

## TWO BIRDS WITH ONE STONE THROUGH MDL INTERLOCUTORY APPEAL: LESSONS FROM RULE 23(F)

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**ABSTRACT**—Debates rage over whether multidistrict litigation, or MDL, should have a mechanism for interlocutory appeal. Though the territory on this topic is well trod, the two sides have not fully mapped out the implications of a parallel controversy in the class action space. One side rails about the due process dangers that MDL plaintiffs face as their claims await resolution in a faraway judicial district. The other complains that defendants get stuck with legal rulings made by these same district judges, with concomitant error costs that get multiplied across many thousands of plaintiffs. Neither seems to make the point that these same issues plagued class action litigation—that is, until the adoption of an appeal mechanism in 1998’s Rule 23(f). This piece argues that the lessons of Rule 23(f) should inform our modern MDL debate. In particular, one core lesson emerges—the interlocutory appeal mechanisms defendants want have strong potential to resolve the procedural irregularities that irk plaintiffs.

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*“MDL’s mode of coordination—from its anti-federalism stance to its insistence that each proceeding is too unique to be confined by the Federal Rules—chafes at almost every aspect of procedure’s traditional rules and values. MDL is not-so-secretly changing the face of civil procedure.”*

—Abbe R. Gluck & Elizabeth Chamblee Burch<sup>†</sup>

INTRODUCTION

“MDL”: an efficient, consolidated name for an efficient, consolidated process. Multidistrict litigation is for getting things done. That much has been clear since the origin of the MDL statute, 28 U.S.C. § 1407.<sup>1</sup> That statute allows for “federal cases with similar facts [to be] aggregated from around the country before a single judge for coordinated pretrial handling”<sup>2</sup> when it “will promote the just and efficient conduct of [an] action[.]”<sup>3</sup> This raises the question: do the transferee judges who handle the thousands of cases sent to their district for MDL focus more on the “efficient conduct” of

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<sup>†</sup> Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 1–2 (2021).

<sup>1</sup> See Andrew D. Bradt, “*A Radical Proposal*”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 854–63 (charting the response to massive, nationwide electrical-equipment antitrust litigation that led to the passage of the MDL statute).

<sup>2</sup> *Supra* note †, at 3.

<sup>3</sup> 28 U.S.C. § 1407(a).

an MDL than the requirement that it be “just”?<sup>4</sup> Perceptions of MDL as a flexible, pragmatic problem-solving mechanism are pervasive through history, and today’s MDL judges speak and act accordingly.<sup>5</sup>

In one memorable example, Judge Dan Polster proclaimed on his first day presiding over *In re National Prescription Opiate Litigation* that “my objective is to do something meaningful to abate this crisis and to do it [this year].”<sup>6</sup> This orientation toward efficiency sparked tremendous procedural innovation. Though efficiency pressures are ubiquitous in the judicial system, they’re especially acute in large MDLs. The resulting innovations, one prominent MDL scholar observed, “tend to be especially far-reaching, with many judges adopting a discernable cowboy-on-the-frontier mentality that is not as apparent in other contexts.”<sup>7</sup>

Judge Polster’s experience managing *Prescription Opiate* exemplifies both this judicial perspective and litigants’ frustration with it. In that MDL, plaintiffs, including cities and counties as well as individuals, bring a variety of claims against opiate manufacturers, distributors, and retail pharmacies.<sup>8</sup> MDL is prone to “procedural unorthodoxies,”<sup>9</sup> and Polster used three—some of which are foreign even to MDL. In a push to reach a settlement, Judge Polster first certified a novel “negotiation class” under Fed R. Civ. P. 23.<sup>10</sup>

<sup>4</sup> See, e.g., Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 6–7 (2009) (noting that “with this [judicial] creativity comes a corresponding fairness concern: are these procedures fair, satisfying, and just?”).

<sup>5</sup> See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 477 (E.D.N.Y. 2006) (“A federal court cannot allow variations in state law to interfere with the fair and efficient administration of a federally-controlled national litigation.”). Nor is the problem confined to modern MDL: in the very first such consolidated proceeding, defense counsel complained of a “series of new and unprecedented rules” that created immense pressure “put upon the defendants to force them to settle.” Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1732 n.123 (2017) (quoting William M. Sayre, *Developments in Multiple Treble Damage Act Litigation*, N.Y. STATE BAR ASS’N ANTITRUST L. SYMP. 51–52 (1966)).

<sup>6</sup> See Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 GA. L. REV. 1287, 1290–92 (2019) (quoting Transcript of Proceedings at 4, *In re Nat’l Prescription Opiate Litig.*, 2018 WL 840067 (N.D. Ohio Jan. 9, 2018) (No. 1:17-CV-2804)). Judge Polster went on to add that “[I]f I’ve got to do it in a traditional way . . . I guess I’ll have no choice. I’ll admit failure and I’ll say, All right. We’ve just got to plow through this . . . .” Transcript of Proceedings at 5, *In re Nat’l Prescription Opiate Litig.*, 2018 WL 840067 (N.D. Ohio Jan. 9, 2018) (No. 1:17-CV-2804).

<sup>7</sup> Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1675 (2017).

<sup>8</sup> *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 536 (N.D. Ohio 2019); see also Suggestions of Remand at 2, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804-DAP (N.D. Ohio Nov. 19, 2019) (“In addition to the governmental entity Plaintiffs, there are also other classes of Plaintiffs pressing similar claims – for example . . . putative classes of similarly-situated individuals . . .”).

<sup>9</sup> Gluck, *supra* note 7, at 1675.

<sup>10</sup> *Prescription Opiate*, 332 F.R.D. at 537. To briefly summarize for those readers unfamiliar: class certification is the mechanism, governed by Fed. R. Civ. P. 23, by which the members of a class action are bound together. Judges must confirm that the class members meet a series of requirements designed

Defendants appealed, and the certification was promptly reversed by the Sixth Circuit.<sup>11</sup> Second, while trying to set up a fruitful bellwether trial, Judge Polster allowed plaintiffs to amend their complaints well after a previously set deadline had passed.<sup>12</sup> Defendants sought and won a mandamus order to resist further amendments to the complaints.<sup>13</sup> And third, to further facilitate settlement discussions, Judge Polster issued and enforced a moratorium on motions to remand to state court, which would have removed the cases from the MDL.<sup>14</sup> Defendants again sought and received mandamus, requiring Judge Polster to promptly rule on the motions to remand.<sup>15</sup>

Judge Polster's *Prescription Opiate* experience was unusual in one respect: most MDL procedural orders never reach an appellate court.<sup>16</sup> Twice now, the Sixth Circuit has gone to the unusual step of granting a writ of mandamus, which is warranted "only in 'exceptional circumstances' involving a 'judicial usurpation of power' or a 'clear abuse of discretion.'"<sup>17</sup> The court went well out of its way to remind Judge Polster that "[t]he rule of law applies in multidistrict litigation (MDL) under 28 U.S.C. § 1407 just as it does in any individual case."<sup>18</sup>

To protect against this apparent abuse of discretion in other MDL cases, defendants want interlocutory appeals to be a fixture in MDL, but each of the three existing mechanisms is unwieldy. Mandamus is one option—but, again, it requires "exceptional circumstances."<sup>19</sup> A second option is to certify a question under 28 U.S.C. § 1292(b), but that requires the consent of the

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to ensure that absentee plaintiffs have their interests well represented. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011). A "negotiation class" is a novel and academically-inspired variant on the standard class action, which aims to resolve certain collective action problems by marshalling support for a future settlement before that settlement is determined—or, indeed, negotiated—and hence the name. *See* Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 78–79 (2020).

<sup>11</sup> *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020).

<sup>12</sup> *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 842 (6th Cir. 2020). A bellwether trial, to clarify, is a single trial run during an MDL in an effort to help value the large stock of cases contained in the MDL for settlement. *See* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330, 2338 (2008).

<sup>13</sup> *Prescription Opiate*, 956 F.3d at 845–46.

<sup>14</sup> *In re Harris Cnty.*, No. 21-3637, 2022 U.S. App. LEXIS 6411, at \*2–3 (6th Cir. Mar. 11, 2022).

<sup>15</sup> *Id.* at \*6.

<sup>16</sup> Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1648 (2011) ("The existing rules of appellate jurisdiction rarely permit immediate appellate review of most significant MDL decisions; the decisions in question do not fit the traditional mold of orders reviewable as of right, and discretionary review in this context is unreliable.").

<sup>17</sup> *Prescription Opiate*, 956 F.3d at 842 (citing *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004)).

<sup>18</sup> *Id.* at 841.

<sup>19</sup> *Id.* at 842.

district court—the same court that presides over the MDL.<sup>20</sup> It’s a gutsy move to ask the judge presiding over thousands of your cases whether they might like to get some extra input on the law. Judge Polster, for one, has not been receptive to these requests.<sup>21</sup> And though Fed. R. Civ. P. 54(b) allows for partial finality, which gives rise to an appeal under 28 U.S.C. § 1291, not all potential appeals can fit into that framework.<sup>22</sup>

So, defendants have sought a new, MDL-specific interlocutory appeal rule. They reason that an appeal rule would make individual MDLs fairer.<sup>23</sup> For example, proponents of such a rule point out an asymmetry in appeal rights. Because finality gives rise to an appeal under 28 U.S.C. § 1291, plaintiffs can appeal adverse rulings on dispositive motions in MDL. But when a defendant loses its dispositive motion, the case survives—no finality, no appeal. This imbalance may breed distortions in settlement and inefficiencies in litigation. Defendants who believe their dispositive motions had merit must press on with the litigation until a final judgment. Only then can they seek appellate review. All the while, global MDL resolution is on hold.

History is repeating itself. Class action litigation went down this same path in the latter half of the twentieth century. First, lawyers, academics, and judges expressed concerns over the power that district judges wielded through the class action mechanism, urging that class certification *itself* placed undue pressure on defendants to settle.<sup>24</sup> The discussion came to a head with a strongly worded mandamus order in 1995’s *In re Rhone-Poulenc Rorer Inc.*<sup>25</sup> Just as the Sixth Circuit chastised Judge Polster for disregarding

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<sup>20</sup> 28 U.S.C. § 1292(b) (“When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.”).

<sup>21</sup> See *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804, 2022 WL 278954, at \*3 (N.D. Ohio Jan. 31, 2022).

<sup>22</sup> See *infra* Section I.B.

<sup>23</sup> See, e.g., U.S. CHAMBER INST. FOR LEGAL REFORM, MDL IMBALANCE: WHY DEFENDANTS NEED TIMELY ACCESS TO INTERLOCUTORY REVIEW 12–13 (2019) (arguing that because plaintiffs, and not defendants, achieve finality from adverse decisions on dispositive motions, MDL needs an interlocutory appeal rule).

<sup>24</sup> See, e.g., William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 380 (1972) (“[C]ertification of a broad class often determines the entire case by coercing the defendants to settle even unmeritorious claims.”); Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590, 605 n.67 (1982) (describing and mathematically characterizing the “‘in terrorem’ effect caused by utilization of the class procedure” (quoting Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971))).

<sup>25</sup> See 51 F.3d 1293, 1295 (7th Cir. 1995).

the rule of law, Judge Richard Posner described the class certification as “usurpative” and “quite extraordinary when all its dimensions are apprehended.”<sup>26</sup> Mindful that mandamus is not a commonly available tool for appellate oversight, class action defendants sought an interlocutory appeal rule. And three years after *Rhone-Poulenc*, they got it. Rule 23(f) provides that “[a] court of appeals may permit,” in its discretion, “an appeal from an order granting or denying class-action certification.”<sup>27</sup>

What happened next? The answer should inform debates over MDL interlocutory appeal. Rule 23(f)’s principal consequence is not its effect on individual cases. Rather, it has allowed courts to develop an important new body of class certification law. Case after case has reached the Supreme Court from a Rule 23(f) petition, many of which fundamentally changed the practice of class litigation.<sup>28</sup> A seemingly innocuous interlocutory appeal rule became an engine for legal change that helped protect class action plaintiffs’ due process rights.<sup>29</sup>

The same could happen for MDL. Practitioners’ narrow focus on the dynamics of individual MDLs obscures the real stakes: interlocutory appeal mechanisms facilitate changes to the law. Through an interlocutory appeal mechanism, MDL may be able to achieve more stability in the same way as its ancestor, the class action. This way, MDL defendants can have their appeal right, fixing the asymmetry on dispositive motions. And advocates for plaintiff involvement and due process can score wins through the body of law that will undoubtedly develop, curbing some of the procedural excesses that MDL has engendered.

This Essay argues that a rule instituting Rule 23(f)-like interlocutory appeals must include two important features. First, the rule must allow for appeals from nondispositive procedural rulings. Transferee judges in MDL have crafted creative procedures that allow them to circumvent due process rights of the parties without triggering any existing avenues for interlocutory appeal. Accessible interlocutory appeal is essential to moving the law forward in this area. Second, the rule should require only the permission of the appellate court, not the trial court. MDL judges face significant pressure to resolve their cases quickly, so requiring their permission for time-

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<sup>26</sup> *Id.* at 1295, 1299.

<sup>27</sup> FED. R. CIV. P. 23(f).

<sup>28</sup> *See, e.g.,* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 347 (2011) (reaching the Court on a review of “the District Court’s certification order”); Comcast Corp. v. Behrend, 569 U.S. 27, 32 (2013) (reaching the Court after “[t]he District Court nevertheless certified the class”).

<sup>29</sup> As an example of concerns about procedural due process in the 1990s, see Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 DEF. COUNS. J. 18, 18 (1996) (“[J]ust as hard cases make bad law, so does burdensome litigation sometimes give rise to dubious procedural devices . . . . Nowhere is this trend more evident than in the adjudication of mass torts . . . .”).

intensive interlocutory appeals bars the most important cases from reaching appellate courts at the interlocutory stage.

I proceed in four parts. Part I illuminates two central problems that stakeholders have identified in MDL: (1) it values efficiency over individual plaintiffs' right to participate and (2) defendants lack access to appellate review. Part II shows that these concerns are not new: they also arose in the context of class action litigation. Therefore, Part II argues that any solution to the two central problems of MDL should be informed by our legal system's class action reform experience. Part III shows how resolving the appealability problem through Rule 23(f) alleviated the due process problem through the increased development of case law on appeal. Part IV discusses the implications of this history for the MDL debate and recommends an MDL interlocutory appeal mechanism which provides for appeals from procedural motions in the sole discretion of the appellate court.

## I. THE TWO CAMPS ON MDL

Two core critiques wrack the world of MDL. First, academics charge that it harms the procedural rights of plaintiffs by removing individual control over the case and prioritizing economies of scale over participation value. Second, defense counsel complain they cannot practically access appellate review in MDL. If an MDL judge hands down an adverse ruling, defendants must wait—potentially for years—before they can access appellate review. In the meantime, they are under tremendous pressure to settle. Yet MDL remains unchanged. Neither academics nor litigators have made substantial progress toward their goals.

### A. *Due Process: The “Wild West” of MDL*

MDL's efficiency depends largely on creative work by the small group of lawyers and judges involved in MDL administration.<sup>30</sup> These practices, created by an insular group of repeat players, have come to form a kind of “federal common law of MDL.”<sup>31</sup> One article colorfully summed up MDL's due process shortcomings by describing the procedure as “something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies.”<sup>32</sup>

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<sup>30</sup> See Gluck, *supra* note 7, at 1673–74. For more on the tight leadership network for MDL, including a list of the top repeat players in the system, see Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1485, 1486 tbl.3 (2017).

<sup>31</sup> Gluck, *supra* note 7, at 1673–74.

<sup>32</sup> Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015).

These procedural mechanisms have contributed to plaintiffs' alienation from the litigation. For example, rather than accommodate individual complaints, many MDLs use short-form complaints that "shoehorn[] plaintiffs' stor[ies] into a six-page check-the-box form."<sup>33</sup> In a recent innovation, other plaintiffs' cases are never filed at all, but are merely placed on registries to await the resolution of other claims.<sup>34</sup> These innovations improve efficiency, no doubt, but MDL plaintiffs are left feeling excluded from the process. As one MDL plaintiff put it, "I feel that the judicial system is treating this serious matter just like a mass production of a product and not as legal human suffering cases where people's lives are at stake."<sup>35</sup>

More abstractly, some academics view even foundational MDL innovations as a grave threat to due process: for example, a transferee judge who appoints lead counsel to act on behalf of all plaintiffs may deprive claimants of their right to choose their own counsel. And these academics note that a plaintiff's choice of lawyer "is often the first expression of their autonomy."<sup>36</sup> Worse still, lead counsel's interests often diverge from MDL claimants'.<sup>37</sup> As repeat players, they have strong incentives to go along to get along, so to speak, with other MDL counsel and transferee judges.<sup>38</sup> These incentives seem to drive outcomes: one leading MDL academic contends that "[t]he deals [repeat players] make are often riddled with self-interest."<sup>39</sup>

These MDL-specific procedures, despite the worries they engender, are virtually never reviewed by appellate courts. An interlocutory appeal mechanism could tame the "Wild West" of MDL-consolidation processes,

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<sup>33</sup> Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, CORNELL L. REV. (forthcoming) (manuscript at 12), <https://papers.ssrn.com/a=3900527> [<https://perma.cc/4CYY-4XQV>]. I should note that some question the statistical veracity of the survey Professors Burch and Williams conducted. See, e.g., Roger M. Michalski, *In a Different Voice*, JOTWELL (Nov. 18, 2021), <https://courtslaw.jotwell.com/in-a-different-voice/> [<https://perma.cc/3ZCL-FCU5>] ("One might have different reactions [after reading the survey results]. One is to examine the data and the process that generated it. There are weak points."). Still, their piece is notable for the raw emotion evident in individual quotes from plaintiffs like this one.

<sup>34</sup> See Amanda Bronstad, *MDL Judges Are Coming Up with New Ways to Manage Thousands of Lawsuits*, LAW.COM (Oct. 11, 2021, 7:00 AM), <https://www.law.com/2021/10/11/mdl-judges-are-coming-up-with-new-ways-to-manage-thousands-of-lawsuits/> [<https://perma.cc/6N2T-HEZ8>].

<sup>35</sup> Burch & Williams, *supra* note 33 (manuscript at 39).

<sup>36</sup> Redish & Karaba, *supra* note 32, at 140.

<sup>37</sup> To understand this divergence of interest, it helps to have a sense of the sheer magnitude of money at play. In one MDL relating to the medication Vioxx, "the lead attorneys asked for \$388 million in . . . fees" and were ultimately awarded over \$300 million. Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 FORDHAM L. REV. 1985, 1990 (2011).

<sup>38</sup> See Elizabeth Chamblee Burch, *Does Multidistrict Litigation Deny Plaintiffs Due Process?*, LAW360 (June 9, 2019, 8:02 PM), <https://www.law360.com/articles/1166461/print?section=access-to-justice> [<https://perma.cc/5ARF-JGLE>].

<sup>39</sup> *Id.*



fight over lead counsel appointment, and perverse repeat-player incentives. The case law that appellate review would create could bring these issues into the light and spark innovative new solutions.

*B. Appeals: “Impossible to Obtain Review”*

Simultaneously, some MDL defense counsel have raised concerns about their inability to access appellate review of key decisions.<sup>40</sup> A preferred move of these litigators is to narrow or eliminate the pool of MDL claimants through motions to dismiss or for summary judgment: dispositive motions. For example, defense counsel might argue that plaintiffs’ common theories of liability are preempted by state or federal law.<sup>41</sup> If successful, these motions quickly and efficiently shepherd many MDL cases to a final judgment in one efficient stroke.<sup>42</sup>

Of course, a successful dispositive motion would not *immediately* end the litigation: it would be subject to an appeal by the plaintiffs. By definition, a successful dispositive motion produces one or more final judgments that a plaintiff can appeal under 28 U.S.C. § 1291—the usual mechanism for appeals of final judgments. But the same is not true when the court denies a defendant’s dispositive motion, since the plaintiff’s claim survives. Instead, any appeal needs a different jurisdictional hook—but options are limited.

First, under 28 U.S.C. § 1292(b), a frustrated defendant can ask the district judge to certify for appeal a “controlling question of law as to which there is substantial ground for difference of opinion.”<sup>43</sup> This avenue seems promising, especially for preemption-based dispositive motions, but it requires both the transferee judge and her circuit court to agree to permit the appeal. These approvals are rare. In fact, a recent review of 127 MDL dockets found that despite fifteen motions to certify a question for appeal, there were *no* certified § 1292(b) appeals.<sup>44</sup> Considering the pressure transferee judges face to quickly reach a global resolution, their

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<sup>40</sup> This effort has been spearheaded by John Beisner, an accomplished mass tort litigator. See Letter from John H. Beisner to Rebecca A. Womeldorf, Sec’y, Comm. on Rules of Prac. & Proc., Admin. Office of the U.S. Cts. (Nov. 21, 2018), [https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion\\_beisner\\_0.pdf](https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf) [<https://perma.cc/C7L9-WT3N>].

<sup>41</sup> See U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 23, at 4.

<sup>42</sup> See *id.* In the federal preemption example, it sometimes happens that plaintiffs bring failure-to-warn or other related claims that FDA or other federal action preempts. See, e.g., *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, No. 3:08-08, 2022 WL 855853, at \*33 (D.N.J. Mar. 23, 2022) (finding state failure-to-warn claims preempted by the FDA’s determination that the product’s label did not require a particular warning).

<sup>43</sup> 28 U.S.C. § 1292(b).

<sup>44</sup> U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 23, at 6. The study suggests that the rarity of certification makes it unlikely attorneys will even motion for an appeal in the first place. *Id.* at 8.

unwillingness to interrupt proceedings for a potentially lengthy appeal should come as no surprise.

The low likelihood of certifying a question leaves defendants with only mandamus and final judgments under Fed. R. Civ. P. 54(b), neither of which has achieved much success. Though *Prescription Opiate* suggests that circuit courts are willing to grant mandamus when district courts employ procedural unorthodoxies, the reality is much different. Mandamus is “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’”<sup>45</sup> Moreover, mandamus orders are unlikely to become common after *Prescription Opiate* because these unorthodoxies, though unusual in other litigation, are standard fare in MDLs—nothing “extraordinary.”

Rule 54(b) fares no better. That rule allows for partial final judgments: a court “may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.”<sup>46</sup> So it is initially promising—a defendant can just take a final judgment on one plaintiff, and then take any issues to the appellate court! But this comes with costs and risks. It is expensive to resolve even one plaintiff’s claim, especially with the stakes so high. In order to access appellate review, the defendant must lose on the partial final judgment. Yet by doing so, they risk other findings being held against them in an issue-preclusive manner.<sup>47</sup>

Inadequate access to appellate review may even distort settlements and *undermine* the efficiency goals of MDL. After an unfavorable ruling, a defendant has two options. They can take a bellwether case to trial, achieving finality and opening up an appellate forum at the cost of immense risk and resources.<sup>48</sup> Or they can settle. This extreme pressure to settle mixes with certain MDL judges’ predispositions toward settlement. Indeed, a favorite document of MDL judges, the Manual for Complex Litigation, underscores their leverage potential in the settlement context: MDLs “afford a unique opportunity for the negotiation of a global settlement . . . . As a transferee judge, it is advisable to make the most of this opportunity and facilitate the

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<sup>45</sup> *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

<sup>46</sup> FED. R. CIV. P. 54(b).

<sup>47</sup> See, e.g., *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, No. 1:100-1898, 2007 WL 1791258, at \*3 (S.D.N.Y. June 15, 2007) (“[I]ssue preclusion will attach only as to those defendants against whom there is an adverse verdict . . .”).

<sup>48</sup> See Andrew D. Bradt & D. Theodore Rave, *It’s Good to Have the “Haves” on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 95 (2019) (“The costs of bellwether trials, which typically carry higher stakes because their results will inform settlement values in other cases, can easily run into the millions of dollars.”).

settlement of the . . . cases.”<sup>49</sup> The judge who prioritizes facilitating settlement has many levers to pull. He can deny dispositive motions. He can decline to certify questions under § 1292(b). He can delay bellwether trials. The combination of these possibilities increases the strain on defendants. And any settlement prices in the transferee judge’s decision to deny the defendant’s dispositive motion—without the benefit of appellate review.

Seeking final judgment through a bellwether trial—an “exemplar” trial of an agreed-on case to help value the whole MDL—is not much better for defendants. Trials are expensive, especially for high-stakes tort cases, which MDLs often present.<sup>50</sup> And working up a bellwether trial takes time. Often, substantial disagreements arise over how best to choose bellwether cases, but even the more efficient methods require litigants to comb through possibly thousands of cases to choose one to try. After this arduous process, bellwethers often settle on the eve of trial.<sup>51</sup> And even after all the expense and uncertainty involved with choosing and playing out a bellwether trial, the defendant can secure appellate review of the initial legal issue *only if they lose*.

An interlocutory appeal mechanism could alleviate issues associated with both settlement pressure and bellwether trials. Any settlement reached would be the product of an informed negotiation based on the reasoned legal judgment of the appellate court, rather than the district court’s pressure to resolve the case efficiently. The mechanism also allows for clarification of the legal issues without resort to costly and uncertain bellwether trials.

### C. *The Prescription Opiate Mandamus*

These two critiques of MDL have not been confined to law reviews and law firm whitepapers. They’ve begun to convince judges, too. Two recent mandamus orders in the Sixth Circuit illustrate the point. One evinces reservations about an MDL transferee judge’s power to control and channel plaintiffs’ claims. The other demonstrates sympathy with defendants’ inability to access appellate review. Both arise from Judge Polster’s administration of *In re National Prescription Opiate Litigation*.

Start with the academic critique: plaintiffs’ due process rights. Judge Polster had issued a moratorium on substantive motions, including motions for remand, at the outset of the litigation in 2017.<sup>52</sup> The core doctrinal justification for MDL is that cases are consolidated only for “pretrial

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<sup>49</sup> See FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004).

<sup>50</sup> See Bradt & Rave, *supra* note 48.

<sup>51</sup> See Thomas Sekula, Note, *Selective Settlement and the Integrity of the Bellwether Process*, 97 TEX. L. REV. 859, 866 (2019).

<sup>52</sup> *In re Harris Cnty.*, No. 21-3637, 2022 U.S. App. LEXIS 6411, at \*1–2 (6th Cir. Mar. 11, 2022).

proceedings.”<sup>53</sup> Yet five years into the litigation, some plaintiffs’ motions to remand—which were pending at the time of the moratorium—remained unadjudicated.<sup>54</sup> Finally, after five years, the Sixth Circuit issued a writ of mandamus in 2022.<sup>55</sup> Showing great solicitude for these plaintiffs’ interests, the circuit court admonished Judge Polster for forgetting that “a party’s rights in one case cannot be impinged upon ‘to create efficiencies in the MDL generally.’”<sup>56</sup> The limited resources of the MDL court justified accommodating some delay, to be sure. “But,” the court noted, “we are no longer at the outset of this litigation, and Petitioners’ motions have been pending an unduly long time.”<sup>57</sup> Judge Polster’s procedural innovation to halt substantive motions could not be justified by the practical necessities of an MDL.

The Sixth Circuit’s other mandamus order vindicated defense firms’ call for an interlocutory appeal mechanism. In the lead-up to a trial on certain claims made by two Ohio counties against twelve pharmacies, Judge Polster had permitted the counties to amend their complaint, adding a whole new group of claims.<sup>58</sup> Because these new claims came eighteen months after the court’s deadline for amending complaints, the pharmacies moved to dismiss the new claims.<sup>59</sup> Judge Polster refused to adjudicate this dispositive motion.<sup>60</sup> Here, too, the Sixth Circuit issued mandamus.<sup>61</sup> The court justified granting the writ by referencing the effects that an adverse legal ruling would have on the defendants, stating: “[T]he Pharmacies will be prejudiced by th[e] decision ‘in a way not correctable on appeal.’”<sup>62</sup> The court further added that Judge Polster’s “‘persistent disregard of the federal rules’ . . . in the MDL context especially[,] presents ‘important problems’ that often evade appellate review.”<sup>63</sup> The sheer persistence of Judge Polster’s repeated

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<sup>53</sup> 28 U.S.C. § 1407(a).

<sup>54</sup> *In re Harris Cnty.*, 2022 U.S. App. LEXIS 6411, at \*3.

<sup>55</sup> *Id.* at \*7.

<sup>56</sup> *Id.* at \*5 (quoting *In re Nat’l Prescription Opiate Litig.*, 956 F.3d 838, 845 (6th Cir. 2020)).

<sup>57</sup> *Id.* at \*6.

<sup>58</sup> *In re Nat’l Prescription Opiate Litig.*, 956 F.3d 838, 841–42 (6th Cir. 2020). Initially, the trial was focused on “distributing claims” based on the distribution of opiates to pharmacies. The new group of claims, the “dispensing claims,” asserted improper conduct in the actual dispensation of opiates to patients at pharmacies. *Id.*

<sup>59</sup> *See id.* at 842.

<sup>60</sup> *Id.* (Judge Polster had informed the defendants that the court would “not receive additional motions to dismiss on distributing claims.” The motions to dismiss were directed only at the new *dispensing* claims, but Judge Polster clarified that the language “was meant to direct defendants not to file *any* non-jurisdictional motions to dismiss.”)

<sup>61</sup> *Id.* at 845–46.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 845–46 (quoting *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008)).

innovations helps account for the Sixth Circuit’s extraordinary response—ordinary, garden-variety MDL innovation may harm due process rights, but it will not attract the kind of ire that was needed to invoke the extraordinary writ against Judge Polster. And these same criticisms echo the defense bar’s justification for an MDL interlocutory appeal mechanism: adverse legal rulings in MDL create irreparable harm that is almost impossible to overturn on appeal.

## II. THE CLASS ACTION PARALLEL

The due process and appealability concerns directed at MDL are not new. By 1998, when the Federal Rules of Civil Procedure were amended to include Rule 23(f), scholars had long complained of due process issues with class certification.<sup>64</sup> Nor was a specialized appeal rule a novel concept; defense lawyers had lobbied for an amendment like Rule 23(f) for years.<sup>65</sup> And the conditions that precipitated the adoption of Rule 23(f) were strikingly similar to those that exist in MDL today. Thus, the consequences of the 1998 Amendments should instruct policymakers considering an MDL analogue.

### *A. Due Process: The Predominant Issue*

Even before the 1998 Amendments that produced Rule 23(f), courts began to recognize that key aspects of Rule 23 had lost their teeth. Three of the strictures of Rule 23(a)—commonality, typicality, and adequacy—serve as crucial protections for plaintiffs’ due process rights, ensuring that the legal and factual questions are sufficiently common among the class, that the named plaintiff has a claim typical of the class, and that the plaintiffs’ counsel is adequate for all of the plaintiffs.<sup>66</sup> The same goes for the Rule 23(b)(3) predominance requirement, which ensures that the issues plaintiffs share predominate over issues that they do not.<sup>67</sup> Because absent plaintiffs

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<sup>64</sup> See, e.g., Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs’ Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 887–95 (1995) (“With the advent of mass tort litigation in the mid-1980s, the issue of plaintiffs’ due process rights in class-action litigation has resurfaced with some urgency.”).

<sup>65</sup> See *infra* notes 76–78 and accompanying text (referring to the defendants’ endorsement of the “reverse death knell” as the policy rationale for proposed changes like adopting Rule 23(f)).

<sup>66</sup> See *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182 n.27 (3d Cir. 2001) (“The Rule 23(a) class inquiries (numerosity, commonality, typicality, and adequacy of representation) constitute a multipart attempt to safeguard the due process rights of absentees.”).

<sup>67</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (“The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”); see also 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1778 (3d ed. 1972) (“[I]f the main issues in a case require the separate adjudication of each class member’s individual claim or defense, a Rule 23(b)(3) action would be inappropriate. There is a

are bound to judgments for and against the class, the Rule 23 requirements ensure that absentees aren't bound unfairly. Yet by the late 1990s, it had become clear that those protections were not operating as intended.<sup>68</sup>

The contemporary attitude toward these requirements is apparent in the leading class action case from the pre-Rule 23(f) era: *Amchem Products, Inc. v. Windsor*.<sup>69</sup> In that 1997 case, which involved a massive settlement of asbestos claims, the Supreme Court referred to the Civil Rules Advisory Committee's warning that "'mass accident' cases are . . . 'ordinarily not appropriate' for class treatment."<sup>70</sup> The common questions should rarely predominate for mass torts, when individualized questions of causation and individual defenses are at play.<sup>71</sup> But, the Court noted, "District Courts, since the late 1970s, have been certifying such cases in increasing number."<sup>72</sup> The protections for absentee plaintiffs had eroded, and by *Amchem*, the Supreme Court had realized it.

### B. Appeals: Dodging the "Death Knell"

Scholars had also long observed that existing appeal mechanisms made an uneasy fit with the class action device—including in one early critique from Professor Martin Redish, who noted that "the most problematic application" of 28 U.S.C. § 1291's final judgment rule "has been with respect to the appealability of district court orders denying the existence of class actions."<sup>73</sup> Professor Redish favored a pragmatic rule, which would "require[] an assessment by an appellate court of the practical factors

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sound basis for this conclusion. Since all members of a Rule 23(b)(3) class who do not exercise their right to be excluded from the action will be bound by the judgment, it is essential that their interests be connected closely.").

<sup>68</sup> See *infra* notes 70–72 and accompanying text; see also Christopher Chorba & Blaine H. Evanson, *Other Due Process Challenges to the Class Device*, in A PRACTITIONER'S GUIDE TO CLASS ACTIONS 738, <https://www.gibsondunn.com/wp-content/uploads/documents/publications/ChorbaEvanson-DueProcessChallenges.pdf> [<https://perma.cc/LG8T-6XRC>] ("The requirement[] that . . . common issues predominate over any individualized issues attempt[s] to ensure the cohesiveness necessary to constitutionally bind the absent class members.").

<sup>69</sup> 521 U.S. 591 (1997). *Amchem* was a rare opportunity for the Supreme Court to make class action law at the time. Without Rule 23(f), review of a settlement was one of very few ways the propriety of class certification could become an issue on appeal. The others included final judgments, interlocutory appeal through § 1292(b), and the collateral order doctrine. These were not very successful. See Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1561 (2000).

<sup>70</sup> *Amchem*, 521 U.S. at 625 (quoting FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment).

<sup>71</sup> See *id.*

<sup>72</sup> *Id.*

<sup>73</sup> Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 93 (1975).

weighing in favor of or against the desirability of direct appellate review of a particular order.”<sup>74</sup> In the class action context, he noted several courts had found that denial of class certification could effectively end the litigation.<sup>75</sup> This came to be known as the “death knell” theory. It was considered by several circuit courts, including the Third and Seventh Circuits.<sup>76</sup>

While Redish’s original iteration of the death knell theory focused on courts’ *denials* of plaintiffs’ class certification, defendants later argued that *grants* of class certification sounded an equally grave note. Due to the enormous downside risk of losing a class action and the inherent uncertainty of jury trials, defendants argued that they would be effectively forced to settle a certified class action regardless of the merits. The stakes were simply too high.<sup>77</sup> This rationale inspired the “reverse death knell” as a basis for appeal. Yet just three years after Redish’s writing, the Supreme Court rejected both the death knell and reverse death knell theories in *Coopers & Lybrand v. Livesay*.<sup>78</sup>

Once the § 1291 options were doctrinally foreclosed, the death knell theory morphed into a policy rationale for proposed changes to the rule. Proponents of interlocutory appeal for class certification decisions changed their tack, shifting their attention from courts to policymakers. In 1986, the American Bar Association recommended a change to the Federal Judicial Code that would permit immediate appeal of class certification decisions.<sup>79</sup> The American Law Institute soon joined the cause.<sup>80</sup> And in 1996—perhaps inspired by the case that follows—then-Chief Judge Posner wrote that “class-

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<sup>74</sup> *Id.* at 91 n.14.

<sup>75</sup> *Id.* at 93. Foremost among these decisions was *Eisen v. Carlisle & Jacquelin*, in which an appellate court permitted an appeal under 28 U.S.C. § 1291 where the trial court had denied class certification and the plaintiff’s claims were not economically viable on their own. 370 F.2d 119, 120 (2d Cir. 1966).

<sup>76</sup> See *Hackett v. Gen. Host Corp.*, 455 F.2d 618, 621 (3d Cir. 1972); *King v. Kan. City S. Indus., Inc.*, 479 F.2d 1259, 1260 (7th Cir. 1973).

<sup>77</sup> See, e.g., Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission’s Authority*, 107 HARV. L. REV. 961, 973 n.38 (1994) (“You find that paying five, 15 or 20 percent of the total claim out as a settlement is worth it to avoid the jury risk . . . [s]ometimes the merits [of the case] don’t mean very much.”); Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers’ Rates of Return*, 15 CARDOZO L. REV. 1755, 1780–82 (1994) (“[T]he actual purpose [of class actions] is to compel defendants to enter settlements on favorable terms with hundreds and thousands of unimpaired claimants . . .”).

<sup>78</sup> 437 U.S. 463, 476 (1978) (finding that these issues of appellate jurisdiction are for Congress, not the courts, to decide).

<sup>79</sup> See FRANK F. FLEGAL, AM. BAR ASS’N SEC. OF LITIG., REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CLASS ACTION IMPROVEMENTS, 110 F.R.D. 195, 210–11 (1986).

<sup>80</sup> See AM. L. INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 134–35 (1994).

action certification should be immediately appealable to the court of appeals.”<sup>81</sup>

### C. *The Rhone-Poulenc Mandamus*

Just like in *Prescription Opiate*, the fervor over plaintiffs’ due process rights and defendants’ need for interlocutory appeal came to a head in a high-profile mandamus decision. Judge Posner synthesized the two critiques in *In re Rhone-Poulenc Rorer Inc.*<sup>82</sup> In the wake of the HIV crisis, blood clotting agents used by hemophiliacs had become contaminated.<sup>83</sup> Many who relied on blood products contracted the virus. The injured persons sought and won certification of a nationwide class in the Northern District of Illinois to pursue their tort claims.<sup>84</sup> The defendants immediately sought mandamus to the Seventh Circuit to overturn the Northern District’s decision to certify the class.<sup>85</sup>

Judge Posner’s opinion was undeniably sympathetic to the defendants’ interests, but his reasoning foreshadowed later developments on the plaintiffs’ rights front. One of his principal reasons for reversing class certification was that the plaintiffs’ nationwide class would pose intractable choice of law problems.<sup>86</sup> Remarkably, Judge Posner cited Fed. R. Civ. P. 23 just twice—both times to explain the case’s procedural posture.<sup>87</sup> But the choice of law problem for nationwide classes would become a key question in class certification doctrine following *Rhone-Poulenc*. In the Rule 23 parlance, it creates an issue of commonality. Commonality is the Rule 23(a) notion that the plaintiffs’ claims must be cohesive enough that their interests will align.<sup>88</sup> In *Rhone-Poulenc*, Judge Posner determined that because plaintiffs from different states would be subject to substantially different legal standards, their divergent legal interests destroyed commonality.<sup>89</sup>

<sup>81</sup> RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 344 (1996).

<sup>82</sup> 51 F.3d 1293 (7th Cir. 1995).

<sup>83</sup> *Id.* at 1295.

<sup>84</sup> *Id.* at 1296–97.

<sup>85</sup> *Id.* at 1293 (“The defendants have filed with us a petition for mandamus, asking us to direct the district judge to rescind his order certifying the case as a class action.”).

<sup>86</sup> *Id.* at 1300 (“[The district judge] proposes to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world.”).

<sup>87</sup> *See id.* at 1296–97.

<sup>88</sup> FED. R. CIV. P. 23(a); *see also* Christopher Chorba & Blaine H. Evanson, *Other Due Process Challenges to the Class Device*, in *A PRACTITIONER’S GUIDE TO CLASS ACTIONS* 738, <https://www.gibsondunn.com/wp-content/uploads/documents/publications/ChorbaEvanson-DueProcessChallenges.pdf> [<https://perma.cc/N3WR-B5NE>] (“The requirement[] that the class representative . . . present common issues typical of the claims of the absent class members . . . attempt[s] to ensure the cohesiveness necessary to constitutionally bind the absent class members.”).

<sup>89</sup> *See* 51 F.3d at 1300.



Circuit courts (empowered by Rule 23(f) and inspired by *Rhone-Poulenc*) have begun to develop something like a bright-line rule against nationwide mass tort class actions to avoid this commonality issue.<sup>90</sup>

The commonality rationale for this bright-line rule fits with the first issue: plaintiffs' due process concerns. By preventing certification of a class with diverging interests, courts ensure that individual plaintiffs' interests are protected against decisions made by other plaintiffs or counsel with different priorities. By contrast, Judge Posner's sympathy with defendants' dilemma is palpable. Ever the pragmatist and ever the scholar, Judge Posner cited a litany of articles about the specter of "blackmail settlements," in which defendants are forced to settle for fear of a bankruptcy-inducing judgment worth billions of dollars.<sup>91</sup> Judge Posner's conclusion presaged the argument the Sixth Circuit used in *Prescription Opiate*. The faulty district court decision, he said, "cannot be rectified by an appeal from the final judgment in the lawsuit."<sup>92</sup> All Judge Posner needed to show irreparable harm was this "intense pressure to settle."<sup>93</sup> This line of reasoning allowed Judge Posner to meet the strict requirements for issuing mandamus—and it later allowed for the adoption of Rule 23(f).

### III. RULE 23(F): ADOPTION AND CONSEQUENCES

After *Rhone-Poulenc*, both the plaintiffs' due process and the defendants' appealability critiques continued to notch victories. The 1998 Amendments to Rule 23 marked a key turning point for both theories. With the advent of Rule 23(f), defendants now had a vehicle for challenging class certification on an interlocutory basis: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this

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<sup>90</sup> See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015, 1018 (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 Fed. R. Civ. P. 23(a), (b)(3) . . . . Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.").

<sup>91</sup> *Rhone-Poulenc*, 51 F.3d at 1298 (citing Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 8–9 (1971); William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 143 n.121 (1974); Charles D. Schoor, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215, 239–40 n.82 (1976); Joseph Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 963, 973 n.38 (1994); Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1780–82 (1994); Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590, 605 n.67 (1982)).

<sup>92</sup> *Rhone-Poulenc*, 51 F.3d at 1297.

<sup>93</sup> *Id.* at 1298.

rule . . . .”<sup>94</sup> Rule 23(f) freed circuit courts from the restrictions inherent in mandamus review and allowed them to rescue defendants from potential blackmail settlements. The 1998 Amendments did not, however, explicitly bolster due process rights. But their legacy—the legacy of Rule 23(f)—has been a body of class certification law that produces more consistent, cohesive, and compliant classes. So, while the Rules Committee did not immediately address the due process critique in the text of Rule 23(f), the Rule enabled the appellate courts to do so.

#### A. *The 1998 Amendments*

The core justification for Rule 23(f) echoed Judge Posner’s logic: defendants had inadequate access to appeals that would protect them from “blackmail settlements.” The Advisory Committee received many familiar-sounding comments “emphasiz[ing] the inadequacy of present appeal opportunities.”<sup>95</sup> The Committee Notes revealed a desire for “significantly greater protection against improvident certification decisions than § 1292(b) now provides,” and, for that reason, the Committee rejected provisions that would have required district court permission to take a Rule 23(f) appeal.<sup>96</sup> The influence of *Rhone-Poulenc* in this period was clear: from November 1995 to April 1996, each edition of the Committee’s minutes referred to the case at least once.<sup>97</sup>

The Committee also valued the possibility that Rule 23(f) itself would resolve other problems with class action litigation. As Judge Paul Niemeyer (then-Chair of the Advisory Committee on Civil Rules) noted, Rule 23(f) “would enable the courts of appeals to develop the law. This change alone, he said, might well prove to be the most effective solution to many of the problems with class actions.”<sup>98</sup> Besides Rule 23(f), the Committee considered other rule changes. Indeed, some committee members “suggested . . . that the impact of the class certification decision on absentees was a very serious question that needed to be addressed further.”<sup>99</sup> But the

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<sup>94</sup> FED. R. CIV. P. 23(f).

<sup>95</sup> ADVISORY COMM. ON CIV. RULES, MAY 1997 AGENDA BOOK 62 (1997), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV1997-05.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV1997-05.pdf) [<https://perma.cc/DZ3F-WSCU>].

<sup>96</sup> ADVISORY COMM. ON CIV. RULES, APRIL 1996 AGENDA BOOK 11 (1996), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV1996-04.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV1996-04.pdf) [<https://perma.cc/8H2U-QEFX>].

<sup>97</sup> See ADVISORY COMM. ON CIV. RULES, NOVEMBER 1995 AGENDA BOOK 139 (1995), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV1995-11.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV1995-11.pdf) [<https://perma.cc/NZ2B-ZW3N>]; ADVISORY COMM. ON CIV. RULES, *supra* note 96.

<sup>98</sup> COMM. ON RULES OF PRAC. AND PROC., JUNE 1997 STANDING COMMITTEE MEETING - MINUTES 18 (1997), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST06-1997-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST06-1997-min.pdf) [<https://perma.cc/8WZF-LCP8>].

<sup>99</sup> *Id.* at 19.

Rules Committee decided not to act immediately, contenting itself to adopt Rule 23(f)'s interlocutory appeal mechanism and observe its effects. As it happened, the case law that Rule 23(f) facilitated largely obviated the need for further changes.

### B. The Blair Criteria

Once the Amendments took effect, the circuit courts were left to determine their application. That is, they had to figure out which appeals to take under Rule 23(f) and which to deny. The first court to do so was the Seventh Circuit just the next year, in the 1999 case *Blair v. Equifax Check Services, Inc.*<sup>100</sup> Though the Advisory Committee was careful to vest the circuit courts with great discretion,<sup>101</sup> the Seventh Circuit itself deferred to the Committee's purposes for creating the appeal mechanism.<sup>102</sup> They found three. The first is the death knell rationale rejected in *Coopers & Lybrand*.<sup>103</sup> The second is the reverse death knell, the pressure to settle felt by defendants after class certification. The court continued to express concern that erroneous district court decisions would improperly foreclose valid legal arguments as a practical, economic matter for plaintiffs or defendants.<sup>104</sup>

"Third, an appeal may facilitate the development of the law."<sup>105</sup> The Seventh Circuit embraced the Advisory Committee's rationale, placing underdevelopment of class certification law at the feet of the "death knell" problem. "Because a large proportion of class actions settles or is resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed."<sup>106</sup> In sum, the Seventh Circuit—whose approach would become "seminal" on this question<sup>107</sup>—saw two key justifications for interlocutory appeal: (1) solving the death knell and reverse death knell problems and (2) developing the law of class certification.

### C. A Growing Body of Rule 23 Law

Though "development of the law" merited only tertiary mention in *Blair*'s list of purposes for adopting Rule 23(f), it has become the Rule's signature contribution. Both circuit courts and the Supreme Court have been

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<sup>100</sup> 181 F.3d 832 (7th Cir. 1999).

<sup>101</sup> See FED R. CIV. P. 23 advisory committee's note to 1998 amendment ("Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals.").

<sup>102</sup> *Blair*, 181 F.3d at 834.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.*

<sup>105</sup> *Id.* at 835.

<sup>106</sup> *Id.*

<sup>107</sup> *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000).

able to decide more questions and make more law after Rule 23(f).<sup>108</sup> Prior to the 1998 Amendments, Supreme Court case law about Rule 23 was scarce. One key precedent on class certification, *General Telephone Co. v. Falcon*,<sup>109</sup> had reached the Court by achieving finality after a trial. But trials are exceedingly rare in the class action context.<sup>110</sup> Just a year before the Amendments were adopted, the Court decided *Amchem Products, Inc. v. Windsor*,<sup>111</sup> which began to turn the tide toward stricter class certification requirements.<sup>112</sup> *Amchem* reached the Court on appeal from a settlement,<sup>113</sup> which was another pre-23(f) route to review. But since neither the plaintiff's nor defendant's lawyers have incentives to appeal a settlement, this is not a reliable mechanism for development of the law. The federal appellate courts needed a new stream of appeals that raised class certification issues. They got it in Rule 23(f).

After Rule 23(f), one way the law of class certification developed to protect absentee plaintiffs' rights was through a fortified commonality requirement.<sup>114</sup> When plaintiffs have individualized defenses, or their liability turns on individualized questions, the strongest cases in a class action suffer. Without a strong commonality requirement, a mass tort plaintiff with an especially strong causation argument may be reduced to the common denominator of the class by the class counsel's decisions.<sup>115</sup> Rule 23(f) afforded the Supreme Court the opportunity to provide clear guidance on commonality. For example, *Wal-Mart Stores, Inc. v. Dukes* was an appeal from certification of a nationwide class of female employees alleging employment discrimination.<sup>116</sup> Part of the trouble with their theory was that Wal-Mart had created substantial discretion at the regional level to make promotion decisions—so some plaintiffs in some regions had suffered clear

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<sup>108</sup> See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 745 (2013) (“Federal courts have not simply heard and decided more cases as a result of Rule 23(f) and CAFA; they have adopted troublesome new standards applicable to plaintiffs seeking classwide relief.”). Though many of these standards may have complicated the prospect of classwide relief, they have also regularly enhanced protections for absentee plaintiffs.

<sup>109</sup> 457 U.S. 147 (1982).

<sup>110</sup> See *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 920 (Cal. 2014) (describing the class action that “proceeded through trial to verdict” as a “rare beast”).

<sup>111</sup> 521 U.S. 591 (1997).

<sup>112</sup> See Klonoff, *supra* note 108, at 800–04.

<sup>113</sup> See *Amchem*, 521 U.S. at 597.

<sup>114</sup> For a perspective that the Court did fortify the commonality requirement, but that this was a negative development, see A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 445 (2013).

<sup>115</sup> See Simona Grossi & Allan Ides, *The Modern Law of Class Actions and Due Process*, 98 OR. L. REV. 53, 83 (2020) (recognizing commonality as part of “the question of whether the class members are (or were) adequately represented”).

<sup>116</sup> 564 U.S. 338, 343 (2011).

discrimination, while others were reliant on a hazier culture of discrimination theory.<sup>117</sup> The Court refused to allow good claims to be mixed up with bad. It held that commonality was lacking where the alleged discrimination stemmed from a policy of regional discretion. “[I]t will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.”<sup>118</sup> The due process argument was especially strong for the *Dukes* class, which was certified as a Rule 23(b)(2) class from which plaintiffs could not opt out.<sup>119</sup> By enforcing Rule 23(f)’s commonality requirement, the Court ensured the strongest claims could go it alone, unencumbered by the weaker ones.<sup>120</sup>

The lower courts have also used Rule 23(f) to experiment with different protections for absentee plaintiffs. One key example here is the ascertainability requirement applied by some circuits, which has a deep regard for absentee plaintiffs’ due process rights at its core. Ascertainability requires that “the class must be currently and readily ascertainable based on objective criteria.”<sup>121</sup> “If the identities of absent class members cannot be ascertained, the argument goes, it is unfair to bind them by the judicial proceeding.”<sup>122</sup> The procedural indignities of a Rule 23 class action are justified largely by giving absentee plaintiffs notice and the opportunity to opt out.<sup>123</sup> If a class is not ascertainable, some absentee plaintiffs will not receive notice and will be practically unable to opt out.

This notion first arose in the 2004 Third Circuit case *Chiang v. Veneman*.<sup>124</sup> It was since articulated in *Marcus v. BMW of North America*,

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<sup>117</sup> *Id.* at 355.

<sup>118</sup> *Id.* at 352.

<sup>119</sup> *Id.* at 362. Classes certified under Fed. R. Civ. P. 23(b)(2), often called “injunctive class actions,” see, e.g., Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 59 (2017) (“Rule 23(b)(2) injunctive class action”), do not provide plaintiffs the chance to pursue their claims alone. They are thought to pose additional due process worries for this reason. The usual mechanism for damages class actions, Fed. R. Civ. P. 23(b)(3), does include an opt-out right for plaintiffs, so those who think their interests are not adequately represented can always go it alone. See FED. R. CIV. P. 23(b)(2)–(3).

<sup>120</sup> *Dukes* is certainly good law, but it has its detractors. See Grossi & Ides, *supra* note 115, at 83–84.

<sup>121</sup> *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

<sup>122</sup> *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 665 (7th Cir. 2015).

<sup>123</sup> Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 599 (2015) (“Opt-out rights provide an appropriate procedural safeguard that protects objecting class members from having their control rights erroneously extinguished, thereby allowing them to decide for themselves whether or not their claims will be asserted.”).

<sup>124</sup> See 385 F.3d 256, 271 (3d Cir. 2004) (stating that defining members of a class should be an “objective evaluation”).

*LLC*<sup>125</sup> and followed in some form by several other circuits,<sup>126</sup> though most courts have now rejected the theory.<sup>127</sup> Nearly every case that contributed to the law of ascertainability reached the appellate courts via Rule 23(f).<sup>128</sup> Though the rule has not prevailed in the majority of circuit courts, it has made its mark on the law of class actions by extending the push for Rule 23 protections into new territory—territory not closely anchored to the Rule’s text. Rule 23(f)’s focus on securing defendants’ appealability rights has produced an evolving body of law on plaintiffs’ due process rights. An MDL analogue should take a broad view, one that allows for the unstilted development of the federal common law of MDL.

#### IV. MDL IMPLICATIONS

Rule 23(f)’s history can help resolve certain questions about a proposed MDL interlocutory appeal rule. The Advisory Committee raised several questions probing the fine details of a potential appeal rule.<sup>129</sup> What level of input should district courts have? Should the rule be restricted to certain kinds of proceedings? Should the rule apply only to certain kinds of determinations? By keeping in mind the principal function of Rule 23(f)—its role as lawmaking catalyst for the appellate courts—we can move past the narrow interests of plaintiffs or defendants in any one case and instead consider the future of MDL as a problem-solving mechanism.

One specific, detailed reform proposal illustrates the problem with a narrow focus on parties’ rights. The Advisory Committee heard from John Beisner, a prominent MDL defense lawyer,<sup>130</sup> who suggested an amendment which “would authorize an immediate interlocutory appeal from any order

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<sup>125</sup> *Marcus*, 687 F.3d at 593.

<sup>126</sup> *See, e.g.*, *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (articulating an ascertainability requirement); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006) (same).

<sup>127</sup> For a particularly comprehensive and well-reasoned review of the case law on ascertainability, *see Mullins v. Direct Digit., LLC*, 795 F.3d 654, 661–72 (2015). *See also* Kyle Harris Timmons, Comment, *The End of Low-Value Consumer Class Action Lawsuits: The Federal Circuit Split on the Ascertainability Requirement for Class Certification*, 68 MERCER L. REV. 1107, 1119–34 (2017).

<sup>128</sup> All of the cases cited in this paragraph, except *John*, 501 F.3d 443, reached the appellate court via Rule 23(f). *John* used § 1292(b)’s discretionary appeal provision. *See Chiang v. Veneman*, 385 F.3d 256, 257 (3d Cir. 2004); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 590 (3d Cir. 2012); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 31 (2d Cir. 2006); *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 657 (2015).

<sup>129</sup> ADVISORY COMM. ON CIV. RULES, OCTOBER 2020 AGENDA BOOK 157–60 (2020), [https://www.uscourts.gov/sites/default/files/2020-10\\_civil\\_rules\\_agenda\\_book\\_final.pdf](https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf) [<https://perma.cc/YA9S-ME8W>].

<sup>130</sup> ADVISORY COMM. ON CIV. RULES, APRIL 2019 AGENDA BOOK 243, 255 (2019), [https://www.uscourts.gov/sites/default/files/2019-04\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf) [<https://perma.cc/MX-9UDX>].

denying or granting a motion that, if successful, would be dispositive of a substantial number of claims in a mass tort MDL proceeding.”<sup>131</sup> Note two key features here. First, the proposal reaches only dispositive motions. Second, the proposal covers only “mass tort” MDL proceedings. Though the Advisory Committee raised concerns about the administration of the proposal,<sup>132</sup> its two features present a bigger problem: it stifles the development of the federal common law of MDL.<sup>133</sup>

Under Beisner’s proposal, a defendant who faces an adverse legal ruling in a high-stakes MDL would secure their interlocutory safety valve and could enjoy much lower pressure to settle. In this way, the proposal mirrors Rule 23(f). But the limited scope of the appeal right circumscribes the rule’s potential lawmaking power. Beisner’s proposal would allow appellate courts to weigh in on some important questions of substantive law that MDL raises. But for situations like the *Prescription Opiate* MDL—where plaintiffs wait years for their motions to be adjudicated—the proposal leaves mandamus as the only option since it only covers orders “denying or granting a motion.”<sup>134</sup> Thus, the procedural law of MDL would remain untouched. A similar logic controls the “mass tort” part of the proposal. Though mass tort MDLs are the face of the aggregation device, many MDLs are not mass torts at all. In fact, just 32% are, by one measure.<sup>135</sup> If only mass tort MDLs get interlocutory appeals, that’s 68% fewer chances to develop the procedural law in this area.

There’s a reason for this asymmetry, of course: the proposed rule was carefully tailored by experienced MDL litigators. Repeat players like Beisner have immense latitude in the system as it exists today.<sup>136</sup> They have the expertise and positions in MDL leadership to “play for rules” that will benefit their clients down the line.<sup>137</sup> And they have busily set to work doing so, contributing to the creation of documents such as the *Manual for Complex Litigation* that shape the face of MDL as well as establishing practices such as inventory settlements that require plaintiffs’ lawyers to recommend the deal to all of their clients.<sup>138</sup> A narrowly tailored appeal rule would alleviate MDL litigators’ death knell worries while protecting their institutional capacity to make federal common law about MDL procedure. But we have

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<sup>131</sup> *Id.*

<sup>132</sup> ADVISORY COMM. ON CIV. RULES, *supra* note 129, at 157–58.

<sup>133</sup> Gluck, *supra* note 7, at 1674.

<sup>134</sup> ADVISORY COMM. ON CIV. RULES, *supra* note 130, at 243.

<sup>135</sup> Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1317 fig.2 (2020).

<sup>136</sup> See Burch & Williams, *supra* note 30, at 1517 n.279.

<sup>137</sup> See Bradt & Rave, *supra* note 48, at 79 (“MDL’s split personality gives repeat-player lawyers some leeway to make the kinds of tradeoffs among their cases that they need to play for rules effectively.”).

<sup>138</sup> *Id.* at 96–97, 107.

a different preferred institution for making and homogenizing common law: the appellate courts. District courts are close to the ground, and they're susceptible to influence from these repeat players (who are, after all, the lead counsel that the district court chose). And while Congress could of course weigh in, that would take the action out of the "common law" world and into the statutory realm.

A preference for shifting lawmaking power away from repeat player lawyers and into the hands of appellate courts requires a broad, strong appeal rule. Even some scholars, who lack strong incentives to preserve repeat-player power, have proposed relatively narrow appeals rules. One article proposes interlocutory appellate review for "orders that raise important issues of unsettled law (or departures from settled law) and that are potentially dispositive of a significant number of the consolidated cases."<sup>139</sup> These proposals are likely born out of a spirit of compromise—the desire to balance the interests of plaintiffs and defendants. But as this Essay has shown, and as the Rule 23(f) experience has demonstrated, there is no necessary conflict between an interlocutory appeal right and plaintiffs' interests. Indeed, a broad, strong appeal right serves both interests.

The preference for a broad, strong appeal right has two essential consequences. First, plaintiffs and defendants should be able to appeal MDL procedural orders such as Judge Polster's moratorium on substantive motions. An appeal rule that does not restrict its scope to dispositive motions allows appellate courts to weigh in on important MDL procedural issues—such as Judge Polster's halt on motions to dismiss—otherwise left to the tight-knit clique of MDL practitioners and transferee judges. While this breadth could slow down MDL proceedings somewhat, the Advisory Committee has noted that "allowing expanded avenues for review need not be linked to a stay of proceedings in the district court."<sup>140</sup> In fact, appeals of class certification decisions work this way; the appeal does not stay proceedings below. And in that context, the Ninth Circuit has concluded that "Rule 23(f) petitions do not actually slow down litigation."<sup>141</sup>

Second, the interlocutory appeal should be left to the sole discretion of the appellate court. An of-right appeal mechanism would overload appellate dockets and create immense delays, so appellate courts must have the discretion to decline appeals. At the same time, provisions like § 1292(b)'s that require permission from the district court have restricted the development of MDL procedural law. The problem-solving orientation of MDL judges creates a strong attitude of resistance to permitting interlocutory

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<sup>139</sup> Pollis, *supra* note 16, at 1648.

<sup>140</sup> ADVISORY COMM. ON CIV. RULES, *supra* note 129, at 156.

<sup>141</sup> Lambert v. Nutraceutical Corp., 870 F.3d 1170, 1180 (9th Cir. 2017).



appeals. This orientation would not change with a new appeal rule. So, an amendment creating an interlocutory appeal mechanism that requires district court approval would provide little improvement over § 1292(b). Nor is an of-right appeal necessary. Once appellate courts set the rules of the road in class action litigation, the need to accept appeals declined dramatically. Leaving the appeal in the circuit court's discretion allows those courts to incur the costs of appeal when—and only when—the state of the law requires clarification.

#### CONCLUSION

MDL is plagued by two core problems. On the one hand, plaintiffs' procedural rights are often ignored in favor of efficiency. On the other, defendants worry that their interests are hugely affected by legal rulings that never get the benefit of appellate oversight. These concerns have begun to break through—from academia to the courtroom—with a pair of recent mandamus orders rebuking an MDL judge's administration.

This set of circumstances is not new. In the 1990s, class action litigation occupied an almost identical position. Academics agonized about plaintiffs' rights; defendants lobbied for the right to appeal class certification. A high-profile mandamus encapsulated both concerns. In the class action context, both camps were ultimately successful. After Rule 23(f) created an avenue for developing the law of class certification, both plaintiffs' due process protections and defendants' death knell plight improved.

MDL can follow the same path. An interlocutory appeal rule may be able to address both of MDL's core problems. But not just any appeal rule will do. To truly reform the federal common law of MDL, an interlocutory appeal rule must provide a broad and strong appeal mechanism. Such a rule would place the future legal development in the forum where it belongs: federal appellate courts.