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**Introduction:** Thank you for joining us for this episode of The American Law Institute’s podcast *Reasonably Speaking*. Today our panel is going to discuss multidistrict litigation, or “MDL,” from its origins to current examples and recommended reforms. Our first panelist is John Beisner. John is a partner in Skadden’s Washington office where he leads the firm’s Mass Torts, Insurance and Consumer Litigation Group. He regularly handles appellate litigations and has appeared in matters before the U.S. Supreme Court. Over the past 35 years, he has defended major U.S. and international corporations in hundreds of purported class actions filed in both federal and state courts at both the trial and appellate levels. He also has handled numerous matters before the Judicial Panel on Multidistrict Litigation, as well as proceedings before various federal and state administrative agencies.

Our second panelist is Abbe Gluck. Abbe is a Professor of Law and the founding Faculty Director of the Solomon Center for Health Law and Policy at Yale Law School. She is also Professor of Internal Medicine at Yale Medical School and a Professor in the Institution for Social and Policy Studies at Yale. She is a member of the Affiliated Faculty of the Yale Program on Addiction Medicine, an Executive Committee member of Yale’s ISPS Health program and directs the Yale Law School Medical Legal Partnership Program. She is an expert on Congress and the political process, federalism, civil procedure, and health law.

Our third panelist is Shanin Specter. Shanin is one of the nation’s preeminent trial lawyers. He is a founding partner of Kline & Specter, one of the leading catastrophic injury firms in the United States. He has obtained numerous jury verdicts and settlements in cases involving medical malpractice, defective products, medical devices, premises liability, auto accidents, and general negligence. He is a member of the Inner Circle of Advocates whose membership is limited to the top 100 plaintiffs’ attorneys in the United States.

Today’s panel is led by MDL expert and scholar Elizabeth Chamblee Burch. Beth is the Fuller E. Callaway Chair of Law at the University of Georgia School of Law where her teaching and research interests include multidistrict litigation, class actions, and mass torts. She is the author of *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation*. Before entering the legal academy, Beth worked as an associate at Holland & Knight in Atlanta, where she practiced in the area of complex litigation, including securities class actions. I will now turn over the microphone to Professor Burch.

**Beth Burch:** Well, thanks to The American Law Institute for having us today and to my co-panelists John Beisner, Abbe Gluck, and Shanin Specter for all being here with us. I thought I’d start by talking a little bit about what multidistrict litigation is or as it’s known to insiders as MDL. Most people think that they’ve never heard of MDL before, but the fact is you probably have. So if you’ve heard of the Opioid Litigation cases, or if you’ve heard of the Roundup cases, you’ve heard of talc or any of these different types of mass tort cases, those are typically centralized through a procedure known as Multidistrict Litigation.

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Now, technically MDL can include all kinds of things. It can include antitrust cases and securities cases, and employment cases, and even intellectual property cases. But it turns out that if you look at the number of proceedings that are aggregated through MDL, about a third of all of the proceedings are products liability and sales practice cases.

And if you dig even deeper, you’ll find that if you’re not looking at the number of proceedings, but instead of the number of actions within an MDL then anywhere between 85 percent and 95 percent of all the actions that are centralized are products liability cases. Now when the products liability cases end, only about 27 percent of those settle as class actions. Those are mostly the economic-only type claims. And the bigger cases—the cases that you tend to hear more about in the news—they tend to settle as what we think of as non-class aggregate litigation or MDLs, for short. And so when we’re thinking about MDLs, that’s really been our focus. So these 45 percent of cases that end in products liability that end through these aggregate settlements are what we’re focusing on today. So for these massive personal injury cases, the moment of centralization really helps to alter the leverage in the case.

But MDLs only require that there is a common question of fact. Which means that they can host a variety of loosely related entrusts, where people might coalesce on some issues and might have very different opinions on others. It also means that this can raise questions about adequate representation on down the line. When judges appoint lead plaintiffs’ attorneys, they tend to focus on things like whether the attorney is experienced and can finance the cases and whether they get along well with others, but they don’t focus on things that you would typically see in a class action, like adequate representation. So we have all these different sorts of checks and balances that we’ve come to rely on in class actions. For example, to make sure that there are not principal agent concerns between the class members and class counsels, judges are required to appoint class counsel.

They have to consider adequate representation. They have to approve a settlement as being fair, reasonable, and adequate. But when it comes to non-class cases, none of those things tend to happen. So we’re going to talk today about what does happen behind the scenes in Multidistrict Litigation. There are all kinds of judicial mechanisms that have been invented that appear nowhere in the pages of the Federal Rules of Civil Procedure, things like Lone Pine orders, direct filing orders, participation agreements. So, John, tell us a little bit about some of your experience behind the scenes when it comes to things like these direct filing orders.

John Beisner:

Well, as you suggested, I’m always surprised at the number of devices that we come up with in MDL proceedings in an effort to try to make them work efficiently. I want to make clear that many of these are really not judicial inventions. They tend to be things that the parties have agreed upon and presented to the court. The court is involved, obviously, but the origins are with the practitioners before the court. One example you mentioned, which came up for me recently, is the direct filing order. Those of you who are familiar with the statute, you know what the statute provides is that an individual files a lawsuit in a proper district, and if an MDL proceeding is created, the MDL panel may choose to transfer that case to the transferee court where the MDL proceeding is pending.

As these mass tort MDLs that you were referencing get going, though, you will have thousands of cases. And somewhere along the line, somebody said, “Well, this is a hassle to file the case in a proper district and then go through the MDL panel to get it transferred to the transferee district, wouldn’t it be easier if we just filed it in the transferee district to start with?” And so we had the invention of direct filing orders that permit that. What the orders normally say is the action may be filed here, even though venue may be improper

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and even though personal jurisdiction may be lacking. But the parties agree that the trial court, the MDL court, may go ahead and deal with these cases that are put before the court under the direct filing order. And then when the proceeding is concluded and it's time to remand cases to a transfer court, we'll figure out at that point where to send them. The reason this came up for me recently is I had an appellate argument and this really wasn't squarely at issue, but direct filing orders were mentioned and the members of the panel said, "What's that?"

And when I explained it, as I just did in unison, they all said, "Where the heck does the court and the party get authority to do that? That's inconsistent with the statute, there's a transfer process set up. And how can parties agree to temporarily give a court personal jurisdiction and temporarily waive venue? Where does this come from?" And we got back on track in the argument and it's not addressing the opinion in the matter, but that's the sort of thing you deal with. And this is a long standing. I'll mention that the reason this is important is that some years ago, back in 1998, the Supreme Court in the *Lexecon* case considered another of these inventions. And this was the practice of courts in order to conduct bellwether trials, transferring to itself a case that originated in a transferor district and was moved to the MDL proceeding.

I think everybody was involved in MDL proceedings when this went up to the Supreme Court, said, "Oh, yeah, this'll be affirmed. This has done all the time. We've done this for years." And I don't think he could've gotten any betting money that the Supreme Court would have overturned that. But in a unanimous decision, the Court said, "Where is that in the statute? That's not provided for." And that caused shock waves for a number of years in MDL proceedings. I think lurking out there, there are a lot of other things that we do in MDL proceedings and have gotten comfortable with that would face that same fate if presented to the Supreme Court in a similar manner.

Burch: I want to turn to Abbe, Abbe Gluck is a health law professor, a health law expert, expert in federalism. She also is an expert in civil procedure, but tell us a little bit about how you came to be interested in MDLs.

Abbe Gluck: So I think John's remarks are perfect segue into what I'm going to talk about. My role here is to talk to you not as an MDL insider, like my wonderful accomplished co-panelist star, but as someone who's a mainstream civil procedure professor, litigation person, never really had experienced in the MDL world and who came into this and had a "wow" moment.

And my "wow" moment came when Judge Jesse Furman of the Southern District (of New York) was talking in my civil procedure class as a guest speaker. And he threw off a statistic saying, "Well, you know of course, some 40 percent of the pending civil cases on a federal docket are an MDL." This is about five years ago and MDL wasn't in any of the law school casebooks. So I sort of stood up, my students stood up and we said, "What's going on here?" And the more I looked into what was going on here, the more "wow" moments I had.

So what I'm going to do is just take a few minutes and talk about the kinds of things that really surprise me when I first came into this. Now I spend a lot of time with MDLs, then I write with Beth.

But when I first I'm into this and I think people who are listening, who might be sort of mainstream litigators, who are practicing in this area. That kinds of things that might surprise you, interest you. So the first thing is just how much MDLs are filling this void created by the difficulty of bringing class actions as Beth alluded to. They're filling an aggregation loophole in cases that are hard to bring as the class—often health cases are

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hard to bring because the differences among plaintiffs—and also cases that have differences across state law.

Our civil procedure system is self-federalism and state-based in many ways. And MDL is a nationalism aggregator. It’s a way to address litigation on a national scale. It’s a work around. And then there are some really interesting features of MDL. First, is that plaintiffs don’t have an opt-out. As John has alluded to in a way, you can file your case, it gets dragged across the country to a different federal district court and a different lawyer than you chose. That’s surprising. The judge is ostensibly there just to make pre-trial more efficient, eliminate duplicative discovery, winnow claims, and send you back. But the reality is that almost all MDL cases settle. And in fact, the judges, it’s a badge of honor, on the part of MDL judges, to settle these cases efficiently and effectively.

I’ve interviewed a lot of MDL judges and they universally attest to their expertise, how good they are at getting these cases settled. A trial seems almost like a failure. And to do this, MDL judges are often remarkably creative and ambitious, as John alluded to. And with the help of litigants, not just the MDL judges alone. But many new forms of procedure have been created. In the Opioid MDL, for example, at the urging of the judge who was interested from the beginning in settling the cases, he said at the very start he didn’t want to have trials, he didn’t want to have discovery. He wanted to solve the public health crisis that was punted into his lap. This is the kind of thing he said and this is the kind of thing you sometimes hear from MDL judges to encourage that kind of settlement.

He encouraged innovation and procedure. And from that, we got a whole new form of class action called the “negotiation class,” which is designed to speed the parties to settlement that was incidentally recently overturned by the Sixth Circuit. But it’s still an example of the way in which MDL pushes the boundaries of the federal rules and encourages very creative procedure making. And there’s another thing, most of these MDL judges’ rulings, as exciting and ambitious as they are, are not subject to appellate review because they’re generally not final orders. In the Opioid MDL again, this has led to an unprecedented amount of mandamusing the federal judge just to get some kind of review. And finally, MDLs have a pretty unusual relationship with federalism. The very active centralization creates the center of gravity that makes the MDL very powerful, where it gives the MDL a lot of leverage.

This happened in the opioid litigation. We had 2000 cities, Indian tribes, individuals in federal district court in Cleveland, but there were also 500 parallel state cases, there were state AGs bringing cases, and yet you have the court in Cleveland trying to bring everybody there to settle. To get global key peace, regardless of the fact that that federal district court in Cleveland doesn’t have jurisdictional power over the state cases, and yet as a de facto matter, the MDL court exerted enormous amount of pressure. And by way of closing, I just want to say ... And by the way, let me say one more thing about that, which is that in the process of that, a lot of federalism things get blurred. In the process of settlement, the drive to settlement, differences across state law get blurred in a way they wouldn’t if they’re being proceeding in individual state court.

And the reason I mentioned opioids right now is both because Beth and I are writing on it together. But also because its salience on the litigation front has brought MDLs into the mainstream; has brought MDLs into the view of regular practicing lawyers. It’s also a case in which we don’t just have MDL insiders. We have all these AGs and different lawyers and they’re pushing buttons here. They’re saying, “Wait a minute, this isn’t right. We need judicial review. We’re not just going to come to the federal district court in Cleveland and be pressured to settle there.” So it’s a really great case study and

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opportunity to do exactly what John said and look at the kinds of things that surprise us and how they push against traditional procedural norms.

Burch: So one of the things that I think maybe surprises plaintiffs when they enter into the system is that the system is very much set up for efficiency. And I think plaintiffs oftentimes enter into the proceeding expecting more of a traditional day in court. And it's a good reminder that there's a really important human element behind all of this. And so I want to turn things to Shanin Specter to talk about things from the plaintiff's perspective.

Shanin Specter: Well, thank you. First of all, thank you so much for inviting me to take part in this important discussion. And for our viewers and listeners, I recommend to them a law review article that's in the works by Beth and Abbe that touch on many of these issues. So I hope before we leave this hour, Beth or Abbe, that you will mention when and where this is going to be published so folks can be on the lookout for this. And I'm honored to be on this panel with John Beisner about whom I've heard very much over the years, but I've never had a chance to interact personally or professionally. So the plaintiff's perspective. Thank you for asking me about the plaintiff's perspective, as opposed to the plaintiff's lawyer's perspective, because regrettably, those are different things. I'm sad to report to you that I think that many plaintiff's lawyers in the MDL context are interested primarily in themselves and not in their clients.

And what we are seeing regrettably in many MDLs is lawyers who have amassed thousands and thousands of cases—way too many for them to ever handle themselves. And such a large amount that a highly competent defense counsel, like John, would look at that matter and say, “Those lawyers can never try their cases. They're going to have to settle their cases and we can drive a very hard bargain because they're really stuck. They're stuck in a corner.” And what happens in those situations often is that those cases get settled for the lowest amount of money that the plaintiff's lawyer can convince his or her client to accept. And that turns the rules of professional conduct and the entire purpose of the lawyer's role in the case on its head. A plaintiff's lawyer's job is to obtain the most amount of money that he or she can obtain within the rules of professional conduct and the rules of procedure from the defendant, not the least amount that their clients will accept.

And you might say, “Well, why in the world would a lawyer ever be motivated to do that?” Yeah. Folks may understand the idea of having too many cases, but “Why would it be in a lawyer's interest to settle a case for a small amount of money?” Well, I'm going to tell you why. The lawyer has an extremely large number of cases, like five or ten thousand cases, and you multiply, let's say 5,000 cases, times a relatively low attorney's fee, well less than would be earned in a case that's properly handled, but still multiplied by that large number, 5,000, is still a very large number. So who does well in that calculation? Not the client. Not the client. Who does well is the plaintiff's lawyer. And I think that that is despicable and it's a disgrace to the federal judiciary that that is permitted to take place.

So very briefly, what I think needs to be done to deal with that is that lawyers should not be allowed to have and handle more cases than they can actually prosecute. And judges should be required to supervise in those circumstances and raise questions and not allow that to occur. And judges also should be receiving petitions from lawyers who are settling cases en masse for court approval to determine whether those settlements are fair and reasonable. A lawyer should not just be able to settle a large number of cases where his clients were badly injured for small amounts of money. We need oversight. We need not to have lawyers take on more than they can handle.

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- Burch: Shanin, it’s interesting to hear you say that because obviously we are in the process right now, and I used the royal “we” there. The Federal Rules of Civil Procedure, their advisory committee is considering possibly creating rules for MDL. There’s now an MDL subcommittee that has been looking at this possibility for several years now. And just this past October in their latest agenda book, they came out with a proposal along those lines, which would give the judge some more oversight. I’m curious, Shanin, do you think that that would fix the problems that you see or do you think that’s going to create new problems?
- Specter: Well, first let me say that I understand that the idea of settlements being approved by federal judges is opposed by defense counsel, plaintiff’s counsel, and judges. It’s opposed by all of the actors in this process. That’s probably a pretty good indication that it’s something that ought to happen. It actually ought to go forward. Why is it opposed? Well, it’s opposed by the plaintiff’s lawyers who run around from MDL to MDL because they don’t want anybody looking over their shoulder for their nefarious behavior of the type that I described earlier. It’s opposed by defense lawyers because they know that in many situations that if their clients paid what was fair, they’d be paying a hell of a lot more money. And it’s opposed by judges because it would make it more difficult to settle cases and regrettably, so many judges, not all of them, but many judges are concerned, largely, I won’t say primarily, but largely about moving their docket.
- And also they don’t want to have to do the additional work involved in examining and assessing the reasonability of those settlements. Do I think it would make a difference is your question, Beth. My answer is it would make some difference. Do I think all judges would studiously go through these petitions and exercise the kind of care that I would like to see? No, probably not. But I think that it would begin slowly. And I think that it would be important to the process. Let’s put the lawyers through their paces, let’s make them explain why these settlements are fair, and let’s in start to have a disciplined process.
- Burch: John, I suspect you might have something to say in response to that. I’m happy to turn things over to you first.
- Beisner: Well, let me start by saying that I actually agree to a large extent with what Shanin is saying here in these proceedings, because counsel on the plaintiff’s side play very different roles in these proceedings. One of the things I think is a big problem in these cases and the reason you end up with the disparity of responsibility levels among the plaintiff’s counsel in these cases, because I think it does exist, really has to do with the outset of these cases. I noticed earlier, Beth, you referred to fact sheets as an invention that we have in MDL proceedings. Actually I think the better way to describe it is that what you have in these mass tort MDL proceedings is totally one-sided discovery. The fact sheets are there to paper over the fact that unlike individual lawsuits, the defendant is not permitted to make any inquiry about the individual claims that are filed.
- You can’t pose any discovery. The courts normally say that’s not permitted. Can’t take any depositions. Can’t do anything. You do get exceptions when you get into bellwether trials, which we’ll talk about later, but that’s usually a very small subset. And I think that initial disclosures that exist under the rules and early discovery, which you normally have going both ways in any individual lawsuit, the absence of that in the MDL cases is responsible for a lot of the phenomenon that Shanin is talking about because people file claims, some and let me stress some, not all, but some counsel file the claims without the proper investigation, without properly engaging the plaintiff to understand what his or her claim is all about, developing relationship with that person, because they know no one’s ever going to ask any questions. You could file a claim that’s completely fraudulent.

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I’m not alleging that that occurs in one of these cases. Nobody would find out about that for years because no inquiry, realistic inquiry, is being made. So I guess what I’m saying is that if the system were shifted more at the beginning to require that engagement with clients and to get more information about the claims, and I’m not saying in an MDL proceeding everybody’s deposition should be taken in the first month or something like that, but some mechanism so that there is a responsibility to display information about claim on the part of the plaintiff’s counsel. If that could be put in place, I think that would be a step to making sure that counsel are filing the right number of claims, the number of claims they can handle, and that they actually have an understanding of what their client’s injuries are and so on, so that they may more adequately represent that person in going through the MDL process.

Gluck:

Beth, can I jump in here for a second? I want to offer a third perspective. One thing I want to say is that I feel like the conversation is skewing very negative. I want to at least say something positive. When I was doing a lot of these interviews, which I did in some earlier study that I did about MDL, you’ve seen a lot of law professors who are progressive, who really were worried about MDL starting to change their tune a little bit. So one thing I want to emphasize to those of us, people who are listening, who aren’t familiar with the animal, that it’s not all bad in the sense that it is providing access to court for a lot of people who would not get access to court at all. My own colleague, Judith Resnick, was a big critic of MDL and has started to change her tune, partly because the courthouse doors are closing in other ways. So I want to emphasize that.

I also want to emphasize that the judges who are in these cases, a lot of them do say something similar. They love them. They find the cases interesting. One of the judges use a phrase of me saying, “This is our dessert,” right? You get this. This isn’t a reward. They get to be involved. They love the roll up their sleeves work. They feel like they’re actually solving problems with the very different kind of role. The judges really relished this opportunity and she has a point. So I think John really just hit on something important in this discussion of the lack of discovery offer dependence. And I want to make a slightly different point about it, which is that sometimes when big MDLs are centralized, the focus is entirely on settlement.

It’s not about substantive legal motion practice. So we’re not getting this question about what the defendants are looking for. It’s more of an assumption that there’s some allocation on blame. The very fact of centralization bringing all of those parties to that one courtroom, you’re already in a different place than you would be if you were trying a case in the beginning and trying to get the defendants out of the case. So I do think there’s something to that in the sense that, in the Opioid MDL in particular, the judge said from the very first day, he said, “Everybody’s responsible.” His very first hearing. He basically said from the distributors, to the manufacturers, to the states, everybody bears some of the blame. That’s a different starting point than we normally think of when we start on our civil procedure cases.

And lastly, just quickly the point that, we’re going to talk more about reforms later, but some of these reforms, like settlement approval and maybe some appellate review, which is one of the things that I actually would really like to see, the interlocutory review in the MDL, Beth and I disagree on this a tiny bit, but I would like to see more interlocutory review. I think there’s a way to put some guard rails on the process while still getting judges the creativity they desire. So the judges will tell you, “These cases aren’t amenable to trial. They come to us to settle. We need creativity to get the job done. You can’t hamstring us.” I think one of the reasons they don’t want any MDL rules is they don’t want to be hamstrung in anything. They want to have license to be creative. I think

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it’s probably a comfortable balance where we can have some guard rails around the end result—like settlement, like attorney selection, maybe like an interlocutory review—but give judges a little more leeway early on as they move the case toward wintering and resolution.

Specter: May I respond very briefly to that?

Burch: Absolutely. Go ahead.

Specter: Yes, I do think there are some very good things about MDLs. I think it’s very good that we can try to streamline discovery of the defendants and not make defendants appear in hundreds of courtrooms across the country in disparate suits for deposition. It’s adequate that they can be deposed in a more streamlined way and produce documents once. I think that makes a lot of good sense. I do not however think that we need to have an MDL because there’s no other way for plaintiffs to get into court.

There’s something called state court and you can bring your claim in state court. But maybe not exactly where you want to bring your claim. Maybe it’s not going to stay there, but you can bring your claim in the state court of the defendant and it can’t be removed. So that’s a realistic option. On John’s issue about fact sheets, I favor fact sheets. I don’t know why it is that we would not want to have plaintiffs prepare fact sheets because I don’t know how you can really approximate a discussion about settlement unless both plaintiff’s counsel and defense counsel know what the nature of the harms are. Thanks for the chance to be able to respond to that.

Beisner: If I may make just a quick note, I wasn’t voicing opposition to fact sheets. What I was saying is I have not found them to be a very effective surrogate for initial discovery and it’s because the counsel, Shanin, I think you’re talking about, punt when it comes to the fact sheets and you don’t ever really get answers from them.

Burch: I share that concern with regard to fact sheets. I mean, I’ve been conducting a procedural justice study for the past couple of years that focuses on women’s health mass torts and I’ve talked to a number of plaintiffs and I’ve reviewed some of their, not their confidential settlements, but just the breakdown of costs. And one of the things that I worry about is, when we think about a plaintiff’s fact sheet, that seems like something that would fit within the plaintiff’s lawyer’s contingency fee, something that the plaintiff’s attorney would be doing on the plaintiff’s behalf. But when I see instead is that they’re outsourcing it to these third-party vendors and they’re running up costs, and then they’re able to get reimbursement for costs, and in some instances are charging interest on those costs. And so you’re talking about interest, in the pelvic mesh case and some of them that have been going on for seven years now, which worries me a great deal. The other thing that I’ll interject into this is that I have a huge concern both about reforms and about transparency.

So in some respects, I feel like we’re trying to feel our way in the dark. That when I talk to defense counsel, they talk about concerns about meritless claims and the proliferation of meritless claims. When I talk about plaintiff’s counsel, they say everything is great. Not Shanin, of course, but everything is great. And there’s nothing that needs to be done reform-wise. The plaintiffs are getting paid. And yet we really have no substantive data on outcomes. So we can look at the inputs, which is what Abbe and I have been doing. We can say, “Look, we’re concerned about this moosh of all of these different state laws.” We can care about choice of law issues, we can care about federalism, but we really don’t have a lot of data on outcomes.

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And so when we're thinking about reforms and we're instituting censuses and plaintiff's fact sheets, I don't think we have a really good hold on what that means for the plaintiffs themselves.

So I want to open it up to other ideas for reform. Shanin had mentioned earlier something that the federal rules committee is currently considering. Abbe and I have some thoughts, and I know John has some thoughts as well. So Abbe, do you want to start us off and then we'll turn to John for the defense perspective?

Gluck:

Sure. I'll mention a couple, Beth, and I'll throw a few back to you so you can mention a couple of things from our study. The paper is called “MDL Revolution.” Thank you, Shanin for the flag. And it's coming out in the *NYU Law Review* in April. And really the title is supposed to stir up the pot. MDL Revolution, the idea that is revolutionizing or pushing against the boundaries of civil procedures. So one of the things that we do want to talk about is appellate review. My own interest would be in getting some more opportunity for interlocutory appeal, having a standard for MDL that allows for procedural rulings that are likely to have an effect on the merits too, on the disposition, not the merits, to get some kind of review, some kind of substantial effect.

And I think, I personally, I think Beth has her own view on this. Let her speak for herself. I personally think that this is superior to mandamus. I don't think mandamus should be used in this context instead of routine appellate review. In the Sixth Circuit at opioids, we've had a bunch of mandamus petitions and we've gotten for the first time, some really long appellate opinions about MDL. And that's great, but that's because the Sixth Circuit has been pretty liberal about granting those mandamus petition than hearing the cases that it'd be much better to have some more routine appellate review. I'm going to let Beth talk about adequate representation and information production, because she has a lot to say about that. I'd like her to say it herself. I'm a federalism person and I worry about what one a federal judge used the technical term “mooshing” of state law that he would say happens in the MDL context.

I would like to see some more attention to differences across state law, some more motion practice to develop the substance of state law. I know most attorneys don't want more motion practice. This rubs against the efficiency benefits of MDL. But as Beth and I point out in the paper, the law of public nuisance still is not fully developed. It's one of these laws that is at issue in opioids, but because we have this drive to settlement where there's a gun or tobacco or opioids, we still don't have this fully developed set of laws of something as basic as public nuisance in the states.

And it would be good to have more motion practice. We think more motion practice also would do a little more to give individual plaintiffs a differentiated day in court. And I for one, I think we will talk about this in the next round of questions, but I think there are really complicated issues about jurisdiction here. I'm sort of a procedural formalist and I'm bothered by the assertions of jurisdiction over state actors federal judges don't have. Also the pressure that's exerted. There's a whole series of controversies about whether the MDL can require lawyers arguing the parallel cases in the state court to pay into the attorney's fees, common benefit fund, and the MDL. And then there are really complicated questions that tend to this that go to preclusion. How are you going to get global settlement? How are you going to exert your jurisdiction over all the parties to get a settlement that precludes parties and state and federal court alike? So I hope you'll come back me on the preclusion thing because I really do want to talk about what's happening in opioids on that. I think it's fascinating from a jurisdictional perspective, but I'd like to hear from the others about what they would hope for.

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Burch: John, do you want to chime in here? And then we'll kind of loop around and just—

Beisner: Yeah, let me just offer a couple of comments and start with the interlocutory review point that Abbe touched on. This has been the subject of an enormous amount of discussion before the Advisory Committee on Civil Rules. And I think at the last meeting in October, the conclusion that was reached announced by the MDL subcommittee, was that they weren't going to be proceeding with that at this time. And I think that's regrettable. You know, when we looked at this statistically, if you limit the research to mass tort proceedings, not the class action-type MDL proceedings that Beth was talking about, a fair number of 1292(b) motions have been made over the last 10 years. We've done the research on this, but we couldn't find any case in which a defense 1292(b) motion was granted over that period. In fact, the only grant was a plaintiff's 1292(b) motion. Basically to seek confirmation of a ruling that the court had obtained.

And so there does seem to be, although I want to caution the set of examples, the set of instances is pretty small. So I hesitate to draw massive conclusions from it, but I think you have to conclude that appellate review of MDL proceedings in the mass tort arena, it's a pretty rare event. I think you at least would have to concede that from the data that are out there. And I think this is a problem. And the main reason that I think I was hearing the advisory committee articulate on this is well, delay. We can't have this because of delay. And I've sat in those meetings that say, delay in what? You have 50,000 cases in this MDL proceeding and there's an opportunity to hear an appeal. What are you going to get done in terms of winnowing or processing that pile of 50,000 cases in that period, and what stops you from going ahead and having bellwether trials or doing whatever else you want to do while this matter is up on appeal?

The main answer you get is, when you really get down to it, well it's going to delay the defendant from engaging in the settlement, because they'd like an answer to that question first. But, look I'm biased, but I don't think that's a very compelling reason to do that. Beth, to your point about, well, maybe, I've heard you articulate, maybe mandamus is sufficient. I don't have data on that, but having been a person who has been bruised badly making mandamus petitions—and I mean by that, not succeeding—I just don't think that's a plausible way of doing it. When you look back at the evolution of Rule 23 and the development of Rule 23(f), I think that came into existence largely because there was a perceived need for appellate review of class certification decisions because district courts were operating in the dark.

There wasn't a lot of precedent from the Supreme Court, because it was so hard for cases to get there because the intermediate appellate courts weren't hearing them. And then starting in the early '80s, you began to see a series of circuit decisions. And it went around to virtually all of the circuits, venturing in to decide to review class certification in various cases. And a lot of them use the mandamus device to get there. But if you read the decisions, they were stretching mandamus all out of proportion to get there, and acknowledge that to some extent. And I think that was a large motivation for coming up with 23(f) because I think there was increasing discomfort of using a mandamus. And if you think about it, I mean, class certification is a discretionary issue. Mandamus just doesn't fit there. And the rulings that I think we're talking about, seeking review of Daubert rulings and questions of other sorts that have broad preemption rulings of that sort. You know, there are going to be gray areas and those rulings as well. I'm not sure they're well suited for mandamus. So in any event, I think that would be an important reform, although I acknowledge, as I think Abbe was, defining exactly the circumstances in which that appeal could occur can be a challenge. And I think that's what the MDL subcommittee has been struggling with.

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Burch: Well, I credit Abbe for really sort of pulling me in that direction. She keeps pushing me on appellate review in ways that I do find compelling. You know, I have a number of sort of critiques of the system. And I do agree with Abbe’s point that there are many good things about MDL, particularly the access to justice that it provides for so many people. Particularly people who might not otherwise be able to find an attorney to be able to represent them. But where I worry, in particular, is when it comes to settlement. So now that we have class actions off the table, defendants of course still want to get the maximum amount of closure that they can possibly achieve. And so what ends up happening is that the defendants end up not contracting with the plaintiffs, as you would typically expect in a normal settlement agreement, but that you have these agreements between the defendants and the plaintiffs’ lawyers, whereby the plaintiffs’ lawyers have to do certain things to encourage their plaintiffs, their clients, to enter into these settlement agreements.

And I think the provisions that I’m talking about—things like the ability to withdraw from representing clients who refuse to settle—really push into the borderlands of what is ethically permissible and what’s ethically responsible. And so I’m deeply concerned about these sort of substitutes that we have come up with to try to encourage client acquiescence on whether it’s an inventory deal that, if you have a single client who it refuses to settle, then they threaten to blow up the deal for all of the clients. Or even whether it’s a global settlement and the defendant has to achieve, in some cases, there are requirements of 100 percent of all of the clients who are on the docket or who even have these kinds of unfiled claims, have to participate, or they can walk away and kind of blow up the deal.

So I worry about that and the things that I think that will fix it are in part perhaps more oversight by the MDL judge. But I worry about that too. I mean, when I looked at a bunch of these cases that were pending on the docket back in May of 2013 and followed those cases to see what ended up happening with them, what I found is that in varying degrees, about 53 percent of the judges actually approved these private settlements, even though of course there’s no formal authority by which they can actually approve deals. And nearly a third of them hadn’t actually ruled on the merits before doing so. So bellwether trials or class certification motions or Daubert motions or summary judgment motions. And so my worry is that if judges are more involved, and given that judges I think are unabashedly pro settlement, that they could actually continue to kind of push clients into these settlements that they might feel coerced to enter into, to begin with.

So in terms of reforms, I think we should have judges actually consider adequate representation when they’re appointing lead lawyers, something akin to what they would do in the class action context. I think that there should be a greater effort to tie common benefit fees to the actual benefit that’s conferred on the plaintiffs themselves. Not to what I think of as the sticker price of the settlement fund. So quick example here, in the Propulsid litigation, there was a so-called big settlement, \$85 to \$104 million, depending on who actually signed up. And the plaintiffs themselves only got kind of a collective amount of \$6.5 million; only 32 of them out of some 6,000 actually recovered. But the plaintiff’s lawyers got \$27 million in common benefit fees. And I think that that is based in large part on this kind of sticker price to this on the settlement fund.

So actually tying the fees to what benefits they confer on the plaintiffs, and Shanin may have a little bit more to say about that in just a second. And then the final thing that I’ll talk about here is the ability to get a case back to federal court, the federal court of origin, to have more liberal use of remands. And I think about this in terms of episodic remands, but there could be key points in any proceeding and they would of course vary depending

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on what the proceeding was, but key benchmarks. So for example, once the lead plaintiffs’ lawyers decide we’re going to work up this batch of cases, but we’re not going to work up this other type of claim or this other type of injury, then remand those cases that aren’t going to be well-served by the MDL to their courts of origin.

After a global settlement, if a plaintiff doesn’t want to settle then freely remand those cases to the courts from which they came, to their home jurisdictions. Those are all sort of key points at which we should consider remand. I think this does a couple of things in terms of larger benefits. So it gives plaintiffs more voice and control opportunities. It also gives defendants a chance to engage in that kind of case-specific motion practice that they might prefer. And in turn that helps to develop substantive law, which I think we need to care deeply about, as Abbe mentioned, there’s really no substantive law on public nuisance claims. Second, I think that remands can actually help correct judicial error. They build judicial redundancy into the process and the more people we have considering these issues, I think the better, because these are complicated questions. The third thing that I think remands can do is that they can relieve some of the substantive burdens that are caused by aggregating state law claims with minimal commonality.

You know, I think a number of judges in these proceedings, particularly when they’re having to apply law in 50 different states, don’t feel comfortable doing so necessarily. And that’s where you get the kind of mush that we talked about when it comes to settlement. And so remanding would help alleviate some of those burdens. Finally, I think that having trials, or at least the ability to credibly threaten trial is a really key, important function of democracy. That we can allow diverse communities to sit as jurors and to decide these cases. And you can imagine that a jury in San Francisco, California, might decide something differently than say a jury in Lubbock, Texas. But we should allow these types of different communities to weigh in on these key questions. So Shanin, I wanted to hear your thoughts, whether it’s on reforms or whether it’s on the sort of common benefit fees that I mentioned. Maybe you could give us a little bit more of a behind-the-scenes view of what happens in the common benefit world.

Common benefit fees, by the way, for our listeners, are fees that the lead plaintiffs’ lawyers receive on behalf of the plaintiffs as a whole, for the work that they do on behalf of the group, rather than the work that they do on behalf of their individual clients.

Specter:

Well, Beth, first of all, I agree with all of the suggestions for reform that you’ve articulated. The only part that I disagree with is I think you’ve been a little bit too polite in the way in which you lay out these proposed reforms. And I think that what your listeners need to really understand here, is that these cases go into, these cases are forced into an MDL, as Abbe outlined earlier. The plaintiffs have no choice. They could file in state court and get moved to federal court, or they could file in federal court initially. And then they get transferred to this MDL court. They had no part in selecting that judge, that judge is in a far away place. And the case as you have written, Abbe and Beth, disappears into what’s regarded as a black hole, never to re-emerge.

And my chief complaint there is that you just can’t get your case out of the MDL. You can’t get it back to their home district for a trial. And that’s very, very wrong. Justice delayed is justice denied. So rather than doing things like creating delays that might occur by permitting appeals, and I hear John when he says that that approach has not been followed by the rule makers. So I don’t think that’s going to be going anywhere, anyway. I think that what we need to do is find ways to get cases back out of the MDL more quickly. I’d like to see a deadline for how long it is an MDL judge can have a case before a plaintiff on motion can simply have their case returned to their home district for trial. So long as that plaintiff agrees not to take any generic discovery, right?

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Because we shouldn't subject the defendant to additional generic discovery. That then spoils the purpose of the streamlining of the MDL. But if you're willing to have your case go back for case-specific discovery of the type that John was talking about, taking depositions of the plaintiff and the plaintiff's treaters and the like, fine. Let it go back to the home district, no generic discovery. But how long should it hang around in the MDL for generic discovery? Twelve months? Nine months? Fifteen months? Something like that. Not four years or five years. We've repetitively moved MDL judges to send our cases back. And they said, "No." Why? Because they want to see if the case can be resolved in their court because they somehow think it's a failure if the case gets sent back to the home court. That's absurd.

It's not a failure, judge. Because you can't control settlement, your honor. That's up to the defendant as to what they're going to pay fair value. If they won't pay fair value, send the case back because you can't control what the defendant does, or for that matter, sir, by the way, you can't control what I do. So let's recognize the MDL judges are not omniscient and omnipresent. Not everybody can be Jack Weinstein, right? So let the cases go back. And then we get what Beth is talking about. We get trials, which does so many things that are important. The intonation of a jury verdict is important for all Americans, not just the parties. So I'm proud, for example, in the mesh litigation, I'm proud that our firm tried more cases than any firm in the country.

But, we tried them in state courts. We filed a lot of them initially in state courts, kept them there, tried the cases, and that helped us resolve cases with other defendants. We had one defendant in the mesh litigation that we could not settle with. And we had to wait out the process of the MDL proceedings. And finally the judge, first of all, he made us take discovery under what's called a Lone Pine order, a very cramped amount of time to take discovery in hundreds of cases. And we did that. We had 50 lawyers working on those cases to take that discovery in several hundred cases, we got that done. And then we waited out the judge, he sent the cases back to their home districts. We got 75 trial listings in courts across America. And that's when the defendant came and said, "Okay, we'll resolve the cases with you."

I don't think that was a coincidence. So I think that that's a good thing, but why should those plaintiffs have to wait five years for the case to sit in the MDL for that purpose? That's very, very wrong. Last point I want to make. And that's with respect to the question of common benefit funds and the like. Look, I'm not, I don't consider myself to be a mass tort lawyer. We have a law firm of 45 lawyers. We hired more to deal with that problem we had with the mesh cases I just described to you. We have 45, whereas most of our work is not mass tort work. We get involved in mass tort where we think it's appropriate. But I don't want to be involved with the plaintiffs' lawyers who are running the MDL. Why? Because if I put in time on that case, they're going to cheat me on my fee.

Cheat. Okay? Cheat. Because they're going to reward each other. Because they get appointed the lead and then they appoint themselves as the fee allocation committee. And then they tell the judge who appoints a special master to oversee their work, and everything gets rubber stamped. And there's no opportunity, no real opportunity, to get fair compensation for your work. So we did come and benefit work, for example, in the mesh MDL. There were 100 some odd firms that did common benefit work. We got the lowest effective hourly rate of any firm in the country when we made an application for a common benefit fee. Why? Oh, because the MDL fee allocation committee knew we had tried cases in state court and we'd gotten fairly substantial verdicts. They figured, "Hey,

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you guys are going to get compensated for your work in a different way.” But that’s not the way it’s supposed to work.

We got punished for our good work, right? So I don’t want to be involved with the MDL, with the MDL lawyers, in taking discovery because I won’t get paid. And that makes me think to myself, “You know what? If you think that we’re good lawyers in our firm, then you’re keeping our lawyers away from doing important work for the plaintiffs in those cases.” I don’t think that’s good for the system. I don’t think it’s good for anybody. So what I’d like to see happen with respect to the fee allocation is the lead counsel should have nothing to do with allocating the fees. That’s like putting the fox in charge of the chicken coop. Who ought to allocate the fees is the judge who would appoint a special master that has nothing to do with the litigation.

And the judge should not accept recommendations from the plaintiff’s lawyers. He should be trying to make his or her own decision as to who that person should be. That person should have no involvement with the case. And then that master should receive applications from lawyers for fees, should make an independent assessment of who did the work and who did good work and the like, and then make a recommendation to the judge. The judge should make a decision, should take a hard look at it herself. And if the lawyers don’t agree with what the master and the federal judge ordered, they ought to be able to take an appeal to the circuit. As things worked in mesh, you weren’t even allowed to take an appeal to the circuit. If you receive common benefit work product, you had to agree to accept whatever the federal judge approved, which ended up being a rubber stamping of what the special master did, which was a rubber stamping of what the fee allocation committee did, which was the same people that ran the MDL. That just can’t be right. That has to be fixed.

Burch: So I agree with so much of what you said, Shanin. The one point that I would want to tweak is the special master point. My coauthor, a different coauthor, Margaret Williams, and I did a study over the summer on what we call judicial adjuncts. Looking at special masters, looking at magistrate judges. And one of the concerns that we raised and that some of our interviewees raised in that study was that the special masters, they tend to be repeat players too. And so even if they’re not involved in that particular proceeding, then they might be involved in another proceeding. And so you have the same sort of capture concerns and cronyism concerns that can come up in the special master context that you could, and sort of the traditional revolving door agency context. So I agree with you —

Specter: You’re right. You’re 100 percent right. I’d rather have the judge appoint his brother, the retired judge, than appoint somebody who’s riding the circuit for these kinds of opportunities.

Beth Burch: So, you know, I even think magistrate judges, I mean, I think the magistrate judges that I spoke with, they want this kind of work. This is really interesting work and they’re public servants and they’re paid a salary and their money doesn’t come from their next gig. And they’re not hired by the parties in the next gig. So I think special masters really should play a much greater role than they have been in the past.

But I want to come back to Abbe and then come back to John with some final thoughts. Abbe, a lot of the things that Shanin raised with regard to common benefit fees also have federalism implications because it’s not just the attorneys and the federal MDL that tend to get charged common benefit fees. It’s state court lawyers as well. And this might be done through these so-called participation agreements. Participation agreements are what I tend to think of as kind of your classic case of a contract of adhesion, where you have the judge that says, “Hey, why don’t you sign this agreement?”

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And if you don't, you're not going to have any access to the discovery materials. But those participation agreements not only cover the cases within the MDL, but they also cover state court cases. It's good in a sense, because we don't want free riders, but if we acquired these traditional kind of quantum meruit principles, then we could get at those same concerns without the overreach that I think Shanin has alluded to. So I wanted to come back to you, Abbe, to talk about some of the federalism issues that you've seen, as well as some of the preclusion questions that we've raised.

Gluck:

Oh, thanks. So one thing I would just say about the conversation that you and Shanin just had is that, not about federalism, but that it is an attention to the plaintiff's due process rights in a lot of ways that we don't teach that much in law school. The civil procedure, it's all about the defendant's due process rights, particularly when we're talking about jurisdiction. And so I think one thing that the MDL evolution and revolution has demonstrated to us is a need to refocus on the plaintiffs too. And I bet your work is really important in that area, the adequate representation stuff is stuff that you really elevated in a very important way. So federalism, somebody mentioned Jack Weinstein. I think it was Shanin. He on several occasions has used the phrase “national tort law.” There's no national tort law. That's not a thing. Okay? My favorite case is the *Erie* doctrine. Remember that from law school, listeners? Okay. My students, when they say *Erie*, I ring a bell in my class. That's a bonus. Okay? And so, I do, I have a big bell. My favorite thing, my favorite case. Okay? For so many reasons. It's a case about federalism. It's a case about formalism. It's a case about statutory interpretation. All the things that I love. Okay? So it was a great case.

So we have a problem with not differentiating across state law, which you've already talked about, and if we're nearing the end I do want to make sure our listeners hear about the preclusion issues in the Opioid litigation because it's a different way of thinking about federalism. So normally the way these MDLs sometimes work is that sometimes the state and federal cases are in parallel and they work together. There are cooperation agreements but along the way, there are these moments where often the state attorneys are kind of bullied into doing, or that lawyers are bullied into, doing something in the MDL court without the formal trappings of jurisdiction but with sort of the gravitational pull of the MDL.

That's problematic for a system that prides itself on having dialectical federalism, but from a practical perspective, if you want to achieve global peace, this idea of competing federal and state litigation can be complicated. In the opioid context, the state AGs, because they're sort of outsiders to the MDL and the MDL threatens their way of doing things, the traditional AG multistate, they've resisted, they race to their own courthouses, they released information the MDL judge wouldn't. They have come to the federal court to try to negotiate, but they've also looked outside the federal court.

This has proved a problem for getting to global peace and led to innovative procedural stuff like the negotiation class which we talked about before. But fast forward, Perdue filed for bankruptcy. And lo and behold, we now have an Article I, not Article III, Article I federal court that like no other court actually has the power to bring everybody to the table.

This is a big irony. We have these two sovereign systems, federal and state court systems, bringing all of these cases. Everybody wants to settle. No one has power to force anybody to settle on their system. Defendant files for bankruptcy, and suddenly thanks to the bankruptcy courts power to stay in litigation and bring all current and future claims before it, bankruptcy court seems to be sort of the one place where you can get a preclusive, complete global settlement.

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So that to me feels wrong. Feels to me as someone who's sort of a procedural and federalism formalist, that if that is where we are going, because we need some kind of global settlement that feels like another unorthodox work around, like I've called [inaudible] unorthodox civil procedure. Something about that, it's a symptom of a broader problem. There needs to be some way if these cases are going to be brought together to bring them together—maybe by virtue of a new federal statute—some way to do this in a way that's formalistically correct. And that's respectful of state sovereignty.

Burch: John, would you like a last word? And then I'll see if Shanin wants to close us out if he has anything he wants to add in?

Beisner: Yeah, let me just make two quick points. One going back to Shanin's concern about remands. I've wondered at times in recent years whether the concept of bellwether trials hasn't taken on too big of a function in MDL proceedings. Now let me start by saying here we have another invention going back to the very beginning of our conversation. The more I've thought about it, I question whether MDL courts sitting as MDL courts have authority under the statute to conduct these trials at all.

(Section) 1407 references pretrial proceedings 14 times, but there is certainly no such suggestion that Congress expected MDL courts to conduct trials. Now, I guess if there's a *Lexecon* waiver and personal jurisdiction is proper in that district, perhaps you can say, well, the court is able to conduct a trial clearly, but yet I'd say that's part of an MDL proceeding and everything else stops until you have those bellwether trials.

In some proceedings, I think they're extremely helpful and probably provide a lot of guidance to both sides. I'm not sure the trials are nearly as important as the pre-trial motions being decided, and defining the case and forcing each side to sort of figure out what they really have as admissible evidence in those cases. So I don't want to disparage them, but they don't work in all MDL proceedings, and I'm not sure everyone stops and thinks is this really going to provide us with any information?

And Shanin, the reason I say that in response to you is I think those trials are the reasons for the delay and remands because everything just stops until you get those done. And there is a hope of a global settlement in the matter. So I think that's a little bit of a fly in the ointment that we're dealing with.

The other point I wanted to make, Beth, was really to your concern about the settlement process and the status of individual claimants. There's a problem, a bargaining problem there that I'm not sure your analysis takes account of. And that is this. If I sit down with a plaintiff's counsel who, using Shanin's example, has brought a thousand cases in an MDL proceeding, and we're going to talk about settlement, I'll look at the inventory and I may say there's about 40 cases in there I'd really like to settle, and I'd love to make you an offer.

And what you normally hear is no, no, it's an all or nothing proposition. And you got to take all of these cases. And so the reason you have these constraints on opt-outs in that circumstances is what's going to happen I know is the money will go to all of these claims. I have no interest in settling, let's go take those to trial. I'm not worried about those cases. And the ones that I really do want to settle, won't get settled.

And so whatever you come up with about looking at these cases individually has got to both from an ethical standpoint and a management standpoint go both directions, because I think it's totally unfair to say the only way you can settle these is without any constraints on opt-outs, but you're being told somewhat seemingly in violation of antitrust principles that all of these have to be tied together, or you don't have a deal. And

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so I just think you need to look at both sides of that. One last thing I'd note is we've talked —

Burch: John, can I ask you a quick question before you move on with that? If remands became a real thing, if we actually had periodic remands, do you think that that would help on the front end? That maybe attorneys would be less inclined to take those cases that are a little bit iffier?

Beisner: Yeah, no, I think that's right. I think it's the absence of remand that's doing it. And I think increasingly defendants are saying, let's do the remands because 80 percent of what we have here is not wheat; it's chaff. And the only way we're going to get them figure that out is to remand them and start having pretrial proceedings in these cases that are specific to that case so people are making decisions about them. No, I think that's part of the problem here.

The one last thing I guess I just noticed we talked about one of the other Sixth Circuit's decisions, but I think the mandamus ruling from the court on the amendment issue from April 15th of this year is also very interesting as well, because it really does raise fundamental questions about so many of the devices that we're using. And I think raises questions about this notion of reviewing and approving settlements, because what the decision says quoting *Gelboim* is that you shouldn't be doing anything in an MDL proceeding that infringes on any other party's rights in the interest of efficiencies.

Well, that's what we do a lot of, and it goes on to say that § 1407, this is quoting *Gelboim*, “refers to individual ‘actions’ which may be transferred to a single district court, not to any monolithic multidistrict ‘action’ created by transfer.” And I think a lot of the reforms that we're talking about in the settlement context, do begin to look like class action reforms. And I think what the Sixth Circuit is saying, that's the sort of monolithic approach to MDL proceedings that are not permitted by the current statute.

And it may well be that a lot of respects it's time for Congress to look anew at whether this whole arrangement is structured properly, because I think so many things that are being done currently and are being considered, I'm not sure authorized by the statute that we have there, which is a very simple canon; it's what you want to see, bring them in, do some generic discovery that covers everything, and send them back from whence they came. That's what the statute says. And we do so much other stuff that isn't contemplated in the words of that statute.

Burch: Yeah. It's funny, Abbe and I actually start our paper with a quote from that opinion. And the quote is “MDLs are not some kind of judicial border country where the rules are few and the law rarely makes appearance.” We want to see the law a little bit more. So Shanin I'll turn to you to close this out unless you have anything you want to add afterwards, Abbe.

Specter: Thank you. So a couple of quick observations, the first is that regrettably from what I've seen cases are not sent back to their home districts after the bellwether case are tried. What happens after the bellwether case is tried is a long time passes where the judge tries to get lawyers to settle and that is successful or unsuccessful. And then the judge will issue a Lone Pine order to force individual discovery very quickly in the remaining cases, then only after that is accomplished will he drive some of the cases back to their home district.

That's many, many years. Way, way too long. I want to comment about John's hypothetical, which I do think that's probably realistic, about 40 meritorious cases, or 40 cases he's concerned about, out of the thousand that the plaintiff's lawyer might have in

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his so-called inventory. And let me just say that some of these things should disturb us as lawyers, make us want to take a proverbial shower because if 960 cases are not meritorious, as John has described, and if the plaintiff's lawyer will only settle the 40 if he can sell the other 960, because he doesn't want to try those 960, then he's compromising one group of clients, the 40 with their meritorious cases, that benefit the 960 with their non-meritorious cases.

That's against the Rules of Professional Conduct and that should cause him to want to take a shower. It makes me want to take a shower just talking about it. And Elizabeth, there's also a problem here with respect to what you said earlier. You talked earlier in very reassuring tones and very reassuring words about the importance of providing access to justice for people who wouldn't otherwise get justice. And maybe you might've been thinking apocryphally about those 960 women who otherwise wouldn't be compensated, for example in mesh, if they had unmeritorious cases or in John's hypothetical, not getting involved in a gender or a product.

But let's be fair about it here to the defendants for a moment and really to the system, if those 960 plaintiffs have non meritorious cases, excuse me, they deserve nothing. And it's a tax on everyone to compensate them just because they happened to file a case. It's wrong. It shouldn't happen. And yeah, if someone is my client, I have an obligation to zealously advocate for them in that particular circumstance. But in this conversation, my obligation as a professional is to tell you and our listeners what I think is right for our system of justice.

And those 960 in John's hypothetical should not be compensated. And I think John, what you should do with that case, and I'm saying this is you should make individual offers on those 40 cases. And that lawyer then has an obligation to communicate those offers to his client and to come back to you and tell you which of those have accepted, and which of those have rejected. And I think you might be surprised. I think those lawyers are just a little bit scared of their own shadow. They actually might go ahead and make those offers and you might get rid of some of those cases that way.

I think that those lawyers ought to be put to their paces and made to accept or reject those offers. So I do think what the net of this is, here's the net of this, for me. As much as possible, we should treat these cases in a binary manner, A versus B not 10,000 As versus B. A versus B, B versus B, C versus B. And it's only by doing that, handling these cases as individually as we can, can we most closely approximate true justice.

Burch: My civil procedure students would love you right now Shanin, because we're in the midst of joinder. So they would much prefer the binary A versus B model I think to what they've been seeing for me.

Gluck: I think my civil procedure students would be upset because they would want those 960 people to have their claims heard even if they're not compensated, right? Or to have the ability to know if their claims are meritorious. And so I think that when people I think when Beth and I refer to act as justice, we're not referring to frivolous cases, we're referring to the idea that someone who thinks they've been harmed, they go see a lawyer and the question is, how much does a lawyer have to do before bringing that claim?

So I think there's to your point, certainly we agree that these frivolous cases that have no merit don't have no place in the MDL. But there's probably a spectrum, there's probably A, A minus and B, or something in between, where we want to be able to have some cases dismissed. It shouldn't be that you're all in or you're all out. But there are some cases in that middle ground that might make it in and then should properly be kicked out. But part of the MDL opening the door to some of these claims that could otherwise not

***The following is transcribed from an audio recording and is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.***

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be heard is that there are people out there who wouldn't normally have access to a lawyer, but for the aggregate attraction to other lawyers in the MDL. I think that's a hard balance to strike an important one to think about.

Burch: And I also just think, this is the place where data would be really, really helpful. I mean, I think we throw around this term “meritless” without really defining what we mean meritless to be. So it might be that non-colorable claims fall under that kind of umbrella term for a whole lot of different reasons. I mean, some plaintiffs might've received a misdiagnosis from their doctors.

Some might not be able to link their injuries to the defendant's drug or the defendant's product. Others might not be in regular communication with their attorneys or vice versa. And so others might simply fall outside of the claims that the plaintiffs' leadership decides to develop. So John, I can tell you want to say something, go for it.

Beisner: Yeah, no, and I just wanted to make clear that in the example and the hypothetical that Shanin has been focusing on, it wasn't necessarily saying the 960 were meritless. What I was saying was I wouldn't have any interest in paying them because I'm happy to let those play out in the process, yet they are all bound together. So yes, you may get your day in court. The problem is that the counsel will bundle those, and that's the reason why you have the restrictions on opting out in that circumstance. Because if one side's going to bundle, it's got to be a bundle if you're not going to bundle and that's the rule, then that's probably a lot better for everybody.

Burch: Well, on that note, I want to thank our panelists again, John Beisner, Professor Abbe Gluck, and Shanin Specter also want to extend our thanks to The American Law Institute for hosting us today. It's been a lot of fun having this group to talk with. And I can't think of three better folks to talk about MDL with. So thank you to you all.