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SOMETHING LESS AND SOMETHING MORE:  
MDL'S ROOTS AS A CLASS ACTION  
ALTERNATIVE

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INTRODUCTION

Rule 23(b)(3) has always had a bit of a self-confidence problem, at least when it comes to mass torts. Although it offers what its drafters called an

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“adventuresome” opportunity to unite and bind a class whose members’ claims share common questions of fact or law,<sup>1</sup> it has always contained hedges that cabin its applicability. These hedges include the requirements of predominance and superiority and the unlimited right of a class member to opt out.<sup>2</sup> Ultimately, Rule 23(b)(3) creates the possibility of a binding judgment on all members of a mass tort class, but the limitations embedded in the rule make such a judgment—and its potential benefits—difficult to realize.

Meanwhile, the MDL statute,<sup>3</sup> which does not by its terms seek to produce binding judgments on behalf of a representative class but only transfers cases to a single court for “pretrial proceedings,” has flourished in mass tort cases—often achieving the kind of mass settlements that one could have imagined might be obtainable under Rule 23(b)(3).<sup>4</sup> Though MDL has detractors, in an era defined by large caseloads and vanishing trials, it is the poster child for successful aggregate litigation.

In this contribution to this Symposium marking fifty years since the 1966 Amendments to Rule 23 were adopted, I examine closely the roots of some of the structural reasons why MDL has succeeded as a mass tort aggregator. In short, MDL works in large measure because of its split personality. An MDL functions simultaneously as a tight consolidation of cases into a unitary package before a single judge and a temporary coordination of individual cases destined for remand to the districts in which they were filed. MDL’s ability to oscillate between these two personalities facilitates the strong aggregation of cases without formally violating traditional norms of litigant autonomy. Because MDL neither formally changes the character of any individual case within it nor produces a judgment that binds an absent party, it does not require the due process-based limitations of the class action rule. An MDL is easily formed and impossible to exit, but the availability of an eventual trial for each individual case ensures that the purportedly temporary coordination for pretrial

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<sup>1</sup> Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (referring to (b)(3) as “the most adventuresome of the new types” of class action). Charles Alan Wright characterized it as “the most doubtful part of the new rule.” *Proposed Changes in Federal Civil, Criminal, and Appellate Procedure*, 31 TENN. L. REV. 417, 436 (1964).

<sup>2</sup> Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 295 (2014) (describing how “the Committee hedged the new provision in with procedural safeguards to protect absentees—giving class members notice and opt-out rights—and limited its availability by requiring common questions to predominate and insisting the class form be superior to other methods of adjudication”); see also JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION* 61 (2015) (describing the limitations included in 23(b)(3) as “restrictive”).

<sup>3</sup> 28 U.S.C. § 1407.

<sup>4</sup> See, e.g., Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (explaining how MDL “creates the perfect conditions for an aggregate settlement”).

proceedings does not produce the same sort of alarm that the class action does—an irony in light of the centralization of power that MDL achieves.<sup>5</sup>

As I have detailed in another article in this law review, this mainspring of MDL's success has been part of the statute from the beginning and was a product of a political compromise by the statute's drafters in order to secure support for its enactment.<sup>6</sup> The small group of federal judges, and one academic, Dean Phil C. Neal of the University of Chicago, who conceived of and shepherded the MDL statute to passage some fifty years ago did so because they believed that—in the words of MDL's primary judicial proponent, District Judge William Becker of Kansas City—a “litigation explosion” was coming to the federal courts and permanent reform to federal procedure was necessary to handle it.<sup>7</sup> In particular, they believed that there needed to be a provision that would centralize litigation of national scope before a single federal judge—and that the judges hearing these cases should be ones committed to the then somewhat novel principles of active case management. The drafters, who understood that pretrial proceedings were increasingly becoming the main event in large-scale litigation, believed that “limited transfer for pretrial” would achieve their aims.<sup>8</sup>

Here, drawing on the records of the committees and drafters who created the amended Rule 23 and the MDL statute, I focus on two episodes in the MDL creation story.

First, I detail the MDL statute's drafters' collaboration with the Reporters of the Civil Rules Advisory Committee in 1963, in which the drafters of the MDL statute made clear their intention that MDL would be the primary aggregation device for mass torts, and one which invested plenary power in the hands of the district judges to whom MDLs were assigned. The creators of the MDL statute expressed to the Advisory Committee's Reporters their strong opposition to any opportunity to opt out of a consolidated mass tort proceeding, because such a right could threaten the efficiencies of aggregate treatment.<sup>9</sup>

Second, I detail the MDL judges' opposition to efforts by two firms, Cravath, Swaine & Moore and Dechert, Price & Rhoades, to amend the

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<sup>5</sup> See *infra* Part I (noting the limitations placed on class actions but not on MDL).

<sup>6</sup> Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017).

<sup>7</sup> *Judicial Administration: Hearings on H.R. 3991, H.R. 6703, H.R. 8276, and H.R. 16575 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 26 (1966) [hereinafter *Judicial Administration Hearings*] (statement of Hon. William H. Becker, Chief Judge, Western District of Missouri) (“We feel that there is a litigation explosion occurring in the Federal courts along with the population explosion and the technological revolution; that even with the addition of many new judges, the caseload, the backlog of cases pending, is growing; and that some new tools are needed by the judges in order to process the litigation . . .”).

<sup>8</sup> See Bradt, *supra* note 6, at 839.

<sup>9</sup> See *Infra* Part II.

proposed MDL statute to require predominance of common questions of law or fact, modeled on Rule 23's predominance requirement.<sup>10</sup> Judge Becker, who spearheaded the effort to pass the MDL statute, vociferously opposed the amendment because he believed that inserting such a requirement would cripple the statute's ability to respond to the predicted "litigation explosion."<sup>11</sup> Becker understood that a predominance requirement would severely limit the availability of MDL, particularly in tort cases involving the application of multiple states' laws. With the benefit of fifty years' worth of hindsight, we can see that Judge Becker's prediction was on the nose.

Both of these episodes highlight the single-mindedness of the small group that drafted the MDL statute: They believed a strong aggregation device was necessary to protect the federal courts as an institution, and their thinking was dominated by fulfilling that need, rather than by a motivation to create a device that was in any real sense more protective of individual litigants' interests.

In Part I of this Article, I will briefly outline the structural differences between MDL and class actions, as well as how those differences create advantages for MDL in aggregating mass tort cases. In Parts II and III, I will tell the stories I described above. Placing the development of MDL against the backdrop of the development of the class action reveals how the seeds of MDL's current dominance were planted long ago. Finally, in Part IV, I turn briefly to the present. In a litigation landscape in which MDL is the dominant mechanism for aggregation, it is necessary to turn a critical eye toward what its creators wrought fifty years ago. Although judges and lawyers on both sides of litigation have accustomed themselves to the benefits of the MDL process, the notion that the cases do not lose their individual character by being transferred into the collective, and therefore the protections of the class action are inapposite, demands reconsideration. The central question going forward in the era of MDL ascendancy will be how to tailor protection for individual litigants within the MDL consolidation.

## I. CLASS ACTIONS AND MDLS IN MASS TORTS

Although one could envision the class action as the essential procedural device for resolving massive litigation, readers of this Symposium need no extensive review of how the various limitations on Rule 23(b)(3) have handicapped the availability of the mass tort class action, even for settlement.<sup>12</sup> After a brief heyday in the federal and state courts in the 1990s,

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<sup>10</sup> *Infra* Part III.

<sup>11</sup> See *Judicial Administration Hearings*, *supra* note 7.

<sup>12</sup> See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013) (discussing how the class action device "has fallen into disfavor"); see also Miller, *supra* note 2, at 296-97 ("[T]he Supreme Court and several courts of appeals have rendered decisions that oblige

decisions by lower federal courts and the Supreme Court diminished the prospects for class certification, including for settlement-only classes, and Congress threw cold water on state courts' attempts to certify nationwide classes by expanding federal jurisdiction under the Class Action Fairness Act.<sup>13</sup> Courts have applied Rule 23's restrictions, particularly the predominance requirement, in myriad ways to prevent class certification. Examples include additional factual gatekeeping at the class-certification stage, scrutiny of whether the representative can adequately represent the class (including those who may have "future claims" who are not yet members of the class), and assessment of whether efficiency is reduced because the individual factual or legal questions of the claimants overwhelm the common questions.<sup>14</sup> With respect to this last issue, it has proven to be a particularly daunting obstacle for certification of the class when the class members' claims arise under multiple states' laws.<sup>15</sup>

The Multidistrict Litigation Act aims somewhat lower than the class action, but it does not burden itself with such limitations. On the surface, the statute is comparatively bloodless: it provides only for limited transfer of cases to "any district for coordinated or consolidated pretrial proceedings," after which each case "shall be remanded by the panel . . . to the district from which it was transferred . . ." <sup>16</sup> MDL, in that sense, is more modest than Rule 23(b)(3). It does not create litigation that would otherwise not exist, for instance by aggregating negative-value claims. Nor does it require any reconceptualization of rights as belonging to groups instead of individuals.<sup>17</sup> Instead, it consolidates only already-filed cases (and to-be-filed tagalong

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district courts to require 'rigorous' adherence to each of the Rule 23 prerequisites . . . [so] the availability of the class action has been constrained dramatically, thereby reducing its effectiveness as a means of private enforcement.").

<sup>13</sup> See Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 504 (2016) (describing the brief "golden age" of the mass tort class action); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1507 (2008) (describing how the "federal appellate courts pretty quickly put an end" to mass tort class actions and how "the Supreme Court made it very difficult for the lower federal courts to certify" settlement classes).

<sup>14</sup> Klonoff, *supra* note 12, at 734. While rumors of the mass tort class action's ultimate demise may be exaggerated, it has been well documented that it continues to face what Richard Marcus has aptly called "headwinds." Marcus, *supra* note 13, at 504.

<sup>15</sup> See Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2008 (2008) (discussing how in one case, the U.S. Court of Appeals for the District of Columbia Circuit "held that the burden was on the class action plaintiffs to demonstrate that the state law variances did 'not present insuperable obstacles' to class certification.").

<sup>16</sup> 28 U.S.C. § 1407(a); see also *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 39 (1998) (holding that the "straightforward language" of the statute requires remand unless the parties waive their right to it).

<sup>17</sup> Cf. David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 591 (2013) (comparing competing philosophies of class actions).

cases), and, unless a class is certified, judgments made by the MDL court do not formally bind any absentees, because presumably there are none. Indeed, because there are no absentees in an MDL, no provision is made for adequate representation.<sup>18</sup> And, of course, the MDL statute does not contain the predominance and superiority requirements, or any opportunity for litigants to opt out.<sup>19</sup> Because no absentees are bound and those who have filed cases are entitled to a trial in the districts they initially chose, MDL appears to be a rather modest procedural mechanism.

But make no mistake: the aims of the small group of men who drafted the statute—the “Coordinating Committee on Multiple Litigation,” or “CCML”—were not modest. The CCML, led by Dean Phil C. Neal of the University of Chicago Law School, Judge Alfred P. Murrah of the Tenth Circuit, and Judge William H. Becker of the Western District of Missouri, believed both that a “litigation explosion” was coming to the federal courts due to increasing numbers of mass torts and federal causes of action, and that such litigation must be centralized and controlled by judges committed to the developing principles of active pretrial case management.<sup>20</sup> And they did not believe that the class action device was up to the task.<sup>21</sup> As a result, although on the surface MDL is a less adventurous procedural innovation than the (b)(3) class action, its original drafters thought it a “radical” addition to the federal procedural toolbox.<sup>22</sup>

Indeed, once one looks closely at how MDL works, one recognizes that the statute is hardly modest in practice. All that is required to create an MDL is “one or more common questions of fact” and the conclusion by the Judicial Panel on Multidistrict Litigation (JPML) that transfer “will be for the convenience of parties and witnesses and will promote the just and efficient

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<sup>18</sup> Of course, there may be class actions *within* MDL cases that serve to bind absentees, but this was not on the minds of the drafters. See *infra* Part II.

<sup>19</sup> See Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1294 (2012) (noting the relative lack of “safeguards” in non-class aggregation). The MDL statute does require notice to litigants that their cases have been transferred. 28 U.S.C. § 1407(c). But the problem of binding absentees without notice that bedevils Rule 23 does not exist because there are no absentees in an MDL—every litigant has filed a case. The question of whether the litigants who get swept into an MDL are functionally “absent,” however, is a separate question. See Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 617 (2011) (noting that “there is no sharp distinction between being a party with little actual control and being an absentee with none”).

<sup>20</sup> See generally Bradt, *supra* note 6.

<sup>21</sup> *Infra* Part II.C.

<sup>22</sup> Phil C. Neal, Address at the Annual Conference of the Seventh Federal Circuit 18 (May 14, 1963) (transcript available in Papers of Judge William H. Becker, Records of the Administrative Office of the United States Courts, Record Group 116, Coordinating Committee on Multiple Litigation, 1962-1968, National Archives, Kansas City, MO [hereinafter Becker Papers], Box 17, Folder 39) (“This is perhaps a radical proposal, and I am unable to suggest any close analogy for such a power.”).

conduct of such actions.”<sup>23</sup> Once an MDL is established, all tagalong cases filed thereafter rather seamlessly move to the MDL, and there is no opportunity to exit until pretrial proceedings have concluded and cases are remanded to the districts in which they were filed.<sup>24</sup> During pretrial proceedings, the MDL judge possesses all of the powers that the transferor judge would have had, including the power to grant dispositive motions.<sup>25</sup> MDL judges appoint steering committees of lawyers to prosecute the litigation, may hold bellwether trials to generate information about the relative strength of the claims, and steer the parties toward global resolution of claims.<sup>26</sup> Some judges even review those settlements and associated attorneys’ fee provisions under the banner of the “quasi-class action.”<sup>27</sup> As a result, MDLs typically lead to mass settlements, and it has always been rare that cases return home for trial.<sup>28</sup> As trials become less likely overall, pretrial proceedings have become the main event. Nowhere is this more true than in MDL, where this pattern has become extraordinarily prominent.

Indeed, as the class action has receded, MDL has filled the void, especially in cases involving state-law tort claims involving product liability or personal

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<sup>23</sup> 28 U.S.C. § 1407(a). Unlike the general transfer statute, 28 U.S.C. § 1404(a), those factors are not assessed case by case, party by party. As Edward Purcell has observed, “the provision was intended to serve the goal of judicial economy and administrative convenience. The interests of the parties, while relevant, are distinctly secondary.” Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 482 n.234 (1992).

<sup>24</sup> See, e.g., 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) (noting that the “plaintiff whose claim is grouped together with countless others is given no choice in the matter”); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 994 (2012) (“[A] plaintiff drawn into MDL proceedings has little power to opt out in any meaningful sense.”).

<sup>25</sup> 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (3d ed. 2007) (“[T]he transferee judge inherits the entire pretrial jurisdiction that the transferor district judge would have exercised . . .”).

<sup>26</sup> Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015) (explaining that judges appoint steering committees in order to “streamline cases and avoid having to communicate with hundreds of attorneys”); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 541 (2003) (finding that MDL committees “dominate the conduct of pretrial litigation”).

<sup>27</sup> Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 111 (2010); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 215 (2008) (pointing out that the “quasi-class occupies an interesting midpoint between public and private ordering, one that draws heavily on the equitable powers of courts in an area bereft of formal rules of procedure”).

<sup>28</sup> See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014) (describing how transfer “is typically a one-way ticket”). In many MDL cases, the parties agree to allow newly filed cases to bypass the transfer process altogether through a stipulation for “direct filing” of cases into the MDL court. See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 794 (2012) (describing how the direct filing process lets plaintiffs “bypass the transfer process”).

injury that are not well suited to class certification.<sup>29</sup> Although MDL was rarely used in products liability cases until the 1990s, those cases are now grist for the MDL mill.<sup>30</sup> Indeed, the ascendance of MDL is striking. While the statistics tell only a partial story, the recent report that MDL cases comprise more than a third of the federal civil docket is remarkable.<sup>31</sup>

There are numerous plausible explanations for why the class action has taken a back seat to the MDL in mass tort cases. The simplest one is that MDL just works better.<sup>32</sup> That is, if the primary goal is to achieve mass settlement of a nationwide controversy, the MDL device regularly accomplishes that mission by gathering all of the involved parties in a single proceeding before a judge who can flexibly guide the case to a resolution.<sup>33</sup> By facilitating these resolutions, MDL serves the central players' interests: defendants prefer a unitary litigation that offers the possibility of peace without the all-or-nothing risks of class certification, plaintiffs controlling the litigation prefer organized and streamlined collective efforts, and the federal courts prefer to avoid separate litigation of the thousands of cases that would otherwise proliferate in a nationwide controversy.<sup>34</sup> To say MDL "works" is not to make a normative claim—it is simply to acknowledge that as a vehicle

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<sup>29</sup> See Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 36, 40 (2015) (explaining that MDL "is in fact dominated by mass-tort cases at a remarkable level"); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 793-94 (2010) (explaining the recent phenomenon of MDL consolidation of products liability cases).

<sup>30</sup> See Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 907 (2007) (noting that "the number of motions for multidistricting filed in product liability cases increased dramatically in the 1990s"); see also Willging & Lee, *supra* note 29, at 798 (describing the "massive increase in MDL aggregate litigation").

<sup>31</sup> DUKE LAW CTR. FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES x-xi (Sept. 2014), available at [https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL\\_Standards\\_and\\_Best\\_Practices\\_2014-REVISED.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf) [<https://perma.cc/2QVX-FAW5>]; see also Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 222 (2015) (analyzing the composition of the JPML's docket).

<sup>32</sup> See Erichson & Zipursky, *supra* note 4, at 270 (explaining how MDL "creates the perfect conditions for an aggregate settlement").

<sup>33</sup> See Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 903 (2001) (finding that "[w]hen the JPML granted a multi-districting motion, a case was much more likely to reach a collective resolution than when the motion was denied"); Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 663 (2011) ("Similarly, federal district courts may be able to superintend final resolutions by settlements in multidistrict cases when those judges do not have the authority to preside at trials of the MDL aggregate.").

<sup>34</sup> See COFFEE, *supra* note 2, at 155 ("[T]he most successful step taken in the administration of aggregate litigation in the United States was the creation of the JPML.").

for achieving resolution, it is remarkably effective and that it is an agreeable process for the most prominent players.<sup>35</sup>

But the settlement class action also sought to serve these same interests— why has MDL thrived while the class action has withered? One reason is MDL's different statutory structure: the surface-level modesty of limited pretrial transfer better facilitates the tight packaging of cases within a single unit without doctrinal hurdles. In earlier work, I have referred to MDL as having a split personality: it is simultaneously a temporary coordination of cases for limited proceedings and a close-knit consolidation under the plenary control of a single judge. Each side of MDL's split personality facilitates the other.<sup>36</sup> But that's the engine of MDL: the patina of individual control facilitates centralized judicial control. The secret of MDL's success is that, among a set of imperfect options, it better structurally achieves consolidation without transgressing traditional norms of litigant autonomy and decentralized trials.<sup>37</sup> The doctrinal hurdles necessary to protect absentees in a class action therefore appear unnecessary in an MDL. The result is, that unlike the class action, to borrow a boxing metaphor, a doctrinal glove has never been laid on the structure of the MDL.<sup>38</sup> At the same time, however, because establishing an MDL is so easy, the only threat to continued judicial control is the end of the pretrial proceedings.<sup>39</sup> In other words, it is relatively easy to establish an MDL and bring cases in, but it is much harder for those cases to get out.<sup>40</sup>

This split-personality aspect of MDL has been there from the beginning and continues to present challenging problems.<sup>41</sup> In this Article, I do not attempt to resolve these controversies, such as defining the appropriate role

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<sup>35</sup> Miller, *supra* note 2, at 310 (noting that MDL is “especially . . . useful when class certification is unlikely because the litigants in the individual cases can be shepherded toward a global settlement by the transferee judge”).

<sup>36</sup> See Bradt, *supra* note 28, at 762. Professor Burch has similarly characterized MDL as a “procedural no man's land.” Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010); see also Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2265 (2008) (noting “an inherent tension in the split authority arrangement Congress built into the statute”).

<sup>37</sup> See Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943, 1944 (2000) (noting that “[o]ur received traditions . . . are treasured, and properly so, but none of them fares well when subjected to the test of mass tort litigation”).

<sup>38</sup> See Redish & Karaba, *supra* note 24, at 115 (“[N]o court appears to have even considered, much less ruled upon, a due process challenge to MDL.”).

<sup>39</sup> See Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2209 (2008) (describing MDL as “looser and more flexible” than class actions).

<sup>40</sup> See *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 405 n.16 (D. Mass. 2008) (borrowing Issacharoff's comparison of MDLs to “roach motels” in which claims “check in—but they don't check out”).

<sup>41</sup> Bradt, *supra* note 6, at 841.

of the judge in an MDL settlement—I discuss this controversy elsewhere.<sup>42</sup> But I do offer the following observation: One reason why the judicial role is so controversial is that it lays bare the tenuousness of MDL’s split personality. Once it becomes apparent that in practice MDL is more tight consolidation than temporary coordination of individual cases, its lack of protections for individual plaintiffs becomes difficult to ignore. And the split personality that drives MDL becomes equally difficult to ignore. As we commemorate the fiftieth anniversary of Rule 23, the fiftieth anniversary of MDL approaches. As it does, continued close examination of whether it is in need of refinement will be in order. For now, however, we rewind to the early 1960s.

## II. THE PARALLEL DEVELOPMENT OF MDL AND NEW RULE 23

### A. *Two Committees on Two Tracks: Events Leading up to November 1963*

The amendments to Rule 23 and the new MDL statute were developed simultaneously, but by two different committees with different agendas. The Civil Rules Advisory Committee had been reconstituted in 1960 and had a broad set of initiatives, only one of which was revising Rule 23.<sup>43</sup> As David Marcus has shown, any substantive aim of the drafters in amending Rule 23 was to facilitate civil rights actions seeking injunctive relief.<sup>44</sup> But the Reporters of the Committee also had a broader goal of updating the rule to better fit current practice and respond to modern problems.<sup>45</sup> They understood that judges had started to use the class action device to handle the problem of multiple cases litigating a single issue, so one reason to revisit the problem of the “spurious” class action was to keep up with these innovations,

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<sup>42</sup> Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. (forthcoming 2017).

<sup>43</sup> Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 356 (1967) (describing the “overhaul of the Rules which has been in progress since the Committee was constituted”); Wright, *supra* note 1, at 417 (describing the “sheer bulk of the new material” circulated in 1964 for comment).

<sup>44</sup> See Marcus, *supra* note 17, at 604-08 (noting that some members of the committee were inspired by Rule 23’s “use as an aid to desegregation lawsuits” and that they “designed Rule 23(b)(2) expressly for this cause”); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702-711 (2011) (explaining that [v]irtually every effort to shape [Rule 23(b)(2)]’s terms” was made to facilitate desegregation litigation); see also John P. Frank, *Response to the 1996 Circulation of Proposed Rule 23 on Class Actions*, in 2 WORKING PAPERS OF THE ADVISORY COMM. ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 262, 266 (1997) (noting the “single, undoubted goal” and “energizing force” of the committee to “create a class action system which could deal with civil rights”).

<sup>45</sup> Marcus, *supra* note 17, at 608 (describing the members’ desire for a “flexible rule” that would be conducive to the kind of development in the case law that they “sensed” would occur as class actions became more common).

which sought to more efficiently resolve related controversies in a single case. As the Reporters stated in a memo to their colleagues in March 1962:

We see the class action device as having a potentiality for healthy growth to cope with an ever increasing volume of litigations involving large groups of individuals. It must remain sufficiently flexible to meet new situations. We suggest that the time may have arrived for a restatement of the Rule to promote this flexibility.<sup>46</sup>

The memo proceeds to discuss the need to deploy the class action in tort cases involving a large number of parties, noting both the benefits and the central problem of litigation by a representative:

The class action is a device of convenience. It looks to disposition of related or rather repetitive problems in one lawsuit. The device is in the interest of members of the class, for it allows them to join together and combine their resources; it is often in the interest of the adversary of the class, for it saves him from the harassment of multiple litigation; and it is in the interest of the public, for it reduces the units of litigation. These considerations suggest a joinder of parties. The distinguishing problem in a class action arises from the fact that there are a number of potential parties, so large that it is impracticable to join them all. The solution is to permit some persons to stand in judgment for all who are similarly situated.

But it is a drastic thing to cut off the rights of persons who are not parties.<sup>47</sup>

Although the Reporters had “feeling[s] of solicitude about barring individual claimants who have not deliberately joined” in cases involving mass accidents,<sup>48</sup> and recognized that “there may be occasions when special considerations can properly move a court to deny full binding effect even when the stated criteria for a model or standard class action otherwise exist,”<sup>49</sup> they concluded that “that these are unusual situations. As a general rule, where the criteria are satisfied, fundamental safeguards are respected, and adequate representation is assured, the device of the class action should be used to full effect. Full, ‘two-way’ binding effect should be the norm.”<sup>50</sup> Ultimately, as of March 1962, the view of the Reporters was that:

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<sup>46</sup> Memorandum from the Reporters to the Civil Rules Advisory Comm. for the Mar. 28-30, 1962 Meeting at EE-2, *in* Records of the U.S. Judicial Conference, *microformed on* CIS No. CI-6309-44 (Cong. Info. Serv.).

<sup>47</sup> *Id.* at EE-20.

<sup>48</sup> *Id.* at EE-29.

<sup>49</sup> *Id.* at EE-63.

<sup>50</sup> *Id.*

The mere fact that the gravamen of the class action is the commission of a tort, or that individuals are claiming recoveries in different amounts, or that the rights asserted are somehow “several” (a point to which we return below), should not itself exclude full binding effect. In particular, we think that the class action with full binding effect has a part to play in solving the problems created by multiple torts.<sup>51</sup>

An example of such innovation that the Reporters cite approvingly is the Tenth Circuit’s decision in *Union Carbide & Carbon Corp. v. Nisley*, an antitrust case brought by miners alleging a conspiracy by companies in the vanadium-bearing ore industry.<sup>52</sup> The district judge in the case allowed plaintiffs to pursue a class action on behalf of all miners in the Colorado Plateau.<sup>53</sup> After a jury found that the inflation of the ore’s price was attributable to the conspiracy, the trial judge allowed the miners who had not yet appeared six months to file claims seeking damages.<sup>54</sup> The defendants objected on the ground that this allowed these claimants to “intervene after determination of defendants’ liability, to share in the fruits of a judgment obtained by their participating representatives.”<sup>55</sup> But the Tenth Circuit affirmed, explaining that any other result would be “grossly redundant.”<sup>56</sup> It added, “we envisage [Rule 23] as having a broader purpose—to allow a final determination of common questions of law and fact. Otherwise [the rule] is relegated to an out-of-context incongruity amongst the utilitarian procedural modes which, when brought together, elucidate the modern-day concepts of class actions.”<sup>57</sup> In their 1962 memo to the Advisory Committee, the Reporters considered going even further, suggesting “that if Rule 23 permitted, it might well have been desirable for the trial court—perhaps after suitable notice—to treat the action as fully binding on the class to the extent of the pervasive and dominating common questions.”<sup>58</sup>

The Tenth Circuit opinion in *Nisley* was written by Chief Judge Alfred Murrah. That Murrah would have come to such a conclusion is unsurprising: he was the Chairman of the Judicial Conference Committee on Pretrial Procedure and part of the committee created by Chief Justice Vinson in 1949 to study the

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<sup>51</sup> *Id.*

<sup>52</sup> 300 F.2d 561 (1962).

<sup>53</sup> *Id.* at 567.

<sup>54</sup> *Id.* at 587.

<sup>55</sup> *Id.* at 588.

<sup>56</sup> *Id.* at 589.

<sup>57</sup> *Id.*

<sup>58</sup> Memorandum from the Reporters to the Civil Rules Advisory Comm. for the Mar. 28-30, 1962 Meeting, *supra* note 46, at EE-63.

growing problem of protracted litigation in “big cases.”<sup>59</sup> These committees urged “rigid control” of complex cases by judges, including increased use of pretrial conferences to streamline litigation.<sup>60</sup> Murrah traveled around the country holding seminars for federal judges, at which he expounded on the virtues of what we would now call managerial judging.<sup>61</sup> Indeed, Chief Justice Warren singled Murrah out for praise in a 1958 address to the A.B.A. in which he decried the “interminable and unjustifiable delays in our courts.”<sup>62</sup>

When, in 1961, the biggest of big cases landed in the federal district courts, Murrah was the judge Warren naturally turned to for help. In 1960, nearly every American manufacturer of electrical equipment was indicted for participating in a massive price-fixing conspiracy.<sup>63</sup> The criminal cases were resolved relatively quickly but by fall 1962, the conspiracy had spawned an unprecedented number of civil antitrust cases brought throughout the federal courts by purchasers of the equipment, including nearly every public utility in the United States.<sup>64</sup> Plaintiffs filed over 1800 cases in thirty-five federal districts.<sup>65</sup> To meet this torrent of cases, Warren created the “Coordinating Committee on Multiple Litigation,” or CCML, to be chaired by Judge Murrah.<sup>66</sup> The CCML’s goal was to centralize the control of the litigation “in the hands of as few judges as possible, who should carefully supervise and

<sup>59</sup> See generally Breck P. McAllister, *The Judicial Conference Report on the “Big Case”: Procedural Problems of Protracted Litigation*, 38 A.B.A. J. 289 (1952) (exploring the challenges that the “big case” poses for the justice system).

<sup>60</sup> See generally *Procedure in Anti-Trust and Other Protracted Cases—A Report Adopted by the Judicial Conference of the United States*, 13 F.R.D. 66 (1951). Murrah was considered the “master of the theory and techniques of the pre-trial conference.” A. Sherman Christenson, *When is a Pretrial Conference a “Pretrial Conference”?*, 23 F.R.D. 129, 131 (D. Utah 1959).

<sup>61</sup> See, e.g., Alfred P. Murrah, *Seminar on Procedures Prior to Trial*, 20 F.R.D. 485, 491 (1957) (“A judge must be willing to assume his role as the governor of a lawsuit. He can’t be just an umpire.”). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013).

<sup>62</sup> See Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J. 1043, 1043, 1045 (1958) (“Judge Murrah has tried for ten years to demonstrate to our federal judges . . . that, when placed in the hands of an able and sympathetic trial judge, pretrial procedure is an important tool of judicial management.”). Murrah was indeed at the forefront of these activities. See Terrence Kern, *Judge Alfred P. Murrah—A Vision of Things*, 29 OKLA. CITY U. L. REV. 737, 775 (2004) (“Judge Murrah was at his strongest, and made his most lasting contribution, in the area of procedural reform with a view toward increasing judicial efficiency.”).

<sup>63</sup> See generally JOHN HERLING, *THE GREAT PRICE CONSPIRACY: THE STORY OF THE ANTITRUST VIOLATIONS IN THE ELECTRICAL INDUSTRY* 92-93 (1962).

<sup>64</sup> See generally CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS* (1973).

<sup>65</sup> Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 622 (1964) (“The avalanche of over 1,800 complex, protracted cases filed in thirty-five districts presented a serious challenge to the capacity of the federal courts.”).

<sup>66</sup> Kern, *supra* note 62, at 782 (“Murrah’s chairmanship was an obvious outgrowth of the work he had performed as chair of the judicial study group on protracted litigation”).

regulate all discovery procedures.”<sup>67</sup> The CCML established an office in Chicago and named as its Executive Secretary Professor (and, as of 1963, Dean) Phil Neal of the University of Chicago Law School.<sup>68</sup>

The CCML’s program to resolve the litigation expeditiously was remarkably successful. The cornerstones of that effort were nationwide depositions overseen by judges, national document depositories, and fast-tracking cases involving the major players, like General Electric and Westinghouse.<sup>69</sup> The Committee itself had no power to enter orders controlling dozens of federal judges hearing these cases, but the enormity of the circumstances prompted cooperation by judges around the country.<sup>70</sup> By the middle of 1963, with discovery in full swing, the judges began to oversee settlement talks between a “steering committee” of lawyers for the plaintiffs and counsel for the largest defendants, General Electric and Westinghouse.<sup>71</sup>

The members of the CCML, in particular Judge Murrah, Judge Edwin Robson of the Eastern District of Illinois, Judge William Becker of the Western District of Missouri,<sup>72</sup> and Dean Neal, had long believed that the problem presented by the electrical equipment scandal would not be a one-off, but was instead the tip of the iceberg.<sup>73</sup> And it was not long after the CCML was established that other district judges involved in similar cases began asking it for help.<sup>74</sup> Consequently, the Committee began in mid-1963 to develop ideas for “[a] new rule or new rules to permit *unified* judicially controlled discovery in situations of multiple litigation” and which would ensure “centralization of the power to make decisions.”<sup>75</sup> The initial approach

67 Report of the Subcommittee on Pretrial Procedure for Considering Discovery Problems Arising in Multiple Litigation with Common Witnesses and Exhibits to the Judicial Conference of the United States 5 (March 2, 1962) (on file in Becker Papers, Box 6, Folder 15).

68 See Neal & Goldberg, *supra* note 65, at 624-25.

69 See BANE, *supra* note 64, at 215-250 (describing the cases’ settlement processes).

70 *Id.*

71 *Id.*

72 Like Murrah, Becker was an enthusiastic supporter of case management and took the lead on developing the first version of what we now know as the Manual for Complex Litigation. See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 294 n.26 (2013) (“The motor force behind the drafting of the *Manual* was the leadership of William H. Becker . . .”).

73 See Bradt, *supra* note 6, at 865 (describing their belief that many less widely publicized groups of cases that involved common questions existed, and that a supervisory system should be developed for identifying them).

74 See Phil C. Neal, *Multi-District Coordination—The Antecedents of § 1407*, 14 ANTITRUST BULL. 99, 99 (1969) (noting that the CCML was created to alleviate the “sudden and extraordinary burdens on the federal courts” brought about by a surge of big price-fixing cases). By this time, the Committee had “taken under its wing” litigations involving the rock salt, concrete pipe, and children’s schoolbook industries. *Id.* at 104.

75 See Discovering Instances of Multiple Litigation—A Clue to the Need for Manually Operated Rules? 5-6 (June 7, 1963) (on file in Becker Papers, Box 17, Folder 39, Divider 1). Chief Justice Warren supported the efforts from the outset. See Earl Warren, *Address to the Annual Meeting*

was an amendment to the federal transfer statute allowing for wholesale transfer of related cases to a single district, but the drafters quickly focused instead on limited transfer for pretrial proceedings.<sup>76</sup> Two concerns prompted this shift to a more modest approach. First, the drafters worried that a “radical *forum non conveniens* statute” transferring all related cases to a single district would “present problems with due process overtones.”<sup>77</sup> Second, as Becker later put it, transfer for only pretrial proceedings “would allay massive resistance” by plaintiffs’ lawyers concerned about losing their cases.<sup>78</sup>

So it came to be that in mid-1963 both the Advisory Committee and the CCML were both developing provisions that sought (at least in part) to address the problem of multiple litigation of common questions in the federal courts. But the two committees were moving down separate tracks. Because the two committees shared a member, Roszel Thomsen, Chief Judge of the District of Maryland, they were aware of each other’s efforts, but they had not collaborated.<sup>79</sup>

B. *The Civil Rules Advisory Committee Meets,  
October 31–November 2, 1963*

As noted above, as early as 1962, the Reporters had suggested that “the class action with full binding effect has a part to play in the problems created by multiple torts.”<sup>80</sup> Indeed, in a footnote in the memo I describe in detail above, the Reporters suggested that binding class actions “might prove helpful in handling at least some of the aspects of the massive litigation rising from antitrust claims against manufacturers of electrical equipment.”<sup>81</sup> But the possibility that Rule 23(b)(3) might be used in so-called “mass accident” cases famously attracted the ire of Committee member John Frank, who proclaimed himself “unpersuadably opposed to the use of the class action in the mass tort

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*of the American Law Institute*, May 22, 1963 (“From the experience derived in processing this litigation the subcommittee will endeavor to develop general principles applicable to the handling of discovery problems in all multiple litigation.”).

<sup>76</sup> *Discovering Instances of Multiple Litigation*, *supra* note 75, at 5-6.

<sup>77</sup> *Id.* at 6. *See also* Notes on Meeting of November 14, 1964, Washington, DC (on file in Becker Papers, Box 17, Folder 39) (referring to the original ideas as a “radical *forum non conveniens* statute”).

<sup>78</sup> *See* Letter from Judge William H. Becker to Judge Albert Maris (June 15, 1964) (on file in Becker Papers, Box 16, Folder 14).

<sup>79</sup> At Thomsen’s suggestion, Sacks sent the Coordinating Committee the draft of proposed amended Rule 23, but nothing else came of the communication at that point. *See* Letter from Benjamin Kaplan to Dean Acheson (May 24, 1963) (on file in Becker Papers, Box 7, Folder 18); Letter from Benjamin Kaplan, Reporter, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., to Phil C. Neal, Dean, Univ. of Chi. Law Sch. (May 28, 1963) (“Al Sacks tells me that you expressed interest in our draft rule on class actions. I enclose a copy of the latest version of text and note.”).

<sup>80</sup> Memorandum from the Reporters to the Civil Rules Advisory Comm. for the Mar. 28-30, 1962 Meeting, *supra* note 46, at EE-53.

<sup>81</sup> *Id.* at EE-63.

situation,” because of the “loss of individual liberty” for claimants and his fears that the class action would be a tool for defendants to engineer binding judgments with the help of corrupt plaintiffs willing to take a dive.<sup>82</sup>

The Frank-Kaplan dispute came to a head at the now-well-known Advisory Committee meeting held from October 31 to November 2, 1963, a transcript of which can be found in the Records of the Judicial Conference.<sup>83</sup> At the meeting, Frank again argued that section (b)(3) should be eliminated altogether.<sup>84</sup> Kaplan, in turn, made clear his view that, although in most cases mass accidents would be inappropriate for class treatment, some provision must be made for this “growing point of the law.”<sup>85</sup> Amidst this impasse came a suggestion from Judge Thomsen. Knowing that the CCML had begun to turn toward the development of a proposed transfer statute, Thomsen suggested that the two committees liaise to consider “an alternative to a class suit to accomplish the greater part of the advantages of the class suit.”<sup>86</sup> Frank enthusiastically endorsed this suggestion, noting his admiration for the CCML’s innovations in the electrical cases.<sup>87</sup> In particular, he praised the “judicial leadership to pull them together, but not in a fashion which can force a person into in effect losing his chance for his rights.”<sup>88</sup> He added:

The devices are working out so well in the electrical cases and showing that we can keep the cases separate and in separate hands and that still by stern leadership it can work out without overruling anybody’s rights and without any risk of fraud at all. I am terribly pleased about it. We’re being controlled, but we’re not being overridden, and it’s coming out quite sensibly I think.<sup>89</sup>

After further discussion and debate, two key developments emerged from this meeting. First, it was agreed that the Reporters would attend the

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<sup>82</sup> Letter from John Frank to Benjamin Kaplan 2-3 (Jan. 21, 1963), in Records of the U.S. Judicial Conference, *microformed on* CIS No. CI-6311 (Cong. Info. Serv.); *see also* Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS. 5, 10 (1991) (quoting the same letter from Frank to Kaplan).

<sup>83</sup> *See* Transcript of Meeting of the Federal Rules Advisory Comm. (Oct. 31-Nov. 2, 1963), in Records of the U.S. Judicial Conference, *microformed on* CIS No. CI-7104 (Cong. Info. Serv.) [Hereinafter, Fall 1963 Advisory Comm. Meeting].

<sup>84</sup> *Id.* at 9 (citing the “interference with individual liberty and the possibility of fraud”).

<sup>85</sup> *Id.* at 11.

<sup>86</sup> *Id.* at 22.

<sup>87</sup> *Id.* at 14.

<sup>88</sup> *Id.*; *see also id.* at 36 (Frank, suggesting that (b)(3) be “tabled pending counsel from Judge Thomsen’s [committee] on the matters which he can so easily take up with the related Committee in the future, because these are completely integrated problems”). Sacks was also in favor of coordination with the CCML, noting that “if Judge Thomsen’s subcommittee comes up with an available alternative that works very well [sic]. That alternative will lead judges to say no to the class action just as this rule now permits.” *Id.* at 31.

<sup>89</sup> *Id.* at 15. *See also* Frank, *supra* note 44, at 273 (recalling that “the committee thought MDL preferable to class actions for mass accidents”).

CCML's upcoming meeting in New York two weeks later.<sup>90</sup> Second, Frank's concerns about (b)(3) were alleviated, at least temporarily, by the adoption of a proposal from Judge Charles Wyzanski to include in (b)(3) a provision allowing class members to opt out.<sup>91</sup> Support for Wyzanski's proposal was broad and immediate, and it assuaged Frank's concerns.<sup>92</sup> During the debate however, Judge Thomsen interjected to clarify the difference between the proposed class action opt-out right and what the CCML had in mind for its proposed consolidation mechanism, warning that "Judge Murrah's anxious to nail him and not let him run his case."<sup>93</sup>

C. *The Reporters Meet With the CCML, November 17-18, 1963*

As directed by the Committee, Kaplan and Sacks subsequently made plans to attend the CCML's upcoming meeting, to be held in New York on November 17-18, 1963.<sup>94</sup> By this time, discovery in the electrical-equipment cases was moving full-steam ahead, and settlement talks between the plaintiffs' steering committee and General Electric had begun. Additionally, a subgroup of the CCML, composed of Neal, Becker, and the Committee's law clerk, Perry Goldberg, had begun to turn its attention to developing the statute providing for pretrial transfer. In a letter to Neal, Kaplan wrote:

With respect to the class suit problem it seems to me that our interests intersect at perhaps two points. Recent experience may have indicated that the class action device for handling 'multiple litigation' should be limited or expanded in some particular way that is not already reflected in our proposed Rule 23. Second, at a certain point in our draft we refer to the judge's considering what procedures are available as alternatives to a class action. The point will be elaborated in the note to accompany the rule. We could draw on your experience in describing the alternative procedures.<sup>95</sup>

Kaplan and Sacks then met with the small subgroup developing the proposed statute (plus Judges Murrah and Thomsen) and, the following day,

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<sup>90</sup> See Fall 1963 Advisory Comm. Meeting, *supra* note 83 at 37.

<sup>91</sup> *Id.* at 51 (proposing that "the class could never include anybody who specifically protests within a given period"); see Burbank, *supra* note 13, at 1488 (stating that the opt-out provision was "added very late in the drafting process").

<sup>92</sup> See Fall 1963 Advisory Comm. Meeting, *supra* note 83; see also Frank, *supra* note 44, at 269 (describing Wyzanski's proposal as a "flash of genius"); Marcus, *supra* note 44, at 708 (describing Frank's reaction to Wyzanski's proposal).

<sup>93</sup> Fall 1963 Advisory Comm. Meeting, *supra* note 83 at 52.

<sup>94</sup> Letter from Benjamin Kaplan, Reporter, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., to Phil C. Neal, Dean, Univ. of Chi. Law Sch. (Nov. 6, 1963) (on file in Papers of Phil C. Neal, Dean, University of Chicago Law School, Chicago, at the University of Chicago Library, Special Collections Research Center).

<sup>95</sup> *Id.*

all of the judges handling the electrical-equipment cases. Several themes emerge from the notes and memoranda memorializing these meetings authored by Neal, Becker, and Kaplan and Sacks.

First, the group did not believe that the class action could or should be the primary solution to the problem of multiple litigation. The MDL statute was necessary to centralize multiple pending lawsuits in a single district over the objection of recalcitrant parties and judges. As Becker put it, the proposed Rule 23 was plainly insufficient because the “[b]ig probelm [sic]” was “one of management” of multiple cases, and there needed to be a centralization of power to identify them and “say where the cases should go.”<sup>96</sup> Neal agreed in a bulletin sent to all judges hearing the scattered electrical-equipment cases summarizing the meeting, “The consensus was that the proposed rule change would be most beneficial for resolving certain existing ambiguities of class actions, but that a general solution of the problems posed by multiple litigation will require more comprehensive treatment.”<sup>97</sup>

Second, the class action device should be available to supplement MDL when needed to achieve efficiencies, including in some mass accident cases. Because, as Kaplan and Sacks describe it, multiple litigation “will henceforth be a staple item appearing with increasing frequency[,] . . . the problems will have to be approached in a variety of ways,” and “a good deal of play in the joints is imperatively required.”<sup>98</sup> They concluded that “[t]he class-action provided in Rule 23 is one of the devices needed to handle multiple litigation. Present Rule 23 should be improved, and . . . the changes made should not be such as to inhibit growth through case-by-case experimentation.”<sup>99</sup> Indeed, the CCML believed that the forthcoming “litigation explosion”<sup>100</sup> would be largely composed of so-called mass accident cases and a variety of approaches would be necessary to resolve them efficiently.

Third, the CCML impressed upon Kaplan and Sacks its view that there should not be an absolute right to opt out of either a class action or MDL

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<sup>96</sup> Minutes of Meeting of Co-Ordinating Comm. 2 (Nov. 17, 1963, 3:00 PM), Statement of Judge Becker, Judge, W.D. Mo.) (on file in Becker Papers, Box 10, Folder 23) (emphasis omitted). The notes also show that the Committee’s work went beyond antitrust to include “Disaster” and “Products Liability” cases as well. *Id.* at 1.

<sup>97</sup> Bulletin No. 20 from Co-Ordinating Committee for Multiple Litigation to the Judges Before Whom Electrical Equipment Anti-trust Cases Are Pending (Nov. 27, 1963) (on file in Becker Papers, Box 8, Folder 19).

<sup>98</sup> Memorandum to the Chairman and Members of the Advisory Comm. on Civil Rules 4 (Dec. 2, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7104 (Cong. Info. Serv.) [hereinafter Reporters’ December 2, 1963 Memo]. The Reporters added, “In the present incubating stage of the development of methods to deal with multiple litigation, it would be unwise to introduce stiff rules excluding judicial discretion.” *Id.*

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

<sup>100</sup> *Judicial Administration Hearings*, *supra* note 7.

consolidation. This view accords with the general position of the CCML, whose judges believed that a mandatory MDL statute would be necessary because the voluntary cooperation and good will of the parties that facilitated the resolution of the electrical-equipment cases was not likely to recur.<sup>101</sup> As Kaplan and Sacks summarized: “The judges with whom we discussed opting out were clear that it should not be allowed simply on the say-so of the individual member of the class. The interest of the individual in litigating as he pleased may be strong, but it should not be considered absolute.”<sup>102</sup>

Following the meeting with the CCML, in a December 2, 1963 memorandum to the Advisory Committee, Kaplan and Sacks proposed three changes to Rule 23. The first was to add the well-known language to the Advisory Committee note stating that a mass accident “is ordinarily not appropriate for a class action.”<sup>103</sup> The second was, in recognition of the CCML’s nascent efforts to codify an MDL provision, to add to Rule 23(b)(3) language requiring that a class action be “superior to other available methods for the fair and efficient adjudication of the controversy.”<sup>104</sup> And the third was to water down the opt-out right inserted at the October meeting. Having “given this proposal a second look,” the Reporters found the absolute right to opt out “to be too rigid.”<sup>105</sup> A member of a defendant class would opt out to “stave off an adverse judgment,” while an absolute opt-out right for plaintiffs “could be extremely burdensome not merely to the defendant opposing the class, but to the judicial system itself, and yet the interest of the individual in maintaining a separate action could in fact be trivial.”<sup>106</sup> As a result, Kaplan and Sacks proposed new limits. First, those who had already begun litigation could presumptively opt out of a class unless the judge considered their inclusion “essential.”<sup>107</sup>

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<sup>101</sup> Co-Ordinating Comm. on Multiple Litig., Minutes of Meeting of Co-Ordinating Committee Held on Monday, November 18, 1963, at 9:30 A.M. (Nov. 18, 1963) (on file in Becker Papers, Box 17, Folder 39). Indeed, Coordinating Committee member Judge George Boldt, of the Western District of Washington, contended that “[c]ooperation in [the] future cannot be expected” and that coordination “[c]an’t be left to voluntary good will.” *Id.*

<sup>102</sup> Reporters’ December 2, 1963 Memo, *supra* note 98, at 6. As Kaplan and Sacks report, the Coordinating Committee’s position on this was unconsidered. *Id.* at 4 (“The judges were quite aware of the problem that has given us concern, namely, that of allowing the individual litigants a fair amount of freedom while at the same time not undercutting the values (which in part accrue to the individuals) of efficient unitary adjudication.”).

<sup>103</sup> *Id.* at 5. Before this point, the note had read: “A ‘mass accident’ resulting in injuries to numerous persons is on its face not appealing for a class action . . .” *Id.* The Reporters added, “[i]n response to our question whether mass accident cases should be absolutely excluded, the judges of the Coordinating Committee seemed clear that they should not be.” *Id.*

<sup>104</sup> *Id.* Prior to this memo, (b)(3) required that the court be “satisfied that a class action will facilitate the fair and efficient adjudication of the controversy.” *Id.*

<sup>105</sup> *Id.* at 6. *See also id.* at 7 (“The proposed draft seems to us a reasonable and desirable modification of the thought worked out at the Committee meeting.”).

<sup>106</sup> *Id.* at 6.

<sup>107</sup> *Id.*

Second, those who had not begun litigation should have their “protest considered by the court and decided without the aid of a presumption.”<sup>108</sup>

The specific change in language to the Advisory Committee note and the addition of the superiority requirement were not controversial, but the change to the opt-out requirement was.<sup>109</sup> Frank renewed his objection to (b)(3) in its entirety, on the ground that the compromise that he had “cheerfully accepted . . . as a fairly satisfactory adjustment of differences” had been altered “very substantially.”<sup>110</sup> On the recommendation of Judge Wyzanski, the Reporters’ proposal was changed to allow all class members a presumptive, though not absolute, right to opt out. In Wyzanski’s view, “the bar would be more easily persuaded” of this position.<sup>111</sup>

Frank was not so persuaded. He again sought the elimination of (b)(3).<sup>112</sup> The Reporters struck back forcefully. Citing the addition of the superiority requirement, they contended that “the stated criteria of subdivision (b)(3) have now been so improved and tightened that only a very exceptional mass accident case could qualify thereunder.”<sup>113</sup> The Reporters also defended their limitation of the opt-out right, citing input from the CCML as support for their conclusion that an individual class member’s interest in exclusion may be “overwhelmed by the practical desirability of resolving the whole controversy in a single suit.”<sup>114</sup> So emphatic was the Reporters’ view that they

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<sup>108</sup> *Id.*

<sup>109</sup> Perhaps overshadowed by the Reporters’ proposed amendment to the opt-out provision, the superiority requirement received no attention from the committee. In follow-up correspondence, Acheson refers to the opt-out issue as the “only important point” raised by the Reporters’ December memo. Letter from Dean Acheson, Chairman, Civil Rules Advisory Comm., to the Members of the Civil Rules Advisory Comm. (Jan. 31, 1964), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003-05 (Cong. Info. Serv.); *see also* Memorandum by the Reporters of the Civil Rules Advisory Comm. 1 (Jan. 31, 1964), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003-08 (Cong. Info. Serv.) (referring to the December memo as raising “but one question of material consequence”).

<sup>110</sup> Letter from John Frank, Member, Civil Rules Advisory Comm., to the Reporters to the Civil Rules Advisory Comm. (Dec. 9, 1963) 1, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003-15 (Cong. Info. Serv.).

<sup>111</sup> Letter from Charles Wyzanski, Judge, D. Mass., to Benjamin Kaplan, Reporter, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. (Dec. 4, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003 (Cong. Info. Serv.). Judge Thomsen concurred with Wyzanski’s proposal because he “recognize[d] the difficulty of selling this to the Bar.” Memorandum by the Reporters of the Civil Rules Advisory Comm. 4 (Jan. 31, 1964), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003-08 (Cong. Info. Serv.).

<sup>112</sup> Letter from John Frank, Member, Civil Rules Advisory Comm., to Reporters of the Civil Rules Advisory Comm. 3 (Jan. 16, 1964), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003-21 (Cong. Info. Serv.) (stating that it was “flat wrong to use class actions ever in mass tort situations or in any typical trade regulation case”).

<sup>113</sup> Memorandum by the Reporters of the Civil Rules Advisory Comm., *supra* note 111, at 3.

<sup>114</sup> *Id.*

proclaimed that an absolute right to opt out would “destroy the viability of subdivision (b)(3),” which was “of great practical importance and has been elaborately developed over the years.”<sup>115</sup>

The committee voted to circulate the rule for comment in 1964 without only a presumptive right to opt out.<sup>116</sup> Eventually, purportedly in light of negative public criticism and pushback from several committee members, the rule was changed at the 1965 Advisory Committee meeting to provide the absolute right to opt out we are familiar with today.<sup>117</sup> The give and take leading to that ultimate change is a complicated story for another day. For our purposes, it is enough to note that there was eventually enough resistance to the qualified opt-out right that it had to be changed to achieve final Advisory Committee sign-off on Rule 23(b)(3). No similar dissenting voices existed within the CCML; that committee was fully committed to preventing defection from the unitary, consolidated proceeding. The opposition was from without.

### III. THE CCML'S REJECTION OF A PREDOMINANCE REQUIREMENT

After the November 1963 meeting with the Reporters, the CCML pursued two parallel goals: the resolution of the electrical-equipment cases and the development of an MDL statute. Both progressed rapidly. The settlement discussions between the plaintiffs and General Electric that had begun in 1963 bore fruit by the end of 1964, with GE eventually settling all claims against it for approximately \$300 million.<sup>118</sup> Settlements in the rest of the cases followed soon thereafter.<sup>119</sup>

Meanwhile, the drafting subcommittee consisting of Becker, Neal, and Goldberg continued its work on an MDL statute. In June 1964, Becker presented the outlines of a pretrial-transfer statute to his CCML colleagues. In explaining why the subcommittee had opted against a complete-transfer

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<sup>115</sup> *Id.* at 4. The Reporters responded to Frank's concern about “rigged lawsuits” to achieve binding judgments against plaintiff classes, saying “[i]t is not possible to provide perfect assurance that the proposed rule will prevent fraud in (b)(3) cases . . . but the safeguards that will appear in the rule will be a great improvement over anything we have had before.” *Id.* at 7.

<sup>116</sup> Letter from Dean Acheson, Chairman, Civil Rules Advisory Comm., to the Civil Rules Advisory Comm. (Jan. 31, 1964), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003-22 (Cong. Info. Serv.) (reporting a 10-2 vote to publish the rule allowing opt-out “unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons for the finding”) (emphasis original; internal quotation marks omitted).

<sup>117</sup> John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 345 (2005).

<sup>118</sup> BANE, *supra* note 64, at 250.

<sup>119</sup> See Earl Warren, *Address to the Annual Meeting of the American Law Institute* (May 19, 1967) quoted in MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION 6 (1969) (noting that, as of May, 1967, “every single one of these cases has been terminated”); see also Resnik, *supra* note 82, at 32 (“Much legal commentary describes the work of the Committee as successful.”).

provision, Becker noted that pretrial transfer was “the maximum practical objective that is attainable.”<sup>120</sup> Anything more aggressive would likely spark “great opposition . . . from local lawyers fearful that all their business is about to be seized by the city attorneys.”<sup>121</sup> Although the transfer was limited, Becker made clear that the proposal anticipated “plenary” control by the transferee judge, including the power to grant dispositive motions and summary judgment.<sup>122</sup> The group unanimously supported the proposal, and the subcommittee continued to refine the draft throughout 1964.

Although the Committee was receiving plaudits for its success, not everyone was pleased with its efforts. More specifically, the defendants in the electrical-equipment cases believed that the rapidity with which the consolidated litigation was progressing was railroading them into settlement.<sup>123</sup> Moreover, defense counsel recognized that their biggest advantage in piecemeal, large-scale litigation was their greater resources, and in consolidated litigation plaintiffs could pool their resources and coordinate their activities to eliminate that advantage.<sup>124</sup> Defense counsel complained bitterly about the pace of the electrical-equipment cases, and when the CCML announced that it would pursue a permanent MDL statute, the defense bar fought it tooth and nail. In their private correspondence, the judges of the CCML expressed their frustration at what they perceived as obstructionism by the defendants, who were “trying to do all they [could] to block [the] amendment.”<sup>125</sup>

Plaintiffs, for their part, enthusiastically supported the proposed statute. Perhaps recognizing the benefits of potential consolidated large-scale litigation, lawyers for the plaintiffs in the electrical-equipment cases were among the

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<sup>120</sup> Proposal for Legislation and Rules for Multiple Litigation (June 3, 1964) (on file in Becker Papers, Box 1, Folder 1).

<sup>121</sup> Notes of Co-Ordinating Committee Meeting 6, July 28, 1964 (July 28, 1964) (on file in Becker Papers, Box 8, Folder 19).

<sup>122</sup> *Id.*

<sup>123</sup> See, e.g., William M. Sayre, *Developments in Multiple Treble Damage Act Litigation*, in 1966 CCH NEW YORK STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 51-52 (“The defendants litigated, but it was all uphill. The courts had little sympathy for their plight, and it must have been obvious to the courts that their burden would be relieved if enough pressure were put upon the defendants to force them to settle. And pressure there was.”); Miles G. Seeley, *Procedures for Coordinated Multi-District Litigation: A Nineteenth Century Mind Views with Alarm*, 14 ANTITRUST BULL. 91, 93 (1969) (describing defense counsel’s views that they “feel that they and their clients were caught up in a torrent of judicial efficiency over whose tumult they scarcely could make their voices heard”).

<sup>124</sup> John Logan O'Donnell, *Pretrial Discovery in Multiple Litigation from the Defendants' Standpoint*, 32 ANTITRUST L.J. 133, 138-39 (1966) (describing how “[i]n multiple litigation, . . . the differential is eliminated in large part” because “[p]laintiffs pool their resources and generally designate their most experienced lawyers” to conduct discovery).

<sup>125</sup> Letter from Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill., to William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo. (Oct. 21, 1964) (on file in Becker Papers, Box 16, Folder 4).

statute's biggest boosters.<sup>126</sup> Apparently satisfied with the statute's limited-transfer provision, the strongest objection this group raised was its concern that the MDL not affect the choice of law in transferred diversity cases. The judges assuaged that concern by asserting that transfer would not affect the governing law under the Supreme Court's recent decision in *Van Dusen v. Barrack*.<sup>127</sup>

After developing the draft of the MDL statute to essentially what we know well today, Judges Becker and Murrah took the lead on making the proposal law. They eventually obtained the support of the Judicial Conference and the Department of Justice and began a lobbying effort in the House and Senate. There they would have to overcome the organized opposition of the defense bar, which had generated a resolution against the bill by the American Bar Association on the grounds that it was unnecessary and vague.<sup>128</sup>

By this time, two law firms had also emerged as additional major opponents of the bill. Both firms represented defendants in the electrical-equipment cases: Cravath, Swaine & Moore; which represented Westinghouse; and Dechert, Price & Rhoades; which represented I-T-E Circuit Breaker. Both firms had long expressed displeasure with the CCML's efforts. For instance, Cravath aired its discontent with the judges by going over their head to Warren Olney, then the Director of the Administrative Office, complaining that the "compression of defendants' discovery and the resulting diminution of their opportunity to prepare for trial has reached a point in our view where due process is endangered and fair trials seem unlikely."<sup>129</sup>

Dechert was also one of the loudest critics of coordinating the electrical equipment litigation. The firm represented defendant I-T-E Circuit Breaker Company, which was named in over 300 cases. The Committee had placed the cases against I-T-E on the "back burner," to be resolved after the mountain of cases against General Electric and Westinghouse. Once those cases settled in 1964, settlements of the cases against the smaller defendants proceeded in droves. But I-T-E held out and refused to settle any of its cases.

The strategy for dealing with the remaining "back burner" cases was to transfer all cases pending nationwide which dealt with a single product to a single district judge for trial under the general transfer statute. For instance, all cases involving hydroelectric generators would be sent to the Eastern

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<sup>126</sup> Bradt, *supra* note 6, at 892-93.

<sup>127</sup> 376 U.S. 612, 638 (1964); *see also* Bradt, *supra* note 6, at 878-79.

<sup>128</sup> *See* Bradt, *supra* note 6, at 888-89.

<sup>129</sup> Letter from Albert R. Connelly, Partner, Cravath, Swaine & Moore, to Warren Olney III, Director, Administrative Office of the U.S. Courts, Jan 22, 1964 (on file in Becker Papers, Box 7, Folder 18) at 1 ("Since the Committee of Judges is dealing with these questions not as a court but presumably as an instrumentality of the Judicial Conference of the United States, it has been suggested that it would be appropriate to keep your office informed of defendants' efforts to obtain relief from the present schedules.").

District of Washington.<sup>130</sup> By the end of 1965, I-T-E had the largest number of still-pending cases of any defendant, some 365 in sixteen different districts.<sup>131</sup> At that point, the CCML decided that all cases involving circuit breakers—including all those pending against I-T-E—should be transferred to the Northern District of Illinois.<sup>132</sup> I-T-E objected vociferously, but district judges persisted in transferring all of the cases to Chicago.<sup>133</sup>

Among those judges was Judge Becker, who had initiated the transfer on his own motion because “only by doing so is there a hope of processing this unprecedented mass of litigation.”<sup>134</sup> I-T-E unsuccessfully sought mandamus in the Eighth Circuit, which lauded the CCML’s “progressive approach” to resolving the litigation through encouraging transfers to a single court.<sup>135</sup> The Eighth Circuit also made clear its opinion of I-T-E’s resistance:

Petitioner admitted before the district court, as it had before the co-ordinating committee, and as it does here, that it has not formulated any program, and indeed that it is without even a suggestion of any plan, for effecting termination of the litigation thus pending against it, either by way of desire to engage in trials, of intention to attempt settlements, or of basis to seek dismissals. What it seemingly wants done is simply to have all of the suits against it left alone . . . . Needless to say, petitioner will be afforded the opportunity for a fair trial. It cannot ask, however, to continue to have its cases stand still.<sup>136</sup>

Ultimately, all of the remaining cases against I-T-E were transferred to Chicago; they all settled on the first day of the first trial in what was deemed “a true courthouse steps settlement.”<sup>137</sup> Indeed, by the end of 1965, the entire electrical-equipment litigation was moving toward a conclusion.<sup>138</sup>

In the meantime, the MDL statute had stalled in the House, apparently due to the ABA’s opposition.<sup>139</sup> But there had been progress in the Senate, due in large measure to the efforts of Sen. Joseph Tydings of Maryland, who, as Chairman of the Judiciary Committee’s Subcommittee on Improvements in

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<sup>130</sup> See *Atl. City Elec. Co. v. I-T-E Circuit Breaker Co.*, 247 F. Supp. 950, 950 (S.D.N.Y. 1965).

<sup>131</sup> *Id.* at 953.

<sup>132</sup> *Id.* at 952 (discussing two motions, one seeking “an order to transfer cases in the circuit breaker and power switchgear assembly product lines to the Northern District of Illinois”).

<sup>133</sup> See, e.g., *id.* at 954 (finding the proposed transfers convenient for the parties and witnesses, and “in the interest of justice”); *I-T-E Circuit Breaker Co. v. Regan*, 348 F.2d 403 (8th Cir. 1965) (upholding the District Court’s transfer of cases to the Northern District of Illinois).

<sup>134</sup> *Kan. City Power & Light Co. v. I-T-E Circuit Breaker Co.*, 240 F. Supp. 121, 123 (W.D. Mo. 1965).

<sup>135</sup> *I-T-E Circuit Breaker Co. v. Becker*, 343 F.2d 361, 362 (8th Cir. 1965) (per curiam).

<sup>136</sup> *Id.* at 362-64.

<sup>137</sup> BANE, *supra* note 64, at 378.

<sup>138</sup> See BANE, *supra* note 64, at 339 (noting that by October 1965 “practically all claims of plaintiffs against practically all defendants had been either tried or settled or were on their way to settlement”).

<sup>139</sup> See Bradt, *supra* note 6, at 891.

Judicial Machinery, was spearheading a series of administrative reforms, such as the Federal Magistrates Act and the creation of the Federal Judicial Center.<sup>140</sup> It also helped that Tydings's mentor since his law school days was Judge Roszel Thomsen—an important player from the prior chapter of this story.<sup>141</sup>

Tydings held two hearings on the bill. Phillip Price, of Dechert, was the most visible and vociferous opponent of the MDL statute at the Senate hearings.<sup>142</sup> He railed against the statute, expressing his view that the judges had shown a “complete lack of regard for the interests of the parties and of the witnesses and counsel, and of the litigants.”<sup>143</sup> Furthermore, Price viewed the electrical-equipment judges as a cabal that would transfer cases on the basis of “telephone conversations among other judges, conversations in private in his own chambers with other counsel, conversations at a cocktail party, or in the corridor.”<sup>144</sup>

At the hearing, after rebuking Price for obstructionism,<sup>145</sup> Tydings solicited constructive comments on the statute from the bar. The two that apparently caught his attention were memoranda from Cravath and Dechert, and Tydings sought Becker's reactions to both. The two memoranda offer an array of suggestions that limited the scope of the statute, but here I focus on one they share: adding a predominance requirement to the statute. Although Price sought a requirement that common questions of fact and law predominate, while Cravath sought predominance only of questions of fact, both had taken the position that the need for MDL treatment would be rare, and they sought to ensure that rarity by making transfer more difficult.<sup>146</sup>

In a private memo to Tydings, Becker explained why he believed a predominance requirement would be “undesirable and crippling.”<sup>147</sup> With fifty years' worth of hindsight, Becker's memo is striking. First, he disputed the notion that MDL would be rare:

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<sup>140</sup> See, e.g., Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 567 (1974) (noting Tydings's interest in judicial administration).

<sup>141</sup> *Multidistrict Litigation: Hearings Before the Subcomm. on Improvements of Judicial Mach. of the S. Comm. on the Judiciary*, 89th Cong. 3 (1966) [hereinafter Senate Hearings]. Tydings refers to Thomsen as his “former mentor . . . who taught me most of the law I know, not only when I was a U.S. attorney but even earlier when I was in law school at the University of Maryland.” *Id.* at 3-4.

<sup>142</sup> The other opponent was William Simon, of Howrey & Simon, who offered a somewhat more tepid defense of the ABA's resolution opposing the statute. See Bradt, *supra* note 6, at 895.

<sup>143</sup> *Id.* at 112.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 115.

<sup>146</sup> *Id.* at 134, 139.

<sup>147</sup> Memorandum from William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo., to the Subcomm. on Improvements in Judicial Mach., Comm. on the Judiciary, U.S. Senate, Comments on Supplemental Statements of Mr. Phillip Price on Senate Bill 159 2 (March 18, 1967) [hereinafter Price Response].

All I can say on this is that prophesy is a risky business. I can imagine future developments which will make the electrical equipment cases seem to be a relatively simple mass of litigation. Suppose that soon a litigable question arises concerning the injurious side effects of birth control pills on women generally . . . . Suppose that liability for personal injury from air pollution becomes the subject of multi-district litigation . . . . Suppose an automobile manufacturer sells millions of a model of an automobile with an obviously unsafe feature in violation of federal law, and massive litigation results.<sup>148</sup>

Becker's prescience on the subject matter of future litigation is remarkable, but so is his understanding of how a predominance requirement might hinder effective aggregation. For one thing, Becker saw how a predominance requirement for common questions of law could prevent aggregation of claims based on state law, particularly in light of the understanding that transfer into an MDL would not affect that law. To Becker, "the words 'of law' should not be used at all because of obvious reasons."<sup>149</sup> As he explained:

Suppose the United States Courts are flooded with hundreds of thousands of diversity damage actions arising in 50 states as might result if a drug (such as a birth control pill) was alleged to have side effects injurious to women generally. The principal issue of fact would be the issue of alleged injurious effects of the drug. Nevertheless the law applicable to the facts could be different in some respect in each state. The suggested amendment would exclude use of the efficient and economical procedures of the bill.<sup>150</sup>

Moreover, Becker understood how a predominance requirement for common questions of fact could equally hamstring the consolidation. He warned that such a requirement would make "unclear and unworkable a simple, clear, workable bill. What does 'predominate' mean? Over what type of question must the common questions of fact predominate? . . . These irrelevant and vague conditions will multiply and complicate multiple litigation rather than reduce and simplify it."<sup>151</sup>

Becker also added his views about the authors of the proposed predominance requirement. Of Price, he concluded, "[i]t is difficult for me to believe that the author here has a genuine concern in view of past attitudes in the electrical

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<sup>148</sup> Memorandum from William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo., to the Subcomm. on Improvements in Judicial Mach., Comm. on the Judiciary, U.S. Senate, Comments on Memorandum for the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate, by Cravath, Swaine and Moore, Dated February 10, 1967, at 1 (Mar. 18, 1967) [hereinafter Cravath Response].

<sup>149</sup> Price Response, *supra* note 147, at 3.

<sup>150</sup> *Id.*

<sup>151</sup> Cravath Response, *supra* note 148, at 6.

equipment cases . . . . The proposed amendments . . . are calculated to cripple the bill.”<sup>152</sup> Becker was somewhat more diplomatic with respect to Cravath, noting:

I recognize the reputation and standing of the firm submitting the memorandum. In no sense is the good faith of the firm questioned. Advocates necessarily must in appraising a judicial reform take into account the interests of their clients and of their own practice.

Judges necessarily must consider only the interests of the administration of justice.<sup>153</sup>

Tydings apparently agreed and did not include a predominance requirement among the small package of revisions the Judiciary Committee made to the statute. And Becker was right not to compromise, for it was not long after that the ABA had a curious change of heart and dropped its opposition to the statute, a story I chronicle elsewhere.<sup>154</sup> The MDL bill soon passed both in both houses without a dissenting vote—or a predominance hurdle.

#### IV. OBSERVATIONS WITH THE BENEFIT OF FIFTY YEARS' HINDSIGHT

Several themes emerge from close attention to these two episodes in the history of American aggregate litigation. One is further understanding of something the rulemakers told us in 1966: Rule 23 was not intended to be the primary aggregator of mass torts; MDL was. After collaborating with the CCML, and understanding that a more comprehensive solution to multiple litigation was in the offing, the Reporters to the Advisory Committee more firmly established that hierarchy. Fifty years later, with some fits and starts along the way, the relative positions of the two devices are essentially as the drafters of both of them intended. Although the two provisions were never meant to be an either/or proposition, the preeminence of MDL in mass tort cases of nationwide import is now well established.<sup>155</sup>

Perhaps more interesting, however, is the contrast in the two provisions arising from the different processes in which they were drafted. The restrictions on the applicability of the 23(b)(3) class actions came out of a vigorous debate within the Advisory Committee, in which concerns for the interests of absent plaintiffs were front and center.<sup>156</sup> It was those concerns that prompted the

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<sup>152</sup> Price Response, *supra* note 147, at 5.

<sup>153</sup> Cravath Response, *supra* note 148, at 10.

<sup>154</sup> Bradt, *supra* note 6, at 902-07.

<sup>155</sup> COFFEE, *supra* note 2, at 116 (“[G]roup litigation that is the functional equivalent to the class action has come to supplant the class action in the mass tort field.”).

<sup>156</sup> Resnik, *supra* note 82, at 10 (“One of the factors clearly deserving consideration here is any interest of the individual in pursuing his own litigation . . . .”) (quoting Memorandum from Ben Kaplan to Civil Rules Advisory Comm. 1 (Jan. 17, 1963), available in National Records Center, 4205

collaboration with the CCML, and it was those concerns that ultimately ensured that the opt-out right in Rule 23(b)(3) was absolute. There was no such dissent within the CCML, whose judges were single-minded in purpose and philosophy. Those judges—who were creating their statute while simultaneously steering the electrical-equipment cases to settlement—were both focused on addressing a perceived “litigation explosion” and philosophically committed to strong judicial control of cases.<sup>157</sup>

The opposition to the CCML came from without—from defendants that the Committee considered obstructionist and self-interested. Unlike the Rule 23 amendments, defendants fought the MDL statute with vigor.<sup>158</sup> The judges supporting the MDL statute, led by Judge Becker, understood the defendants’ strategy well and fought back, casting aspersions on both their motives and their means.

Moreover, unlike Rule 23(b)(3), which started out broad and became more restricted, the MDL statute was self-limited from the beginning due to the drafters’ fears of resistance from plaintiffs’ lawyers. The resulting preemptive political compromise was transfer for only pretrial proceedings with eventual remand for trial. Plaintiffs—at least those who were consulted or commented—were satisfied with the limited-transfer plan so long as their venue privilege for trial, and its accompanying choice-of-law benefits, were not disturbed. The electrical-equipment cases had demonstrated to them the benefits of aggregation and motivated judicial control of the litigation, so they were happy to go along.

That said, it would be a mistake to think of the MDL statute as overly solicitous of plaintiffs’ interests in controlling the litigation. The drafters of the MDL statute surely did not want to trample plaintiffs’ rights, and to the extent there was any substantive goal of the drafters it was to facilitate effective private enforcement of the law through efficient litigation. But setting aside the now unfortunately quaint notion that the proper response to a “litigation explosion” is to facilitate such litigation more efficiently rather than to invent ways to prevent it,<sup>159</sup> it is clear that the drafters’ primary

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Suitland Blvd, Maryland, Record Group No 116, Accession No 82-0028, Box 24, Folder labeled “Kaplan memo 1/17/63 enclosing Topics EE and FF for February Meeting”); Marcus, *supra* note 17, at 605 (discussing fear of “the loss of individual liberty”) (quoting Letter from John Frank to Benjamin Kaplan 3 (Jan. 21, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6312-20 (Cong. Info. Serv.)).

<sup>157</sup> As we know from the research of Stephen B. Burbank and Sean Farhang, the Advisory Comm.’s membership was not nearly as judge-dominated as it is today. See Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1511-12.

<sup>158</sup> For an interesting theory about defendants’ relative indifference to the amendments to Rule 23, see Brian T. Fitzpatrick, *The Ironic History of Rule 23* (forthcoming) (on file with author) (arguing that the business community perhaps believed that revised Rule 23(b)(3) would benefit them).

<sup>159</sup> See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1890 (2008) (describing the “tort reform”

purpose was not to protect litigant autonomy. Rather, the goal of MDL was to protect the judiciary from crippling caseloads, and the solution was centralized judicial management. The history demonstrates that a reason for establishing MDL as part of the permanent federal procedural machinery was the drafters' belief that voluntary cooperation by the parties and federal judges could not be depended upon in the future.<sup>160</sup> Hence the need to place the decisions of whether and where to transfer cases in the hands of the JPML, and to place the unitary control of the litigation in the hands of the MDL judge. The mainspring of that centralization in MDL is its founding compromise: freely available limited transfer but complete control during the period of transfer, which is usually, as the song goes, "all there is."

What resulted from the two processes is a class action rule whose limitations doomed its viability and an MDL statute that appears more modest, but which is actually extremely powerful. Indeed, Judge Becker and his colleagues understood that an absolute right to opt out and a predominance requirement were effectively poison pills for the mass tort class action. That they do not appear in the MDL statute is a testament to their understanding of how effective aggregation could work, particularly in the era of the vanishing trial.

Today, with MDL ascendant, the prescience of MDL's creators is especially remarkable—see, for example, Judge Becker's eerily accurate premonition of major twenty-first century litigations—but much has changed since the statute was passed, including the rise and fall of the mass tort class action for trial or settlement. Now, the organized plaintiffs' bar understands that there are potential gains from global settlement.<sup>161</sup> There is little doubt that defendants recognize the benefits of MDL—it is logistically easier than fighting cases out around the country, and the centralization of control in the hands of one judge and a small group of lawyers facilitates eventual settlement. Unlike the 1960s, a pre-class action era<sup>162</sup> when defendants considered MDL a threat to their inherent litigation advantages, defendants now see the

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movement's efforts "to blame most of America's woes on a frightening, unjustified, and greed-inspired 'litigation explosion'" and to support "a broad range of legislative and judicial reform measures designed to drive plaintiffs from the courts").

<sup>160</sup> Indeed, one argument Becker made defending the statute was that without it "litigants would run cases." Notes on Meeting of November 14, 1964, Washington, DC (on file in Becker Papers, Box 8, Folder 19).

<sup>161</sup> D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192-98 (2013) (describing benefits to plaintiffs of non-class aggregation).

<sup>162</sup> Indeed, the rapid ascendancy of the class action was apparently a surprise. See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 670 (1979) ("The class action onslaught caught everyone, including the draftsmen, by surprise.").

benefits of an opportunity for global peace.<sup>163</sup> And all sides recognize what the small group of judges promoting MDL saw in the early 1960s: some sort of aggregation mechanism is necessary to handle nationwide controversies.<sup>164</sup> It is natural, then, that for the most part judges have embraced MDL.

But with MDL's ascendance has also come increased scrutiny, particularly from academics. It oversimplifies matters to summarize all of this forceful and trenchant scholarship, but a dominant theme is the concern that individual plaintiffs' interests are swallowed up in the aggregate. According to the critique, the mass settlements brokered by repeat-player plaintiffs and defendants, supervised by a judge whose primary motivation is in resolving the controversy without remand, are a bad deal for individuals who have functionally no control over their potentially high-stakes cases.<sup>165</sup> This is particularly problematic when one considers that the safeguards against these problems in Rule 23 worked out by the Advisory Committee in 1966 do not exist in non-class aggregations. Some judges have responded by supervising MDL settlements under the aegis of a "quasi-class action."<sup>166</sup> While these attempts to mitigate the problems of aggregate settlement have been tentatively praised by some,<sup>167</sup> they have also been criticized as lawless,<sup>168</sup>

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<sup>163</sup> Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 L.A. L. REV. 399, 414 (2014) ("Centralization likewise advantages defendants by making meaningful closure possible through a global settlement.").

<sup>164</sup> Miller, *supra* note 2, at 326 ("Not only is effective aggregate litigation a matter of common sense, it is a matter of the rational utilization of litigant and judicial system resources; that is in everyone's interest. Global litigation peace is preferable to debilitating individualized litigation war.").

<sup>165</sup> See, e.g., Redish & Karaba, *supra* note 24, at 115 ("The sweeping deprivations of an individual's ability to protect his legal rights brought about by MDL cannot be justified by naked concerns of pragmatism if the concept of due process is to mean anything."); Silver & Miller, *supra* note 27, at 124 ("Being stuck forever in a court that cannot preside over a trial and that wants a global settlement at all costs, plaintiffs caught up in MDLs have little bargaining leverage.")

<sup>166</sup> COFFEE, *supra* note 2, at 116 ("The term quasi-class action has developed to describe this new form of group litigation, and a few courts have sought to exercise close scrutiny over the process."); see also Wolff, *supra* note 61, at 1029.

<sup>167</sup> See Miller, *supra* note 2, at 312 (describing quasi-class treatment as "pragmatic and creative endeavors, but there are substantial questions about whether federal judges have authority to create quasi-classes without meeting the requirements of Rule 23").

<sup>168</sup> See Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1025 (2013) ("Judges are well situated to adjudicate; they are not equally well suited to decide for individuals whether those individuals should be willing to release their claims in exchange for an offered compromise."); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013) ("[T]here is no constitutional, statutory, doctrinal, or other basis for the quasi-class action."); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011) ("MDL judges . . . by endorsing the concept of the quasi-class action have greatly expanded the scope of their authority and have become complicit in allowing private parties to accomplish the very backdoor settlements that the Supreme Court and federal courts have disallowed for decades.").

unduly restrictive of litigants' autonomy,<sup>169</sup> or, worse, a cover for bad deals achieved in the name of efficiency.<sup>170</sup> Further, some accounts suggest that pressures toward cooperation and cartelization among repeat-player lawyers with (or aspiring to) leadership positions in other MDLs may limit the effectiveness of competition among the mass of plaintiffs' lawyers at keeping the steering committee in check.<sup>171</sup>

An understanding of the underlying history of MDL will of course not resolve debates about how the statute ought to be applied today, even if we could accurately understand everything that was in the minds of the drafters.<sup>172</sup> This debate about whether MDL is the best of the available and feasible alternatives will of course continue, aided by continuing experience of judges and lawyers and developing empirical evidence. And a continuing dialogue among interested players will yield more interesting policy proposals seeking to maximize the good in MDL and minimize the bad. But considering the parallel stories of Rule 23 and the MDL statute does shed light on current debates about how MDL works in practice in several ways. Mainly, the changes included in Rule 23 to cabin its use—and the way they came to be interpreted—were intended to be checks on the district judge's discretion. They require the judge to surmount a series of obstacles before certifying a class, and they allow class members to escape, as the CCML might say, only on their "say-so." MDL's lodestar, by contrast, is firm judicial control, accomplished by easy consolidation and lack of opt-out until the conclusion of pretrial proceedings. Judge Thomsen's apt summary of Judge Murrah's aim to "nail" a party "and not let him run his case" is indicative.<sup>173</sup> The justification for this strong judicial control is the lack of a binding effect on absentees in an MDL case. After all, the limited nature of the transfer

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<sup>169</sup> See Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 164 (2012) ("I continue to be troubled by the ongoing search for novel ways to bind individual mass tort plaintiffs to outcomes by which they do not affirmatively agree to be bound . . . or do not affirmatively support . . .").

<sup>170</sup> See Miller & Silver, *supra* note 27, at 111 (arguing that "judges have compromised their independence, created unnecessary conflicts of interest, intimidated attorneys, turned a blind eye to ethically dubious behavior, and weakened plaintiffs' lawyers' incentives to serve clients well").

<sup>171</sup> Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 71 ("External competitive checks are likewise absent: the overwhelming message sent by transferee judges is that leadership appointments—and the lucrative fees accompanying them—are conditioned upon cooperation and team play. So, even though plaintiffs' attorneys are assertive and ambitious, their calculated response may be to silence their discord and achieve financial success by playing the long game.").

<sup>172</sup> See Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 292 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)) (cautioning that "inferences about Committee intent [are] somewhat hazardous and necessarily tentative").

<sup>173</sup> Fall 1963 Advisory Comm. Meeting, *supra* note 83, at 52.

facilitates aggregation because control of the decision whether to go to trial or not remains within the hands of the individual litigant.

The debate about MDL—and the use of the quasi-class action to mitigate it—generally proceeds from the recognition that in practice the transfer is not as limited as it would appear. Although the statute avoids the third rail of binding absentees, it does in reality facilitate a significant loss of control for individual plaintiffs, whose claims are often transferred far away and litigated by lawyers they have not selected. And when the deals struck raise eyebrows, the same concerns that led the Advisory Committee to restrict the availability of Rule 23(b)(3) return to the fore. In this sense, then, the dominance of MDL, a result in part meant to avoid fears about the mass tort class action, has replicated them. And the carefully constructed split personality of MDL, which more gently packages centralized judicial control, becomes more untenable.

### CONCLUSION

Looking back at the simultaneous development of the 1966 amendments to Rule 23 and the MDL statute reveals some interesting ironies. The opponents to Rule 23's use in mass tort cases demanded protections to ensure that individual plaintiffs were not swept up in a potentially disadvantageous aggregation sought in the name of efficiency. Those opponents apparently preferred MDL, which offered the possibility of tight judicial control over pretrial proceedings, but which did not produce a judgment that would bind absentees. The primary critics of MDL worried that the statute would steamroll defendants who would be overwhelmed and coerced into extortionate settlements.

Now, fifty years later, the sides have changed, with MDL emerging as the dominant mechanism for aggregating mass tort cases—a result, incidentally, that seems to have been intended by the drafters of both provisions. As MDL continues to become dominant, the arguments that provoked the limitations originally installed in Rule 23(b)(3) are now forcefully made against actual practice in MDL. Those most concerned about the interests of individual plaintiffs being swept aside see MDL as a steamroller, while defendants—along with large plaintiff-side firms and judges—have begun to embrace MDL as a means of achieving global resolution of large-scale litigation.

In a sense, then, we are back where we began: trying to optimize ease of consolidation in a world of scarce litigation resources and the need to protect individuals from being overwhelmed by an aggregation process that zealously pursues resolution. Unlike Rule 23, MDL has gotten a bit of a free ride, thanks to the structure created by its creators fifty years ago and the benefits of mass resolution. The question going forward is whether that free ride should continue.