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MDL Immunity: Lessons from the National Prescription Opiate Litigation

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MDL Immunity: Lessons from the National Prescription Opiate Litigation

MDL IMMUNITY: LESSONS FROM THE NATIONAL PRESCRIPTION OPIATE LITIGATION

ROGER MICHALSKI*

Federal multi-district litigation (MDL) suffers from a massive blind spot that has escaped notice: it only selects cases based on “convenience,” “efficiency,” and the preservation of judicial resources. The statute does not take into account broader societal and governmental interests that can trump litigation efficiency arguments. One way to fix this blind spot is through the new concept of MDL immunity (a procedural rather than liability immunity). This doctrinal

* Associate Professor of Law, *University of Oklahoma*. I would like to thank the National Center for Health Statistics, the Center for Disease Control, vital statistics jurisdictions, as well as their staff for granting me access to the vital statistics used in this Article and for their helpfulness and professionalism. For their helpful comments, I thank Dave Marcus, Deborah Hensler, Steven Gensler, Melissa Mortazavi, and the participants of the Civil Procedure Workshop.

innovation would exempt cases by and against government entities from generalized MDL treatment.

I make the doctrinal argument for MDL immunity informed by original data collected from hundreds of cases in the federal opiate epidemic litigation, cross-referenced with opioid abuse data from the Center for Disease Control and American Community Survey data from the Census Bureau.

The doctrinal and empirical contributions of this Article will likely prove useful in other domains where local governments also struggle to articulate and fund responses to national crises, including litigation surrounding data privacy, e-cigarettes, firearms, predatory lending, obesity, environmental contamination, global warming, and sanctuary cities.

TABLE OF CONTENTS

Introduction.....	178
I. Who and Who Not.....	185
A. Data.....	187
B. Who	189
Table 1. Types of Plaintiffs in MDL #2804, National Prescription Opiate Litigation, as of 2/14/2019	190
C. When	192
Figure 1. Weekly Number of Filings of Cases in MDL #2804	193
Figure 2. Weekly Number of Filings of Cases in MDL #2804 for County Litigants (Panel 1), Municipal Litigants (Panel 2), and Tribes (Panel 3).....	195
D. Where	196
Figure 3. County Governments in MDL #2804.....	197
Figure 4. County Governments in MDL #2804 Colored by Filing Window	198
E. Opioid Deaths	199
Figure 5. Yearly Per Capita Average of Opioid Deaths Between 1999 and 2016 by County	199
Table 2. Opioid Deaths per 100,000 Residents per Year across Litigation Categories	200
Figure 6.1. Monthly Moving Average Per Capita Drug Deaths by County (2003-2017)—Early Filers in MDL #2804.....	202
Figure 6.2. Monthly Moving Average Per Capita Drug Deaths by County (2003-2017)—Not-Early Filers in MDL #2804	203

Figure 6.3. Monthly Moving Average Per Capita Drug Deaths by County (2003-2017)—Not in MDL	
#2804.....	204
F. Demographics.....	205
Table 3. Initial Demographics	205
Table 4. Education	208
Table 5. Income and Employment.....	208
Table 6. Health Insurance Status	209
Table 7. Mobility.....	210
Table 8. Vulnerability and Assistance	211
G. A Story in Numbers	211
II. Normative Concerns	212
A. Heterogeneity and First Mover Idiosyncrasies	213
B. Black Holes.....	219
C. Distance	224
D. Settlements.....	227
E. Quasi-Sovereigns	231
F. Unpredictable.....	233
III. A Proposed Solution	235
A. Modifying the MDL Statute.....	235
B. Choices	238
C. Which Tool	242
D. Concerns, Problems, Objections	244
Conclusion	246
Appendix A—Model 1407(a).....	247
Appendix B—B & W Version of Figure 4.....	248
Appendix C—B & W Version of Figure 5.....	251

INTRODUCTION

The opioid epidemic claimed over 40,000 lives last year.¹ Over 2 million individuals suffer from opioid induced impairment and dependence.² Countless other lives are affected and many families and communities suffer the effects of rampant opioid abuse.³ In the past, many courts conceptualized opioid abuse as the individuals' responsibility.⁴ More

1. See Brendan Saloner et al., *A Public Health Strategy for the Opioid Crisis*, 133 PUB. HEALTH REPS. 24S (2018) ("The current drug overdose crisis is substantially driven by opioids, which accounted for 42,000 deaths in 2016, a 5-fold increase since 1999."); *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> [<https://perma.cc/2VN2-J6TL>] ("Every day, more than 130 people in the United States die after overdosing on opioids."); see also Nadia Kounang, *Opioids Now Kill More People Than Breast Cancer*, CNN (Dec. 21, 2017, 12:14 AM), <http://www.cnn.com/2017/12/21/health/drug-overdoses-2016-final-numbers> [<https://perma.cc/DNB9-SF4V>] ("More than 63,600 lives were lost to drug overdose in 2016 . . ."); Patricia Mazzei, *Opioids, Car Crashes and Falling: The Odds of Dying in the U.S.*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/us/opioids-car-crash-guns.html> ("[F]or the first time, Americans are more likely to die of an opioid overdose than in a vehicle crash."); Barry Meier, *Sacklers Directed Efforts to Mislead Public About OxyContin, Court Filing Claims*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/health/sacklers-purdue-oxycontin-opioids.html> ("Since OxyContin came on the market in 1996, more than 200,000 people have died in the United States from overdoses involving prescription opioids . . ."). See generally Abbe Gluck et al., *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J. L. MED. & ETHICS 351 (2018).

2. See REBECCA AHRNSBRAK ET AL., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2016 NATIONAL SURVEY ON DRUG USE AND HEALTH (2017), <https://store.samhsa.gov/system/files/sma17-5044.pdf> [<https://perma.cc/6EPU-48PG>] (estimating that 2.1 million individuals had symptoms of an opioid use disorder such as impairment and dependence).

3. See WHITE HOUSE COUNCIL OF ECONOMIC ADVISERS, THE UNDERESTIMATED COST OF THE OPIOID CRISIS 1 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf> [<https://perma.cc/2WTB-WCC5>] (stating that in 2015, the Council estimated that the "economic cost of the opioid crisis was \$504 billion, or 2.8 percent of GDP," including substantial costs for both fatalities and consequences for opioid misuse among the living); see also First Amended Complaint & Jury Demand, *Commonwealth v. Purdue Pharma L.P.*, No. 1884-cv-01808 (Mass. Super. Ct. Jan. 31, 2019) (highlighting the cost of opioid addiction for those who do not fatally overdose, including expensive treatment, inability to work, loss of child custody, and the risk that children may be born addicted to opioids).

4. See *Inge v. McClelland*, 257 F. Supp. 3d 1158, 1163 (D.N.M. 2017) (concluding that "[p]laintiffs are barred from asserting their claims because they are based on [p]laintiffs' own illegal conduct, acquiring narcotics through fraudulent prescriptions"); *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 485 (Miss. 2006) (stating that because the opioid user's violation of the law was "not merely a condition, but

recently, a broad coalition of legislators, attorneys, academics, commentators, and doctors have argued that drug manufacturers might share a significant portion of the blame for the opioid epidemic because they intentionally or recklessly encouraged over-prescriptions, enshrouded the true risks of addiction, and targeted vulnerable populations.⁵ In hundreds of lawsuits filed across the nation, numerous cities, counties, Native-American tribes, states, labor-unions, hospitals, individuals, and insurance companies are currently invoking these novel legal arguments against opioid manufacturers and distributors.⁶ All of the federal lawsuits concerning the opioid epidemic have been transferred away from their various courts of origin for coordinated pretrial proceedings.⁷ Currently, over 1900 cases with over 2400 plaintiffs are in front of a single judge in the Northern District of Ohio.⁸ If past

instead an integral and essential part of his case and *the* contributing cause of his alleged injury,” his claim was precluded by his own wrongful conduct).

5. See Complaint, State *ex rel.* DeWine v. Purdue Pharma, L.P. (Ind. Super. Ct. 2018) (“From 2012 through 2016, there were 58 *Indiana counties* with opioid prescribing rates greater than 100+ prescriptions per 100 residents.”); First Amended Complaint & Jury Demand, *supra* note 3 (stating that distributors that fulfill prescription drug orders to pharmacies failed to question suspicious activity and monitor the quantity of painkillers shipped to individual pharmacies); Complaint, State v. Purdue Pharma L.P. (Ohio Ct. Com. Pl. May 31, 2017) (noting that in 2012, the level of over-prescription increased when the total number of opioid doses prescribed to patients in Ohio was 793 million, enough to supply every person in the state with sixty-eight pills); Katie Zezima, *Congressional Report: Drug Companies, DEA Failed to Stop Flow of Millions of Opioid Pills*, WASH. POST (Dec. 19, 2018), <https://www.washingtonpost.com/national/congressional-report-drug-companies-dea-failed-to-stop-flow-of-millions-of-opioid-pills/2018/12/18/5bc750ee-0300-11e9-b6a9-0aa5c2fcc9e4> (stating that distributors that fulfill prescription drug orders to pharmacies failed to question suspicious activity and monitor the quantity of painkillers shipped to individual pharmacies); see also Barry Meier, *Sacklers Directed Efforts to Mislead Public About OxyContin, Court Filing Claims*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/health/sacklers-purdue-oxycontin-opioids.html> (“A confidential 2006 Department of Justice memorandum prepared in connection with the federal government’s case against Purdue Pharma concluded that the drug maker was aware of OxyContin’s growing abuse soon after it came onto the market in 1996.”).

6. See Transfer Order, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 12, 2017), ECF No. 1 (stating that plaintiffs in forty-six actions allege that defendants, manufacturers of opioid drugs, improperly marketed and distributed opiate medications across the country and failed to prevent diversion of opiates into illicit channels, thereby contributing to the opioid crisis).

7. See *id.* Related actions that were filed after the original transfer are now also transferred as so called “tag-along action[s].” See RULES OF PROCEDURE OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 1.1(h), 7.1, 7.2 [hereinafter JPML RULES OF PROCEDURE] (detailing the procedure for new cases to be joined to existing MDL cases).

8. These numbers are derived from my own dataset.

experience serves, virtually none of these cases will ever return to where the plaintiffs originally filed these lawsuits.⁹

This stunning feat of procedural prowess is possible under 28 USC § 1407 (“1407” or “MDL statute” or “federal multidistrict litigation”). Once a rarely used procedural oddity, cases transferred under the multidistrict litigation statute now account for roughly a third of the federal docket.¹⁰ Use of section 1407 is controversial and often fiercely contested because it radically re-balances the litigation opportunities and vulnerabilities of plaintiffs and defendants.¹¹ Instead of defending in district courts all over the country, a defendant only has to defend in one proceeding. Instead of facing many plaintiffs with many strategies and approaches to discovery and motion practice, the defendant faces a steering committee of plaintiff attorneys selected by the judge who, often, is focused on protecting judicial resources and encourages broad settlements.¹²

9. Only around 3% of MDL cases ever come back. See Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1206 (2018) (“The reality of MDL practice, as everyone understands, is that the cases almost never exit the MDL proceeding. They are almost always—in fact, over 97 percent of the time—resolved in the MDL court, either by dispositive motion or through mass-settlement agreement.”); see also Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 679 (2013) (noting that in practice, judges increasingly refuse to allow plaintiffs to return to their original districts for trial); Emery Lee et al., *The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation: An Empirical Investigation* 15 (July 10, 2010) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443375 [<https://perma.cc/N8XD-LU2E>] (noting that “cases that are transferred as part of an MDL generally do not return to the transferor court”).

10. See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., *STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407 FISCAL YEAR (2017)*, https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2017.pdf [<https://perma.cc/9X65-M7D6>] (noting annual data of cases transferred pursuant to § 1407); see also Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. (forthcoming 2019) (manuscript at 2–3), <https://ssrn.com/abstract=3255623> [<https://perma.cc/4EGV-UQVG>] (describing the MDL process as “arguably the central feature in federal litigation” and stating that more than one third of all federal civil lawsuits are in MDL proceedings).

11. See *DeLaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147, 152–53, 155 (D. Mass. 2006) (“Some, believing that any settlement is preferable to any trial, may consider [the pursuit of settlement without offering a trial] a desirable outcome. In actuality, however, this marginalization of juror fact-finding perversely and sharply skews the MDL bargaining process in favor of defendants The litigant who refuses to settle can never get back to his home court to go before a local jury unless the transferee judge agrees. Once trial is no longer a realistic alternative, bargaining shifts in ways that inevitably favor the defense.”).

12. See Tidmarsh & Peinado Welsh, *supra* note 10, at 11–12 (“Appointment of counsel also limits the claims and arguments of plaintiffs, making it easier for transferee judges to generate broadly applicable procedural, substantive, or evidentiary rulings that can channel the litigation into a global summary judgment or settlement.”).

Multidistrict litigation faces numerous critics,¹³ but the opioid epidemic litigation highlights a problem that has largely escaped notice: 1407 only selects cases where “common questions of fact” are present and where transfer serves the vague goals of furthering “the convenience of parties and witnesses” and “promote[s] the just and efficient conduct” of transferred cases.¹⁴ The MDL statute does not test for broader interests. Such broader interests might be at play in many instances. Typically, the belief is that other interests are subordinate to the larger goal of efficient adjudication and the parsimonious use of judicial resources.

However, in the context of the opioid epidemic (and litigation like it) there are special and strong additional considerations at play. First, the opioid epidemic is of greater national concern than many other MDL cases.¹⁵ Second, the plaintiffs in this MDL (mostly counties and cities) are representing sections of the public at large and are trying to protect their government police powers.¹⁶ Third, the plaintiffs here are unusually heterogeneous, ranging in population, wealth, litigation resources and experience, governing powers and responsibilities, and varying exposure to the opioid epidemic (early/late, low/high, legally prescribed/illegally obtained). This extreme variation sets the opioid epidemic plaintiffs apart from those in many other MDL cases where similarly situated individual consumers allege more comparable harm.¹⁷ Fourth, many plaintiffs here stress the importance of public disclosure as a litigation goal to educate the public they represent.¹⁸

13. See generally Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1167–68 (2006); Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 339–40 (2008); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 86–87 (2017); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 541 (2013); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015).

14. 28 U.S.C. § 1407(a) (2012).

15. See generally Abbe R. Gluck et al., *Civil Litigation and the Opioid Epidemic*, 46 J. L. Med. & Ethics 351 (2018).

16. The causes of action range dramatically from a few federal causes of action to a broad array of state causes of action (choice of law questions are unaltered by 28 U.S.C. § 1407 transfers and the cases from around the country thus typically retain the law of those jurisdictions). Summarizing and simplifying a great deal, many plaintiffs seek help for overburdened institutions by recovering costs associated with treatment of opioid addiction and associated costs of public safety measures.

17. Nora Freeman Engstrom & Michelle M. Mello, *Suing the Opioid Companies*, STAN. L. SCH. (Aug. 30, 2018), <https://law.stanford.edu/2018/08/30/q-and-a-with-mello-and-engstrom> [<https://perma.cc/UC9P-S9Z6>].

18. See The Commonwealth's Pre-Hearing Memorandum for the Hearing Set for January 25, 2019 at 5, ex. 1 at 4, *Commonwealth v. Purdue Pharma, L.P.*, No. 1884-cv-01808 (Mass. Super. Ct. Jan. 15, 2019) [hereinafter *Commonwealth's Pre-Hearing*].

Fifth, the legal theories invoked by the current plaintiffs in the opioid cases are novel and complex¹⁹ and implicate a difficult debate about the nature and causes of addiction,²⁰ the role of intervening causality,²¹ preemption,²² the interplay of criminal and civil sanctions,²³ measuring

Memorandum] (“The Attorney General is the Commonwealth’s lawyer, and the people of Massachusetts should be allowed to see the allegations brought on their behalf. The Defendants’ deceptive sales tactics injured people across the Commonwealth, and the people of Massachusetts deserve to know the truth.”) (“Revealing the truth about Purdue’s misconduct is important to achieve justice and make sure deception like Purdue’s never happens again.”). *See generally* Barry Meier, *Opioid Makers Are the Big Winners in Lawsuit Settlements*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/opioids-lawsuits-purdue-pharma.html> (“Forcing the opioid industry to reveal the truth will likely take years, but it could prevent a similar catastrophe in the future.”).

19. For example, a number of plaintiffs argue that the behavior of the opioid manufacturers constitutes a public nuisance. Complaint at 66–69, *State v. Purdue Pharma L.P.*, (Ohio Ct. Com. Pl. May 31, 2017); *see also* Opinion & Order at 38–39, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 12, 2017), ECF No. 1203 (“Plaintiffs allege that Defendants have contributed to the addiction of millions of Americans to these prescription opioids and to the foreseeable result that many of those addicted would turn to street drugs. While these allegations do not fit neatly into the legal theories chosen by Plaintiffs, they fit nevertheless.”).

20. *See* Nicolas Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 652 (2019) (questioning “a simple cause and effect model to explain a far more complex problem”).

21. *See* Koenig v. Purdue Pharma Co., 435 F. Supp. 2d 551, 556–57 (N.D. Tex. 2006) (concluding that the “read and heed” presumption that a user would have read and heeded a drug’s warnings or instructions is not applicable in cases that involve a “learned intermediary,” such as a prescribing physician).

22. *See* *Yates v. Ortho-McNeil-Janssen Pharm., Inc.*, 808 F.3d 281, 293 (6th Cir. 2015) (concluding that because the FDA approved the birth control patch that plaintiff alleged caused her stroke, her claims of pre-approval and post-approval design defect claims were preempted). *See generally* Michael R. Abrams, Note, *Renovations Needed: The FDA’s Floor/Ceiling Framework, Preemption, and the Opioid Epidemic*, 117 MICH. L. REV. 143, 150 (2018) (arguing that the Supreme Court’s holdings allowing federal administrative standards to preempt state tort law permits pharmaceutical companies to avoid internalizing the public health costs of opioids).

23. *See* Sari Horwitz & Scott Higham, *Doctors in Seven States Charged with Prescribing Pain Killers for Cash, Sex*, WASH. POST (Apr. 17, 2019), <https://www.washingtonpost.com/world/national-security/doctors-in-five-states-charged-with-prescribing-pain-killers-for-cash-sex/2019/04/17/7670d20e-607e-11e9-9ff2-abc984dc9eec> (“Dozens of medical professionals in seven states were charged Wednesday with participating in the illegal prescribing of more than 32 million pain pills, including doctors who prosecutors said traded sex for prescriptions and a dentist who unnecessarily pulled teeth from patients to justify giving them opioids.”); *see also* Hon. Lawrence K. Marks, *The Unified Court System’s Response to the Opioid Epidemic in New York*, 11 ALB. GOV’T L. REV. 28, 32, 34, 36, 56 (2017) (describing New York state’s Unified Court System, in which drug court officials work in tandem with social services and treatment providers and criminal justice professionals to help addicts recover instead of serving prisons sentences, which generally exacerbate addictions); Cara O’Connor,

harm,²⁴ local powers in the midst of a paralyzed national crisis, and the intractable costs of a drugged society.²⁵ Such new and complex legal theories can best be tested and developed over time if diverse advocates push for them, diverse defendants point out their flaws, and diverse audiences evaluate them.²⁶ Litigating such issues in a single forum in front of a single judge will likely underdevelop the factual record, underdevelop the legal theories, and underdevelop democratic legitimacy.

All of this suggests a heightened value for dispersed local adjudication, in a timely manner, on the merits, targeted at the specific and individualized harm suffered in that place, controlled by that plaintiff (e.g., targeting discovery to their litigation goals), and which provides resident witnesses a chance to participate in front of a local judge and jury that are mindful of local conditions and sensibilities. This is the exact opposite of what the MDL process typically promises and has actually delivered in this case thus far.

We can gain some sense of what the road not taken might look like thanks to the accident of non-removability.²⁷ While most opioid cases were either filed in federal court or removed to federal court and thus

Comment, *A Guiding Hand or a Slap on the Wrist: Can Drug Courts Be the Solution to Maternal Opioid Use?*, 109 J. CRIM. L. & CRIMINOLOGY 103, 106 (2019) (arguing that drug courts must undergo reforms in order to better adjudicate cases involving pregnant women addicted to opioids and better help pregnant addicts).

24. See Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 U. KAN. L. REV. 1061, 1107 (2019) (conducting a study of the opioid crisis using “unstructured, qualitative interviews with local government department heads and other service providers to determine the extent to which their opioid costs could be readily captured”).

25. See *Pain Relief Most Reported Reason for Misuse of Opioid Pain Relievers*, NAT’L INST. ON DRUG ABUSE (July 31, 2017), <https://www.drugabuse.gov/news-events/news-releases/2017/07/pain-relief-most-reported-reason-misuse-opioid-pain-relievers> [<https://perma.cc/4TGZ-WT87>] (citing data collected from the 2015 National Survey on Drug Use and Health, which estimated that 92 million people in the United States used opioid pain relievers in 2016).

26. See Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 905, 922 (2018) (“[T]here may be systemic benefits from multiple decisions by multiple judges arising from arguments by multiple lawyers.”); Melissa Mortazavi, *Tort As Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 931 (2015) (“Tort suits bring forth new ideas, create new forums for debate, force fact-finding, and increase back and forth dialogue amongst the public and private institutional actors to develop sound law and policy.”).

27. For example, Purdue Pharma Inc. is incorporated in New York with its principal place of business in Connecticut. Diversity-only suits filed in the state courts of those states are non-removable. 28 U.S.C. § 1441(b)(2) (2012) (“A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”).

brought within the broad transfer powers of the Judicial Panel on Multidistrict Litigation (JPML or the “Panel”), a few cases remained in state courts and thus cannot be transferred to the federal MDL.²⁸ For example, one opioid case was filed in Oklahoma state court and became non-removable, seemingly because of a mistake by counsel for the defendants.²⁹ The case has remained in state court despite subsequent efforts to remove to federal court and invoke 1407. The Oklahoma case was filed around the same time as hundreds of others now in the federal opioid MDL. While the federal cases appear years away from deep and individualized discovery and an on-the-merits adjudication, the case in Oklahoma state court went to trial in May 2019.³⁰

None of this is to suggest anything derogatory about the MDL process in general or the MDL judge here in particular. However, I argue that the opioid epidemic cases (and cases like it) are not a good fit for MDL treatment and teach us about massive blind spots in the MDL statute and doctrine. There is currently no way in MDL litigation to account for powerful societal and governmental interests that trump litigation efficiency arguments.

One way to fix this blind spot is through the new concept of “MDL immunity.” This doctrinal innovation is one of the main contributions of this Article. I propose that cases by and against government entities must be exempted from generalized MDL treatment. In contrast to other immunities that block liability, this is an immunity from a particular procedural device, namely transfers of cases to a multidistrict litigation proceeding. The best way to accomplish this is through a one-sentence amendment to the MDL statute (Appendix A). Something close to it could also be accomplished without Congressional action by modifying JPML doctrine or changed practices by MDL judges. However, these alternative approaches would not be as formalized and predictable as legislative action.

28. *But cf.* American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis*, 217–18 (1994) (arguing for “intersystem consolidation” that would allow transfers from state to federal courts for consolidation purposes). Also, 28 U.S.C. § 1441(b)(2) (2012) limits removal of cases (and therefore transfer of cases under 1407) where any “defendant[] is a citizen of the State in which such action is brought.” However, most plaintiffs would like to assert federal claims that puts them beyond the requirements of 1441(b)(2).

29. Defendants stipulated to non-removability in exchange for more time to answer the complaint and they requested removal after the time allowed in 28 U.S.C. § 1446(b). Stipulation at 2, *State v. Purdue Pharma L.P.*, No. CJ-2017-816 (Okla. Dist. Ct. July 27, 2017).

30. Andrew M. Harris & Jef Feeley, *Oklahoma Narrows Opioid Suit Before Trial in J&J, Teva Case*, BLOOMBERG (Apr. 4, 2019), <https://www.bloomberg.com/news/articles/2019-04-04/oklahoma-narrows-opioid-lawsuit-before-trial-in-j-j-teva-case> [https://perma.cc/KQ4V-T6AJ].

I make the argument for MDL immunity informed by data collected from state and federal courts on hundreds of cases, cross-referenced with opioid abuse data from the Center for Disease Control³¹ and Census and American Community Survey data. Together, such data provide a broader lens to capture the extent and limitations of the federal opiate litigation. Despite the importance of the opioid MDL, no research has yet examined who actually is participating in the case and which communities are left out from partaking and leadership. The data shows the predominance of atypical leaders in the MDL and normatively relevant absences.

Section 1 will provide an empirically informed description of the federal opioid MDL with a particular focus on the plaintiffs in the case. Section 2 builds on this account to highlight doctrinal and normative concerns that the opioid MDL raises. Section 3 explains the new concept of MDL immunity and how it would address numerous normative concerns and contribute to a more democratic resolution of the opioid epidemic and cases like it.

The doctrinal and empirical contributions of this Article will likely prove useful in other domains as well where local governments struggle to articulate and fund responses to national crises, including litigation surrounding firearms, e-cigarettes, predatory lending, obesity, environmental contamination, global warming, sanctuary cities, and national emergencies declared by the President.³²

I. WHO AND WHO NOT

This Section provides an empirically informed perspective of the federal opioid MDL.³³ It focuses on the plaintiffs in the case to highlight the doctrinal incongruity between the MDL statute and the actual configuration of this case.

31. Thanks to the Center for Disease Control (CDC) and the National Association for Public Health Statistics and Information Systems (NAPHSIS) for providing vital statistic micro-data.

32. See Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1286 (2018) (discussing how cities bring suits as plaintiffs in order to redress large-scale harms such as gun violence and opioid addiction); Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J.L. REFORM 581, 584 (2019) (“Cities . . . can provide much-needed resources to augment states’ litigative capacities in areas such as consumer protection, environmental protection, and enforcement of anti-discrimination laws.”).

33. See also Emery G. Lee et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 211–12 (2015) (noting that despite the importance of the MDL process, there is little research on it).

My account begins with an explanation of data and methods. I collected data on hundreds of cases and cross-referenced them with opioid abuse data and Census data. I then geo-located government entity plaintiffs (the vast majority of plaintiffs in the opioid MDL). This allowed me to highlight connections and discontinuities between plaintiffs in real space and in relation to variables important for understanding the opioid litigation.³⁴ The data reveals that the government plaintiffs in this case are far from homogenous and comprehensively selected.³⁵ Early filers in particular are atypical.³⁶ They clump together geographically and represent communities that tend to be affected earlier and harder by the opioid epidemic than other jurisdictions.³⁷ These early filers also tend to be poorer, less diverse, and less educated than other jurisdictions.³⁸ They have higher numbers of those who are government-insured and those supported by government assistance programs than later filers and other peers.³⁹

The atypicality of early filers is important because only early filers were present when the initial transfer motion was argued, the scope of the MDL

34. This account is non-causal in nature. My aim is to describe and characterize a complex case to highlight key aspects that are easily overlooked if we focus on motions, opinions, and doctrine alone.

35. See *infra* Sections I.B, I.F.

36. See Transfer Order, *supra* note 6, at A1–A4 (listing the original forty-six filers seeking to consolidate their claims via an MDL action).

37. See *id.*; see also NAT'L INST. ON DRUG ABUSE, KY. OPIOID SUMMARY 2 (2019), <https://www.drugabuse.gov/node/pdf/21961/kentucky-opioid-summary> [<https://perma.cc/4KC3-JPLQ>] (noting that the rate of opioid-related deaths in Kentucky is nearly twice the national average); NAT'L INST. ON DRUG ABUSE, OHIO OPIOID SUMMARY 2 (2019), <https://www.drugabuse.gov/node/pdf/21980/ohio-opioid-summary> [<https://perma.cc/JHV7-T5GC>] (noting that in 2017, Ohio had the second highest rate of opioid-related drug overdose deaths in the nation); NAT'L INST. ON DRUG ABUSE, W. VA. OPIOID SUMMARY 2 (2019), <https://www.drugabuse.gov/node/pdf/21991/west-virginia-opioid-summary> [<https://perma.cc/8SNA-XP23>] (noting that the state has the highest rate of opioid-related drug overdose deaths in the nation).

38. See *QuickFacts*, U.S. CENSUS BUREAU (Dec. 6, 2018), <https://www.census.gov/quickfacts/geo/chart/WV,OH,KY/INC110217> [<https://perma.cc/WN2S-SBFV>] (providing data for *median household income in 2017 dollars*); *QuickFacts*, U.S. CENSUS BUREAU (Dec. 6, 2018), <https://www.census.gov/quickfacts/geo/chart/WV,OH,KY/EDU685217> [<https://perma.cc/EV8C-TDBG>] (providing data for percent of population older than twenty-five years with a Bachelor's degree or higher); *QuickFacts*, U.S. CENSUS BUREAU (Sept. 13, 2018), <https://www.census.gov/quickfacts/geo/chart/WV,OH,KY/IPE120217> [<https://perma.cc/CL93-LFAQ>] (providing data for percent of *persons in poverty*); *Quickfacts*, U.S. CENSUS BUREAU (July 1, 2017), <https://www.census.gov/quickfacts/geo/chart/WV,OH,KY/RHI125218> [<https://perma.cc/EX6V-9PQS>] (providing data for percentage of white people).

39. See *QuickFacts*, U.S. CENSUS BUREAU (Mar. 24, 2016), <https://www.census.gov/quickfacts/geo/chart/WV,OH,KY/HCN010212#qf-headnote-c> [<https://perma.cc/6K6P-QDUQ>] (providing data for *total health care and social assistance receipts/revenue*).

determined, and lead counsel proposed and selected. Later filers are in the MDL all the same but did not have a voice in these important stages of the case and continue to be excluded from pre-trial litigation decisions.⁴⁰

Beyond atypical, early filers do not include all jurisdictions that are similarly situated. While three neighboring counties might be virtually indistinguishable in terms of opioid abuse patterns, demographics, government structure, and economics, one county might be an early filer in the MDL case and have its attorney selected as lead attorney; another county might be a late filer with little or no power to affect the direction of the MDL; and a third county might not have initiated any lawsuit whatsoever. Doctrinally this is understandable: there is nothing in the MDL statute that requires these three counties to behave alike even when they are affected by the opioid MDL in a similar way.⁴¹ However, normatively, this is troubling. The following sections will establish the empirical foundations that are the bedrock of later doctrinal and normative arguments.

A. Data

This Section presents a broad overview of the membership in the opioid MDL. The case is a beast. Currently, it is comprised of roughly 1900 cases with more transferred every week by the JPML.⁴² Many cases include multiple plaintiffs, typically many defendants, and many causes of action. The docket sheet currently contains more than 2600 entries.⁴³ There are also dozens of amicus curiae⁴⁴ and a handful of intervenors.⁴⁵

40. See *infra* note 70 and accompanying text.

41. 28 U.S.C. § 1407 (2012). The lack of required consistency can be contrasted with, say, 23(b)(2) class action treatment.

42. The JPML decides on whether to consolidate, designates a MDL judge for the matter, designates a district for MDL proceedings, and decided whether/when to remand cases. The JPML does not decide or influence the MDL proceedings directly by, for example, weighing in on orders, opinions, and judgments. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 421 (J.P.M.L. 1991) (“The Panel has neither the power nor the disposition to direct the transferee court in the exercise of its powers and discretion in pretrial proceedings.”).

43. *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio filed Dec. 8, 2017).

44. *Id.* (listing amicus curiae on the docket sheet, mostly hospitals and states).

45. Most of the intervenors are newspapers that seek to publicize information utilized in the litigation that is currently shielded from public view by protective orders. *Id.*; see also Kevin Koeninger, *Newspaper Argues for Release of Data in Opioid Case*, Courthouse News Serv. (May 2, 2019), <https://www.courthousenews.com/newspaper-argues-for-release-of-data-in-opioid-case> [<https://perma.cc/4HGW-K8N8>] (documenting the Washington Post’s attempt to obtain government data).

To gain a better understanding of the composition of this MDL, I began by identifying all member cases transferred by the JPML.⁴⁶ I then hand-coded docket identification information, plaintiff names, plaintiff types, original filing courts, original filing dates, and transfer dates.⁴⁷

This dataset provides an initial snapshot of how many plaintiffs are in the MDL, when they originally filed their suits, when their cases were transferred, and what type of plaintiffs predominate. To gain a better understanding of the litigation needs and vulnerabilities of these plaintiffs, I then cross-referenced the MDL data with two other data sources.

The first data source is mortality data from the Center for Disease Control (CDC) and the National Center for Health Statistics (NCHS).⁴⁸ Access to this data is conditional on adherence to data sharing restrictions and NCHS data suppression standards that limit some reporting on the data.⁴⁹ Vital statistics micro-data provides an indication of the timing and extent of the opioid epidemic in different communities based on fatal overdoses.⁵⁰ This data is not without problems and limitations, but it provides

46. MDLs are a moving target, with cases added from time to time and, potentially, remanded and dismissed. See *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio filed Dec. 8, 2017) (indicating on the docket sheet that third-party defendant King Pharmaceuticals, Inc. was dismissed on December 17, 2018). I continuously collected data on cases at the point in time when they were transferred. Also, a few cases are part of the MDL even though they were never transferred by the JPML. Some plaintiffs are located in the Northern District of Ohio (where the MDL takes place). They filed in their home jurisdiction and were included in the MDL without transfer. A few other plaintiffs, though not located in Ohio, decided to file directly in the Northern District of Ohio rather than their home districts. They too were included in this MDL without JPML transfers. See generally Andrew Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 759 (2012) ("In direct filing, plaintiffs bypass the transfer process and file their cases directly into an MDL court.").

47. I focus on when the transfer into the MDL court actually occurs rather than when there is a motion for transfer, the JPML considers the transfer, the JPML issues a conditional transfer order, or the JPML transfers. Oftentimes all of these events happen in close proximity.

48. This data includes the National Center for Health Statistics' Vital Statistics, Mortality, All County (micro-data) 2000–2017, as compiled from data provided by the fifty-seven vital statistics jurisdictions through the Vital Statistics Cooperative Program.

49. A note of caution to future legal researchers: the process for obtaining this data took ten months from request to receipt of data, including multiple rounds of review.

50. Deaths are, of course, not the sole indication of the extent of the opioid epidemic. As indicated earlier, many people suffer from opioid addiction without ever overdosing and dying. However, they often do so in private and it is difficult to collect data on, for example, families torn apart by opioid addiction. As such, this Article uses opioid deaths as a crude but clear, well-documented, and important proxy for the timing and extent of the opioid epidemic. Beyond the proxy nature of this variable, it is also important to highlight the risk of bias. Death as a result of opioid overdoses

important and, to my knowledge, unmatched detail on where and when deaths occur in the United States. This data allowed me to test, for example, whether the MDL plaintiffs mostly consist of counties that were affected earlier or more recently by the opioid epidemic.

The second data source is the U.S. Census and the American Community Survey.⁵¹ This data is used to characterize the counties and cities involved in the MDL with a focus on population numbers, incomes and earnings, age, diversity, household size, presence of veterans, education levels, employment numbers, health insurance coverage (private & public), geographic mobility, poverty, food-stamp recipients, public assistance recipients, and disabled⁵² and vulnerable populations.⁵³ Put crudely, this data allowed me to query, for example, whether only rich or poor counties partake in the opioid MDL.

Merged together, these three data sources provide a novel way to characterize who was an early filer in the opioid MDL (and thus could shape its scope and leadership), who filed later, and who did not file at all. The data shows the predominance of atypical leaders in the MDL and normatively relevant absences.

B. Who

To gain a better overview of this massive case, we can begin by characterizing the types of plaintiffs in the MDL.⁵⁴ While the JPML order creating this MDL focused on government litigants, it is not limited to

might not be evenly distributed across all people and communities that grapple with opioid addiction. For example, it might be the case that well-educated individuals who are addicted to opioids overdose more or less frequently than others. This could bias results significantly. Causality chains are extremely complicated in this area and beyond the scope of this Article. The analysis assumes, without knowing, that such biasing factors are comparatively mild.

51. *American Community Survey (ACS)*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs> [<https://perma.cc/844U-9G6G>].

52. Disabled individuals for ACS purposes include individuals with hearing, visual, cognitive, ambulatory, self-care, and independent living disabilities. *How Disability Data Are Collected from the American Community Survey*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/health/disability/guidance/data-collection-acs.html> [<https://perma.cc/E2TS-WZBM>] (last revised Oct. 17, 2017).

53. “Vulnerable populations” can be defined in many ways. For the purposes of this Article, I focus on a z-score index of young people (under five years of age), old people (above sixty-four years of age), and disabled individuals.

54. Unless otherwise indicated, I count each plaintiff separately even if they joined together in a case. For example, two counties might initiate a lawsuit together as co-plaintiffs before the JPML transfers their case to the opioid MDL. I count that as two plaintiff counties in part because different types of litigants frequently join together in one opioid lawsuit, thus creating difficult categorization problems with case-based counting methods.

them.⁵⁵ This Section thus begins with a headcount of the types of plaintiffs in this case, asking whether government litigants still predominate. Within the subset of government litigants, different types of government entities at different levels have varying responsibilities and abilities. This Section thus also inquires at what level the brunt of the government litigants govern.

Table 1. Types of Plaintiffs in MDL #2804, National Prescription Opiate Litigation, as of 2/14/2019

Type	Number	Percentage
Federal	0	0
State	45 ⁵⁶	2.4
County	871	47.0
Municipality	506	27.3
Sub-Municipality	34	1.8
Union	28	1.5
Business	119	6.4
Non-profit	37	2
Individual	129	7.0
Tribe	81	4.4
Total	1850	100%

Note: “Counties” include county-equivalents like Louisiana Parishes. “Municipalities” include cities, towns, townships, villages and the like. “Sub-Municipalities” include city police departments, jails, hospitals, and schools. As such, this category includes government structures subsidiary to counties and cities. Future researchers might desire a more fine-grained distinction but, given the low numbers, that seemed unnecessary in the context of this study. “Union” includes sub-units of unions and related entities, such as union retirement funds. “Tribe” includes state and federally recognized tribes. The percentage might not add up to 100% because of rounding above.

Table 1 makes clear that the brunt of the plaintiffs in this MDL are counties and municipalities (about $\frac{3}{4}$ of all litigants). The federal government and a large number of affected federal agencies could be

55. Transfer Order, *supra* note 6, at 3–4 (“Although all of the cases on the motion before us involve claims brought by political subdivisions, we have been notified of potential tag-along actions brought by individuals, consumers, hospitals and third party payors. As reflected in our questions at oral argument, this litigation might evolve to include additional categories of plaintiffs and defendants, as well as different types of claims.”).

56. This number might be misleading because it does not indicate that forty-five separate states are in this MDL as plaintiffs. Instead, it is a handful of states that repeatedly join other government units (typically counties) in their lawsuits.

part of the MDL; nothing in 1407 or JPML rules prevents the inclusion of federal government litigants as plaintiffs or defendants.⁵⁷ The U.S. Department of Justice briefly considered joining the case and asked the court for additional time to consider this option in light of the massive and multifaceted impact of the opioid crisis on federal services, federal programs, and federal law enforcement activities.⁵⁸ Ultimately, the federal government decided to participate only in an amicus capacity⁵⁹ and as a non-party discovery target.⁶⁰

While not a type of litigant, this is also a good time to briefly explore the representative status of litigants within putative class actions. An MDL is not a class action⁶¹ though it has features that resemble class actions.⁶² Within the MDL, any plaintiff could theoretically move for

57. See generally 28 U.S.C. § 1407 (2012).

58. Statement of Interest of the United States of America at 1–2, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Mar. 1, 2018), ECF No. 161 (“[T]he United States respectfully asks that the Court afford it a period of thirty days to evaluate whether to participate in these proceedings at this stage.”).

59. United States’ Memorandum in Support of Its Motion to Participate in Settlement Discussions and as Friend of the Court at 1, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Apr. 2, 2018), ECF No. 212-1 (discussing the United States’ determination to be a “friend of the Court” after reviewing the applicable federal statutes, the federal government’s numerous other opioid efforts, and its statutory authority to recover funds from previously paid medical treatments).

60. The federal Drug Enforcement Administration (“DEA”) maintains a database of opioid distribution channel use called the “ARCOS/DADS database.” Much of the litigation activity in the first year of the opioid MDL has centered on who can get access to this data, when, and how they are allowed to use the data. See Order Re: ARCOS/DADS Database at 2, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Feb. 2, 2018), ECF No. 112 (“There is a legitimate need for Plaintiffs to obtain this data, but the Court believes that production must be tailored—perhaps through a protective order—in a way to address the DEA’s concerns regarding breadth, years in question, potential interference in investigations and enforcement actions . . .”).

61. See, e.g., Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011) (explaining that an MDL “strip[s] away” the usual class action protections).

62. See generally Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 215 (noting that in mass harm cases, the term “quasi-class” refers to the aggregation of related cases usually overseen by an MDL court); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1113–14, 1151 (2010) (suggesting that some cases be combined through procedural “hybridization,” which is the “combination of individual actions with some manner of centralizing mechanism,” and further describing multidistrict litigation’s role in combining cases); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 107, 110 (2010) (utilizing three MDL settlements and four common MDL practices to study the “quasi-class action approach” to MDL case management).

class certification.⁶³ Currently only a few plaintiffs have sought class certification. They include individual opioid users,⁶⁴ hospitals,⁶⁵ unions,⁶⁶ and parents and legal guardians of infants born with neonatal abstinence syndrome resulting from in vitro opioid exposure.⁶⁷ The court has made no indication that it will permit class certification to move forward any time soon.

C. When

When created, this MDL consisted of forty-six cases.⁶⁸ Since then, it has grown to almost 1900, with more cases added week after week. This Section examines this growth and inquires into the timing of new actions filed and transferred. Timing is relevant for numerous reasons, chief among them is the ability to control litigation. For example, plaintiffs who filed their opioid cases after October 2017 did not have an opportunity to argue to the JPML whether these cases were suitable for MDL treatment, where the MDL should be situated (the transferee district), or which federal judge should be in charge of all of these cases (the transferee judge). Later filers were, by and large, stuck with decisions that they had no opportunity to shape.⁶⁹

Similarly, one of the first orders of business once the MDL was created was to select lead attorneys. Only they have the power to

63. See Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1695 (2017) ("More than seventy-five percent of MDLs involve class actions.").

64. See Complaint, *Lewis v. Purdue Pharma L.P.*, No. 1:17-op-45076 (W.D. Ark. June 29, 2017).

65. See Class Action Complaint, *Sw. Miss. Reg'l Med. Ctr. v. Amerisourcebergen Drug Corp.*, No. 1:17-CV-145-KS-MTP (S.D. Miss. Nov. 30, 2017).

66. See Class Action Complaint, *United Food & Commercial Workers Health & Welfare Fund of N.E. Pa. v. Purdue Pharma, LP*, No. 1:17-op-45177 (N.D. Ohio Nov. 9, 2017).

67. See Class Action Complaint, *Wood v. Purdue Pharma L.P.*, No. 1:18-op-45264 (N.D. Ohio Mar. 3, 2018) (filing as a putative class representative for children who had "[p]renatal exposure to opioids [that] cause severe withdrawal symptoms and lasting developmental impacts"); Shahla M. Jilani et al., *Evaluation of State-Mandated Reporting of Neonatal Abstinence Syndrome—Six States, 2013–2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 6, 6 (2019) ("NAS is a drug withdrawal syndrome that most commonly occurs among infants after in utero exposure to opioids, although other substances have also been associated with NAS."). See generally Catherine Saint Louis, *A Tide of Opioid-Dependent Newborns Forces Doctors to Rethink Treatment*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/health/opioid-addiction-babies.html>.

68. Transfer Order, *supra* note 6, at 1.

69. *But cf. id.* at 4 ("We will address whether to include specific actions or claims through the conditional transfer order process.").

litigate, and they are in charge of negotiating global settlements.⁷⁰ Plaintiffs who filed after December 2017 could not have their attorney selected as lead attorney. Also, steering committees and related organs do not have to be static but display a tendency toward the status quo. Simplifying a great deal, litigants whose cases were in the MDL early have a far greater chance of having their attorney in a position of control and power than late filers. Figure 1 presents a week-by-week count of filings.

Figure 1. Weekly Number of Filings of Cases in MDL #2804

Notes: Each vertical bar represents the number of filings in a given week. Cases are counted for the purposes of Figure 1 when they were originally filed or originally removed to federal court, rather than when they were ordered transferred to the MDL or actually transferred. The first vertical line indicates when the initial 1407 motion was filed. The second vertical line indicates when the JPML created this MDL and transferred the first set of cases.

Figure 1 illustrates how late filers numerically predominate over the original plaintiffs in this MDL. Most cases now in this MDL were filed after the order to centralize. Figure 1 also provides vague hints at filing incentives. If many would-be plaintiffs sat on the sidelines and waited for the 1407 motion to succeed, we would expect a dramatic influx of

70. See D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2176 (2017) (noting that the negotiating parties who create a global settlement in an MDL are the defendant and the lead lawyers for the plaintiffs, who are appointed by the MDL judge to the plaintiffs' steering committee).

cases right after December 2017.⁷¹ That is not the case here. But neither is the flipside. If most potential opioid litigation plaintiffs detested MDL treatment, we would expect a drop of filings after December 2017.⁷² That is also not the case here. Instead, the data demonstrates a steady increase and eventual platooning of cases over the next twelve-month period (that might be due, in part, to more awareness about opioid litigation rather than appetite or distaste for MDL proceedings). The median number of days between filing/removal of a case and completed transfer to the Northern District of Ohio is twenty-four days.⁷³ This suggests that the JPML is highly efficient at detecting and transferring tag-along cases.

Beyond overall numbers, I am also interested in who filed when. As the previous section indicated, the majority of plaintiffs in this MDL represent different kinds of governments, mostly counties, cities, and tribes. Figure 2 examines filing patterns across these three groups that account for more than three-fourths of all plaintiffs in this MDL.

71. See generally Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000) (examining the view that some case aggregation invites plaintiffs “who would never have brought a ‘real’ case anyway”); Victor E. Schwartz et al., *Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 284 (2003) (“Rather than making cases go away, [efficient complex litigation procedures invite] new ones.”).

72. It is virtually certain that new filings will be included in the MDL as tag-along cases.

73. This number is derived from my own calculations. Typically, the JPML orders transfers a few days before the docket is transferred and the transfer completed. Parties thus know typically within mere days from filing an action or having their state court action removed that their case will end up in the MDL proceedings.

Figure 2. Weekly Number of Filings of Cases in MDL #2804 for County Litigants (Panel 1), Municipal Litigants (Panel 2), and Tribes (Panel 3).

Figure 2 demonstrates that counties are not just numerically predominant; they also were the most common early filers. Tribes, in contrast, filed their lawsuits later. Not a single tribal litigant was present when the initial 1407 motion was made, argued, or decided.⁷⁴ Similarly, no tribal plaintiffs were in the room when lead counsel for the MDL was selected.⁷⁵ This is troubling. Insofar as these different governments have different sovereign powers, resources, responsibilities, exposure, and vulnerability to the opioid epidemic, this filing pattern paired with early and consequential litigation decisions suggests that entire

74. See Stacy L. Leeds, *Beyond an Emergency Declaration: Tribal Governments and the Opioid Crisis*, 67 U. KAN. L. REV. 1013, 1025–26 (2019) (noting that none of the individual actions initially transferred to the MDL were tribal lawsuits).

75. See *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio filed Dec. 08, 2017) (showing on the docket that Special Masters were appointed two weeks before the first tribal plaintiffs filed their appearance).

categories of litigants might not be well-represented when it comes to making decisions about this litigation.⁷⁶

Perhaps in response, and as suggested by the JPML,⁷⁷ the presiding judge in the opioid MDL created a separate track for tribal plaintiffs.⁷⁸ Though a step in the right direction, this track cannot solve more fundamental problems. The track for tribal cases is controlled by two tribal plaintiffs.⁷⁹ They are able to litigate, within set boundaries, their own cases. The tribal litigants not selected for this leadership in this track still have no control or voice about litigation decisions. For example, they are powerless to shape discovery requests or pre-trial strategy. These decisions are made by lead counsel and the attorneys for the two tribal cases that were selected before many of these plaintiffs ever filed suit.

These filing patterns suggest that a few litigants that filed early, mostly counties and some cities, might have a disproportionate voice in litigating this MDL. This raises the question of who these litigants are and how they compare to litigants that filed later and governments that never filed suit. The following sections turn to these questions.

D. Where

One way to get an initial and intuitive sense of who the primary government litigants are is to geolocate them. Geography is information-rich, multifaceted, and underutilized. Representing litigation in real space can be a useful way to explore connections and discontinuities. I begin with a look at counties (the most common plaintiff type), highlighting all counties in the continuous United States that are currently in the MDL.⁸⁰

76. Some might also insist on differently-situated lawyers. *See generally* Melissa Mortazavi, *Blind Spot: The Inadequacy of Neutral Partisanship*, 63 UCLA L. REV. DISCOURSE 16, 18, 21 (2015) (discussing the importance of overlap in identifying traits—such as race and gender—between class members and their legal representatives because such commonalities can increase trust, empathy, and effective communication between plaintiffs and their counsel).

77. Transfer Order, *supra* note 6, at 3 (“The transferee judge might find it useful, for example, to establish different tracks for the different types of parties or claims.”).

78. *See* Case Management Order Number Six, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio July 23, 2018), ECF No. 770 (setting briefing deadlines for two Indian Tribe cases).

79. *See In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio filed Dec. 8, 2017) (showing docket listing the Muscogee (Creek) Nation and Blackfeet Tribe as the individual tribal plaintiffs).

80. As such, Figure 3 does not include filings from Hawaii, Alaska, and U.S. territories (principally a handful of municipalities in Puerto Rico).

Figure 3. County Governments in MDL #2804

Figure 3 is a reminder about the breadth and depth of this MDL. It highlights just how many county governments are involved in this MDL. Figure 3 also presents many puzzles. Why are most of the counties of some states (e.g., Wisconsin) in this MDL while no counties from other states are present? Even in states where many counties filed suit, why did others not? We will explore some of these questions in later sections.⁸¹ Before tackling those questions, I return to a previous question about early and later filers: who are the early filers identified in the previous section? Where are they located? Figure 4 provides an initial answer. It colors different counties in this MDL by when they filed suit (Appendix B provides figures that reproduce this information in a greyscale version).

81. See *infra* Section I.G (discussing the challenges and vulnerabilities of potential and actual litigants); Section II.C (discussing that the JPML considered distance between the MDL jurisdiction and plaintiffs' home jurisdictions as it impacted defendants, not plaintiffs).

Figure 4. County Governments in MDL #2804 Colored by Filing Window

Notes: Counties shaded dark yellow filed suit before the initial 1407 motion was filed. Counties shaded light yellow filed suit between when the initial 1407 motion was filed and when the JPML ordered MDL treatment. Counties in descending shades of green filed suit afterwards (receiving a new color every passing 6 months). See Appendix B for a greyscale version of Figure 4.

Figure 4 makes clear that the early filers are not geographically diverse. The vast majority of early filers are from West Virginia,⁸² Kentucky,⁸³ and Southern Ohio.⁸⁴ Only one county outside of this region, San Joaquin County in California, was part of the initial 1407 motion. Not represented on this map are non-county litigants.⁸⁵

As the map shows, the early plaintiffs in this MDL clump together in one part of the country. Geographic proximity is of course not inherently bad (or good). However, it raises the question of whether those counties are anomalous in ways relevant for this MDL.

82. One state litigant, ten counties, one city, and five individuals.

83. Twenty-four county litigants.

84. Eleven county litigants, two cities, one individual.

85. Beyond the ones mentioned in the footnotes above, this category is comprised of two cities from Washington State, one city in Alabama, and the State of Illinois.

E. Opioid Deaths

The first and perhaps most important variable to consider when evaluating these counties, and the extent to which they might be anomalous, is their exposure to the opioid epidemic. A county's experience with opioid abuse is likely to shape its thinking about lawsuits against opioid manufacturers and distributors. I begin with a county-by-county overview of the average per capita number of opioid deaths between 1999 and 2016 (Appendix C provides this information in a greyscale version).

Figure 5. Yearly Per Capita Average of Opioid Deaths Between 1999 and 2016 by County

Notes: Red indicates a higher rate and blue indicates lower rates. Grey indicates missing or significantly incomplete data. See Appendix C for a greyscale version.

Figure 5 provides a basic sense of where the opioid epidemic has caused the most harm. The primary lesson for the purposes of this Article is that opioid deaths are not evenly distributed around the country. Instead, there are distinct pockets where opioid deaths are significantly higher than surrounding areas. This raises the question: how are opioid deaths related to participation in opioid litigation?

There are many ways to tackle this question, but an initial way is to compare Figure 4 (MDL participation) and Figure 5 (opioid deaths). Both figures suggest a concentration of activity in West Virginia, nearby counties in Ohio and Kentucky, as well as isolated counties elsewhere

in the nation. To hone in further on potential connections, Table 2 compares average opioid death rates across counties by the participation status of those counties in the federal opioid MDL.

Table 2. Opioid Deaths per 100,000 Residents per Year across Litigation Categories

	Early in MDL	In MDL	Not in MDL	All Counties
Average 1999-2016	17.06	10.57	8.90	9.33
2016 only	25.02	17.32	15.77	16.17
1999 only	10.51	5.92	4.60	4.94

Table 2 again shows that some counties experienced a much higher average death rate than others (an average death rate of 9.33 for all counties and almost twice as much for others). Similarly, some counties were affected by the opioid epidemic much earlier and therefore much longer than others. The numbers also suggest a ghastly increase in the opioid death rate over time.⁸⁶

To apply these general observations to the litigation at hand, Table 2 shows opioid death rates by broad categories: for those counties in the MDL that filed opioid-related suits before consolidation, all those in the MDL (whether they filed early or recently), those counties not in the MDL at all, and for all counties in the nation (as a baseline comparison category). This categorization suggests that the actual and potential county litigants are differently situated. Early MDL filers have been affected the most by the opioid epidemic and the longest (their death rates were among the highest as far back as 1999). Other counties in the MDL have numbers slightly above the national average but lower than early filers. Counties not in the MDL tend to be less affected.

In one way, this makes intuitive sense: the counties most impacted by the opioid epidemic do and perhaps should take the lead in litigating opioid cases. However, there are two problems with this intuition. First, even counties not at the top of the impact distribution

86. Some see signs that these numbers are starting to plateau. See, e.g., Ricardo Alonso-Zaldivar & Carla K. Johnson, *US Health Chief Says Overdose Deaths Beginning to Level Off*, AP NEWS (Oct. 23, 2018), <https://www.apnews.com/2bf839f545ca4ed98637c1a44ef854ec> [<https://perma.cc/YB7D-QQE5>] (quoting health secretary Alex Azar as saying that “[w]e are so far from the end of the epidemic, but we are perhaps, at the end of the beginning”).

are massively affected by the opioid epidemic.⁸⁷ Though less than some, they are still affected in ways that strain their ability to govern.⁸⁸ Similarly, while some of the counties might not have been affected as early as others, they are still now in the midst of a massive crisis.⁸⁹ “Less affected” in this context is relative indeed and provides little comfort. Second, while many of the counties most and longest affected by the opioid epidemic are early filers in the MDL, there are others similarly situated who are not.

Figures 6.1-6.3 sharpen this point. These figures present monthly moving averages of per capita deaths from drugs. Each line represents one county or county-equivalent. I split up the counties once again into three categories: early participants in MDL 2804 (Figure 6.1), those who filed later (Figure 6.2), and those who have not yet filed (Figure 6.3).

87. See *supra* Table 2.

88. See Mike Nolan, *More South, Southwest Suburbs Accuse Drug Companies of Contributing to Opioid Epidemic*, CHI. TRIB. (July 31, 2018), <https://www.chicagotribune.com/suburbs/daily-southtown/ct-sta-south-suburbs-opioids-lawsuit-st-0801-story.html> [<https://perma.cc/C5NW-QDLG>] (stating that local governments “have spent significant taxpayer money” on law enforcement and emergency medical services to combat the opioid crisis).

89. See *supra* Table 2 (showing that the 2016 rate of opioid-related deaths in counties not in the MDL was only roughly nine percent less than the rate of opioid-related deaths of counties in the MDL).

Figure 6.1. Monthly Moving Average Per Capita Drug Deaths by County (2003-2017)—Early Filers in MDL #2804

Figure 6.2. Monthly Moving Average Per Capita Drug Deaths by County (2003-2017)—Not-Early Filers in MDL #2804

Figure 6.3. Monthly Moving Average Per Capita Drug Deaths by County (2003-2017)—Not in MDL #2804

These figures graphically recreate the basic insights of Table 2 (increase over time, variation between the three groups). However, they are much messier and much more difficult to read than Table 2 due to the massive amount of data represented here. The added complexity is justified because these figures convey, much better than my words could, that yearly averages between groups, while helpful, hide tremendous variation. Figures 6.1-6.3 show huge variation between counties even in the same group, and the figures show important variation across time. For example, even within the few counties that filed early (Figure 6.1), and that on average were much more affected by the opioid epidemic than most other counties, Figure 6.1 suggests different experiences. For example, some counties trend upward in recent years and some downward. Some experienced

spikes in deaths and others steady developments. Some were affected earlier than others.

Similarly, a look at Figure 6.2 and Figure 6.3 shows that while these categories of counties (late filers and counties that have not filed yet) are on average less affected than earlier filers, they contain counties with high and early opioid exposure. Averages and medians can obscure such variation. In the interest of space and analytical focus, much of the remainder of this Article will focus on a handful of summary statistics. Such an approach allows me to focus on a few stark, overarching points. However, it also entails a loss of important details and variation (and this Section was dedicated to highlighting the existence of such variation). As such, I present the following solely as an initial broad-brushstrokes, descriptive account and leave for future work more detailed examinations of different facets of the opioid epidemic and opioid litigation.

F. Demographics

The previous section explored how various actual and potential county litigants differ with regard to exposure to the opioid epidemic. This Section does the same for variables that are useful to understand the opportunities and vulnerabilities of these litigants. It compares, again, counties across categories (early filers, any filers, non-filers, and the comparison category of national medians). I begin with broad demographic variables before turning to education, income, insurance status, mobility, and poverty.

Table 3. Initial Demographics

	Early in MDL	In MDL	Not in MDL	All Counties
Population	63,230	147,853	83,819	100,027
Non-White %	8.06	17.60	16.74	16.96
Hispanic/Latino %	2.49	7.67	12.30	11.13
Non-U.S. Citizen %	1.00	2.72	2.85	2.81
Average Household Size	2.52	2.53	2.54	2.54
Veteran %	8.75	9.23	9.37	9.33

Notes: All terminology and definitions of populations are those used by the U.S. Census Bureau.

Early and later filers in the MDL are not exceptional in some ways. The median age across all categories of counties is roughly the same and so is the average household size and the percentage of the

population that has served in the military.⁹⁰ However, there are also significant departures. Race, Hispanic/Latino status, and citizenship stand out as clear, distinguishing elements.⁹¹ Counties included in the MDL that filed early are significantly less diverse and international than other counties in the nation.⁹² This is significant because these factors have historically played a complicated role in accounts concerning drugs, drug policy, and moral accountability.⁹³ Discussions about drugs, whether legal or illegal, crack or OxyContin, are rarely only about drugs.⁹⁴ Instead,

90. Veteran status is notable because of allegations that some opioid manufacturers specifically targeted veterans. See First Amended Complaint & Jury Demand, *supra* note 3 (“Purdue also targeted veterans with its deceptive claims that they should take opioids.”).

91. I use, with some reservations, the terminology used by the Census Bureau because this data originates from the ACS administered by the Census Bureau and there is value in keeping variable names consistent.

92. This claim, like this Article, is focused on the opioid litigation, not the opioid crisis. As such, I make no claims here about what segment of the population is most affected or most in need of help. Cf. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., RESULTS FROM THE 2016 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES (2017), <https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.pdf> [<https://perma.cc/K4U4-RMCK>] (providing extensive and detailed information on the national opioid crisis); see also STEPHANIE SCHMITZ BECHTELER & KATHLEEN KANE-WILLIS, CHI. URB. LEAGUE, WHITEWASHED: THE AFRICAN AMERICAN OPIOID EPIDEMIC 2 (2017), https://chiul.org/wp-content/uploads/2019/01/Whitewashed-AA-Opioid-Crisis-11-15-17_EMBARGOED_FINAL.pdf [<https://perma.cc/5AMJ-DKNJ>] (stating that despite the opioid epidemic’s portrayal as an issue affecting white communities, communities of color have also been “profoundly impacted” by the crisis); Abdullah Shihpar, *The Opioid Crisis Isn’t White*, N.Y. TIMES (Feb. 26, 2019), <https://www.nytimes.com/2019/02/26/opinion/opioid-crisis-drug-users.html> (“Labeling the opioid crisis as ‘white’ risks overlooking the very real damage experienced by black, Latino and Native American communities.”).

93. See Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), <https://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html> (“When the nation’s long-running war against drugs was defined by the crack epidemic and based in poor, predominantly black urban areas, the public response was defined by zero tolerance and stiff prison sentences. But today’s heroin crisis is different. While heroin use has climbed among all demographic groups, it has skyrocketed among whites; nearly 90 percent of those who tried heroin for the first time in the last decade were white. And the growing army of families of those lost to heroin—many of them in the suburbs and small towns—are now using their influence, anger and grief to cushion the country’s approach to drugs, from altering the language around addiction to prodding government to treat it not as a crime, but as a disease.”)

94. See generally Julie Netherland & Helena Hansen, *White Opioids: Pharmaceutical Race and the War on Drugs that Wasn’t*, 12 BIOSOCIETIES, 217, 217 (2017) (“[The] less examined ‘White drug war’ has carved out a less punitive, clinical realm for Whites where their drug use is decriminalized, treated primarily as a biomedical disease, and

they are often tied up with narratives about entire categories of people.⁹⁵ Even if we conceptualize the opioid epidemic not in criminal terms but as a public health crisis⁹⁶ (perhaps a choice that is itself intertwined with questions of race),⁹⁷ it is still difficult to avoid the allure of metaphor and grand narratives.⁹⁸ I worry about the wisdom of focusing on race in discussions about drugs (unless, of course, medically useful). But perhaps it is inevitable and future researchers might find this data useful to explain, for example, shifting public sentiments or regulatory approaches. Table 4 shifts toward related considerations of education.

where their whiteness is preserved, leaving intact more punitive systems that govern the drug use of people of color.”).

95. See, e.g., Benjamin D. Steiner & Victor Argothy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 TEMP. POL. & CIV. RTS. L. REV. 443, 443–44 (2001) (arguing that while the War on Drugs is presented as a program to enforce drug law nationally, in reality, the program disproportionately targets African and Latino Americans and enforces racial hierarchies by criminalizing drug use in minority populations while in White populations, drug use is considered a health problem).

96. See Eric D. Hargan, Acting Secretary, Dep’t of Health & Human Servs., *Determination That a Public Health Emergency Exists* (Oct. 26, 2017), <https://www.hhs.gov/sites/default/files/opioid%20PHE%20Declaration-no-sig.pdf> [<https://perma.cc/UN3K-7J7K>] (stating that “a public health emergency exists nationwide”).

97. See Vann R. Newkirk II, *What the ‘Crack Baby’ Panic Reveals About The Opioid Epidemic*, ATLANTIC (July 16, 2017), <https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763> [<https://perma.cc/DX8T-35EW>] (“Today’s opioid epidemic presents a mostly-white face to the world, and the larger ‘epidemic of despair’ tends to target communities in vaunted ‘Middle America,’ as opposed to inner-city Baltimore and Detroit. And with that changing face comes better results. Instead of wide-scale carceral panics and schemes to imprison addicted mothers, the country has considered a public-health approach . . .”).

98. See generally SUSAN SONTAG, *AIDS AND ITS METAPHORS* 5 (1989) (“Saying a thing is or is like something-it-is-not is a mental operation as old as philosophy and poetry.”); SUSAN SONTAG, *ILLNESS AS METAPHOR* 3–4 (1978) (“My point is that illness is *not* a metaphor, and that the most truthful way of regarding illness—and the healthiest way of being ill—is one most purified of, most resistant to, metaphoric thinking. Yet it is hardly possible to take up one’s residence in the kingdom of the ill unprejudiced by the lurid metaphors with which it has been landscaped.”). See also Roger M. Michalski, *A Primer on Opioid-Epidemic Litigation*, JOTWELL (Mar. 7, 2019), <https://courtslaw.jotwell.com/a-primer-on-opioid-epidemic-litigation> [<https://perma.cc/4HYL-HR9L>].

Table 4. Education

	Early in MDL	In MDL	Not in MDL	All Counties
High School or Higher %	74.59	79.95	80.11	80.07
Bachelor or Higher %	16.09	20.55	20.87	20.79

Notes: All terminology and definitions of populations are those used by the U.S. Census Bureau.

Again, breaking apart the variables of interest by categories shows that counties that are early MDL filers tend to have populations that are less educated than their peers. These counties have a lower percentage of high school graduates and individuals who completed an undergraduate degree. This might be relevant because populations that received more or less formal education might systematically vary in terms of how they react to medical claims; their susceptibility to marketing strategies, their ability to obtain multiple medical opinions and evaluate them; how much sympathy they receive from doctors; and ultimately, their ability to use opioids without overdosing.⁹⁹ Also, insofar as a potential resolution to the opioid epidemic contains a public awareness campaign, as the tobacco settlement did,¹⁰⁰ then it should be mindful that populations with different education levels might be exposed and respond to such a campaign differently. Also, formal education is linked to income levels. Table 5 explores questions of income and employment.

Table 5. Income and Employment

	Early in MDL	In MDL	Not in MDL	All Counties
Median Household Income	41,972	46,503	47,506	47,252
Median Individual Earnings	27,272	27,769	27,925	27,886
Female/Male Earnings Ratio	0.6728	0.6793	0.6788	0.6789
No Work at some Point in Time in the last Year	34.70	28.39	26.90	27.28

99. I make no claims here about the direction of the causality. An educated population might be more or less vulnerable.

100. Nicholas Terry & Alia Hoss, *Opioid Litigation Proceeds: Cautionary Tales from the Tobacco Settlement*, HEALTH AFFS. (May 23, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180517.992650/full> [<https://perma.cc/3PVC-M94J>].

Notes: Household income and individual earnings are reported as medians by county. Because both distributions are heavily skewed, these numbers are significantly lower than national averages.

Table 5 shows that early filer counties have a significantly lower median household income than all other categories of counties. This suggests that people in these counties are generally poorer than their peers and that these counties have a smaller tax base from which to fund opioid related expenses. Later filing counties are poorer than counties not in the MDL, but the difference is far less stark.

Individual earnings are more comparable between all categories of counties. This suggests that counties included in the MDL that filed early and later have lower labor participation rates than their non-MDL litigating peers. Relatedly, while individual earnings are comparable, labor stability is not. Individuals in early filer counties reported at much higher rates that, at some point in the previous year, they had no work. This suggests a more transient labor force that lacks stable and consistent work.¹⁰¹

Employment is frequently not only a source of income, but also health care benefits. Table 6 explores health care coverage.

Table 6. Health Insurance Status

	Early in MDL	In MDL	Not in MDL	All Counties
% with any insurance	89.52	88.28	87.76	87.89
% with private insurance	59.01	63.93	64.02	63.99
% with public insurance	43.71	38.26	37.66	37.81

Notes: All terminology and definitions of populations are those used by the U.S. Census Bureau.

Table 6 shows that early filing counties have a *higher* percentage of individuals living within them that have health insurance than their peers. This alleviates to some extent fears that a population suffering from the opioid crisis might do so without insurance coverage. However, it is important to recognize that early filing counties have a lower rate of private insurance coverage than other counties and a higher percentage of individuals with public coverage.¹⁰² This highlights the burden that the opioid crisis has imposed on public sector insurance programs in

101. Table 4 also shows individual earning ratios between male and female workers. The ratios are abysmal, but uniformly abysmal across these categories.

102. “Public insurance coverage” includes: medicare, medicaid, tricare or other military health care, VA health care, and Indian health service care.

general¹⁰³ and particularly in the counties that decided to file suit early. It also suggests that government units might have a greater or different insurance-coverage based interest in resolving the opioid crisis. Conceivably, the effects of the opioid crisis might be most apparent in the jail bookings of one county and the health insurance payments of its neighbor.

This example also reminds us about the possibility of people moving around. Opioid use is not inherently static. Somebody might start taking legally prescribed opioids in one county, become dependent in another county, switch to illegally obtained opioids in a third, cause expenses in a fourth, and die in a fifth. All of these five counties are affected by the opioid crisis but in different ways. As such, this Article inquires into the extent to which people are mobile and move around.

Table 7. Mobility

	Early in MDL	In MDL	Not in MDL	All Counties
Internal move within state	3.65	4.08	4.31	4.25
Move from different state	1.80	1.99	2.27	2.20
Born in state of residence	76.15	69.15	64.63	65.78

Notes: Internal moves within a state include only moves from one county to another within the last year. Moves from different state are within the last year.

Table 7 uses three proxies for overall mobility. The first proxy is the percentage of people who moved from one county to another within the same state in the last year. The second proxy measures how many people in a county have moved there from another state within the past year. The third proxy counts the percentage of residents who were born in the same state where they now reside. On all three measures, early filers and all counties in the MDL exhibit less mobility than other counties. Insofar as people affected by the opioid crisis do not move around, they remain the responsibility of the same county. This reduces, but does not eliminate, one aspect of the complex causation issue inherent in governments suing in relation to a public health crisis that affects their past,

103. See PRESIDENT'S COMM'N ON COMBATING DRUG ADDICTION & THE OPIOID CRISIS, FINAL REPORT 31 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf [<https://perma.cc/YD72-Y2SF>] ("Approximately 25% of the economic burden was borne by public sector (Medicaid, Medicare, and veterans' programs) and other government sources for substance abuse treatment.").

current, and future residents. Table 8 turns to some of the most vulnerable residents in these counties.

Table 8. Vulnerability and Assistance

	Early in MDL	In MDL	NOT in MDL	All Counties
Poverty %	21.15	17.51	17.09	17.20
Disability %	20.41	16.20	15.87	15.95
Food Stamps %	20.43	15.62	14.53	14.81
Public Assistance %	28.21	25.44	26.31	26.10
Vulnerability Index	0.1378	-0.0093	0.0031	0

Notes: The Vulnerability Index is normalized to the national mean.

Table 8 demonstrates the extent to which early filers and counties in the MDL that filed later have higher percentages of vulnerable populations than their peers. They have more residents who are experiencing poverty, more people with disabilities, and more vulnerable individuals (those particularly young or old). This is true for all counties in the MDL and even more so for the ones that filed first. Not surprisingly, these counties tend to have populations with more need for assistance such as food stamps.

Given the extent of the opioid crisis, it is difficult to know whether the opioid crisis is the cause or effect here. I suspect, without knowing, that the opioid crisis did not create these effects but likely exaggerated them, perhaps, as some allege, because opioid manufacturers specifically targeted vulnerable populations.¹⁰⁴ Suffice it to say here that the counties in the MDL, and the earlier filers in particular, have significant percentages of people in need of assistance. They are among the worst situated to deal with a massive public health crisis.

G. A Story in Numbers

These numbers, tables, and figures tell a story. They present a broad-brushstrokes portrait of the potential plaintiffs that chose to participate in this MDL and those that did not. This portrait allows us to better understand, in the aggregate, the challenges and vulnerabilities of different actual and potential litigants. As we will see in the next section, MDL doctrine does not take into account many of these elements.

104. See First Amended Complaint & Jury Demand, *supra* note 3 (alleging that Purdue targeted elderly patients by asking doctors to commit to giving elderly people opioids and coaching sales representatives to focus on geriatric patients).

II. NORMATIVE CONCERNS

MDL litigation faces many critics,¹⁰⁵ but the descriptive account of the previous section highlights a problem that has largely escaped scholarly attention: the MDL statute focuses on cases that present “common questions of fact” and where transfer serves the vague goals of furthering “the convenience of parties and witnesses” and “promot[ing] the just and efficient conduct” of transferred cases.¹⁰⁶ The JPML is charged with interpreting these terms and ordering or denying the transfer of cases¹⁰⁷ with little supervision.¹⁰⁸ The JPML has power over all cases in federal courts, and its decisions to transfer are not limited by personal jurisdiction considerations.¹⁰⁹ It weights the centrality and heft of common issues of fact, the potential for litigation efficiency gains (e.g., through minimizing duplicative discovery), how far advanced different cases are, and perhaps party preferences.¹¹⁰ When weighing the creation of a new MDL and transferring new potential member cases, the JPML seems most concerned with the benefits of consistent and uniform pretrial rulings.¹¹¹

105. See, e.g., Redish & Karaba, *supra* note 13, at 111 (stating that an MDL proceeding is “something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies”); see also Mullenix, *supra* note 13, at 552.

106. 28 U.S.C. § 1407(a) (2012).

107. See generally Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008) (tracing the development of the JPML and providing an overview of its practices).

108. See 28 U.S.C. § 1407(e) (2012) (stating that orders to transfer may not be reviewed except by “extraordinary writ”; orders not to transfer may not be reviewed); see also Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue*, 32 REV. LITIG. 497, 512 (2013) (failing to find any successful writs of mandamus since the JPML’s creation in 1968); Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1643 (2011) (arguing for the expansion of non-discretionary interlocutory appeals to combat the “outsized impact” of unreviewable pretrial rulings).

109. See Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1463 (2019) (noting that lower courts operate as if personal jurisdiction concerns do not apply in this context); Bradt, *supra* note 9, at 1165–66 (“Surprisingly, despite the fact that the MDL court is where all of the action in these cases typically happens, that court need not have personal jurisdiction over the plaintiffs or the defendants under the rules that would apply were the cases being litigated one-by-one.”).

110. Party preferences might matter more in deciding *where* to centralize than *whether* to centralize. See generally Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3283968 [<https://perma.cc/X9L6-RYPY?type=image>] (presenting empirical data on the relationship between party preferences and the assignment of MDLs to particular districts).

111. 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,

In the context of the opioid MDL, the benefits of consolidated pre-trial treatment are massive. For example, discovery under a single judge will be more consistent, focused, and efficient than discovery rulings by many judges around the country deciding identical or similar issues over and over.¹¹² However, while the benefits might be massive, so are the overlooked costs: the MDL statute does not test for broader social and governmental interest that might not be served in a given set of cases by MDL treatment.

This Section turns to these doctrinal and normative concerns that the descriptive account above indicated. It is a free-standing account that is not dependent on the descriptive account but is bolstered by it.

A. *Heterogeneity and First Mover Idiosyncrasies*

All aggregate litigation struggles with balancing efficiency and norms that prize autonomous party adversarialism.¹¹³ MDL transfers might, at first sight, present few tradeoffs because 1407 only allows transfers for “pretrial proceedings” and, in contrast to class actions, includes no device to force settlements onto unwilling litigants.¹¹⁴ However, this should not blind us to the important costs imposed on individual litigants, especially those not selected as lead counsel or included in any steering committees.¹¹⁵ For example, they must ask the court for permission to file any motions, and they are often prevented from making motions that would be routine in non-MDL litigation.¹¹⁶ Plaintiffs excluded from MDL leadership roles have few tools available to influence the course of litigation.¹¹⁷ For example, imagine that one

2270–72 (2008) (arguing that the JPML attempts a “maximalist” use of its transfer power to avoid conflicting pretrial rulings).

112. See Bradt & Clopton, *supra* note 26, at 920 (“A single judge overseeing consolidated cases is in a better position to police duplicative discovery requests than scores of judges hearing hundreds of separate cases. A single judge also could resolve each of the many inevitable discovery disputes only once—a major savings for court and lawyer resources. On the expert side, Daubert motions, which are often very expensive and central to the resolution of mass tort cases, can be centralized too.”).

113. See generally Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601 (2015).

114. See 28 U.S.C. § 1407(a) (2012).

115. See Silver & Miller, *supra* note 62, at 146 (“[F]orced aggregation may saddle claimants with agency costs by putting them at the mercy of lawyers they cannot control or discharge.”).

116. Case Management Order One at 11, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Apr. 11, 2018), ECF No. 232 (“No party may file any motion not expressly authorized by this Order absent further Order of this Court . . .”).

117. Order Re: Motions for Leave to File Motions in Track One Cases, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Jan. 17, 2019), ECF No. 1278 (“[W]ith respect to the Track One Cases only, the Court hereby lifts its

of the plaintiffs in the MDL does not agree with the lead counsel's approach to, say, discovery strategy.¹¹⁸ All they realistically can do is wait, often for years, before their case becomes eligible for a transfer back to the district where they first filed their suit and before it was transferred to the MDL. Once back home, they are still largely stuck with the pretrial rulings that they had little chance to influence.¹¹⁹ Most of the plaintiffs in the MDL have effectively no control over lead counsel and the steering committees, yet the decisions of these other attorneys have, in practice, massive consequences over how well any one case is prepared for trial and whether a party can credibly seek a high or low settlement value.¹²⁰

Who is selected into MDL leadership roles is, in short, very important. It matters tremendously to those attorneys who receive more money, more recognition, more experience, and a higher chance to be selected as lead counsel in the next MDL proceeding.¹²¹ But even more significant, selection of MDL leadership also matters to the clients of those attorneys. An MDL is not a class action proceeding and does not feature the same structural due process protections.¹²² MDL lead counsel does not become counsel for all member cases in the MDL. Each plaintiff in each member case (including the case that furnished lead counsel and other MDL leadership roles) retains the power to hire,

requirement to seek leave to file substantive motions pertaining to issues in the Track One Cases. Parties may hereby file these motions directly on the docket.”).

118. See, e.g., Twenty-Three Sovereign Indian Tribes' Motion for Leave to File Motion to Be Allowed to Conduct Discovery on Certain Issues That Are Unique to the Claims of Indian Tribes at 2, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 3, 2018), ECF No. 1164 [hereinafter Indian Tribes' Motion for Leave] (requesting permission to conduct discovery separately from the Bellwether plaintiffs because defendants raised issues that are unique to the Indian Tribe Movants).

119. See generally MANUAL FOR COMPLEX LITIGATION § 20.133 (4th ed. 2004) (“Although the transferor judge has the power to vacate or modify rulings made by the transferee judge, subject to comity and ‘law of the case’ considerations, doing so in the absence of a significant change of circumstances would frustrate the purposes of centralized pretrial proceedings.”); Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 605 (1987) (praising law of the case doctrine for precluding inconsistent decisions).

120. See generally Silver & Miller, *supra* note 62, at 131–35 (describing how lead attorneys can increase their own compensation by controlling the settlement negotiations).

121. See Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1488 (2017) (analyzing social networks to determine that transferee judges routinely appoint the same lead attorneys).

122. See Tidmarsh & Peinado Welsh, *supra* note 10, at 17–20 (“Although multidistrict litigation has inched towards the class-action model, analogous protections have not followed.”).

direct, and fire his or her own attorney.¹²³ The ethical duties of those attorneys also run to their clients, not the clients of other attorneys in the MDL.¹²⁴ Key MDL leadership roles are few in number,¹²⁵ powerful, and linked to the clients of the attorneys in the leadership roles.¹²⁶

The overbearing influence of lead counsel in MDL cases is a concern in any MDL proceeding.¹²⁷ It is of heightened concern in the context of the opioid litigation because the plaintiffs here are unusually heterogeneous along many dimensions. First, the plaintiffs encompass many different types of litigants, including government litigants, non-profits, businesses, and individuals.¹²⁸ Second, even within each of these categories there is important variation. For example, there are individuals in the litigation who are suing on their own behalf, who are suing on behalf of somebody already dead, and who are suing on behalf of their children who were exposed to opioids before birth.¹²⁹ Similarly, within the category of government litigants there are states, counties, municipalities and sub-municipalities. Even if we just focus on the largest category of plaintiffs (counties), there is massive variation in location, population, wealth, litigation resources and experience, governing powers and responsibilities, and varying exposure to the opioid epidemic (early/late, low/high, legally prescribed/illegally obtained).¹³⁰ This extreme variation sets the opioid epidemic plaintiffs apart from those in many other MDL cases where similarly situated individual consumers allege more comparable harm.

123. See, e.g., Bradt, *supra* note 9, at 1206 (“Individual plaintiffs file their own cases and hire their own lawyers [in MDL proceedings].”).

124. See generally Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 525; Stephen J. Herman, *Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent*, 64 LOY. L. REV. 1, 1–24 (2018).

125. See Transcript of Teleconference Proceedings Had before the Honorable Judge Dan A. Polster, Judge of Said Court, on Wednesday, December 13th, 2017, Commencing at 1:00 O’Clock P.M. at 13, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 18, 2017), ECF No. 10 [hereinafter Teleconference Transcript] (“I will want a very small number from the plaintiffs’ side. You know, we are not talking like probably no more than two or three from the plaintiffs’ side . . .”).

126. See generally Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015) (noting the absence of competitive checks by lawyers on the steering committee).

127. See Marcus, *supra* note 111, at 2256 (“Yet another fairness consideration is the degree of personal control that a litigant loses when her claim is combined with the claims of others.”).

128. See *supra* Section I.B.

129. See *supra* notes 64–67 and accompanying text.

130. See *supra* Part I.

Not only are the potential and actual plaintiffs here extremely heterogeneous, but the early filers are also idiosyncratic. They differ in important and systematic ways from later filers (now in the MDL) and non-filers. Early filers have a profile that suggests a stance toward the opioid epidemic that is different in multifaceted ways from the stance of later filers. Yet, only the early filers were present when the MDL consolidation motion was first argued, when people were nominated for key leadership positions,¹³¹ and when they were filled.¹³² At that point in time, the court was only able to select attorneys for leadership roles from among the fifty or so cases that were in front of the court.¹³³ The plaintiffs in the 1900 cases that were filed later are represented by their own attorneys, but these attorneys have little influence over the litigation and were never considered for leadership roles.¹³⁴

The attorneys in those leadership roles represent clients who are unlike many of the plaintiffs that are now in the MDL. As the previous section showed, there is reason to believe that litigation interests of these differently situated plaintiffs might diverge in relevant ways. When they do, will lead counsel pick the course of action in the best interest of her individual client?¹³⁵ Or what is in the best interest of the “average case” currently in the MDL? Or what might further the interests of potential plaintiffs that will likely join the MDL some day? If lead counsel is primarily concerned with her own client, then that attorney might pick a litigation strategy best suited for the individual circumstances of her own

131. See Teleconference Transcript, *supra* note 125, at 6, (“[U]ltimately, it is [the Court’s] appointment, but I will certainly rely heavily on suggestions from the parties . . .”).

132. See Minutes of Teleconference & Scheduling Order at 1–2, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 14, 2017), ECF No. 4 (“Counsel for Plaintiffs and Defendants shall file a Motion to Approve Liaison Counsel and Steering Committees.”).

133. See Plaintiffs’ Motion to Approve Co-Leads, Co-Liaisons, and Plaintiffs’ Executive Committee at 1, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 20, 2017), ECF No. 16.

134. The MDL leadership does not have to be static. The court retains the power to appoint new attorneys to leadership roles. However, MDL judges rarely do so. Sometimes they tweak leadership roles, but they rarely reform. See, e.g., Order at 1, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 21, 2017), ECF No. 22 (noting that the leadership team should be restructured to include at least one attorney handling Third-Party Payor cases and one attorney handling Hospital cases).

135. See generally 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) (suggesting a conflict of interest exists in acquiring attorneys’ fees that cannot be adequately regulated through the trial courts’ inherent authority to enforce ethics rules).

client. Other cases in the MDL might be shortchanged.¹³⁶ The other plaintiffs in the other MDL cases might face very different individual circumstances, and their attorney would have chosen a course of action more attuned to the needs, interests, and vulnerabilities of *her* client.

Not surprisingly, numerous plaintiffs in the MDL have stressed that they do not feel properly represented and that the individual circumstances between the various plaintiffs vary too much.¹³⁷ They argue that no leadership structure could hold together such diverse members.¹³⁸

The court has responded to concerns about heterogeneity in the litigation in part by creating different “tracks” for different cases. For example, Case Management Order No. 1 selected a handful of plaintiffs (out of more than 2000) for the litigation track.¹³⁹ These cases are being prepared for trial while all others do not receive the same attention. Later court orders established

136. See Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1273 (2012) (noting important agency-cost considerations in MDL cases). *But cf.* Mark Robinson Jr. & Kevin Calcagnie, *To Join an MDL . . . or Not*, 37 TRIAL 34, 41–42 (2001) (noting that plaintiffs may benefit from MDLs because their case will be controlled by more experienced plaintiff’s counsel); Tidmarsh & Peinado Welsh, *supra* note 10, at 21 (“In addition, even though MDL plaintiffs formally file individual lawsuits, rather than opt into a class action, many lawyers who file their clients’ cases in federal court are aware of, and may even be angling for, multidistrict treatment.”).

137. See, e.g., Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings at 1, *In re* Infants Born Opioid-Dependent Prods. Liab. Litig. at 1, MDL 2872 (J.P.M.L. Sept. 20, 2018) (arguing for transfer to a separate MDL because “[m]ovants have grave concerns that the due process rights of opioid-dependent infants are not being protected in MDL 2804”).

138. Brief *Amici Curiae* of 448 Federally Recognized Tribes in Opposition to Defendants’ Motions to Dismiss Tribal Claims at 2, *In re* Nat’l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio Oct. 5, 2018), ECF No. 1026 (arguing it is imperative that the Tribes get a “seat at the table” because the states are the Tribes’ “deadliest enemies”). See generally Melissa Mortazavi, *Institutional Independence: Lawyers and the Administrative State*, 87 FORDHAM L. REV. 1937 (2019) (emphasizing the importance of the institutional setting of a lawyer in shaping legal judgments).

139. Case Management Order One, *supra* note 116, at 6 (“The following three cases are included in Track One”); see also Case Management Order Number Six, *supra* note 78, at 1–2 (setting briefing deadlines for two Indian Tribe case); Case Management Order Number Four at 1–3, *In re* Nat’l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio May 22, 2018), ECF No. 485 (setting briefing deadlines for Track One cases, a third-party payor case, and a hospital case, identifying “six cases brought by local governmental entities for briefing of motions to dismiss”).

additional tracks (e.g., one for a handful of tribal cases)¹⁴⁰ and refused to establish other tracks (e.g., for the so-called opioid baby claims).¹⁴¹

While different tracks help to alleviate the problems of heterogeneity and idiosyncrasies, they cannot plaster over the important differences between different litigants in any given track. For example, in the track for Native American Tribes, the court selected a few tribes as lead plaintiffs who can now litigate in ways that the remaining tribal track plaintiffs cannot.¹⁴² The creation of this track recognizes the important differences between tribal governments and non-tribal governments. However, tribes vary tremendously in ways that are relevant for this litigation. They vary in population, wealth, governing capacity, litigation resources, geography, geographical concentration, reliance on federal health care measures, and many more variables.¹⁴³ This variation makes the tribal track a poor substitute for local and individualized litigation that would be more mindful of individualized circumstances. Similarly, tribes that were not included by the time the lead cases for the tribal track were selected did not even have a chance to be selected. These plaintiffs, just like the majority of those currently in the MDL, are stuck watching another government's attorney litigate, also not on their behalf.¹⁴⁴

140. Order, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio June 4, 2018), ECF No. 549 (“[The] work [of one of the special masters] will be focused on resolving a protocol for the coordination of depositions between the related state and federal cases, and working with the Tribes to develop a Case Management Order and a separate MDL track.”).

141. Motion for Leave to File Motion for Order to Establish Separate Track for Opioid Baby Claims at 1–2, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio May 31, 2018), ECF No. 540; Order [Non-Document] Denying Motion for Leave to File Motion for Order to Establish Separate Track for Opioid Baby Claims, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio June 28, 2018).

142. Plaintiffs' Ponca Tribe of Nebraska, et al., Motion for Order(s) Establishing a Separate Tribal Government Tract at 2, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio May 28, 2018), ECF No. 502 (requesting that “lead, coordinating, committee, and trial counsel” be selected).

143. See generally C. Matthew Snipp, *Sociological Perspectives on American Indians*, 18 ANN. REV. SOC. 351 (1992) (discussing differences between tribes).

144. See generally Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009) (noting the procedural justice concerns inherent in non-class aggregation).

B. Black Holes

Beyond control, there is the question of time-to-resolution. Speed is always a concern in litigation.¹⁴⁵ How long cases in the opioid MDL take to resolve is of particular concern because of the opioid epidemic's horrendous scale. If some or all of the plaintiffs are indeed entitled to relief under the law (monetary or injunctive), then it is vital that they receive such relief as quickly as possible. Early relief would put them in a stronger position to battle the opioid litigation, either through injunctions that slow the flow of medically unnecessary opioids or through monetary relief that could be used to fund important government functions connected to the opioid epidemic. If the plaintiffs are not entitled to relief under the law, then this would be important to know sooner rather than later as well, so that these government units can focus their attention and resources to pursue other avenues to battle the opioid epidemic (e.g., taxation of opioids or further federal and/or local regulations).

How long the litigants in the opioid MDL have to wait until these cases resolve is anybody's guess. MDL cases typically remain in coordinated or consolidated proceedings until pretrial matters are concluded, the case settles, or the MDL court grants a dispositive motion that terminates the cases.¹⁴⁶ It is difficult to predict how long this will take in the opioid case. Generally, MDL litigation takes a significant time to reach resolution, much longer than the average non-MDL litigation.¹⁴⁷ This type of litigation has been described, famously, as the "black hole," into which cases are transferred never to be heard from again.¹⁴⁸ For some MDL judges, remand equates to failure.¹⁴⁹

145. See, e.g., FED. R. CIV. P. 1 ("[These Rules] should be construed, administered, and employed by the court and the parties to secure the just, *speedy*, and inexpensive determination of every action and proceeding." (emphasis added)).

146. 28 U.S.C. § 1407(a) (2012) ("Each action so transferred 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 . . .").

147. See, e.g., *DeLaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006) ("[A]s compared to the processing time of an average case, MDL practice is slow, very slow."); Hon. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIG. 26, 31 (2012) ("The single most prominent complaint about multidistrict litigation arises from counsel's negative experiences in so-called black hole cases—those that seem not to move at an acceptable pace.").

148. Eldon E. Fallon et al., *Belkweather Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008).

149. See Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 144 (2013) ("As a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case, by adjudication or settlement, during the MDL process. That view, together with the business model of aggregation and

In the case of the opioid litigation, we can gather more clues about the speed of litigation through a look at the litigation track that the court established. Only cases that were filed in the district where the MDL takes place,¹⁵⁰ or where the parties waived jurisdictional defenses, are eligible for trial in that locale.¹⁵¹ The few cases in this track are the only ones that are currently prepared for trial. The hope is that they will serve as bellwether trials that can inform settlement negotiations.¹⁵² As such, the court and many commentators do not expect significant developments in non-litigation track cases until, at the very least, the trials of these cases have completed.¹⁵³

Originally, the MDL court hoped for trials in these cases to begin in March 2019.¹⁵⁴ Commentators were impressed by the suggested speed of litigation.¹⁵⁵ However, the original trial date has been pushed back a few times, first to September,¹⁵⁶ then October,¹⁵⁷ and it might be

consolidation of cases for settlement, interfered with the litigation of individual cases in the MDL court.”).

150. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 43 (1998) (holding that a transferee court does not have the authority to self-assign by ruling on a transfer motion).

151. Parties that filed elsewhere can waive jurisdictional objections and allow for trial in the transferee court if they file a so-called “*Lexecon* waiver” that is clear and unambiguous. *See, e.g., In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348 (5th Cir. 2017).

152. *See generally* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185 (2018) (describing the use of bellwether trials in MDL and the issues raised by the practice); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008) (advocating for bellwether trials as means of combining autonomy and efficiency); Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275 (2017) (comparing bellwether mediation to bellwether trials).

153. Teleconference Transcript, *supra* note 125, at 15 (“My thought is to just leave [cases with remand potential] hanging for a while. The cases are in the MDL, and my objective is to get my hands around this and see if there is some—maybe some framework for some resolution, and if so, it is much preferable to have more cases in the MDL, the more the better, rather than having them out there in individual state courts where there can’t be any coordination.”).

154. Case Management Order One, *supra* note 116, at 8 (“The Court intends to begin the trial at 9:00 a.m. Eastern Time on Monday, March 18, 2019 . . .”).

155. *See, e.g.,* Amanda Bronstead, *Polster Sets Aggressive Discovery Schedule, Slating Opioid Trial for March 2019*, NAT’L L.J. (Apr. 12, 2018, 6:10 PM), <https://www.law.com/nationallawjournal/2018/04/12/polster-sets-aggressive-discovery-schedule-as-first-opioid-trial-is-slated-for-march-2019> (calling the case management order and the early trial date “aggressive”).

156. Case Management Order No. 7 Setting New Deadlines for Track One Cases, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Aug. 13, 2018), ECF No. 876 (entering amended case management schedule and setting a first trial start date for track one cases for September 3, 2019).

157. Case Management Order No. 8 Setting New Deadlines for Track One Cases, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Jan. 29,

pushed back further still.¹⁵⁸ Half of the original bellwether cases have been postponed indefinitely until trial in other cases has completed.¹⁵⁹

Even with the remaining few cases concluded, there is no reason to anticipate a global solution shortly thereafter. Diverse plaintiffs with individualized discovery needs are unlikely to benefit from the bellwether trials of plaintiffs that are differently situated and few in number.¹⁶⁰ Whether these first plaintiffs win or lose would tell other plaintiffs little about the strengths or weaknesses of their own cases. Before taking their own cases to trial or settling, many might desire individualized discovery that has not yet taken place and that could take many more months to complete after the first round of trials.

The litigation in the opioid MDL so far has been focused on the cases that are being prepared for trial. There has been little attention focused on the non-litigation track cases. For example, twenty-three sovereign Indian tribes moved “to be Allowed to Conduct Discovery on Certain Issues that are Unique to the Claims of Indian Tribes”¹⁶¹ The court denied the motion the next day as “untimely and a waste of judicial resources” because some cases of other tribes were selected for the litigation track to serve as bellwether cases.¹⁶² This means that the non-selected cases linger in limbo without further discovery taking place. The discovery in the selected cases might be useful for non-selected cases but, at least in this instance, numerous plaintiffs seem to have preferred their own individualized

2019), ECF No. 1306 (entering amended case management schedule and setting a first trial start date for Track One cases for October 21, 2019).

158. See, e.g., The State’s Emergency Motion to Show Cause for Purdue’s Intentional Disregard of Two Court Orders and Failure to Provide Witness as Ordered by the Court at 2, Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816 (Okla. Dist. Ct. Aug. 20, 2018) [hereinafter State’s Emergency Motion] (“The MDL settlement process is stuck in glue and the first trial in the MDL has been moved back to at least September 2019 . . . and it will be moved back again.”). *But cf. Nunc Pro Tunc* Order Re Expert Depositions at 2, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Apr. 11, 2019), ECF No. 1540 (“The Court has, on more than one occasion, moved the dates for the Track One trial back at the behest of the parties and declines to do so now or at any point in the future.”).

159. Order Regarding Track One Trial Plaintiffs at 1, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Feb. 25, 2019), ECF No. 1392 (“The claims of the City of Cleveland and the City of Akron (the ‘Municipal Plaintiffs’) will be set for trial at a later date, which shall not occur before the trial of the claims of the Track Two Bellwethers . . .”).

160. See, Edward K. Cheng, *When 10 Trials Are Better Than 1000: An Evidentiary Perspective on Trial Sampling*, 160 U. PA. L. REV. 955, 964 (2012) (“The problem with extreme value averaging is that it is highly nonrobust, meaning it is badly sensitive to outliers and performs terribly on asymmetric distributions.”).

161. Indian Tribes’ Motion for Leave, *supra* note 118, at 1.

162. Order, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 4, 2018), ECF No. 1165.

discovery.¹⁶³ For now, MDL treatment of the opioid cases has mostly bought the defendants time¹⁶⁴ without providing significant efficiency gains thus far.¹⁶⁵ Some litigants fear that defendants will use this time to move assets abroad,¹⁶⁶ file for bankruptcy,¹⁶⁷ and otherwise make it difficult for plaintiffs to execute a potential judgment down the road.¹⁶⁸

Contrast the delay in waiting for the result of bellwether cases with some of the opioid cases that remained in state courts and thus beyond the power of the JPML to order transfer to the federal MDL.¹⁶⁹ For example, one opioid case was filed in Oklahoma state court and

163. Indian Tribes' Motion for Leave, *supra* note 118, at 3 ("It is imperative that the Indian Tribe Movants be allowed to conduct the discovery unique to Tribes in order to protect their sovereign rights and authority, as well as to properly evaluate their claims.").

164. See Mark Herrmann, *To MDL or not to MDL? A Defense Perspective*, 24 LITIG. 43, 44 (1998) (noting that MDL proceedings can buy defendants time to "organize a defense, negotiate a global settlement, or file a bankruptcy proceeding").

165. See Benjamin W. Larson, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach: Respecting the Plaintiff's Choice of Forum*, 74 NOTRE DAME L. REV. 1337, 1364 (1999) ("[M]any of [the] arguments concerning the efficiency gains of consolidated trial are not supported by reality.").

166. See, e.g., First Amended Complaint at 110, *New York v. Purdue Pharma L.P.*, No. 4000016/2018 (N.Y. Sup. Ct. Mar. 28, 2019) (highlighting that despite the fact that the Sackler defendants knew that the state attorneys general were investigating and commencing actions against Purdue by 2014, they still continued voting to have Purdue pay them significant distributions as well as wire money to offshore companies); see also Roni Caryn Rabin, *New York Sues Sackler Family Members and Drug Distributors*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/health/new-york-lawsuit-opioids-sacklers-distributors.html> ("As investigators closed in on Purdue Pharma, the maker of the opioid painkiller OxyContin, more than a decade ago, members of the family that owns the company began shifting hundreds of millions of dollars from the business to themselves through offshore entities . . .").

167. See Sara Randazzo & Jared S. Hopkins, *Opioid Maker Explores Filing for Chapter 11*, WALL ST. J. (Mar. 5, 2019), <https://www.wsj.com/articles/purdue-pharma-preparing-for-possible-bankruptcy-filing-11551721519> (outlining Purdue Pharma's preparation of a bankruptcy filing in response to opioid-related lawsuits); Mike Spector et al., *Exclusive: OxyContin Maker Purdue Pharma Exploring Bankruptcy—Sources*, REUTERS (Mar. 4, 2019, 10:29 AM), <https://www.reuters.com/article/uk-purduepharma-bankruptcy-exclusive/exclusive-oxycontin-maker-purdue-pharma-exploring-bankruptcy-sources-idUSKCN1QL1KP> [<https://perma.cc/NFL6-KQC7>] (reporting first that Purdue Pharma was considering declaring bankruptcy as a response to the opioid-related lawsuits it faced).

168. See State's Emergency Motion, *supra* note 158, at 2–3 ("Purdue is trying to buy time so it can move assets and employees overseas . . . and either file bankruptcy or leave an empty shell here in the United States for all of the victims of its corporate greed.").

169. The JPML cannot transfer non-federal cases. However, MDL judges often informally coordinate with state court proceedings. See generally EMERY G. LEE III, FED. J. CTR., SURVEY OF TRANSFEREE JUDGES IN MDL PROCEEDINGS REGARDING COORDINATION WITH PARALLEL STATE PROCEEDINGS: REPORT TO THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION AND THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION 1–2 (2011).

became non-removable, seemingly because of a mistake by counsel for the defendants.¹⁷⁰ The case has remained in state court despite subsequent efforts to remove to federal court and invoke 1407. The Oklahoma case was filed around the same time as hundreds of others now in the federal opioid MDL. While most of the federal cases appear years away from deep and individualized discovery and an on-the-merits adjudication, the case in Oklahoma state court went to trial in May 2019, and judgment was granted in August.¹⁷¹ Attempts by the defendants to delay trial largely failed.¹⁷² While the federal MDL slowly proceeds in Cleveland (the city), the most advanced state opioid case already ended in Cleveland County (Oklahoma).

The local trial in Oklahoma is not the only lawsuit that remained outside of the federal MDL. Other examples include Alabama,¹⁷³ Alaska,¹⁷⁴ Arizona,¹⁷⁵ Delaware,¹⁷⁶ Florida,¹⁷⁷ Indiana,¹⁷⁸ Kentucky,¹⁷⁹

170. Defendants stipulated to non-removability in exchange for more time to answer the complaint, and they requested removal after the time allowed in 28 USC § 1446(b). See Stipulation, *supra* note 29, at 2.

171. Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html>.

172. See, e.g., Nate Raymond, *OxyContin Maker Purdue Pharma Loses Bid to Delay Opioid Epidemic Trial*, REUTERS (Mar. 8, 2019, 7:24 PM), <https://www.reuters.com/article/us-usa-opioids-litigation/oxycontin-maker-purdue-pharma-loses-bid-to-delay-opioid-epidemic-trial-idUSKBN1QQ00B> [<https://perma.cc/8324-5TX2>] (reporting Purdue Pharma and other drug makers lost their bid to delay trial because they had not established that plaintiff's actions had prejudiced them).

173. *Alabama v. Purdue Pharma L.P.*, No. 2:18-cv-00089-MHT-WC (M.D. Ala. filed Feb. 6, 2018).

174. *State v. Purdue Pharma L.P.*, No. 3AN-17-09966CI (Alaska Super. Ct. filed Oct. 30, 2017).

175. *State ex rel. Brnovich v. Insys Therapeutics, Inc.*, No. CV2017-012008 (Ariz. Super. Ct. Aug. 30, 2017).

176. *Delaware ex rel. Denn v. Purdue Pharma L.P.*, No. 1:18-cv-00383-RGA (D. Del. filed Mar. 9, 2018) (filed originally in Delaware Superior Court on January 19, 2018 and removed to federal court in March).

177. Amended Complaint, *State v. Purdue Pharma L.P.*, No. 2018-CA-001438 (Fla. Cir. Ct. Nov. 16, 2018).

178. Complaint, *State v. Purdue Pharma L.P.* (Ind. Super. Ct. Nov. 14, 2018).

179. Complaint, *Commonwealth ex rel. Beshear v. Endo Health Sols. Inc.*, No. 17-CI-1147 (Ky. Cir. Ct. Nov. 6, 2017).

Louisiana,¹⁸⁰ Massachusetts,¹⁸¹ Mississippi,¹⁸² Missouri,¹⁸³ Montana,¹⁸⁴ New Hampshire,¹⁸⁵ New Jersey,¹⁸⁶ New Mexico,¹⁸⁷ New York,¹⁸⁸ North Carolina,¹⁸⁹ Ohio,¹⁹⁰ South Carolina,¹⁹¹ and Washington.¹⁹² Many of them are moving far quicker toward resolution than their MDL litigation track counterparts, and all of them are moving faster than the MDL cases not on the litigation track.

C. Distance

Beyond concerns about speed, there are also concerns about distance. Most of the plaintiffs in this MDL filed in their home districts, a place as close as possible to where they are located. Inherent in the MDL process is a transfer away from such home districts to any one of the federal districts in the country (in the opioid litigation, the Northern District of Ohio).¹⁹³ The JPML has power over all cases in federal courts, and its decisions to transfer are not limited by personal jurisdiction

180. Petition for Damages & Injunctive Relief, *La. Dep't of Health v. Purdue Pharma L.P.*, No. U61638 (La. Dist. Ct. Sept. 20, 2017).

181. Complaint, *Commonwealth v. Purdue Pharma L.P.*, No. 1884-cv-01808 (Mass. Super. Ct. June 13, 2018).

182. *Mississippi v. Barr Labs., Inc.*, No. 3:2017cv00268 (S.D. Miss. filed Apr. 14, 2017) (removed to federal court from Chancery Court 1st Judicial District).

183. *State v. Purdue Pharma L.P.*, No. 1722-CC10626 (Mo. Cir. Ct. filed June 29, 2017).

184. Complaint, *State v. Purdue Pharma L.P.*, No. ADU-2017-949 (Mont. Dist. Ct. Nov. 30, 2017).

185. *New Hampshire v. Purdue Pharma L.P.*, No. 1:17-cv-00427-PB (D.N.H. filed Sept. 15, 2017).

186. Complaint for Violation of the New Jersey False Claims Act, *N.J.S.A. 2A: 32C-1, et seq., As Well As Other Claims, Porrino v. Insys Therapeutics, Inc.*, No. MID-C-162-17 (N.J. Super. Ct. Ch. Div. Oct. 5, 2017).

187. *State ex rel. Balderas v. Purdue Pharma*, No. D-101-CV-2017-0254 (N.M. Dist. Ct. 2017); *see also New Mexico ex rel. Balderas v. Purdue Pharma*, 323 F. Supp. 1242, 1253 (D.N.M. 2018) (remanding removed state case back to state court and denying defendants' motion for stay pending the outcome of the opioid MDL proceeding).

188. Complaint, *State ex rel. Schneiderman v. Insys Therapeutics, Inc.* (N.Y. Sup. Ct. Feb. 1, 2018).

189. Complaint, *State ex rel. Stein v. Insys Therapeutics, Inc.*, No. 17CV015532 (N.C. Super. Ct. Dec. 21, 2017).

190. Complaint, *State ex rel. DeWine v. Purdue Pharma L.P.*, No. 2017CL261 (Ohio Ct. Com. Pl. May 31, 2017).

191. Complaint, *State v. Purdue Pharma L.P.*, No. 2017-CP-400-4872 (S.C. Ct. Com. Pl. Aug. 15, 2017).

192. Complaint for Injunctive & Other Relief Under the Consumer Protection Act, RCW 19.86, Public Nuisance, & Negligence, *State v. Purdue Pharma L.P.* (Wash. Super. Ct. Sept. 28, 2017).

193. 28 U.S.C. § 1407(a) (2012) ("[S]uch actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

considerations.¹⁹⁴ While it takes geography into account, sometimes,¹⁹⁵ it is not constrained by it.¹⁹⁶ In the case of the opioid MDL, the JPML considered geography and picked a district nearby.¹⁹⁷ But it only focused on proximity to defendants, not plaintiffs or witnesses.¹⁹⁸ Even if the JPML had considered plaintiffs, as it sometimes does, it might have focused on current plaintiffs, rather than potential plaintiffs that might file suit at some later point in time. As we saw, the early filers geographically clump in the Appalachian region, close to Ohio.¹⁹⁹ Later filers do not. They are spread all over the country just as the opioid epidemic has spread all over the country. For many, consequently, the opioid MDL takes place in a distant forum.

Distance has numerous consequences.²⁰⁰ The farther away the courthouse where a case is litigated, the less of a practical opportunity for parties to attend, for the local public and press to observe proceedings, and for witnesses to testify.²⁰¹ For example, the county commissioners of a west coast county might find it difficult and expensive to periodically travel all the way to the Northern District of Ohio to see in person how the litigation is

194. See Bradt, *supra* note 9, at 1165–66 (“Surprisingly, despite the fact that the MDL court is where all of the action in these cases typically happens, that court need not have personal jurisdiction over the plaintiffs or the defendants under the rules that would apply were the cases being litigated one-by-one.”); Dodson, *supra* note 109, at 1463 (“Lower courts operate on the assumption that, in both ordinary venue-transfer cases under 28 U.S.C. § 1404(a) and multidistrict-litigation cases under § 1407(a), personal-jurisdiction concerns for plaintiffs simply do not apply.”); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 62 (1984).

195. See generally Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation’s Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 330–32 (2009) (conducting an empirical analysis of factors considered by the JPML when choosing transferee court).

196. See generally Bradt, *supra* note 46, at 787 (“The JPML considers a variety of factors . . . from the experience of the particular judge in prior MDLs . . . [to the] motivation of the transferee judge.”).

197. Transfer Order, *supra* note 6, at 3.

198. *Id.* at 4 (“The Northern District of Ohio presents a geographically central and accessible forum that is relatively close to defendants’ various headquarters in New York, Connecticut, New Jersey and Pennsylvania. Indeed, one of the Big Three distributor defendants, Cardinal Health, is based in Ohio.”).

199. See *supra* Figure 4.

200. See generally Roger Michalski, *Transferred Justice: An Empirical Account of Federal Transfers in the Wake of Atlantic Marine*, 53 HOUS. L. REV. 1289, 1320 (2016) (advocating for transfer standards that protect vulnerable litigants in sensitive subject areas).

201. See Chamblee Burch, *supra* note 9, at 670 (noting the benefits of centralization but also stressing the “countervailing concerns of the traditional, geographic community”).

proceeding.²⁰² If the same case was litigated down the street in a local courthouse, they might view things differently. Distance, as such, might shift control over litigation away from clients to attorneys, and, as we have seen, likely other people's attorneys.²⁰³

Beyond travel woes, there are additional reasons to worry about proximity. Opioid abuse is a national problem, but its effects and conditions of growth are inherently localized. Similarly, the ability of a local government to respond to the opioid epidemic is inherently tied up with localized and often idiosyncratic governing abilities, powers, and fiscal limitations.²⁰⁴ This variation will call for non-common discovery on a volume that the MDL will not be able to handle efficiently or quickly.²⁰⁵ Similarly, since MDL transfers are for coordinated or consolidated pre-trial purposes only, the governing choice of law does not change when a case is included in MDL.²⁰⁶ In other words, the opioid litigation MDL contains cases that are governed by all kinds of different state law.²⁰⁷ Since discovery needs are tied to substantive law and since the substantive law varies

202. See generally *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (“[T]he time and energy required to [participate in] a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace.”).

203. See generally Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 514 (2015) (“[T]hese [MDL] cases are transferred to districts far away from the place where they were originally filed and are run by a plaintiffs’ management committee.”).

204. See Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 U. KAN. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3325401 [<https://perma.cc/2GUN-HX76?type=image>] (providing a review of existing studies on the financial impact of the opioid epidemic and noting shortcomings of those studies in quantifying costs for local governments).

205. The MDL court has been working with so-called fact sheets that government entity plaintiffs must fill out to gain a better understanding of various claims and defenses. One function of these fact sheets is to serve as a proxy for individualized discovery and to lay the groundwork for a global settlement. See Fact Sheet Implementation Order at 1–2, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio June 19, 2018), ECF No. 638.

206. See generally Bradt, *supra* note 46, at 762–63 (noting the growing conflict between choice of law and efficiency as MDLs increasingly focus on the group rather than the individual cases); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 579 (1996) (“Choice of law defines the parties’ rights. States differ about what those rights should be. Such differences are what a federal system is all about. They are not a ‘cost’ of the system; they are not a flaw in its operation. They are its object, something to be embraced and affirmatively valued.”).

207. See e.g., Order at 2, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 31, 2018), ECF No. 1218 (directing the parties to “address[] the viability of statutory and/or common law claims for public nuisance in each State and territory where any MDL plaintiff is located”). There are, of course, also federal causes of actions that many plaintiffs allege that do not vary from case to case.

tremendously, so do the discovery needs of many member cases in the opioid MDL.²⁰⁸ Local judges familiar with local substantive law examining local witnesses will be in a better position than an MDL proceeding to provide for such individualized discovery in a nearby location accessible to local witnesses.²⁰⁹

D. Settlements

These features of distant, slow, and piece-meal litigation also encourage settlements at the expense of on-the-merits adjudication.²¹⁰ Plaintiffs who refuse to settle remain stuck in distant MDL proceedings that they cannot control with little hope to return to his or her home court. Unless a plaintiff is in no hurry to resolve a matter and is willing to by-and-large accept the pretrial litigation decisions of somebody else's attorney, they have little choice but to accept poor settlement offers.²¹¹ With class actions in decline, the federal judiciary increasingly utilizes MDLs as an alternative procedural vehicle to aggregate a large number of cases and bring them to efficient resolution, which often means settlement.²¹² MDL proceedings are often structured with settlement, rather than litigation in mind.²¹³ MDL

208. See FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . .").

209. See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 404 (2014) ("[C]onsidering statewide classes and conducting trials in affected communities can ease the regulatory mismatch between defendants' behavior, which affects citizens nationwide; transferee courts, which have nationwide authority over pretrial matters only; and a state's laws, which govern defendants' conduct toward its citizens.").

210. See, e.g., Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (stating that an MDL "creates the perfect conditions for an aggregate settlement").

211. See, e.g., *DeLaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147, 152–55 (D. Mass. 2006) (highlighting the although a settlement may be preferred over a lengthy trial with no guarantee of a favorable outcome, the "marginalization of juror fact finding perversely and sharply skews the MDL bargaining process in favor of defendants").

212. See Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1741 (2017) (comparing Rule 23's check on judicial discretion to the power afforded MDL judges); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346–47 (2014) ("As reliance on Rule 23 has diminished, MDL has ascended as the most important federal procedural device to aggregate (and settle) mass torts."); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 806 (2010) (noting the reduction in class certifications granted relative to the increase in products liability MDLs).

213. See Chamblee Burch & Williams, *supra* note 121, at 1504; Rave, *supra* note 70, at 2177 (noting various mechanisms that "tend to strongly encourage claimants to accept the deal and provide opportunities for defendants to back out if too few do").

judges are encouraged to “make the most of [the] opportunity and facilitate the settlement of the federal and any related state cases.”²¹⁴

That seems to be the case in the opioid MDL.²¹⁵ From the beginning, the court was skeptical of trials²¹⁶ and focused on settlement.²¹⁷ The judge in charge of the opioid MDL indicated that he believes the JPML panel picked him because of his ability to facilitate settlements and avoid trials.²¹⁸ Instead of “a whole lot of finger pointing . . . depositions, and discovery, and trials,”²¹⁹ the court would seek to eliminate barriers to a “global resolution.”²²⁰

Most of the litigation activity in the first year was centered on the handful of “litigation track” cases that were being prepared for trial. However, even this limited focus on trial for a few cases was designed primarily and explicitly with global settlement in mind.²²¹ The court seemed to hope that a few bellwether cases would facilitate settlement of all cases prior to them receiving individualized discovery attuned to the

214. See MANUAL FOR COMPLEX LITIGATION, *supra* note 119, § 20.132 (“One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.”).

215. See generally Howard Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 GA. L. REV. (forthcoming 2019) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371209 [<https://perma.cc/FG5J-URZD?type=image>] (“The judge overseeing the opioids MDL took an unusually aggressive pro-settlement stance from the start.”).

216. Teleconference Transcript, *supra* note 125, at 37 (“I have had two substantial MDLs, and I know that you can’t try your way out of them, even though we have excellent lawyers.”).

217. Referring to a possible settlement, Judge Polster explained that “my objective is to get my hands around this and see if there is some—maybe some framework for some resolution, and if so, it is much more preferable to have more cases in the MDL . . .” *Id.* at 15.

218. *Id.* at 42–43 (recording statement of Judge Polster that the “best use of [his] time and [his] abilities” would be to come to a resolution between the parties and expressing that he thinks that is why the JPML chose him for this case).

219. Transcript of Proceedings before the Honorable Dan A. Polster United States District Judge and before the Honorable David A. Ruiz United States Magistrate Judge at 4, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Jan. 9, 2018), ECF No. 58.

220. Minutes of 3/6/2018 Conference & Order at 1, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Mar. 07, 2018), ECF No. 170 (noting that barriers “to a global resolution” prompted the establishment of a “limited litigation track, including discovery, motion practice, and bellwether trials”).

221. Case Management Order One, *supra* note 116, at 1 (creating a litigation track because the parties requested one to aid in their settlement discussions).

local causes, harm, and effects of the opioid epidemic in the jurisdiction of the local government plaintiffs.²²²

This raises the fear that this wave of opioid litigation will end like the last one. In cases in West Virginia,²²³ Kentucky,²²⁴ California,²²⁵ Illinois,²²⁶ Massachusetts,²²⁷ and a host of other states,²²⁸ many of the same defendants settled cases in the past without admitting wrongdoing and without disclosing to the public the scope and dangers of opioid abuse.

222. *Id.*

223. See Eric Eyre, *2 Drug Distributors to Pay \$36M to Settle WV Painkiller Lawsuits*, CHARLESTON GAZETTE-MAIL (Jan. 9, 2017), https://www.wvgazettemail.com/news/health/drug-distributors-to-pay-m-to-settle-wv-painkiller-lawsuits/article_b43534bd-b020-5f56-b9f3-f74270a54c07.html [<https://perma.cc/6ZTX-83F7>] (reporting on settlement reached between West Virginia and drug suppliers Cardinal Health and Amerisourcebergen for a combined \$36 million in January 2017, with no fault admitted); Landon Thomas Jr., *Maker of OxyContin Reaches Settlement with West Virginia*, N.Y. TIMES (Nov. 6, 2004), <https://www.nytimes.com/2004/11/06/business/maker-of-oxycontin-reaches-settlement-with-west-virginia.html> (detailing West Virginia *ex rel.* McGraw v. Purdue Pharma L.P. settlement reached in November 2004 worth \$10 million, with no fault admitted).

224. See Verdict & Settlement Summary, *Commonwealth v. Purdue Pharma L.P.*, No. 07-CI-01303 (Ky. Cir. Ct. Dec. 22, 2015), 2015 WL 10458548 (settling claims of misrepresentation on Dec. 23, 2015 for \$24 million and no fault admitted).

225. See Nate Raymond, *Teva to Pay \$1.6 Million to Resolve California Counties' Opioid Case*, Reuters (May 25, 2017, 5:09 PM), <https://www.reuters.com/article/health-teva/teva-to-pay-1-6-million-to-resolve-california-counties-opioid-case-idUSL1N1IR1W3> [<https://perma.cc/8T6F-FYNW>] (documenting settlement between two California counties and Teva Pharmaceutical Industries for \$1.6 million in May 2017, with no fault admitted).

226. See Verdict & Settlement Summary, *Madigan v. Insys Therapeutics Inc.*, No. 2016CH11216 (Ill. Cir. Ct. Aug. 22, 2017), 2017 WL 9473206 (settling claims of unlawful marketing on August 22, 2017 for \$4.5 million with no fault admitted).

227. See *Healey v. Insys Therapeutics Inc.*, No. 17-3207D, 2017 WL 7725486 (Mass. Super. Ct. 2017) (settling claims of illegal marketing and bribery on October 5, 2017 for \$500,000 with no fault admitted).

228. See Shannon Hensen, *Purdue Pharma Settles with States Over OxyContin*, LAW360 (May 8, 2007, 12:00 AM), <https://www.law360.com/articles/24311/purdue-pharma-settles-with-states-over-oxycontin> [<https://perma.cc/HPZ6-DHLU>] (reporting on claims settled by twenty-six states and the District of Columbia for \$19.5 million in May 2007).

Federal²²⁹ and foreign lawsuits²³⁰ fared better in some ways. These cases remind us about the dangers of settlements that do little to stem the tide of opioid addiction and abuse.

Litigation has the potential to educate the public on the causes and effects of the opioid epidemic and shed light on the role some pharmaceutical companies and distributors have played in this crisis. As such, a key aim of many of the government plaintiffs in the opioid MDL is not solely recovery for past harms, but many also stress the importance of public disclosure as a litigation goal to educate the public they represent.²³¹ However, little discovery has taken place so far in this MDL (in part because of the early focus on settlements). The court has interdicted discovery of keen public interest. For example, the court has refused to allow discovery into third-party litigation financing.²³² What little discovery there has been has not been

229. See, e.g., *United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569, 572–73, 576 (W.D. Va. 2007) (settling lawsuit over misbranding of pharmaceuticals on July 23, 2007 with Purdue paying \$600 million and Purdue’s corporate officers paying a total of \$34.5 million); U.S. DEP’T OF JUSTICE, *UNITED STATES V. MCKESSON CORPORATION SETTLEMENT AGREEMENT AND RELEASE 1* (2017), <https://www.justice.gov/opa/press-release/file/928471/download> [<https://perma.cc/C8BC-H4XH>] (settling claims of improper sales monitoring under the Controlled Substances Act on January 5, 2017 for \$150 million and an admission that defendants failed to report suspicious orders); *Cardinal Health Inc., Agrees To Pay \$34 Million To Settle Claims That it Failed to Report Suspicious Sales Of Widely-Abused Controlled Substances*, COLO. U.S. ATTORNEY’S OFFICE (Oct. 2, 2008), https://www.justice.gov/archive/usao/co/news/2008/October08/10_2_08.html [<https://perma.cc/S2H9-MJHA>] (settling allegations that Cardinal Health violated federal reporting standards of the Controlled Substances Act for \$34 million). But see *United States v. Mallinckrodt LLC*, 2017 WL 6502139 (N.D.N.Y. July 11, 2017) (settling claims of failing to report suspicious orders of pharmaceutical drugs on July 11, 2017 for \$35 million with no fault admitted).

230. See, e.g., *OxyContin Maker Settles Canadian Class Action for C\$20m*, BBC NEWS (May 2, 2017), <https://www.bbc.com/news/world-us-canada-39773354> [<https://perma.cc/9VXP-YSJE>] (discussing a Canada-wide class action against Purdue Pharma that settled for C\$20 million in 2017).

231. See, e.g., Commonwealth’s Pre-Hearing Memorandum, *supra* note 18, at 5 (“The Attorney General is the Commonwealth’s lawyer, and the people of Massachusetts should be allowed to see the allegations brought on their behalf. The Defendants’ deceptive sales tactics injured people across the Commonwealth, and the people of Massachusetts deserve to know the truth.”). See generally Barry Meier, *Hold Makers of Opioids Accountable*, N.Y. TIMES, Dec. 27, 2018, at A19 (“Forcing the opioid industry to reveal the truth is likely to take years, but it could prevent a similar catastrophe in the future.”).

232. Order Regarding Third-Party Contingent Litigation Financing at 1, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio May 7, 2018), ECF No. 383 (stating that the court will not permit discovery into third-party contingent litigation financing, including “any agreement under which any person . . . has a right

disclosed to the public.²³³ The court has also excoriated the public officials whose lawyers are in the MDL by indicating that information gained during discovery must not be publicly discussed.²³⁴ Most of the discovery related to opioid pharmaceutical companies comes to the public from state court proceedings, not the federal opioid MDL.²³⁵

As the court overseeing the federal opioid MDL argued, disclosure would “contradict the bedrock principle that discovery is a private process, the *sole purpose* of which is to assist trial preparation and, in this case, global settlement discussions.”²³⁶ I will leave aside the question whether discovery in *some* cases might be a private process. However, it cannot be in this case. Not only is the subject matter of extreme public concern, but most of the litigants are representing the public.²³⁷ In some instances, protective orders preventing public disclosure of specific pieces of information might, of course, be warranted. But these episodes suggest that the pressures of the MDL process toward settlement might systematically skew the process toward privacy at the cost of public education, public participation, and public benefit.²³⁸

E. Quasi-Sovereigns

The concerns about distant and private proceedings so far have primarily focused on calculations of costs and benefits. However, there is also a more foundational reason to value local adjudication: most of the plaintiffs in this MDL are not ordinary litigants. Instead, the brunt of this MDL is comprised of counties and cities that represent sections of the public at large that are trying to protect their government police powers.²³⁹ Some local government litigants feel that they have an inherent

to receive compensation that is contingent on and sourced from any proceeds of an MDL Case, by settlement, judgment, or otherwise”).

233. See, e.g., Order at 1, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Feb. 13, 2019), ECF No. 1360 (highlighting that the MDL had “generated a great deal of media attention” and that the court had “no intention of preventing the public officials who have filed these cases, the corporate defendants, or the lawyers representing any party from discussing” this information with the media, but also noting that “it is imperative that this case be tried in the courtroom, and not in the media”).

234. *Id.* at 1–2.

235. See, e.g., Barry Meier, *High-Dose OxyCotin Sales Strategy is Scrutinized*, N.Y. TIMES, Feb. 1, 2019 at B1, B6 (reporting on information gained in a Massachusetts state court case).

236. Order & Opinion at 11, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio June 26, 2018), ECF No. 800 (emphasis added).

237. See *supra* note 16 and accompanying text.

238. See generally Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61, 63 (2018) (identifying different procedural values and tradeoffs among them).

239. See *supra* Part I (describing the types of litigants in the opioid MDL).

and implicit right to local adjudication²⁴⁰ in furtherance of dispute resolution mechanisms that reflect and enhance democratic principles.²⁴¹

Sub-state government units like counties, municipalities, and sub-municipal units (e.g., school boards) exist in a netherworld of neither being fully sovereign nor fully detached from sovereignty. They are clearly not full sovereigns like states or the federal government.²⁴² For example, counties²⁴³ and municipalities²⁴⁴ cannot invoke sovereign immunity and counties are treated as citizens of their states for federal diversity jurisdiction purposes.²⁴⁵ Still, local governments exert massive influence over the lives of their populations on a day-to-day, intimate, and invasive level rarely matched by state or federal governments. From sheriff departments to firefighters, prosecutors and public defenders, school boards, election boards, local jails, zoning commissions, county courts, and water boards, local governments have the power to do tremendous good and tremendous harm. Additionally, counties and municipalities are often the instrumentalities for the work state sovereigns and the federal sovereign try to accomplish.²⁴⁶ As such, local governments invoke,

240. See, e.g., Andrew Joseph, *Why Houston and Other Cities Want Nothing to do with the Massive National Opioid Lawsuit*, STAT (Mar. 27, 2018), <https://www.statnews.com/2018/03/27/houston-national-opioid-lawsuit> [<https://perma.cc/K2QZ-85YP>] (quoting a Houston prosecutor as stating that Houston's lawsuit should be tried in the county's own court before the county's own judge and jury).

241. See Mullenix, *supra* note 13, at 564 (“[T]he argument may be made that the new models of nonclass aggregate dispute resolution represent an even more compelling illustration of the death of democratic dispute resolution.”).

242. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.”).

243. See, e.g., *N. Ins. Co. of N.Y. v. Chatham Cty.*, 547 U.S. 189, 197 (2006) (“Because the County has failed to demonstrate that it was acting as an arm of the State when it operated the Causton Bluff Bridge, the County is not entitled to immunity from Northern’s suit.”); *Jinks v. Richland Cty.*, 538 U.S. 456, 466 (2003) (“[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.”). See generally Denise Gilman, *Calling the United States’ Bluff: How Sovereign Immunity Undermines the United States’ Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 610 (2007) (“Local government entities, such as counties, municipalities, and districts, do not enjoy the same blanket sovereign immunity applicable to states.”).

244. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977) (*per curiam*) (holding that the school board is not an “arm of the state” and, therefore, does not qualify for immunity).

245. See *Moor v. Cty. of Alameda*, 411 U.S. 693, 698 (1973) (reversing the lower court’s “holding that the County is not a citizen of California for purposes of federal diversity jurisdiction”).

246. See generally Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 839 (2017) (“States abdicate many of their federal responsibilities to local governments.”).

controversially, a kind of quasi-sovereign power,²⁴⁷ and courts have granted them a kind of local sovereign immunity.²⁴⁸ Whatever the overall wisdom of this approach, courts recognized that local governments have a special role in our system of government by linking full sovereigns to the daily lives of large swaths of the overall population.²⁴⁹

The opioid MDL is inherently tied up with these vital local government functions, and many local governments have elected to protect their populations through litigation. In a democratic system, it is up to the populations of these local governments to judge whether their leaders chose wisely or not and whether the benefits of litigation warranted the costs. But in the context of the opioid MDL, local leaders and their attorneys are not in charge of important decisions.²⁵⁰ Instead, a remote and unaccountable set of other people's attorneys are making consequential decisions on behalf of other counties, cities, and Native American tribes. Insofar as their decisions will shape outcomes, this represents a kind of commandeering of government decision-making by one local government over another local government. This raises a bucket of thorny philosophical, political, and practical puzzles about the scope of democratic accountability, rights to local self-determination, and intra- and inter-state local government subsidies, taxes, and priorities.

F. *Unpredictable*

All of the normative concerns outlined above could be alleviated within the MDL process. The MDL judge could allow more parties to file motions. Or he might expedite proceedings. Or the judge could allow for more discovery and disclose more of it to the public. The judge could also return more cases earlier to their original transferor districts where they were originally filed. Or he could create more tracks in recognition of greater variation among the plaintiffs.²⁵¹ Or he

247. See, e.g., Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 964 (2010) (“[C]ourts increasingly came to view local governments as possessing a democratically rooted right to autonomy that situated them as a separate tier of American federalism-like mini-polities with independent legitimacy rooted in their election by local constituencies.”).

248. See generally Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016) (exploring the implications of the “accountability gap” in cases involving constitutional violations by local officials).

249. See Anderson, *supra* note 247, at 968.

250. See Redish & Karaba, *supra* note 13, at 151 (“Measured in terms of autonomy, paternalism, utilitarianism, or dignitary theories, procedural due process demands considerably more protection of the individual litigants’ interests than MDL provides.”).

251. See Order, *supra* note 207 (creating a second track to include more issues and parties relevant to the MDL outside of the three Track One cases).

could certify a class.²⁵² All of these options, and many more, are on the table because the MDL judge has very broad powers that have traditionally been yielded in creative ways. All pretrial techniques are on the table, including dispositive motions.²⁵³

This makes it difficult, in some ways, to criticize MDL proceedings because any flaw could be remedied or alleviated tomorrow through a creative or even radical use of pretrial techniques. MDL judges are not constrained by the usual rules, traditions, and norms of civil procedure the way that same judge would be in a non-MDL proceeding.²⁵⁴ This flexibility is one of the greatest strengths of MDL proceedings, but also a great flaw because it renders MDL proceedings unpredictable. Every MDL is different and every MDL might change and be dealt with differently halfway through.²⁵⁵ For example, the judge in the opioid MDL was previously in charge of another MDL case, but stressed the uniqueness of each, suggesting that an approach that was taken in one case will likely not work in another.²⁵⁶ This makes it difficult for parties to plan ahead, to make predictions, and to compare current settlement offers to other likely outcomes.

The loosening of the regular constraints on what an MDL judge can and cannot do has a second downside: regular rules embody a careful balance of competing interests, including but not limited to judicial

252. See, e.g., Daniel Fisher, *Opioid Lawyers Say Settlement May Hinge on Forcing Plaintiffs into Class Action*, FORBES (Sept. 27, 2018, 6:00 AM), <https://www.forbes.com/sites/legalnewsline/2018/09/27/opioid-lawyers-say-settlement-may-hinge-on-forcing-plaintiffs-into-class-action> [<https://perma.cc/9JHX-FSHB>].

253. See generally Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1270–72 (2017) (describing the significant power that the MDL judge has over pretrial proceedings); Tidmarsh & Welsh, *supra* note 10, at 7–9 (“[E]arly transferee judges asserted the power to rule on all pretrial motions—including dispositive motions to dismiss or for summary judgment—that arose during the MDL proceeding”).

254. See generally Gluck, *supra* note 63 (arguing that MDLs need a national approach to rules of procedure); David L. Noll, *The Rule of Law in Multidistrict Litigation*, 118 MICH. L. REV. (forthcoming 2019) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371952 [<https://perma.cc/9UFW-HNEU?type=image>] (arguing that MDLs lack “guarantees of transparency, public participation, and judicial review,” making the operations of MDLs unlike those of administrative agencies).

255. See Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 91 (2018) (“Externally imposed procedures for MDL cases . . . would undermine one of the crucial goals of the drafters of the statute, who believed that flexibility for individual judges was necessary to adapt to the endless variety of complicated cases that face the federal courts.”).

256. See, e.g., Teleconference Transcript, *supra* note 125, at 10 (“Well, each MDL is different. This one is different than my previous one.”).

economy.²⁵⁷ Uncoupling MDL proceedings from this balance frees MDL judges to be creative, but it also creates the danger that they will subtly or overtly tilt litigation to further efficiency interests over all others.²⁵⁸ None of this is to suggest anything derogatory about the MDL process in general or the MDL judge here in particular. However, I argue that the opioid epidemic cases, and cases like it, are not a good fit for MDL treatment and teach us about massive blind spots in the MDL statute and doctrine. There is currently no way in MDL litigation to account for powerful societal and governmental interests that trump litigation efficiency arguments.

III. A PROPOSED SOLUTION

One way to fix this blind spot is through the new concept of “MDL immunity.” This doctrinal innovation is one of this Article’s main contributions. I propose that defined cases by and against government entities must be exempted from generalized MDL treatment. In contrast to other immunities that block liability, this is an immunity from a particular procedural device, namely transfers of cases to a multidistrict litigation proceeding.²⁵⁹ The best way to accomplish this is through a one-sentence amendment to the MDL statute (Appendix A). Something close to the proposed statutory amendment could also be achieved without congressional action by modifying JPML doctrine or by changing the practices of MDL judges. However, these alternative approaches would not be as formalized and predictable as legislative action.

A. *Modifying the MDL Statute*

The normative concerns outlined above suggest a heightened value for dispersed local adjudication, in a timely manner, on the merits, targeted

257. See, e.g., FED. R. CIV. P. 1 (“These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

258. See generally Carter G. Phillips et al., *Rescuing Multidistrict Litigation from the Altar of Expediency*, 1997 BYU L. REV. 821, 821 (“One of the more disturbing developments in our judicial system in the wake of mass tort and other complex litigation is the willingness of courts to depart from clear and unbending procedural requirements—thereby sacrificing key structural protections embodied in those requirements—in the name of judicial economy or efficiency.”).

259. Because the thrust of this proposal aims at the decision to transfer, see *infra* Appendix A, this proposal sidesteps the charge that it is based on a “categorization error.” See Zachary D. Clopton, *MDL as Category*, CORNELL L. REV. (forthcoming 2019) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354742 [<https://perma.cc/S5DT-4NTS?type=image>] (arguing “against reform efforts that target the workings of an MDL *once in the hands of a transferee judge*” (emphasis added))).

at the specific and individualized harm suffered in that place, controlled by that plaintiff (e.g., targeting discovery to their litigation goals), and providing resident witnesses a chance to participate, all in front of a local judge and jury that are mindful of local conditions and sensibilities. This is the exact opposite of what the MDL process typically promises and has actually delivered in this case thus far.

This result is not surprising because the statutory mandate in 28 U.S.C. § 1407 does not require the JPML to engage in a solicitous inquiry about the localized litigation needs of government litigants. The statute is structured to emphasize efficient litigation through centralization.²⁶⁰ The JPML in the context of the opioid epidemic, as elsewhere, has lived up to the statutory mandate.

One way to address the heightened need for local adjudication is to exempt government litigants from MDL proceedings. This would guarantee that government litigants are not swept up into distant MDLs. This solution protects the special instrumentalist and deontological reasons for localized adjudication outlined above.²⁶¹ A government that contemplates suit would be guaranteed local adjudication without risk that the JPML engages in a vague case-by-case analysis of whether transfer of a case would “promote the just and efficient conduct of such actions.”²⁶² As such, the proposed solution would create an immunity from MDL transfer orders. The JPML would no longer have the power to order the consolidation or coordination for pre-trial purposes of actions involving government litigants.

This type of immunity sets it apart from immunities in the past that are immunities from liability.²⁶³ Such immunities come and came in many forms.²⁶⁴ Some are well known: sovereign immunity, tribal sovereign immunity,²⁶⁵ foreign sovereign immunity,²⁶⁶ international

260. JPML RULES OF PROCEDURE, *supra* note 7, at 3.3 (centralizing proceedings, such as by requiring all pleadings to originally be filed with the MDL panel).

261. See *supra* notes 246–50 and accompanying text.

262. 28 U.S.C. § 1407 (2012).

263. See *infra* notes 272–75 (providing examples of other immunities from liability).

264. See *infra* notes 272–75.

265. See generally *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (“Among the core aspects of sovereignty that tribes possess—subject to congressional action—is the ‘common law immunity from suit traditionally enjoyed by sovereign powers.’” (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))); Katherine J. Florey, *Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 619 (2010) (“Despite the murkiness of tribal sovereign immunity’s origins, it has a fairly long history of recognition in federal law.”).

266. See 28 U.S.C. §§ 1602–11.

organizations immunities,²⁶⁷ judicial immunity,²⁶⁸ arbitrator immunity,²⁶⁹ prosecutor immunity,²⁷⁰ and numerous criminal immunities (e.g., transactional immunity).²⁷¹ Some are less-well known: immunity for death certificate completion related to recording the sex of the decedent,²⁷² immunity for volunteers to nonprofits or government bodies in various circumstances,²⁷³ clerical immunity for entering or refusing to enter judgment by default,²⁷⁴ and immunities arising out of the handling of loaned property by museums.²⁷⁵ And some immunities are no longer popular, for example: interspousal tort immunity,²⁷⁶ interfamily immunity, and charitable immunity.²⁷⁷ All of these immunities, and many more, absolve defendants from liability.²⁷⁸ Courts disagree

267. See 22 U.S.C. §§ 288–288j (“The President shall be authorized . . . to withhold or withdraw . . . privileges, exemptions, and immunities provided for in this subchapter.”).

268. See *Mireles v. Waco*, 502 U.S. 9, 9 (1991) (per curiam) (“A long line of this Court’s precedents acknowledges that, generally, a judge is immune from a suit for money damages.”); *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988) (per curiam) (“A judge loses absolute immunity only when he acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature.”).

269. See, e.g., Cal. Bus. & Prof. Code § 6200(f) (West 2019) (“In any arbitration or mediation conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of trustees, an arbitrator or mediator . . . shall have the same immunity which attaches in judicial proceedings.”).

270. See, e.g., *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985) (“Full immunity also has been given to federal and state prosecutors.”); *Fry v. Melaragno*, 939 F.2d 832, 836 (9th Cir. 1991) (holding that IRS tax attorneys who were performing “official conduct representing the government in the litigation in the Tax Court” were entitled to absolute immunity).

271. See, e.g., *Furs v. Superior Court*, 3 A.3d 912, 915 (Conn. 2010) (“Transactional immunity ‘protects a witness from prosecution for the offense to which the compelled testimony relates.’” (quoting *United States v. Nanni*, 59 F.3d 1425, 1431 (2d Cir. 1995))).

272. See, e.g., Cal. Health & Safety Code § 102875(a)(1)(D) (West 2019) (“A person completing the death certificate in compliance . . . is not liable for any damages or costs arising from claims related to the sex of the decedent as entered on the certificate of death.”).

273. See 42 U.S.C. §§ 14501–05 (2012).

274. See, e.g., *Lundahl v. Zimmer*, 296 F.3d 936, 939 (10th Cir. 2002) (dismissing a claim against a court clerk on absolute immunity grounds).

275. See Cal. Civ. Code § 1899.6(b) (West 2019).

276. *Self v. Self*, 376 P.2d 65, 70 (Cal. 1962) (en banc) (permitting one spouse to bring an intentional against the other, overruling prior precedent that barred such actions).

277. See generally Jill R. Horwitz, *The Multiple Common Law Roots of Charitable Immunity: An Essay in Honor of Richard Epstein’s Contributions to Tort Law Scholarship*, 3 J. TORT L. (SPECIAL ISSUE) 1 (2010) (explaining the history of charitable immunity).

278. See generally Susan Bendlin, *Qualified Immunity: Protecting “All but the Plainly Incompetent” (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1025 (2012) (“The doctrine of qualified immunity shields state officials from individual liability for violations of constitutional rights if the test for immunity is met.”); Karen Blum et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013) (discussing the recent expansion of absolute immunity).

whether immunity voids liability once liability is established or whether “the essence of absolute immunity is its possessor’s entitlement not to have to answer for his conduct in a civil damages action.”²⁷⁹

In contrast to these substantive immunities of the past, I propose the creation of a new procedural immunity. This immunity would exempt a class of litigants from a procedural device. The MDL transfer statute already contains a comparable provision. Actions by the United States under antitrust laws are categorically exempt from MDL treatment.²⁸⁰ Elsewhere, procedure is also mindful of the special litigation needs of government litigants.²⁸¹ For example, the United States receives special protections for default judgment,²⁸² extended time-allowances in pleadings,²⁸³ and protections from offensive non-mutual issue preclusion.²⁸⁴ In short, it is consistent with past practice to incorporate blanket protections into procedural rules (including the MDL statute itself) that take into account the litigation position of government litigants.

B. Choices

There are many ways to implement an immunity provision, whether substantive or procedural in nature. This Section discusses some of these choices and recommends an immunity configuration consistent with the normative concerns and the empirical description outlined above. All of these choices have been incorporated into the statutory language proposed in Appendix A. Of course, somebody might agree with the need for some type of MDL immunity without agreeing with all of the choices made here. As such, this section presents a menu of regulatory levers to fine-tune MDL proceedings that relate to the concerns outlined above. On

279. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). *But see Williams v. State*, 664 P.2d 137, 139 (Cal. 1983) (en banc). “[T]he immunity cart” should not be improperly “placed before the duty horse.” *Id.* (quoting *Davidson v. City of Westminster*, 649 P.2d 894, 894 (Cal. 1982)). Put differently, “the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.” *Id.* (internal quotation marks omitted).

280. See 28 U.S.C. § 1407(g) (2012) (“Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws.”).

281. See generally Roger Michalski, *Trans-Personal Procedures*, 47 CONN. L. REV. 321 (2014) (discussing procedural differences between different types of entities).

282. FED. R. CIV. P. 55(d) (“A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.”).

283. FED. R. CIV. P. 12(a)(2) (allowing a United States governmental entity to respond within 60 days instead of 21).

284. See *United States v. Mendoza*, 464 U.S. 154, 164 (1984) (holding “that the Court of Appeals was wrong in applying nonmutual collateral estoppel against the Government”).

the whole, I advocate here for broad-blanket rules that would be easier to administer, would be more predictable, and would decrease the chance of doctrinal drift over time.

The first choice to make when designing an MDL procedural immunity is to determine the scope: who and what is covered by the immunity? The immunity could only cover clear sovereigns like the government of the United States and States.²⁸⁵ Or it could cover these sovereigns as well as their agencies, corporations, officers, and employees. Or it could go further still and include U.S. territories and sub-state government entities like counties and county-equivalents (e.g., parishes in Louisiana), municipalities, and sub-municipal entities (e.g., police departments). Of particular importance is the treatment of federally recognized tribes.

I propose that the MDL immunity cover all government litigants. This is a broad articulation that captures tremendous variation. Some may be skeptical as to whether a sub-municipal government unit should be treated with the same deference in MDL matters as a mighty federal government agency. Perhaps, some might argue that the difference between all of these government entities is too great to warrant equal MDL immunity.

Notice, however, that MDL immunity is a commitment to recognize differences between government units rather than to treat different government units equally. In MDL proceedings, all but a handful of cases are mere onlookers. They are equally onlookers no matter their governing responsibilities, exposure to harm, litigation resources, or initiative. MDL immunity would break up this uniform treatment and guarantee that all of these government units could litigate in their home forums in ways that are mindful of local needs and conditions.

The second choice to make is whether to focus on government litigants solely on the plaintiff side, the defendant side, or both.²⁸⁶ My proposal includes all government litigants. The normative concerns outlined above arose in litigation where the government units are plaintiffs, but many of the same arguments could also apply to where the government units are defendants. Notably, a common law legal system works best when decisions percolate up through the system from numerous starting points,

285. I focus here on domestic government litigants only because suits against foreign governments are fairly rare, unlikely to end up in MDL proceedings, and subject to additional requirements. *See generally* 28 U.S.C. § 1604 (immunizing foreign states from MDL jurisdiction in most circumstances).

286. *Cf.* § 1407(g) (“Nothing in this section shall apply to any action in which the United States is a *complainant* arising under the antitrust laws.” (emphasis added)).

each generating more discovery, arguments, and counter-arguments.²⁸⁷ Another reason to prefer an inclusive party-role definition is the possibility of counter claims. Assume for a moment that we created an MDL immunity that exempted government defendants from MDL treatment, but not government plaintiffs. Now, imagine one of these government plaintiffs files suit, the defendant asserts a mandatory counter-claim,²⁸⁸ and the case with both the claim and counter-claim is swept into an MDL. In such a situation, the JPML would have to leave the original claim in the MDL but separate the related counter-claim and remand it to local proceedings.²⁸⁹

A third choice in designing an MDL immunity concerns limiting the immunity by subject matter.²⁹⁰ For example, somebody might believe that some type of MDL immunity is warranted but only in specific types of lawsuits, for example, civil rights cases. Perhaps MDL immunity is warranted in public law disputes but should not apply to private law litigation. The current limitation on MDL treatment contained in section 1407(g) is such a mixture of party limitation (“United States”) and subject matter limitation (“antitrust laws”). I did not include such a subject-matter limitation in the proposal because I find it difficult to predict the shape of future lawsuits. Most people twenty-five years ago would not have been able to anticipate an opioid MDL with hundreds of local government plaintiffs in it. A narrow focus in MDL immunities would likely leave out subject matters that at some point in the future need to be shielded from generalized MDL treatment involving governments.

The last choice in crafting an MDL immunity asks us to consider how durable the immunity should be. Is MDL immunity, like many substantive immunities, waivable? If it is waivable, then what would constitute waiver? Must it be invoked? When and how? Can waiver occur only explicitly or also implicitly? Can it only be waived in litigation or can it be waived pre-suit? (e.g., by a contract provision

287. See Bradt & Clopton, *supra* note 26, at 922 (“[T]here may be systemic benefits from multiple decisions by multiple judges arising from arguments by multiple lawyers.”).

288. FED. R. CIV. P. 13(a) (“A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”).

289. See 28 U.S.C. § 1407(a) (“[T]he panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.”).

290. See generally David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 2010 DEPAUL L. REV. 371, 371 (2010) (“[T]he Federal Rules, at least on the surface, offer a procedural canvass of stunning simplicity.”); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1193 (2014) (discussing how some legal doctrines are similarly applied across different areas of substantive law).

related to a pharmaceutical company providing opioids to the county hospital). Similarly, is waiver never revocable or could there be situations where parties get a second bite at the immunity apple?

These questions, and many more, arise as soon as MDL immunity becomes anything other than automatic, self-executing, and non-waivable. Any of these features would introduce unpredictability, costly immunity satellite litigation, and the potential for sophisticated legal entities to take advantage of inexperienced parties (e.g., a small county without a permanent legal staff). Common law interpretations of “consent to MDL treatment” might also unduly shift over time in favor of repeat litigants.²⁹¹ To counter all of these dangers, the proposed MDL immunity is not waivable.

This might seem like a harsh and overly broad provision of the rule. However, keep in mind that section 1407 is not the sole transfer statute. Section 1404 provides another way to transfer cases with party consent.²⁹² Determined parties can thus still have their cases transferred for litigation elsewhere. Once there, such a case could be consolidated with other similarly situated cases.²⁹³ A 1404 transfer has different up and downsides from a 1407 transfer, but could accomplish some of the same efficiency benefits.²⁹⁴ As such, the existence of alternative transfer possibilities cushions the blow of the proposed strict MDL immunity provision.

291. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 97 (1974) (discussing the similarities and differences between claimants with only “occasional recourse to the courts” and claimants who are “repeat players” regularly engaged in litigation).

292. 28 U.S.C. § 1404(a) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”).

293. See FED. R. CIV. P. 42(a) (“If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.”); see also Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 916 (2010) (discussing the benefits of plaintiffs voluntarily associating and coordinating litigation activity).

294. For example, 1404, in contrast to 1407, would not only transfer cases for pre-trial matters but for all matters, including trial. Compare 28 U.S.C. § 1404 (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”), with 28 U.S.C. § 1407 (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated *pretrial proceedings*.” (emphasis added)).

C. Which Tool

MDL immunity, in some form, could be accomplished through four tools: the MDL statute, amendment of substantive law statutes, JPML doctrine, or changed practices by MDL judges. Modifying the MDL statute is the most difficult path. The statute has not been modified since its initial enactment in 1968.²⁹⁵ However, it is also the path that establishes the most predictability and certainty. Alternatively, Congress could modify substantive statutes to include provisions that prevent MDL transfers in those types of cases (e.g., securities).²⁹⁶

Modifying JPML doctrine could accomplish roughly the same outcome by reinterpreting the words “just and efficient conduct of such actions” to include an exception for government litigants. However, that would put a significant amount of weight on the vague term “just” and arguably go beyond the powers of the JPML.²⁹⁷ Also, the Panel has traditionally not produced lengthy opinions that vary greatly between cases.²⁹⁸ More commonly, JPML transfer orders tend toward the brief and formulaic.²⁹⁹ This makes them poor tools to accomplish a massive sea change in MDL practice. Furthermore, membership on the JPML is not static and changed membership may bring different views as to MDL immunity issues.³⁰⁰

Finally, the least difficult but also least predictable and reliable way to accomplish a type of MDL immunity would be through changed

295. See Andrew Bradt, *The Stickiness of the MDL Statute*, 37 REV. LITIG. 203, 205 (2018) (“Because MDL was passed as a statute, and not a rule, and because MDL ultimately delegated control over MDL’s implementation to the JPML and not the Rules Committee, it has been relatively difficult to tinker with.”).

296. Civil procedure scholars might also relish the Erie doctrine issues that will abound if a substantive state law that a plaintiff invokes has things to say that implicate MDL transfers.

297. See *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (imposing heightened pleading standard in a unanimous reversal of common law doctrine against municipalities explaining that it “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation”); see also *Jones v. Bock*, 549 U.S. 199, 212 (2007) (“Courts should generally not depart from the Federal Rules’ usual practice based on perceived policy concerns.”).

298. See, e.g., *In re MI Windows & Doors, Inc., Prods. Liab. Litig.*, 857 F. Supp. 2d 1374 (J.P.M.L. 2012) (consolidating 10 cases in a four-page opinion); *In re Kugel Mesh Hernia Patch Prods. Liab. Litig.*, 493 F. Supp. 2d 1371, 1371 (J.P.M.L. 2007) (consolidating 31 cases in a four-page opinion).

299. See, e.g., *Transfer Order*, *supra* note 6, at 3 (consolidating over 100 cases in a four-page transfer order).

300. See 28 U.S.C. § 1407(d) (2012) (“The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated . . . by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.”).

practices by MDL judges. Any party, the Panel, or the MDL judge can theoretically initiate a remand of transferred actions back to their original courts.³⁰¹ However, it is “typically [] the transferee judge” who initiates successful remands.³⁰² Normally, “the Panel is reluctant to order a remand absent the suggestion of the transferee judge.”³⁰³ The MDL judge, in short, could decide at any time that actions by government litigants should not, or no longer should, be part of the judge’s MDL and initiate remands of those actions back to their home jurisdictions.³⁰⁴ In the case of the opioid epidemic, the Panel provided for this possibility in its original transfer order.³⁰⁵ The Panel, as it typically does, expressed faith in the “sound judgment of the transferee judge.”³⁰⁶ While an MDL judge might thus be able to accomplish something like MDL immunity by stubbornly requesting remands of actions involving government litigants, this tool of reform is unlikely and unstable.³⁰⁷ MDL judges are selected by the JPML in significant part because of their ability and willingness *not* to remand cases.³⁰⁸ That is how the judge in the opioid MDL perceives his selection and mandate.³⁰⁹ Judges selected, in part,

301. JPML RULES OF PROCEDURE, *supra* note 7, at 10.1(b) (“Typically, the transferee judge recommends remand of an action, or a part of it, to the transferor court at anytime by filing a suggestion of remand with the Panel.”).

302. *Id.*

303. *Id.* at 10.3(a); *see also* Heyburn, *supra* note 107, at 2235 (“Where the transferee judge has suggested remand, however, the party seeking to vacate the CRO faces an uphill battle, as the Panel ‘gives great deference to a transferee judge’s suggestion that an action pending before [that judge] is ripe for remand.’”).

304. *See generally* Edward F. Sherman, *When Remand is Appropriate in Multidistrict Litigation*, 75 LA. L. REV. 455, 467 (2014) (“The MDL judge necessarily has broad discretion in deciding whether remand of cases—either individually or in a group—will serve the interests of the MDL statute.”).

305. Transfer Order, *supra* note 6, at 4 (stating that some claims may be more efficiently handled in the claims’ transferor courts, and in those cases, the MDL judge should file a suggestion of remand with the Panel).

306. *See id.* (“As always, we trust such matters to the sound judgment of the transferee judge.”).

307. *Cf.* Chamblee Burch, *supra* note 209, at 402, 422 (arguing that there is “evidence that a normative shift may be underway” that will make early remand “routine”).

308. *See generally* Robreno, *supra* note 149, at 144 (“As a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case, by adjudication or settlement, during the MDL process.”).

309. *See* Teleconference Transcript, *supra* note 125, at 42–43 (“I don’t think it is in anyone’s interest to have this [case] dragging on for five or ten years, which it will if we don’t come to some resolution. It will easily go that long, and there are a whole lot of reasons from both sides why that doesn’t make sense, and quite frankly, I think the best use of my time and my abilities will be to help see if there is some sort of resolution we can reach. I think *that’s why the MDL panel picked me*. I am sure there are better trial judges

on this trait are unlikely to then turn around and request remands for hundreds of cases with government litigants. Even if some MDL judges did, others might not. The remand requests of one MDL judge have no binding force on other and future MDL judges. This renders MDL immunity based on the practices of MDL judge unpredictable and unreliable. Modification of section 1407 is the most difficult, but also the most lasting and stable tool to accomplish a meaningful grant of MDL immunity to government litigants.

D. Concerns, Problems, Objections

MDL immunity, in whatever form and accomplished through whatever tool, is not without flaws. This Section will highlight the two most glaring issues.

First, MDL immunity might take many cases out of MDLs, where they would have been dealt with efficiently, and create a large number of duplicative litigation around the country, plowing the same ground over and over. Some might argue that this is a waste of sparse judicial resources and will overtax all parties and witnesses involved.³¹⁰

MDL treatment of properly related cases *does* make litigation more efficient and can dramatically cut back on duplicative discovery requests (e.g., multiple depositions of a pharmaceutical executive) and pre-trial motions (e.g., multiple protective orders related to depositions of a pharmaceutical executive).³¹¹ Beyond waste, there is also the danger of inconsistent rulings (e.g., one court granting the deposition and another court denying it). These are concerns in any complex litigation, but were particularly on the mind of the JPML when it created the opioid MDL.³¹²

Nothing in this Article should suggest that there are not important litigation efficiencies to be gained by MDL treatment. However, there are also important countervailing considerations that sometimes get shortchanged. The normative concerns that the opioid epidemic litigation highlights are a good opportunity to ponder what these countervailing considerations might be and how they stack up against

in the country, maybe better trial judges right here in my Court, but I think I was picked for that reason, and that's where I am going to spend my time." (emphasis added)).

310. See, e.g., Marcus, *supra* note 111, at 2266–67 (emphasizing the tradeoff between judicial efficiency and the inconvenience for the parties, particularly those in a distant forum).

311. See, e.g., Bradt & Clopton, *supra* note 26, at 920 ("A single judge overseeing consolidated cases is in a better position to police duplicative discovery requests than scores of judges hearing hundreds of separate cases.").

312. Transfer Order, *supra* note 6, at 3 ("The alternative of allowing the various cases to proceed independently across myriad districts raises a significant risk of inconsistent rulings and inefficient pretrial proceedings.").

efficiency goals. In the end, that necessarily entails a judgment call between two important sets of competing and inconsistent aims. Reasonable minds will disagree, but there can be no meaningful choice if one side of the equation is left out of consideration. In my mind, the instrumental and quasi-sovereignty arguments for exempting government litigants are even more important in some contexts than the important efficiency arguments.

The second major unaddressed objection to giving MDL immunity to government litigants is that this would raise federalism concerns. Many laws contribute to a complex fabric of shared, distributed, and delegated governing responsibilities and powers between and among different layers of government. Procedural laws are part of that delicate balance. Some might argue that a grant of MDL immunity would upset that balance.

There are numerous responses to this complex topic. Federalism is, of course, not static but instead is constantly renegotiated in the face of new challenges and demands.³¹³ Insofar as the opioid epidemic presents such a challenge, perhaps a careful re-calibration of federalism concerns in the complex litigation context are warranted. Relatedly, perhaps MDL immunity would not upset a federalism balance but rather restore it. It is not clear that the MDL statute was designed with cases like the opioid litigation in mind.³¹⁴ Conceptualized as a deviation rather than continuation, federalism concerns in the context of the opioid epidemic litigation call for a return to localized government litigation. Finally, whatever federalism concerns exist should not be overvalued. The MDL statute is not jurisdictional in nature. It does not modify the reach of federal courts either by granting or stripping powers. Instead, section 1407 is a transfer statute. As such, it only has the power to move cases from one federal district court to another if there is federal subject matter jurisdiction.³¹⁵ The MDL statute does not and cannot create such jurisdiction.³¹⁶ MDL immunity, as such, would only speak to cases

313. See generally Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1996–97 (2014) (noting changes in federalism over time, including how “[f]ederal law is now predominantly statutory law, and the reach of federal statutes into areas of historic state control continues to expand”).

314. See generally Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017) (arguing that the original purpose of the MDL statute was to consolidate power in the hands of a few judges who believed they were better suited to control the impending flood of mass tort litigation).

315. See 28 U.S.C. § 1404(a) (2012) (allowing a judge to transfer venue to another “district or division where it might have been brought,” i.e. another court that has subject matter jurisdiction).

316. See 28 U.S.C. § 1407(a) (restricting the MDL panel to remanding the case “to the district from which it was transferred”).

that invoke federal jurisdiction while leaving state court proceedings untouched. MDL immunity could not reallocate power from federal to state courts because MDL transfers do not have that power either.

CONCLUSION

This is not the first time that the MDL system has faced a massive public health crisis³¹⁷ and not the last time that courts will encounter similar issues. As local governments take on a more active litigation role, they might find themselves more frequently in federal MDL proceedings. These situations will raise a bag of thorny legal issues³¹⁸ and require a full toolset of potential solutions³¹⁹ and perspectives.³²⁰ MDL immunity could be a device to

317. See, e.g., Deborah R. Hensler, *As Time Goes By: Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1900–01 (2002) (explaining that in the wake of the asbestos health crisis, thousands of asbestos cases were consolidated in the Eastern District of Pennsylvania with a judge known for “facilitating large-scale settle”); Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 479 n.13 (1991) (explaining how congress modified the MDL statute, coincidentally during the asbestos health crisis, to allow for minimal diversity jurisdiction in the transfer district).

318. For example, preclusion questions between different and subsidiary government units. See, e.g., Daniel Fisher, *Cities vs. States: A Looming Battle for Control of High-Stakes Opioid Litigation*, FORBES (Mar. 28, 2018, 10:30 AM), <https://www.forbes.com/sites/legalnewsline/2018/03/28/cities-vs-states-a-looming-battle-for-control-of-high-stakes-opioid-litigation> [<https://perma.cc/9CQS-P58J>] (“A public fight between the Tennessee attorney general and counties that have filed separate lawsuits against the opioid industry could be the first of many similar conflicts as state AGs try to assert control over mushrooming litigation over the addiction crisis.”). Similarly, the search for “global peace” might prove elusive. See generally Morgan McCollum, Note, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, N.Y.U. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378794 [<https://perma.cc/8TYB-K5FJ?type=image>] (emphasizing that only a fraction of all possible litigants, including potentially 40,000 municipalities, are in the current MDL and any potential global settlement would have to cover all future litigants). There may also be legal ethics concerns. See generally Melissa Mortazavi, *The Cost of Avoidance: Pluralism, Neutrality, and the Foundations of Modern Legal Ethics*, 42 FLA. ST. U. L. REV. 151, 155 (2014) (discussing the general impact of updating the ethics model code for a modern world).

319. See, e.g., Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1821 (1992) (discussing how a new solution for the asbestos health crisis was needed, including “an administrative alternative [that] may be required and may well be preferable”).

320. Cf. Steven M. Sellers, *U.S. Chamber Warns That Cities Are Litigating Too Much*, BLOOMBERG (Mar. 7, 2019, 8:42 AM), <https://news.bloomberglaw.com/us-law-week/u-s-chamber-warns-that-cities-are-litigating-too-much-1> [<https://perma.cc/NY83-NXS7>] (“State legislatures should limit or stop the burgeoning trend of cities and counties hiring outside counsel to litigate everything from opioid addiction costs to environmental contamination, the U.S. Chamber of Commerce said.”).

guarantee, in the opioid litigation and litigation on the horizon, that efficiency concerns are properly balanced against other social and governmental interests.

APPENDIX A—MODEL 1407(A)

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred 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: Provided, however, that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded. **The panel may not transfer civil actions by or against government litigants.**

APPENDIX B—GREYSCALE VERSION OF FIGURE 4

The following Panels show County Governments in MDL #2804 by filing Window (the original Figure 4 combined all these panels and coded filing windows with colors).

Panel 1 (before initial 1407 motion):

Panel 2 (between initial 1407 motion and MDL order):

Panel 3 (first 6 months):

Panel 4 (7-12 months):

Panel 5 (beyond 12 months):

APPENDIX C—GREYSCALE VERSION OF FIGURE 5