

Washington University Law Review

Volume 90

Issue 3 *Hodge O'Neal Corporate and Securities Law Symposium: The Future of Class Actions*

2013

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Recommended Citation

Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667 (2013).
Available at: http://openscholarship.wustl.edu/law_lawreview/vol90/iss3/4

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DISAGGREGATING

ELIZABETH CHAMBLEE BURCH*

INTRODUCTION

Resolving mass torts prompts a study in contrasts. Definitionally, what makes a tort a mass tort is that numerous claimants' cases present a finite set of factual variations that involve similar causation questions and interdependent claim values.¹ A thread of commonality—be it the same defendant, similar facts, comparable legal theories, or the same lawyers—runs throughout. But mass-tort claimants typically do not share enough in common to warrant class certification. That is, commonality does not *predominate*. Claimants might have discrete genetic predispositions, consume a drug for different time periods under different conditions, suffer diverse injuries that manifest in unique ways, or live within various states. Consequently, judges typically cannot resolve mass torts on an aggregate basis except by promoting private settlement.

This paradox—the practice of centralizing claims before a single judge that the judge usually cannot resolve except through settlement—prompts two questions. First, what level of commonality justifies aggregating mass torts, shorn of Rule 23's procedural protections? And, second, should the federal judicial system continue to centralize claims with nominal commonality when courts typically cannot conclude them collectively? This Article's title suggests one answer: if minimal commonality continues to justify collective litigation, then the system should aggregate claims to adjudicate common concerns and then, as state laws or individual differences come to the forefront, disaggregate into smaller, cohesive groups whose members' claims could be resolved collectively through public, judicial means, such as trials or dispositive motions. Disaggregating into smaller, more cohesive groups could revive the use of issue classes, particularly when the class definition is correspondingly narrow.

Currently, courts routinely centralize through multidistrict litigation, but often afford little thought as to the preceding first-order question about

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1. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* xiii (2007); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *BROOK. L. REV.* 961, 965–69 (1993).

commonality—at least in nonclass aggregation. Commentators and courts have considered commonality principally in the class-action context where their answers and justifications have tended toward either an individualistic or a welfare-maximizing approach. Individual justice theorists claim that the right to participate and be heard—to have one’s day in court—should limit collectivization.² Thus, absent a high degree of commonality, the judicial system should not force plaintiffs to litigate collectively.³ Welfare-maximizing scholars, on the other hand, trumpet efficiency: the individual’s right to her day in court must give way to the greater good when doing so maximizes social welfare.⁴ If aggregate litigation provides some measure of justice to the collective group in an economical way, then a low level of commonality suffices. But using these two metrics as the only means for judging commonality undervalues the nuances of nonclass aggregation where plaintiffs with diverse claims arising out of the same product must often sue collectively to make litigation economically viable and credibly threaten the defendant. Put simply, though plaintiffs have much in common, they have plenty of differences, too.

Reconsidering the question of what level of commonality justifies aggregate litigation in a community centered context can shed new light on both the answer to this question and a solution to the current paradox. Disaggregating mass torts for trial based on substantive commonality

2. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627–28 (1997) (emphasizing plaintiffs’ individual rights and overturning a global asbestos class action, in part, on that basis); *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (discussing the notion of one’s own day in court); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (noting class members right to notice and opt out); Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573 (2007); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69.

3. There are scholars who have suggested approaches that mediate between the individual justice and welfare-maximizing camps. See, e.g., Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008); Richard L. Marcus, *They Can’t Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858 (1995); Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995).

4. See, e.g., JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545 (1998).

makes sense as one thinks about the disconnect between judicial resolution through class certification (when claims are judicially resolvable in the aggregate) versus the attorney overreaching that may take place in engineering resolution through a multidistrict litigation settlement. As “disaggregating” implies, decentralization occurs only after the transferee judge has uniformly addressed common, generic questions. This option strikes at the core of the disconnect between centralization and resolvability: state laws supply the rules of decision for nationwide mass torts and state legislatures enact tort statutes in response to community needs and demands, but the variations in those laws cause many of the substantive legal differences that undermine collective adjudication through the class action.

To be sure, disaggregating coupled with greater use of issue classes does not come as a simple fix or even the only fix. For instance, when plaintiffs are in the midst of a large multidistrict litigation that the transferee judge wants to resolve collectively, I have argued for a self-referential, relational definition of community that would allow plaintiffs to voluntarily associate with others who share their litigation goals, injuries, and claims.⁵ Community in this sense concerns litigants’ affective ties and relationships with one another; it grows out of their shared emotional connections from history, experience, and circumstantial commonality.⁶ While remaining a part of the larger multidistrict litigation, that group could decide collectively whether to govern themselves and their settlement decisions through a supermajority vote.⁷ Yet, this idea of community works within the current system. As such, it assumes the answer to the second question posed above must be “yes”—the federal judicial system should continue to centralize and collectively resolve claims with nominal commonality even though that resolvability typically hinges on private settlement, not a determinative judicial ruling or a jury trial. Put differently, allowing claimants to associate with one another based on their affective ties helps to justify a private, aggregate resolution by increasing relational commonality.

5. Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 899–902 (2010).

6. *Id.*; see also THOMAS BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* 122–28 (1978); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 25 (1989); David W. McMillan & David M. Chavis, *Sense of Community: A Definition and Theory*, 14 J. COMMUNITY PSYCHOL. 6, 9 (1986).

7. Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 122–25, 152 (2011) [hereinafter Burch, *Litigating Together*].

Disaggregating, however, provides a different answer to the second question of when to centralize claims. Disaggregating is not incompatible with centralization; rather, the federal system might still gain efficiency by aggregating claims with nominal commonality and allowing the transferee judge to address common, generic questions. But, after doing so, mass centralization should dissolve and yield to the countervailing concerns of the traditional, geographic community. The geographic community is concerned with local judges and juries accurately applying communal norms and state laws to factual claims, a role that remains important so long as state laws continue to govern nationwide mass torts. Otherwise, a handful of bellwether trials conducted under a single state's law could dictate the settlement terms for all victims, regardless of whether the verdicts might change based on alternative community values or state law variations. Community in this sense includes "people with common interests living in a particular area," such as neighborhoods, towns, and cities.⁸ Given that mass-tort claims are often national in scope,⁹ disaggregating for trial (and thus adhering to section 1407's pretrial restriction) allows heterogeneous communities to participate in fact finding and determine wrongdoing.

"Disaggregating" relies on several previous articles¹⁰ that explained the tension between the individual and the group in mass litigation: On one hand, aggregation allows plaintiffs to present a united front and a credible threat to defendants, but, on the other, it weakens their autonomy when pursuing claims that are deeply personal. This fosters a strained union between the individual and the collective; sometimes the individual's goals harmonize with the group's aim, other times they do not. Consequently, my past work explored individuality and interdependence

8. *Community*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/community> (last visited Dec. 20, 2012).

9. See Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1865–66 (2006).

10. Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009) [hereinafter Burch, *Procedural Justice*] (explaining the procedural justice problems and risks presented by nonclass aggregation); Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1 (2009) [hereinafter Burch, *Litigating Groups*] (arguing that groups of plaintiffs may have been or could be encouraged to develop organic or indigenous origins such that they form moral obligations to one another that are reinforced by social and personal norms); Burch, *Litigating Together*, *supra* note 7 (contending that process should enable aggregated plaintiffs to reason together about the right thing to do and design a governance agreement that embodies their shared conception of fairness); Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506 (2011) [hereinafter Burch, *Group Consensus*] (examining sections 3.17 and 3.18 of the American Law Institute's *Principles of the Law of Aggregate Litigation* and suggesting ways for the claimants themselves to play a central role in litigation governance).

in terms of social norms, moral duties, and legal obligations. It contended that aggregating could fulfill procedural justice goals by bringing plaintiffs together and encouraging them to reason together about appropriate litigation ends, deliberate about how to best achieve those ends collectively, and pursue those ends with concerted force. In short, these previous articles focused on improving procedural legitimacy.

Each of these previous articles, however, alluded to a radical alternative: allowing individuals or groups to exit the aggregation. The reasons ranged from the pragmatic to the theoretical. Exit can signal dissatisfaction with substantive or procedural fairness.¹¹ It allows plaintiffs with fundamental differences over which litigation goals to pursue and how to pursue them to leave the group when significant conflicts arise.¹² Exit thus preserves litigants' voice opportunities and right to maximize their own individual tort gains.¹³ Plus, members of smaller groups tend to be more cooperative and cohesive in advancing their collective interests.¹⁴ Similarly, large, fractured groups jeopardize even a faithful attorney's ability to adequately represent all group members.¹⁵ Finally, allowing smaller groups to exit may preserve a plaintiff's choice of forum, safeguard defendants' right to assert individual affirmative defenses, maintain fidelity to substantive state law, and reduce judicial error.¹⁶

Other reasons for allowing exit further swell this list. For example, centralizing claims almost inevitably leads to group-wide settlement, at least where the defendant is unsuccessful with motions to dismiss and

11. Burch, *Litigating Together*, *supra* note 7, at 144; *see also* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 *CARDOZO L. REV.* 407, 425–29 (2008) (discussing how the Worldcom opt outs provided a signal to investors that they might achieve more satisfactory results by exiting a securities class action).

12. Burch, *Litigating Together*, *supra* note 7, at 144; *see also* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 *CORNELL L. REV.* 811, 821–22 (1995) (describing individuals involuntarily included in aggregate litigation as "kidnapped rider[s]"); Samuel Issacharoff, *Class Action Conflicts*, 30 *U.C. DAVIS L. REV.* 805, 833 (1997).

13. NAGAREDA, *supra* note 1, at 119–20; Burch, *Procedural Justice*, *supra* note 10, at 50.

14. Burch, *Procedural Justice*, *supra* note 10, at 47, 52; Burch, *Litigating Together*, *supra* note 7, at 100; *see also* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53–54 (1965); T.K. Ahn, R. Mark Isaac & Timothy C. Salmon, *Endogenous Group Formation*, 10 *J. PUB. ECON. THEORY* 171, 190–91 (2008); Phillip Bonacich et al., *Cooperation and Group Size in the N-person Prisoners' Dilemma*, 20 *J. CONFLICT RESOL.* 687, 687–705 (1976); Norbert L. Kerr & Steven E. Bruun, *Dispensability of Member Effort and Group Motivation Losses: Free-Rider Effects*, 44 *J. PERSONALITY & SOC. PSYCHOL.* 78 (1983); Norbert L. Kerr, *Illusions of Efficacy: The Effects of Group Size on Perceived Efficacy in Social Dilemmas*, 25 *J. EXPERIMENTAL SOC. PSYCHOL.* 287 (1989).

15. Burch, *Procedural Justice*, *supra* note 10, at 51; Burch, *Litigating Together*, *supra* note 7, at 97–99.

16. Burch, *Procedural Justice*, *supra* note 10, at 55; Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 *WM. & MARY L. REV.* 639, 646–57 (1981).

motions for summary judgment. While private ordering through settlement might follow a handful of bellwether trials, jurors are geographically concentrated in the transferee forum. That prevents public participation from other affected communities nationwide, whereas holding trials in plaintiffs' original fora would further democratic participation ideals.¹⁷ Jury trials are, after all, meant to be a communal enterprise and, as the American Tort Reform Association likes to point out, each community may approach the adjudicative and deliberative process differently.¹⁸

Accordingly, this Article explores a central theme that ties together all of these rationales for exit: disaggregating helps to protect litigants' substantive rights and furthers the public's faith in a legitimate judicial system. Disaggregating promotes adjudication's principal purpose, which is to produce outcomes that reflect parties' substantive entitlements as defined by applicable state laws, but does so in a way that is procedurally fair and psychologically satisfying.¹⁹ Part I introduces the centralization paradox—the practice of centralizing claims before a single judge that the judge typically cannot resolve on an aggregate basis except through private settlement. As Part II elaborates, that practice is at odds with procedural rights, rights that on paper purport to preserve plaintiffs' preference for trial in their original fora. Part III then chronicles the benefits of allowing plaintiffs to exit the centralized litigation in terms of procedural justice, substantive aims, and democratic ideals. Part IV explains how the Judicial Panel on Multidistrict Litigation (“MDL Panel” or “the Panel”) and the transferor courts might strategically disaggregate national claims for trial after they have been centralized to capture multidistrict litigation's pretrial efficiency. Finally, Part V considers objections to disaggregating in a procedural system in which accuracy, efficiency, finality, and consistency each compete with one another for top billing.

17. See Lahav, *supra* note 3, at 577–78.

18. E.g., AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2011/2012 (2011); see also Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 745 (1995) (“[The right to a jury trial] ensures a role for the community in adjudicative proceedings.”).

19. See Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1160–61 (2006).

I. THE CENTRALIZATION PARADOX

Commonality is a defining characteristic of mass-tort litigation.²⁰ Mass torts exhibit finite factual variations, the cases' values are highly interdependent, a relative few plaintiffs' law firms handle most cases, plaintiffs sue only one or a small handful of defendants, and their injuries involve similar causation questions.²¹ Consequently, plaintiffs easily meet the multidistrict litigation statute's requirement that their cases involve a common factual question.²² But, these cases frequently cannot be tried as a unit. Once the Judicial Panel on Multidistrict Litigation transfers mass-tort cases to a single court, few—if any—judges certify them as class actions because the cases lack the requisite level of commonality. Rule 23 requires common issues to *predominate*,²³ a standard that choice-of-law questions make increasingly difficult to meet given that tort law varies from state to state. Nevertheless, coordinating and centralizing these claims has become standard practice on several levels—procedurally, jurisdictionally, judicially, and representationally.

This current state of affairs was not part of a carefully executed master plan. We reached this point through a series of procedural turns wrought by political interests, courts, and Congress. But it is worth understanding how we arrived at this point; how we came to juxtapose centralizing mass torts based on their defining characteristic of commonality on one hand, with a refusal to certify them, on the other; and how, as a result, the judicial system's only hope of resolving these cases is through procedural wrangling that tees up settlement talks.

Despite the advisory committee's initial skepticism over certifying what it dubbed "mass accident[s],"²⁴ certifying mass torts under Rule 23(b)(3) became more accepted in the early 1970s and 1980s.²⁵ But that began to change when the Supreme Court decided *Amchem Products, Inc. v. Windsor*. *Amchem* affirmed the decertification of a global asbestos class-action settlement and warned against "ever more 'adventuresome'"

20. Hensler & Peterson, *supra* note 1, at 965–69.

21. NAGAREDA, *supra* note 1, at xiii; Hensler & Peterson, *supra* note 1, at 965–69.

22. See 28 U.S.C. § 1407 (2006).

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

24. FED. R. CIV. P. 23 advisory committee's note. In fact, the advisory committee focused principally on civil rights and antitrust matters, not on mass torts. See *id.*

25. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("But the text of [Rule 23] does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's, have been certifying such cases in increasing number.").

class-action practice,²⁶ particularly when “individual stakes are high and disparities among class members great.”²⁷ The decision strengthened Rule 23’s requirements regarding adequate representation and predominance.²⁸ Even though all class members had been or might be harmed by asbestos, they were exposed to different asbestos products, in different ways, over different time periods, and had varying degrees of physical injuries.²⁹ Their unifying characteristics did not predominate over their dissimilarities.³⁰

So, while the potential for a mass-tort class action declined significantly after *Amchem*, the possibility remained that settlement designers might be able to fix both adequate representation and predominance problems through proper subclassing. About a year after the Supreme Court decided *Amchem*, however, even that possibility began to wane as Congress initiated jurisdictional changes that would allow defendants to remove putative class actions from state to federal court. The Class Action Fairness Act (CAFA), initially introduced in 1998 and in some form every year thereafter until it passed in 2005,³¹ created federal jurisdiction for claims affecting the national market, but it also exacerbated the preexisting choice-of-law problem that often rendered mass torts unmanageable as a class.³²

Because tort law is a creature of state law CAFA’s enactment made it less likely that attorneys could use subclassing as a means for addressing adequate representation and choice-of-law problems.³³ At some point in a nationwide class, subclassing itself threatens to overwhelm the class’s manageability. Congress might have addressed this concern by enacting a

26. *Id.* at 614, 617 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM L. REV. 497, 497 (1969)).

27. *Id.* at 625.

28. *Id.* at 619–22; FED. R. CIV. P. 23(a), (b)(3).

29. *Amchem*, 521 U.S. at 624–25.

30. *Id.*

31. Class Action Fairness Act of 2005 § 2(a)–(b), Pub. L. No. 109-2, 119 Stat. 4, 5 (codified in scattered sections of 28 U.S.C.); Class Action Fairness Act of 2004, S. 2062, 108th Cong. (2004); Class Action Fairness Act of 2003, S. 274, 108th Cong. (2003); Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. (2002); Class Action Fairness Act of 2001, S. 1712, 107th Cong. (2001); Class Action Fairness Act of 2000, S. 353, 106th Cong. (2000); Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999); Class Action Fairness Act of 1999, S. 353, 106th Cong. (1999); Class Action Fairness Act of 1998, S. 2083, 105th Cong. (1998).

32. See Issacharoff, *supra* note 9, at 1865–66 (noting the irony that CAFA allows removal for important national market concerns but binds those cases to states’ choice-of-law rules).

33. See generally Emery G. Lee III & Thomas E. Willging, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 789 (2010) (showing a decline in class certification motions from seventy percent of cases in 1996 to just twenty-four percent in 2009).

federal choice-of-law scheme to accompany nationwide class actions, but it opted not to do so.³⁴ This caused a mismatch: CAFA supplies a federal forum for putative class actions of national importance, but federal courts are still bound to apply states' tort laws. Applying numerous states' laws renders the class unmanageable under Rule 23(b)(3) and undermines class certification.

Clearing what was once a relatively low commonality threshold in Rule 23(a) has likewise become increasingly difficult with the Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*.³⁵ Even though *Dukes* was an employment-discrimination case, it created a formidable commonality standard and affirmed defendants' ability to raise individual defenses in all cases.³⁶ These changes further diminish the possibility that transferee judges managing mass torts might use an issue class to resolve common claims or questions, like medical monitoring or whether the defendant failed to warn plaintiffs of certain risks. What matters now is not whether plaintiffs can raise common *questions*, but whether "a classwide proceeding [can] generate common *answers* apt to drive the resolution of the litigation."³⁷ Given the thorny choice-of-law problem that CAFA compounded and that mass-tort plaintiffs tend to allege state-law claims, the capacity of an issue class to generate classwide answers is less likely.

A similar problem arises with regard to a defendant's right to assert individual defenses during classwide proceedings. Because litigating those defenses en masse would alter the substantive right to raise defenses in individual proceedings, an issue class action could violate the Rules Enabling Act.³⁸ Allowing defendants to assert individual defenses means that they can inject individuality into an otherwise cohesive class, which undermines the predominance of common questions and suggests that a class action is no longer superior to individual cases.³⁹

34. See David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1296 (2007). A number of proposals for applying uniform laws to class actions exist. See, e.g., AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT § 6.01 cmt. f (Proposed Final Draft Apr. 5, 1993) (recommending that courts apply the law of defendant's principal place of business).

35. 131 S. Ct. 2541 (2011).

36. See *id.* at 2553–57, 2561.

37. *Id.* at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

38. See *id.* at 2561.

39. John C. Coffee, Jr., "You Just Can't Get There from Here": A Primer on *Wal-Mart v. Dukes*, 12 BNA CLASS ACTION LITIG. REP. 610, July 8, 2011. Compare *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) ("Although a necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Rule 23(b)(3), we reject any per se rule that treats the presence of such issues as an automatic disqualifier."), with *Barnes v.*

Even without class certification, mass-tort cases do not revert to individual lawsuits. Experience in the post-*Amchem* years has shown that the central-planning model is alive and well on various levels. Plaintiffs' attorneys begin the process of amassing clients through advertising, referrals, and affiliating with other law firms. It is not unusual for a single firm to represent thousands of clients with roughly analogous claims. As similar claims arise nationwide, the federal judicial system aggregates them through multidistrict litigation. States with a hefty mass-tort practice, such as New Jersey, where most pharmaceutical companies are headquartered, have a similar centralization mechanism on a statewide level.⁴⁰ Judges then centralize further by appointing a plaintiffs' steering committee as well as other specialized committees, such as negotiating committees and committees to perform common benefit work.⁴¹ The upshot of these measures is almost always an aggregate settlement.⁴²

Although multidistrict litigations settle at a similar rate to other cases, settlement in the multidistrict-litigation context poses special problems, including agency problems between attorneys and their clients and conflicts of interest between the claimants themselves. Claimants may have different litigation aims, risk tolerances, and financial concerns. They may belong to subgroups (like a labor union, veteran's group, or community organization) that affect their desire for a particular remedy. And the severity of their injuries and their preexisting medical conditions will likely affect the strength of their claims. When a single, isolated plaintiff sues a defendant, her attorney can consider all of these factors in devising a litigation and settlement strategy. But when an attorney represents many clients with heterogeneous preferences, the attorney is bound to subvert individual preferences to the group's collective interests. This means that some will be dissatisfied with the outcome and may withhold their consent to settle, a problem that becomes particularly knotty

Am. Tobacco Co., 161 F.3d 127, 149 (3d Cir. 1998) (finding that individual questions about statute of limitations, among other concerns, prevented class certification). For previous cases noting that class certification could be proper despite the availability of individual affirmative defenses, see *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 39–40 (1st Cir. 2003); *Aliotta v. Gruenberg*, 237 F.R.D. 4, 12 (D.D.C. 2006); *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 46 (E.D.N.Y. 2008).

40. New Jersey Rule 4:38A, available at <http://www.judiciary.state.nj.us/notices/2012/n120809b.pdf>.

41. See Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2277–78 (2008) (discussing judicial use of settlement conferences).

42. *Id.*

if the defendant conditions the settlement offer on unanimous consent.⁴³ And, because preference aggregation is a hazy science at best, the attorney may well use her own self-interest as a proxy or a tiebreaker, which exacerbates attorney-client agency conflicts.

The ways in which agency problems can infect aggregate settlements suggest that substantial procedural barriers to mass-tort class actions may hinder both procedural justice and accurate outcomes.⁴⁴ Substantive goals are best realized through settlements that reflect the parties' genuine consent. Yet, distorted incentives between a contingent-fee attorney and her client can result in overbearing settlement terms that undermine consent. For example, settlements regularly include walk-away provisions that allow defendants to withdraw the offer if too few claimants agree. Some agreements require participating plaintiffs' attorneys to recommend the deal to one hundred percent of their clients and to withdraw from representing those who decline.⁴⁵ Others add "bonus" payments if 100 percent of the plaintiffs settle, thereby encouraging social pressure to achieve consensus.⁴⁶ Still others involve instances where attorneys pay off holdouts (thereby misallocating settlement funds) in order to fulfill defendants' demands for complete resolution,⁴⁷ forge ongoing "sweetheart" business relationships with settling defendants,⁴⁸ and overcompensate weak but prevalent claims to attract more clients or avoid

43. For an overview of how these provisions exert ethical pressure on plaintiffs' counsel, see Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010).

44. Bone, *supra* note 19, at 1168.

45. Initial Settlement Agreement at para. 1.2.8.1, *In re Vioxx Prod. Liab. Litig.*, No. MDL 01657 (E.D. La. 2007), available at <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf>; see also Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 267–68 (2011) (describing how the Vioxx settlement required participating lawyers to withdraw from clients who refused the settlement agreement). After some plaintiffs' attorneys contended the settlement conflicted with ethical rules, it was reinterpreted to mean that the attorneys should recommend the deal only if it was in the client's best interest. Alex Berenson, *Some Lawyers Seek Changes in Vioxx Settlement*, N.Y. TIMES, Dec. 20, 2007, <http://www.nytimes.com/2007/12/20/business/20cnd-vioxx.html>.

46. In the ground zero workers' case against New York City, settlement designers tried to cram the settlement down through group cohesion. Attorneys offered a close-knit community of firefighters and police officers \$575 million if 95 percent of them accepted, but if 100 percent agreed, that amount increased to \$657.5 million. Mireya Navarro, *Ground Zero Workers Reach Deal Over Claims*, N.Y. TIMES, Mar. 12, 2010, at A1. Judge Hellerstein rejected the proposal, dubbed the compensation inadequate, and questioned the large attorneys' fees. Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. TIMES, Nov. 20, 2010, at A1. Eventually, attorneys increased the settlement amount to \$625 million, so long as 95 percent approved; 95.1 percent did. *Id.*

47. See, e.g., *Gallion v. Ky. Bar Ass'n*, 266 S.W.3d 802, 803–04 (Ky. 2008).

48. See, e.g., *Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 139–40 (2d Cir. 2011) (describing an informal settlement guaranteeing plaintiffs' counsel \$2 million to work directly for the defendant as a consultant).

paying referral fees.⁴⁹ Because attorneys receive a return on their litigation investment and are compensated only upon judgment or settlement, the incentive structure is open to abuse in multidistrict litigation.

These settlements are open to potential abuse not only because of the distorted incentives between lawyers and their clients, but because judges lack the clear policing authority that Rule 23 gives them in the class-action setting such as approving the settlement terms and awarding attorneys' fees. Plus, the plaintiffs themselves are poorly situated to monitor their attorneys. Although aggregating increases the economic viability of their claims, it also fosters collective-action problems and makes meaningful information difficult to attain.⁵⁰ Learning the status of one's own case yields little information about the overall litigation since mass-tort cases are factually, legally, and economically interdependent.

This is not to say that mass-tort class actions were a perfect solution either. As Richard Nagareda observed, *Amchem* represents a failed attempt by attorneys and lower courts to accomplish law reform through the judicial process.⁵¹ Both class settlements and aggregate settlements are poor vehicles for legal reform because they lack the kinds of repeated interactions, continued scrutiny, and subsequent adjustments that legislatures may deliver.⁵² A settlement provides only one chance to get things right.

Still, the class action may improve accuracy and certainly improves procedural legitimacy through several layers of checks and balances. For example, we impose fiduciary duties on judges as well as class-action attorneys to ensure that they act in the whole class's best interest.⁵³ We require the judge to certify that the attorney adequately represents the class; ensure that any settlement is fair, reasonable, and adequate; and

49. Paul H. Edelman, Richard A. Nagareda & Charles Silver, *The Allocation Problem in Multiple-Claimant Representations*, 14 SUP. CT. ECON. REV. 95, 99 (2006) (noting that because lawyers must pay referral or forwarding fees for some clients, they have an incentive to misallocate in favor of those without fees attached); see, e.g., *In re New York Diet Drug Litig.*, 850 N.Y.S.2d 408, 408–09 (N.Y. App. Div. 2008); *Parker & Waichman v. Napoli*, 815 N.Y.S.2d 71, 72–74 (N.Y. App. Div. 2006). These claims were eventually dismissed. *Parker & Waichman v. Napoli*, 858 N.Y.S.2d 156 (N.Y. App. Div. 2008).

50. WEINSTEIN, *supra* note 4, at 11–12; Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1272, 1276 (2012); Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1913 (2002); Charles Silver, *Ethics and Innovation*, 79 GEO. WASH. L. REV. 754, 756 (2011).

51. NAGAREDA, *supra* note 1, at 90–94.

52. *Id.* at 94.

53. See FED. R. CIV. P. 23(e); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002); see also Chris Brummer, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1060–61 (2004).

approve attorneys' fee requests.⁵⁴ Class objectors can object to unfair settlement terms as well as attorneys' fees and can then appeal decisions overruling their objections, thereby subjecting the settlement to an additional layer of error-correction and review.⁵⁵ Finally, under CAFA, defendants must give notice of the proposed settlement to state attorneys general,⁵⁶ who can intervene and object to class settlements.⁵⁷

Aggregate settlements lack these safeguards. This means that centralizing mass torts often causes conflicts with procedural justice goals and substantive aims, like accuracy. Although I have suggested elsewhere that third-party financiers might perform a monitoring role in multidistrict litigation,⁵⁸ my focus here is on the pressure the central-planning model exerts on the parties when settlement, as opposed to exit, is the only viable option.

II. PROCEDURAL RIGHTS VERSUS PROCEDURAL PRACTICE

A close look at the procedural rules governing mass torts reveals careful attention to preserving plaintiffs' right to choose their desired jurisdiction and the laws associated with that forum—at least within well-defined rules of personal jurisdiction, subject matter jurisdiction, and venue. Yet, in practice, judges have increasingly reconfigured lawsuits by insisting that litigants combine or consolidate their claims, transferring those cases out of their preferred fora, appointing steering committees that effectively wrest case control away from the plaintiff's chosen attorney, and refusing to permit plaintiffs to return to their original district for trial.⁵⁹

Multidistrict litigation is ostensibly aimed at efficient and coordinated *pretrial* litigation.⁶⁰ Section 1407's legislative history indicates that “trial in the originating district is generally preferable from the standpoint of the parties and witnesses.”⁶¹ So, Congress designed the statute to “maximize

54. See FED. R. CIV. P. 23(e), (h).

55. See FED. R. CIV. P. 23(e)(5), (h)(2); Devlin v. Scardelletti, 536 U.S. 1 (2002); Brummer, *supra* note 53, at 1060–61; Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 42–46 (1993).

56. 28 U.S.C. § 1715 (Supp. V 2005).

57. See FED. R. CIV. P. 24.

58. Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012).

59. See Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1485–86 (1994).

60. 28 U.S.C. § 1407 (2006).

61. S. REP. NO. 90-454, at 5 (1967).

the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party jury trials."⁶² If exiting the centralized litigation were impossible, it would subvert these preferences and undermine procedural fairness. Nevertheless, transferee judges regularly transferred cases to their own court for trial under section 1404(a).⁶³ In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, the Supreme Court held this practice impermissible; a transferee court conducting pretrial proceedings pursuant to section 1407 had no authority to use section 1404(a) to assign the cases to itself for trial.⁶⁴ Self-transfer violated section 1407's requirement that the Panel remand consolidated cases to their original transferor districts "at or before the conclusion of such pretrial proceedings."⁶⁵

Yet, as Judge Young observed eight years after the *Lexecon* decision,

[A]s MDL practice flourishes, many cases are transferred out of their home courts and away from local juries, but few—very few—ever return for trial. The reasons are twofold. Most cases settle, and this is as it should be. . . . Yet the "settlement culture" for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice. . . . [I]t is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial. This, in turn, reinforces the unfortunate tendency to hang on to transferred cases to enhance the likelihood of settlement. Indeed, MDL practice actively encourages retention even of trial-ready cases in order to "encourage" settlement.⁶⁶

62. Report of the Co-ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28 (Mar. 2, 1965), reprinted in *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499 (J.P.M.L. 1968).

63. See *Suggested Procedures for Multidistrict Litigation*, 75 F.R.D. 589, 600–02 (1977); John F. Nangle, *From the Horse's Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 DEF. COUNS. J. 341, 344 (1999); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1031 (1973).

64. 523 U.S. 26, 28 (1998).

65. *Id.* (quoting 28 U.S.C. § 1407(a) (1994)); see also Carter G. Phillips et al., *Rescuing Multidistrict Litigation from the Altar of Expediency*, 1997 BYU L. REV. 821, 825 (1997).

66. *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150–52 (D. Mass. 2006).

So, while Congress never intended to disturb plaintiffs' preference for trial in their chosen jurisdiction, that is precisely what has happened in practice.⁶⁷

In 2010, products liability and illegal sales practices comprised half of the 52 litigations subject to multidistrict litigation.⁶⁸ Since Congress created the Panel in 1968, the Panel has centralized 349,914 civil actions for pretrial proceedings and, as of September 30, 2010, transferee courts have terminated 266,264 actions, reassigned 398 actions to transferor courts within the transferee district, and remanded 11,986 actions for trial.⁶⁹ To put this result starkly, since its inception, the multidistrict litigation process has remanded a mere 3.425% of cases to transferor districts for trial.

III. THE IMPORTANCE OF EXIT

Centralizing mass torts has taken hold in a fundamental way. In the name of efficiency, multidistrict litigation subverts autonomy goals that individual justice theorists hold dear. But it also undermines procedural justice aims, the community's ability to participate in litigation that often impacts public health and safety (such as pharmaceutical manufacturers' marketing practices and the effectiveness of the FDA's approval process), and substantive aims such as accuracy and fidelity to state laws. By contrast, allowing plaintiffs to exit the centralized action serves procedural justice goals, safeguards fidelity to substantive law and federalism principles, facilitates participation by heterogeneous communities, and may increase the accuracy of decisions and settlement values.

A. *Exit's Import for Procedural Justice*

Because democratic systems like ours take subjective citizen preferences into account when designing procedural rules, public perceptions of fairness impact the judiciary's institutional legitimacy.⁷⁰

67. The Federal Judicial Center and past chairs of the MDL Panel have lobbied for Congress to change this statute to include the statutory authority to transfer cases for trial purposes. THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION (Federal Judicial Center 1987); see also Wm. Terrell Hodges, *Chair of Judicial Panel Sees Role as Gatekeeper*, THIRD BRANCH, Nov. 2005, at 12.

68. JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 29 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>.

69. *Id.*

70. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 63–64 (1988).

Research on procedural justice shows that litigants prefer: (1) an adversarial system before an impartial decision-maker with error-correcting mechanisms such as new trials and appeals; (2) either well-established court rules or the ability to participate in designing dispute-resolution procedures; and (3) an opportunity to take part and be heard in the adjudicatory or deliberation process.⁷¹

Exit could further these procedural preferences in three ways. First, it helps correct error.⁷² Under the current system, most cases end in settlement. In a bipolar plaintiff-versus-defendant case, genuine consent eliminates the need for error-correcting mechanisms. Similarly, in class actions, error-correcting mechanisms are embedded in Rule 23 through judicial fairness review, objectors, and the opportunity for appeal.⁷³ But an aggregate settlement lacks these procedural safeguards, which increases exit's importance as both a signaling function and as a check on substantive and procedural fairness. In securities class actions, for example, class members occasionally signal that the proposed settlement is unattractive by opting out.⁷⁴

Although plaintiffs can, in theory, withhold their consent in the central-planner model, this choice is often a Morton's Fork: one must either continue litigating in front of and incur the displeasure of a judge who has played an active role in encouraging settlement or accept the settlement offer. Taking the offer may mean settling for a result that fails to account for substantive differences in state law. As Richard Marcus observed, adopting "an aggressive use of MDL procedures as a way of enabling national settlements under a single substantive regime seems an end run around [the Supreme Court's limitation in *Amchem*]." ⁷⁵ But if a plaintiff could insist on returning to her home state for trial, this option would give her a meaningful choice. Moreover, multiple trials in diverse jurisdictions encourage the repetition that allows parties to carefully distinguish between claims based on legal and factual differences, which ultimately increases the accuracy of settlement values.⁷⁶

71. Burch, *Procedural Justice*, *supra* note 10, at 29–43.

72. Cover, *supra* note 16, at 650–58; *see also* Burch, *Procedural Justice*, *supra* note 10, at 55.

73. *See* FED. R. CIV. P. 23.

74. *See* Coffee, *supra* note 11, at 425 (discussing how the Worldcom opt outs provided a signal to investors that they might achieve more satisfactory results by exiting a securities class action).

75. Marcus, *supra* note 41, at 2256.

76. *See* Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2397 (2008); Francis E. McGovern, *A Proposed Settlement Rule for Mass Torts*, 74 UMKC L. REV. 623, 631–32 (2006).

Second, exit preserves litigants' autonomy and participation opportunities by allowing plaintiffs with fundamental differences over litigation goals or remedies to leave multidistrict litigation when significant conflicts arise.⁷⁷ It also reinstates attorney autonomy. The plaintiffs' steering committee members—which judges tend to select for their reputations and deal-brokering capabilities rather than their ability to represent a cross-spectrum of clients—can no longer control disaggregated cases.⁷⁸

Depending on how exit is engineered, it may likewise safeguard defendants' rights to assert individual affirmative defenses and insist that each plaintiff prove specific causation. In cases like *Bendectin*, where the district court consolidated over 800 cases for a trial on liability,⁷⁹ there is a danger that a jury may assume liability based on the sheer volume of plaintiffs—the “where there's smoke, there's fire” syndrome.⁸⁰ Thus, joinder might increase the likelihood that a jury would find the defendant liable by focusing less on any given plaintiff's injury and more on the number of allegedly affected people.⁸¹ Disaggregating, on the other hand, would create smaller, more cohesive groups where defendants could challenge specific causation and assert individual affirmative defenses.

Finally, disaggregating makes smaller, cohesive groups possible, which may enhance adequate representation as well as autonomy and participation opportunities. In aggregate litigation, as in any litigation, most litigants participate through counsel.⁸² But large, fractured groups

77. Burch, *Litigating Together*, *supra* note 7, at 144; *see also* Cramton, *supra* note 12, at 821–22 (noting a situation in which involuntary class participation creates a “kidnapped rider” problem); Issacharoff, *supra* note 12, at 833 (identifying the problematic nature of mechanisms that bind non-participants); Resnik, *supra* note 59, at 1485–86 (noting tension between increased judicial authority and attorney and party autonomy).

78. *But see* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1497 (2005) (arguing that aggregation through multidistrict litigation has enhanced the ability of litigants and their attorneys to individually control their claims). Of course, this can cut two ways. If the plaintiff's chosen attorney specializes in advertising and collecting a large inventory of cases, but is less adept at actually litigating those cases, the plaintiffs may not be better off. Still, it may be that the attorney's ability to credibly threaten defendants comes not through courtroom skills, but by wielding a significant portfolio of cases.

79. *In re Bendectin Litig.*, 857 F.2d 290, 298 (6th Cir. 1988). The phased trial structure of the *Bendectin* litigation actually worked to defendant Merrill Dow's advantage since it had a strong case against general causation.

80. Marcus, *supra* note 41, at 2255–56.

81. Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 27 (1989).

82. One study conducted on students at Stanford University indicated that participants preferred self-representation, but “Stanford University students might generally feel competent enough to represent themselves in relatively simple disputes.” Donna Shestowsky, *Procedural Preferences in*

jeopardize even a faithful agent's ability to adequately represent all group members.⁸³ Members of smaller groups, however, tend to be more cooperative and cohesive in advancing their collective interests; they act more decisively, use resources more effectively, and have more autonomy than larger ones.⁸⁴ Smaller groups also help counter agency problems caused by a strong plaintiffs' steering committee and weak client monitoring.⁸⁵ Having fewer members within a group increases the likelihood that members will be able to influence the decision-making process, which helps insulate them from attorney neglect.⁸⁶

B. Exit's Import on Substantive Law

The central-planning model impacts more than just procedural justice. As important as procedural justice is to maintaining institutional legitimacy, aggregation's repercussions on substantive law rival that impact. Aggregation may affect substantive laws in several ways. First, anticipating the need for joinder and consolidation as a prelude to all-encompassing settlement, plaintiffs' lawyers may forgo certain claims and remedies that prove divisive on a state-by-state basis. Although this is more common in the class-action context, mass-tort plaintiffs' attorneys still tend to file motions for class certification on the off chance that the judge might certify a class or to try to toll the statute of limitations and preserve future clients' rights to sue.⁸⁷ Knowing that their clients could return to their home state for trial could encourage attorneys to include all of the legal theories and remedies available to their clients rather than pursuing only those claims most likely to be certified.

Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea, 10 PSYCHOL. PUB. POL'Y & L. 211, 233, 244 (2004). This is unlikely in complex mass-tort disputes.

83. Burch, *Procedural Justice*, *supra* note 10, at 51; Burch, *Litigating Together*, *supra* note 7, at 121–22.

84. See sources cited *supra* note 14.

85. See W. RUSSELL NEUMAN, *THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN THE AMERICAN ELECTORATE* 126–27 (1986); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1223–24 (1982). For a general account of pluralism in the political process, see ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* (1982).

86. See ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 105 (1972); MICHAEL WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* 224 (1970).

87. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 907–08 (E.D. La. 2007) (holding that *American Pipe & Construction Co. v. Utah*, 94 S. Ct. 756 (1974) is a matter of federal common law and therefore the motion for class certification did not toll state statutes of limitation when the court's jurisdiction is based on diversity of citizenship).

Second, multidistrict litigation undermines the communal enterprise of trial and juror fact finding for claims that are national in scope.⁸⁸ Centralizing claims almost inevitably leads to a private, group-wide settlement, at least where the defendant is unsuccessful with motions to dismiss and motions for summary judgment. While settlement might follow a handful of bellwether trials, jurors are geographically concentrated in the transferee forum. That allows little or no public participation from nationwide communities, whereas holding trials in plaintiffs' original fora would further democratic participation ideals and expand the information available for use in any subsequent settlement grid.⁸⁹

Jury trials are, after all, meant to bring the community's diverse perspectives and norms to bear on fact finding, and each community may approach the adjudicative and deliberative process differently.⁹⁰ As Judge Land explained:

[Settlement-focused multidistrict litigation] is a significant departure from our traditional notion of dispensing justice using "local" citizens (jurors) and "local" judges. Historically, this decentralized model not only helped establish "standards of conduct" in our tort system, but its "closeness" to the people was designed to give it legitimacy.

For example, I have been on the bench nine years and cannot recall but a small handful of significant products liability jury trials that I have conducted. We have had numerous cases filed in this district, but for the most part, they have all been swept away to MDL. They may return one day, but I doubt it. Although I cannot precisely articulate the reason, I sense something is lost when Mrs. Smith, who is injured by ingesting a drug in Columbus, Georgia,

88. See S. REP. NO. 109-14, at 14, 61 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 56-57; H.R. REP. NO. 107-370, (2002), available at http://thomas.loc.gov/cgi-bin/cpquery/96?&sid=cp10718f0T&refer=&r_n=hr370.107&db_id=107&item=96&&sid=cp10718f0T&r_n=hr370.107&dbname=cp107&hd_count=104&item=96&&sel=TOC_3551&.

89. See Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 126-33; Lahav, *supra* note 3, at 577-78; cf. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) ("By allowing juries an initial opportunity to [match medical conditions with compensation payouts] on an ad hoc, case-by-case basis, bellwether trials essentially supply counsel with 'raw' data around which a more fair and equitable grid-based compensation system can ultimately be constructed.").

90. See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 864-81 (2009); Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 745 (1995) ("[The right to a jury trial] ensures a role for the community in adjudicative proceedings.").

does not have the opportunity to tell her story here at home but must be relegated to “Plaintiff number X” in some settlement grid in a faraway courthouse by a faceless judge.⁹¹

Social scientists confirm Judge Land’s intuition. As a judge in a “foreign” jurisdiction, transferee judges are atypical community authority figures and are less likely to be seen as prototypical of any given community.⁹² Yet, social-identity theorists have empirically shown that people respond more positively to authority figures when they believe that those figures share common moral values.⁹³ Tom Tyler observes on this point, “[w]hen people think that group authorities represent their values, they identify and cooperate with them.”⁹⁴

As debates over politics, gun control, and tort reform illustrate, plural communities vary dramatically in their moral views and social values. Thus, it does not tax the imagination to theorize that federal judges in San Francisco, California might disagree with those in Lubbock, Texas. Nearly sixty years ago, Robert Merton commented on the increasing amount of social conflict in ideological perspectives:

With increasing social conflict, differences in the values, attitudes and modes of thought of groups develop to the point where the orientation which these groups previously had in common is overshadowed by incompatible differences. Not only do there develop universes of discourse, but the existence of any one universe challenges the validity and legitimacy of the others.⁹⁵

So, while bellwether trials provide the public and the nonparticipating plaintiffs a glimpse into the issues, multidistrict litigation undermines democratic values of communal participation and fact finding by communities nationwide. Because jurors and judges in heterogeneous communities bring their own experiences with them when making decisions, they may well view the “facts” differently, which affects substantive rights and liability.

91. Letter from Judge Clay D. Land, United States District Court Judge for the Middle District of Georgia, to Professor Francis E. McGovern, Duke Law School (Oct. 29, 2010) (on file with author).

92. See generally CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17–46 (2006) (suggesting that there are systematic differences in decision making patterns among federal appeals judges appointed by Democratic or Republican presidents).

93. See Jason Sunshine & Tom Tyler, *Moral Solidarity, Identification with the Community, and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group’s Moral Values*, 66 SOC. PSYCHOL. Q. 153, 154 (2003).

94. *Id.* at 162.

95. ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 218 (1949).

Related to these trial concerns, the third substantive concern is that central planning through multidistrict litigation disturbs federalism principles.⁹⁶ As Larry Kramer has observed, states differ about what parties' rights should be: "Such differences are what a federal system is all about. They are not a 'cost' of the system They are its object, something to be embraced and affirmatively valued."⁹⁷ But centralizing mass-tort claims necessarily dilutes states' laws. Two forces combine to cause this result. First, as discussed, judges and juries in state courts—and even federal courts sitting in various states—have few opportunities to decipher the facts underlying a mass tort in the context of state substantive law. A handful of bellwether trials in one jurisdiction do not remedy this situation. Second, although federal courts pay attention to choice-of-law rules and may apply them faithfully when conducting bellwether trials, all-encompassing settlements water down state law variations in order to make resolution and claims administration possible. While this result is inevitable, it is less troublesome when the settlement grid is informed by trials in multiple jurisdictions that reflect state laws' primacy in governing these disputes.⁹⁸ Consequently, absent a federal standard where a national legislature sets recovery conditions, the current central-planning model raises federalism concerns.⁹⁹

IV. STRATEGICALLY DISAGGREGATING

Despite the concerns prompted by the inability to exit, multidistrict litigation does facilitate efficiency by eliminating duplicative discovery, reducing litigants' costs, and saving time and effort on behalf of the attorneys, their witnesses, and the court system.¹⁰⁰ The American Law Institute, in its *Principles of the Law of Aggregate Litigation*, identified four goals that aggregation should advance to facilitate the pursuit of justice under law: "enforcing substantive rights and responsibilities;" "promoting the efficient use of litigant resources;" "facilitating binding resolutions of civil disputes;" and "facilitating accurate and just

96. See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002).

97. Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 579 (1996).

98. See Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085, 1088 (1994).

99. See generally Kramer, *supra* note 97, at 579.

100. Desmond T. Barry, Jr., *A Practical Guide to the Ins and Outs of Multidistrict Litigation*, 64 DEF. COUNS. J. 58, 59 (1997); Lahav, *supra* note 76, at 2382–83.

resolutions of civil disputes by trial and settlement.”¹⁰¹ As the comments to that section recognize, these goals are often in tension with one another.¹⁰² For instance, if efficiency and binding dispute resolution are our system’s principal aim, then the central-planner model works quite well. But if we value competing aims like communal participation in the fact-finding process for nationwide claims, procedural justice and the dignity it affords litigants, enforcing substantive rights and responsibilities in accordance with state laws, and accurate claim evaluation, then we must strike a better balance between competing ends.¹⁰³

Strategically disaggregating for trial—and thus adhering to multidistrict litigation’s textual limit of “pretrial” litigation—could strike the right balance.¹⁰⁴ Consider the current central-planner model, which aggregates claims jurisdictionally and procedurally based on minimal commonality, as one end of the extreme and atomization as the other. Atomization would allow each individual to maintain a separate and distinct claim, an idea that individual justice theorists hold dear in theory, but which may overly consume judicial and litigant resources in practice.¹⁰⁵ These extremes are not the only two options. Nor must we pursue one exclusively. Strategically disaggregating would retain the current aggregation model for pretrial purposes and would thus capture the benefits of efficient discovery and consistent pretrial rulings, but could also reap exit’s benefits by then disaggregating.

A. *Defining Group Membership*

If plaintiffs disaggregate for trial on some collective basis, how should judges determine the members of that collective for purposes of remand? Consider two potential methods: (1) allow plaintiffs to associate with one another, form their own groups, and disaggregate according to those relational communities; or (2) categorize plaintiffs according to shared factual and substantive legal issues as defined from the standpoint of issue preclusion such that there is a higher degree of commonality.

This first method is centered on free association; it would allow plaintiffs to determine their own groups by forming affective ties with one

101. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (2010).

102. *Id.* at cmt. a.

103. *Id.*

104. See 28 U.S.C. § 1407(a) (2006).

105. See Lahav, *supra* note 76, at 2372; Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 308 (1996).

another.¹⁰⁶ The model encourages plaintiffs to develop organic or indigenous origins such that they form moral obligations to one another that are reinforced by social and personal norms.¹⁰⁷ They can then litigate together and self-govern. Depending on the group, self-governance might take place through social norms and social sanctions or through a formal, collective decision-making arrangement.¹⁰⁸

Although this “litigating-together” model could work well within large multidistrict litigation that the transferee judge plans to retain and conclude,¹⁰⁹ it does not work as a means for delineating groups when disaggregating. First, when diverse subgroups interact with one another during the decision-making process, as they could in multidistrict litigation, they avoid sameness and homogeneity. Homogeneity provokes group decision making’s most detrimental effects: confirmation bias and group polarization. Confirmation bias can infect group decision making when, for example, group members’ conviction makes them discount contrary evidence and retain their presently favored approach.¹¹⁰ Group polarization occurs when likeminded group members deliberate without dissenters; their discussion leads them to adopt more extreme positions.¹¹¹ Both afflictions occur with greater frequency and intensity when group members are connected through friendship, mutual affection, or solidarity.¹¹² So, while this litigating-together model could work well within multidistrict litigation because the aggregate membership includes heterogeneous members, using it as a basis to specify groups for remand could cause confirmation bias and group polarization.

The second reason that this relational definition of community would not work well as a basis upon which to disaggregate is that it transcends

106. Burch, *Litigating Together*, *supra* note 7, at 117–25.

107. *Id.* at 117–21, 125–32.

108. *Id.* at 125–32.

109. Burch, *Litigating Groups*, *supra* note 10; Burch, *Litigating Together*, *supra* note 7.

110. Unlike group polarization and groupthink, confirmation bias is an individual bias that can be exacerbated or mollified by group decision-making. See Dieter Frey, *Recent Research on Selective Exposure to Information*, in 2 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 41, 52–53 (Leonard Berkowitz ed., 1986); Joshua Klayman, *Varieties of Confirmation Bias*, in *DECISION MAKING FROM A COGNITIVE PERSPECTIVE* 385, 385–87, 398 (Jerome Busemeyer & Reid Hastie eds., 1995); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REV. GEN. PSYCHOL.* 175, 178, 210 (1998); Stefan Schulz-Hardt et al., *Biased Information Search in Group Decision Making*, 78 *J. PERSONALITY & SOC. PSYCHOL.* 655, 656–58 (2000).

111. See Michael A. Hogg, *Social Identity, Self-Categorization, and the Small Group*, in *UNDERSTANDING GROUP BEHAVIOR: SMALL GROUP PROCESSES AND INTERPERSONAL RELATIONS* 227, 234 (Erich Witte & James H. Davis eds., 1996).

112. CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 129–30 (2003); Michael A. Hogg & Sarah C. Hains, *Friendship and Group Identification: A New Look at the Role of Cohesiveness in Groupthink*, 28 *EUR. J. SOC. PSYCHOL.* 323, 323–35 (1998).

territorial, geographic boundaries. A relational community uses technology for would-be group members to develop affective ties and social relationships within large, multidistrict litigations. But, in fostering a sense of community that functions on an aggregate level for settlement purposes, it ignores the legal and communal importance of the geographic bounds that disaggregating must consider. Each state's legislature designs and implements its state laws based on a majority of the populace's shared values.¹¹³ Maintaining fidelity to those laws is important to federalism and allowing community members—judges or juries—to bring their experience and understanding of those values to bear on civil enforcement is important to democratic principles.

The second method for defining group membership begins with the optimal group from the standpoint of substantive commonality, which plaintiffs may or may not form on their own. This group is one in which plaintiffs share factual and substantive legal issues, as defined from the standpoint of issue preclusion.¹¹⁴ Given that state laws vary, this typically means remanding groups to their respective home states and then allowing trial judges to further sort claimants based on state-specific legal variations.

B. Disaggregating Based on Substantive Commonality

Disaggregating based on substantive commonality is a three-step process. First, after conducting discovery on common issues (and, in some cases, identifying what those commonalties are) and ruling on pretrial motions that affect the corpus of cases, the transferee judge catalogues the cases and identifies the major distinctions between them. Second, the Panel then remands the cases to their transferor fora with the suggestion that transferor judges within a particular state consolidate the cases before a single trial judge within that state under section 1404(a). Third, the trial judge then begins with categories established by the transferee judge, further delineates between those cases based on substantive state law differences, considers whether those narrowly tailored cases might be ripe for class certification or an issue class, and selects representative cases for trial.

Consider each of these three steps in more detail. First, at the centralized level, the transferee court would begin by overseeing discovery

113. Granted, choice of law considerations often require even state-court juries to apply the laws of sister states.

114. Burch, *Litigating Together*, *supra* note 7, at 122.

on common issues and ruling on pretrial motions that affect all cases, such as *Daubert* motions and motions for class certification. Then, the judge would catalogue the universe of cases and identify the major variables through, for example, exchanging case-profile forms and conducting some case-specific discovery.¹¹⁵ Judge Hellerstein's handling of the 9/11 First Responders litigation and Judge Fallon's initial orders in the Vioxx litigation provide two useful illustrations. Judge Hellerstein required plaintiffs to file a master complaint that identified the issues common across all of the cases and ordered some of them to answer 360 questions under oath that explained the particulars of where, when, and for whom plaintiffs worked as well as their injuries and the defendants' alleged faults.¹¹⁶ As Judge Weinstein did with the military contractor defense in the Agent Orange litigation,¹¹⁷ Judge Hellerstein likewise ordered discovery limited to New York City's governmental immunity defense, a defense that would apply to all plaintiffs.¹¹⁸ The court then had the parties assemble all of this information into a single database to create a "common core of reliable information."¹¹⁹ From that database, the court-appointed Special Masters used the American Medical Association and American Thoracic Society's system for ranking illness severity.¹²⁰

The process that Judge Fallon used to categorize the Vioxx cases provides another example of how transferee courts might discern and categorize overarching common issues before disaggregating.¹²¹ To distinguish between diverse Vioxx cases and to select a representative pool for bellwether trials, Judge Fallon used five major variables, which included: "(1) type of injury (heart attack, stroke, or other), (2) period of ingestion (short-term versus long-term), (3) age group (older or younger than sixty-five), (4) prior health history (previous cardiovascular injuries or not), and (5) date of injury (before or after a certain label change)."¹²²

115. Fallon et al., *supra* note 89, at 2344.

116. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 499–500, 502 (S.D.N.Y. 2009) (requesting information on "pedigree information, medical history, tobacco use, alleged injuries, medical tests, diagnoses, symptoms, treatments, and any worker's compensation filings and recoveries"); Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. (forthcoming, 2012) (manuscript at 19, 29–30), available at <http://ssrn.com/abstract=2033944>.

117. *In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046, 1054–58 (E.D.N.Y. 1982).

118. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 500.

119. *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC(AKH), 2008 WL 793578, at *2 (S.D.N.Y. Mar. 24, 2008); see also Hellerstein et al., *supra* note 116 (manuscript at 56).

120. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 503–04; Hellerstein et al., *supra* note 116 (manuscript at 21, 25).

121. See Fallon et al., *supra* note 89, at 2344.

122. *Id.* at 2345.

By contrast, in the Propulsid litigation, Judge Fallon selected categories based on different alleged injuries.¹²³

Of course, Judge Fallon focused his search on cases that he could try in the transferee forum since he preferred not to remand them.¹²⁴ Still, in any given mass tort, the attorneys and the transferee judge “should focus on those variables that can be easily identified, are substantively important, and provide clear lines of demarcation—i.e., the major variables,” which allows them to then “create sensible and easily ascertainable groupings.”¹²⁵

The second step in strategically disaggregating is to remand the cases. In so doing, it makes sense to allow federal district courts to coordinate their cases on a statewide level before a single judge in that jurisdiction using section 1404(a) and Rule 42.¹²⁶ Federal courts pull jurors from each of the counties within their district, which includes a broad swath of a state’s various communities and thereby satisfies both democratic concerns about involving the territorial community in fact finding and federalism concerns about applying the appropriate state substantive law.¹²⁷ Although the Panel might suggest an appropriate judge with the requisite expertise and time to handle the cases, given the Supreme

123. *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2003 WL 22023398, at *1 (E.D. La. Mar. 11, 2003).

124. Jef Feeley & Leslie Snadowsky, *Merck Vioxx Judge Threatens to End Suit Consolidation*, BLOOMBERG, Jan. 5, 2006.

125. Fallon et al., *supra* note 89, at 2345.

126. Section 1404(a) allows courts to transfer a case “[f]or the convenience of parties and witnesses, in the interests of justice . . . to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a) (2006). “Although a motion by one of the parties is ordinarily required for transfer, a district court may consider the possibility of transfer *sua sponte*, particularly when the parties have been given an opportunity to be heard prior to transfer.” *Fort Knox Music, Inc. v. Baptiste*, 139 F. Supp. 2d 505, 512 (S.D.N.Y. 2001); *see also* *Lead Indus. Ass’n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 79 n.17 (2d Cir. 1979). To transfer for trial purposes, venue must either be proper, or, since venue is waivable, the parties must consent. *See* 28 U.S.C. § 1404(a). Venue will typically not be an issue in mass-tort cases with corporate defendants. For corporations, venue is proper where the defendant resides, which is where the defendant is subject to personal jurisdiction when the case commenced. 28 U.S.C. § 1391(d).

127. This assumes that after conducting a choice-of-law analysis, judges in most states tend to apply their own state’s law, which they have wide latitude to do. As the Supreme Court held in *Phillips Petroleum Co. v. Shutts*, Kansas could apply its own law to the claims asserted by the class members if it had a “significant contact or significant aggregation of contacts” . . . in order to ensure that the choice of Kansas law is not arbitrary or unfair.” 472 U.S. 797, 821–22 (1985). This proposition is bolstered by the Court’s decision in *Sum Oil Co. v. Wortman*, which declared, “it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court’s attention.” 486 U.S. 717, 730–31 (1988). It may be the case, however, that a different state’s law would govern a dispute filed in a particular jurisdiction.

Court's restriction in *Lexecon*, the decision to coordinate remanded federal cases on a statewide basis lies with the transferor judge.¹²⁸

The third step assumes that the transferor judges see the merit in coordinating similar cases on remand and encourages the judge who ultimately receives the cases (the "trial judge") to further sort claimants into additional categories based on substantive commonalities in state law. The first step in the disaggregation process provides a well-defined starting point for the trial judges because it involves categorizing the major commonalities at the centralized level. With major questions about commonality hashed out at the national level, the trial judge can pinpoint unique state law factors that might also affect commonality. At that disaggregated level, it may become clear that one issue binds a large number of plaintiffs in that jurisdiction, which makes their claims ripe for an issue class or a consolidated trial on that question. In that sense, a narrower class definition could "generate common *answers* apt to drive the resolution of the litigation."¹²⁹ Using these preset and additional variables, the trial court could then select representative cases for trial.

V. EXIT'S COSTS

Despite exit's benefits, several strong objections can be leveled at disaggregating, most of which center around the competing importance of accuracy, efficiency, finality, and consistency. Accordingly, this Part considers three principal objections based on these competing values. First, it examines how disaggregating may hamper the parties' ability to negotiate a global settlement, which conveys an apprehensiveness about the value of efficiency and finality when contrasted with accuracy and enforcing substantive rights. Second, this Part considers exit's effect on reaching consistent outcomes and balances this consistency concern against the need for substantively accurate outcomes. Finally, transferee judges have expressed an efficiency related concern about sending cases back to their home districts. They fear that transferor judges will lack the time and expertise to handle complex cases.

Consider the first and perhaps most compelling objection: disaggregating undermines attorneys' ability to broker a nationwide settlement. Returning cases to federal court within their originating state

128. See *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998); 28 U.S.C. § 1407(a).

129. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting Nagareda, *supra* note 37, at 132).

means that the negotiating power no longer rests in the hands of a few power players on the steering committee. For the defendant, this makes finality more elusive. And this hinders plaintiffs' attorneys' ability to tender closure to the defendant, who usually demands this concession in exchange for a handsome pay out.

By one account, exit's effect on facilitating a nationwide resolution through settlement makes both parties worse off. Plaintiffs cannot deliver finality to defendants, neither party can fully benefit from the exchange, and plaintiffs' claims may then be uneconomical to pursue. But there are two alternative accounts that suggest this may not be the case. First, plaintiffs' ability to exit the multidistrict litigation and return to their home states for trial will likely amplify their ability to credibly threaten the defendant and, with more attorneys in play, may reduce the risk of collusion between plaintiffs' attorneys and the defendant.¹³⁰ After all, trial is the one bargaining chip that plaintiffs' attorneys have.¹³¹ Multidistrict litigation removes that bargaining chip for all but a few plaintiffs. It also forces those who do want a trial (and who are selected) to consent to trial before the transferee judge. The settlement that typically results is thus conditioned on the outcome of bellwether trials, which typically advantage defendants.¹³² So, one alternative account is that exit would improve plaintiffs' threat effects and might result in a more favorable global settlement before remand.

The second reason that exit may not negatively affect plaintiffs' settlements is that defendants may have to negotiate smaller inventory settlements tailored to the plaintiffs in a particular subgroup. Rather than have a single, nationwide settlement where the value of stronger claims is diluted by weak claims, or even a lump-sum settlement that attorneys must allocate among their clients, tailored settlements would have to take substantive differences into account.¹³³ For example, if plaintiffs sued in a state with favorable substantive law or had strong evidence of specific causation, then they could demand a higher price for their consent.

130. See Lahav, *supra* note 76, at 2402 ("The risk of collusion may be reduced by multicenteredness because competition will make it more difficult for defendants to buy off plaintiffs' counsel at the expense of the class.")

131. NAGAREDA, *supra* note 1, at 20.

132. *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 152–55 (D. Mass. 2006).

133. See NAGAREDA, *supra* note 1, at 25–26 (observing that consolidating individuals with "widely disparate physical conditions" can enhance the settlement value of "exposed but unimpaired claimants"); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1009–12 (2005) (noting that aggregating claims can both amplify and undervalue certain claims).

Consequently, disaggregating provides plaintiffs with more choices about when, whether, and under what conditions to settle. It thus increases the likelihood of genuine consent.¹³⁴ So, while finality remains important from a business-transaction perspective, allowing plaintiffs to disaggregate may result in a stronger correlation between claim value and settlement value.

As Judge Easterbrook explained in the Bridgestone/Firestone litigation, although “[e]fficiency is a vital goal in any legal system . . . the central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution.”¹³⁵ That information includes what the various state laws would say about a specific case, which is often unknown because “the central planning model keeps the litigation far away from state courts.”¹³⁶ Even when the transferee court conducts bellwether trials, it is limited to trying those cases that were filed directly in the transferee forum or where the plaintiffs consent.¹³⁷ Thus, even though mass torts tend to involve claims from across the nation, there is often little known about how various state laws and juries might affect trial verdicts.

The trouble with central planning then is that it may overvalue efficiency at the sake of accuracy. An all-encompassing settlement *may* accurately value claims (and bellwether trials certainly increase those odds), but trials in diverse jurisdictions would supply the missing information needed to evaluate nationwide claims vis-à-vis disparate state substantive laws and heterogeneous communities. As Judge Easterbrook concluded, the market model, which uses diversified decision making, may look “‘inefficient’ from the planner’s perspective, but it produces more information, more accurate prices, and a vibrant, growing economy.”¹³⁸ Something similar might be said of disaggregating.

Now consider a second objection to strategically disaggregating: it will produce inconsistent results.¹³⁹ When states enact different laws and reach

134. See Burch, *Group Consensus*, *supra* note 10, at 512–14.

135. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002).

136. *Id.*

137. See Fallon et al., *supra* note 89, at 2354 (“If litigants in cases transferred by the MDL Panel do not consent to trial, the universe of cases amenable to trial in MDL is extremely limited in both number and applicable law. For example, had none of the non-Louisiana litigants consented to trial in the *Vioxx* MDL, the total universe of triable cases would have been approximately 350 and all would have been tried under Louisiana law, which does not allow recovery of punitive damages.”).

138. *In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1020 (citing THOMAS SOWELL, KNOWLEDGE AND DECISIONS (1980)).

139. Of course, issue preclusion exists to reduce the possibility of inconsistent results, but preclusion depends on whether the issues are actually the “same issues,” which they may not be given

alternative conclusions about parties' rights, we can hardly be surprised if home jurisdictions compensate mass-tort plaintiffs differently. If pretrial litigation is handled in a coordinated fashion, then those inconsistencies should appropriately reflect diverse judgments about how to compensate various tort victims under competing state laws.¹⁴⁰ So long as this is the case, there is nothing inherently unfair about inconsistency. To be sure, the awards may vary from a national baseline, but unless Congress enacts national legislation, the system must measure fairness through heterogeneous state laws.¹⁴¹

A single trial in a single jurisdiction, or even a few bellwether trials in a single jurisdiction, should not be used as the metric for consistency since these trials lack the diversified decision making needed to evaluate and produce accurate outcomes vis-à-vis various state laws. From a statistical standpoint, a verdict is simply one point on a frequency distribution.¹⁴² If the same case were tried 100 different times, each verdict would represent a point on a spectrum, any one of which may over- or under-compensate compared with the mean distribution.¹⁴³ To be sure, I am not claiming that we should preference accuracy over consistency and efficiency to this degree, but rather that the balance should not overly favor consistency at the expense of accuracy, opportunities for communal participation, and federalism. At the least, disaggregating for trial can produce additional points on the verdict spectrum that can, in turn, facilitate increasingly accurate settlement values.

Finally, consider an objection that's related to the efficiency concern: transferee judges hesitate to return cases to their home districts for fear that the transferor judge will lack the expertise and time to handle them.¹⁴⁴ This concern might be further exacerbated if the transferor court modifies pretrial orders and fails to adhere to the law-of-the-case doctrine.¹⁴⁵ Judge

variations in state laws, and whether other cases have yielded inconsistent results—the problem addressed here. *See generally* Marcus, *supra* note 41, at 2254–55.

140. *See* Cover, *supra* note 16, at 656; Kramer, *supra* note 97, at 579; Lahav, *supra* note 76, at 2398 (“Depending on the social and political context of the particular issue at stake, jurisdictional redundancy can result in an emerging consensus—such as occurred in the tobacco litigation—or reflect deep social disagreements.”) (footnote omitted).

141. Kramer, *supra* note 97, at 579; Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76, 89–90 (1989).

142. Saks & Blanck, *supra* note 4, at 833.

143. *Id.* at 833–35.

144. *Delavventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 157 n.10 (D. Mass. 2006).

145. This doctrine suggests that the transferor court should defer to the rulings of the transferee judge, but does not mandate this result. *See, e.g., Amarel v. Connell*, 102 F.3d 1494, 1516 (9th Cir. 1997).

Weigel, an original member of the Judicial Panel on Multidistrict Litigation, suggested, “it would be improper to permit a transferor judge to overturn orders of a transferee judge even though error in the latter might result in reversal of the final judgment of the transferor court.”¹⁴⁶ To allow otherwise, he noted, would undermine multidistrict litigation’s purpose.¹⁴⁷

Still, a helpful analogy might be drawn between the transferee judge and an architect who designs two or three blueprints for homes in a planned development. Because the models are cookie cutters, the builders will inevitably have to make some adjustments based on the terrain of the individual lots. The same might be said for the trials on remand; the trial judge should principally follow the transferee judge’s blueprint, except where the individual circumstances of a given case dictate otherwise. As I have suggested, once the transferee court conducts pretrial discovery and identifies the major categories in a case and the trial judge further parses these cases from a “same issue” standpoint, that judge might decide that the best way to structure trial would be through consolidation or using issue classes. Given the pervasive dissimilarities among cases in large-scale aggregation, the transferee court would be poorly situated to decide these narrower, state-specific questions. But the trial judge, with a more limited docket, can easily parse these distinctions.

As for the concern that the trial judge will lack the time and expertise to handle complex cases, this can be minimized through several means. First, if remand occurs after a handful of bellwether trials, plaintiffs’ counsel will have already assembled trial packages, which they could disseminate to litigants and local counsel to streamline the process.¹⁴⁸ Second, modern communication methods make it much easier for transferee judges to assist and work alongside transferor judges during the remand process.¹⁴⁹ Third, if similar cases are centralized statewide before a single federal judge, or even a handful of judges, then it is easier to take time and expertise into account. Finally, as a last resort, the transferee judge could seek an intracircuit assignment to preside over the case in its

146. Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978).

147. *Id.*

148. Fallon et al., *supra* note 89, at 2339–40 (“The trial package is the final product of this interactive creative process, and its dissemination to local counsel upon the dissolution of MDL is akin to ‘taking the show on the road.’”).

149. *See* *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d at 157 n.10. *See generally* Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J. L. & SOC. PROBS. 451 (2012) (discussing the ways in which the Internet facilitates new procedures for handling mass torts).

home jurisdiction, though this would not alleviate concerns about whether the judge is prototypical of that community.¹⁵⁰

CONCLUSION

Although disaggregating may hamper efficiency and finality, the balance has shifted too far towards those goals and away from competing concerns like substantive accuracy, fairness, communal participation in fact finding, and procedural justice. Untethering plaintiffs from the central-planner model post-aggregation gives plaintiffs more litigation choices, permits heterogeneous communities and judges to weigh in on nationwide controversies, and supplies more information about claim value to settlement designers. In short, disaggregating encourages pluralism in mass-tort litigation, which rounds out the balance in favor of fairness and accuracy.

150. *See Delavventura*, 417 F. Supp. at 157.