers pursuant to contingency fee agreements.[20] The JPMDL transferred related cases pending in the federal system to a single federal judge for pretrial purposes.[21] In each case, the MDL trial court appointed a subset of

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the Court, subject of course to the right of any plaintiff's counsel to present non-repetitive individual or different positions," and establishing time and expense reporting requirements for "all activities performed and expenses incurred by counsel that relate to matters common to all claimants in MDL 1657").

18. Practice has outpaced doctrine in that there is no clear statutory basis for some of the practices pertaining to the treatment of attorneys' fees, and there has been little if any appellate court vetting of their doctrinal footings. The underdevelopment of doctrine pertaining to MDL practice was noticeable by the 1990s. *See, e.g.*, Resnik, Curtis, & Hensler, *supra* note 2, at 355 ("[I]t is a fourth context, the mass tort, that makes plain the inadequacy of the law developed to date. Current rules fail to address the problems of aggregate mass torts, with their layers of lawyers. Who should get paid in these litigations, and for what?... How much of a role (if any) should clients play in making decisions about paying 'their' lawyers?"); Judith Resnik & Dennis E. Curtis, *Contingent Fees in Mass Torts: Access, Risk and the Provision of Legal Services when Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 432 (1998) [hereinafter Resnik & Curtis, *Contingent Fees in Mass Torts*] ("While the existence of two sets of attorneys in mass torts has become well-known over the past decade, little by way of rules or case law guides courts in sorting out the relationships among clients and the many lawyers within mass tort group litigation."). *See also In re* Zyprexa Prods. Liab. Litig., 594 F.3d 113, 119 (2d Cir. 2010) (Kaplan, J., concurring) (noting that the question of whether a district court may order that a percentage of settlement monies paid in pending MDL cases be set aside to fund possible fee awards to court-appointed common benefit counsel "arises frequently in MDLs" but "has not been addressed by any circuit" and is thus "novel"). The persistence of this doctrinal immaturity is explained, at least in part, in Section IV, *infra*, which identifies a basic unresolved tension within the MDL governance regime. The question of the treatment of MDL attorneys' fees is one aspect of an emerging set of issues pertaining to the scope of the MDL transferee judges' power. *See* Richard L. Marcus, Edward F. Sherman & Howard M. Erichson, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 160-172 (5th ed. 2010) (outlining the broader questions relating to MDL transferee judges' powers).

19. Individual plaintiffs typically retain their own counsel pursuant to a contingency fee agreement under which the lawyer advances costs and labor, at no charge to the client, unless the lawyer's efforts result in a recovery for the client, from which costs and the negotiated contingent fee may be deducted.

20. *Id.* at 551 (describing a wave of filing of individual suits after September 20, 2004, when Merck withdrew Vioxx from the market); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *1 (D. Minn. Mar. 7, 2008) (noting the filing and subsequent transfer and coordination of individual actions for "injuries alleged to have been caused by certain defective implantable defibrillator devices and pacemakers manufactured by Guidant"); *Zyprexa*, 594 F.3d at 119 (Kaplan, J., concurring) (noting filing of tens of thousands of cases by individuals who were prescribed and took Zyprexa and claimed that they consequently suffered injuries).

21. *See In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005) (conferring multidistrict litigation status); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 398 F. Supp. 2d 1371

counsel to leadership positions.[22] In *Vioxx* and *Guidant*, courts assessed MDL plaintiffs to create a source of funds to compensate court-appointed counsel for common benefit work, a standard practice in MDL litigation.[23] In each coordinated proceeding, the parties engaged in both common motion practice and discovery as well as individual, plaintiff-specific discovery.[24] In addition,

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(J.P.M.L. 2005) (centralizing actions sharing allegations of defects in certain implantable defibrillator devices and pacemakers manufactured by the defendants); *In re* Zyprexa Prods. Liab. Litig., 314 F. Supp. 2d 1380 (J.P.M.L. 2004) (consolidating tens of thousands of suits).

22. *See In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 552 (E.D. La. 2009) ("[T]he Court appointed committees of counsel to represent the parties and to meet with the Court once every month to review the status of the litigation"); *Guidant*, 2008 WL 682174, at *1 (recounting procedural history, including appointment of Plaintiffs' Lead Counsel Committee and Plaintiffs' Steering Committee); *Zyprexa*, 594 F.3d at 116 ("A group of lawyers was established as the Plaintiffs' Steering Committee to help prosecute the cases in the MDL court. That litigation was settled in late 2005.") (citation omitted.). In early 2006, the trial court provided that the costs and fees of the PSC would be paid out of the general settlement fund to the extent approved by the special masters and pursuant to a one percent set aside in an escrow fund of the gross settlement amount payable to each settling plaintiff. "A second Plaintiffs' Steering Committee (the 'PSC II') was then established to help prosecute the many new *Zyprexa* cases that had been filed . . . . In an order dated March 28, 2006, the district court established" fee restrictions, including the contingency fee caps mentioned above. "In an order dated December 5, 2006, the district court granted in part a motion by PSC II to establish a common benefit fund to compensate PSC II attorneys for their 'significant discovery work.' The court ordered a set-aside equal to three percent of judgments and settlements in favor of the plaintiffs in any of the cases in the MDL court . . . .").

23. *See* MANUAL §§ 14.215, 20.312 (2004); *see also In re* Oil Spill, MDL No. 2179, December 28, 2011 Order and Reasons as to the Motion to Establish Account and Reserve for Litigation Expenses (Rec. Doc. 4507), *available at* http://www.laed.uscourts.gov/OilSpill/Orders/12282011Order(ReserveAccount).pdf (ordering defendants to hold back 6% of gross payments to plaintiffs to create a reserve for later payments to compensate and reimburse common benefit counsel, and ordering, further: "Specifically, this hold back requirement applies to all actions filed in or removed to federal court that have been or become a part of the MDL, whether or not a motion to remand has been filed, claimants who settle directly with the Gulf Coast Claims Facility, or state court plaintiffs represented by counsel who have participated in or had access to the discovery conducted in this MDL. Exempt from this hold back requirement are state court counsel who have or had no cases in this MDL and who have never had access to any of the discovery undertaken in the MDL."); *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, at *4-5 (E.D. La. Oct. 19, 2010), *available at* http://vioxx.laed.uscourts.gov/Orders/o&r101910.pdf (describing PTO 19, dated August 4, 2005, which established "a Plaintiffs' Litigation Expense Fund, to compensate and reimburse attorneys for services performed and expenses incurred for the common benefit. Pursuant to this Order, any case that was settled, compromised, dismissed, or otherwise reduced to judgment for monetary relief, with or without trial, was subject to an assessment. In order to avail themselves of the initial work of the common benefit attorneys, individual plaintiffs' counsel could, for a limited time, enter into a contract that was to dictate the assessment amount. The 'Full Participation Option,' which was one such option, established an assessment of 2% of the recovery for fees and 1% of the recovery for costs." After the expiration of that limited time period, counsel could "accept a 'Traditional Assessment Option' providing for 6% assessment of recoveries in MDL cases and 4% assessment of recoveries in state court cases"); *Guidant*, 2008 WL 682174, at *1-2 (describing "PTO" (pretrial order) No. 6, in which the trial court established a common benefit fund and "set forth protocols to compensate and reimburse attorneys for services performed and expenses incurred for MDL administration or otherwise for Plaintiffs' general benefit," including a four percent fee and cost "assessment" on plaintiffs' gross monetary recoveries); *Zyprexa*, 594 F.3d at 119-120 (Kaplan, J., concurring) (describing set aside orders, attendant to a first-wave aggregate settlement, and subsequently to create a fund for possible compensation of PSC II attorneys who were still working to prosecute cases after the original settlement).

24. *See, e.g.*, Order & Reasons, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, at *5 (E.D. La 2009), *available at* http://vioxx.laed.uscourts.gov/Orders/o&r101910.pdf ("Discovery rapidly commenced. The common benefit attorneys were responsible for all aspects of pre-trial preparation, including document discovery,

bellwether trials[25] of a representative sampling of cases were contemplated and, in some instances, conducted.[26] At the same time, the trial court in each case actively encouraged settlement discussions,[27] which produced aggregate settlements on a non-class basis. The courts thus achieved preclusion through the release provisions of contracts, rather than via certification of a plaintiff class and entry of a class judgment under Rule 23.

As framed and implemented, the settlements shared key features: They were aggregate, in that in each settlement defendants agreed to pay a lump sum, conditioned upon minimum participation rates.[28] *Vioxx* and *Guidant* involved

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the taking of depositions, preparation of experts, motions practice, and to some extent, coordination of federal and state court proceedings. Millions of documents were discovered and collated. Thousands of depositions were taken and at least 1,000 discovery motions were argued."); *Guidant*, 2008 WL 682174, at *2-3 (summarizing court structuring of common and individual discovery through pretrial orders); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006) (noting that discovery was overseen by the court-appointed discovery master).

25. A bellwether trial is an individual (non-class) representative (typical) trial, normally generating a final judgment that is preclusive only with regard to the parties in the individual case, and, in addition, of informational value to parties involved in mass tort litigation for purposes of testing claims or defenses, or assigning value to categories of claims or defenses. *See, e.g.*, Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332 (2008) [hereinafter Fallon, Grabill & Wynne] (describing history and modern informational use of bellwether trials in MDL litigation).

26. *See Vioxx*, 650 F. Supp. 2d at 552 (describing six MDL bellwether trials, as well as thirteen additional Vioxx-related cases tried before juries in state courts, preceding the most significant global settlement discussions); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *3 (D. Minn. Mar. 7, 2008) (discussing scheduling of bellwether trials).

27. *See Vioxx*, 650 F. Supp. 2d at 552 (noting encouragement of "several coordinated courts" to promote settlement discussions); *Guidant*, 2008 WL 682174, at *3 (discussing court's involvement in ultimately successful settlement discussions through Magistrate Judge Boylan and Special Master Pat Juneau); *Zyprexa*, 424 F. Supp. 2d at 490 (noting involvement of court-appointed special settlement masters).

28. *See* Settlement Agreement Between Merck & Co., & Counsel at 41-43, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 650 F. Supp. 2d 549, 551-52 (E.D. La. 2009), *available at* http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf (describing Merck's "walk away rights" in the event enrollment in the settlement fails to meet specified minimum thresholds); Memorandum from Levin, Fishbein, Sedrin & Berman, Counsel to Plaintiffs, to All Vioxx Clients (2008), http://www.lfsblaw.com/wp-content/themes/lfsblaw/inc/MEMO-TO-CLIENTS-FOR-WEBSITE.pdf ("Please note, however, that Merck has the option not to fund the Settlement Program and to terminate the Settlement Program if a minimum number of potentially eligible Claimants nationwide does not agree to participate."); Order Amending the March 3, 2010 and June 16, 2010 Orders Amending the Distribution of Funds for No. 05-1708 (D. Minn. August 23, 2010), http://www.mnd.uscourts.gov/MDL-Guidant/Pretrial_Minutes/2010/100823ord2005md1708.pdf ("On December 1, 2008, Plaintiffs provided Guidant with settlement documents for 95% of the eligible settlement participants. Upon 95% participation, the Guidant MDL settlement was guaranteed to go forward. After reaching this participation threshold, the parties agreed that the vast majority of claimants' obligations under the Master Settlement Agreement (MSA) had been met and further agreed that these claimants were eligible for payment. Accordingly, on December 19, 2008, the Court ordered a partial distribution of settlement funds so as to provide payment eligible claimants with access to a portion of their allocated settlement funds."); Eli Lilly Co., Quarterly Report (Form10-Q) at 4 (Nov. 3, 2005) (making defendant's funding obligations contingent on acceptance of the settlement terms by 90 percent of Zyprexa plaintiffs); *see also* Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2004) (defining and characterizing "aggregate" settlements as having qualities among multiple dimensions, including collective allocation and conditionality); Howard M. Erichson & Benjamin C. Zipursky, *Consent*

enhanced payments to counsel[29] who performed common benefit work. This meant that the very counsel who negotiated the global settlements negotiated provisions enabling them to seek from the court an award of fees greater than provided in pre-settlement orders.[30] Finally, in each case, the trial court capped fees that could be collected by individually-retained counsel. The contingency fee caps were imposed across-the-board; they applied to all claims (or claims that settled for particular amounts), though individually-retained counsel had the option of seeking a limited adjustment of the contingency fee cap.[31]

These contingency fee caps were the flip side of payment of enhanced fees to common benefit counsel, itself a vehicle for facilitating the management and global resolution of MDLs. This is not a particularly controversial statement; the fee cap orders in *Vioxx*, *Guidant*, and *Zyprexa* explicitly linked the "reasonableness" of contingency fees charged by individually-retained counsel to the attorneys' fee amounts allocatable to common benefit counsel.[32] Judge Frank was

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Versus Closure, 96 CORNELL L. REV. 265, 265 (2011) (critically examining the structure of the *Vioxx* settlement, which was between the defendant and law firms representing individuals suing the defendant).

29. The fees paid to court-appointed common benefit counsel were "enhanced" in two respects. First, such fees were paid in addition to fees collected by such counsel from the clients who individually-retained them pursuant to contingency fee agreements. Second, in *Vioxx* and *Guidant*, fees paid to court-appointed common benefit counsel were enhanced in that the pool from which such fees could be paid was enlarged as part of the global settlements reached in those cases. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 132-33 (2010) [hereinafter Silver & Miller] (describing how *Vioxx* and *Guidant* MDL global settlements resulted in enlarged pools from which court-appointed common benefit or "lead" lawyers were ultimately paid).

30. *See id.* at 131-32 ("'Seeking a firmer foundation for fee awards in MDLs, some judges required limited lawyers to sign fee transfer agreements,' which specified low percentage pre-global-settlement set asides to pay common benefit fees and costs, as did Judges Fallon and Frank in *Vioxx* and *Guidant*. 'In practice, however, a different problem emerged: the lead attorneys wanted more money than the agreements entitled them to collect. To get around the agreements, which the MDL judges promulgated at their request, the lead attorneys might have sought orders increasing the amounts set aside for common benefit compensation. But this direct approach had an obvious downside: it would have deprived the fee set-aside of its consensual gloss. Hoping to preserve the impression that moneys were being withheld by agreement, the lead attorneys devised a different strategy. They wrote provisions into the global settlement agreements increasing the set-asides, and they required disabled lawyers and their clients to waive objections to these provisions as a condition for enrolling in the settlements.'").

31. *See Vioxx*, 650 F. Supp. 2d at 565 ("[I]n the rare case where an individual attorney believes a departure from this cap is warranted, he shall be entitled to submit evidence to the Court for consideration."); *Guidant*, 2008 WL 682174, at *19 ("Parties may petition the Special Masters to have the 20% increased upward to a maximum of either 33.33%, the percentage previously agreed to in the individual cases contingent fee arrangement between the attorney and the client, or the limit imposed by state law, whichever of the three is less."); *Guidant*, 2008 WL 3896006 at *10 (raising fee caps); *Zyprexa*, 424 F. Supp. 2d at 491 ("[T]he special masters will have the power to vary fee caps . . . on the basis of special circumstances.").

32. In *Vioxx*, Judge Fallon noted that contingency fee caps and the award of fees to common benefit counsel were intertwined. *See Vioxx*, 650 F. Supp. 2d at 556 n.9 ("It should be pointed out that addressing the issue of attorneys' fees in the context of the Vioxx global settlement will require a two-step process. The first step involves examining the reasonableness of all the contingent fee contracts in the global settlement and setting an appropriate limitation on the amount of fees that attorneys may charge claimants. The second step of the process will involve allocating a percentage of those fees for the Common Benefit Fund to be distributed to those who provided services that benefitted all claimants and their attorneys."). In *Guidant*, Judge Frank addressed

perhaps the most explicit in terms of justifying the contingency fee caps by reference to the amounts he allocated for purposes of paying common benefit fees, a number he treated as fixed when comparing outcomes while varying caps on contingency fees that could be charged by individually-retained counsel. Justifying the 20% contingency fee cap he imposed, Judge Frank wrote:

> The Court finds that anything more than 20% would result in excessive fees based on the unique contours of this case. For example, setting aside 10% of the $240,000,000.00 for costs, 15% of the remaining $230,000,000.00 for the Common Benefit Attorney Fee Fund, and allowing 30% across the board for attorney fees, results in 38.81% of the total Settlement Fund going strictly toward attorney fees. Setting aside 10% of the $240,000,000.00 for costs, 15% of the remaining $230,000,000.00 for the Common Benefit Attorney Fee Fund, and allowing 25% across the board for attorney fees, results in 34.73% of the total Settlement Fund going strictly toward attorney fees. Both of these scenarios result in a total attorney-fee award that is too high. Instead, setting aside 10% of the $240,000,000.00 for costs, 15% of the remaining $230,000,000.00 for the Common Benefit Attorney Fee Fund, and allowing 20% across the board for attorney fees, results in 33.67% of the total Settlement Fund going strictly toward attorney fees, which the Court finds reasonable under the circumstances.[33]

A primary driver of the 20% cap on contingency fees that could be charged by individually-retained counsel in *Guidant* was thus the overall amount MDL plaintiffs would have to pay in attorneys' fees in light of the enhanced fees allocated to common benefit counsel. Comparing the fee caps in *Vioxx* and *Guidant* makes the same point: Why were individually-retained counsel in *Vioxx* able to charge higher contingency fees (under a universal fee cap of 32%, including the 6.5% allocated for common benefit fees) than were the individually-retained counsel in *Guidant*, who initially faced a 20% cap? In *Vioxx*, a case with a larger settlement pot, court-appointed common benefit counsel sought only 6.5% of the fund as a source of compensation for common benefit work, whereas in *Guidant*, a much larger share of a smaller settlement fund, 15%, was set aside

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enhanced payments to common benefit counsel and contingency fee caps for individually-retained counsel in the same decision. *See Guidant*, 2008 WL 682174, at *1. Judge Frank first ruled on the Plaintiffs' Steering Committee's Request Pursuant to Section II.K of the Master Settlement Agreement for a Determination of the Common Benefit Attorney Fee Amount. *Id.*, at *4-17. Judge Frank then turned to the issue of contingency fee caps. *Id.*, at *17-19. He justified a 20% cap on contingency fees chargeable by individually-retained counsel in light of the fact that any higher fee percentages would cause MDL plaintiffs to pay too much in attorneys' fee overall, in light of and taking as a given, the 15% Common Benefit Attorney Fee Fund. *Id.* at *19 n.30. Similarly, in *Zyprexa*, Judge Weinstein tethered contingency fee caps to common benefit work and fees. *Zyprexa*, 424 F. Supp. 2d at 490 ("[L]imiting fees is particularly appropriate in the instant litigation since much of the discovery work the attorneys would normally have done on a retail basis in individual cases has been done at a reduced cost on a wholesale basis by the plaintiffs' steering committee.").

33. Guidant, 2008 WL 682174, at *19 n.30. As noted, the Court subsequently adjusted the fee formula, raising the cap, without changing the underlying dynamics the original fee cap order reflects. *See supra* note 5.

for possible payments to common benefit counsel.[34] The fee capping decisions do not suggest that individually-retained counsel did less work in one case or the other, or that the scale economy advantage from MDL aggregation was greater in one case or the other. Instead, in each case, the enhanced fee award to common benefit counsel drove the cap on contingency fees individually-retained counsel could collect. The importance of these observations cannot be overemphasized: Enhanced fees were awarded to MDL common benefit counsel to facilitate aggregation by providing what amounts to an incentive payment for successfully resolving MDL proceedings via contractual aggregation, and these incentive awards, analogous to the attorneys'-fee-as-bounty[35] awarded at the end of successfully-resolved class actions, drove the fee caps on individually retained counsel.

These moves—non-class aggregate settlements, involving enhanced fee set-asides for common benefit counsel and related caps on individually-retained counsel's contingency fees—placed two procedural issues front and center: the allocation of fees between court-appointed common benefit counsel and MDL plaintiffs' individually-retained attorneys, and the role of the court with respect to awarding fees to either group of counsel, issues as to which, as noted, the MDL statute is silent. The trial court in each case provided a detailed justification for its fee orders, which the next section of this Article assesses.[36]

B. DOCTRINAL JUSTIFICATIONS FOR CONTINGENCY FEE CAPS IN RECENT MDLS

The MDL courts' fee-capping orders contain virtually identical doctrinal arguments in support of the caps, grounded in procedural analogies to class actions, the text of the MDL statute, the terms of the global settlement agreements, and ethics doctrine.[37]

34. *See supra* notes 4-5.

35. *See* William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2136 (2004) (noting the conventional distinction between private and public attorneys general based on their incentives); *see* John C. Coffee, Jr., *Rescuring the Private Atttorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 235-36 (1983) (characterizing the class action lawyer as a "bounty hunter").

36. Traditionally, courts have been reluctant to interfere with contingency fee agreements negotiated by legally competent persons, absent a concern regarding abuse—typically defined as "unreasonable" or "excessive" fees. *See, e.g.*, Rosquist v. Soo Line R.R., 692 F.2d 1107, 1111 (7th Cir. 1982) (A contingency fee "agreement between two freely consenting, competent adults will most often be controlling . . . .").

37. The fee capping orders canvassed in this Article were entered in MDLs in which non-class aggregate settlements were reached. The doctrinal arguments they marshaled appear to have traction outside this setting. Judge Carl J. Barbier, in *In re* Oil Spill, 2012 U.S. Dist. LEXIS 83214 (E.D. La. 2012), faced with class action settlements effectuated through that MDL proceeding, cited and relied on Judge Fallon's fee capping order in *Vioxx*. MDL No. 1657 at *5 (imposing a 25% contingency fee cap on individually-retained counsel, and noting that "the Court agrees with, relies upon, and incorporates by reference the reasons set forth by Judge Fallon" in *Vioxx*).

1. PROCEDURAL, STATUTORY, AND CONTRACTUAL JUSTIFICATIONS

The trial courts' orders characterized the MDL proceedings as "quasi-class actions," in part because the matters involved numerous plaintiffs, and were litigated and resolved on a group basis with substantial MDL trial court involvement.[38] On that ground, the courts invoked principles governing the regulation of attorneys' fees in class actions. These class action principles included the common benefit/common fund doctrine, which is rooted in restitutionary principles. As has been forcefully argued elsewhere, key structural features of class actions that implicate the common fund doctrine (*e.g.*, enrichment,[39] implied consent[40]) are arguably missing in the MDL setting; the restitutionary principles that justify court control over fees in class actions thus do not easily fit in the MDL context.[41] Moreover, formally, there is no such procedural creature as a "quasi-class action." The Supreme Court has made it abundantly clear that it intends to police the line, at least for purposes of non-party preclusion, between class actions certified under Rule 23, and other actions that involve merely "virtual" representation.[42] Accordingly, it is not

38. *Vioxx*, 650 F. Supp. 2d at 554 (characterizing the Vioxx global settlement as a quasi-class action, thus giving the court equitable authority to review contingency fee agreements for reasonableness); *Guidant*, 2008 WL 682174, at *18 (labeling the proceeding as a quasi-class action, implicating the court's equitable authority to impose caps on contingency fees); *Zyprexa*, 424 F. Supp. 2d at 490 (The order capping fees of individually-retained counsel was part of the court's exercise of "its power to control legal fees in a coordinated litigation of many individual related cases—in effect, a quasi-class action."). *See also* Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litigation*, 67 N.Y.U. ANN. SURV. AM. L. 589 (2012) (tracing history and context of use of "quasi-class action" model in MDLs).

39. As Professors Silver and Miller have argued, at least some MDL plaintiffs can be said to be worse off due to MDL aggregation, rather than enriched, because they are deprived of their choice of counsel on claims that are individually worth litigating (unlike many class actions, where the claims are not individually economically viable), and because the MDL plaintiffs' counsel are effectively declawed as a result of being unable to effectively threaten an aggregate trial. *See* Silver & Miller, *supra* note 29, at 122-24. *See also* William B. Rubenstein, *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATT'Y FEE DIG. 87, 87-88 (Mar. 2009) [hereinafter Rubenstein] ("The one thing a common benefit fee is not is a class action fee award," in part because, unlike, say, the small claims class action, the individual cases that comprise an MDL are individually economically viable).

40. MDL plaintiffs need not consent either to aggregation, or to participation in the MDL, or to the appointment of counsel performing common benefit work, or to the choices such counsel make. Class plaintiffs' consent, conversely, is implied, at least in cases involving money damages that are certified under Rule 23(b)(3), by the opt-out right afforded to them. *See* Silver & Miller, *supra* note 29, at 124.

41. *See* Silver & Miller, *supra* note 29, at 121-30 (questioning the application of unjust enrichment doctrine to authorize fee awards to lead lawyers in MDLs). *But see In re* Zyprexa Prods. Liab. Litig., 594 F.3d 113, 128-30 (2d Cir. 2010) (Kaplan, J., concurring) (grounding authority to compensate court-appointed common benefit counsel in the common benefit doctrine).

42. *See* Taylor v. Sturgell, 553 U.S. 880 (2008) (disapproving of the doctrine of preclusion by "virtual representation"); Troy A. McKenzie, *Toward a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y.U. L. REV. (forthcoming April 2012) (manuscript at 30) (cited with approval from the author) ("One message *Taylor* should send is the danger presented by analogies to the class action to justify procedural steps in a litigation that does not involve a certified class. Special red flags appear to go up in the view of the Court when arguments from the world of the class action are harnessed to do work outside the defined contours of that device.").

surprising that the MDL trial courts went beyond the class analogy in search of a doctrinal hook for regulating fees that are typically the subject of private contract.

The MDL statute itself provided a second major basis of the contingency fee cap orders. In *Vioxx*, for example, Judge Fallon found that the MDL statute implicitly authorized an inquiry into the reasonableness of fees:

> Admittedly, the Federal Rules of Civil Procedure expressly provide that district courts may require reasonable fees in class actions while the MDL statute lacks an analogous provision. Compare Fed. R. Civ. P. 23(g)(1)(C)(iii) and Fed. R. Civ. P. 23(h), with 28 U.S.C. § 1407. This statutory difference, however, is not the end of the story. First, the MDL statute requires that transferee courts "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). In the context of contingent fee arrangements, implementing a reasonable cap promotes justice for all parties by allowing claimants to benefit (as their attorneys have) from the economies of scale and increased efficiency that an MDL provides. Certainly, this statutory language lends support to the proposition that MDL courts, like class action courts, can exercise equitable authority to examine the reasonableness of fees.[43]

As an attempt to articulate doctrine, Judge Fallon's statutory argument heads in the right direction, grounding court supervision of fees in the procedural statute itself. Judge Fallon's argument also implies a formula for calculating court-appointed counsel compensation and fee caps by quantifying the efficiency gain from MDL coordination. But the implied statutory authority argument with regard to court intervention on fees suffers from a number of weaknesses, both in formulation and application: As currently framed, it does not explain why the MDL statute's stated goal of "just and efficient" pretrial management requires intervention in privately-negotiated fee contracts. The word "just" in the MDL statute may be sufficiently elastic to imply that plaintiffs should enjoy some or all of the scale economy advantage that MDL litigation produces for their attorneys; but the leap from just pretrial management to re-allocation of attorneys' fees is arguably a big one. It involves clearing the hurdle of a powerful tradition of honoring privately negotiated attorney fee contracts, discussed below. These, though, are more matters of justification and articulation of doctrine, than of power. The real problem with the statutory argument is in the application of it. Specifically, it is not at all clear that any one of the MDL courts in *Vioxx*, *Guidant*, or *Zyprexa* actually used the formula in Judge Fallon's procedural argument. When imposing fee caps the courts imposed across-the-board fee caps. These caps impacted different MDL plaintiffs differently, not depending on the scale economy advantage each plaintiff enjoyed, but, rather, depending merely on the original contingency fee agreement. Plaintiffs who agreed to pay more at the outset benefited more from the caps, even if they did not necessarily benefit any

43. *Vioxx*, 650 F. Supp. 2d at 558.

more from common benefit work than did those plaintiffs whose original contingency fee agreements were closer to the cap.[44]

A third major grounding of the court's intervention in private fee agreements was the text of the global settlement agreements,[45] which, according to the trial courts in *Vioxx* and *Guidant* at least, expressly authorized the courts to regulate fees.[46] Some of the individually-retained plaintiffs' attorneys expressed surprise that the global settlement agreement terms vested the trial courts with the authority to impose contingency fee caps.[47] It is safe to assume at this point that lawyers involved in mass torts are on notice of this issue. It will be interesting to see whether such awareness limits the ability of court-appointed common benefit counsel to negotiate global agreement terms that both render individually-retained counsel's fees vulnerable to caps, and prompt widespread participation in MDL aggregate settlements.

2. THE COURTS' INHERENT AUTHORITY TO SUPERVISE MEMBERS OF THE BAR TO ENFORCE ETHICS RULES

The focus of this Article is the final doctrinal justification asserted by the MDL trial courts in support of contingency fee caps. This justification transcends the terms of the global settlement agreements in those cases. In each case, the trial court asserted its inherent authority to regulate members of the bar to enforce ethics norms.

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44. As discussed below, it is this squarely procedural foundation for judicial intervention in MDL fees that must be developed, strengthened (via statutory amendment to clarify the role of fees in achieving MDL procedural goals, or via case law more clearly grounding fees in the inherent authority of courts to manage proceedings, rather than to enforce ethical norms), and, most importantly, actually applied to determine fee awards and allocations.

45. *See* Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 124 (2012) ("A private mass tort settlement begins as a contractual agreement between plaintiffs' liaison counsel and the defendant(s) involved in a particular mass tort litigation that sets forth a negotiated settlement offer for each individual to consider. The substance of the settlement offer consists of a commitment by the defendant(s) to pay a fixed amount to the current aggregate plaintiff population, with individual awards varying based on the strength of each plaintiff's claim as determined by the allocation of 'points' among the plaintiffs by a neutral administrator pursuant to negotiated—and often very complex—formulas and grids. . . . Once negotiated by liaison counsel, the master settlement offer is then presented to individual plaintiffs for consideration and often made available for inspection by the general public as well. Each individual plaintiff may either affirmatively opt in to the claims process (*i.e.*, accept the settlement offer) and voluntarily dismiss his or her lawsuit, or reject the settlement offer and continue litigating.").

46. *See Vioxx*, 650 F. Supp. 2d at 561-62 ("The Vioxx Settlement Agreement is replete with examples of the parties' desire to grant authority to this Court" to adjust fees.); In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174 at *4 (D. Minn. 2008) ("The MSA included a provision, section II.K., stating that the Court would determine the amount of the Common Benefit Payment.").

47. *See, e.g., Vioxx*, 650 F. Supp. 2d at 561 (Certain plaintiffs' counsel opposed to the contingency fee caps asserted that no provision of the settlement agreement purports to regulate the fee contracts at issue, and that, moreover, the agreement "expressly divests this Court of the authority to act," contentions rejected by Judge Fallon).

In *Zyprexa*, the first and most ground-breaking of the three MDLs canvassed herein, Judge Weinstein noted that the "judiciary has well-established authority to exercise ethical supervision of the bar in both individual and mass actions."[48] This authority includes "the power to review contingency fee contracts for fairness."[49] He further held that the court's ability to supervise fees "includes the power to determine the fee contract was not obtained through undue influence or fraud and that the amount of the fee is not unfair or excessive under the circumstances of the case."[50] Calling the project of reviewing individually negotiated fees "distasteful and unappetizing,"[51] Judge Weinstein nevertheless undertook it because the circumstances of the *Zyprexa* MDL purportedly warranted it: The contingency fees were deemed potentially excessive as a consequence of MDL administrative aggregation itself, which involved the appointment of particular counsel to perform common benefit work. Such counsel's labor generated economies of scale thereby reducing litigation costs of individually-retained counsel who would otherwise have been forced to reproduce the same common work in each separately-filed case. Failure to pass the savings gained from aggregation on to MDL settlement participants risked tarnishing the public's perception of the profession in general and of MDL litigation in particular.[52]

The trial courts in *Guidant* and *Vioxx* made substantially identical arguments, referring to the same principles and doctrine. The cases also cited each other as additional support for these propositions. In *Guidant*, Judge Frank held: "this Court has the inherent right and responsibility to supervise the members of its bar in both individual and mass actions, including the right to review contingency fee contracts for fairness," citing some of the same ethics cases prohibiting excessive and unreasonable fees on which Judge Weinstein relied in *Zyprexa*.[53] Bringing

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48. *In re* Zyprexa Prods. Liab. Lit., 424 F. Supp. 2d 488, 492 (E.D.N.Y. 2006) (citing *Ex Parte Bur*, 22 U.S 529, 530 (1824) (quotation omitted)).

49. *Id.* (citing Taylor v. Bemiss, 110 U.S. 42, 45-46, 3 S. Ct. 441, 443-44 (1844) (using "clearly excessive" standard)).

50. *Id.* (citing Rosquist v. Soo Line R.R., 692 F.2d 1107, 1111 (7th Cir. 1982)).

51. *Id.* at 493.

52. *Id.* ("The total settlement amount held in escrow is large, and the over 8,000 plaintiffs involved in the settlement are represented by only a handful of firms, all of whom can be expected to gain substantial fees from their numerous clients' combined recoveries. Yet these firms all benefitted from the effectiveness of coordinated discovery carried out in conjunction with the plaintiffs' steering committee and from other economies of scale, suggesting a need for reconsideration of fee arrangements that may have been fair when the individual litigations were commenced."); *Id.* at 493–94 ("The risk of excessive fees is a matter of special concern here because of the mass nature of the case. As the *Farmington Dowel* court recognized, excessive fees can create a sense of overcompensation and reflect poorly on the court and its bar. *Farmington Dowel*, 421 F.2d at 90 n.62. *See also Rosquist*, 692 F.2d at 1111 ('Courts have a stake in attorney's fee contracts; the fairness of the terms reflects directly on the court and its bar.').").

53. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 2008 WL 682174, at *18 (citing, among other authorities, the *Rosquist*, *Farmington Dowel*, and *Taylor* decisions on which Judge Weinstein relied in the *Zyprexa* fee capping order).

that body of doctrine to bear on the case before him, Judge Frank found that plaintiffs' counsel were conflicted with regard to the fee issue (because they were not motivated to contest their own fees), that excessive fee awards in the MDL would risk being viewed as "abusive" by the public, and that the plaintiffs themselves were "both physically ill and aging," all of which together suggested that only the court could "effectively exercise the ethical control of fees and properly monitor fee division to protect all Plaintiffs' interests."[54]

Similarly, in *Vioxx*, Judge Fallon, citing Judge Frank in *Guidant* and Judge Weinstein in *Zyprexa*, among other authorities, noted "Courts that have considered the issue have nearly unanimously concluded that the power to consider the reasonableness of contingent fees is inherent in a federal court."[55] He married that authority to the court's power to "prevent a violation of the lawyers' professional responsibility to charge only reasonable rates . . . ."[56] As particular justification for the exercise of this authority in the *Vioxx* MDL litigation, Judge Fallon found an inherent conflict of interest between the claimants and their lawyers on the issue of fee caps, since both seek to maximize their respective percentage take of any award; that outsized contingency fees would "damage the public's faith in the judicial process"; and that the claimants were "vulnerable," because they were generally elderly and claimed personal injuries from use of a drug.[57]

There is no question that trial courts have long claimed inherent authority to supervise members of the bar, and specifically to supervise attorneys' fees for reasonableness.[58] Contingency fee contracts are treated differently than the contracts of laypersons, and even of other professionals, because lawyers are subject to special controls, including the disciplinary powers of courts and the

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54. *Id.*

55. *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 559-60 (citing the *Guidant* and *Zyprexa* fee capping orders, as well as Hoffert v. General Motors Corp., 656 F.2d 161, 164 (5th Cir. Unit A Sept. 1981)).

56. *Id.* at 560.

57. *Id.* at 560-61.

58. Chambers v. NASCO, 501 U.S. 32, 43, 48 (1991) (recognizing flexibility of the inherent powers doctrine); *see also* Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENV. U. L. REV. 437, 455 (2010) ("Courts, in both class actions and non-class action mass torts cases, have long considered it a function of their inherent authority and case management jurisdiction to keep track of lawyers' time and costs, on an ongoing basis, and to set limits, not only on court-awarded class counsel fees, but on private contingency fees as well. This trend has recently accelerated."); Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 8 (2005) [hereinafter McMorrow] ("Federal courts have the inherent power to control the proceedings in their courtroom, including the long-recognized (albeit conceptually unclear) inherent power to regulate attorneys."); Resnik, Curtis, & Hensler, *supra* note 2, at 336 ("Courts have power over fees either because Congress has said so (in the context of requiring defendants to pay attorneys' fees of prevailing plaintiffs, in the bankruptcy arena, and in other statutory litigation schemes) or because courts have found their own authority."). *But see generally* Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003) (questioning the conceptual basis of the federal court's inherent authority to regulate attorneys).

ethical prescriptions formulated by bar associations.[59] Courts' power to supervise attorneys' fees for reasonableness is traditionally located in the courts' power to "regulate the practice of law."[60] This authority is so widely recognized that many of the attorneys subjected to fee caps in *Vioxx*, *Guidant*, and *Zyprexa* did not even bother to challenge its existence.[61] The more difficult question, then, with regard to these cases, is whether the courts' authority was properly bounded and exercised.

III. MDL TRIAL COURTS HAVE PUSHED THE BOUNDARIES OF THEIR "INHERENT AUTHORITY" TO POLICE FOR EXCESSIVE FEES

The *Vioxx*, *Guidant*, and *Zyprexa* fee capping orders cite a number of cases containing broad language about the authority of trial courts to supervise counsel. But those cases involve an application of that authority that is distinct from, and narrower than, what the courts have done in these MDL cases. In general, the cases cited in the MDL courts' fee capping orders involved highly-contextualized and case-specific court supervision of attorneys' fees, where the plaintiffs were legally incompetent (*e.g.*, minors), or where court intervention in fee issues was attendant to either the award of statutory fees (*e.g.*, under federal antitrust law), or to the creation of a common fund as part of a class action settlement. A different type of inherent authority—not to police counsel's adherence to ethics norms, but, instead—to ensure the proper conduct of litigation, may properly ground court interventions to ensure payment to common benefit counsel. However, its parameters in the MDL setting are not yet known, because the procedural questions at stake with regard to MDL fees have not been definitively asked or answered.

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59. *See* Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 FORDHAM L. REV. 443, 445 (1998) ("When lawyers appear before the courts as litigants, special rules laid down for lawyers in contract cases can be viewed as extensions of the courts' powers to regulate the conduct of members of the bar. Similarly, the courts' application, in contract decisions, of disciplinary standards of conduct, can be seen as further extensions of the power of the organized profession to guide or discipline the conduct of individual lawyers.").

60. *See, e.g.*, Gardner v. N.C. St. Bar, 316 N.C. 285, 287-88 (1986) ("While we agree with the statement in McMichael v. Proctor, 243 N.C. 479, 485, 91 S.E.2d 231, 235 (1956), that 'questions of propriety and ethics are ordinarily for the consideration of the . . . Bar' because that organization was expressly created by the legislature to deal with such questions, nevertheless the power to regulate the conduct of attorneys is held concurrently by the Bar and the court."); Perillo, *supra* note 59, at 450 (citing First Nat'l Bank v. Brower, 368 N.E.2d 1240, 1242 (N.Y. 1977)).

61. *See, e.g.*, *In re* Vioxx, 650 F. Supp. 2d at 551 (noting objections to order capping individually-retained attorneys' contingency fees asserted by "a group of five attorneys, identified as the Vioxx Litigation Consortium"). For an interesting discussion of the ethical implications for individually-retained counsel of objecting to contingency fee caps, see Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833 (2011), discussing objections by attorneys to the fee caps imposed in recent MDL cases, and evaluating the contested boundary line between the contractual right to payment and lawyers' fiduciary duties to clients.

A. THE ETHICS DOCTRINE THE MDL TRIAL COURTS INVOKED CONTEMPLATES PARTICULARIZED INQUIRIES

How does a trial court exercising its inherent authority to supervise members of the bar know if a fee is reasonable or, conversely, excessive? The MDL trial courts in *Vioxx*, *Guidant*, and *Zyprexa* provided one answer to this question: look to ethics doctrine.[62] These courts did not confine themselves to the ethics rules of any particular state when exercising their inherent authority to regulate members of the bar. In fact, they declined in each case to select a jurisdiction's ethics code, or to address sticky choice of law questions regarding which jurisdiction's ethics rules would apply.[63]

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62. *See* McMorrow, *supra* note 58, at 22 ("The inherent powers doctrine sets out the court's power, but it does not articulate any standards or rules. It is a jurisdictional statement, not an articulation of norms. Because the inherent powers doctrine is designed to supplement the federal rules, courts are left with a common law process to guide them in using their inherent powers. When applied to attorney conduct, the federal courts do not write on a blank slate. The scholarly debate over rules of attorney conduct in federal courts has often been framed as if the ethics rules (*Rules of Professional Conduct*) are the dominant source of norms. Ethics rules are important, but are not the only place to look for litigation ethics. Litigation ethics is supported by at least four core anchors: the Federal Rules of Civil and Criminal Procedure and Evidence, the Rules of Professional Conduct, norms of conduct established by custom or practice within the bar, and expectations framed by the judges before whom the lawyer is appearing.") (footnote omitted). The MDL courts were not limited to ethics rules to frame their exercise of inherent authority. For example, though they did not do so, they could have rested the caps more squarely on agency or fiduciary law (of one or more jurisdictions), and the generally accepted requirement that an agent charge "reasonable" fees. *See* Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. ILL. L. REV. 1181, 1182 (2003) ("Our common-law heritage includes development of the three main branches of civil law: contracts, torts, and fiduciary obligation . . . . The attorney-client relationship is the archetype for the fiduciary obligation . . . The principal fiduciary obligations imposed on the lawyer include . . . [the duty of] acting fairly towards the client. The duties to act fairly and in a non-self-interested fashion, in particular, relate to the financial relationship between the lawyer and client . . . . In recent decades, the fiducial rights of clients have been under assault.") (alteration in original) (footnote omitted). Since the courts in each MDL fee capping decision linked their exercise of inherent authority to "ethics," this Article meets them on their own terms, and examines their exercise of fee capping authority as they framed it, *i.e.*, as an issue of ensuring ethical conduct by individually-retained counsel.

63. In general, when regulating members of the bar, federal courts are not bound by any one set of ethics rules. Depending on the federal court, the judges may look to the *ABA Model Rules*, the rules adopted by the state in which the federal court sits, or, less often, the federal court's own detailed rules. *See* McMorrow, *supra* note 58, at 8 ("An analysis of the citation patterns of federal courts reveals a healthy reference to either the state or Model versions of the rules of professional conduct. But in practice, the rules of professional conduct function like standards, serving to guide the federal courts but not unduly constrain their decision-making."); David Hricik & Jae Ellis, *Disparities in Legal Ethical Standards Between State and Federal Judicial Systems: An Analysis and a Critique*, 13 GEO. J. LEGAL ETHICS 577 (2000). While there is some variation in the precise language used, the multi-factor tests deployed in the various jurisdictions consider many of the same factors as those listed in Model Rule 1.5. *Compare* CAL. RULES OF PROF'L CONDUCT R. 4-200 ("Fees for Legal Services") (2009) ("(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. (B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.") *with* N.Y. RULES OF PROF'L CONDUCT R. 1.5 ("Fees and Division of Fees") (2012) ("A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive.").

In *Vioxx*, for example, Judge Fallon cited the *ABA Model Rules of Professional Conduct*, Rule 1.5, to frame his discussion of the reasonableness requirement for contingency fees, and then string cited cases from multiple jurisdictions.[64] In *Guidant*, Judge Frank cited federal court cases from a range of jurisdictions capping excessive fees, invoking ethics principles without citing any particular ethics rule.[65] Similarly, in *Zyprexa*, Judge Weinstein discussed fee caps as part of the judiciary's "well-established authority to exercise ethical supervision of the bar" to "ensure that fees are in conformance with codes of ethics and professional responsibility" without identifying a specific ethical code or code provision.[66]

The factors considered in the *ABA Model Rules*, and in the professional rules adopted by most states, contemplate a particularized assessment of reasonableness given the circumstances of each lawyer-client relationship and case. Rule 1.5 of the *ABA Model Rules* identifies a non-exclusive list of factors to be considered as part of the determination of whether a fee is unreasonable, addressing such context-specific matters as the client's understanding of a lawyer's likely opportunity costs, the work done by the lawyer in a particular case, as well as the specific lawyer's experience and ability.[67] The comment to the

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64. *In re* Vioxx, 650 F. Supp. 2d at 559. Objectors in *Vioxx* insisted that the court should consider whether fees were excessive by reference of each jurisdiction's rules. Rather than finding the absence of any conflict of law on the issue of fee reasonableness or excessiveness as a matter of ethics doctrine, or otherwise undertaking a choice of law analysis, Judge Fallon held that a state-by-state analysis would be "squarely at odds with the mandate of justice and efficiency established by the MDL statute," because conducting a fifty-state survey would "drain judicial resources and would eliminate the efficiency that the MDL was designed to create." *Id.* at 563. Furthermore, the court held that circumventing a choice of law inquiry was ultimately fair, because the claimants' attorneys were all tasked with navigating their clients through the same settlement matrix "regardless of in which state their fee arrangement was consummated." *Id.* To some extent, what we are seeing under the mantle of MDL litigation practice—*i.e.*, MDL courts attempting to impose a uniform set of ethics norms, at least with respect to attorneys' fees, on all related cases filed in the federal system—is reminiscent of past (failed) efforts to develop a federal rules of attorney conduct. *See* McMorrow, *supra* note 58, at 7.

65. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *18 (D. Minn. Aug. 21, 2008).

66. *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 492 (E.D.N.Y. 2006).

67. ABA Model Rule 1.5 lists as factors to be considered:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client; and
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> MODEL RULES OF PROF'L CONDUCT R. 1.5 (2010) [hereinafter MODEL RULES]

Identification of contingency fees that are so excessive that they violate the ethics rules is much harder than identifying other more obvious kinds of attorney misconduct with respect to fees, such as stealing from clients. An example is the 2009 conviction of attorneys William Gallion and Shirley Cunningham, Jr., on multiple counts of federal wire fraud, for their handling of client settlement funds in connection with the Kentucky

Model Rule also mentions potentially applicable (presumably state) laws imposing limits on contingent fees.[68] Cases filed within a single MDL may involve claims of varying difficulty (*e.g.*, relating to individual proof of claims, such as the availability or clarity of medical records, and other causation issues), prosecuted by lawyers of dramatically different reputation or ability, who tailor the prosecution of each case to its individual merits and/or according to the lawyer's own practices, and whose opportunity costs vary dramatically.[69] Faithfully applying the factors listed in Model Rule 1.5 and in the fee provisions of most ethics codes requires a court to evaluate each lawyer-client relationship on its own terms.[70] Perhaps in recognition of the need for such a contextualized inquiry, the MDL trial courts built room into their fee capping orders for adjustments from the contingency fee caps, upon extraordinary showings.[71] But the courts inverted the ethics doctrine they purported to use to frame their exercise of inherent authority. The attorney-client contract typically controls absent extraordinary circumstances suggesting the need to prevent collection of unreasonably excessive fees.[72] Here, in the MDL fee capping orders, contractual

Fen-Phen diet drugs litigation. *See* Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KANSAS L. REV. 979, 983-987 (2010) (chronicling lawyers' mishandling of client settlement funds in order to circumvent and exceed contracted-for contingency fee amounts). That kind of outright theft of client funds obviously violates ethics rules. It is not at all clear or obvious that any contingency fee amount above the caps set in the MDL cases canvassed herein would have violated any ethics rule. Stealing from clients is always wrong; but is a total 33% contingency fee, rather than, say, the 32% contingency fee cap imposed in *Vioxx*, obviously wrong, as a matter of professional ethics?

68. MODEL RULES R. 1.5 cmt. 3 ("Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable . . . .").

69. Variation in the performance of individually-retained counsel prompted Judge Frank to bemoan:

In the majority of cases in this MDL, the Court believes that contingency fee contracts have worked just as they should. Unfortunately, the Court has observed instances where this has not always occurred. For example, the Court has received numerous communications from Claimants stating that their attorneys have never contacted them or that their attorneys are making the Claimants complete, by themselves, all of the settlement documents . . . . Some attorneys have filed documents with the Court that are wholly incomplete, based on the wrong local rules, or submitted in handwritten form.

In re Guidant, 2008 WL 3896006, at *9.

70. *See* Amiee Lewis, Note, *Limiting Justice: The Problem of Judicially Imposed Caps on Contingent Fees in Mass Actions*, 31 REV. LITIG. 209, 228–30 (2012) (analogizing across-the-board attorneys' fee caps in MDLs to impermissible legislation from the bench, and contrasting such caps with the kind of ex ante, context-specific inquiry Model Rule 1.5 contemplates).

71. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 564 ("However, upon further reflection, this Court recognizes that, simply because of the large number of claims in this case, in theory and perhaps in reality there may be one or more cases in which special treatment might be justified. In this particular case there are over 50,000 claims originating in all fifty states. Accordingly it is not unreasonable to conclude that certain rare circumstances might exist which would warrant a departure, in either direction, upwards or downwards, from the universal fee cap."); *In re Guidant*, 2008 WL 682174, at *20 ("Parties may petition the Special Masters to have the 20% [cap] increased . . . .").

72. *See, e.g.*, Alderman v. Pan Am World Airways, 169 F.3d 99, 102-03 (2d Cir. 1999) ("Courts have broad authority to refuse to enforce contingent fee agreements that award fees that exceed a reasonable amount. However, we have recognized that a contingency agreement is 'the freely negotiated expression both of a [client's] willingness to pay more than a particular hourly rate to secure effective representation, and of an

arrangements were presumptively excessive and in need of reform. The MDL courts all cited the early case of *Gair v. Peck*[73] for the proposition that a court has relatively sweeping "inherent authority" to inquire into fee arrangements to protect clients from excessive fees and conflicts of interest, even by establishing broadly applicable caps.[74] *Gair*'s holding was narrower. *Gair* was an action against the Justices of the New York Supreme Court, Appellate Division, First Judicial Department, who had adopted a rule defining with specificity what percentage contingency fees constituted "unreasonable" or "unconscionable" fees as defined by the state ethics code.[75] In upholding the lower court's exercise of rule-making authority, the appellate court in *Gair* interpreted the challenged rule narrowly, holding that the rule did nothing more than make provisions for disciplining attorneys for receiving more from their clients than could legally be collected under retainer agreements "even in the absence of the rule."[76] As thus interpreted, the challenged rule in *Gair* was not an across-the-board cap, but, instead, was a "procedural aid in rendering effectual" the court's disciplinary power by determining "where the burden of proof shall lie in the determination of censurability of contingent fees in the individual case."[77]

The fee cap orders in *Vioxx*, *Guidant*, and *Zyprexa* were, unlike the rule

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attorney's willingness to take the case despite the risk of nonpayment.' Therefore, a court should seek to enforce the parties' intentions in a contingent fee agreement, as with any contract . . . . The district court's assessment of a reasonable fee must begin with the agreement itself.") (citations omitted); McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101-02 (3d Cir. 1985) ("It should therefore be the unusual circumstance that a court refuses to enforce a contractual contingent attorney's fee arrangement because of events arising after the contract's negotiation."); Rosquist v. Soo Line R.R., 692 F.2d 1107, 1111 (7th Cir. 1982) (A contingency fee "agreement between two freely consenting, competent adults will most often be controlling . . . ."); Dunn v. H.K. Porter Co., 602 F.2d 1105, 1111-12 (3d Cir. 1979) ("Where, however, the lawyer and client have entered into a contractual fee agreement prior to the litigation, the considerations stressed above argue in favor of deference to the parties' contractual arrangement. The strong judicial reluctance to enforce the terms of a judicially fashioned bargain upon the parties now presses in favor of honoring the express terms of the fee agreement."). *See also* discussion *infra* Section III.B.

73. Gair v. Peck, 6 N.Y.2d 97 (N.Y. 1959).

74. *In re Vioxx*, 650 F. Supp. 2d at 559; *In re Guidant*, at *18; *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 495 (E.D.N.Y. 2006).

75. 6 N.Y.2d at 101 (quoting the disputed rule). The limited function of the disputed rule is explained as follows:

Rule 4, *sub judice*, is essential in order to put on record the data necessary to be used as a foundation for taking disciplinary action. Even under plaintiffs' theory of action, no objection would lie against the rule if every lawyer filing a contingent fee retainer agreement were also required to file in his closing statement the amount of time he devoted to the case and an enumeration of the other facts underlying the elements entering into the value of the lawyer's services (citation omitted), That would enable the court *after the event* and *in the individual case* to determine whether the lawyer was censurable for charging a contingent fee that was unconscionable as being out of all relation to the value of the work performed. The 'fee schedule' in rule 4 dispenses with supplying that information where the agreed contingent fee is less than the percentages designated in the rule. If the stipulated fee is greater, the attorney is required to supply the information necessary on which to form a conclusion concerning the value of the professional services which have been rendered.

Id. at 109.

76. 6 N.Y.2d at 107-108.

77. *Id.* at 114.

interpreted in *Gair*, not designed merely to shift the burden of proof, once contingency fee percentages exceeded amounts that could be legally collected even in the absence of the fee capping orders. Instead, as explained in Section II.A., above, the fee cap orders were driven by the procedural circumstances presented by each of the MDLs in which they were entered, and, specifically, were set by reference to and to create space for the fee set asides for court-appointed common benefit counsel. The MDL fee cap orders were thus neither an exercise of rule-making authority to aid in the enforcement of ethics norms generally, as in *Gair*, nor the fact-specific inquiry into the circumstances of each case and retainer agreement that the ethics rules contemplate.

B. THE CASES CITED BY THE MDL TRIAL COURTS INVOLVE PROTECTION OF INCOMPETENTS, OR AWARDS OF FEES IN STATUTORY FEE SHIFTING OR CLASS ACTIONS

The cases cited by the MDL trial courts in the contingency fee capping orders canvassed in this Article involved either the protection of persons deemed to be legally incompetent, or the award of fees in statutory fee shifting cases or class actions. *Rosquist v. Soo Line R.R.*, a 1982 Seventh Circuit decision prominently cited in each of the MDL orders, is typical of the cases involving incompetents. In that case, the Circuit Court upheld United State District Court Judge for the Northern District of Illinois John F. Grady, Jr.'s decision to reduce attorneys' fees provided for by a contingent fee contract. That case arose out of an accident in which a Soo Line Railroad train collided with a car carrying Edward Rosquist, Sr., his wife, and two children. The collision killed Rosquist's wife, and severely injured his eldest child. Attorney William D. Maddux represented the plaintiffs on a contingency fee basis. Mr. Maddux initially negotiated a structured settlement of the case with a then-present value of $304,874,[78] with attorneys' fees to be paid separately by the defendant, totaling $250,000 payable over five years. Because the case involved minors whose father was deemed incapable of protecting their interests (due to financial and psychological problems), Judge Grady scrutinized the settlement, and determined that it was not adequate. He appointed a guardian *ad litem* to investigate the case and advise the court on behalf of the most severely injured child. The case subsequently went to trial, resulting in a $628,000 verdict. The district court entered judgment on the verdict and ordered both the guardian ad litem and Mr. Maddux to submit petitions for fees and expenses. Judge Grady capped Mr. Maddux's fee at 15 percent, down from the 30 percent the original contingency fee contract permitted.[79] In rejecting Mr. Maddux's appeal from the fee order, the Seventh Circuit emphasized the unique features of this case – exploitative behavior (appearing to potentially trade

78. All dollar figures are as described in the opinion, and are not adjusted to 2012 present value.
79. Rosquist v. Soo Line R.R., 692 F.2d 1107, 1109 (7th Cir. 1982).

an early settlement and generous fees for compensation to the client) by an attorney with regard to legal incompetents.[80]

Farmington Dowel—cited in *Rosquist*, and in the *Guidant* and *Zyprexa* fee capping orders—similarly defines a relatively narrow set of circumstances under which courts will exercise inherent authority to upset fee agreements entered into by competent adults. *Farmington Dowel* involved a fee petition made by plaintiffs' counsel upon successfully litigating a federal antitrust claim under Section 2 of the Sherman Act and Section 2(a) of the Clayton Act. The jury found $109,100 in damages, trebled it, and awarded $327,300 to the plaintiff, Farmington Dowel. Farmington Dowel's attorneys then sought one-third of that treble-damages amount as fees under Section 4 of the Clayton Act. Due to the statutory fee application, the district court learned that the plaintiffs' counsel's fee agreement with Farmington Dowel entitled counsel to one-third of the trebled damages, plus all the amount awarded as a "reasonable attorney's fee" pursuant to Section 4 of the Act. The district court determined that the combination of the contracted-for contingency fee and a Section 4 award would be excessive; it thus declined to award fees under the Act, limiting plaintiffs' counsel to its contingency fee contract.

The First Circuit upheld the ruling, holding that the trial court was justified in limiting the Section 4 fee award in order to prevent attorneys practicing before it from receiving "excessive" fees.[81] The court took pains to cabin the function of the ethics doctrine, explaining that even with regard to Section 4 fee applications under the federal antitrust law, the excessiveness inquiry under the professional rules would be "reserved for exceptional circumstances," taking into account the agreement of the parties, which, "if freely made, is not lightly set aside."[82] Furthermore, the First Circuit explicitly distinguished between the reasonableness inquiry with regard to fees awarded under Section 4, and the "excessive-

80. *Id.* at 1110-11 ("In ordinary circumstances, trial courts may have no reason to inquire into the terms of an attorney-client contract. But in this case, there were two children, one severely injured, both deprived of their mother and in effect abandoned by their father.") The Seventh Circuit grounded the trial court's authority to cap the contingency fee in this case in part in the "court's inherent power of supervision over the bar to examine the attorney's fee for conformance with the reasonable standard of the Code of Ethics." *Id.* The Seventh Circuit did not set forth a specific standard for defining unreasonable fees that violated the Code of Ethics; instead, it highlighted the trial court's discretion to review for reasonableness under the particular circumstances of the case. *Id.* Several other authorities cited in the recent spate of decisions capping contingency fees similarly involved incompetents. *See, e.g.*, Taylor v. Bemiss, 110 U.S. 42 (1884) (cited in *Guidant*, at *18; *Zyprexa*, 424 F. Supp. 2d at 492) (confirming ability of guardian ad litem to contract for legal services on behalf of minors on a contingency basis); *see also* Hoffert v. Gen. Motors Corp., 656 F.2d 161, 165 (5th Cir. 1981) (cited in *Vioxx*, 650 F. Supp. 2d at 554, 557, 560-61) (approving trial court's imposition of a contingency fee cap, jurisdictionally, on plaintiff's counsel's appeal to the trial court's equitable powers to review and ratify the proposed settlement of a claim of a minor as to whom the court appointed a guardian ad litem, and where plaintiff's counsel originally sought a 40 percent contingency fee for a case that settled two months after filing for $2.5 million).

81. Farmington Dowel Prod. Co v. Forster Mfg. Co., 421 F.2d 61, 87 (1st Cir. 1969).

82. *Id.* at 88-90.

ness" inquiry ethics doctrine implicates. Among other differences, the Section 4 inquiry was generally *ex post facto*, assessing the work done during the life of the case, whereas the ethics inquiry assessed the reasonableness of the contingency fee at the time the agreement was made.[83] Similarly, the ethics inquiry involved a distinct test; rather than the "reasonableness" inquiry involved in awarding fees under Section 4, a review for excessiveness under the ethics rule attempted to define "the outer limit of reasonableness." Finally, it should be noted that the negotiated fee percentage was undisturbed; the court in *Farmington Dowel* made its adjustments solely in regard to the statutory fee under Section 4.[84]

The cases cited in the MDL fee capping orders do not support the adjustment of contingency contracts negotiated by legally competent clients as a regularly-deployed tool for allocating fees in MDL. Instead, the cases cited by the MDL courts suggest that judicial intervention in privately negotiated fee contracts to prevent attorneys from earning excessive fees is an exceptional event, often to protect unusually vulnerable plaintiffs.[85] To the extent courts' interventions in contingency fees stray from this setting, it is typically because they are required to set the plaintiffs' attorneys' fee, under a fee shifting statute, or in connection with a class action fee award.

C. THE DISSONANCE BETWEEN ETHICS DOCTRINE AND THE PROCEDURAL ISSUE OF ALLOCATING FEES AMONG LAYERS OF COUNSEL IN MDLS; A PATH FORWARD

MDL trial courts certainly can use ethics doctrine to police for excessive fees. But as the decisions their fee-capping orders cite demonstrate, doing so would involve a different approach than the imposition of across-the-board fee caps used in the MDL proceedings discussed in this Article. First, the need for court intervention of any kind, as an ethics matter, would be assessed on an individualized basis, considering each lawyer-client fee agreement and relationship, applying the contextual, case-specific factors discussed in both the Model Rules and relevant case law, discussed above. Second, that assessment would be

83. *Id.* at 89.

84. *Id.* at 90. Other cases cited in the MDL courts' fee capping orders similarly involved either statutory fees or fees awarded in class actions. *See generally* Blum v. Stenson, 465 U.S. 886 (1984) (cited in *Guidant*, at *9) (civil rights case involving statutory fees); Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255 (8th Cir. 1980) (antitrust case in which losing defendant challenged statutory attorneys' fee award to plaintiff, and where contingency fee agreement was discussed as part of the determination of the statutory fee award rather than as justification for a cap placed on the contingency fee contract itself, cited in *Guidant*, at *18); *In re* Infospace, Inc. Sec. Litig., 330 F. Supp. 2d 1203 (W.D. Wash. 2004) (cited in *Guidant*, at *4, *9, *15) (federal securities class action).

85. Of the three case studies examined here, only *Zyprexa* involved particularly vulnerable plaintiffs; nothing distinguishes the plaintiffs in *Vioxx* and *Guidant* from typical products liability mass torts involving personal injuries. *See, e.g.*, Silver & Miller, *supra* note 29, at 117 ("We know of no physical basis on which to distinguish the Guidant and Vioxx claimants from other plaintiffs with serious injuries.").

initiated in exceptional cases, for example where the plaintiffs are so vulnerable as to be incapacitated, as noted in the authority on which the MDL fee capping orders rests. Finally, ethics doctrine would be used to identify specific fee awards that violate professional norms of reasonableness, rather than to achieve case management goals, such as promoting aggregate, non-class contractual settlements via the award of enhanced fees to court-appointed common benefit counsel, the current driver of fee caps in the MDL proceedings canvassed in this Article, as demonstrated in Section II.A., above. Put differently, ethics doctrine prohibiting unreasonably excessive fees will apply only in limited cases within particular MDLs, as an exceptional rather than a routine event, to police for unreasonably excessive fees, rather than to regularly establish common benefit fees as a tax on individually retained counsel.

Procedural doctrine can be developed in the MDL setting that functionally matches the procedural doctrine that structures decision-making regarding fees in class actions. Class action fees are not determined by reference to ethics doctrine such as ethics prohibitions on the charging of unreasonably excessive fees. Instead, as noted, in class actions, the fee award to class counsel, which is analogous to the award in the MDL setting to common benefit counsel, is rooted in the equitable common fund doctrine, or in fee shifting statutes associated with particular substantive law claims, application of which is structured by a rule of procedure, Rule 23(h), in the service of expressly procedural goals.[86] In the MDL setting, in proceedings resolved not via class aggregation under Rule 23, but, instead, via contractual aggregation, as were *Vioxx*, *Guidant*, and *Zyprexa*, the fee allocation questions would not be resolved by reference to the common fund doctrine, or, in products liability mass tort cases, pursuant to a fee-shifting statute.[87] Instead, to be functionally equivalent to the fee award in class actions, MDL common benefit fees should be awarded either pursuant to terms added to the MDL statute via Congressional authorization, or via the trial courts' exercise of their inherent authority to establish case management structures that facilitate the goals of MDL consolidation, the same authority that, for example, allows MDL trial courts to appoint common benefit counsel in the first instance.[88] That

86. *See supra* notes 10-12.

87. *See supra* note 40; *see also* Silver & Miller, *supra* note 29, at 109 ("Over the long history of MDLs, judges have awarded lead attorneys billions of dollars in fees and cost reimbursements. Typically, fee awards range from 4 percent to 6 percent of total recoveries, but smaller and larger percentages can be found. This practice supposedly rests on the common fund doctrine, a creature of the law of restitution which undergirds fee awards in class actions. Yet the Supreme Court has never said the doctrine applies in MDLs, which are consolidations rather than class suits, and the American Law Institute's *Restatement (Third) of the Law of Restitution and Unjust Enrichment* suggests otherwise: "'By comparision with class actions, court-imnposed fees to appointed counsel in consolidated litigation frequently appear inconsistent with restitution principles,'" *citing* RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b (Tentative Draft No. 3, 2004)).

88. *In re* Vioxx Prods. Liab. Litig., 802 F. Supp. 2d 740, 770 (2011) (citing In re Air Crash Disaster at Fl. Everglades on Dec. 29, 1972, 549 F.2d 1006 (1977) ("The Fifth Circuit has long recognized that a court's

is, the "inherent power" would be the power of the Court to realize the statutory goals of 28 U.S.C. § 1407, which is not a question of regulating counsel to police for excessive fees, but, instead, raises a cluster of important questions about the nature and goals of MDL aggregation as a case management device. Answers to these questions would dictate the terms of a formula or framework for allocating fees between common benefit counsel and individually retained counsel in MDLs, one which would actually be used to award and allocate fees pursuant to its terms.

These procedural issues, with which courts and commentators have long struggled in the class setting, have not been squarely addressed by Congress (via direction through amendment of the MDL statute) or by Courts confronting fee questions in non-class MDLs: How do we account for both the similarities and the differences between class actions and MDLs, in terms of the degree of litigant autonomy and involvement?[89] For example, trial courts do not typically pass judgment on the fairness or adequacy of non-class aggregate settlements; but given the extraordinary degree of disenfranchisement of individual plaintiffs within the aggregate of an MDL, should they?[90] Is the court's role as fiduciary for the MDL plaintiffs, if there is one, limited to MDL settlements, or to MDL settlements in which the court plays a substantial role in either negotiation or implementation? To the extent the attorney fee lever is available either to facilitate a desired degree of aggregation in the MDL context, or to otherwise help the court manage the proceeding justly and efficiently, when precisely can or should the court intervene, and pursuant to what standards? Which fee formulas provide proper compensation and incentives to both court-appointed common benefit counsel and individually-retained counsel, each of whom provide key

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power to consolidate and manage litigation necessarily implies a corollary authority to appoint lead or liaison couinsel and to compensate them for their work.".)

89. *See* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 630-31 (2011) ("The procedural project of the twenty-first century is figuring out what to do with all the diverse rights-holders, eligible to pursue enforcement of their entitlements in courts operating under" expanded theories of due process in conjunction with an expanded array of methods "group cases together through joinder, consolidation, class action, and multidistrict litigation"); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1106 (2010) ("Moving outside the parameters of the class action means shifting into new settings a similar need for a centralizing mechanism and, crucially, legal regulation of the manner in which that mechanism may exercise coercive power. This Article seeks to break down the prevalent supposition of a neat division between the perceived need for legal regulation of class actions and the supposedly benighted world of autonomous individual lawsuits."); *see generally* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (2003) (questioning disparate treatment of class and non-class litigation, in terms of the procedural protections afforded to plaintiffs).

90. *See, e.g.*, Thomas E. Willging & Emery G. Lee, III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, *supra* note 16, at 801-02; *see generally* Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319 (2011) (presenting a procedural argument for why non-class mass settlement are not subject to judicial approval and rejection, despite efforts by certain MDL judges to evaluate recent non-class aggregate settlements).

services?[91] That question implicates an even more fundamental procedural question: whether and to what extent MDL transfer and coordination converts individual litigation to group litigation to a sufficient extent as to justify court interventions in the form of the allocation or establishment of attorneys' fees, and the approval of settlements.

Ethics doctrine tells us nothing about these procedural questions and choices. As explored further in Section V, below, framing free award and allocation decisions under ethics doctrine that merely seeks to police for excessive fees diverts participants in the MDL process from the core issues. Why did the MDL trial courts in *Vioxx*, *Guidant*, and *Zyprexa* push the boundaries of ethics doctrine pertaining to excessive fees to justify procedural moves connected to the management and resolution of MDL litigation? The following Section explores this question.

IV. UNRESOLVED TENSIONS WITHIN THE MDL GOVERNANCE REGIME EXPLAIN WHY TRIAL COURTS ARE USING ETHICS DOCTRINE TO ACHIEVE PROCEDURAL GOALS

Borrowing from theoretical developments in political theory, I use the term "governance regime" to refer to the rules, judicial decisions, practices, and norms that structure MDL litigation.[92] MDL governance is dynamic and polycentric;[93]

91. *See* Resnik & Curtis, *Contingent Fees in Mass Torts supra* note 18, at 440 ("Where aggregate mass torts and more typical contingency fee arrangements converge is in the search for a 'correct' fee. The ever-present issue in the effort is the design of a metric. Should the baseline be the amount an individual attorney might have received, were she or he to bill on an hourly basis? Should the measurement be a percentage of the value of the victory? If so, how should victories be valued?").

92. *See* Laurence E. Lynn, Jr., Carolyn J. Heinrich & Carolyn J. Hill, *Studying Governance and Public Management: Challenges and Prospects*, 10 J. PUB. ADM. RES. & THEORY 233, 233-34 (2002), [hereinafter Lynn, Heinrich & Hill] ("The term 'governance' is widely used in both public and private sectors, in characterizing both global and local arrangements, and in reference to both formal and informal norms and understandings. Because the term has strong intuitive appeal, precise definitions are seldom thought to be necessary by those who use it. As a result, when authors identify 'governance' as important to achieving policy or organizational objectives, it may be unclear whether the reference is to organizational structures, administrative processes, managerial judgment, systems of incentives and rules, administrative philosophies, or combinations of these elements. Despite ambiguity of definitions, governance generally refers to the means for achieving direction, control, and coordination of wholly or partially autonomous individuals or organizations on behalf of interests to which they jointly contribute."); *see* David L. Levy & Peter J. Newell, *Business Strategy and International Environmental Governance: Toward a Neo-Gramscian Synthesis*, 2 GLOBAL ENVTL POL, 84, 85 (2002), *available at* http://www.mitpressjournals.org/doi/pdf/10.1162/152638002320980632 [hereinafter Levy & Newell] ("Regimes thus comprise networks of actors, routines, principles, and rules, simultaneously constituting and disciplining their subjects, constraining and enabling patterns of behavior.").

93. *See* Claudia Pahl-Wostl, *A Conceptual Framework for Analysing Adaptive Capacity and Multi-level Learning Processes in Resource Governance Regimes*, 19 GLOBAL ENVTL. CHANGE J. 354, 356 (2009), *available at* www.elsevier.com/locate/gloenvcha ("Governance regimes are thus characterized by self-organization, emergence and diverse leadership."); *Id.* at 357 ("More generally, polycentric governance systems are defined here as complex, modular systems where differently sized governance units with different purpose, organization, spatial location interact to form together a largely self-organized governance regime.").

multiple actors—Congress, trial courts, appellate courts, and differently-organized counsel—contribute to a constellation of approaches that nevertheless appears to be sufficiently bounded that the term "MDL practice" is intelligible. To assess MDL governance issues, including questions about attorneys' fees, in proper context, it helps to define the regime, to understand its constituent parts and their relationships to each other. That task involves identifying the stakeholders in the MDL governance regime, *i.e.*, the entities and interest groups whose activities create MDL practice.[94] Because stakeholders have distinct interests, they are likely to conflict with each other over the rules, practices, and norms that are constitutive of the regime. "Governance is, therefore, inherently political, involving bargaining and compromise, winners and losers, ambiguity and uncertainty."[95]

In the context of MDL litigation practice, to speak of a governance regime is really a way of organizing observations, or, put differently, to give expression to an intuition: The MDL governance regime consists of two principal coalitions of stakeholders with distinct views of the nature and purpose of MDL litigation. The coalitions consist of those on the side of litigant autonomy and those who are more supportive of aggregation. The fault line appears where the pressure to aggregate meets the ideal of litigant autonomy.

A. THOSE FAVORING AUTONOMY AND OPPOSING AGGREGATION

On the side of litigant autonomy are a Congress and a Supreme Court suspicious of large-scale litigation (though open to large-scale resolution of mass torts); plaintiffs' firms whose business models depend on either the trial or individual claims, or the warehousing of large numbers of claims that are then settled as a bloc; and business interests that have historically been in favor of aggregation only for purposes of facilitating mass settlements.[96] Congressional attitudes towards large-scale litigation are unstable, and impossible to characterize precisely. But, Congress has, for the past two decades, regularly leaned toward limiting large-scale litigation. This can be seen by comparing 1968 MDL statute itself, 28 U.S.C. § 1407, which enabled large scale administratively aggregated actions in the federal system, to more recent procedural legislation presenting obstacles to aggregation and enacted since the mid-1990s, including

94. *See* Lynn, Heinrich & Hill, *supra* note 92, at 5 ("A given governance regime distributes resources and responsibility for functions and operations within and between offices and organizations in the public and private sectors . . . Through these distributions, governance links the objectives of various diverse stakeholders (*e.g.*, citizens expressing themselves as voters, respondents to polls, and consumers; organized interest groups; and elected and appointed officials) with the activities that take place at the operational levels of government.").

95. *See id.*

96. *See generally* SNIGDHA PRAKASH, ALL THE JUSTICE MONEY CAN BUY: CORPORATE GREED ON TRIAL (2011) (setting up, in the tension it documents between Vioxx plaintiffs' attorneys Mark Lanier and Chris Seeger, the larger tensions between and conflicting interests of counsel who organize their practices around individual litigation versus MDL leadership insiders).

the Private Securities Litigation Reform Act[97] and the Class Action Fairness Act,[98] both of which were designed to address perceived abuses in large-scale litigation.[99] Congress's unwillingness to enact legislation to modify or address litigation-disaggregating decisions from the Supreme Court, described below, is equally revealing of the political landscape that has shaped Congressional activity for the past few decades.[100] Similarly, comparing the classic 1985 decision enabling large-scale litigation, *Phillips Petroleum Co. v. Shutts*,[101] with a string of more recent decisions—including *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[102] *Amchem Products, Inc. v. Windsor*,[103] *Ortiz v. Fibreboard Corp.*,[104] *Taylor v. Sturgell*,[105] *Wal-Mart Stores, Inc. v. Dukes*,[106]

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97. Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in 15 U.S.C.A. §§ 77-78).

98. Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in 28 U.S.C.A. §§ 1711-1453).

99. *See* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 915 (2003) ("First, the PSLRA was intended to reduce the costs that securities actions impose on the capital markets by discouraging the filing of non-meritorious suits. Second, Congress wanted to reduce litigation risk for high technology issuers, which it found were disproportionately targeted in securities class actions. Third, Congress wanted to reduce the 'race to the courthouse' whereby class actions were filed soon after significant stock price declines, apparently with very little prefiling investigation."); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PENN. L. REV. 1823, 1825, 1851-56 (2008) (detailing the "inherently political and social nature" of federal jurisdictional reform, and characterizing CAFA as a response to the proliferation of large-scale class actions in state court, which occurred after federal courts limited the availability of the device in the mid-1990s).

100. Observers are skeptical of the likelihood of the enactment of recently proposed bills responsive to *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) or *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See, e.g.*, Christopher Drahozal, Concepcion *and the Arbitration Fairness Act*, SCOTUSBLOG (Sept. 13, 2011) http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act/ (noting that the reintroduction of the Arbitration Fairness Act, a recent iteration of which responds to *Concepcion*, has little chance of success); *see* Alison Frankel, *On the Case: Will Congress Roll Back SCOTUS Reversals?*, THOMSON REUTERS NEWS & INSIGHT (June 24, 2011) http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=20236 ("But looking at the recent history of legislative attempts to undo Supreme Court precedent doesn't offer a whole lot of hopes for plaintiffs, as even the advocacy groups acknowledge.").

101. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 798 (1985) (facilitating large-scale litigation by finding that due process is satisfied by notice and an opportunity to be heard, justifying exercise of jurisdiction over and rendering of a preclusive judgment as to non-forum class members who do not affirmatively opt in to a class).

102. *Lexecon, Inc.*, 523 U.S. at 40-41.

103. 521 U.S. at 592-94 (1997) (sprawling asbestos personal injury settlement class illegitimate under Fed. R. Civ. P. 23, due to absence of adequate representation under Fed. R. Civ. P. 23(a)(4), and failure to satisfy predominance requirement of Fed. R. Civ. P. 23(b)(3)).

104. *See generally*, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (discussing the traditional indicia of a limited fund—including a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution—are presumptively necessary to justify mandatory class certification under Fed. R. Civ. P. 23(b)(1)(B)).

105. *See* Taylor v. Sturgell, 553 U.S. 880, 892 (2009) (rejecting expansive doctrine of virtual representation and noting: "[t]he application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historical tradition that everyone should have his own day in court'") (citing and quoting Richards v. Jefferson County, 517 U.S. 793, 798 (1996).

106. *Supra* note 100.

and *AT&T Mobility LLC v. Concepcion*[107] demonstrates that, for the past few decades, the Supreme Court has consistently been more interested in marking the boundaries of aggregation, or preserving ideals of litigant autonomy, than in enabling or facilitating aggregation. Though each recent decision was arguably driven by peculiar concerns other than specifically limiting large-scale litigation —*e.g.*, statutory interpretation in *Lexecon*, or promoting arbitration in *Concepcion*—these decisions, taken as a whole, represent a sustained effort to cabin the systemic urge to aggregate. The third major group of stakeholders in the MDL governance regime with deep misgivings about centralization and aggregation includes the plaintiffs' law firms whose organizational structure and/or practice models benefit from fragmentation of litigation.[108] It is easier to say who is not in this group than to characterize its members. This grouping of stakeholders excludes firms consistently appointed to leadership positions in MDLs, many of which are identifiable repeat players in large-scale litigation.[109] The range of relatively disenfranchised plaintiffs' firms is broad; while they are often smaller and less well capitalized, little unites these firms other than an ambivalence about or outright suspicion of the MDL process, and, most importantly, a lack of faith in their likelihood of being appointed to leadership positions. They include but are not limited to firms that rely on advertising campaigns and routinization of law practice to collect claims to be bundled for settlement,[110] as well as firms that generate value in their case portfolios from actually trying individual cases, rather than by engineering mass settlements.[111] The last group of stakeholders in the anti-aggregation coalition includes large business interests, which have traditionally supported aggregation only in the limited setting of settlement, where they benefit from broad preclusion, and have traditionally fought against

107. *Id.*

108. The observations in this paragraph regarding the structure of the plaintiffs' bar are based in part on the Author's direct observations while prosecuting MDLs. *See, e.g.*, *In re* Columbia/HCA Health Care Corp. Billing Practices Litig., 293 F.3d 289, 291 (6th Cir. 2002) (identifying the Author as one of the counsel in MDL No. 1227 performing common benefit work by litigating MDL discovery issues); *In re* Nazi Era Cases Against German Defendants Litig., MDL No. 1337, 198 F.R.D. 429, 423, 434, 435 (D.N.J. 2000) (identifying the Author as one of the counsel involved in the prosecution of the coordinated claims).

109. *See* Morris A. Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, (forthcoming 2012) (manuscript at 14) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924278) ("There is yet another way to demonstrate the supremacy of larger firms in class litigation: randomly selecting nearly any case management order appointing plaintiffs' attorneys and firms to leadership positions in high profile MDL litigation matters reveals that, when presented with a choice, judges gravitate toward established, big plaintiffs' firms.").

110. *See, e.g.*, Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1488, 1491-92, n.19 (2009) (describing the practices of the cadre of attorneys who make their living "settling large numbers of claims almost entirely outside the court system," characterizing them as "settlement mills," and defining them as having characteristics including high-volume personal injury practices, dependent on aggressive advertising for client harvesting, and taking few cases to trial, and noting parallels to mass tort law firms).

111. *Supra* note 96.

large-scale litigation.[112]

B. PROPONENTS OF AGGREGATION

Against this lot of bedfellows is an opposing coalition of MDL stakeholders whose interests in aggregation align. They include the deep-pocket players in the upper strata of the plaintiffs' bar, typically larger firms that tend to get appointed as repeat players on MDL leadership committees, along with the MDL Panel itself and trial court judges, who face institutional pressures toward efficient aggregation. The JPMDL, which, as noted, is largely autonomous,[113] is seen as favoring aggregation.[114] In selecting judges to whom to transfer large-scale litigation proceedings, the Panel often selects trial court judges with a demonstrated interest in facilitating the management and resolution of these cases,[115] including Judges Weinstein and Fallon, who have both commented on the role of the MDL judge in actually resolving coordinated litigation, rather than just managing it for pre-trial purposes.[116] These judges consistently appoint plain-

112. Businesses rarely have the occasion to speak directly and generally about multidistrict litigation or other aggregation mechanisms, though the U.S. Chamber of Commerce actively seeks to protect business interests from large-scale litigation. *See, e.g.*, Theodore Eisenberg, U.S. *Chamber of Commerce Liability Survey: Inaccurate, Unfair and Bad for Business*, 6 J. EMPIRICAL LEGAL STUD. 969, 970 (2009) (The U.S. Chamber of Commerce uses its liability "survey in court to support legal arguments to narrow actions against businesses."). To the extent defense lawyers' stated attitudes toward aggregate litigation are reflective of their clients' interests, they are also revealing. *See, e.g.*, Jim Beck, *Latest Draft Of ALI Principles Of Aggregate Litigation: Three Steps Forward, Two Steps Back*, DRUG & DEVICE L. BLOG (May 9, 2007) http://druganddevicelaw.blogspot.com/2007/05/latest-draft-of-ali-principles-of.html ("As defense attorneys, we don't like aggregated litigation—particularly attempts to try cases on an aggregated basis .... For one thing, any time litigation is aggregated the stakes are raised in direct proportion to the extent of the aggregation.").

113. *Supra* note 14.

114. *See* Marcus, *Toward a Maximalist Use, supra* note 14 at 2266, 2269 ("[T]he operation of § 1407 has tended in a maximalist direction. One ingredient in that thrust has been the understandable ... tendency of transferee judges to take seriously their responsibility to resolve the cases that they have received from the Panel. Others flow from the Panel's approach to its job, one that emerged ... early in its operation .... The tenor of the Panel's early decisions reinforces the impression. Its emphasis on judicial efficiency bespoke an impulse toward combination .... [T]he Panel's willingness to combine cases, and its confidence that the combination will be for the advantage of the litigants as well as serve judicial economy, is sometimes striking.")

115. *See, e.g.*, Richards, *JPML Selection of District and Judge, supra* note 14, at 340-42 (surveying factors that appear to influence transfer orders, including the experience of transferee judges, specifically with regard to the handling of MDLs, a factor the Panel particularly emphasizes when transferring to a district in which no constituent actions are pending, and one which seems particularly influential in products liability and sales practices litigation MDLs).

116. *See, e.g.*, Jack B. Weinstein, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 102 (995) ("Much has been said about the role of the judge in the settlement of mass tort cases, particularly the propriety of 'managerial' judging in these cases .... Few dispute that, at a minimum, a court's strong interest in the efficient and effective management of its docket justifies a more active role in these complex cases. This active role naturally includes acting as a clearinghouse for information and adviser in the course of settlement negotiations."); Fallon, Grabill & Wynne, *supra* note 25, at 2330 ("Indeed, by establishing a mechanism for conducting 'bellwether' or 'representative' trials, the transferee court can enhance and accelerate both the MDL process itself and the global resolutions that often emerge from that process.").

tiffs' counsel who share the MDL trial court judges' penchant for using the MDL process to achieve global resolution of claims.[117] Moreover, these plaintiffs' firms are often organized in such a way as to make them dependent on aggressive use of aggregation mechanisms for their financial success. The firms handling common benefit work organize their practices around such work, by hiring lawyers capable of handling intensive briefing, as well as common fact and expert discovery. Since these firms do not necessarily collect and resolve large numbers of individual claims, those that routinely assume leadership positions in MDL matters rely on fee set-asides for common benefit counsel to make MDL litigation profitable for them.

Conversely, firms that are structured to primarily obtain and warehouse claims for processing and settlement will not need to hire lawyers capable of handling complex legal briefing or argument, and will need to organize the firm to have substantial non-lawyer staff, such as paralegals or clerks, who can process large numbers of client claims; their law firms are, in effect, volume businesses.[118] The dividing line between plaintiffs' firms that are wholeheartedly enthusiastic, and, those that are deeply ambivalent about facilitating MDL aggregation is to some extent a structural one, having to do with law firm organization and business practices.

The fee orders capping contingency fees of individually-retained counsel in *Vioxx*, *Guidant*, and *Zyprexa*, though framed in the language of ethics, were part-and-parcel of a series of related moves designed to mediate this basic tension animating the MDL governance regime. Thus, the orders were designed to achieve the facilitation of MDL aggregation, including specifically the resolution of the MDL proceedings by non-class aggregate settlements, by carving out enhanced payments to court-appointed common benefit counsel, and by making room for such payments through caps on individually-retained counsel's contingency fees. Even if fee-capping orders preceded the actual award of fees to court-appointed common benefit counsel, the caps were imposed in anticipation of such payments.[119] But by framing the fee caps primarily in terms of ethics, i.e., in terms of policing for excessive fees, the courts avoided expressly confronting

117. *See, e.g.*, *In re Vioxx Prod. Liab. Litig.*, EEF, MDL No. 1657, at 3, n.4 (E.D. La. Oct. 19, 2011) ("Some have suggested that the attorneys themselves should select the Plaintiffs' Steering Committee with the attorney with the largest number of plaintiff cases having the laboring oar . . . . Having a large number of cases in the MDL often indicates skill at advertising, but does not guarantee the best lawyering or even the selection of those best suited to handle the matter in a cooperative endeavor which is crucial for MDL proceedings . . . . [T]he efficient and successful resolution of an MDL is dependent on coordination and cooperation of lead counsel for all sides.").

118. *Supra* note 110.

119. *See* Resnik & Curtis, *Contingent Fees in Mass Torts*, *supra* note 18 at 440 ("Where aggregate mass torts and more typical contingency fee arrangements converge is in the search for a 'correct' fee. The ever-present issue in the effort is the design of a metric. Should the baseline be the amount an individual attorney might have received, were she or he to bill on an hourly basis? Should the measurement be a percentage of the value of the victory? If so, how should victories be valued?").

the thorny procedural questions that must be answered as a part of determining fees to be awarded to common benefit counsel, or allocated between such counsel and individually retained counsel.

The basic tension animating the MDL governance regime thus remains unresolved. Absent greater and more direct resolution of this fundamental animating tension, either in the form of amendments to the MDL statute to address the underlying procedural questions MDL non-class aggregate settlements pose, or in the form of some signal from appellate courts that the "quasi-class action" theory, a theory of the courts' inherent authority to use fees to achieve procedural goals of MDL transfer and coordination, or some alternative procedural basis for regulating MDL fees, has legs, trial courts will be left with only so much room to maneuver doctrinally. To move past the current stalemate in the MDL governance regime requires the mustering of a resolve by Congress or courts that has, thus far, proved to be elusive.

V. INDIRECTION COMES AT A PRICE

The problem with using courts' inherent authority to supervise counsel's ethical conduct in order to achieve procedural goals is that we obfuscate and avoid making the kinds of procedural choices a more direct approach entails. The real question in each of these MDL cases was not whether individually-retained counsel violated ethics rules by charging excessive fees, a determination that illuminates only what is beyond the pale. Other questions should have been paramount: What is the proper role of the MDL trial court with respect to fees, and with respect to the allocation of fees among layers of counsel, in the service of what case management goals; and what specific fee calculation and allocation methodologies would best achieve those goals? To the extent the current stalemate in the MDL governance regime prompts courts to bypass these basic procedural questions, the answers, themselves grounded in the doctrine developed to manage MDL litigation, will also remain stunted.

Because it does not ask or answer these core questions at issue in MDL non-class settlements, the ethics doctrine to which MDL trial courts have recently turned is of limited applicability. It may not be available, at least as currently framed, to justify fee awards and allocations in connection with other MDL settlements.[120] Each of the MDL courts whose fee capping orders is canvassed in this Article felt compelled to make certain findings to attempt to fit within the

120. *See* Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C. L. REV. 237, 250 (2011) ("If the mix of inherent judicial powers, analogy to class actions, the MDL statute, and the altered status of the attorney-client relationship under MDL consolidation is enough to justify Judge Fallon's capping order, a question is how far that authority goes. Is it present in all MDL consolidations (even though the statute does not specifically provide for it) . . . ? Or is it present only in some MDL and ordinary consolidation cases in which there are special concerns over a conflict of interest between attorneys and clients or special needs for a more expansive form of case management?").

confines of ethics doctrine, including that the plaintiffs were particularly vulnerable, and that, absent caps, fees would have been excessive. Does that mean there is no role for the trial court with respect to allocating and setting attorneys' fees when the plaintiffs are not particularly infirm, or where the individually-retained attorneys' fee agreements, on balance, are not so extreme as to violate ethics rules? Ethics doctrine should not be the fixed star for navigating these procedural waters.

Indirection not only defers resolution of difficult procedural questions, but, also, in any one proceeding, allows fees to be set without any guiding star whatsoever. What was the "correct" fee to be awarded to common benefit counsel in *Vioxx*, *Guidant*, and *Zyprexa*, for example, and how does any enhanced fee negotiated by common benefit, and made available in part through fee capping orders, relate to the ideal fee? Because the question was not clearly asked or answered in each specific case, we do not know. This lack of clarity calls the legitimacy of fee allocations within such MDLs into question, and suggests the possibility that enhanced fees made available under non-class aggregate settlements to common benefit counsel may be established by reference to common benefit counsel's perceived self interest, rather than as a function of the needs of all participants in the MDL.[121]

Whether Section 1407 is outfitted with an appropriately tailored analog to Rule 23(h), or, more likely, trial courts independently articulate and apply a clear test for awarding and allocating fees to MDL counsel in connection with non-class aggregate settlements, the path to be trudged cuts through the center of the tensions animating the MDL governance regime. Of necessity, it forces trial courts to more definitively resolve it, by considering how and why MDL non-class aggregate settlements differ from class action settlements, and how those differences should impact the way fees are awarded and allocated in such matters.

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121. *See* Silver & Miller, *supra* note 29, at 139 (variations in fee caps among specific MDLs may reflect, among other considerations, "the size of the reduction each judge thought the limited attorneys in his MDL would accept without making a fuss.").