PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 51
Issue 3 *Symposium: All Rise: The Future of the Federal Judiciary*

Article 4

4-1-2024

# The "Inherent Powers" of Multidistrict Litigation Courts

Lynn A. Baker

# The "Inherent Powers" of Multidistrict Litigation Courts

Lynn A. Baker*

*ABSTRACT*

*Mass tort multidistrict litigations (MDLs) involving thousands of claims present the judge with unique management issues. The MDL statute, in its scant two pages enacted in 1968, offers no guidance for the proper handling of these issues, and the Federal Rules of Civil Procedure speak to these issues only very generally through Rules 16 and 42. Thus, MDL judges have often invoked their "inherent powers" as authority when they take certain actions with significant implications for the parties and their attorneys. Not surprisingly, several of these actions and their underlying justifications have been controversial: (a) appointing lead attorneys; (b) ordering that these attorneys be compensated through a "common benefit" assessment on the recoveries of certain clients in the litigation; (c) reducing the total contractual fees that plaintiffs agree to pay their individually retained counsel; and (d) reviewing private settlement agreements. Professors Robert Pushaw and Charles Silver have recently offered the most thorough analysis to date of judges' assertions of their inherent powers when managing MDLs and have concluded that the courts' inherent powers do not properly extend to any of these four actions.*

*In this Article, I critically examine the arguments put forward by Pushaw and Silver. Offering my own analysis within their inherent powers framework, I agree with Pushaw and Silver's conclusion that the inherent powers of the federal courts do not properly extend to reducing the total contractual fees that plaintiffs agree to pay their individually retained counsel or to reviewing private settlement agreements. However, I find unpersuasive their analysis regarding the appointment and compensation of MDL leadership attorneys.*

---

* Frederick M. Baron Chair in Law, University of Texas School of Law. This Article was prepared for the *Pepperdine Law Review*'s 50th Anniversary Symposium, *All Rise: The Future of the Federal Judiciary*, held on March 24, 2023, at Pepperdine University Caruso School of Law. I am grateful to Professor Robert Pushaw for inviting me to participate and for his valuable comments on an early draft, to the Pepperdine University Caruso School of Law community for its gracious hospitality, and to the *Pepperdine Law Review* Volume 51 editors for guiding this Article into print.

*I conclude that MDL courts do have authority to appoint lead attorneys and to order that these attorneys be compensated through a common benefit assessment on the recoveries of certain clients in the litigation.*

TABLE OF CONTENTS

## I. INTRODUCTION

More than half of all civil litigation in federal courts now takes place as multidistrict litigation (MDL), and billions of dollars in compensation each year are paid to claimants through the MDL litigation process.[1] Not surprisingly, with the increasing prominence of MDL have come increasing concerns about certain powers being exercised by some MDL judges.[2] The concerns expressed are not relevant to all MDLs. For example, some MDLs are class actions and are subject to extensive—and largely uncontroversial—judicial oversight pursuant to Federal Rule of Civil Procedure (FRCP) 23.[3] And some MDLs are small, involving ten or fewer claims.[4] The MDLs in which

1. As of June 30, 2023, there were 548,345 private civil cases pending in federal district courts, and the Judicial Panel on Multidistrict Litigation reported 406,456 actions pending in MDLs as of June 15, 2023, which is 74.12% of all pending civil cases in federal district courts. *Table C-1—U.S. District Courts–Civil Statistical Tables for the Federal Judiciary (June 30, 2023)*, U.S. CTS. (June 30, 2023), https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2023/06/30 [https://perma.cc/5KUR-C6NV]; *see also* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT - DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (June 15, 2023), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-June-15-2023.pdf [https://perma.cc/98SV-A8AD]. The 254,943 pending actions involving the 3M Combat Arms Earplugs were 62.72% of all actions pending in MDLs and 46.49% of all private civil actions pending in federal district courts. *Id.*

Regarding the compensation that is paid through the MDL process, the August 2023 global settlement of the 3M Combat Earplug litigation was for $6 billion, and the December 2022 settlement of the JUUL vaping litigation was for $1.7 billion and $6 billion. *See* Combat Arms Settlement Agreement 26–31 (Article 11, Payments to Be Made by Defendants), https://www.uscourts.gov/courts/flnd/3M-MSA_I.pdf [https://perma.cc/X6C3-UG4J]; J. Edward Moreno, *3M Says It Will Pay $6 Billion to Resolve Combat Earplug Lawsuits*, N.Y. TIMES (Aug. 29, 2023), https://www.nytimes.com/2023/08/29/business/3m-earplug-litigation.html [https://perma.cc/8RK7-Q9NS]; Christina Jewett, *Vaping Settlement by Juul Is Said to Total $1.7 Billion*, N.Y. TIMES (Dec. 10, 2022), https://www.nytimes.com/2022/12/10/health/juul-settlement-teen-vaping.html [https://perma.cc/9UAQ-4EHL].

2. *See, e.g.*, Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations*, 48 BYU L. REV. 1869, 1874 (2023).

3. *See* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1321–22 (2020) (describing MDLs that involve "a small number of overlapping class actions"); *see also* FED. R. CIV. P. 23.

4. *See* Clopton*, supra* note 3, at 1320–21 (giving examples of "small MDLs"). As of October 16, 2023, the "MDL Statistics Report" of the JPML indicated that 16 of 172 (9.3%) pending MDLs involved 10 or fewer actions. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT - DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (Oct. 16, 2023), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-October-16-2023.pdf [https://perma.cc/BZU6-3N53] [hereinafter OCTOBER 2023 MDL JUDICIAL PANEL REPORT].

questions and controversies have arisen about the scope of the court's powers, especially its "inherent powers," are primarily the non-class mass torts.[5] These are the "mega" MDLs, involving hundreds or thousands of personal injury product liability claims, such as those against manufacturers of pharmaceuticals or medical devices alleged to have dangerous side effects.[6]

Over the past several decades, MDL judges in mass tort cases have invoked their "inherent powers" to do several things that have proven controversial: (a) they have appointed "lead attorneys," typically for the plaintiffs, who displace in part the clients' individually retained counsel (IRC);[7] (b) they have imposed "common benefit" assessments on recoveries of certain clients to compensate the lead attorneys;[8] (c) they have, on occasion, reduced the total contractual fees that the clients agreed to pay their IRC;[9] and (d) on very rare occasion, they have reviewed private settlement agreements.[10] Various critics

5. *See generally* Pushaw & Silver, *supra* note 2 (discussing federal courts' exercise of "inherent powers" in mass tort MDLs).

6. *See* OCTOBER 2023 MDL JUDICIAL PANEL REPORT, *supra* note 4. JPML statistics as of October 16, 2023, indicate that 37 of 172 (21.51%) pending MDLs involved 1,000 or more actions, with the largest being products liability cases involving 3M Combat Arms Earplugs (348,286 actions), Johnson & Johnson Talcum Powder (54,119 actions), Xarelto (31,965 actions), and Polypropylene Hernia Mesh (21,082 actions). *Id.* at 1; *see also* Clopton, *supra* note 3, at 1309–10 (describing the nineteen MDLs pending in April 2018 with more than 1,000 cases each).

7. *See, e.g.*, David L. Noll & Adam S. Zimmerman, *Diversity and Complexity in MDL Leadership: A Status Report from Case Management Orders*, 101 TEX. L. REV. 1679 (2023) (empirical analysis of leadership appointment orders in sixty-eight products liability MDLs created between December 2001 and June 2019); David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433 (2020) (empirical analysis of leadership appointment orders entered in 201 MDLs pending in the federal courts as of June 18, 2019); Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 474 (2020) (discussing leadership appointment orders in MDLs and citing examples).

8. *See, e.g.*, Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374 (2014) (noting that "MDL transferee courts usually establish a procedure for creating a common benefit fee to compensate the members of the [court-appointed leadership] and the members of any subcommittees who have done common benefit work."); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV105, 115–19 (2010) (discussing the "common benefit" assessments ordered by judges in large MDLs involving Guidant Defibrillators (Frank, J.), Zyprexa (Weinstein, J.), and Vioxx (Fallon, J.)).

9. *See, e.g.*, Silver & Miller, *supra* note 8, at 136–41 (discussing the caps on clients' contractual contingent fees imposed by the MDL judges in Guidant Defibrillators, Zyprexa, and Vioxx); Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59 (2013) (analyzing fee capping decisions by MDL judges).

10. The two major examples of this practice to date are each *sui generis*. The best known is Judge

and scholars have contended that one or more of these actions taken by MDL courts is improper, notwithstanding the court's invocation of its inherent powers.[11] Most notably, Professors Robert Pushaw and Charles Silver have argued that *each* of these uses of inherent powers "subvert the Constitution's structure and violate the Due Process Clause."[12] They contend that these exercises of judicial power are "lawless, even though they are lawful in the less profound, positive sense that MDL courts have asserted them and have yet to be constrained by appellate courts."[13]

In this Article, I examine four of the controversial actions frequently taken by MDL judges pursuant to their "inherent powers" and the arguments put forward by Pushaw and Silver that each of these actions is improper. In my examination, I accept, *arguendo*, the analysis of the federal courts' inherent powers on which Pushaw and Silver rely, and which was first offered in 2001 by Professor Pushaw, one of the nation's leading experts on the history and doctrine of the inherent powers of the federal courts.[14] Part II sets out the

Hellerstein's *sua sponte* review and rejection of the proposed settlement agreement in the 9/11 responders' litigation. *See, e.g.*, Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259, 1274–75 (2017); Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127 (2012). This was not an MDL but a consolidation that proceeded under a different federal statute. *See* Clopton, *supra* note 3, at 1324. The other major example is Judge Fallon's review of the global settlement agreement in the *Vioxx* MDL. But his review was not *sua sponte*; rather, the settlement agreement itself stated that Judge Fallon would serve as "chief administrator" of the settlement and authorized him to oversee it and even to modify it. *In re* Vioxx Prods. Liab. Litig., 650 F.Supp.2d 549, 554 (E.D. La. 2009); *see also* Silver & Miller, *supra* note 8, at 136; Lynn A. Baker & Charles Silver, *In Defense of Private Claims Resolution Facilities*, 84 LAW & CONTEMP. PROBS., no. 2, 2021, at 45, 68–69.

11. *See, e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 121–32 (Cambridge Univ. Press 2019) (contending that MDL judges have illegitimately invoked inherent powers to assert unlimited power to take various actions); Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 773 & n.13 (2019) (observing that "[s]eizing on the lack of formal structures of individual protections, many have expressed concerns that MDL proceedings have become the Wild West of aggregation law," and citing to works by Robert G. Bone, Elizabeth Chamblee Burch, and Linda Mullenix); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 133, 111 (2015) (contending that MDL is unconstitutional because it arguably "fails to provide a constitutionally adequate opportunity to litigate" to individual plaintiffs within the MDL, and describing MDL as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies").

12. Pushaw & Silver, *supra* note 2, at 1926.

13. *Id.*

14. *See, e.g.*, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

express sources of authority for MDL courts and briefly summarizes Pushaw and Silver's analysis of the inherent powers of the federal courts. Part III examines two of the controversial powers commonly exercised by MDL courts: (a) reducing the total contractual fees that the clients agreed to pay their IRC, and (b) reviewing (and potentially "rejecting") private settlement agreements. I agree with Pushaw and Silver's conclusion that the inherent powers of the federal courts do not properly extend to either of these actions, but I offer my own analysis within Pushaw and Silver's inherent powers framework. Part IV focuses on the authority of MDL courts to appoint lead attorneys. I critically examine each of the arguments given by Pushaw and Silver for why the federal courts lack this power, and I ultimately find none of their arguments persuasive. Part V examines the authority of MDL courts to compensate their appointed lead attorneys by imposing "common benefit" assessments on the recoveries of certain clients in the litigation. Here, too, I disagree with Pushaw and Silver's analysis and their conclusion that the inherent powers of MDL courts cannot properly authorize such assessments. Part VI concludes.

## II. THE EXPRESS AND "INHERENT" POWERS OF MDL COURTS

The work of MDL courts, like all federal courts, is authorized and governed by Article III of the U.S. Constitution and the Federal Rules of Civil Procedure (FRCP), including "local rules" adopted by each district and circuit court.[15] In addition, the work of MDL courts is authorized and governed by the Multidistrict Litigation statute, 28 U.S.C. § 1407.[16] Enacted in 1968, the MDL statute provides that the Judicial Panel on Multidistrict Litigation (JPML) may transfer to a single judge any civil actions "involving one or more common questions of fact" that are pending in different districts.[17] The transfers are "for coordinated or consolidated pretrial proceedings" upon the JPML's "determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient

15. David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 430 (2019) ("The MDL system operates within the federal judiciary and is administered by Article III judges."); *see also* U.S. CONST. art III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States District Courts . . .").

16. 28 U.S.C. § 1407.

17. *Id.* § 1407(a).

conduct of such actions."[18] The statute authorizes the judge to whom the MDL is assigned to "exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings."[19] But the statute adds that "[e]ach action so transferred shall be remanded by the [JPML] at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . ."[20]

In addition to the powers granted by these express sources of authority, MDL judges take various actions which they contend are authorized by their inherent powers.[21] For purposes of this Article, I accept, *arguendo*, Pushaw and Silver's analysis of the inherent powers of the federal courts, which is based in part on the structural principle that a federal court's inherent powers cannot be plenary: "[A]llowing judges to exercise virtually unbridled discretion contravenes the Constitution's limitation of the federal government to its enumerated powers."[22] Thus, Pushaw and Silver contend that the "judicial powers" authorized by Article III carry with them two categories of implied powers: "implied indispensable" powers and "beneficial" powers.[23] The "implied indispensable" powers are "critical to the exercise of 'judicial power' by courts," such as the "power to supervise discovery and the presentation of evidence at trial."[24] The implied indispensable powers also include those necessary for the courts to "be able to handle their internal administration and manage cases, maintain their authority, and safeguard the integrity of their processes."[25] Pushaw and Silver contend that these implied indispensable powers are "rooted in the Constitution" and that Congress therefore cannot

18. *Id.*

19. *Id.* § 1407(b).

20. *Id.* § 1407(a).

21. *See, e.g*, Pushaw & Silver, *supra* note 2, at 1871, 1926–58.

22. *Id.* at 1916. Pushaw and Silver note that this is one of three "structural constitutional principles" that constrain a court's inherent powers. *Id.* In addition, "Article I grants Congress 'legislative power' to make laws, whereas Article III confines courts to the 'judicial power' of interpreting existing laws—except when they must craft a rule because of a gap in a federal statute or the Constitution." *Id*. Finally, "Articles I and III authorize Congress to regulate the federal courts' jurisdiction and to make for them all laws (including adjective ones) that it deems 'necessary and proper' to effectuate the exercise of judicial power." *Id*.; *see also* Pushaw, *supra* note 14, at 741–44 (describing how the concept of "inherent powers" of federal courts flows from the language of Article III).

23. *See* Pushaw & Silver, *supra* note 2, at 1917–18 (defining the two categories of inherent judicial authority); Pushaw, *supra* note 14, at 741, 847–49 (same).

24. Pushaw & Silver, *supra* note 2, at 1917.

25. *Id.*

"prohibit or impair them."[26]

In contrast, the "beneficial" implied powers, according to Pushaw and Silver, are merely "helpful, useful, or convenient to judges in fulfilling their Article III role."[27] Thus, with regard to these powers, judges "should operate within the established federal legislative scheme and seek to have any novel powers formally recognized in a statute or a congressionally approved [Federal Rule of Civil Procedure]."[28] Pushaw and Silver reject the claim that federal courts can properly create new, beneficial inherent powers "in common law fashion."[29] They acknowledge that to "properly exercise Article III 'judicial power,' federal 'courts' must be able to maintain their authority and to process and decide cases independently."[30] They contend, however, that "today it is almost never indispensably necessary for a federal judge to invoke [inherent powers] to fill gaps in adjective law in order to manage and adjudicate a case."[31] Rather, they argue, "[C]ourts should amend their local rules, or recommend that the Court (with congressional approval) revise the Federal Rules, to meet that rare need."[32] They assert that "[s]uch amendments safeguard due process by giving parties and their attorneys notice instead of subjecting them to arbitrary assertions of [inherent powers]."[33]

I am prepared to accept, for the sake of argument, Pushaw and Silver's distinction between "indispensable" and "beneficial" inherent powers. The issue then becomes how to understand, within this conception of implied powers, the four controversial actions taken by MDL judges that are the focus of this Article.

---

26. *Id.*

27. *Id.*

28. *Id.* at 1918.

29. *Id.* Pushaw and Silver note specifically, for example, that "the growing volume and complexity of litigation" taken alone does not license federal courts to create new "beneficial" inherent powers. *Id.* Pushaw and Silver acknowledge that "[a]lthough Pushaw's approach captures the original understanding . . . the modern Court has consistently allowed several [inherent powers] that are merely beneficial." *Id.* at 1920. They argue that "the Court should require federal judges to clearly identify which IPs fall into this category (and are therefore subject to complete congressional control) and which are indispensable (and hence amenable only to enabling legislation) instead of lumping all IPs together." *Id.* at 1920–21.

30. *Id*. at 1921.

31. *Id.* In this regard, Pushaw and Silver contrast current times with "the early days of the Republic." *Id.*

32. *Id.*

33. *Id.*

## III. THE MDL COURT'S CAPPING OF CONTRACTUAL ATTORNEYS' FEES AND REVIEW OF PRIVATE SETTLEMENT AGREEMENTS

Pushaw and Silver, among other commentators, have argued that the powers of the federal courts do not properly extend to two of the controversial actions sometimes taken by MDL judges: (a) reducing the total contractual fees that the clients agreed to pay their individually retained counsel, and (b) reviewing (and potentially "rejecting") private settlement agreements.[34] I agree with Pushaw and Silver's conclusion that the inherent powers of the federal courts do not properly extend to either of these actions, but I briefly offer my own analysis within Pushaw and Silver's inherent powers framework.

Both of these judicial actions involve private agreements entered into either by plaintiffs' counsel and their plaintiff clients (in the case of contractual attorneys' fees) or by plaintiffs' counsel and defense counsel (in the case of a settlement agreement).[35] There is no role that a court *ever needs* to play with regard to either type of private contract. Consider that mass tort MDLs regularly proceed smoothly without the MDL court reviewing or taking any particular actions with regard to either category of private contract.[36] The court's "implied indispensable" powers, therefore, cannot authorize such actions.[37]

---

34. Scholarship that is critical, on various grounds, of MDL judges' capping of the contractual attorneys' fees that the clients each agreed to pay their attorneys includes: Pushaw & Silver, *supra* note 2, at 1950–52; Silver & Miller, *supra* note 8; Ratner, *supra* note 9; Aimee Lewis, *Limiting Justice: The Problem of Judicially Imposed Caps on Contingent Fees in Mass Actions*, 31 REV. LITIGATION 209 (2012).

Scholarship that is critical, on various grounds, of MDL judges' reviewing (and potentially "rejecting") private settlement agreements includes: Pushaw & Silver, *supra* note 2, at 1953–58; Baker & Silver, *supra* note 10; Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015 (2013) (rejecting the notion that judges have the power to "approve" or "reject" settlements); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123 (2012) (outlining the limits of judicial authority regarding private mass tort settlements.); Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319 (2011) (arguing that the Federal Rules of Civil Procedure do not authorize judicial approval or rejection of non-class mass settlements).

35. *Cf.* Grabill, *supra* note 34, at 175–76 (observing that the original invocation of inherent powers as justification for courts reviewing non-class settlements and attorneys' fees recognized that the "settlement was 'in the nature of a private agreement between individual plaintiffs and the defendant.'").

36. *See, e.g.*, Baker & Silver, *supra* note 10, at 45.

37. It should be noted that although I agree with Pushaw and Silver that the inherent powers of the federal courts do not properly extend to these two types of actions, I do not necessarily agree with their supporting analysis set out at Pushaw & Silver, *supra* note 2, at 1950–58.

To further elaborate: With regard to an MDL court ordering a reduction in the total contractual fees that the clients agreed to pay their individually retained counsel, it is significant that each plaintiff in a non-class action MDL will have a lawyer whom they chose and retained through an individual contract.[38] Each of those individual contracts will detail, among other things, the basis on which the client has agreed to pay their chosen attorney for their service.[39] Virtually all of these plaintiffs' attorneys will have agreed to work on a contingent fee, which is specified in the contract as a certain percentage of any recovery that the attorney might obtain for the client.[40] When an MDL judge reduces or caps that total percentage fee that the client has agreed to pay and that the attorney has agreed to accept, the judge is essentially rewriting *sua sponte* the terms of the attorney-client retainer agreement. And the court's implied indispensable powers cannot be invoked to justify this action.

With regard to the MDL court reviewing private settlement agreements, it is significant that a mass tort settlement agreement is importantly different from a class action settlement agreement. Pursuant to FRCP 23, a proposed settlement of a class action must be reviewed and approved by the judge in whose court the action is pending.[41] A group settlement agreement that does not involve a class action, however, is a private agreement.[42] In a mass tort MDL, such a settlement agreement will typically involve an "inventory"

38. *See* Baker & Herman, *supra* note 7, at 473 ("Each claimant in a mass tort MDL initially chooses and retains counsel pursuant to an individual attorney-client contract.").

39. *See* Ratner, *supra* note 9, at 64 (MDL plaintiffs "choose their own lawyers on terms they individually negotiate").

40. *See* Baker & Herman, *supra* note 7, at 473 ("Virtually all of these contracts will provide the individually retained counsel . . . a contingent fee tied to the size of the client's eventual gross monetary recovery.").

41. *See* FED. R. CIV. P. 23(e) (stating that a certified class, or a class proposed to be certified for purposes of settlement, may be settled "only with the court's approval" and specifying that "[i]f the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate."). Judicial review and approval of class action settlements are needed because "class members have practically no direct control over class counsel, and they do not affirmatively consent to the representation." Bradt & Rave, *supra* note 10, at 1268. Thus, Rule 23 "assign[s] a central role to the judge to look out for absent class members. Indeed, some courts have described the judge as a 'fiduciary of the class.'" *Id.*; *see also* Baker & Silver, *supra* note 10, at 67–68 (noting that "[b]ecause relationships between absent class members and class counsel are created by law, not by contracts, the law must address all problems connected to the principal-agent relationships it creates" and contending that problems such as excessive agency costs are addressed through mandatory judicial review of class action settlements).

42. *Cf.* Rothman, *supra* note 34, at 351 (noting that judicial approval and rejection is "inapplicable to a non-class mass settlement, which is a private contract").

settlement with a particular plaintiffs' law firm.[43] This means that the settlement agreement will cover only that portion of the cases "in" the MDL for which the plaintiffs' firm is counsel and will typically also cover the similar claims of that firm's other clients which are unfiled, or filed in state court, over which the MDL court has no jurisdiction. In addition, such an agreement will not itself resolve any claimant's claim. Rather, the agreement will typically establish a settlement program through which the covered claimants will receive settlement offers and have the option to accept or decline those offers.[44] All of this regularly takes place without any involvement of the MDL judge who often learns of the confidential settlement agreement only when the parties request a stay of any proceedings involving the covered clients while the counsel who are signatories to the settlement agreement focus their attention and resources on effectuating the settlement.[45] In short, there is no role that a court *ever needs* to play with regard to these settlements, and the

43. There are two basic types of non-class settlement agreements commonly negotiated to resolve groups of mass tort claims in MDLs: "inventory" settlements and "global" settlements:

> The most common type by far is an "inventory" settlement in which the defendant enters into a confidential agreement with an individual law firm or consortium of firms to potentially settle the claims of the clients represented by that particular firm or consortium. The other, much more rare type is the truly "global" settlement in which the defendant enters into an agreement with designated MDL leadership attorneys to attempt to resolve all of the claims pending against the defendant in the MDL court (and sometimes also state courts).

Baker & Herman, *supra* note 7, at 484 (footnote omitted).

44. *See* Baker & Silver, *supra* note 10, at 56:

> When a defendant undertakes inventory settlements, it seeks to obtain closure by entering into (usually confidential) agreements with law firms that represent large numbers of claimants. Typically, these deals resolve each firm's entire inventory of qualifying claims for a lump-sum dollar amount. To be clear, the settlement agreement neither resolves any individual claim nor determines the amount that any claimant will receive. It operates at a meta level, specifying the maximum amount the defendant will pay and outlining a process through which the plaintiffs' lawyers (perhaps aided by a special master) will make settlement offers to their inventory of qualifying clients that will total the specified dollar amount.

*See also* Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165, 1166–67 (2020) (noting that the "settlement agreement" entered into by a defendant to resolve mass tort personal injury claims "will not itself resolve any individual plaintiff's claims" and that "[i]n essence, such an agreement simply provides the bare outlines of a process—which, in several material respects, does not involve the defendant—by which plaintiffs will receive individual offers to settle their claims against the defendant.").

45. *See id.* at 1166–68; Erichson, *supra* note 34, at 1016 (describing non-class mass tort settlements as "contract[s]" between a claimant and a defendant in "in which a claimant agrees to release a claim in exchange for something offered by the defendant," where there is no requirement that the settlement be approved by the court, and, in fact, the court has no authority to review it).

court's "implied indispensable" powers, therefore, cannot authorize such judicial action.

Although I agree with Pushaw and Silver's conclusions that the powers of the federal courts do not properly extend to the two actions sometimes taken by MDL judges which are discussed in this section, I disagree with their view of two other actions commonly taken by MDL courts: (a) the appointment of "lead attorneys" (which I take up in Part IV), and (b) the imposition of "common benefit" assessments on the recoveries of certain clients to compensate the lead attorneys and the other attorneys performing common benefit work (which I take up in Part V).[46] Pushaw and Silver argue, unpersuasively in my view, that the "inherent powers" of the federal courts do not properly extend to either of these actions, and they assert that "these uses of [inherent powers] subvert the Constitution's structure and violate the Due Process Clause."[47]

## IV. THE APPOINTMENT OF LEAD ATTORNEYS BY MDL COURTS

With regard to the appointment of "lead attorneys," Pushaw and Silver would distinguish between "liaison counsel," whose appointment they find unproblematic, and arguably unconstitutional "lead attorneys."[48] Pushaw and Silver acknowledge that "[p]ressing administrative problems arise when MDLs involve multitudes of plaintiffs and attorneys. Matters that normally are handled easily, such as communicating with counsel, convening meetings, scheduling hearings, and managing document depositories, can be daunting."[49] They contend that MDL courts typically assign responsibility for these "administrative tasks" to "liaison counsel," whom they describe as "local plaintiffs' lawyers who know the ropes."[50] They further describe these "liaison counsel" as performing uncontroversial functions of "[s]upervising and coordinating."[51]

On its face, the distinction that Pushaw and Silver would draw between "liaison counsel" and "lead attorneys" is puzzling. There is substantive, pre-

46. Pushaw & Silver, *supra* note 2, at 1930–50 (arguing that MDL judges have no inherent constitutional authority to (a) assign "lead attorneys" to represent clients in matters the attorneys may not have been retained by those clients to handle, or (b) ensure payment of lead attorneys with money the clients contracted to pay their individually retained "non-lead lawyers").

47. *Id.* at 1926.

48. *Id.* at 1928, 1930.

49. *Id.* at 1928.

50. *Id.*

51. *Id.* at 1929.

trial work to be done by plaintiffs' counsel in an MDL, above and beyond simple administrative tasks.[52] And there must be efficiency and coordination in that substantive work. As one respected MDL judge, Vince Chhabria, has written,

> Because all of the cases in a federal MDL present similar or identical issues, the MDL judge's pretrial decisions—whether they involve case management or substantive legal analysis—will typically impact all the plaintiffs. *But the MDL judge cannot manage or adjudicate the cases effectively if the lawyers from every case have an active role*. Accordingly, an MDL judge's first order of business is often to decide which lawyers will take the lead in managing and litigating the cases. This is an important decision because the performance of those lawyers, and the strategic decisions they make, often affect the outcome for the entire group of plaintiffs.[53]

Pushaw and Silver, however, assert that plaintiffs' retained lawyers must be able to "continue to represent their clients on substantive matters" and be "free to represent their clients as they normally would."[54]

In support of this distinction between "liaison counsel" and "lead attorneys," Pushaw and Silver cite approvingly the 1958 decision of the Second Circuit Court of Appeals in *MacAlister v. Guterma*.[55] They assert that the "power recognized in *MacAlister* was only to appoint a litigation manager" to handle various administrative tasks.[56] In fact, however, the *MacAlister* court held that the appointment of "general counsel" in a consolidation extended much further.[57] At issue in the case was the authority of the federal district court to consolidate actions for purposes other than trial.[58] The court wrote:

52. *See, e.g.*, Redish & Karaba, *supra* note 11, at 118 (summarizing pretrial matters that might be undertaken in an MDL).

53. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 953 (N.D. Cal. 2021) (emphasis added).

54. Pushaw & Silver, *supra* note 2, at 1929–30.

55. 263 F.2d 65 (2d Cir. 1958).

56. Pushaw & Silver, supra note 2, at 1929.

57. *MacAlister*, 263 F.2d at 69 ("The benefits achieved by consolidation and the appointment of general counsel, i.e. elimination of duplication and repetition and in effect the creation of a coordinator of diffuse plaintiffs through whom motions and discovery proceedings will be channeled, will most certainly redound to the benefit of all parties to the litigation.").

58. *Id.* at 68.

> The purpose of consolidation is to permit trial convenience and economy in administration. Toward this end Rule 42(a) in addition to providing for joint trials in actions involving common questions of law and fact specifically confers the authority to "make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Certainly, overlapping duplication in motion practices and pre-trial procedures occasioned by competing counsel representing different plaintiffs in separate . . . actions constitute the waste and inefficiency sought to be avoided by the lucid direction contained in [Rule 42(a)].[59]

The court went on to observe that an "order consolidating such actions during the pre-trial stages, together with the appointment of a general counsel may in many instances prove the only effective means of channeling the efforts of counsel along constructive lines."[60]

As Pushaw and Silver note, the *MacAlister* court described the functions of "general counsel" as "merely to supervise and coordinate the conduct of plaintiffs' cases."[61] However, the court's conception of the "coordination" involved was quite substantive. In particular, the court emphasized that the benefits of appointing the general counsel, consistent with the benefits of consolidation more generally, include the "elimination of duplication and repetition" and described the general counsel as "a coordinator of diffuse plaintiffs through whom motions and discovery proceedings will be channeled."[62] This role of the general counsel with regard to motions and discovery proceedings seems clearly to involve some discretion in determining the content of those motions, which would presumably be filed on behalf of all of the plaintiffs whose claims were consolidated. Thus, the *MacAlister* court expressly noted that "[t]he advantages of this procedure [of consolidation and the appointment of general counsel] should not be denied litigants in the federal courts because of misapplied notions concerning interference with a party's right to his own

59. *Id.*

60. *Id.* The court noted that such a consolidation order

> [C]ertainly does not clash with the oft repeated policy underlying consolidation under Rule 42, to wit, "Consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties, in one suit parties in another."

*Id*. (citations omitted).

61. Pushaw & Silver, *supra* note 2, at 1929 (citing *MacAlister*, 263 F.2d at 68).

62. *MacAlister*, 263 F.2d at 69.

counsel."[63] The court further quoted with approval an 1899 decision in which the New York Supreme Court stated with regard to the appointment of general counsel that:

> There can be but one master of a litigation on the side of the plaintiffs. It is also plain that it would be as easy to drive a span of horses pulling in diverging directions, as to conduct a litigation by separate independent action of various plaintiffs, acting without concert, and with possible discord.[64]

Thus, I disagree with Pushaw and Silver's interpretation of the *MacAlister* court's decision regarding the role for the "general counsel" that it envisioned when it held that "the necessary power is reposed in the district court to order pre-trial consolidation and the appointment of one general counsel."[65] It seems clear that the court anticipated the general counsel's role to be more substantive and broader than the "administrative tasks" of "communicating with counsel, convening meetings, scheduling hearings, and managing document depositories" that Pushaw and Silver consider unproblematic.[66]

Importantly, the *MacAlister* court as well as Federal Rules of Civil Procedure 42 and 16(c)(2) all reference a concern with efficiency that suggests that each plaintiff in a consolidation simply cannot be left to file their own repetitive and potentially conflicting discovery motions, for example.[67] Rather, consistent with Judge Chhabria's observations above, the court-appointed general counsel must be able to speak for all plaintiffs on certain, substantive pre-trial issues if the court is to be able "'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants.'"[68] The Fifth Circuit agrees about the need for the judge to

63. *Id.*

64. *Id.* at 69 n.2 (quoting Manning v. Mercantile Tr. Co., 57 N.Y.S. 467, 468 (N.Y. Sup. Ct. 1899)).

65. *Id.* at 69.

66. Pushaw & Silver, *supra* note 2, at 1928.

67. The *MacAlister* court stated that "Rule 42(a) in addition to providing for joint trials in actions involving common questions of law and fact specifically confers the authority to 'make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.'" 263 F.2d at 68 (citations omitted). And as Pushaw and Silver note, Rule 16 empowers federal judges to "'adopt[] special procedures for managing potentially difficult or protracted actions that may involve . . . multiple parties'" and to "'facilitat[e] in other ways the just, speedy, and inexpensive disposition of the action.'" Pushaw & Silver, *supra* note 2, at 1929 n.331 (quoting FED. R. CIV. P. 16(c)(2)(L), (P)).

68. *MacAlister*, 263 F.2d at 68 (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (Cardozo, J.)).

appoint lead counsel when "handling a mass of related cases": "[W]ithout lead counsel, hundreds of diligent lawyers would lobby the court for attention, leaving it unable to manage and adjudicate the related cases, not to mention the rest of its docket."[69]

Pushaw and Silver propose their very narrow scope of the general counsel's powers, and a distinction between "liaison counsel" and "lead counsel," because they are concerned with ensuring that each plaintiff's retained lawyer is still "free to represent their clients as they normally would."[70] That is, Pushaw and Silver seem to believe that although "[t]he FRCP give judges considerable freedom to process matters efficiently" and a court's inherent powers "are properly used to handle managerial problems that the rules do not address," these efficiencies must be achieved and these management problems handled without the court-appointed "general counsel" impinging in any way on the authority or actions of each plaintiff's individually retained attorney.[71] But as explained by Judge Chhabria above, this is neither possible nor preferable.[72] In order to solve certain management problems and to achieve necessary efficiencies, the court simply must be able to appoint counsel who can speak for all of the plaintiffs in the consolidation on *some* substantive issues and who can take *some* binding actions on behalf of all plaintiffs.

On this issue, too, Pushaw and Silver misread the *MacAlister* decision.[73]

---

69. *See In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1012–15 (5th Cir. 1977)). In *In re Air Crash Disaster*, the Fifth Circuit observed:

> The appellants do not challenge the power of the court to appoint counsel to perform duties such as were assigned in this case but only its power to order that "lead counsel" be paid out of the fees of employed attorneys. Appellants approach the case as though it were purely a private contest over fees between competing lawyers. This approach is a nostalgic luxury no longer available in the hard-pressed federal courts. It overlooks the much larger interests which arise in litigation such as this. Each case in the consolidated case was private in its inception. But the number and cumulative size of the massed cases created a penumbra of class-type interest on the part of all the litigants and of public interest on the part of the court and the world at large. The power of the court must be assayed in this semi-public context.

*Id.* at 1011–12.

70. Pushaw & Silver, *supra* note 2, at 1930.

71. *Id*. at 1929.

72. *See supra* note 53 and accompanying text.

73. Not surprisingly, Pushaw and Silver describe as "mistaken" the numerous federal courts that have read *MacAlister* to hold that the courts' necessary inherent powers extend to the appointment of lead counsel who will in part displace claimants' retained counsel with regard to certain substantive issues at certain times. *See* Pushaw & Silver, *supra* note 2, at 1933–34 ("The fact that MDL courts routinely appoint lead attorneys who displace claimants' retained counsel does not establish that the practice has a sufficient legal basis. *MacAlister* did not hold that judges' IPs extend this far . . . . By

In support of their (inaccurate) claim that the *MacAlister* court recognized a judicial power to facilitate litigation only to the extent that it simultaneously, somehow, "[left] retained lawyers free to represent their clients as they normally would," Pushaw and Silver cite this language from *MacAlister*: "The separate actions are not merged under the direction of one court appointed master of litigation—each counsel is still free to present his own case, to examine witnesses and to open and close before the jury, if there be one."[74] Each of these listed actions taken by counsel, however, is most naturally read as involving the actual trial of a case, not the pre-trial proceedings that were subject to the consolidation in *MacAlister*. Note, for example, that the court did not say that its appointment of general counsel left each attorney free to file his own discovery motions and take depositions of expert witnesses, which are the type of tasks that the appointment orders of MDL judges often specify are to be managed by the lead counsel on behalf of all plaintiffs.[75] Stated differently, the court-appointed counsel must be able to displace the plaintiffs' individually retained counsel with regard to *certain* issues at *certain* times. And I believe that the *MacAlister* court understood and authorized this.

It should also be noted that Pushaw and Silver are inconsistent and, thus, inevitably inaccurate, in describing the powers exercised by court-appointed lead counsel in MDLs. They first contend that "[l]ead attorneys' powers and responsibilities are plenary"[76] but then reference the "appointment order" issued by each MDL court that specifies the tasks being assigned the lead attorneys by the appointing court.[77] Pushaw and Silver do not explain why they consider the powers of the lead counsel to be plenary despite the fact that the appointing court delineates in its order the tasks that it is authorizing the lead counsel to perform on behalf of all plaintiffs.

Insofar as the appointment of lead attorneys for certain purposes is deemed by an individual MDL judge to be necessary in order to manage the litigation and "to avoid unnecessary cost[s] or delay,"[78] that power of

equating 'general counsel' with 'lead counsel,' the Ninth Circuit made a colossal mistake.")

74. *Id.* at 1940 (quoting MacAlister v. Guterma, 263 F.2d 65, 68 (2d Cir. 1958)).

75. *See, e.g.*, *id.* at 1931 (quoting from Judge Chhabria's appointment order in the Roundup MDL).

76. *See id.* at 1930–31 ("Lead attorneys' powers and responsibilities are plenary . . . . In addition to being plenary, lead attorneys' dominion is exclusive.").

77. *See id.* at 1931 ("Appointment orders document the breadth of lead attorneys' commissions.").

78. FED. R. CIV. P. 42(a); *see also* FED. R. CIV. P. 16(a)(1)–(3) ("In any action, the court may order the attorneys . . . to appear for one or more pretrial conferences for such purposes as: (1) expediting disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities . . . .").

appointment seems clearly to be authorized by Rule 42 (and Rule 16), and in any event, to fall within the "indispensable" inherent powers that Pushaw and Silver consider unproblematic.[79] To be sure, these lead attorneys will be *presumptively* displacing the non-lead lawyers with regard to the particular tasks that they are assigned by the MDL court. But the fact that the plaintiffs' originally retained lawyers inevitably will not be "free to represent their clients as they normally would"[80] does not mean that the appointing court has exceeded its constitutional authority. When appointing lead counsel and expressly ordering them to act on behalf of all claimants with regard to certain tasks, the MDL court has presumably determined that this limited, exclusive role for the lead counsel is essential in order for the court to function effectively. Regarding all other aspects of an MDL plaintiff's representation, however, the plaintiffs' individually retained counsel retains complete authority and is free to represent their client as they normally would.[81] For example, the individually retained counsel is free to negotiate with the defendant an "inventory settlement" of their clients' claims or to try the case of any client that is remanded back to the transferor court.[82]

Notably, even in the areas of court-ordered "displacement" specified in the MDL court's order appointing lead counsel, a non-lead lawyer is not without the ability to speak on behalf of the clients who have individually retained her. Pushaw and Silver acknowledge that "[l]ead attorneys are supposed to

79. Pushaw & Silver, *supra* note 2, at 1916–18 (summarizing the distinction between "indispensable" and "beneficial" implied judicial powers).

80. *Id.* at 1930. Stated differently, lead counsel's performance of certain substantive pre-trial tasks on behalf of all plaintiffs does not mean that lead counsel has been authorized "to alter or override parties' procedural or substantive rights." *Id.* at 1928. Rather those rights are simply being prosecuted in certain respects by the court-appointed lead counsel rather than by each plaintiff's individually retained counsel. *Id.*

81. *See* Noll, *supra* note 15, at 415 (noting that lead counsel "cannot settle or dismiss non-lead's cases" and that non-lead counsel have the authority "to engage in ordinary motion practice, take discovery, and access court resources").

82. As discussed previously, mass tort claims are much more frequently resolved via "inventory" settlements negotiated by individual plaintiffs' counsel than through "global" settlements negotiated by MDL leadership. *See supra* note 43 and accompanying text; Baker & Herman, *supra* note 7, at 484 ("The most common type [of non-class aggregate settlement] by far is an 'inventory' settlement in which the defendant enters into a confidential agreement with an individual law firm or consortium of firms to potentially settle the claims of the clients represented by that particular firm or consortium. The other, much more rare type is the truly 'global' settlement in which the defendant enters into an agreement with designated MDL leadership attorneys to attempt to resolve all of the claims pending against the defendant in the MDL court (and sometimes also state courts.)").

consult non-lead lawyers."[83] In addition, a non-lead lawyer who is troubled by an act (or omission) of the lead lawyers has the option to appeal to the MDL judge.[84] A non-lead lawyer may also supplement lead attorneys' filings, an option that Pushaw and Silver acknowledge is usually preserved in case management orders.[85] Of course, a non-lead lawyer cannot order the lead lawyers to take a particular action, an appeal to the MDL judge may well not be successful, and a supplemental filing may not prove persuasive.[86] But these limitations on the actions of non-lead lawyers do not render the court's appointment of lead counsel unconstitutional. As Professor David Noll has observed, consistent with Judge Chhabria's comments above, "Designating particular attorneys as leaders [would do] little to address coordination problems on the plaintiffs' side if non-lead attorneys [were] free to engage in discovery and motion practice, engage with the court and defendants, and generally litigate however they want."[87]

Apart from the *MacAlister* decision, Pushaw and Silver offer several other arguments for why they believe that federal judges do not have the power to appoint lead attorneys in MDLs, none of which are persuasive. First, they acknowledge, consistent with their distinction between "indispensable" and "beneficial" inherent powers, that "MDL courts can have [inherent powers] to appoint lead attorneys only if doing so is essential to their functioning."[88] They conclude that "[t]his condition is not met, however, because consolidated lawsuits can be managed, and have been managed, in other ways."[89] By way of example, they reference various instances in which they contend that plaintiffs' lawyers have "work[ed] together cooperatively without having

83. Pushaw & Silver, *supra* note 2, at 1932. Pushaw and Silver give little weight to the ability of non-lead lawyers to make their views known to the lead lawyers, contending that the conversations between lead and non-lead lawyers "are invariably one-sided because the latter cannot order the former to do anything." *Id*.

84. *Id.*

85. *Id.* at 1942.

86. Pushaw and Silver bemoan the fact that non-lead attorneys "cannot order the [lead attorneys] to do anything." *Id.* at 1932. They also state that "[a] disgruntled non-lead lawyer can appeal to a presiding judge, but this option is rarely effective. A non-lead lawyer who 'disagrees with a strategic choice made by lead counsel . . . faces a steep uphill battle to reassert control over [a] representation.'" *Id*. (quoting Redish & Karaba, *supra* note 11, at 143).

87. Noll, *supra* note 7, at 454.

88. Pushaw & Silver, *supra* note 2, at 1935. As I noted above, for purposes of my analysis in this Article, I am happy to accept Pushaw and Silver's distinction and its implications.

89. *Id.*

leaders forced upon them by courts."[90] They also observe that the *Manual for Complex Litigation* "recognizes that 'attorneys [may] coordinate their activities without the court's assistance' and adds that 'such efforts should be encouraged.'"[91] But the fact that attorneys in consolidations *may sometimes* be able to voluntarily arrive at a leadership structure and coordinate the management of a litigation to the court's satisfaction without judicial involvement does not mean that judicial appointment of lead attorneys is not *essential* to the court's functioning *in other cases*. The decision of what the court considers essential in order to manage the consolidation effectively is ultimately a decision for the court alone to make.[92] Nothing in Pushaw and Silver's inherent powers analysis suggests otherwise.

With regard to voluntary cooperation by lawyers in consolidations, two additional items merit note. First, even an MDL judge who determines that she must appoint lead counsel in order to manage the litigation effectively is free to appoint whatever voluntarily arranged leadership structure the plaintiffs' counsel might propose. Indeed, one of the examples given by Pushaw and Silver, who approved of the "plaintiffs' lawyers' ability to coordinate organically," is precisely of this sort.[93] They observe that prior to the establishment of the *Roundup* MDL, a group of plaintiffs' lawyers had been voluntarily working together for more than a year to advance the litigation.[94] Once the MDL was established and the judge (Judge Chhabria) sought applications for lead counsel positions, a group of those lawyers presented themselves as a "slate" to the MDL judge.[95] The slate's application "was unchallenged and unopposed," and the judge subsequently appointed the slate as lead counsel.[96] Through its formal appointment of the slate, the court secured for itself and all of the plaintiffs the benefits of a leadership team that had already proven an ability to work together and advance the litigation effectively, while avoiding disruptive management issues and questions of control and authority that would inevitably arise over subsequent years, as tens of thousands of

90. *Id.*

91. *Id.* (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22 (2004)).

92. *See* 28 U.S.C. § 1407(b) (stating that the MDL judge "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.").

93. Pushaw & Silver, *supra* note 2, at 1935.

94. *Id.* at 1935–36.

95. *Id.* at 1936 n.357.

96. *Id.* at 1936.

additional claimants and the dozens of different law firms representing them emerged.[97] Do Pushaw and Silver mean to suggest that the MDL judge should not have appointed any lead counsel in the *Roundup* MDL ever? Or is their view that the MDL judge should have waited until a flood of conflicting pretrial motions and other disagreements among the growing number of plaintiffs' counsel rendered the effective management of the litigation impossible without court-appointed lead counsel?

Second, Pushaw and Silver argue that voluntary cooperation by lawyers in consolidations is a reasonable and workable alternative to the appointment of lead counsel by MDL courts.[98] Most importantly, they contend that inherent powers "cannot be derived from first principles because MDL courts can satisfy the need for coordinated action by non-coercive means."[99] For their examples of successful, voluntary coordinated action, they rely significantly on a short 1982 article by attorney Paul D. Rheingold.[100] But very few of the examples they cite come close to fitting their thesis,[101] and Rheingold's article as a whole is not an enthusiastic endorsement of voluntary cooperation among mass tort lawyers. Rather, Rheingold observes that voluntary group formation is predictably difficult and rarely successful due to a host of factors: the absence of a sudden event that triggers the litigation involving a particular

97. Judge Chhabria wrote in June 2021 that "Public reports filed by Bayer . . . state that well over a hundred thousand cases have either been filed or are in the works." *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 953 (N.D. Cal. 2021).

98. Pushaw & Silver*, supra* note 2, at 1936–37.

99. *Id.* at 1937.

100. Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1 (1982); Pushaw & Silver, *supra* note 2, at 1935.

101. The eight examples of litigation groups mentioned by Rheingold that Pushaw and Silver reference include one class action (Agent Orange) and one MDL (Bendectin), each with court-appointed lead counsel, and three groups (DES, Ford transmissions, and Jeeps) that Rheingold expressly cites as examples of groups that were not successful. Pushaw & Silver, *supra* note 2, at 1935. Oddly, Pushaw and Silver do not reference the MER/29 litigation which, along with the state-court Bendectin proceedings, are the two examples that Rheingold discusses that were arguably most significantly successful in that the voluntary plaintiffs' group was able to work out a common discovery plan with the defendant. Rheingold, *supra* note 100, at 7.

product;[102] leadership struggles among the various attorneys;[103] an inability to compromise differing plans for how to handle the litigation;[104] an inability to compel sufficient monetary contributions by counsel in order to finance the litigation;[105] low participation rates;[106] and an inability to work out a common discovery plan with the defendant.[107]

---

102. Rheingold, *supra* note 100, at 2. Rheingold states:

> For every occasion when a litigation group has been formed, however, there are dozens which have not come into creation. A common reason for lawyers with similar cases going their separate ways is that the litigation involving a particular product does not start with a sudden event, such as dramatic recall from the market, but rather, starts gradually. By the time a sizeable number of lawyers have cases, a few lawyers have already done considerable work and are thus less disposed to share the data they have created. Examples of this are DES, Chloromycetin and most automobile cases.

*Id.* Notwithstanding Rheingold's reference here to DES and automobile cases as attempted voluntary litigation groups that suffered this important flaw, Pushaw and Silver cite both as examples of plaintiffs' lawyers "work[ing] together cooperatively without having leaders forced upon them by courts." Pushaw & Silver, *supra* note 2, at 1935.

103. Rheingold, *supra* note 100, at 3:

> The birth and operation of most groups have been touched with leadership struggles. While sometimes the problem is that no one wants to take on the responsibility of committing the time to guide a group, the usual problem is that there are too many chiefs. . . . Organizational meetings for litigation groups are splendid displays of ego and peacock tail spreading.

104. With regard to voluntarily organized leadership groups, Rheingold observes:

> The plan is that the committee will meet from time to time to make decisions; however, it lacks the force of a court-appointed committee which can make binding decisions for the group, and it lacks a single leader. As a result, little may get accomplished because there is no need, and no way, to compromise differing plans for how to handle the litigation. Nor is there likely to be much financial reward for the time spent.

*Id.* at 4.

105. *Id*. at 9 ("Groups need money to operate and it is not surprising to learn that they often have a difficult time raising sufficient funds to operate when they are proceeding voluntarily"); *id.* at 5 (noting that many plaintiffs' lawyers do not join voluntary groups because they "want to save the few dollars that it costs to participate").

106. *Id.* at 5 ("Under voluntary groups, there are no means to compel all plaintiffs' lawyers with cases to participate, and many do not. Many, usually, the majority, want to save the few dollars that it costs to participate, although they may give as a rationale that they want to be able to 'do their own thing.'"). Rheingold lists nine mass tort litigations and notes that the "[p]ercent [p]articipating" in the five that included "[v]oluntary" organizations ranged from 10% (Dalkon Shield state proceedings; asbestos; Ford transmission) to 25% (the Pill) and 60% (MER/29). *Id.* at app. In addition, Rheingold lists DES as having no leadership organization and thus assigns it no "[p]ercent [p]articipating" figure. *Id.* Rheingold does not specify whose participation (claimants or attorneys) he means by "[p]ercent [p]articipating." *Id.*

107. Insofar as discovery is a core task of pre-trial proceedings, this is arguably the most troubling category of failures of voluntary groups that Rheingold discusses. He notes that "[i]n the instance of voluntary groups not organized by the court, the activities for the most part . . . do not involve any

Pushaw and Silver next contend that the MDL statute does not empower federal judges to appoint lead attorneys in MDLs.[108] They observe, accurately, that the statute "says almost nothing about transferee judges' powers."[109] They also note, accurately, that the statute says that "'[the] judge . . . to whom [the transferred] actions are assigned, . . . may exercise *the powers of a district judge* in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.'"[110] They contend, however, that this sentence of the statute operates essentially as a limitation on the powers of the MDL judge.[111] To be sure, this sentence does not grant the MDL judge any special powers, but it also does not in any way limit the judge's authority to manage the MDL proceeding. Importantly, the statute explicitly authorizes "the judicial panel on multidistrict litigation" to transfer certain civil actions to a single district for "coordinated or consolidated pretrial proceedings" upon the panel's determination that "such proceedings will be for the convenience of parties and witnesses and *will promote the just and efficient conduct of such actions*."[112] It seems clear that, inside or outside an MDL, coordinated pretrial proceedings involving thousands of claims and hundreds of different plaintiffs' counsel simply cannot be managed—let alone efficiently—without the court appointing lead counsel. Thus, this appointment power is arguably possessed by every district court judge in every coordinated or consolidated proceeding, and there was no need for the MDL statute to expressly mention it. Pushaw and Silver, however, seemingly

group efforts in discovery from the defendant." *Id.* at 5. According to Rheingold, the absence of formal discovery is "either because the plaintiffs were not interested (sometimes out of fear of being bound by what some other lawyer did—the 'frontiersman' approach to litigation) or because the defendant would not agree." *Id.* at 8. He adds that "[t]here have been only two instances where groups, voluntarily formed and not under court mandate, have been able to work out a common discovery plan with the defendant." *Id.* at 7. One of these was the MER/29 litigation in the 1960s which began before the passage of the MDL statute and whose details Rheingold provides in *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968). The other instance is the Dalkon Shield litigation, in which there was both a federal MDL and hundreds of state court cases. There, the defendant, A.H. Robins, "voluntarily agreed to apply to the state court cases the MDL discovery taken in the federal cases" under terms "worked out in a very long agreement negotiated between national defense counsel for the defendant and a lawyer selected by the state court lawyers to represent them." Rheingold, *supra* note 100, at 7.

108. Pushaw & Silver, *supra* note 2, at 1937–38.

109. *Id.* at 1937.

110. *Id.* (quoting 28 U.S.C. § 1407(b)).

111. *Id.* at 1937–38.

112. 28 U.S.C. § 1407(a) (emphasis added).

believe that no district judges have this power.[113] They acknowledge that "[t]he need to coordinate the actions of plaintiffs and lawyers in MDLs was at the forefront of the minds of the judges who pressed for the legislation,"[114] but they never explain how they envision the MDL judge managing these proceedings without appointing lead counsel.

Pushaw and Silver note that the MDL statute's legislative history suggests that the statute's "limited transfer" structure of "'consolidation for pretrial proceedings with eventual remand for trial'" was in part a political compromise: this structure "'would insulate the statute from both the resistance of plaintiffs' lawyers who might fear loss of control over their cases (and their fees) and district judges who might fear invasion of their jurisdiction.'"[115] They go on to assert that this fact, combined with the absence of any express mention in the statute of the court's power to appoint lead counsel, means that the MDL judge cannot exercise that power.[116] A more sensible interpretation of the compromise, however, is not that the jurisdiction of (transferor court) district judges would *not* be affected by the statute's passage (which was expressly not true) nor that the plaintiffs' lawyers would retain *complete* control over their cases (which is not possible if a consolidation of any substantial number of cases is to be manageable). Rather, the simplest interpretation is that the necessary impingements on the jurisdiction of the transferor courts and on the plaintiffs' lawyers control of their cases would be expressly limited to "pretrial proceedings."[117] Upon remand, which is expressly required by the statute "at or before the conclusion of such pretrial proceedings,"[118] the transferor court will resume complete jurisdiction over any remaining cases that had been transferred into the MDL and the counsel for each individual

113. Pushaw & Silver, *supra* note 2, at 1937–38.

114. *Id.* at 1938.

115. *Id.* at 1938 n.362 (quoting Andrew Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 839 (2017)).

116. *Id.* at 1938 ("If plaintiffs' attorneys had known they would *lose control* of their cases, they would have blocked the statute. To gain passage, the judges compromised, and their decision must frustrate any attempt to derive the power to appoint lead counsel from the statute today." (emphasis added) (footnote omitted)).

117. 28 U.S.C. § 1407(a)–(c). The statute is explicit that the transfer and consolidation is only for "pretrial proceedings" and expressly provides that "[e]ach action" transferred by the panel to the MDL court "shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* § 1407(a).

118. *Id.* § 1407(a).

plaintiff will resume complete control over their case.[119] It is especially significant that the statute's limited transfer structure preserves both transferor court jurisdiction and complete control by counsel for the individual plaintiff for any post-remand trial. Upon remand from the MDL, "each counsel is still free to present his own case, to examine witnesses and to open and close before the jury, if there be one," all of which is consistent with the *MacAlister* decision.[120]

Pushaw and Silver next argue that the Federal Rules of Civil Procedure do not empower federal judges to appoint lead attorneys in MDLs.[121] They focus on Rules 16 and 42 which, they note, MDL judges often cite as the source of their authority to appoint lead attorneys.[122] Indeed, Rule 42 states that "[i]f actions before the court involve a common question of law or fact, the court may . . . issue any other orders to avoid unnecessary cost or delay."[123] And Rule 16 expressly provides that a court may "adopt[] special procedures for managing potentially difficult or protracted actions that may involve . . . multiple parties . . . and facilitat[e] in other ways the just, speedy, and inexpensive disposition of the action."[124] The plain language of each Rule would seem to authorize the MDL judge to appoint lead counsel when the judge deems it appropriate and, thus, there is no need to look also to the court's inherent powers for authority for those appointments. Pushaw and Silver, however, contend that some inherent powers justification is also necessary, but it is not clear why.[125]

First, Pushaw and Silver argue that, even if done pursuant to Rule 16 or Rule 42, the appointment of lead counsel must still be "essential" to the court's management of the MDL.[126] And they contend that such appointments cannot be considered essential because "[l]awyers can and have coordinated their

119. *See id.*

120. MacAlister v. Guterma, 263 F.2d 65, 68 (1958).

121. Pushaw & Silver, *supra* note 2, at 1938–43.

122. *Id.* ("When appointing lead attorneys, MDL judges often purport to derive their authority from Rules 16 and 42 of the FRCP.").

123. FED. R. CIV. P. 42(a)(3).

124. FED. R. CIV. P. 16(c)(2)(L), (P).

125. Pushaw & Silver, *supra* note 2, at 1939. They do not explain why this is their view, but I expect that if either Rule 16 or 42 explicitly authorized the appointment of lead counsel in consolidations that Pushaw and Silver would not argue that additional authority for those appointments must be found in the court's inherent powers.

126. *Id.*

efforts organically, that is, without having lead attorneys forced upon them."[127] As I explained above, however, the fact that attorneys in consolidations may sometimes be able to voluntarily coordinate the management of the litigation to the court's satisfaction without judicial involvement does not mean that the court is precluded from deciding that its appointment of lead attorneys is essential to the court's functioning in other cases.[128]

Second, Pushaw and Silver argue that Rules 16 and 42 cannot be the source of the MDL court's power to appoint lead attorneys because of "the practice of treating MDLs as representative proceedings in which such attorneys act with binding effect for all plaintiffs, including those who are not their clients."[129] But this claim misdescribes the MDL in several critical respects. First, as noted above, the lead attorneys are authorized by the MDL court only to take specific actions with regard to all plaintiffs, unlike class counsel who are authorized to speak for all plaintiffs in the class on all issues.[130] Second, if the judge in an MDL (or any other consolidation) appoints lead attorneys, the judge has decided that it is *necessary* for those attorneys to be able to act on behalf of all plaintiffs with regard to the specified matters in order for the court to manage the litigation effectively.[131] Third, unlike in a class action, each plaintiff in an MDL has individually retained counsel of its choice and is known to be a plaintiff in the litigation.[132] That is, there are no "lead plaintiffs" or unknown "class members" whom the lead attorneys are being appointed by the court to represent.

Relatedly, and most critically, the fact that each plaintiff in an MDL is represented by their chosen counsel means that those individually retained counsel are able to provide their clients full representation in all areas in which the court-appointed lead counsel is not authorized to act. They also are able to monitor the lead counsel in the areas in which the lead counsel are authorized by the court to act on behalf of all plaintiffs in the MDL. As noted above, Pushaw and Silver acknowledge that each individually retained counsel is free to object to actions taken (or sought to be taken) by the lead counsel and are able to supplement any filings by the lead counsel.[133] However, they argue

127. *Id.*
128. *See supra* notes 92–97 and accompanying text.
129. Pushaw & Silver, *supra* note 2, at 1939.
130. *See supra* notes 7, 80–82 and accompanying text.
131. *See supra* notes 71–75 and accompanying text.
132. *See supra* notes 38–40 and accompanying text.
133. Pushaw & Silver, *supra* note 2, at 1942 ("[O]ne might argue that MDLs do not saddle plaintiffs

that none of these options is sufficient to ensure that the MDL plaintiffs receive due process—that each plaintiff's "right to be heard" is satisfied—because the individually retained counsel are not able to "tell lead attorneys what to do, avoid having lead attorneys' actions and filings attributed to their clients, nor insist on being able to handle their clients' matters personally."[134] In sum, and seemingly contrary to their own theory of indispensable inherent powers, Pushaw and Silver contend that "MDL judges must allow retained lawyers to represent their clients in the usual way" even if this renders the judge's management of the MDL impossible.[135] Indeed, Pushaw and Silver ultimately assert that MDLs (and ostensibly all consolidations in which the plaintiff's "right to be heard" is impinged upon in any way) are unconstitutional: "If it is true that courts cannot manage MDLs without appointing lead attorneys to speak for non-lead lawyers' clients, then the procedure always denies due process and must be discontinued."[136]

## V. COMPENSATING THE COURT-APPOINTED LEAD ATTORNEYS

I also disagree with Pushaw and Silver's argument that the inherent powers of the federal courts do not properly extend to the MDL judge compensating lead attorneys through the imposition of "common benefit" assessments on the recoveries of certain clients in the litigation.[137] I agree with Pushaw

with [virtual representation] because, by failing to object, retained lawyers adopt lead attorneys' actions as their own. Consent might also be inferred when retained lawyers refrain from supplementing lead attorneys' filings, an option that [MDL] case management orders usually preserve.").

134. *Id.* at 1941–42.

135. *Id.* at 1943.

136. *Id.* at 1941.

137. *Id.* at 1943–50. It is important to note that although the compensation to be paid to the court-appointed lead attorneys results in a de facto reduction in the contractual fees of the non-lead attorneys in the MDL, that (consequential) reduction is importantly different from the judicial caps on contractual attorneys' fees that I agree with Pushaw and Silver are problematic. *See supra* Part II. Critically, the appointing and compensating of the lead attorneys are both arguably determined by the MDL court to be necessary for that court to fulfill its management obligations under the MDL statute and Article III. *See, e.g.*, *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 962 (N.D. Cal. 2021). No such argument from managerial necessity can be made about an MDL court's *sua sponte* decision to cap the contractual fees of all attorneys' representing plaintiffs in the MDL. In addition, the non-lead attorneys arguably receive something of value in exchange for the reduction in their contractual fees resulting from the court's "common benefit" assessment. The lead attorneys become their court-appointed co-counsel in the litigation who, in exchange for their share of the non-lead attorneys' contractual fees, will perform substantial pre-trial work that the non-lead attorneys would themselves need to perform in the absence of the lead attorneys. No such benefit accrues to the non-lead (or leadership) attorneys from an MDL court's *sua sponte* decision to cap all plaintiffs' attorneys' fees.

and Silver that neither the MDL statute nor FRCP 16 or 42 expressly authorize the payment of court-appointed lead counsel and that MDL judges typically assert that their inherent authority to appoint lead attorneys implies the power to pay them.[138] Pushaw and Silver, however, go on to contend that even if an MDL court determined that it needed to appoint lead attorneys in order to effectively manage the litigation that the "court's need for managerial assistance does not logically entail a power to compensate attorneys who provide it."[139]

Pushaw and Silver offer two main arguments here, neither of which is persuasive. The first is reminiscent of one of their previous arguments why MDL courts have no necessary inherent power to appoint lead counsel.[140] They assert that because "state court judges have managed many large consolidations successfully without awarding common benefit fees" and "[t]heir experience shows that the option of having lead attorneys serve as volunteers is practical, not fanciful," that such fee assessments are not essential and therefore are not authorized by their inherent powers.[141] As I argued above in the context of the judicial appointment of lead counsel, however, the fact that a court determines that it is not necessary to compensate lead counsel in *some* consolidations does not mean that the court cannot determine that compensating lead counsel is *essential* to the court's functioning in *other* cases.[142] And the decision of what the court considers essential in order to manage the consolidation effectively is ultimately a decision for the court alone to make. Once determined by the court to be "essential," the exercise of the power is authorized, according to Pushaw's inherent powers analysis summarized in Part II above. Contrary to Pushaw and Silver's contention, the existence of a "substantial track record establishing that judges can manage large consolidations without paying lead attorneys extra" does not logically mean that "the asserted [inherent power] to award common benefit fees cannot be essential to the exercise of judicial power" *in other cases*.[143] Stated differently, I do not

138. Pushaw & Silver, *supra* note 2, at 1939–40.

139. *Id.*; *see also id.* at 1949 ("Even if judges have [inherent powers] to appoint counsel with substantive responsibilities, which we deny, they exceed their powers by forcing other lawyers to pay lead attorneys anything.").

140. *Cf. supra* notes 88–91 and accompanying text.

141. Pushaw & Silver, *supra* note 2, at 1945; *see also id.* at 1946–49 (detailing various large consolidations in which the relevant judge did not order the payment of any common benefit fees).

142. *Cf. supra* notes 91–92 and accompanying text.

143. Pushaw & Silver, *supra* note 2, at 1949.

interpret Pushaw and Silver's category of "indispensable" inherent powers to be limited to powers that are "indispensable" *in all cases*. (Indeed, I am not sure that any such powers exist, given the vast diversity among individual cases that are filed in court.)

Pushaw and Silver's second argument, "that a court's need for managerial assistance does not logically entail a power to compensate attorneys who provide it," focuses on the justification given by some courts when ordering a common benefit fee assessment.[144] Positing that "[j]udges could fill plaintiffs' steering committees with lawyers who agree to serve as volunteers," Pushaw and Silver dismiss courts' concerns that "claimants could have no assurance that uncompensated lawyers would perform well."[145] Pushaw and Silver argue that this assertion by courts "focuses attention on adequacy of representation rather than judges' ability to manage their proceedings" and that inherent powers "exist to facilitate the latter, not to guarantee the former."[146] In fact, these are not separate issues. As Judge Chhabria explains, a judge's ability to manage proceedings is affected by the quality of the representation provided:

> "A subset of plaintiffs' lawyers do the lion's share of the work, but that work accrues to the benefit of all plaintiffs. If those other plaintiffs were not required to pay any costs of that work, high-quality legal work would be under-incentivized and, ultimately, under-produced." Mass tort cases are difficult enough to manage and adjudicate when the common benefit work is being done by good lawyers; *the cases would be impossible to manage if good lawyers lacked sufficient incentive to step up*.
>
> . . . . [I]t remains safe to assume that if a district court lacked the ability to ensure that lead counsel can receive compensation from the other plaintiffs in the MDL *when the situation warrants it*, good counsel would be hard to find in at least some cases. . . .
>
> Accordingly, when a district court is handling an MDL or some other group of related cases, it has the authority to compensate common

144. *Id.* at 1945.

145. *Id.* (referencing *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1020–21 (5th Cir. 1977)).

146. *Id.*

> benefit work by redistributing attorneys' fees in those cases, *to the extent necessary to ensure effective management and adjudication of the litigation*.[147]

Judge Chhabria's final sentence above is especially significant for any inherent powers analysis. If any compensation awarded to leadership attorneys by the court is limited to the amount "necessary to ensure effective management and adjudication of the litigation," the court is taking care that its exercise of this inherent power to award compensation does not exceed what is essential for it to effectively manage the litigation.[148]

## VI. CONCLUSION

Mass tort MDLs involving thousands of claims present the judge with unique management issues. The MDL statute, in its scant two pages enacted in 1968, offers no guidance for the proper handling of these management issues. And the Federal Rules of Civil Procedure speak to these issues only very generally through Rules 16 and 42. Thus, MDL judges have often invoked their "inherent powers" as authority when they take certain actions with significant implications for the parties and their attorneys.

In this Article, I have examined the arguments put forward by Pushaw and Silver that four of the actions sometimes taken by MDL judges are improper when viewed in the light of Pushaw's prior analysis of the federal courts' inherent powers. Offering my own analysis within their inherent powers framework, I agree with Pushaw and Silver's conclusion that the inherent powers of the federal courts do not properly extend to reducing the total contractual fees that plaintiffs agreed to pay their individually retained counsel or reviewing (and potentially "rejecting") private group settlement agreements. However, I find unpersuasive Pushaw and Silver's analysis and application of

147. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 962 (N.D. Cal. 2021) (emphasis added) (footnote omitted) (quoting *In re* Gen. Motors LLC Ignition Switch Litig., 477 F. Supp. 3d 170, 174 (S.D.N.Y. 2020)).

148. *Id.*; *see also id.* at 969 (stating that the concern is "that lawyers doing common benefit work be compensated adequately for that work. They should be compensated enough to make the work worth doing—to make sure that the difference between taking the lead and sitting on the sidelines is meaningful enough to prevent the good lawyers from running to the sidelines."); *id.* at 953–54 ("For lawyers, leading an MDL is a major responsibility and a major risk. Lead lawyers invest a lot of time and money into managing and litigating the MDL. And if they lose, there is no way to recover their investment from the attorneys and plaintiffs who sat back and watched.").

their inherent powers framework to the appointment and compensation of MDL leadership attorneys. I conclude that MDL courts do have authority to appoint lead attorneys and to order that these attorneys be compensated through a "common benefit" assessment on the recoveries of certain clients in the litigation.