

THE QUASI-CLASS ACTION MODEL FOR LIMITING ATTORNEYS' FEES IN MULTIDISTRICT LITIGATION

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INTRODUCTION

In 2008, Judge Donovan W. Frank noted a disturbing trend in a large multidistrict consolidation he was overseeing: “[T]he Court . . . received numerous communications from [plaintiffs] stating that their attorneys have never contacted them or that their attorneys are making the [plaintiffs] complete, by themselves, all of the settlement documents.”¹ With multidistrict consolidations—in which a single judge oversees the pretrial activities of a collection of similar lawsuits—growing more common,² it is increasingly important that all facets of the justice system, including attorneys, work together to guide these suits to just and efficient resolutions. Attorneys’ fees, however, complicate this objective. Because cases are consolidated to avoid duplicative work, and because individual attorneys receive their contracted-for fees regardless of whether they or someone else does that work, attorneys have the incentive to leave as much work as possible to others.³ In other words, attorneys’ fees in multidistrict litigation create a free-rider problem. Courts should be able to combat that problem by limiting attorneys’ fees and thus adjusting attorneys’ incentives. In class actions, courts have explicit authority to do just this,⁴ but in multidistrict consolidations, they do not. This Note addresses an emerging solution to this lack of authority: the quasi-class action model for limiting attorneys’ fees in multidistrict litigation.

The class action once promised to provide the means to resolve instances of mass harm, but in recent years courts have increasingly soured on class actions in the mass-harm context. Multidistrict litigation (MDL) has taken up some of the resulting slack.⁵ The powers of federal courts over class actions are deline-

1. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2008 WL 3896006, at *9 (D. Minn. Aug. 21, 2008).

2. *See infra* notes 35–37 and accompanying text.

3. *See infra* text accompanying notes 276–77.

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

5. “When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.” 28 U.S.C. § 1407(a) (2006). For instance, several thousand people who allege injuries resulting from the use of a drug might file suit in their own home districts, but the Judicial Panel for Multidistrict Litigation might, primarily for efficiency reasons, consolidate these cases before one court. *See infra* note 22 and accompanying text. For a full explanation of the history and procedure of multidistrict consolidations, see *infra* Part I.B. A multidistrict consolidation is not a strict substitute for a class action. *See infra* note 35. For instance, such a consolidation may in fact *include* one or more class actions. Rather, a multidistrict consolidation is a procedural mechanism that, in the mass

ated in Federal Rule of Civil Procedure 23 (Rule 23), but courts' powers over multidistrict consolidations are less clear cut. This lack of rule-based clarity has forced courts to innovate new ways of managing multidistrict consolidations. They have looked to alternative sources of authority for this control and have developed a number of tools to guarantee that multidistrict consolidations are both efficient and just. Given the increasing prominence of MDL practice and the fact that a single multidistrict consolidation can involve tens of thousands of individual claimants, a major corporate defendant, and billions of dollars in claims,⁶ these efforts to define judicial power affect not only the legal system itself, but also a great number of individuals.

The quasi-class action model is just such an effort. Because a multidistrict consolidation is made up of originally separate actions, individual plaintiffs and their attorneys in such consolidations decide on their own contingent-fee arrangements, arrangements under which, in all likelihood, different attorneys will be paid different amounts. Labeling large multidistrict consolidations "quasi-class actions," some courts have capped, *ex post*, the amount that plaintiffs' attorneys can receive under *ex ante* contingent-fee agreements.⁷ This authority is not explicitly founded on any rule or statute, but it is similar to the power that courts possess under Rule 23 when hearing class actions.⁸ Some have criticized the quasi-class action model,⁹ but the authority to limit attorneys' fees furthers the

harm context, can be used to resolve instances of mass harm in which a class action is, for one reason or another, unavailable.

6. For instance, the *Vioxx* MDL involved some 50,000 claims against Merck and a settlement fund of \$4.85 billion. *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 608, 612 (E.D. La. 2008).

7. *McMillan v. City of New York*, Nos. 03-CV-6049, 08-CV-2887, 2008 WL 4287573, at *5 (E.D.N.Y. Sept. 17, 2008); *Vioxx*, 574 F. Supp. 2d at 612; *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *1 (D. Minn. Mar. 7, 2008), *overruled in part by* MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006). By capping the attorneys' fees at a certain percentage, a court can in essence capture funds that would have otherwise gone to attorneys for no other reason than that they had more advantageous retainer agreements than other attorneys. It can then ensure that these funds go, for instance, to attorneys who have performed work that benefits all plaintiffs or to the plaintiffs themselves. *See infra* Part III.A.2.

8. FED. R. CIV. P. 23(h) ("In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . .").

9. *E.g.*, Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and A Proposal*, 63 VAND. L. REV. 107, 111 (2010). Professors Silver and Miller criticize a number of judicial management

underlying aims of the MDL mechanism: justice and efficiency. In the context of courts' attempts to define their powers over multidistrict consolidations, the quasi-class action model fills a gap in the authority courts need to deal with the realities of modern litigation.

This Note focuses on the cases that have expressly adopted the quasi-class action model. It offers a limited, functional definition of that model based on the manner in which courts have employed it. Though the term "quasi-class action" implies that a court hearing a multidistrict consolidation has broad powers—perhaps powers similar to all of those granted by Rule 23—the reality of the term's use to date has been far more modest.¹⁰ Courts that have employed it have done so for a very specific purpose: to justify limiting the percentage of clients' recoveries that plaintiffs' attorneys can be paid under contingent-fee contracts.¹¹ Some commentators have suggested a broader definition of "quasi-class action" that encompasses more aspects of judicial management of multidistrict consolidations.¹² In characterizing the term more narrowly, this Note takes its lead instead from the way courts themselves have actually used the term: as a justification for limiting attorneys' fees.¹³

techniques that they define as part of the quasi-class action method: "judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfers, and fee cuts." *Id.* at 110. By employing these techniques, Professors Silver and Miller argue, "judges have compromised their independence, created unnecessary conflicts of interest, intimidated attorneys, turned a blind eye to ethically dubious behavior, and weakened plaintiffs' lawyers' incentives to serve clients well." *Id.* at 111. This Note focuses specifically on fee caps, and it addresses the benefits and drawbacks of such fee caps at length. *See infra* Part III.

10. This gap between the potentially broad meaning of "quasi-class action" and its limited application in practice has led one commentator to criticize the term and the willingness of courts to base their authority over multidistrict consolidations on Rule 23. Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. (forthcoming 2012) (manuscript at 58–59), available at <http://ssrn.com/abstract=1909967> ("[C]ourts . . . need not risk the confusion that the quasi-class action theory connotes.").

11. *See infra* Part I.C. It is for this reason that this Note defines the quasi-class action model as authorizing fee caps only.

12. Silver & Miller, *supra* note 9, at 110 (defining "quasi-class action" as consisting of "judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfers, and fee cuts").

13. *McMillan v. City of New York*, Nos. 03-CV-6049, 08-CV-2887, 2008 WL 4287573, at *5 (E.D.N.Y. Sept. 17, 2008); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 618 (E.D. La. 2008); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *20 (D. Minn. Mar. 7, 2008), *overruled in part by* MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *Zyprexa*, 424 F. Supp. 2d at 496–97.

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The quasi-class action has garnered little scholarly attention.¹⁴ This Note offers the first in-depth examination of the history and context of the quasi-class action and argues that the authority over fees that courts claim under the model furthers the principal aims of multidistrict consolidation and is thus a valuable judicial tool. Part I analyzes 28 U.S.C. § 1407 (MDL Statute or Statute) and the current state of class actions in the mass-harm context before examining the history of the quasi-class action model. Part II puts that model in context by considering other powers courts have adapted and innovated in order to manage multidistrict consolidations: Federal Rule of Civil Procedure 16 (Rule 16); plausibility pleading with respect to motions to dismiss under Federal Rule of Civil Procedure 12 (Rule 12); evidentiary gatekeeping under *Daubert v. Merrell Dow Pharmaceuticals*;¹⁵ bellwether trials;¹⁶ and the ability to provide “common-benefit fees,” additional compensation to attorneys who have worked for the common benefit of all plaintiffs. Notably missing from these powers is the authority to limit attorneys’ fees—authority that courts expressly possess when they oversee class actions.¹⁷ Part III analyzes the benefits and drawbacks of the quasi-class action model and concludes that it is a valuable—if as yet imperfect—part of modern aggregate-litigation practice.

I. MULTIDISTRICT CONSOLIDATION AND THE POWERS OF THE TRANSFEREE COURT

The quasi-class action model developed as a means to help judges manage multidistrict consolidations. This Part explores that development. Section A describes the procedures outlined by the MDL Statute. Section B discusses the importance of the MDL mechanism in light of the decline of the class action in the mass-harm context. Section C examines the history of the term “quasi-class action” and explores the development of the quasi-class action model.

14. The primary scholarly treatment of the subject is Silver & Miller, *supra* note 9.

15. 509 U.S. 579, 597 (1993).

16. A bellwether trial is a single case that is selected from the pool of cases in a multidistrict consolidation and is then tried front-to-back before the remainder of the cases in the consolidation are tried or settled. *See infra* Part I.C.4.

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

A. *The MDL Statute*

Congress enacted the MDL Statute in 1968¹⁸ as a response to the systemic difficulties of resolving some 1800 separate actions alleging conspiracy among electrical equipment managers.¹⁹ The Statute provides that pending federal “civil actions involving one or more common questions of fact . . . may be transferred to any district for coordinated or consolidated pretrial proceedings.”²⁰ The Judicial Panel on Multidistrict Litigation (MDL Panel) administers these consolidations.²¹ The Panel may transfer related actions to a single “transferee court” for consolidated pretrial proceedings if the Panel determines “that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”²² The Panel must remand each transferred action to its court of origin (its “transferor court”) “at or before the conclusion of . . . pretrial proceedings.”²³

The MDL Statute, then, mandates that three prerequisites be in place before actions can be consolidated and transferred: (1) the actions must share at least one common question of fact; (2) consolidation must be for the convenience of parties and witnesses; and (3) consolidation must further the just and efficient conduct of the transferred actions. In practice, the Panel does not accord equal importance to each requirement. The first is treated loosely: any of “a wide spectrum of issues” may qualify as an issue of fact.²⁴ Moreover, the Panel tends to take a broad view of what constitutes a question of fact, to the extent that questions of law²⁵ or mixed ques-

18. For a more thoroughgoing history of the MDL Statute, see for example Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 *FORDHAM L. REV.* 311, 314 (2009); Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 *REV. LITIG.* 47 (2007).

19. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 *TUL. L. REV.* 2225, 2226 (2008).

20. 28 U.S.C. § 1407(a) (2006).

21. *Id.* The MDL Panel consists of seven circuit and district judges, no two from the same circuit. § 1407(d). The Chief Justice of the United States appoints Panel members “from time to time,” and any Panel action requires the agreement of four members. *Id.*

22. *Id.* § 1407(a).

23. *Id.*

24. 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3863, at 381 (3d ed. 1998) (citing cases).

25. Ostolaza & Hartmann, *supra* note 18, at 52–53 (noting transfer of cases based on “important or dispositive questions of law, as well as factually similar cases involving the assertion of different legal theories”) (footnotes omitted); WRIGHT, MILLER & COOPER, *supra* note 24, § 3863, at 388–94; see, e.g., *In re Pfizer, Inc., Secs.*,

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tions of law and fact²⁶ may meet the requirement. The Panel generally considers the second requirement to be comparatively insignificant—inconvenience to individual parties or witnesses may be outweighed by overall efficiencies associated with consolidation and transfer.²⁷ The third requirement, however, is critical.²⁸ In fact, “this . . . requirement really subsumes the other two.”²⁹ The Panel takes into account a wide variety of factors in determining whether transfer would promote “the just and efficient conduct” of an action. For instance, cases have been transferred “to avoid duplication of discovery activities, to prevent the entry of inconsistent pretrial rulings, and to conserve the human and financial resources of the parties, their counsel, and the judiciary.”³⁰

The Panel’s consolidation decision greatly affects parties to the suits in question, particularly since consolidation offers the chance to settle the actions simultaneously. The Manual for Complex Litigation notes this “unique opportunity” for settlement and is straightforward about a judge’s role in it: “Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.”³¹ Some are skeptical that such settlement is in the

Derivative, & “ERISA” Litig., 374 F. Supp. 2d 1348, 1349 (J.P.M.L. 2005) (finding transfer appropriate for claims arising under federal securities law and ERISA); *In re* MP3 Power Razor Sys. Mktg. & Sales Practices Litig., 398 F. Supp. 2d 1363, 1364 (J.P.M.L. 2005) (noting transfer appropriate when some actions involved interpretation of different states’ laws).

26. WRIGHT, MILLER & COOPER, *supra* note 24, § 3863, at 395–96 (“This liberal interpretation of Section 1407 seems sound since the policy behind the statute is to promote judicial efficiency, and permitting consolidation under any circumstance in which there are common questions, whether legal, factual, or mixed, furthers that goal.”).

27. *Id.* § 3863, at 412–13 (“[I]f the other tests required by Section 1407 are met, the Panel appears to take the position that logistical inconveniences can be overcome by efficient management of the coordinated actions.”).

28. *Id.* § 3863, at 413 (“The third and, in the minds of many courts, the most important prerequisite to obtaining a transfer and consolidation for pretrial purposes under Section 1407 is a showing that the just and efficient conduct of the actions will be served thereby.”) (citing cases).

29. *Id.* § 3863, at 415.

30. *Id.* § 3863, at 417. The Panel, of course, considers many more issues than these when choosing a district and a judge to oversee the consolidated pretrial proceedings. For an analysis of the various factors cited by the Panel, see Richards, *supra* note 18, at 330–40.

31. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132, at 223 (2004).

best interests of all parties,³² but, for good or ill, the vast majority of actions consolidated under the MDL Statute are terminated by the transferee court, either through settlement or a dispositive motion.³³

The MDL Panel, in sum, may consolidate a large number and a wide variety of cases before a single transferee court, primarily to serve the interests of justice and efficiency. Many of these cases settle, and it is this opportunity for coordinated mass settlement that makes the MDL process particularly significant. And nowhere is the process more important than in the mass-harm context, in which the viability of class actions is deteriorating.³⁴

B. *Multidistrict Consolidation and the Decline of the Mass-Harm Class Action*

Multidistrict consolidation is increasingly important as a method of resolving disputes arising from incidents of mass harm.³⁵

32. See, e.g., *Delavventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 155 (D. Mass. 2006) (“Once trial is no longer a realistic alternative, bargaining shifts in ways that inevitably favor the defense.”).

33. As of September 30, 2010, transferee courts had terminated a total of 266,264 actions. In contrast, the MDL Panel had remanded only 11,986 actions to their respective transferor courts. Thus, of the cases either terminated or remanded, over 95% were terminated. U.S. JUDICIAL PANEL ON MULTI-DISTRICT LITIG., *STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION 2010*, at 4 (2010), available at http://www.jpml.uscourts.gov/JPML_Statistical_Analysis_of_Multidistrict_Litigation_2010.pdf.

34. E.g., AM. LAW INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 1.02 reporter’s notes, at 25 (2010) (“As a doctrinal matter, the class action has fallen into disfavor as a means of resolving mass-tort claims arising from personal injuries. This development reflects many factors, including concerns about the quality of the representation received by members of settlement classes, difficulties presented by choice-of-law problems, and the need for individual evidence of exposure, injury, and damages.”).

35. See 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, 794, 798 (2010). This may be true in some contexts other than mass harms as well. 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, 2279 (2008) (“There thus seems to be considerable justification for believing that multidistrict litigation could serve to take up whatever slack results from the impediments class actions now encounter in resolving dispersed litigation.”); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2223 (2008) (“The MDL model, applied creatively, can be an effective alternative in certain situations to class treatment for accomplishing an aggregate or global settlement.”). Of course, multidistrict consolidations are not direct substitutes for class actions, as the actions are different in many respects. See, e.g., Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L.

Empirical research indicates both that that courts have been less likely to certify mass-harm classes in recent years³⁶ and that mass-harm consolidations under the MDL Statute are increasingly common.³⁷ Accepting the latter observation on its face, this Section explores the mass-harm class action's decline.

A number of decisions and rule changes in recent years have made the class action a less viable tool for resolving mass-harm claims. First, two Supreme Court decisions have curbed the class action's usefulness in this context.³⁸ In *Amchem Products, Inc. v. Windsor*, the Court held that a "sprawling" settlement class containing both present and future claimants seeking damages from asbestos companies had been improperly certified as an opt-out class under Rule 23(b)(3).³⁹ The present claimants manifested a wide variety of symptoms of several asbestos-related diseases, and the fu-

REV. 1769, 1773-84 (2005); Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495 (1991).

36. Willing & Lee, *supra* note 35, at 787.

37. *Id.* at 794 ("[T]he [MDL Panel] has become much more likely to order consolidation of products-liability proceedings—almost three times as likely to consolidate—at the same time as the number of products-liability proceedings has increased.").

38. Though it is beyond the scope of this Note, recent Court decisions may affect other types of class actions as well. For instance, the Court's recent decision to deny certification of a class of employees claiming sex discrimination in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), may limit the availability of class actions in the employment context. The extent of any such limitation remains to be seen. With respect to securities class actions, however, the Court sided with plaintiffs in *Erica P. John Fund, Inc. v. Halliburton*, holding that a private securities-fraud plaintiff need not prove loss causation to obtain class certification. 131 S. Ct. 2179, 2185-86 (2011).

39. 521 U.S. 591, 622 (1997). Rule 23 allows a court to certify three types of classes, provided that the proposed class meets the prerequisites of numerosity, commonality, typicality, and representativeness. FED. R. CIV. P. 23(a). Rule 23(b)(1) describes classes in which prosecution of separate actions would risk inconsistent adjudications or incompatible standards, or would affect the interests of nonparties. FED. R. CIV. P. 23(b)(1). Rule 23(b)(2) allows class actions when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). Rule 23(b)(3) describes the third of these, providing that a class is viable if it meets certain prerequisites set forth in Rule 23(a) and:

[T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the

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ture claimants manifested no such symptoms at the time the class was certified.⁴⁰ According to the Court, the class did not satisfy Rule 23(b)(3)'s predominance requirement,⁴¹ which mandates that "questions of law or fact common to class members [must] predominate over any questions affecting only individual members."⁴² Moreover, the interests of the present and future claimants diverged, such that the class did not satisfy Rule 23's adequate-representation requirement. The present claimants were primarily interested in large immediate payments; the future claimants sought a fund sufficient to compensate those who would manifest symptoms in the future.⁴³ The predominance and adequacy requirements imposed by *Amchem* thus made the resolution of large, complex cases more difficult by virtually eliminating Rule 23(b)(3) as a vehicle for such resolution.

The Court's decision in *Ortiz v. Fibreboard Corp.*⁴⁴ continued in this vein. The *Ortiz* parties had attempted to use a mandatory class under Rule 23(b)(1)(B) to resolve a large number of asbestos cases.⁴⁵ The Court decertified the class, holding that certification under this section is confined to cases involving a limited fund, and that a limited fund must have "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."⁴⁶ Moreover, such a fund must be limited "independently of the agreement of the parties to the action"⁴⁷: consensus of all parties that a fund is limited, in other words, does not make it so.

desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. FED. R. CIV. P. 23(b)(3).

40. *Amchem*, 521 U.S. at 624.

41. *Id.*

42. FED. R. CIV. P. 23(b)(3).

43. *Amchem*, 521 U.S. at 625–26.

44. 527 U.S. 815 (1999).

45. *Id.* at 825–28. The subsection at issue here provides that class certification is appropriate if the prerequisites of Rule 23(a) are met and the prosecution of separate actions by class members would create the risk of "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." FED. R. CIV. P. 23(b)(1)(B).

46. *Ortiz*, 527 U.S. at 838–41. The Court applied this requirement even though "the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept" because it was concerned about the possibility of abuse under a more lenient rule. *Id.* at 842.

47. *Id.* at 864.

The *Ortiz* plaintiffs had not shown that the defendant asbestos companies constituted such a fund.⁴⁸ Like *Amchem*, *Ortiz* curtailed the utility of the class action in the mass-harm context. In this case, the Court determined that mass-harm claims cannot be resolved using a Rule 23(b)(1)(B) class. In the words of one commentator and practitioner, in these cases “the Supreme Court transformed [Rule] 23(b)(3)’s ‘superiority’ requirement into a mandate of perfection, and reformatized the ‘limited fund’ doctrine beyond practical utility.”⁴⁹

Beyond *Amchem* and *Ortiz*, a number of lower court decisions have made class certification more challenging and thus mass-harm class actions less viable. For instance, a number of courts of appeals have denied certification to putative nationwide classes in which the plaintiffs allege state-law claims, citing the impossibility of reconciling the laws of the several states.⁵⁰ In another example, the Seventh Circuit expressed concern in *In re Rhone-Poulenc Rorer, Inc.* that a class action might “hurl [an] industry into bankruptcy,” a possibility that “need not be tolerated” since the individual plaintiffs could bring each case in the putative class action on its own.⁵¹ Moreover, the mere possibility of a large verdict for the plaintiffs, the court reasoned, would coerce the defendants to settle, resulting in what the court called “blackmail settlements.”⁵² Some courts and commentators disagree with the Seventh Circuit’s dim view of the mass-harm class action and the court’s decision to deny certification based on factors like threats to an entire industry⁵³ and settlement

48. *Id.* at 848.

49. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475–76 (2005).

50. *E.g.*, *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015 (7th Cir. 2002) (“No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of [Rules] 23(a) [and] (b)(3).”); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (“In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.”).

51. 51 F.3d 1293, 1300 (7th Cir. 1995).

52. *Id.* at 1298 (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973)).

53. *See, e.g.*, *Klay v. Humana, Inc.*, 382 F.3d 1241, 1274 (11th Cir. 2004) (“It would be unjust to allow corporations to engage in rampant and systematic wrongdoing, and then allow them to avoid a class action because the consequences of being held accountable for their misdeeds would be financially ruinous.”).

pressure;⁵⁴ however, the reasoning behind *Rhone-Poulenc* holds sway in many areas of the country.⁵⁵

Finally, as Thomas Willging and Emery Lee have observed, alterations to several federal rules and guidelines have made class certification, particularly of mass torts, less likely.⁵⁶ First, the addition of Rule 23(f) to the Federal Rules of Civil Procedure in 1998 authorized for the first time interlocutory appeal of class-certification decisions.⁵⁷ The subsection's drafters apparently found *Rhone-Poulenc* convincing: According to the advisory committee, "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."⁵⁸ Based on data from district and appellate decisions, Rule 23(f) has indeed reduced the number of classes ultimately certified.⁵⁹ Second, the 2003 revisions to Rule 23(c)(1) changed the time at which a certification decision had to be made from "as soon as practicable" to "an early practicable time"⁶⁰ and also eliminated the possibility of conditional certification.⁶¹ In Willging and Lee's analysis, "[r]ead together, these provisions raised the standard for certifying a class from an early, conditional ruling to a later, relatively final decision."⁶² Finally, the

54. See, e.g., *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 722 (9th Cir. 2010) ("[T]he fairness of the pressure, i.e., the sociological merits of the small claims class action[,] is not a question for us to decide." (quoting *Blackie v. Barrack*, 524 F.2d 891, 899 (9th Cir. 1975)) (second alteration in original)); *Klay*, 382 F.3d at 1275 ("Mere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit."); Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429–30 (2003) (concluding that settlement pressure in class actions does not resemble blackmail and that the argument that coercive settlement pressure in class actions exists is unpersuasive).

55. See, e.g., *Newton v. Merrill Lynch*, 259 F.3d 154, 167–68 (3d Cir. 2001) (citing, inter alia, *Rhone-Poulenc*, 51 F.3d 1293); *Andrews v. AT&T*, 95 F.3d 1014, 1025 (11th Cir. 1996), *abrogated in part by* *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (same); *Castano*, 84 F.3d at 748–50 (same).

56. Willging & Lee, *supra* note 35, at 783–87. R

57. FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.")

58. *Id.* advisory committee's note.

59. Willging & Lee, *supra* note 35, at 785. R

60. FED. R. CIV. P. 23(c)(1)(A) advisory committee's note.

61. FED. R. CIV. P. 23(c)(1)(C) advisory committee's note.

62. Willging & Lee, *supra* note 35, at 785. R

fourth and current edition of the Manual for Complex Litigation⁶³ sets out more stringent requirements for class certification of mass torts than previous editions did.⁶⁴ Where the third edition notes that “courts have increasingly utilized class actions to avoid duplicative litigation in mass tort cases,”⁶⁵ the fourth observes that “[f]ederal courts have ordinarily disfavored—but not ruled out entirely—using class actions in dispersed tort cases.”⁶⁶ Though non-binding, these newer recommendations for trial judges suggest that the federal judiciary is, on the whole, less inclined than it once was to certify mass-tort classes.

In short, due to a combination of judicial precedent, rule changes, and modifications to recommendations for judges, the class action is waning as a viable means for resolving instances of mass harm. Multidistrict litigation, rising in popularity where the class action has fallen,⁶⁷ offers a possible alternative mechanism to bring closure to these disputes.

Multidistrict litigation is not a perfect solution, however. One major problem is that the MDL Statute, unlike Rule 23,⁶⁸ provides no authority for a court to control attorneys’ fees. Though clients and their attorneys nearly always have divergent interests when it comes to fees,⁶⁹ aggregate litigation presents problems that one-to-one litigation does not. First, given the nature of aggregation, a contingent-fee agreement that is fair in one-to-one litigation may be unfair in aggregate litigation: when claims are aggregated and attorneys represent many clients, the amount an attorney receives as a

63. The Manual for Complex Litigation is a set of recommendations for trial judges that is not “authoritative legal or administrative policy.” *Introduction to MANUAL FOR COMPLEX LITIGATION (FOURTH)*, at 1 (2004).

64. Willging & Lee, *supra* note 35, at 785–87.

65. *MANUAL FOR COMPLEX LITIGATION (THIRD)* § 33.262 (1995) (citation omitted). The caveat the Manual refers to is located in the advisory committee’s note to Rule 23: “A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.” *FED. R. CIV. P. 23* advisory committee’s note.

66. *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 22.7 (2004) (citation and internal quotation marks omitted).

67. Willging & Lee, *supra* note 35, at 794.

68. *FED. R. CIV. P. 23*(h) (“In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . .”).

69. *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491–92 (E.D.N.Y. 2006) (noting that “plaintiffs’ counsel have a built-in conflict of interest” regarding their fees).

R

R

percentage of his clients' recoveries may have more to do with the number of clients the attorney represents than with the amount or quality of that attorney's work.⁷⁰ A private contingent-fee arrangement under which an attorney's fees amount to, say, forty percent might be reasonable in one-to-one litigation, but it might also lead to an unjustifiably large fee award in a case in which plaintiffs stand to recover over a billion dollars.⁷¹ Second, such contingent-fee arrangements are inefficient, resulting in a suboptimal allocation of resources. As discussed at greater length below, a consolidated action presents a free-rider problem.⁷² If only a small percentage of the attorneys in a consolidation perform the vast bulk of the work in the case but every attorney receives his agreed-upon fee in full, every attorney's incentive is to let other attorneys do the work. In such a case, the attorneys who do little or no work are taking their clients' money without providing their clients, or the legal system, with any real benefit. Rule 23(h) provides a solution to this problem in class actions: "In an action certified as a class action, the court may award *reasonable* attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . ."⁷³ No rule or statute, however, provides a transferee court with similar powers. It was to address just this deficiency that the quasi-class action arose.⁷⁴

70. See *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 736 (3d Cir. 2001) (observing that, with respect to class actions, "[i]n many instances the increase [in attorneys' fees] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel") (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 339 (3d Cir. 1998)) (first alteration in original); see also *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237, 256 (1986) ("The negotiated fee, and the procedure for arriving at it, should be left to the court's discretion. In most instances, it will involve a sliding scale dependent upon the ultimate recovery, the expectation being that, absent unusual circumstances, the percentage will decrease as the size of the fund increases.").

71. See *Prudential*, 148 F.3d at 340 ("While such private fee arrangements might be appropriate in smaller class actions or litigation involving individual plaintiffs, we do not believe they provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding \$1 billion.").

72. See *infra* Part III.A.1.

73. FED. R. CIV. P. 23(h) (emphasis added).

74. Prior to the quasi-class action model, some courts had innovated other, less drastic ways to deal with the problem of fees. See *infra* Part II.E.

C. *The Development of the Quasi-Class Action Model*

This Part examines the development of the quasi-class action as a means of controlling attorneys' fees. Multidistrict consolidations are stepping in where mass-harm class actions are no longer viable, but courts hearing class actions have at least one vital statutory power that transferee courts lack: the authority to cap plaintiffs' attorneys' fees.⁷⁵ Class action courts have recognized the value of this power and have employed Rule 23(h) to reduce contingency fee amounts.⁷⁶ Before the quasi-class action model, however, no transferee court had done so.

The quasi-class action is inextricably linked with Judge Jack Weinstein of the United States District Court for the Eastern District of New York. The term "quasi-class action" appears in few cases before a 2006 order from Judge Weinstein in *In re Zyprexa Products Liability Litigation*.⁷⁷ Most pre-*Zyprexa* courts used the term in one of two ways. First, several courts used it to refer to what is also known as a "collective action" under § 216(b) of the Fair Labor Standards Act (FLSA).⁷⁸ Second, some courts used the term to refer loosely to various actions and procedures that exhibited some characteristics of a class action.⁷⁹ In his 2006 *Zyprexa* order, Judge Weinstein dubbed the multidistrict consolidation before him a "quasi-class action" and asserted that a court possesses expanded authority in such a case.⁸⁰ He used that authority to cap attorneys' fees.⁸¹

This Section outlines the pre-*Zyprexa* history of the term and analyzes the way Judge Weinstein and others have used it more re-

75. FED. R. CIV. P. 23(h) ("In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . .").

76. *See, e.g., In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. MDL 1055, 1996 WL 780512, at *20–21 (E.D. Mich. Dec. 20, 1996) ("[I]ndividual attorneys in this case may collect from their clients no more than 5% of their individual clients' recoveries as contingency fees."); *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 561–62 (E. & S.D.N.Y. 1995), *vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996); *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915, 924–25 (E.D. Ky. 1986) (limiting plaintiff class members' attorneys' fees to 6.3% of individual clients' recoveries).

77. 424 F. Supp. 2d 488, 496–97 (E.D.N.Y. 2006) (applying the term "quasi-class action" to the *Zyprexa* MDL throughout the order).

78. 29 U.S.C. §§ 201–219 (2006); *see, e.g., Douglas v. GE Energy Reuter Stokes*, No. 1:07CV077, 2007 WL 1341779, at *2 (N.D. Ohio Apr. 30, 2007) ("Actions filed pursuant to § 216(b) are properly termed 'collective actions' or 'class actions.'"). For further discussion of the FLSA, see *infra* Part II.A.

79. *See infra* notes 97–100 and accompanying text.

80. *Zyprexa*, 424 F. Supp. 2d at 496–97.

81. *Id.*

cently. Subsection 1 traces the term's meanings before Judge Weinstein began to use it. Subsection 2 discusses the ways in which Judge Weinstein employed it before he applied it to *Zyprexa*. Subsection 3 addresses *Zyprexa* itself, and Subsection 4 turns to the term's use in subsequent cases.

1. Usage Prior to Judge Weinstein

Before *Zyprexa*, a quasi-class action was either a collective action under the FLSA or an action that resembled a class action in some ways but not others. This Section addresses both meanings. With respect to the first, a collective action is described in § 216(b) of the FLSA. The procedure so specified is, by the standards of American law, unusual. Generally, the FLSA requires an employer, inter alia, to pay its employees no less than a specified minimum wage⁸² and to pay qualifying employees at least one-and-one-half times their regular rate for time they work in excess of forty hours during a workweek.⁸³ The Act also prohibits an employer from discharging or discriminating against an employee who institutes a proceeding under the FLSA, testifies at such a proceeding, or "has served or is about to serve on an industry committee."⁸⁴

If an employer violates any of these provisions, § 216(b) allows employees to aggregate their claims in a particular way: one or more employees may maintain an action "for and in behalf of himself or themselves and other employees similarly situated."⁸⁵ Furthermore, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing."⁸⁶ The procedures specified in § 216(b) also govern collective actions for age discrimination by non-federal employees under the Age Discrimination in Employment Act (ADEA)⁸⁷ and equal-pay actions by all employees under the Equal Pay Act.⁸⁸

82. See 29 U.S.C. § 206.

83. § 207(a)(2).

84. § 215(a)(3).

85. § 216(b).

86. *Id.*

87. 29 U.S.C. § 626(b) (2006) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title . . ."). Section 216(b) is not applicable to government employees, however. See § 633.

88. 29 U.S.C. § 206(d) (2006). The Equal Pay Act amended the FLSA, providing a cause of action based on wage disparity. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963).

Courts have construed actions under § 216(b) to be quite unlike class actions under Rule 23. The Fifth Circuit explained this distinction:

There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by [§ 216(b)]. In a Rule 23 proceeding a class is described; if the action is maintainable as a class action, each person within the description is considered to be a class member and, as such, is bound by judgment, whether favorable or unfavorable, unless he has “opted out” of the suit. Under [§ 216(b)], on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively “opted into” the class; that is, given his written, filed consent.⁸⁹

Section 216(b) differs from Rule 23 in another important respect. Under § 216(b), claimants must be “similarly situated” to one another, but the Act does not define this phrase. In contrast, Rule 23 lists four prerequisites for class certification: numerosity, commonality, typicality, and adequate representation.⁹⁰ In interpreting the “similarly situated” requirement of § 216(b), courts have not required that plaintiffs be “identical.”⁹¹ Further, most have held that meeting the Rule 23 prerequisites is unnecessary in a collective action under § 216(b).⁹²

The first time the phrase “quasi-class action” appears in a decision by a federal court, in 1946, it refers to a § 216(b) collective

89. *LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (footnote and citations omitted).

90. FED. R. CIV. P. 23(a).

91. *E.g.*, *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001); *id.* at 1219 (“Plaintiffs in this case all held the same job title, and they all alleged similar, though not identical, discriminatory treatment.”); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996) (holding that plaintiffs need not show their positions are identical).

92. This is true regardless of whether claims are brought under the FLSA, the Equal Pay Act, or the ADEA. *See, e.g.*, *Grayson*, 79 F.3d at 1106 (finding that ADEA suits under § 216(b) are not subject to Rule 23 requirements); *Lynch v. United Servs. Auto. Ass’n*, 491 F. Supp. 2d 357, 369 (S.D.N.Y. 2007) (“[Rule 23] is not relevant to an FLSA collective action.”); *Ebbert v. Nassau County*, No. 05-CV-5445(FB)(AKT), 2007 WL 2295581, at *2 (E.D.N.Y. Aug. 9, 2007) (finding Equal Pay Act claims not subject to Rule 23). *Contra Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 265 (D. Colo. 1990) (“[N]amed representative plaintiffs in an ADEA class action must satisfy all of the requirements of rule 23, *insofar as those requirements are consistent with* [§216(b)].”).

action.⁹³ The court was explaining the nature of representative suits under the FLSA, then but eight years old. This usage of the term, however, did not prove popular. The next time a court referred to a § 216(b) action as a quasi-class action was more than three decades later, in the context of an ADEA suit.⁹⁴ In all, a handful of courts have used the term to refer to an action under either the FLSA⁹⁵ or the ADEA.⁹⁶ Perhaps because of the similarity of the term “quasi-class action” to “class action” and the fundamental differences between actions under § 216(b) and those under Rule 23, courts have rarely used “quasi-class action” in this context.

Federal courts have also used “quasi-class action” more loosely to refer to actions that resemble class actions under Rule 23 in some ways but not in others. The Sixth Circuit, for instance, used the phrase to refer to a decision by the National Labor Relations Board to grant relief to thirteen individuals, even though the Board considered evidence relating to only one of them.⁹⁷ In the context of a suit under 42 U.S.C. § 1983, the Eighth Circuit employed the term in affirming a district court’s refusal to allow the plaintiffs in a case to amend their complaint to include more plaintiffs.⁹⁸ The district court had previously refused to certify a class in the case, and it found that “the naming of additional plaintiffs would essentially amount to the grant of permission for plaintiffs to go forward in a quasi-class action[,] which the Court has determined not to be appropriate.”⁹⁹ In another example, a bankruptcy court used the term to call attention to the similarities between a class action and objec-

93. *Swettman v. Remington Rand*, 65 F. Supp. 940, 944 (S.D. Ill. 1946) (“The next part concerns itself with the right of joinder of plaintiffs and the authorization for a representative suit or quasi class action.”).

94. *Montalto v. Morgan Guar. Trust Co.*, 83 F.R.D. 150, 152 (S.D.N.Y. 1979) (“To the extent that the plaintiff may hereafter secure filed written consents of eligible plaintiffs pursuant to the provisions of 29 U.S.C. § 216(b) a class or quasi-class action may come into being *de facto* and the assistance of the court will be unnecessary.”).

95. *E.g.*, *Aguilar v. Sunland Beef Co.*, No. 95-15028, 1996 WL 218188, at *1 (9th Cir. Apr. 29, 1996); *Highland v. Wal-Mart Stores, Inc.*, No. CIV04-0711 JC/KBM, 2005 WL 3415855, at *1 n.1 (D.N.M. Sept. 15, 2005).

96. *E.g.*, *Hallas v. W. Elec. Co.*, No. C-2-79-519, 1981 WL 205, at *2 (S.D. Ohio Apr. 23, 1981) (citing *Montalto*, 83 F.R.D. at 152).

97. *NLRB v. Indus. Towel & Unif. Servs.*, 473 F.2d 1258, 1261 (6th Cir. 1973) (“We . . . disapprove of the quasiclass-action aspect of this case.”).

98. *Sweat v. City of Fort Smith*, 265 F.3d 692, 698 (8th Cir. 2001).

99. *Id.*

tions to the granting of a debtor's discharge under 11 U.S.C. § 727(a).¹⁰⁰

Originally, then, the term "quasi-class action" could describe any action that bore some similarity to a class action. Courts most commonly used the term, though, to refer to collective actions under § 216(b) of the FLSA.

2. Judge Weinstein's Usage Prior to *Zyprexa*

Judge Weinstein's use of the term "quasi-class action" to refer to the *Zyprexa* multidistrict consolidation gave the term new vitality. He first employed the phrase, though, in a different context: a 1994 law review article in which he concluded that, since aggregate mass tort actions in many ways resemble class actions, "mass consolidations are in effect quasi-class actions."¹⁰¹ He contended that "obligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations."¹⁰² Given the complexity of such mass consolidations, he reasoned, a judge must sometimes intervene "by force of necessity" to "take control and help guide the litigation."¹⁰³ Judge Weinstein's assertion that non-class "consolidations should be treated for some purposes as class actions to assure judicial review of fees and settlements"¹⁰⁴ foreshadows his handling of *Zyprexa* more than a decade later.¹⁰⁵

After his law review article and before *Zyprexa*, Judge Weinstein began using the phrase "quasi-class action" in his written opinions. He first did so in 1997 in *United States v. Cheung*,¹⁰⁶ a consolidation

100. *In re Joseph*, 121 B.R. 679, 682 (Bankr. N.D.N.Y. 1990) ("In addition to the general body of creditors as beneficiaries of a quasi-class action pursuant to [11 U.S.C.] § 727(a), the moral basis of the bankruptcy statute is also affirmed when a dishonest debtor is denied discharge.").

101. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 481 (1994).

102. *Id.*

103. *Id.* at 550.

104. *Id.* at 529. Notably, Judge Weinstein asserts that a court hearing a quasi-class action should be able to review both fees *and* settlements. In practice, however, courts that have expressly used the quasi-class action model to justify their actions have done so solely in the context of fees.

105. Of the mass consolidation at issue in *Zyprexa*, Judge Weinstein ruled that "[w]hile the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of the court." *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006).

106. 952 F. Supp. 148 (E.D.N.Y. 1997).

of civil litigation and a criminal action against a single defendant, Hollman Cheung.¹⁰⁷ Both cases settled simultaneously in an agreement under which Cheung paid a total of nearly \$1.5 million in restitution and fees.¹⁰⁸ In the civil portion of the case, ninety-four plaintiffs had filed complaints against Cheung under the Racketeer Influenced and Corrupt Organizations Act.¹⁰⁹ Although joinder of plaintiffs was pursuant to Federal Rule of Civil Procedure 19 rather than Rule 23, Judge Weinstein called the civil part of the case “in effect a civil quasi-class action.”¹¹⁰ Judge Weinstein handled the case like a class action in at least two respects. First, he “held extensive post-settlement, post-plea hearings akin to those required in approving a Rule 23 class action settlement.”¹¹¹ Second, he “approved the civil action fee of the attorney for plaintiffs, treating it as if it had been earned in a class action.”¹¹² This latter action, particularly, foreshadows both Judge Weinstein’s treatment of *Zyprexa* and other judges’ approaches to quasi-class actions.

Four years later, in 2001, Judge Weinstein decided a summary judgment motion in *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*¹¹³ In this case, the plaintiff health insurers contended that misrepresentation and deceptive conduct by the defendant tobacco companies adversely affected the health of the plaintiffs’ subscribers, resulting in increased costs for the plaintiffs.¹¹⁴ The tobacco companies moved for summary judgment, and the court denied the motion.¹¹⁵ As an argument in favor of summary judgment, the companies asserted that New York law barred the plaintiffs from seeking punitive damages and that the amount of the plaintiffs’ recoveries should thus be limited to the amount they actually paid on their insurance policies.¹¹⁶ Judge Weinstein disagreed, pointing to the broader social value of punitive damages and stating that “[p]unitive damages serve the purpose of providing compensation to society where—as here—many individual claims cannot as a practical matter be brought.”¹¹⁷ He went on to note

107. *Id.* at 148–49.

108. Cheung’s payment consisted of \$1.25 million in restitution to his victims and \$200,000 to the civil plaintiffs’ counsel. *Id.* at 149, 152.

109. *Id.* at 149.

110. *Id.* at 148.

111. *Id.* at 149; see FED. R. CIV. P. 19, 23(e)(2).

112. *Cheung*, 952 F. Supp. at 149.

113. 133 F. Supp. 2d 162, 179 (E.D.N.Y. 2001).

114. *Id.* at 164–65.

115. *Id.* at 165.

116. *Id.* at 176.

117. *Id.* at 176–77.

that the “[d]efendants [had] not raised the point that, in a sense the class action or quasi-class action such as the present one, where many claims are aggregated, takes care of the problem of social payment for the full cost of damages a defendant caused.”¹¹⁸ This case illustrates two salient points with respect to the development of the quasi-class action. First, and most obviously, it reveals that Judge Weinstein continued to think about non-class aggregations as quasi-class actions. Second, and more importantly, it demonstrates his willingness to inquire into ways in which the distribution of funds in complex trials potentially affects not only parties, but also society as a whole, and whether that distribution is just.

Judge Weinstein’s use of the term “quasi-class action” in *Cheung* and *Blue Cross* represents an intermediate step in the term’s development. In some ways, these cases resonate with Judge Weinstein’s use of the term in his 1994 law review article. At the same time, though, the opinions do not fully articulate definitions of the term or offer explicit rationales as to why a court can exercise certain powers in a quasi-class action. These developments would be forthcoming.

3. *Zyprexa*

The quasi-class action came into its own in *Zyprexa*, five years after *Blue Cross*. In April 2004, the MDL Panel consolidated six actions against Eli Lilly and Company, all of which concerned the safety of the schizophrenia drug *Zyprexa*, and transferred them to Judge Weinstein for pretrial proceedings.¹¹⁹ In November 2005, Judge Weinstein approved a partial settlement agreement between the defendant and about 8000 individual plaintiffs.¹²⁰ Of greater concern for this Note, however, is the court’s subsequent order in March 2006 on the issue of attorney compensation. Here Judge Weinstein issued an order setting out a scheme for the payment of the plaintiffs’ attorneys’ legal fees under which, in relevant part, fees for claims worth a lump sum of \$5000 were capped at twenty percent, fees for all other claims were capped at thirty-five percent, and special masters were authorized to adjust fees for the latter group of claims up or down within a specified range.¹²¹

118. *Id.* at 178.

119. *In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380 (J.P.M.L. 2004).

120. *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596 (JBW), 2005 WL 3117302, at *1 (E.D.N.Y. Nov. 22, 2005); see *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006).

121. *Zyprexa*, 424 F. Supp. 2d at 496–97. Judge Weinstein had, prior to *Zyprexa*, used his powers under Rule 23(h) to cap attorneys’ fees in a similar way in

The essential element of this order is the court's asserted power to override the contracts between plaintiffs' attorneys and their clients and cap the attorneys' fees at a certain percentage. As laid out further below, previous courts overseeing settlements of multidistrict consolidations had exercised authority over fees, often in order to ensure that the plaintiffs' attorneys who really did the work in the case were compensated accordingly.¹²² In *Zyprexa*, however, Judge Weinstein went further. He did not, for instance, tax each plaintiff at the same rate in order to find funds to transfer to the common-benefit attorneys, as previous courts had done.¹²³ Instead, he effectively altered the contracts of those attorneys whose contracts provided that they were to be paid more than he found appropriate.¹²⁴

The first sentence of the order leaves no doubt as to its conclusion: "[b]y this order the court exercises its power to control legal fees in a coordinated litigation of many individual related cases—in effect, a quasi-class action."¹²⁵ Judge Weinstein based his authority on two sources: class action law and a court's authority to exercise ethical supervision over attorneys, particularly with respect to contingent fees.¹²⁶ First, with respect to class action law, Judge Weinstein pointed to Rule 23, which specifically allows a court to require reasonable fees in a class action.¹²⁷ He then identified four similarities between a class action and *Zyprexa*: (1) "the large number of plaintiffs subject to the same settlement matrix approved by the court"; (2) use of special masters for discovery and settlement; (3) the court's order for a large escrow fund; and (4) "other interventions by the court."¹²⁸ Later courts and commentators have picked

class actions. *E.g.*, *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 561-62 (E. & S.D.N.Y. 1995) (reducing amount of attorneys' fees under contingency contracts from 33.3% to 25%), *vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996).

122. *See infra* Part II.E.

123. *E.g.*, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, No.1203, 1999 WL 124414, at *2 (E.D. Pa. Feb. 10, 1999) (ordering defendant to pay 9% of each plaintiff's award into separate account).

124. *Zyprexa*, 424 F. Supp. 2d at 496-97.

125. *Id.* at 490.

126. *Id.* at 490-92.

127. *Id.*; FED. R. CIV. P. 23(h) ("In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . ."); *see also* FED. R. CIV. P. 23(g)(1)(C) (allowing court to "order potential class counsel to . . . propose terms for attorney's fees and nontaxable costs").

128. *Zyprexa*, 424 F. Supp. 2d at 491. Judge Weinstein also noted that the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2006),

up on these four factors, which have become central to the identification of quasi-class actions.¹²⁹ According to Judge Weinstein, the factors “reflect a degree of court control supporting its imposition of fiduciary standards to ensure fair treatment to all parties and counsel regarding fees and expenses.”¹³⁰ This analysis underscores the importance of the role of the court in the settlement of the cases. Implicit in Judge Weinstein’s reasoning is the idea that, once parties take advantage of the powers of a court to resolve their dispute, the parties—and their attorneys—are subject to that court’s general equitable powers. Whether the court’s intervention is through a class action or a multidistrict consolidation, the fundamental point is that the court has indeed intervened. Given that intervention, the court’s power to ensure a fair outcome to the parties should not be limited by the particular form—class action, multidistrict consolidation, or any other procedural mechanism¹³¹—of the intervention.

Second, Judge Weinstein based his authority on a court’s “well-established authority to exercise ethical supervision of the bar in both individual and mass actions.”¹³² In the course of his discussion of a court’s general ethical supervision of the bar, Judge Weinstein

treats class actions and “mass actions” similarly for purposes of removal. *Zyprexa*, 424 F. Supp. 2d at 491; 28 U.S.C. § 1332(d)(11)(A). Under CAFA, a mass action is, generally speaking, “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact” that also meets certain amount-in-controversy requirements. 28 U.S.C. § 1332(d)(11)(B).

129. *E.g.*, *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 611–12 (E.D. La. 2008) (quoting the four *Zyprexa* factors and comparing the *Vioxx* litigation to the *Zyprexa* litigation by noting the large number of plaintiffs subject to the same settlement matrix, the use of special masters, and the large escrow fund in both cases).

130. *Zyprexa*, 424 F. Supp. 2d at 491. Other courts have ruled that the district judge in a class action is a fiduciary of the class in the settlement phase of the action. *E.g.*, *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005) (“At the fee determination stage, the district judge must protect the class’s interest by acting as a fiduciary for the class.”); *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (“We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”).

131. As noted above, for instance, Judge Weinstein called *Blue Cross* a quasi-class action, even though the case had been consolidated under Rule 19, not the MDL Statute. *See supra* notes 113–18 and accompanying text.

132. *Zyprexa*, 424 F. Supp. 2d at 492 (“[I]t is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion ought to reside in the Court.” (citing *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824))).

emphasized two primary points. First, a court may exercise such control in assuring that attorneys' fees are not excessive, whether or not a party has challenged such fees.¹³³ Second, mass litigations are "highly beneficial to the public when adequately controlled,"¹³⁴ and overcompensation of attorneys threatens to undermine such consolidations by reflecting poorly on the court and undermining public confidence in and support for these types of actions.¹³⁵ This point resonates with Judge Weinstein's earlier consideration of the broader social consequences of the litigation in *Blue Cross*.¹³⁶ The order further points out that the court was the only entity able to control fees effectively for three reasons: (1) many of the plaintiffs were mentally and physically ill, lacking the power and knowledge necessary to negotiate their fees effectively; (2) the plaintiffs' attorneys had conflicting interests; and (3) the defendant was indifferent as to how the settlement fund was to be apportioned.¹³⁷ The last point is particularly significant, as it means that a court cannot rely on the normal adversarial clash of interests to set a proper fee schedule in cases like this. Judge Weinstein thus impliedly argued that, since the usual methods of fee determination are not efficient means of setting proper rates, judicial fee determination is justified.

In this brief order, Judge Weinstein established the template other courts would look to when invoking the quasi-class action model. Basing his authority on class action law and a court's equitable powers, he filled a gap in the authority of transferee courts and acted in accordance with his sense of justice and efficiency, thus furthering the two primary rationales underlying the MDL Statute itself.

133. *Zyprexa*, 424 F. Supp. 2d at 492–93. The opinion cites primarily to two cases for this proposition: *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982), and *Farmington Dowel Prod. Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970).

134. *Zyprexa*, 424 F. Supp. 2d at 494.

135. *Id.* at 493–94. Additionally, the order surveys a variety of state laws for the proposition that a federal court is obliged "to guard against excessive fees." *Id.* at 494.

136. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162, 176–77 (E.D.N.Y. 2001).

137. *Zyprexa*, 424 F. Supp. 2d at 491–92. With respect to the last point, the court is arguing that a defendant who has to pay a lump sum as part of a settlement does not care how that sum is apportioned among the plaintiffs and the plaintiffs' attorneys. Such a defendant has no interest in who gets the money, or in the fact that different agreements between plaintiffs and their attorneys specify different contingent fee arrangements, some higher than others.

4. Post-Zyprexa Usage

Since *Zyprexa*, two other federal district courts have adopted both *Zyprexa*'s terminology and its reasoning, and Judge Weinstein has himself used the term in another case. In 2008, the United States District Court for the District of Minnesota looked to the quasi-class action model in *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation* in 2008.¹³⁸ The MDL Panel consolidated the actions in this case and assigned them to Judge Donovan W. Frank.¹³⁹ The plaintiffs in the actions contended that they had been injured by certain defective implantable defibrillator devices and pacemakers produced by the defendants.¹⁴⁰ The parties worked out a settlement agreement that included a provision allowing the court to determine the amount of any "common benefit payment" to plaintiffs' attorneys who performed work benefitting the plaintiffs as a whole.¹⁴¹ Attorneys working for the plaintiffs' steering committee submitted a request under this provision for payment from the settlement fund.¹⁴² The court ultimately granted the common-benefit attorneys' request in part and denied it in part, setting aside funds for common costs and common-benefit attorneys' fees.¹⁴³ The court capped attorneys' contingent fees at 20% of their clients' recoveries but allowed parties to petition special masters to increase that percentage to "a maximum of either 33.33%, the percentage previously agreed to in the individual case[']s contingent fee arrangement between the attorney and the client, or the limit imposed by state law, whichever of the three is [least]."¹⁴⁴

Judge Frank explicitly referred to the case as a quasi-class action,¹⁴⁵ and his justifications for awarding attorneys' fees were similar to Judge Weinstein's in *Zyprexa*. First, the court noted its express authority to require reasonable fees in a class action under Rule 23

138. MDL No. 05-1708, 2008 WL 682174 (D. Minn. Mar. 7, 2008), *overruled in part* by MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008). In this order, the court expressly referred to the case as a quasi-class action on three occasions. *Id.* at *6, *10, *12.

139. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 398 F. Supp. 2d 1371 (J.P.M.L. 2005).

140. *Guidant*, 2008 WL 682174, at *1. The three defendants in the case were Guidant Corporation, Guidant Sales Corporation, and Cardiac Pacemakers, Inc. *Id.*

141. *Id.* at *1, *4.

142. *Id.* at *4.

143. *Id.* at *20.

144. *Id.*

145. *Id.* at *6, *10, *12.

and stated that *Guidant* had, like *Zyprexa*, the hallmarks of a quasi-class action.¹⁴⁶ The court further observed that it alone was able to effectively exercise ethical control over fees.¹⁴⁷ Judge Frank agreed with Judge Weinstein that a court has the inherent authority to supervise members of the bar.¹⁴⁸ He asserted the right to review the fairness of contingent-fee contracts and also noted the importance of ensuring that the public does not view mass litigations as abusive.¹⁴⁹ In sum, the *Guidant* court grounded its actions in the same authority the *Zyprexa* court did, with reference to, first, class action rules and, second, its equitable power to supervise attorneys generally and contingent fees specifically. The *Guidant* court, however, had an additional source of authority that the *Zyprexa* court did not: the contractual arrangement in the settlement agreement under which the parties agreed that the court had authority over common-benefit fees.¹⁵⁰

The court, notably, altered course several months later. After reviewing a report and recommendation from the case's special masters, seventeen objections to that report, and sixty-seven petitions from plaintiffs' attorneys,¹⁵¹ the court determined that the plaintiffs' attorneys had in the end performed more work than the court had initially anticipated.¹⁵² Given the costs involved in such unforeseen difficulties as complex settlement-related paperwork, lengthy delays, and a complicated protocol for dealing with deceased plaintiffs, the court concluded that "what was a fair cap in March . . . [was] no longer fair [in August]."¹⁵³ Under a revised fee formula, the court capped *total* fees (contingency fees plus common-benefit fees) at the least of: "(1) the percentage contracted for in [the] contingency/retainer agreement; (2) 37.18%; or (3) the state-imposed limit."¹⁵⁴ The court noted that the "unique facts and contours" and the "changed circumstances" in the case were alone

146. *Id.* at *17.

147. *Id.* at *18.

148. *Id.*

149. *Id.*

150. As discussed *infra*, Part II.E, some courts had, even without such contractual arrangements, exercised authority over common-benefit fees, which compensate attorneys for work those attorneys have done that benefits the plaintiffs as a whole, rather than just those attorneys' clients.

151. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2008 WL 3896006, at *1 (D. Minn. Aug. 21, 2008).

152. *Id.* at *6.

153. *Id.* The court in fact referred to "a fair cap in March 2007," *id.*, but the cap that this order revised was put into place in March 2008. *Id.* at *1.

154. *Id.* at *8.

responsible for the alteration, and that under the revised formula, “the maximum amount of contingency fees that any firm will be allowed to collect is approximately 28%.”¹⁵⁵ Judge Frank’s revision of the fee framework demonstrates a significant point: Given the changing equities of a particular multidistrict consolidation, a fee cap may not be set in stone. A court’s ability to amend its orders based on changed circumstances, however, does not undermine its authority to set fees at what it considers to be a just level.

The third decision to employ the terminology of and reasoning of *Zyprexa* was *In re Vioxx Products Liability Litigation*.¹⁵⁶ In this case, the MDL Panel transferred “thousands of individual suits and numerous class actions” against defendant Merck to Judge Eldon E. Fallon of the United States District Court for the Eastern District of Louisiana.¹⁵⁷ The plaintiffs were users of Vioxx, a drug designed to relieve pain and inflammation. They asserted various products liability, tort, fraud, and warranty claims in connection with injuries allegedly resulting from their use of Vioxx, contending that the drug increased its users’ risks of heart attacks and ischemic strokes.¹⁵⁸ In an order dealing with fees for the plaintiffs’ attorneys, the court capped all contingent fee arrangements at 32%, plus reasonable costs, reserving for later consideration determination of an appropriate fee for common-benefit work.¹⁵⁹

In explaining its authority to issue orders related to attorneys’ fees, the court, like the *Guidant* court, referenced *Zyprexa*.¹⁶⁰ Judge Fallon noted his authority under Rule 23 to require reasonable fees in class actions.¹⁶¹ He also referred to the matter under consideration as a quasi-class action, noting that three of the four factors set forth by Judge Weinstein in *Zyprexa* were met in *Vioxx* as well: Both cases involved a large number of plaintiffs subject to the same settlement matrix, both courts used special masters during the proceedings and for the administration of the settlement, and both settlement funds were large and were held in escrow.¹⁶²

155. *Id.* at *10.

156. 574 F. Supp. 2d 606, 611–12 (E.D. La. 2008).

157. *Id.* at 608; *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

158. *Vioxx*, 574 F. Supp. 2d at 608.

159. *Id.* at 618. In a later order, the court granted in part a motion for the award of common benefit funds. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 3d. 640, 650–51 (E.D. La. 2010).

160. *E.g.*, *Vioxx*, 574 F. Supp. 2d at 611–12.

161. *Id.* at 611.

162. *Id.* at 612.

The *Vioxx* court also noted its authority to exercise ethical supervision over attorneys.¹⁶³ Relying on both *Guidant* and *Zyprexa*, the court pointed out that settlement agreements “will likely become more common” and asserted a “growing need to protect the public’s trust in the judicial process.”¹⁶⁴ Moreover, it noted that many *Vioxx* plaintiffs were in poor health and that, on account of this fact, the court had a heightened duty to ensure that the plaintiffs’ attorneys’ fees were both fair and reasonable.¹⁶⁵ Finally, the *Vioxx* court, like the *Guidant* court but unlike the *Zyprexa* court, had a further source of authority in a settlement agreement in which the parties agreed that the court would “oversee various aspects of the administration of settlement proceedings, including . . . allocating of a percentage of the settlement proceeds to a Common Benefit Fund.”¹⁶⁶

Judge Weinstein has also cited *Zyprexa* in other litigation. In *McMillan v. City of New York*, plaintiff James McMillan was awarded damages in a case arising out of the 2003 crash of a Staten Island Ferry.¹⁶⁷ Many other claimants had previously brought litigation related to this accident, and, by the time of *McMillan*, “[t]he issue of liability had already been decided under the leadership of other counsel.”¹⁶⁸ McMillan’s attorney sought a fee in the amount of one-third of McMillan’s recovery, but the court limited the attorney’s fee to 20%.¹⁶⁹ Judge Weinstein concluded that, since the liability issue had already been resolved and the attorney thus faced little risk in this action, “this was a quasi aggregate or quasi class action,” and the court had greater-than-usual power to control fees.¹⁷⁰

Judge Weinstein, like Judge Frank before him,¹⁷¹ later reconsidered this order, at least provisionally. After the plaintiff confirmed that “he freely agreed to [the one-third contingency fee] and . . . wishe[d] to pay in full,” Judge Weinstein relented—conditionally.¹⁷² He ordered 20% of the plaintiff’s award to be paid to

163. *Id.*

164. *Id.* at 613.

165. *Id.*

166. *Id.* at 609.

167. Nos. 03-CV-6049, 08-CV-2887, 2008 WL 4287573, at *1 (E.D.N.Y. Sept. 17, 2008).

168. *McMillan*, 2008 WL 4287573, at *5.

169. *Id.*

170. *Id.*

171. *See supra* notes 151–55 and accompanying text.

172. *McMillan v. City of New York*, Nos. 08-CV-2887, 03-CV-6049, 2010 WL 1487738, at *1 (E.D.N.Y. Apr. 13, 2010), *modifying* Nos. CV-08-2887, CV-03-6049, 2010 WL 1459218 (Mar. 4, 2010).

the plaintiff's attorney immediately, and he ordered an additional 13% to be held in escrow for the attorney, pending the resolution of litigation over fees for common-benefit work provided by other attorneys in the litigation.¹⁷³ Reinforcing his view of the case, Judge Weinstein noted that “[t]he benefits of that aspect of this quasi-class action litigation allegedly accrued to hundreds of injured claimants, including the client.”¹⁷⁴

Judge Weinstein's view of a court's role in determining attorneys' fees in non-class aggregate litigation has thus gained some traction over the past several years. Courts adopting his reasoning ground their authority over fees in class action law as set forth in Rule 23 and in a court's equitable power over members of the bar in general and contingency fees in particular. Courts also tend to point to matters of societal welfare and public perception which, while they may not be sufficient of themselves to authorize the courts' actions, further justify the way courts treat and distribute settlement funds. Despite such justifications, the quasi-class action model is not explicitly based on any rule; rather, it is an innovation developed to meet a particular need. The history of the multidistrict consolidation, however, is full of just such innovations.

II.

THE MDL TOOLKIT: TRANSFEREE COURTS' POWERS OVER MULTIDISTRICT CONSOLIDATIONS

Consolidations under the MDL Statute provide opportunities to resolve aggregate litigation without the various roadblocks that now impede class action practice. However, the powers of courts over such consolidations are somewhat uncertain. In the class action context, Rule 23 lays out the ground rules, taking into account the particular challenges of aggregate litigation. For instance, the court in a class action certifies or refuses to certify the class,¹⁷⁵ selects the class counsel,¹⁷⁶ and approves the class counsel's fees,¹⁷⁷ all pursuant to Rule 23. Such procedures have no direct corollaries in multidistrict litigation. Instead, transferee courts must look to a collection of various judicial tools largely designed for one-to-one litigation to ensure, in the phrasing of the MDL Statute itself, “the just and efficient conduct of [consolidated] actions.”¹⁷⁸ This Sec-

173. *Id.*

174. *Id.*

175. FED. R. CIV. P. 23(a)-(b).

176. FED. R. CIV. P. 23(g).

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

178. 28 U.S.C. § 1407(a) (2006).

tion addresses these tools and analyzes the ways in which they have been adapted to the particular challenges of MDL practice. Section A describes the authority of courts to hold pretrial conferences under Rule 16. Section B explores the effects of plausibility pleading on motions to dismiss in MDL practice. Section C concerns the role of *Daubert* hearings in shaping consolidated actions. Section D deals with the authority of transferee courts to hear bellwether trials. Finally, Section E discusses some of the ways courts allocated attorneys' fees before the development of the quasi-class action model.

A. Pretrial Conferences under Rule 16

As originally promulgated in 1938, Rule 16 allowed judges to hold pretrial conferences.¹⁷⁹ Judges were authorized to direct attorneys to attend such conferences, which could be convened to consider matters including issue simplification, amendment of pleadings, limitation of the number of expert witnesses, and “[s]uch other matters as may aid in the disposition of the action.”¹⁸⁰ Missing from this version of Rule 16, however, was any mention of settlement conferences. Indeed, in 1944 the Judicial Conference of the United States approved a recommendation relating to pretrial procedure declaring in part “that settlement is a by-product of good pre-trial procedure rather than a primary objective to be actively pursued by the judge.”¹⁸¹

The text of Rule 16 remained unchanged until 1983, when it was revised heavily to expand judges' pretrial powers and responsibilities.¹⁸² The revised rule contemplated more conferences, including a required early scheduling conference¹⁸³ and a final pretrial conference.¹⁸⁴ The new rule gave judges power over both attorneys and unrepresented parties,¹⁸⁵ and it allowed judges to sanction parties for such offenses as failing to follow the court's or-

179. FED. R. CIV. P. 16, 308 U.S. 684 (1938) [hereinafter 1938 Rule]. For a history of the evolution of Rule 16, see Jeffrey A. Parness & Matthew R. Walker, *Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws*, 50 U. KAN. L. REV. 347, 349–353 (2002).

180. 1938 Rule, *supra* note 179, at 684.

181. Alfred P. Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 424 (1953); see also Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937 (2000) (noting that, as originally contemplated, pretrial conferences were “a prelude to trial”).

182. FED. R. CIV. P. 16, 97 F.R.D. 165, 168–71 (1983) [hereinafter 1983 Rule].

183. *Id.* at 168–69.

184. *Id.* at 170.

185. *Id.* at 168.

ders and failing to attend pretrial conferences.¹⁸⁶ With respect to settlement, a court could now hold a conference to, among other things, “facilitat[e] the settlement of the case.”¹⁸⁷ Further, the 1983 rule provided that conference participants could “consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.”¹⁸⁸ Rule 16 was amended again in 1993,¹⁸⁹ and, though the changes were relatively minor, they did “contemplate[] a more active role for judges.”¹⁹⁰ For instance, judges could now “require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.”¹⁹¹ Further cosmetic amendments in 2006 and 2007 did not affect the rule’s substance.¹⁹²

Rule 16 does not mention transferee courts, and the MDL Statute does not mention Rule 16. Although they have explicit authority to do so under neither rule nor statute, transferee courts have exercised power under Rule 16. One such court took a broad view of its authority under the 1983 version of the rule, holding that “the transferee court in a consolidated multidistrict case has jurisdiction to order a corporation properly before it to designate individuals with certain authority to attend certain conferences.”¹⁹³ Citing the efficiency rationales behind both Rule 16 and the MDL Statute, the court concluded that “the limits of the authority conferred by Rule 16 are determined as much by the circumstances of the particular case as by the language of the Rule.”¹⁹⁴ Rule 16, under this reading, thus provides a transferee court with the authority to compel parties to attend settlement conferences.

Courts have, furthermore, buttressed this authority with the power to sanction—including by dismissal—parties who disobey court orders. The Ninth Circuit upheld a transferee court’s dismissal of the complaints of several plaintiffs who disobeyed the transferee court’s case-management orders issued pursuant to Rule

186. *Id.* at 171.

187. *Id.* at 168.

188. *Id.* at 169–70.

189. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 427–31 (1993) [hereinafter 1993 Rule].

190. Parness & Walker, *supra* note 179, at 351.

191. 1993 Rule, *supra* note 189, at 430–31.

192. See FED. R. CIV. P. 16 advisory committee’s note.

193. *In re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1433, 1436 (D. Colo. 1988), *rev’d on other grounds*, *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992).

194. *Id.* at 1437.

16.¹⁹⁵ A court's power to dismiss a complaint in a multidistrict consolidation is the same as it is in a non-MDL case, the Ninth Circuit reasoned, and "the court's discretion is necessarily informed, and broadened, by the number of actions, their complexity, and its charge in the multidistrict context to promote the just and efficient conduct of actions that are coordinated or consolidated for pretrial purposes."¹⁹⁶ Transferee courts have thus assumed a great deal of power over the parties before them, power that ranges from the scheduling of settlement conferences, to the management of cases, to the dismissal of complaints for parties' noncompliance with court orders.

B. Plausibility Pleading under Twombly and Iqbal

A transferee court, like any district court, may dismiss a complaint under Rule 12.¹⁹⁷ This power is particularly notable given the emergence of "plausibility pleading" under *Bell Atlantic Corp. v. Twombly*¹⁹⁸ and *Ashcroft v. Iqbal*.¹⁹⁹ Decided in 2007 and 2009, respectively, *Twombly* and *Iqbal* allow federal trial courts to dismiss complaints that the courts find implausible. This power presumably extends to all federal district courts, including those hearing multidistrict consolidations, though some debate surrounds the manner in which Rule 12 applies to multidistrict consolidations.

As scholars have elsewhere written extensively on the effects of *Twombly* and *Iqbal* on pleading standards,²⁰⁰ this Note will only sketch that history. Before *Twombly*, district courts relied on *Conley v. Gibson*, a 1957 case holding that "a complaint should not be dis-

195. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1222 (9th Cir. 2006) (upholding most of transferee court's dismissals and reversing others). The court noted that Rule 16(f) permits a court to sanction parties who do not comply with Rule 16, and that Rules 37(b)(2)(C) and 41(b) allow dismissal, respectively, "for failure to comply with discovery plans and orders," and "for failure of the plaintiff to prosecute or to comply with any order of court." *Id.* at 1227.

196. *Id.* at 1252.

197. *Cf.* FED. R. CIV. P. 12.

198. 550 U.S. 544 (2007).

199. 556 U.S. 662 (2009).

200. *E.g.*, Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2007 (2010); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 890-98 (2009); Charles B. Campbell, *A "Plausible" Showing After Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 9-21 (2008); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434-39 (2008).

missed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”²⁰¹ *Conley*’s “no set of facts” language became the standard used to decide motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(6) and 12(c).²⁰² The Supreme Court expressly retired this language in *Twombly*,²⁰³ in its place articulating a “plausibility standard”²⁰⁴ under which a complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level.”²⁰⁵ In *Iqbal*, the Court clarified that *Twombly*’s plausibility pleading standard applies to all civil actions.²⁰⁶

There is some question as to just how a transferee court should approach a motion to dismiss under Rule 12—and thus plausibility pleading—in the MDL context.²⁰⁷ Specifically, can a court dismiss a master complaint? Master complaints, consolidated statements of the plaintiffs’ claims, “are often used in complex litigation, although they are not specifically mentioned in either the Federal Rules of Civil Procedure or in any federal statute.”²⁰⁸ Some courts hesitate to dismiss master complaints. For instance, the transferee court in a consolidation involving the contraceptive NuvaRing determined that a Rule 12(b)(6) motion to dismiss was inappropriate in the context of the master complaint, since the master complaint was “simply meant to be an administrative tool to place in one document all of the claims at issue in this litigation.”²⁰⁹ Another trans-

201. 355 U.S. 41, 45–46 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

202. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215 (3d ed. 2004) (“[T]his general rule is supported by a wealth of judicial authority; complete citation to the case law is neither feasible nor useful.”).

203. *Twombly*, 550 U.S. at 563.

204. *Id.* at 560.

205. *Id.* at 555.

206. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1953 (2009) (citing FED. R. CIV. P. 1) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’”)

207. Effron, *supra* note 200, at 2059–60.

208. *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 141 (E.D. La. 2002). The purpose of a master complaint is “to promote judicial economy.” *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 489 F. Supp. 2d 932, 936 (D. Minn. 2007).

209. *In re NuvaRing Prods. Liab. Litig.*, No. 4:08MD1964 RWS, 2009 WL 2425391, at *2 (E.D. Mo. Aug. 6, 2009); *accord In re Trasylol Prods. Liab. Litig.*, No. 08-MD-1928, 2009 WL 577726 (S.D. Fla. Mar. 5, 2009). *But see* James M. Beck et al., *The Nuvaring Cycle, Revisited*, DRUG AND DEVICE LAW (May 17, 2011 12:56 AM), <http://druganddevicelaw.blogspot.com/2010/01/nuvaring-cycle-revisited.html> (calling motion to dismiss NuvaRing master complaint “perfectly proper”).

feree court denied a similar motion to dismiss on its merits, but the court noted the uncertainty surrounding the proper treatment of a master complaint facing such a motion.²¹⁰

Despite some judges' hesitance to apply it to master complaints, the *Twombly/Iqbal* standard still applies to individual complaints in a multidistrict consolidation. In the *NuvaRing* MDL, the defendants followed the court's rejection of their motion to dismiss the master complaint with a series of motions to dismiss, each aimed at a different individual complaint, of which there were over 200.²¹¹ The trial judge, who clearly found this strategy distasteful,²¹² noted that ruling on all of the motions was not in the interest of "judicial economy [or] litigant efficiency," both of which the MDL procedure seeks to promote.²¹³ Though this court denied the individual motions, nothing would have prevented a different court from granting them. Indeed, the Third Circuit has held that transferee courts do have the authority to dismiss individual claims and complaints under Rule 12(b)(6).²¹⁴ The court pointed out, first, that transferee courts have in fact terminated consolidated cases, and, second, that language in the Federal Rules of Civil Procedure²¹⁵ and the Manual for Complex Litigation supports such termination.²¹⁶ Though a master complaint may be invulnerable to a motion to dismiss, nothing in the MDL Statute or elsewhere pre-

210. *In re* Digitek Prods. Liab. Litig., MDL No. 2:08-md-01968, 2009 WL 2433468, at *8 (S.D. W. Va. Aug. 3, 2009) ("[I]t is uncertain how a master complaint should be treated when it is challenged via Rule 12(b)(6).").

211. *In re* NuvaRing Prods. Liab. Litig., No. 4:08MD1964 RWS, 2009 WL 4825170, at *2 (E.D. Mo. Dec. 11, 2009).

212. *Id.* ("Instead of devoting its energy to promoting the efficient coordination of discovery, [the movant] has decided, through motion practice, to request that I review all 223 (and counting) individual complaints and rule on whether each claim in each complaint comports with federal and state pleading requirements.").

213. *Id.* (citing *In re* Phenylpropanolamine Prods. Liab. Litig., No. MDL 1407, 2004 WL 2034587, at *2 (W.D. Wash. Sept. 3, 2004)). The *NuvaRing* court noted that ruling on the motions would require additional briefing and inquiries into the laws of several states, including choice-of-law rules. *NuvaRing*, 2009 WL 4825170, at *2.

214. *In re* Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig., 7 F.3d 357, 367 (3d Cir. 1993).

215. *Id.* at 368 ("Actions terminated in the transferee district court by valid judgment, including . . . judgment of dismissal . . . , shall not be remanded . . . and shall be dismissed by the transferee district court." (quoting FED. R. CIV. P. 14(a))).

216. *Id.* ("The transferee judge has the power to terminate actions by rulings on motions under [Rule] 12." (quoting MANUAL FOR COMPLEX LITIGATION (SECOND) § 331.122 (1985))). The current version of the Manual is similarly explicit: "the judge may terminate actions by ruling on motions to dismiss, for summary

vents a transferee court, to which matters have been referred for pretrial proceedings, from ruling on a series of pretrial dispositive motions seeking to dismiss each individual complaint.

Rule 12, in light of *Twombly* and *Iqbal*, confers a great deal of power on transferee courts. The ability to dismiss an entire multidistrict consolidation's worth of complaints—either by dismissing a master complaint or individual complaints en masse—means a transferee court can dispose of a massive number of actions at a stroke. The plausibility pleading standard thus enhances a transferee court's powers by allowing it to dismiss a complaint in which the plaintiff's claims have not been “nudged . . . across the line from conceivable to plausible.”²¹⁷ The wealth of judicial and academic commentary on plausibility pleading suggests that this area of law is far from settled, but it seems clear that a trial court—and by extension a transferee court—has more authority now than it did even a few years ago to dismiss a complaint.

C. Evidentiary Gatekeeping under Daubert

Federal district judges, in addition to exercising the powers described above, serve as evidentiary “gatekeepers.” This authority in effect authorizes a court to determine the fate of a case that turns on expert testimony: if vital evidence is ruled inadmissible, the case is all but dead. In *Daubert v. Merrell Dow Pharmaceuticals*,²¹⁸ the Supreme Court held that a trial judge must determine whether proffered expert scientific testimony is indeed “scientific knowledge,” and whether it “will assist the trier of fact to understand or determine a fact in issue.”²¹⁹ In other words, expert scientific evidence must be “not only relevant, but reliable.”²²⁰ The Court later extended this gatekeeping obligation to all expert testimony, scientific or otherwise.²²¹ The Federal Rules of Evidence were subsequently amended to reflect these rulings.²²²

judgment, or pursuant to settlement, and may enter consent decrees.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

217. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

218. 509 U.S. 579 (1993).

219. *Id.* at 592.

220. *Id.* at 589.

221. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

222. FED. R. EVID. 702 (allowing expert testimony “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”); *see also id.* advisory committee's note (explaining that Rule 702, as revised in 2000, “provides that all types of expert

A federal trial court may make a *Daubert* determination before a trial begins, for instance, on a motion *in limine*.²²³ Since the MDL Statute gives a transferee court power over pretrial proceedings,²²⁴ it follows that such a court has the authority to make *Daubert* determinations. And transferee courts have indeed made such rulings, even when the rulings threatened to present subsequent problems at trial. In *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, the transferee court ruled on a *Daubert* motion challenging experts whose testimony took the form of trial deposition videos.²²⁵ The transferee court recognized several difficulties in ruling on such testimony considerably in advance of trial, such as the possibility of a remand court's needing to redact or modify the testimony and the possibility that a remand court might be forced to reconsider the admissibility of the evidence based on intervening events.²²⁶ Nonetheless citing gains in judicial economy, the court granted the *Daubert* motion in part, thus excluding some evidence.²²⁷

In some cases, a *Daubert* ruling may be dispositive for all intents and purposes. *In re Silica Products Liability Litigation* was a multidistrict consolidation in which over 10,000 plaintiffs, mostly in Mississippi, alleged injuries caused by exposure to silica, asserting claims against over 250 corporate defendants.²²⁸ Inhalation of silica dust can lead to silicosis, an incurable and potentially fatal condition.²²⁹ The transferee court was skeptical of the plaintiffs' evidence, given that silicosis is extremely rare and that an occurrence of 10,000 cases would constitute "perhaps the worst industrial disaster in recorded world history."²³⁰ Noting that the massive number of diagnoses "def[ied] all medical knowledge and logic," the court suggested that impending Mississippi "tort reform" and a downturn in the number of new asbestos lawsuits—factors leading to a precipitous decline in work for plaintiffs' attorneys and litigation screen-

testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful").

223. See FED. R. EVID. 702 advisory committee's note (approving of challenges based on *Daubert* in, inter alia, *in limine* hearings).

224. 28 U.S.C. § 1407 (2006).

225. No. MDL 1203, 2001 WL 454586 (E.D. Pa. Feb. 1, 2001).

226. *Id.* at *1–2.

227. *Id.* at *1.

228. 398 F. Supp. 2d 563, 573 (S.D. Tex. 2005).

229. *Id.*

230. *Silica*, 398 F. Supp. 2d at 572.

ing companies²³¹—explained the lawsuits.²³² The court heard evidence with respect to all of the diagnosing physicians,²³³ finding their diagnoses “fatally unreliable.”²³⁴

Ultimately, the court determined that it did not have subject-matter jurisdiction over the vast majority of the cases before it and remanded those cases to state courts, thus rendering its opinion largely advisory.²³⁵ With respect to the sole case over which the court did have subject-matter jurisdiction, the court excluded the evidence of the diagnosing physicians, “as well as their accompanying diagnoses,” noting that further inquiry would be required to determine “whether (and, if so, under what conditions) the [p]laintiffs’ claims [could] proceed.”²³⁶ Had the court found that it had subject-matter jurisdiction with respect to the other cases before it, exclusion of the plaintiffs’ doctors—as would have been likely, given the court’s view of the case—would have sounded the death knell for the lawsuits. With no evidence of diagnoses, the plaintiffs would have found further litigation virtually impossible. Furthermore, even though it remanded most of the cases and did not rule on the motion, the transferee court included in its opinion all the evidence from the *Daubert* hearings, sparing the remand courts from holding similar hearings of their own.²³⁷ This evidence included the court’s conclusion that the silicosis claims were “largely the result of misdiagnosis.”²³⁸ Thus, even though it did not rule on the motion, the transferee court’s view of the case affected the viability of the plaintiffs’ actions. Indeed, about six months after

231. These companies assist plaintiffs’ firms in diagnosing particular diseases in individuals, helping to determine which individuals may in turn become plaintiffs. *Silica*, 398 F. Supp. 2d at 597–98.

232. *Id.* at 620.

233. *Id.* at 581–637.

234. *Id.* at 675. The court applied the “fatally unreliable” description specifically to diagnoses used by one plaintiffs’ firm, but the label fits the court’s overall view of the diagnosing physicians’ work. The physicians often “diagnosed” hundreds, or even thousands, of plaintiffs, and some physicians were unaware of the fact that forms they signed purported to be diagnoses. *See id.* at 581–637; *see also* Mark A. Behrens & Corey Schaecher, *Rand Institute for Civil Justice Report on the Abuse of Medical Diagnostic Practices in Mass Tort Litigation: Lessons Learned from the “Phantom” Silica Epidemic That May Deter Litigation Screening Abuse*, 73 ALB. L. REV. 521, 526–28 (2010).

235. *Silica*, 398 F. Supp. 2d at 679.

236. *Id.* at 680.

237. *Id.* at 633.

238. *Id.* at 632.

remand, more than half of the lawsuits had been dismissed, most of them voluntarily by the plaintiffs' firms that filed them.²³⁹

In sum, the power to rule on a *Daubert* motion gives a transferee court the evidentiary gatekeeping authority of a trial court. Even though a transferee court does not have the power under the MDL Statute to try a case, it may nonetheless admit and exclude evidence. This authority in turn affects trials on remand as well as settlement negotiations, the latter of which is perhaps more important given the tendency of multidistrict consolidations to settle. A party whose experts have been excluded by the transferee court will be at a disadvantage at trial and, correspondingly, in settlement negotiations.²⁴⁰ The transferee court's power over evidence provides another example of a transferee court's ability to influence the outcomes of cases consolidated before it and to drive those cases toward resolution.

D. Bellwether Trials

Another important innovation in the MDL context is a transferee court's ability to hear bellwether cases. Unlike the procedures discussed thus far, bellwether trials were created to deal with the problems of aggregate litigation. "The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock."²⁴¹ Bellwether cases, in a similar vein, are representatives selected from the "flock" of cases consolidated in front of the transferee court and tried front-to-back.²⁴² A particular case is selected as a bellwether "because it involves facts, claims, or defenses that are similar to the facts, claims, and defenses presented in a wider group of related cases."²⁴³ Some courts have made, or have tried to make, bellwether trials binding on parties other than those in the bellwether trials themselves;²⁴⁴ others, par-

239. Behrens & Schaecher, *supra* note 234, at 529.

240. After the *Silica* ruling discussed above, *see infra* text accompanying notes 228–39, for instance, the plaintiffs had virtually no negotiating leverage at all.

241. *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997).

242. For a thorough discussion of bellwether cases, see Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

243. Fallon, Grabill & Wynne, *supra* note 242, at 2325.

244. *See, e.g., In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1505, 1510 (D. Colo. 1989), *rev'd on other grounds*, *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992) ("[C]ases consolidated for resolution through the exemplar trial, by order of the court or confession of the parties, are bound by the result of the exemplar trial."); *Hilao v.*

ticularly courts of appeals, are skeptical that such preclusive effects are legitimate.²⁴⁵ Nevertheless, bellwether trials can still assist the transferee court and the parties: “the knowledge and experience gained during the bellwether process can precipitate global settlement negotiations and ensure that such negotiations do not occur in a vacuum, but rather in light of real-world evaluations of the litigation by multiple juries.”²⁴⁶ This use of bellwether trials as information-gathering devices is uncontroversial.²⁴⁷

Under the MDL Statute, cases are consolidated before the transferee court for pretrial purposes only.²⁴⁸ In order to try bellwether cases for the first few decades after the MDL Statute was in force, transferee courts would assign the bellwether cases to themselves under 28 U.S.C. § 1404(a).²⁴⁹ Section 1404(a), unlike the MDL Statute, allows a court to retain the transferred case for trial.²⁵⁰ The Supreme Court put a stop to this practice of “self-assignments” in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*.²⁵¹ The Court held that the MDL Statute “obligates the [MDL] Panel to remand any pending case to its originating court when, at the

Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996) (affirming district court’s binding of all claimants in Rule 23(b)(3) class action to results of a series of determinations of a statistical sample of the claims). For an example of an attempt to bind parties in other MDL actions to the outcome of bellwether trials that was reversed on appeal, see *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998).

245. See, e.g., *Chevron*, 109 F.3d at 1021 (Jones, J., concurring) (“I also have serious doubts . . . that a bellwether trial of representative cases is permissible to extrapolate findings relevant to and somehow preclusive upon a larger group of cases.”). Other courts have found that such preclusive effects are illegitimate unless the parties agree to them. E.g., *In re TMI Litig.*, 193 F.3d 613, 725 (3d Cir. 1999) (“[A]bsent a positive manifestation of agreement by Non-Trial Plaintiffs, we cannot conclude that their Seventh Amendment right is not compromised by extending a summary judgment against the Trial Plaintiffs to the non-participating, non-trial plaintiff.”). These courts, in other words, are uncomfortable with the idea that a party that has not had its day in court could be bound by the results of a bellwether trial.

246. Fallon, Grabill & Wynne, *supra* note 242, at 2325.

247. See, e.g., *Chevron*, 109 F.3d at 1019 (“The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar.”).

248. 28 U.S.C. § 1407(a) (2006).

249. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32–33 (1998).

250. 28 U.S.C. § 1404(a) (2006) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”).

251. 523 U.S. 26 (1998).

latest, [all] pretrial proceedings have run their course.”²⁵² Despite this setback, however, transferee courts and parties to MDL proceedings, continuing to see the benefits of bellwether trials, have used “[c]reative thinking” to continue the practice of trying bellwether cases.²⁵³ For instance, a transferee court can, without violating the holding of *Lexecon*, hear any case in a multidistrict consolidation that was (1) originally filed in the transferee district; (2) dismissed from its original district and re-filed in the transferee district; (3) remanded to the original court and then transferred *back* to the transferee court by the transferor court under § 1404(a);²⁵⁴ or (4) “filed directly into the MDL.”²⁵⁵ Moreover, the transferee judge may remand a case to the original, transferor court, and then herself seek an intercircuit²⁵⁶ or intracircuit²⁵⁷ assignment to that transferor court, in effect following the case to the court in which it was originally filed and presiding over it there.²⁵⁸

The primary import of a transferee court’s ability to hear bellwether cases is that through such cases the court “can precipitate and inform settlement negotiations.”²⁵⁹ The ability to accurately determine the values of individual cases is an important part of the settlement of multidistrict consolidations, and, given that most of the cases transferred under the MDL Statute are settled,²⁶⁰ this ability is vital to the judicial efficiency that multidistrict litigation is meant to promote.

E. Authority over Attorney’s Fees Prior to the Quasi-Class Action Model

With the exception of the ability to hear bellwether cases, the procedures discussed in this Section—pretrial conferences, motions to dismiss, and *Daubert* hearings—are adapted from a court’s

252. *Id.* at 34.

253. Fallon, Grabill & Wynne, *supra* note 242, at 2354 n.107.

254. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

255. Fallon, Grabill & Wynne, *supra* note 242, at 2355–56. In such a case, the transferee court is technically the forum court, whether or not the plaintiffs reside in the transferee court’s judicial district. *Id.*

256. *See* 28 U.S.C. § 292(b) (2006) (“The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.”).

257. *See* § 292(d) (“The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.”).

258. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

259. Fallon, Grabill & Wynne, *supra* note 242, at 2338.

260. *See supra* note 33 and accompanying text.

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authority in traditional, one-to-one litigation. Such procedures serve judges well in multidistrict consolidations, but they do not address certain problems inherent in aggregate litigation, such as the problem of fees.²⁶¹ The quasi-class action evolved to help solve this problem, but the *Zyprexa* court was not the first to realize that the power to control fees is important.

Despite their lack of express authority to address attorneys' fees, some transferee courts have simply done so.²⁶² For instance, in the *Diet Drugs* settlement, the transferee court ordered the defendant to pay 9% of each plaintiff's award into a separate account.²⁶³ The court used this account to provide common-benefit fees to attorneys for work those attorneys did that benefitted the plaintiffs as a whole.²⁶⁴ One possible justification for these sorts of court actions is the common fund doctrine,²⁶⁵ but some commentators have asserted that this doctrine does not apply in the MDL context.²⁶⁶ Regardless of their validity, these actions demonstrate that courts are aware that the issue of fees is critical in aggregate litigation, and they show that courts are willing to innovate to ensure that fees are justly apportioned. This power over fees under the common fund doctrine, however, is limited: whereas a court overseeing a class action can limit class counsel's fees to a certain percentage under

261. See *supra* note 71 and accompanying text.

262. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.927 (2004) ("If there is a combination of individual settlements and a class-wide settlement, the judge sometimes orders individual plaintiffs' lawyers to pay a *certain percentage of the fees* they received into a common fund to contribute to the fees of the class counsel, whose work in discovery and trial preparation contributed to the settlement of the individual cases as well." (emphasis added) (citations omitted)).

263. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, No.1203, 1999 WL 124414, at *2 (E.D. Pa. Feb. 10, 1999).

264. *Id.* at *3.

265. *E.g.*, Dennis E. Curtis & Judith Resnik, *Contingency 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, 430 (1998) ("At the conclusion of [multidistrict] litigations, when attorney fee payments come into play, the equitable common fund doctrine enables judges to supervise the payment of fees and costs to attorneys."). The common fund doctrine provides that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

266. See generally Silver & Miller, *supra* note 9, at 119–30 (concluding, after looking at several requirements underlying the use of the doctrine, "that the common fund doctrine does not apply to MDLs").

Rule 23(h),²⁶⁷ a transferee court does not have that authority under the common-fund doctrine. The quasi-class action addresses this concern.

Class actions, in summary, are increasingly unable to resolve instances of mass harms. Multidistrict consolidations are filling the resulting void, but a transferee courts' powers over consolidations are not clearly defined. Transferee courts have looked to a range of procedural mechanisms to meet the two objectives of the MDL Statute by providing justice and efficiency in the resolution of the consolidated actions. Despite these efforts, courts lacked the ability—at least before *Zyprexa* in 2006—to limit attorneys' fees under contingent-fee arrangements, leading to a potentially unjust and inefficient allocation of resources. By addressing these problems and helping to ensure that multidistrict consolidations are more just and efficient, the quasi-class action model furthers the objectives of the MDL Statute itself.

III. THE QUASI-CLASS ACTION MODEL AND THE OBJECTIVES OF MULTIDISTRICT LITIGATION: ADVANTAGES AND DISADVANTAGES

This Part analyzes the advantages and disadvantages of the quasi-class action model.²⁶⁸ It concludes that the quasi-class action model furthers the primary aims of the MDL Statute and that, on balance, the model's advantages outweigh its disadvantages. Section A discusses the comparative merits of the quasi-class action model by examining two of the most important purposes of the MDL Statute: justice and efficiency. Section B discusses the potential drawbacks of the model.

A. *Advantages of the Quasi-Class Action Model*

The MDL Statute states that the MDL Panel may consolidate and transfer related actions provided that, inter alia, the transfer would “promote the just and efficient conduct of such actions.”²⁶⁹ As discussed above, the promotion of justice and efficiency is the most important factor the Panel considers when deciding whether

267. *E.g.*, *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 561–62 (E. & S.D.N.Y. 1995) (reducing amount of attorneys' fees under contingency contracts from 33.3% to 25%), *vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996).

268. As explained above, this Note addresses the quasi-class action model only insofar as it relates to the limiting of attorneys' fees. *See supra* notes 10–13 and accompanying text.

269. 28 U.S.C. § 1407(a) (2006).

to consolidate and transfer actions.²⁷⁰ This Note has laid out a variety of tools transferee courts have adapted to the MDL process to further such just and efficient conduct: pretrial conferences,²⁷¹ plausibility pleading,²⁷² evidentiary gatekeeping,²⁷³ bellwether trials,²⁷⁴ and allocation of common-benefit attorneys' fees.²⁷⁵ The quasi-class action model, a new adaptation, similarly promotes the just and efficient conduct of actions consolidated under the MDL Statute, thereby furthering the two primary purposes of multidistrict consolidation. This Section addresses both justice and efficiency under the quasi-class action model, beginning with the latter. Subsection 1 examines the efficiency rationale underlying multidistrict litigation, and Subsection 2 analyzes the justice rationale.

1. The Efficiency Rationale

By allowing a court to limit the amount an attorney can be paid, the quasi-class action model allows for a more efficient allocation of resources than is available without it. Because a non-adjustable fee agreement creates a free-rider problem, a transferee court should have the ability to limit the amount a free-riding attorney is paid and thus adjust such attorney's incentives, ensuring that resources are more efficiently allocated. Moreover, the ability to set a single cap for all attorneys furthers judicial economy.

A multidistrict consolidation presents a significant risk of free riders. A plaintiff's attorney who is assured of receiving her contracted-for fee has the incentive to sit back and let other attorneys do the work in the case, collecting effectively the same fee whether she works on the case herself or lets others do so. The problem, in other words, is that attorneys have the incentive to take a large portion of any settlement without adding any value to the settlement process. And this incentive is more than theoretical. In *Guidant*, Judge Frank observed that "the Court . . . received numerous communications from [plaintiffs] stating that their attorneys have never contacted them or that their attorneys are making the [plaintiffs] complete, by themselves, all of the settlement documents."²⁷⁶ Pro-

270. See *supra* notes 28–29 and accompanying text.

271. See *supra* Part II.A.

272. See *supra* Part II.B.

273. See *supra* Part II.C.

274. See *supra* Part II.D.

275. See *supra* Part II.E.

276. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2008 WL 3896006, at *9 (D. Minn. Aug. 21, 2008).

viding compensation to attorneys who perform common-benefit work—a step courts have taken without invoking the quasi-class action model²⁷⁷—helps alleviate the free-rider problem by providing incentives for attorneys to do such work. The quasi-class action model, however, takes the further step of providing a *disincentive* to free riders and encouraging them to not forsake their clients like some *Guidant* attorneys did. Limiting the compensation available to attorneys who free ride ensures that every attorney is motivated to provide a benefit to his client and the legal system by working to bring the consolidation to a conclusion. As a policy matter, an attorney should not be entitled to a windfall for simply signing up a client, agreeing to a fee, and forgetting about his client until other attorneys resolve the case. Allowing a court the power to cap such an attorney's fee helps prevent these kinds of windfalls. The quasi-class action, in short, allows a transferee court to allocate resources so as to encourage efficiency. A court's ability to limit the amount available to an attorney *ex post* ensures that otherwise potentially free-riding attorneys are motivated to work to resolve the case and aid their clients.

Furthermore, setting a single cap for all contingent fees furthers judicial economy by ensuring that, as a baseline matter, a court does not have to determine appropriate fees for all attorneys but can instead set one percentage that is applicable to all.²⁷⁸ Due to the economies of scale created by consolidations, the vast majority of attorneys will often perform the same relatively straightforward tasks for their clients. In *Vioxx*, for instance, most attorneys did not pursue individual discovery or draft individual motions.²⁷⁹ Instead, the attorneys “were able to simply wait while a \$4.85 billion settlement was negotiated and then do no more than enroll their clients in the settlement and monitor their progress through the claims valuation process.”²⁸⁰ The court decided that, as a matter of both economy and equity, the fact that the attorneys performed similar tasks mandated “a uniform, consistent result for all attorneys and their clients.”²⁸¹ By allowing for a more effective use of re-

277. *E.g.*, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, No.1203, 1999 WL 124414, at *3 (E.D. Pa. Feb. 10, 1999).

278. This does not take into account common-benefit work or other special circumstances, which may be considered by a special master *ex post*. As the *Vioxx* court observed, “there may be one or more cases in which special treatment might be justified.” *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 564 (E.D. La. 2009).

279. *Id.* at 563.

280. *Id.*

281. *Id.*

sources and justifying a court's setting of a single cap for attorneys' fees, the quasi-class action furthers one of the two principal grounds for multidistrict consolidation: efficiency.

2. The Justice Rationale

Aside from efficiency, the other primary justification for multidistrict consolidation is the furtherance of just conduct of the consolidated actions.²⁸² The quasi-class action furthers justice in three ways: by providing a method to distribute resources to those who deserve them, by treating similarly situated plaintiffs similarly, and by strengthening confidence in and the fairness of the MDL mechanism itself.

First, the quasi-class action helps to ensure that resources go to those who deserve them. If a court can cap contingent-fee agreements and thus decrease the funds available to free-riding attorneys, it can allocate those funds to two groups of people: attorneys who have performed common-benefit work, and clients who have been harmed by a defendant's actions. As a purely equitable matter, either distribution is preferable to distributing the funds to a free-riding attorney. Moreover, the quasi-class action model allows a court to collect funds in a fair way. Instead of, say, taking a percentage of *all* attorneys' fees or *all* clients' awards to supply the common-benefit fund, under the quasi-class action model a court can capture resources that would otherwise go to attorneys whose only claim to them is that they happened to have a higher contingent-fee arrangement than other attorneys. The court can then distribute these resources either to attorneys who have performed work for the common benefit of all plaintiffs, or to the plaintiffs themselves. This process helps to ensure that attorneys are paid for the work they do, rather than simply the retainer contracts they draft.

Second, the power to alter contingent-fee contracts allows a court to treat similarly situated plaintiffs in similar ways. Specifically, it extends to plaintiffs in multidistrict consolidations the protections that plaintiffs in class actions already have. As Judge Weinstein and other judges to adopt his reasoning have noted, mass-harm multidistrict consolidations and class actions are similar in many respects,²⁸³ and the former are supplanting the latter in many in-

282. 28 U.S.C. § 1407(a) (2006).

283. *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 612 (E.D. La. 2008); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *17 (D. Minn. Mar. 7, 2008), *overruled in part by* MDL No.

stances in the mass-harm context.²⁸⁴ On a surface level, of course, both sorts of actions involve large numbers of plaintiffs. Even more, though, these plaintiffs are similarly disadvantaged. While it is true that each individual plaintiff in a multidistrict consolidation may well have individual representation,²⁸⁵ where most individual class members do not, the mere fact of representation is insufficient to provide each plaintiff in a consolidation the sort of attention from her attorney that she would have in traditional one-on-one litigation. A single plaintiff whose attorney or whose attorney's law firm represents dozens or hundreds of other clients in the same multidistrict consolidation may, depending on the nature of the underlying claim, have as little individualized attention as a class action plaintiff represented by class counsel. Indeed, Judge Frank commented on such a lack of attention in *Guidant*.²⁸⁶ Particularly in light of the fact that multidistrict consolidations have begun to replace class actions in the mass-harm context,²⁸⁷ plaintiffs in one type of action in a mass-harm aggregation should have similar protections to those in the other. Plaintiffs who are similarly situated in all respects save for the type of aggregation mechanism at work in their cases should, as a normative matter, be treated similarly. The historical accident that procedural law has developed in a certain way should not affect the ability of courts to police unfair attorney-client contracts.

Additionally, the quasi-class action model allows a court to treat all plaintiffs in the same way if one of the cases designated for

05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006).

284. See *supra* Part I.B. Of course, class actions and multidistrict consolidations are dissimilar in a number of important ways as well. As Professors Silver and Miller note:

In MDLs, lawyers often have valuable client inventories. . . . The pre-existing incentives of class counsel, by contrast, are usually much weaker. Class counsel typically has a few signed clients whose claims, standing alone, scarcely justify the cost of litigation. The problem in class actions is to create incentives from whole cloth; in MDLs, it is to enhance pre-existing incentives that may already be quite strong.

Silver & Miller, *supra* note 9, at 148; see also Willging & Lee, *supra* note 35, at 794 (“MDL aggregation is not *exactly* an alternative to class action aggregation of claims.”).

285. A plaintiff in a multidistrict consolidation might not have individual representation if she is an absent class member in a class action that was consolidated and transferred to the transferee court.

286. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2008 WL 3896006, at *9 (D. Minn. Aug. 21, 2008).

287. See *supra* Part I.B.

consolidation is itself a class action. Allowing transferee courts to exercise the same powers over class members and individual plaintiffs ensures that the court can treat all plaintiffs as equity requires. The plaintiffs all ultimately looked to the same court to aid in the resolution of their dispute, and the court should be able to ensure that all plaintiffs are treated similarly. In the words of one commentator, “there is a compelling logic in ensuring that plaintiffs from around the country brought together in mass tort litigation pay the same percentage contingency fee to their attorneys when all of their claims are resolved in a centralized forum.”²⁸⁸ Such equitable treatment is particularly important in light of the fact that, as in *Zyprexa*, *Guidant*, and *Vioxx*, plaintiffs in mass-harm consolidations often require extra solicitude due to their injuries or the particularities of their situations.²⁸⁹

Third, and finally, the quasi-class action model furthers justice by enhancing trust in the MDL mechanism and ensuring that it is fair. As Judges Weinstein, Frank, and Fallon noted, the ability to prevent excessive MDL attorneys’ fees may enhance public confidence in the justice system.²⁹⁰ But the quasi-class action mechanism may accomplish even more than that. Although they are judicially efficient, multidistrict consolidations have been criticized as pro-defendant to the point that “Congress appears to have lost confidence in a judicial management mechanism that once had such great promise.”²⁹¹ The Class Action Fairness Act of 2005 (CAFA)²⁹² includes a provision prohibiting transfer under the MDL Statute of any class action that was itself removed from state court to federal court under CAFA, unless a majority of plaintiffs request such a transfer.²⁹³ One court has called this pro-plaintiff non-transferabil-

288. Grabill, *supra* note 10, at 58.

289. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 561 (E.D. La. 2009) (“[L]ike the elderly and physically ill claimants in *Zyprexa* and *Guidant*, *Vioxx* claimants have all suffered some form of physical injury and many are elderly. Accordingly, the Court was justified in exercising its inherent authority and responsibility to examine contingent fee contracts for fairness and consistency.”).

290. *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 613 (E.D. La. 2008); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008), *overruled in part* by MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 493–94 (E.D.N.Y. 2006).

291. *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 156 (D. Mass. 2006).

292. 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2006).

293. § 1332(d)(11)(C)(i). Notably, this provision is in a piece of legislation that, in the eyes of many observers, was drafted so as to benefit business defendants at the expense of plaintiffs. *See, e.g.*, Stephen B. Burbank, *The Class Action Fairness*

ity provision “an unmistakable rebuke to the [MDL] Panel.”²⁹⁴ If CAFA indeed includes a congressional strike against the MDL process, any actions by judges designed to protect plaintiffs may help to allay congressional fears that multidistrict consolidations are unfair and that further legislation limiting the MDL process is necessary. The quasi-class action model allows for just such pro-plaintiff actions, since it provides judges a means to look after the interests of plaintiffs in an area—fee determination—in which they are inherently at odds with their own counsel.²⁹⁵ Moreover, Professor Judith Resnik has argued that public adjudication is a good thing in and of itself: “Open courts and published opinions permit individuals who are neither employees of the courts nor disputants to learn, firsthand, about processes and outcomes.”²⁹⁶ Public scrutiny of what would otherwise be a private contractual arrangement may help to educate the public about the nature of the attorney-client relationship and the manner in which attorneys and clients contract, ensuring savvy clients and, accordingly, more informed bargaining in future attorney-client relationships.

In sum, the quasi-class action model for limiting attorneys’ fees furthers both of the primary rationales underlying the MDL Statute: justice and efficiency. By providing for a more efficient and equitable allocation of resources, by allowing for the similar treatment of similarly situated plaintiffs, and by helping to guarantee the fairness and strength of the MDL mechanism itself, the quasi-class action model assists in ensuring that multidistrict consolidations are the just, efficient mechanisms they were designed to be.

B. *Disadvantages of the Quasi-Class Action Model*

Despite the benefits outlined above, the quasi-class action model is not without its shortcomings. First, and most obviously, the

Act of 2005 in Historical Context: A Preliminary View, 156 U. PA. L. REV. 1439, 1441 (2008) (“[S]ome critics regard the . . . legislation as inimical to the interests of numerous groups of potential litigants.”); Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1654 (2005) (arguing that CAFA “may take away a plaintiff’s ‘day in court’”).

294. *Delaventura*, 417 F. Supp. 2d at 156.

295. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 560 (E.D. La. 2009) (“[W]hen it comes to the percentage or amount of the contingency fee, a conflict of interest necessarily exists between the claimants and their attorneys who both seek to maximize their own percentage of an award.”).

296. 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, 694 (2011); see also *id.* at 690–94 (describing “the arguments for the public facets of the due process model”).

quasi-class action model, by providing for the capping of attorneys' fees, allows a court to disregard private contracts, which may seem inequitable to the contracting parties. In cases in which judges have altered fees, they have in essence used their equitable powers to override terms they consider unfair to plaintiffs.²⁹⁷ However, as discussed above, the quasi-class action provides substantial benefits to MDL plaintiffs and the broader public.²⁹⁸ On balance, those advantages outweigh any unfairness to the contracting parties. This is particularly so since the reason courts employ the quasi-class action model in the first place is to make the attorney-client contract fairer to the contracting parties and to make the settlement fairer to the plaintiffs as a group. Furthermore, a fee cap need not be permanently fixed. For instance, in *Zyprexa*, the court granted a special master the authority to adjust particular attorneys' fees up or down within a specified range.²⁹⁹ In *Guidant*, Judge Frank altered the fee structure as the changing circumstances of the case required.³⁰⁰ In *McMillan*, both attorney and client agreed that the original contract was indeed fair, and Judge Weinstein amended his order accordingly.³⁰¹ Nothing, in short, prevents a court from taking into account the equities of a particular situation and adjusting fee caps as necessary.

Second, the quasi-class action appears cut from whole cloth. As one law firm argued to the Second Circuit on appeal from a *Zyprexa* ruling, "[t]here is no such thing as a quasi-class action."³⁰² Although "quasi-class action" is undoubtedly a new term in this context, other courts have exercised powers like those the quasi-class action model encompasses. For instance, the Fifth Circuit held in 1977 that a "the district judge had the power to award compensation to the [Plaintiffs'] Committee to be paid by other plaintiff counsel out of the fees they were entitled to receive."³⁰³ Nor is such power limited either to federal courts or to the precise issue at stake in the quasi-class action model. In *Tax Authority, Inc. v. Jackson Hew-*

297. *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 612 (E.D. La. 2008); *Guidant*, 2008 WL 682174, at *18; *Zyprexa*, 424 F. Supp. 2d at 497.

298. *See supra* Part III.A.

299. *Zyprexa*, 424 F. Supp. 2d at 497.

300. *See supra* notes 151–55 and accompanying text.

301. *McMillan v. City of New York*, Nos. 08-CV-2887, 03-CV-6049, 2010 WL 1487738, at *1 (E.D.N.Y. Apr. 13, 2010).

302. Reply Brief & Supplemental Appendix for Appellant at 23, *In re Zyprexa Prods. Liab. Litig.* (Mulligan Firm Injunction Appeal), 594 F.3d 113 (2d Cir. 2010) (No. 07-3815-cv), 2008 WL 7947269, at *23.

303. *In re Air Crash Disaster at Fla. Everglades* on Dec. 29, 1972, 549 F.2d 1006, 1008 (5th Cir. 1977).

itt, Inc.,³⁰⁴ for example, the Supreme Court of New Jersey held that an attorney may not “obtain[] consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement.”³⁰⁵ In that case, one attorney represented 154 plaintiffs in a single mass action.³⁰⁶ A provision in the retainer agreement with each client provided that a vote in favor of a settlement by 60% of the attorney’s clients would bind all of the clients to the settlement.³⁰⁷ In invalidating that provision, the court held that a client must have knowledge of the terms of a settlement before agreeing to them.³⁰⁸ In short, the court nullified a term in attorney-client contracts based on unfairness to the clients. The quasi-class action may be a new theoretical concept, but as a practical matter, other courts have limited the ability of clients and attorneys to contract based on potential inequity to the clients.

Third, Jeremy Grabill has criticized the courts that have at least partially based their fee caps on the similarity of the multidistrict consolidations before those courts to class actions.³⁰⁹ He argues that such reasoning is unnecessary, since “the inherent judicial authority to ensure that contingency fees are not excessive is well established.”³¹⁰ Moreover, such reasoning has “muddied the waters and added to the confusion that now exists concerning the proper role for courts to play more generally vis-à-vis private mass tort settlements.”³¹¹ While Grabill supports fee caps,³¹² he criticizes the manner in which such caps have been justified and the resulting confusion that such justifications may cause. However, the authority of the courts using the quasi-class action model is not as well estab-

304. 898 A.2d 512 (N.J. 2006).

305. *Id.* at 522.

306. *Id.* at 515.

307. *Id.*

308. *Id.* at 522. The court based its decision on New Jersey’s aggregate settlement rule, which provides that “[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.” *Id.* at 518 (citing SYLVIA B. PRESSLER, CURRENT N.J. COURT RULES 1.8(g) (2003)).

309. Grabill, *supra* note 10, at 58–59.

310. *Id.* at 58.

311. *Id.* at 59.

312. *Id.* at 58 (“I believe there is a compelling logic in ensuring that plaintiffs from around the country brought together in mass tort litigation pay the same percentage contingency fee to their attorneys when all of their claims are resolved in a centralized forum.”).

lished as Grabill suggests. As Grabill points out,³¹³ two cases from the 1980s support the proposition that judges have the authority to regulate contingency fees,³¹⁴ as does a nineteenth-century Supreme Court decision.³¹⁵ Indeed, *Zyprexa*, *Guidant*, and *Vioxx* all ground their authority in part in one or more of these prior cases.³¹⁶ Nevertheless, not many cases support this authority: the most recent Supreme Court word on the topic was in 1884.³¹⁷ Moreover, the *Zyprexa*, *Guidant*, and *Vioxx* courts broke new ground in asserting control over contingency fees on a much larger scale than did courts in the nineteenth and twentieth centuries. Supporting this large-scale action by looking to courts' analogous authority in class actions makes sense as a way to ground this newly expanded power. While it is true that the term "quasi-class action" brings with it some uncertainty,³¹⁸ no court has used the term to support anything other than a cap on attorneys' fees. Furthermore, the courts' need to anchor their authority over fees justifies the uncertainty.

Finally, Professors Charles Silver and Geoffrey Miller have articulated a robust critique of the quasi-class action.³¹⁹ This critique is based on a broader definition of the quasi-class action model than this Note adopts: they consider the quasi-class action method of handling multidistrict consolidations to include "judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfers, and fee cuts,"³²⁰ whereas this Note's

313. *Id.* at 58 n.208.

314. *E.g.*, *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1111 (7th Cir. 1982) ("The district court's appraisal of the amount of the fee is . . . justified by the court's inherent right to supervise members of its bar."); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1277 (8th Cir. 1980) ("The court has the power and responsibility to monitor contingency fee arrangements for reasonableness.").

315. *Taylor v. Bemiss*, 110 U.S. 42, 45–46 (1884) ("This . . . does not remove the suspicion which naturally attaches to such [contingency] contracts, and where it can be shown . . . that the compensation is clearly excessive, . . . the court will in a proper case protect the party aggrieved.").

316. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 554 (E.D. La. 2009) (citing *Rosquist*, 692 F.2d 1107); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL 05-1708 DWF/AJB, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) (citing *Rosquist*, 692 F.2d 1107; *Travel Arrangers*, 623 F.2d 1255; and *Taylor*, 110 U.S. 42); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 492 (E.D.N.Y. 2006) (citing *Rosquist*, 692 F.2d 1107).

317. *Taylor*, 110 U.S. 42.

318. As Grabill asks, "[I]s all Rule 23 authority imported into the non-class aggregate settlement context, some subset of that authority, or only the authority to regulate attorneys' fees?" Grabill, *supra* note 10, at 59 n.212.

319. Silver & Miller, *supra* note 9, at 111.

320. *Id.* at 110.

functional definition—based strictly on case law—encompasses only fee caps.³²¹ With respect to such caps, however, Professors Silver and Miller offer both theoretical and practical criticisms. On the theoretical side, they argue that economies of scale do not justify fee limitations, since “aggregation is predictable”³²² and “lawyers compete for clients in competitive markets.”³²³ In other words, the market should drive plaintiffs’ attorneys to price their services competitively and efficiently. There may still be instances in any particular multidistrict consolidation, though, in which the market functions imperfectly. In a consolidation of nationwide cases covering thousands of geographically dispersed plaintiffs who have filed cases over a number of months or years, it is reasonable to believe that the market alone does not create a situation in which similarly situated plaintiffs pay similar attorneys’ fees. To ensure equity among plaintiffs, judges should have the authority to counter any market failures that arise and cap fee arrangements that are unjust in light of the facts of a given consolidation. This point is particularly important given that—as in *Zyprexa*, *Guidant*, and *Vioxx*—mass-harm MDL plaintiffs are often particularly vulnerable.³²⁴ Moreover, given that a primary goal of the MDL Statute is to encourage the just conduct of consolidated actions, fee caps are directly in line with the purpose of the Statute. Finally, even if a particular contract was fair *ex ante*, a judge should be able to decide whether the work an attorney has done justifies the agreed-upon fee. As Judge Frank pointed out in *Guidant*, some attorneys virtually abandon their clients.³²⁵ Regardless of the market forces governing *ex ante* contracting, a court should be able to adjust for the actual events of a case *ex post*. In short, a client should not bear the risk that her attorney will be a free rider.

321. See *supra* notes 11–13 and accompanying text.

322. Silver & Miller, *supra* note 9, at 137.

323. *Id.*

324. See *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 561 (E.D. La. 2009) (“In order to qualify for the Vioxx Settlement Agreement, a claimant must have suffered a heart attack, ischemic stroke, or sudden cardiac death.”); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 DWF/AJB, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) (“In this MDL, many of the individual Plaintiffs are both physically ill and aging and, understandably, do not have the strength or knowledge to negotiate fair fees for themselves.”); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (“Many of the individual plaintiffs are both mentally and physically ill and are largely without power or knowledge to negotiate fair fees . . .”).

325. See *supra* note 1 and accompanying text.

Even if the market is imperfect, Professors Silver and Miller argue that, in practice, judges do not tend to exercise fee-capping authority in an informed, data-driven manner, but that “[t]hey invent numbers instead.”³²⁶ However, even conceding that judges have not yet perfected the process of setting fee caps, the quasi-class action model as thus far adopted should not be abandoned. An ideal version of the model may require more data and more study than judges have thus far employed, but, as detailed above, the quasi-class action model furthers the rationales—justice and efficiency—that justify multidistrict consolidations themselves.³²⁷ Given the advantages the model offers, the framework it has put in place is worth keeping.

In sum, the quasi-class action model is not perfect. While critics have articulated valid concerns, the concerns justify tinkering with the model, not discarding it. A court sensitive to the equities of a particular case and willing to look to hard data can bring about the model’s benefits while mitigating its potential drawbacks. The quasi-class action model remains a viable way to ensure that multidistrict litigation continues to perform the functions it was designed to perform and meet the objectives it was designed to meet.

326. Silver & Miller, *supra* note 9, at 110. Professors Silver and Miller offer a solution to the problems they identify with MDL practice more broadly:

The proposal would establish a default rule requiring an MDL judge to appoint a Plaintiffs’ Management Committee (“PMC”) made up of lawyers with valuable client inventories: often, but not necessarily, lawyers with the largest numbers of signed clients. The PMC would then select, set compensation terms for, and monitor a group of common benefit attorneys (“CBAs”) who would perform the common benefit work (“CBW”) MDLs require. CBW is legal work beneficial to all plaintiffs, such as discovery relating to factual issues common to all plaintiffs’ claims. PMC members would receive only fees from their signed clients, but this should motivate them to select, incentivize, and monitor CBAs with care because good CBW will make their client inventories more valuable. CBAs would draw fees on a pro rata basis from all lawyers with cases in an MDL.

Id. at 111–12 (footnote omitted). Since this Note considers the quasi-class action to be exclusively related to the authority to cap fees, the Professors’ solution is not directly applicable to the narrow issue discussed in this piece. Rather, their recommendation takes into account all of the elements that they consider to be part of the quasi-class action model (i.e., “judicial appointment of lead attorneys, judicial control of lead attorneys’ compensation, forced fee transfers, and fee cuts,” *id.* at 110). The Professors’ suggestion does not seem to provide a solution to the problem of inequity among plaintiffs in the event of a market failure leading to similarly situated plaintiffs ending up with different contingent-fee agreements. This is one of the problems Judge Weinstein identified when he introduced the quasi-class action in *Zyprexa*, and it is one that a well managed and thoughtful fee cap still helps to resolve.

327. See *supra* Part III.A.

CONCLUSION

The quasi-class action model for limiting attorneys' fees is a new tool in the MDL toolkit, but it is one that promises to further the purposes of the MDL mechanism. The MDL Statute is explicit that cases should be consolidated to ensure that they are handled justly and efficiently, but the statute is less forthcoming as to precisely what powers courts have to ensure this justice and efficiency. Consequently, judges have had to innovate. The quasi-class action model is just such an innovation, filling a gap in courts' powers while at the same time furthering both of the primary objectives of the MDL Statute. Though not without its shortcomings, the model provides enough benefits that the framework it establishes should be kept in place. The power to limit attorneys' fees is a valuable tool for judges overseeing multidistrict consolidations, and it helps ensure that the legal system can continue to solve complex and significant problems.