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OPIOID CASES AND STATE MDLS

*Zachary Clopton & D. Theodore Rave*¹

I. INTRODUCTION

In the opioid litigation, as in so many other instances, the federal courts seem to get all the attention. Even as scholars such as Professor Judith Resnik have shone a light on the importance of state courts, they continue to lack support.² State courts handle many more cases than federal courts, and they often do so on shoestring budgets. Some have called this a “crisis.”³

While there may be a crisis in state courts for many litigants and many cases, this diagnosis is not universally true. For one thing, some states have developed specialized business courts, seemingly to attract high-end litigation or to serve the needs of powerful interests in the state.⁴ In addition to this “wine track” for high-value cases, we have identified a pattern of states developing specialized bodies or rules to handle mass litigation that may or may not involve “business cases.”⁵

1. Professor of Law, Northwestern Pritzker School of Law; Professor of Law, University of Texas School of Law. Thanks to Emily Berman, Pamela Bookman, Elizabeth Burch, Erin Delaney, David Fagundes, Maggie Gardner, Maria Glover, Abbe Gluck, Lonny Hoffman, David Kwok, Alexandra Lahav, Stephan Landsman, James Nelson, David Noll, Judith Resnik, Joe Sanders, Irene Ten Cate, Alan Trammell, Kellen Zale, and Adam Zimmerman for helpful comments.

2. See, e.g., Judith Resnik, *Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1926–27 (2016). Professor Resnik has, at times, relied on the amount of actual light shone to shine a light on the courts. See, e.g., Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1126 (2006) (“[C]ongressional investigations (prompted by requests for funding of courthouse construction) report that federal courtrooms have their ‘lights on’—meaning lit for at least two hours a day—about half of the time.”).

3. See, e.g., Peter T. Grossi, Jr. et al., *Crisis in the Courts: Reconnaissance and Recommendations*, in FUTURE TRENDS IN STATE COURTS 83–85 (2012), available at http://www.ncdsv.org/images/NCSC_FutureTrendsInStateCourts_2012.pdf.

4. See, e.g., John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1918–19 (2012) (collecting examples).

5. Although high-profile mass torts such as the opioid litigation are also highly resourced litigation, the state MDLs we study are seemingly agnostic to the monetary value of the cases they consolidate. See generally Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 Nw. U. L. REV. 1649 (2021). Indeed, California rejected a proposal to create a “business court” in favor of pursuing a transsubstantive state MDL procedure. *Id.* Note, too, that while a few high-profile federal MDLs garner most of the attention, federal MDL also has been a mechanism for consolidating smaller numbers of much lower resourced cases. See Zachary D. Clopton, *MDL as*

We have called these procedures to consolidate state-court litigation “state MDLs.”⁶

Like federal multidistrict litigation (MDL), state MDLs coordinate litigation across courts within a court system. Sometimes, state MDLs handle mass intrastate disputes (e.g., insurance lawsuits in Texas following a hurricane, wage-and-hour cases against employers in California).⁷ But sometimes, a state invokes its MDL procedures to coordinate state-court litigation in parallel with a federal MDL and other state MDLs—including in the ongoing opioid litigation.⁸

In this Article, we use the opioid litigation to consider the role of state MDLs in resolving national controversies proceeding in both state and federal courts. Of course, the opioid litigation is special for countless reasons, many of which are detailed elsewhere in this volume. But we think that the presence of overlapping federal and state MDLs is likely to be a persistent feature of mass tort litigation more generally, and there is value in uncovering how state MDLs work in perhaps the highest profile mass tort litigation of the day.

Our first contribution is descriptive. In this Article, we undertake a detailed study of opioid cases consolidated in state MDLs. We identify the state MDLs that have consolidated hundreds of opioid cases, describe their creation and development, and present detailed information on the parties and lawyers involved. The state MDLs vary considerably along a number of dimensions. In some states, the judge handling the state MDL is handpicked by a special panel or by the state’s highest court; in other states, the judge in the first case filed can consolidate all subsequent related cases in his or her own court. In some states, the lead plaintiffs’ lawyers from the federal MDL appear to have considerable sway in the parallel state MDLs; in other states, lawyers who have no apparent role in the federal leadership have been appointed to lead the state MDLs. And so, with effective control over all of the opioid cases pending in a given state’s courts, state MDL judges and lawyers can form power centers independent from—and potentially antagonistic to—the federal MDL.

Our second contribution is more theoretical. We use the opioid litigation to explore what it means to have alternative power centers in

Category, 105 CORNELL L. REV. 1297, 1316–23 (2020) (describing the range of MDLs and collecting examples of low-profile cases).

6. See Clopton & Rave, *supra* note 5, at 1657.

7. See *id.* at 1676–93 (surveying case types in California and Texas’s state MDL systems); see also D. Theodore Rave & Zachary D. Clopton, *Texas MDL*, 24 LEWIS & CLARK L. REV. 367, 368 (2020).

8. See Clopton & Rave, *supra* note 5, at 1714–18.

state courts when nationwide litigation is consolidated in a federal MDL. Because of the rules of federal subject-matter jurisdiction (and the preferences of parties and attorneys), mass tort disputes in the United States typically will be centered around a federal MDL, exerting a gravitational pull on satellite cases in state courts. But the consolidation of those satellite cases into state MDLs creates opportunities for smaller yet meaningful counterweights to form and exert their own (weaker) gravitational pull on the federal MDL and on each other. State MDLs derive their potency both from the fact that they proceed in separate court systems and from the fact that they represent the consolidation of multiple state lawsuits. That potency limits the power of federal MDL judges and lawyers, and in so doing potentially reduces some of the agency costs that critics worry plague the plaintiffs' side in these disputes. Of course, this reduction in agency costs also comes with an increase in collective action problems on the plaintiffs' side, as the ability to pool resources and bargain collectively with defendants is cut down.

We do not in this Article offer a full-throated endorsement or critique of state MDLs in general or in the opioid litigation in specific. Instead, we argue that the ability to consolidate state cases into state MDLs substantially changes the mass tort litigation environment—in ways that matter for parties, courts, and public policy. The opioid litigation is not necessarily better or worse for the presence of state MDLs. But it is different.

II. THE STATE OF OPIOID LITIGATION IN STATE MDLS

A. *State MDLs in General*

Starting only four years after adoption of the federal Multidistrict Litigation Act of 1968,⁹ states began to adopt their own procedures to coordinate related litigation across courts within the state.¹⁰ In other work, we refer to these procedures as “state MDLs.”¹¹ We define state MDLs as “special mechanisms that depart from the ordinary venue or venue-transfer rules to allow for consolidation or coordination of cases across different courts within a single state.”¹² This definition excludes subject-specific procedures, rules to consolidate cases pend-

9. 28 U.S.C. § 1407 (1968); see generally Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017).

10. See, e.g., CAL. CIV. PROC. CODE §§ 404–04.9 (West 2021); 1972 Cal. Stat. 2286, 2287 (creating California’s Civil Case Coordination Proceeding, effective January 1, 1974).

11. Clopton & Rave, *supra* note 5, at 1657. The following description draws heavily on this other work.

12. *Id.*

ing within a single court, and the usual provisions for venue transfer within a court system.¹³

Our earlier study taxonomized state MDLs into four rough categories based on how cases are consolidated: (1) “institutional MDL,” (2) “peer MDL,” (3) “ad hoc MDL,” and (4) no mechanism for MDL-like consolidation.¹⁴ This taxonomy is reflected in Table 1 below.

TABLE 1: STATE MDL TAXONOMY

Institutional MDL	Peer MDL	Ad Hoc MDL	No MDL analogy	
California	Indiana	Michigan	Alabama	Mississippi
Colorado	Maine	Oklahoma	Alaska	Missouri
Connecticut	Massachusetts	South Carolina	Arizona	Montana
Illinois	New Hampshire	Tennessee	Arkansas	Nebraska
Kansas	Pennsylvania		Delaware	Nevada
Minnesota	Rhode Island		Florida	New Mexico
New Jersey	Wisconsin		Georgia	North Dakota
New York			Hawaii	Ohio
North Carolina			Idaho	South Dakota
Oregon			Iowa	Utah
Texas			Kentucky	Vermont
Virginia			Louisiana	Washington
West Virginia			Maryland	Wyoming

The “institutional MDL” states have formal procedures that rely on an institution or actor outside of the trial court to make decisions about consolidation and assignment of related cases.¹⁵ Colorado, New York, Texas, Virginia, and West Virginia rely on a specialized MDL panel to consolidate cases.¹⁶ Illinois, Kansas, New Jersey, and Oregon rely on the state’s highest court to decide whether to consolidate cases.¹⁷ California, Minnesota, and North Carolina authorize the chief justice of the state’s highest court to decide whether and where to

13. Cf. 231 PA. CODE § 1041.1 (2020) (outlining procedures governing asbestos cases); FED. R. CIV. P. 42 (permitting consolidation of related actions within a court); 28 U.S.C. § 1404(a) (1948) (governing venue transfer).

14. See Clopton & Rave, *supra* note 5, at 1657–59. The following table is drawn from that source as well. See *id.* at 1658.

15. *Id.* at 1659–60.

16. See *id.* at 1664. Texas, Virginia, and West Virginia’s panels also decide on which judge will handle the consolidated cases. In New York, the administrative judge of the selected court makes the assignment. *Id.* (collecting sources). And in Colorado, the Chief Justice makes the assignment. *Id.* (collecting sources).

17. *Id.* at 1666 (collecting sources). Kansas, Illinois, and New Jersey’s high courts also select the transferee judge. In Oregon, the chief justice alone makes the assignment. *Id.* (collecting sources).

consolidate cases, with California's procedure formally providing for input from other judicial actors.¹⁸ Finally, Connecticut has a hybrid system that allows the chief court administrator to make decisions about consolidation along with allowing trial judges to consolidate cases themselves.¹⁹

In the "peer MDL" states, trial judges with pending cases get to decide whether to consolidate cases pending in front of other trial judges in the state.²⁰ Indiana, Massachusetts, and Pennsylvania allow the judge in the earliest-filed action to order other cases filed around the state to be consolidated.²¹ Maine and Rhode Island extend this authority to any judge with pending cases, and New Hampshire extends it to any judge receiving a motion.²² Finally, in Wisconsin, the transferee and transferor judges must issue a joint order for consolidation.²³

We also identified four states that have a history of "ad hoc" consolidation. Michigan, Oklahoma, and South Carolina have at times consolidated cases by Supreme Court order without relying on any specific rule or statute.²⁴ Tennessee essentially allows each of its districts to adopt its own system. The state's most populous county (Shelby County) has taken advantage of this option by providing in a local rule that all judges of the court may sit together to decide whether consolidation is appropriate.²⁵

As it turns out, all three types of state MDL systems were employed in the opioid litigation.

B. *Opioid Litigation in State Courts*

The most visible aspects of the opioid litigation have been in federal court, but court watchers know that not all opioid cases are consolidated in the federal MDL in front of Judge Dan Aaron Polster.²⁶ Indeed, the first trial in the opioid litigation was held in state court in

18. *Id.* at 1666–67 (collecting sources).

19. *Id.* at 1667 (collecting sources).

20. *Id.* at 1660.

21. *Id.* at 1667 (collecting sources).

22. *Id.* at 1667–68 (collecting sources).

23. *Id.* at 1668 (collecting sources).

24. *Id.* at 1660–62 (collecting sources).

25. *Id.* at 1661 (collecting sources); see Tenn. 30th J. Dist. Ct. R. 28.

26. See, e.g., Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html> (describing Judge Polster's role).

Oklahoma.²⁷ And, an important trial to be held in New York state court was delayed due to COVID-19.²⁸ But the structure of these state proceedings is less well known. As we explain below, much of the state opioid litigation has found its way into state MDLs.

Our investigation began with state opioid cases generally. In the face of thousands of lawsuits, Purdue Pharma, one of the primary opioid defendants, filed for bankruptcy and, as part of that process, asked the bankruptcy court to stay a list of cases pending across the country.²⁹ We reviewed this list and extracted all of the cases pending in state courts. Doing so revealed 430 cases in state courts (and two in state administrative proceedings) as of September 2019. There are, of course, substantially more “opioid cases” in state courts not captured by this method, but this rough cut was sufficient to give us an approximate sense of the scale of state court opioid litigation and begin to identify cases consolidated into state MDLs.³⁰ Because we know where to look for state MDLs, we are more confident that we have captured the universe of opioid cases in state MDLs.

Looking more closely at the state cases identified in the bankruptcy filings, we found that there were opioid cases pending in forty-eight states.³¹ New York led the way with fifty-eight state opioid cases. Ten states had ten or more pending cases, accounting for eighty percent of the state cases. At the other end of the spectrum, there were two or fewer cases in 30 states (including the two states with none). Full results are reflected in Table 2 below.

27. See 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>.

28. See Press Release, NY Attorney Gen. Letitia James, *Out Of Abundance Of Caution, Opioid Trial Delayed Due To Coronavirus* (Mar. 10, 2020), <https://ag.ny.gov/press-release/2020/out-abundance-caution-opioid-trial-delayed-due-coronavirus>.

29. See Complaint, Exhibits A–C, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. Sept. 18, 2019) [hereinafter “Bankruptcy Exhibits”].

30. For example, this method does not capture cases initiated after Purdue filed its exhibits in the bankruptcy proceeding or completed before the filing, nor can we be sure that Purdue listed all cases that one would consider “opioid litigation.” For some early examples of opioid cases, see Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285 (2021).

31. The only states whose courts did not appear among the bankruptcy exhibits were Michigan and Nebraska. Since those documents were filed, the state of Michigan filed a lawsuit in state court. See *Michigan v. Cardinal Health, Inc.*, No. 19-016896 (Mich. Cir. Ct. Dec. 17, 2019).

TABLE 2: PURDUE CASES BY STATE AS OF SEPTEMBER 2019

New York - 58	Alabama - 3	Colorado - 1
Pennsylvania - 53	Delaware - 3	Florida - 1
West Virginia - 50	Missouri - 3	Georgia - 1
Texas - 48	Ohio - 3	Idaho - 1
South Carolina - 42	Arkansas - 2	Iowa - 1
Illinois - 30	Hawaii - 2	Kansas - 1
Oklahoma - 25	Indiana - 2	Kentucky - 1
Massachusetts - 15	Maryland - 2	Louisiana - 1
Utah - 13	Mississippi - 2	Maine - 1
Connecticut - 10	New Hampshire - 2	Minnesota - 1
Arizona - 9	New Mexico - 2	Montana - 1
New Jersey - 7	North Carolina - 2	North Dakota - 1
Nevada - 5	Oregon - 2	South Dakota - 1
Tennessee - 5	Rhode Island - 2	Washington - 1
Virginia - 5	Vermont - 2	Wisconsin - 1
California - 4	Alaska - 1	Wyoming - 1

The opioid cases in state court are primarily cases filed by municipalities, along with some actions filed by state attorneys general and some private actions.³² Though we cannot say so definitively, it appears that many state-court plaintiffs could have pleaded cases plausibly within federal subject-matter jurisdiction,³³ so we think it is fair to say that most of these plaintiffs had a preference for state court. We also note that many of the municipality plaintiffs in state courts (and in state MDLs) have opted out of the federal negotiation class.³⁴

Defendants, on the other hand, frequently tried to escape state court using (sometimes artful) removal.³⁵ The cases that remain in

32. See Bankruptcy Exhibits, *supra* note 29.

33. For example, for purposes of diversity of citizenship, any corporate defendant is a citizen of its state of incorporation and principal place of business, meaning that plaintiffs in at least 48 states would have been able to sue that defendant in federal court for claims exceeding \$75,000. See 28 U.S.C. § 1332(a), (c) (1948).

34. Compare Bankruptcy Exhibits, *supra* note 29, with Request for Entry of Proposed Rule 23(c)(1)(B) Negotiation Class Membership Order, Exhibit C (“NPO Opt Out Report - Timely Opt Outs”), *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Jan. 10, 2020) [hereinafter “Request for Negotiation Class”].

35. See, e.g., *In re Nat’l Prescription Opiate Litig.*, 327 F. Supp. 3d 1064 (N.D. Ohio 2018) (permitting defendant McKesson Corporation to rely on federal officer removal statute by applying Sixth Circuit’s broad interpretation of that statute); *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Aug. 23, 2018) (finding no federal subject-matter jurisdic-

state court are a mix of removed-and-remanded cases for which federal jurisdiction did not attach,³⁶ cases in which not all defendants consented to removal (and in which the Class Action Fairness Act did not permit nonunanimous removal),³⁷ and cases that defendants did not attempt to remove.³⁸

Eight of the ten states with the most cases listed in the Purdue exhibits have consolidated some or all of their cases in state MDLs.³⁹ California (sixteenth on the list) also consolidated some of its cases in a state MDL.⁴⁰ In the order of quantity of cases listed in the Purdue bankruptcy filing, the nine states with opioid MDLs are:

- *New York*: In 2017, New York used its institutional MDL to consolidate its state-court opioid cases.⁴¹ As of May 14, 2020, the New York proceeding included sixty-three cases.⁴²
- *Pennsylvania*: In 2018, the judge in the first action filed in Pennsylvania court used the state's peer MDL procedure to transfer sixteen opioid cases to himself in Delaware County.⁴³ Later-filed

tion under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005)); *City of Galax v. Purdue Pharma, L.P.*, No. 7:18-cv-00617, 2019 WL 653010 (W.D. Va. Feb. 14, 2019) (permitting the use of controversial pre-service or "snap" removal). *See generally* Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 134 HARV. L. REV. FORUM (forthcoming 2021).

36. *See, e.g.*, *County of Uintah v. Purdue Pharma, L.P.*, No. 2-18-cv-00585-RJS, 2018 WL 3747847 (D. Utah Aug. 7, 2018). Although not presented in any opioid cases we are aware of, state MDL consolidation for trial purposes may create "mass actions" for purposes of CAFA removal. *See Atwell v. Boston Sci. Corp.*, 740 F.3d 1160, 1161 (8th Cir. 2013); *see also* 28 U.S.C. § 1332(d)(11)(B)(ii) (excluding cases consolidated from pretrial purposes only from the definition of "mass actions").

37. *See, e.g.*, *City of Galax v. Purdue Pharma, L.P.*, No. 7:18-cv-00617, 2019 WL 653010 (W.D. Va. Feb. 14, 2019).

38. *See, e.g.*, *Complaint, State v. Purdue Pharma L.P.*, No. X07 HHD-CV-19-6105325-S (Conn. Super. Ct. Jan. 2, 2019).

39. The two states with substantial numbers of unconsolidated cases are Oklahoma with twenty-five cases and Utah with thirteen cases. Oklahoma has created ad hoc MDLs on previous occasions but has not as of yet done so for opioid litigation. *See Clopton & Rave, supra* note 5, at 1661 (discussing Oklahoma's ad hoc MDLs). It appears that many if not all of the Oklahoma cases have since been removed to federal court so would not be candidates for state MDL at this time.

40. Virginia presents an unusual situation. The Virginia Supreme Court used its institutional MDL authority to convene an MDL Panel to consider consolidation of state opioid cases, but for technical reasons, the MDL proceeding stalled. *See Motion for Suspending Order, In re Multi-Circuit Opioid Litig.* (May 6, 2019) (including consolidation order as Exhibit A and stay order as Exhibit B).

41. *See Order Granting Defendants' Application to Coordinate Cases and for Partial Stay Pursuant to 22 NYCRR 202.69, County of Suffolk v. Purdue Pharma L.P.*, No. 613760/2016 (N.Y. Sup. Ct. July 19, 2017) (on file with author).

42. *See Opioid Litigation Index Numbers*, Index No: 400000/2017 - *In re Opioid Litig.* (on file with authors).

43. *See Order, County of Delaware v. Purdue Pharma L.P.*, CV-2017-008095 (Pa. Ct. C.P. Mar. 26, 2018) (on file with authors).

actions were also transferred to the same court, bringing the total to at least forty-one consolidated cases, though a suit by the state attorney general (AG) remains pending in a separate court.

- *West Virginia*: In June 2019, West Virginia used its institutional MDL to consolidate nineteen opioid cases; this has since grown to at least fifty cases.⁴⁴
- *Texas*: Texas used its institutional MDL to consolidate at least fifty-four opioid cases in front of Judge Robert Schaffer in Houston.⁴⁵
- *South Carolina*: The South Carolina Supreme Court issued an ad hoc MDL order consolidating all cases in front of Thirteenth Circuit Court Judge Perry Gravely.⁴⁶ Judge Gravely would handle consolidated pretrial proceedings in his own court and then preside over any trials in the circuit courts in which they were filed.⁴⁷ At least thirty-eight cases have been consolidated in this manner.⁴⁸
- *Illinois*: The Illinois Supreme Court used its institutional MDL powers to consolidate at least twenty-eight cases in a state MDL in Cook County (Chicago).⁴⁹
- *Massachusetts*: All fifteen opioid cases listed in the bankruptcy documents were transferred to the Suffolk County Business Litigation Session with Judge Janet L. Sanders, seemingly based upon the peer MDL procedure.
- *Connecticut*: State opioid cases were consolidated on the complex litigation docket, and it appears that at least some of these

44. See Administrative Order, *Monongalia Cty. Comm'n v. Purdue Pharma L.P.*, Nos. 18-C-222, 18-C-233, 18-C-234, 18-C-235, 18-C-236 (W. Va. June 7, 2019); *Opioid Litigation*, W. VA. JUD., <http://www.courts.wv.gov/lower-courts/mlp/opioid.html> (collecting documents); Bankruptcy Exhibits, *supra* note 29 (listing cases as of September 2019); Order, *In re Opioid Litig.*, No. 19-C-9000 (W. Va. Cir. Ct. Sept. 6, 2019) (transferring AG case, which was not listed as consolidated in the bankruptcy exhibits).

45. See *In re Texas Opioid Litig.*, No. 2018-63587 (Tex. Dist. Ct.). This includes forty-five of the forty-eight cases mentioned in the bankruptcy exhibits and other cases not captured in those exhibits.

46. Order, *In re Opioid Litig.*, No. 2018-08-09-02 (S.C. Aug. 9, 2018), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2018-08-09-02>.

47. Amended Order, *In re Opioid Litig.*, No. 2018-08-23-01 (S.C. Aug. 23, 2018), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2018-08-23-01>.

48. Case Management Order No. 1, Exhibit A, *In re South Carolina Opioid Litig.*, No. 2018-CP-23-01294 (S.C. Ct. C.P. June 26, 2019).

49. See Order, *People v. Purdue Pharma L.P.*, No. 123090 (Ill. Jan. 29, 2018) (on file with authors); Bankruptcy Exhibits, *supra* note 29.

cases were referred to that court by the chief civil administrative judge (presumably using the institutional MDL procedure).⁵⁰

- *California*: On the same day that Purdue declared bankruptcy, California used its institutional MDL to consolidate its opioid litigation in Judicial Council Coordination Proceeding No. 5029.⁵¹

All of these state MDLs include municipality plaintiffs, and all but Pennsylvania include a state AG action.⁵² South Carolina's MDL includes the state AG, but the AG action appears to get separate treatment within the MDL.⁵³

Participation in state MDLs is not always consensual.⁵⁴ Municipality plaintiffs supported consolidation in California, Connecticut, Illinois, Massachusetts, and New York,⁵⁵ while they opposed consolidation in West Virginia.⁵⁶ In Texas, the municipality plaintiffs conceded that the criteria for consolidation may have been met but argued that the consolidation motion was premature.⁵⁷ In Pennsylvania, the first-filed municipality plaintiffs supported consolidation in their court (Delaware County).⁵⁸ Most other municipality plaintiffs supported consolidation in Philadelphia County,⁵⁹ and after the case was consolidated

50. See, e.g., *City of New Haven v. Purdue Pharma, L.P.*, No. X07HHDCV176086134S, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019); Complex Litigation Application (on file with authors).

51. See *Judicial Council of California Civil Case Coordination Proceeding (JCCP) Log*, CAL. CTS., https://www.courts.ca.gov/documents/CivilCaseCoord_2015toPresent_JCCPLog.pdf.

52. The proto-MDL in Virginia did not include the AG action either. See *supra* note 41. Pennsylvania, Texas, and West Virginia also included non-government plaintiffs.

53. Amended Order, *In re Opioid Litig.*, No. 2018-08-23-01 (S.C. Aug. 23, 2018), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2018-08-23-01>.

54. The descriptions in this paragraph were drawn from extensive searching of the dockets and underlying documents in the state MDL proceedings (on file with authors).

55. See Order on Petition for Coordination, *In re Prescription Opioid Cases*, JCCP No. 5029 (Cal. Civ. Dep't Super. Ct. Sept. 6, 2019); Application for Referral of Case to the Complex Litigation Docket (CLD), *City of New London v. Purdue Pharma L.P.*, No. KNL-CV-18-6034326-S (Conn. Super. Ct. May 4, 2018); *In re People v. Purdue Pharma L.P.*, No. 18123090 (Ill. Jan. 29, 2018); Order Granting Defendants' Application to Coordinate Cases and for Partial Stay Pursuant to 22 NYCRR 202.69, *County of Suffolk v. Purdue Pharma L.P.*, No. 613760/2016 (N.Y. Sup. Ct. July 19, 2017). Information regarding Massachusetts plaintiffs is on file with authors.

56. Administrative Order, *Monongalia Cty. Comm'n v. Purdue Pharma L.P.*, Nos. 18-C-222, 18-C-233, 18-C-234, 18-C-235, 18-C-236 (W. Va. June 7, 2019).

57. *In re Texas Opioid Litig.*, MDL No. 18-0358 (Tex. J.P.M.L. June 13, 2018).

58. Joint Motion for Pretrial Coordination and Defendants' Motion for Stay of Actions at 2, *County of Delaware v. Purdue Pharma L.P.*, No. 2017-008095 (Pa. Ct. C.P. Jan. 25, 2018).

59. Joint Response of the Counties of Armstrong, Beaver, Cambria, Fayette, Greene, Lackawanna, Lawrence, Washington, and Westmoreland to the Joint Motion for Pretrial Coordination and for Stay of Actions, *County of Delaware v. Purdue Pharma, L.P.*, No. 2017-008095 (Pa. Ct. C.P. Feb. 14, 2018); City of Philadelphia's Response to the Joint Motion for Pretrial Coordination and for Stay of Actions, *County of Delaware v. Purdue Pharma, L.P.*, No. 2017-008095

in Delaware County, some municipal plaintiffs filed a motion to terminate the proceeding.⁶⁰ Those plaintiffs later dropped that motion⁶¹ when their lawyer was appointed to a leadership position in the state MDL.⁶² With respect to the state actions, AGs expressly asked to be included in the MDLs in Illinois⁶³; they expressly opposed inclusion in Texas⁶⁴ and West Virginia⁶⁵; and they requested only partial inclusion in California.⁶⁶ We found no evidence of defendants opposing state MDL consolidation, though as noted above, defendants frequently tried to avoid state-court jurisdiction in the first place.⁶⁷

Finally, because plaintiffs' lawyers often play an important role in venue selection—after all, they are the ones who choose whether to file in state or federal court—we collected information on the plaintiffs' lawyers in these state MDLs and compared them to lawyers in

(Pa. Ct. C.P. Feb. 14, 2018); Response of the Commonwealth of Pennsylvania, Acting By and Through Philadelphia District Attorney Lawrence S. Krasner, to the Joint Motion for Pretrial Coordination and for Stay of Actions, *County of Delaware v. Purdue Pharma, L.P.*, No. 2017-008095 (Pa. Ct. C.P. Feb. 14, 2018).

60. Notice of Supplemental Information in Support of Motion to Terminate Pretrial Coordination by Plaintiffs, the Pennsylvania Counties of Armstrong, Beaver, Bradford, Cambria, Clarion, Fayette, Greene, Huntingdon, Lackawanna, Lawrence, Monroe, Washington, and Westmoreland, *County of Delaware v. Purdue Pharma L.P.*, No. 2017-008095, (Pa. Ct. C.P. Apr. 5, 2019).

61. Notice of Withdrawal of Motion to Terminate Pretrial Coordination by Plaintiffs, the Pennsylvania Counties of Armstrong, Beaver, Bradford, Cambria, Clarion, Fayette, Greene, Huntingdon, Lackawanna, Lawrence, Monroe, Washington, and Westmoreland, *County of Delaware v. Purdue Pharma L.P.*, No.2017-008095, (Pa. Ct. C.P. May 31, 2019).

62. See Amended Order Appointing Leadership Structure, *County of Delaware v. Purdue Pharma L.P.*, No-2017-008095 (Pa. Ct. C.P. May 3, 2019). Appointment to a leadership or steering committee role in an MDL is often coveted position, as these lawyers often control how the consolidated cases are managed and can be awarded lucrative common benefit fees for their work. See, e.g., Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 82 (2019).

63. *In re People v. Purdue Pharma L.P.*, No.18123090 (Ill. Jan. 29, 2018).

64. Indeed, the Texas AG was so opposed to inclusion in the MDL that it immediately sought remand and then appealed the MDL judge's denial of its motion to the Texas MDL Panel. Order Denying Motion for Rehearing, *In re Texas Opioid Litig.*, No. 18-0358 (Tex. J.P.M.L. Mar. 21, 2019). When that proved unavailing, the Texas Attorney General convinced the legislature to pass a statute retroactively exempting its enforcement action from state MDL treatment. S.B. 827 § 2, 86th Leg. (Tex. 2019) (codified as TEX. GOV'T CODE ANN. § 74.1625 (West 2019)) (exempting claims under the Texas Deceptive Trade Practices Act and Texas Medicaid Fraud Prevention Act). See generally Rave & Clopton, *supra* note 7.

65. Order, *In re Opioid Litig.*, No. 19-C-9000 (W. Va. Cir. Ct. Sept. 6, 2019).

66. People of the State of California's Opposition to Coordination Petition, *In re Prescription Opioid Cases*, JCCP No. 5029 (Cal. Civ. Dep't Super. Ct. Aug. 19, 2019); Order on Petition for Coordination, *In re Prescription Opioid Cases*, JCCP No. 5029 (Cal. Civ. Dep't Super. Ct. Sept. 6, 2019). In Connecticut and Massachusetts, the AG was already in the court to which plaintiffs requested transfer. See Complaint, *State v. Purdue Pharma L.P.*, No. X07 HHD-CV-19-6105325-S (Conn. Super. Ct. Jan. 2, 2019); Complaint, *State v. Purdue Pharma L.P.*, No. 18-180813 (Mass. Super. Ct. June 12, 2018).

67. See *supra* notes 35–38 and accompanying text.

the federal MDL.⁶⁸ State AGs tend to represent themselves, while municipalities primarily have private representation. To be more specific:

- *New York*: Four firms are listed as representing plaintiffs in New York's state MDL: (i) Simmons Hanly Conroy; (ii) Napoli Shkolnik, PLLC; (iii) Lief Cabraser Heimann & Bernstein; and (iv) Frankfurt Kurnit Klein & Selz.⁶⁹ The first two of these firms are listed on the state-court master complaint, suggesting they may be driving the state MDL (along with the AG). Both firms have leadership roles in federal MDL (as does Lief Cabraser) and are participating in other state MDLs.
- *Pennsylvania*: As noted above, Pennsylvania's leadership structure has changed over time.⁷⁰ As of May 2019, the leadership included representatives from eight firms: (i) Simmons Hanly Conroy LLC; (ii) Pogust Millrood, LLC; (iii) Baron & Budd PC; (iv) Motley Rice LLC; (v) Saltz Mongeluzzi Barrett & Bendesky PC; (vi) Scott & Scott; (vii) Marc J. Bern & Partners LLP; and (viii) Haviland Hughes.⁷¹ Three of these firms (Simmons Hanly Conroy LLC, Baron & Budd PC, and Motley Rice LLC) have roles in federal leadership. Three of these firms (Simmons Hanly Conroy LLC; Scott & Scott; and Marc J. Bern & Partners LLP) also have leadership roles in other state MDLs.
- *West Virginia*: Lead counsel for municipality plaintiffs are from Napoli Shkolnik PLLC and The Chafin Law Firm.⁷² The former has a leadership role in the federal MDL and in other states; the latter has neither.
- *Texas*: The plaintiffs' steering committee for municipality plaintiffs includes lawyers from twelve different firms: (i) Dan Downey PC; (ii) Fibich, Leebron, Copeland & Briggs; (iii) The Gallagher Law Firm; (iv) The Lanier Law Firm; (v) Hendler Flores Law; (vi) Fears Nachawati Law Firm; (vii) Perdue & Kidd; (viii) Reich & Binstock, LLP; (ix); Law Offices of Richard

68. Results on file with authors. For the federal lawyers, see Court Docket, *In Re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Feb. 21, 2020).

69. See Plaintiffs' Master Long Form Complaint and Jury Demand, *In re Opioid Litig.*, No. 400000/2017 (N.Y. Sup. Ct. Oct. 6, 2017); WebCivil Supreme—Case Detail, N.Y. ST. UNIFIED CT. SYS. (last visited Apr. 20, 2020).

70. See *supra* note 62 and accompanying text.

71. Order Appointing Leadership Structure, *County of Delaware v. Purdue Pharma L.P.*, No. 17-008095 (Pa. Ct. C.P. June 13, 2018); Amended Order Appointing Leadership Structure, *County of Delaware v. Purdue Pharma L.P.*, No. 17-008095 (Pa. Ct. C.P. May 3, 2019).

72. Order Regarding Rulings Issued During the September 20, 2019 Status Conference, *In re Opioid Litig.*, No. 19-C-9000 (W. Va. Cir. Ct. Oct. 9, 2019).

Schechter, PC; (x) Simon Greenstone Panatier, PC; (xi) The Snapka Law Firm; (xii) Watts Guerra LLP.⁷³ Two of the twelve firms have roles in the federal MDL leadership (The Lanier Law Firm and Simon Greenstone Panatier, PC). None has a leadership role in another state MDL.

- *South Carolina*: Plaintiffs' liaison counsel are from four firms: (i) Harrison White, P.C.; (ii) Marc J. Bern & Partners LLP; (iii) Simmons Law Firm, LLC; and (iv) Finger, Melnick & Brooks, P.A.⁷⁴ None of these firms has a leadership role in the federal MDL, and one (Marc J. Bern & Partners) is involved in another state MDL.
- *Illinois*: Only two firms have more than one case: Meyers & Flowers (eleven cases) and Kralovec, Jambois, & Schwartz (nine cases).⁷⁵ Neither has a leadership role in the federal MDL or another state MDL.
- *Massachusetts*: Cases are primarily handled by Scott & Scott, sometimes in conjunction with Anderson & Kreiger LLP.⁷⁶ Neither of these firms has a leadership role in the federal MDL. Scott & Scott has a role in other state MDLs.
- *Connecticut*: Most cases identify plaintiffs' lawyers from either Scott & Scott or from three firms seemingly working together (Drubner Hartley & Hellman LLC; Simmons Hanly Conroy LLC; and Clendenen & Shea LLC).⁷⁷ Simmons Hanly Conroy is represented in federal leadership (and in other state MDLs). None of the other firms has a federal leadership role. Scott & Scott has a role in other state MDLs.
- *California*: Coordination seems to be driven by one private firm, Robins Kaplan.⁷⁸ This firm does not have a leadership role in the federal MDL or other state MDLs.

To summarize these findings, firms with leadership roles in federal MDLs also hold leadership positions in some, but not all, state MDLs. Indeed, some state MDL leadership teams include no federal leadership firms. Of the firms without federal leadership positions, some ap-

73. Order Appointing Leadership for the Plaintiffs, *In re Texas Opioid Litig.*, No. 2018-63587 (Tex. Dist. Ct. Nov. 26, 2018).

74. Plaintiffs' Statement in Support of Plaintiffs' Proposed Case Management Order No. 3, *In re South Carolina Opioid Litig.*, No. 2018-CP-23-01294 (S.C. Ct. C.P. Feb. 19, 2020).

75. Information regarding Illinois lawyers is on file with authors.

76. Information regarding Massachusetts lawyers is on file with authors.

77. Information regarding Connecticut lawyers is on file with authors.

78. See Order on Petition for Coordination, *In re Prescription Opioid Cases*, JCCP No. 5029 (Cal. Civ. Dep't Super. Ct. Sept. 6, 2019).

pear to be players only in their home state, while others have roles in more than one state MDL. So, at least in the context of municipal mass tort litigation, plaintiffs' law firms have the capacity to facilitate trans-local organization within and across states.⁷⁹

III. ASSESSING STATE MDLS

The previous section used the opioid litigation to demonstrate how state MDLs can permit groups of coordinated cases to proceed in front of judges other than a federal MDL judge, and to be led at times by lawyers outside the federal MDL leadership. To generalize, state MDLs offer an intermediate level of consolidation between the nationwide consolidation of a federal MDL and the ordinary joinder possible in a single state venue. And in doing so, state MDLs allow additional—and potentially competing—power centers to form within a nationwide mass tort litigation, but outside of the federal MDL.

As with any form of jurisdictional redundancy,⁸⁰ these intermediate levels of consolidation—and the intermediate power centers they create—could hold many advantages. But this form of redundancy also comes with drawbacks in resolving mass litigation, such as the opioid crisis. Here, we analyze those costs and benefits. Section A begins with a discussion of the tradeoffs inherent in the notion of competing power centers. Section B then turns to additional consequences of state MDLs for federal mass tort litigation. The theoretical account in this Part is not based entirely on the opioid litigation; indeed, the vagaries of any dispute mean that no real-world litigation will match any ideal type. But we think that the account here is consistent with the general dynamics of mass-tort litigation, and we think that the opioid litigation tracks and helps illustrate many of those general observations.

A. *Competing Power Centers*

Any form of aggregation creates a tradeoff on the claimants' side: Are the benefits of collective action worth the agency costs of aggre-

79. Cf. Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 711–12 (2008).

80. Our thinking here builds on the substantial literature on jurisdictional redundancy. See, e.g., Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016). Our analysis here has particular resonance with the important work of Professors Cover and Lahav, which we cite throughout.

gated representation?⁸¹ Recent commentary on this tradeoff often treats the federal MDL as the only game in town.⁸² The ability to litigate mass tort claims in state MDLs, however, allows some plaintiffs (and some plaintiffs' lawyers) to create competing power centers in the states. This section first articulates the ways that these competing power centers can be beneficial with respect to agency problems in legal representation for plaintiffs. It then turns to the potential costs of this approach in terms of the increased collective action problems within litigation and the reduced ability to offer defendants global peace or finality at the end of it.⁸³

Before turning to this analysis, two caveats are in order. First, at least in the opioid litigation, there is another important power center—the state AGs who have brought their own public enforcement and *parens patriae* actions against opioid defendants. Indeed, one major fault line that has emerged in the opioid litigation is between the private lawyers at the head of the federal MDL and several state attorneys general.⁸⁴ Because our goal is to explain the place of state MDLs in the mass litigation ecosystem, and because state MDLs afford platforms for interests to coalesce distinct from either the federal leaders or the state AGs, our focus here is not on the AG lawsuits. Additionally, there will be many mass tort cases in which state MDLs are active but state AGs play no role, suggesting that the state MDL aspects of the opioid case may be more generalizable than the important, but less common, AG suits.⁸⁵

Second, we focus here on relationships on the plaintiffs' side. We do so because the plaintiffs' side of mass torts has drawn the attention of commentators and because—at least in our view—the presence of state MDLs can have a dramatic effect on those relations. To be sure, in some mass torts, including the opioid litigation, there will be complex relationships on the defendants' side as well. But defendant-side

81. See, e.g., D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1213–15 (2013).

82. See *infra* notes 86–90 and accompanying text.

83. Using Cover and Lahav's framework, we are talking here about "interest." See Cover, *supra* note 81, at 658–62; Lahav, *supra* note 81, at 2403–04. Defendants in mass litigation tend to value closure and are often willing to pay a peace premium to settle all pending claims in a single transaction. See generally Rave, *supra* note 81.

84. See, e.g., Alison Frankel, *State AGs pose big obstacle for novel opioids negotiating class proposal*, REUTERS (June 26, 2019, 4:31 PM), <https://www.reuters.com/article/us-otc-opioids/state-ags-pose-big-obstacle-for-novel-opioids-negotiating-class-proposal-idUSKCN1TR35R>.

85. We would say the same things about the Purdue bankruptcy: Though the bankruptcy proceeding itself is a separate power center, it does not help us explain the role of state MDLs in mass tort cases.

relationships have received far less scholarly attention, and we think state MDLs are less likely to play a substantial role in shaping them.

1. Agency Problems

One vocal strand of criticism of federal MDL is that it is dominated by a handful of repeat-player plaintiffs' lawyers who can collude with each other (and potentially with the defendant) to suppress competition from other lawyers to the detriment of their one-shot clients.⁸⁶ Of course, the lead lawyers in the federal MDL are not the only plaintiffs' lawyers in a controversy as massive as the opioid litigation.⁸⁷ Appointment to a leadership position in a federal MDL does not give a lawyer "monopoly" control over all of the cases in the same way as appointment as class counsel in a class action.⁸⁸ Other lawyers will have cases inside and outside of the federal MDL, and they may push back against the decisions of the lead lawyers or advise their clients not to go along with any settlement negotiated by the federal leaders. Yet critics still worry that the lead lawyers will co-opt potential dissenters through their perch at the head of the litigation, their ability to distribute common benefit work (and fees), and their prior relationships.⁸⁹ So, while the power of this repeat-player "cartel" may be overstated,⁹⁰ there are real risks that lead lawyers' interests may not align perfectly with their clients' interests, and that they may use their positions to try to undercut potential competitors.

One way that competing lawyers might consider escaping the clutches of federal MDL leadership would be to file their cases in state courts. But even when state court litigation is possible, it may not be practical. The rules of subject-matter and personal jurisdiction make nationwide aggregation in state court impracticable, except in

86. See, e.g., ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 2–4 (2019); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 73–74 (2017) [hereinafter Burch, *Monopolies*]; Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1459 (2017).

87. In the opioid litigation, state attorneys general have been a powerful counterweight to the private lawyers at the head of the federal MDL. But the interests of the state attorneys general are not necessarily aligned with the cities and counties that make up the bulk of the plaintiffs either—particularly on the question of who will control any settlement proceeds. See generally Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

88. See Bradt & Rave, *supra* note 62, at 109; cf. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 164 (2003).

89. See, e.g., Burch, *Monopolies*, *supra* note 87, at 122–24.

90. See Bradt & Rave, *supra* note 62, at 111–14.

the states where plaintiffs are least likely to want to sue.⁹¹ And litigating one case at a time across hundreds of state courthouses is unlikely to be attractive or cost-effective in most mass torts. Without a way to aggregate state cases, the option to use state courts to compete meaningfully with the federal MDL is illusory.

State MDLs, however, offer a ready-made means for state-by-state aggregation in state court.⁹² As such, they allow state courts to be venues for substantial competing power centers to form within a mass litigation. Lawyers who are (or expect to be) shut out of leadership positions in the federal MDL might look to secure leadership positions in state MDLs.⁹³ Leadership over a state MDL essentially subsidizes the competing power center by giving these lawyers effective control over a substantial number of cases filed by other lawyers around the state.⁹⁴ The state lawyers' independence from their federal counterparts is magnified because the state judge is an independent decision maker that can speed up or slow down different parts of the litigation or make different rulings on important motions.⁹⁵ For example, it only takes one state judge to rule that discovery material should be made public for potentially damaging information to come out—an outcome that defendants might be willing to pay a premium to avoid.⁹⁶ This independence gives state leaders leverage to push back against the strategic decisions of the lead lawyers in the federal MDL—more leverage than simply having a large inventory of cases in the federal MDL or in uncoordinated state courts. If the federal lead lawyers are settling too cheaply in exchange for outsized common benefit fees, the leaders of a state MDL are in a position to object in at least a subset

91. The Class Action Fairness Act (CAFA) makes it nearly impossible to sustain any sort of multistate class action in state court. And after the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), plaintiffs will have trouble sustaining even multistate non-class aggregations in any state that does not have general jurisdiction over the defendant. See Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251, 1256–57 (2018). Federal courts are thus likely to absorb most but not all related cases in mass torts, and the residual cases will likely be spread across state court systems.

92. See Clopton & Rave, *supra* note 5, at 1715–18.

93. We have more to say about law firm decision-making below. See *infra* Part.III.A.4.

94. See, e.g., Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2145–47 (2000) (characterizing aggregation as a subsidy of private litigation).

95. See, e.g., *Smith v. Bayer Corp.*, 564 U.S. 299, 306–18 (2011) (holding that a federal judge may not enjoin a state court from granting motion to certify a class action that a federal court had denied in a related case).

96. For more in this volume on the issue of publicity, see Alexandra D. Lahav & Elizabeth Chamblee Burch, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 2 (2021).

of cases and potentially expose the federal leaders' self-dealing.⁹⁷ To the extent that a lack of competition is increasing agency costs in mass-tort plaintiffs' legal representation, state MDLs can help counteract this effect.⁹⁸

In this way, state MDLs can play a similar checking function as state governments within our federal system. When one political party is shut out of power at the federal level, it may still be able to win control over one or more state governments, and from that position, push back against the policies of the dominant party in Washington D.C.⁹⁹ Think of California's relationship to the Trump administration, or Texas's relationship to the Obama administration.¹⁰⁰ There are limits, of course, to the opposition party's ability to shape national policy from this perch. States' territorial reach is limited, their laws can be preempted, and they can be bribed into compliance through conditional federal spending.¹⁰¹ But the smaller units of state government give the opposition party a place to coalesce and affect real policy in ways that they might be shut out from at the federal level.¹⁰²

97. See Lahav, *supra* note 81, at 2402 (“The risk of collusion may be reduced by multicenteredness because competition will make it more difficult for defendants to buy off plaintiffs’ counsel at the expense of the class.”). Note, too, that because the federal leadership cannot settle state cases and the state leadership cannot settle federal cases, there is no risk of a “reverse auction” by defendant among plaintiffs’ counsel. See Bradt & Rave, *supra* note 62, at 109–10; cf. Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 473 (2000); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354, 1370–73 (1995); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853–54 (1995). In fact, institutional forms of state MDL (like their federal counterpart) further reduce the risk of a reverse auction. Even if the defendant eschewed CAFA removal, cf. Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1710 (2006), the settling parties cannot shop around for a pliant state court judge to approve a class action settlement because an external judicial actor—not the parties themselves—chooses the judge who will handle the consolidated actions. See Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259, 1303 (2017).

98. Certainly this is the premise of the repeat-player critics mentioned above.

99. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748–50, 1782–83 (2005); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 58 (2004).

100. Then-Attorney General of Texas Greg Abbott described his job in 2013 as “I go into the office, I sue the federal government, and I go home.” Richard Fausset, *In Texas, Distrust of Washington Collides With Need for Federal Aid*, N.Y. TIMES (Sept. 4, 2017), <https://www.nytimes.com/2017/09/04/us/texas-storm-federal-aid-abbott-cruz.html>.

101. See, e.g., U.S. CONST. art. VI (Supremacy Clause); *Pennoy v. Neff*, 95 U.S. 714 (1877) (states’ territorial reach limited); *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding conditional spending); *New York v. United States*, 505 U.S. 144 (1992) (noting ways Congress can preempt state law).

102. Particularly in times of strong partisan polarization, the governor of Texas or California may have considerably greater ability to affect policy—and therefore leverage in negotiating

By providing ready-made machinery for aggregating and coordinating cases at the state level, state MDLs can play a similar function in mass litigation. Lead lawyers in state MDLs may not have as much influence over the direction of the larger litigation or settlement leverage with the defendant as the federal leaders. But lead lawyers in state MDLs do have a platform to act independently from, and push back against, the federal lead lawyers when it comes to litigating or settling the cases.

To be sure, there is substantial overlap between the state and federal lawyers in the opioid litigation.¹⁰³ This sort of overlap is common in mass torts. And the resolution of federal and state cases is likely to be interdependent; a settlement in federal court may be contingent on what happens to the state court cases, and vice versa.¹⁰⁴ But as long as the state MDL lawyers control a somewhat independent set of cases, they can still act as a counterweight to the federal MDL leadership. Indeed, control of cases that proceed independently of the federal MDL potentially gives these state MDL lawyers more influence than they might have if the same set of cases were inside the federal MDL.

Recognizing this dynamic, the federal lead lawyers will undoubtedly attempt to capture leadership positions in state MDLs for themselves or their allies. But that strategy may prove more challenging than it first appears. In politics, it is difficult for the dominant party at the federal level to win in *all* of the smaller state units. The same holds true in litigation. Because states differ in the ways they select their judges and the ways they assign MDL cases, the varied terrain can make it difficult for the federal leaders to win all of the state leadership contests. Competing lawyers only need to win a leadership contest in one state MDL to gain some independence, and thus, gain some leverage with respect to any potential global settlement. To give one example, Pennsylvania's first-filed rule allows forward-thinking plaintiffs' firms to put a thumb on the scale toward coordination in their preferred court by deciding where to file first.¹⁰⁵ The judge in the first-filed case will then decide if and where to consolidate the cases; if that judge keeps the cases, that judge will also decide which lawyers to

with the majority party in Washington—than the Minority Leader of the House of Representatives or the Senate.

103. See *supra* notes 68–78 and accompanying text.

104. See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784–95 (2005) (discussing interdependence); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.16 (A.L.I. 2010) (discussing interdependence).

105. See *supra* note 21 and accompanying text. The rule in Pennsylvania's peer MDL system is that the judge handling the first-filed case decides whether and where to consolidate cases. See *id.*

appoint to leadership positions.¹⁰⁶ The availability of state MDLs thus further complicates the repeat-player “cartel” story.¹⁰⁷

We can see this dynamic playing out in the opioid litigation. While some of the lead lawyers in the federal MDL have secured leadership positions in several state MDLs, other firms, which are not part of the federal leadership, appear to have control in other states. In New York, Pennsylvania, West Virginia, Texas, and Connecticut, law firms that are part of the leadership structure in the federal opioid MDL hold some of the leadership positions in the state MDLs.¹⁰⁸ But in California, South Carolina, Illinois, and Massachusetts, none of the lead law firms in the state MDLs appear to have any formal role in the federal leadership.¹⁰⁹ Indeed, two firms that have no federal leadership roles—Marc J. Bern & Partners LLP and Scott & Scott—have secured leadership positions in multiple state MDLs.¹¹⁰ Those positions could give lawyers in those firms significant leverage to push back against the federal leadership.

Observing the give and take among lawyers in a complex dispute such as the opioid litigation is challenging as outsiders, to say the least. But when the federal lead lawyers proposed a novel negotiation class to present a united front in settlement negotiations, many of the cities and counties with cases pending in state MDLs opted out, preferring to negotiate with the defendants on their own.¹¹¹ Indeed, several of the lead lawyers in state MDLs filed an amicus brief asking the Sixth Circuit to reverse the federal MDL judge’s certification of the negotiation class.¹¹² This may be some evidence of the ability and willingness

106. *See id.*

107. *Cf.* Burch, *Monopolies*, *supra* note 87; Burch & Williams, *supra* note 87.

108. These firms are (by state): Simmons Hanly Conroy (NY, PA, CT), Napoli Shkolnik PLLC (NY, WV), Lief Cabraser Heimann & Berns (NY), Barron & Budd (PA), Mottley Rice (PA), The Lanier Law Firm (TX), Simon Greenstone Panatier (TX). For more, see *supra* notes 68–78 and accompanying text.

109. *See supra* notes 68–78 and accompanying text.

110. Marc J. Bern & Partners LLP holds leadership positions in Pennsylvania and South Carolina. Scott & Scott holds leadership positions in Pennsylvania, Massachusetts, and Connecticut. For more, see *supra* notes 68–78 and accompanying text. It’s worth noting that Marc J. Bern was a founding partner of Napoli Bern Ripka Shkolnik, but in 2015, the firm broke up in dramatic fashion that played out across the pages of the *New York Post*. *See Napoli Bern*, N.Y. *Post* <https://nypost.com/tag/napoli-bern/> (last visited Apr. 26, 2021). One successor firm, Napoli Shkolnik PLLC, has maintained an active federal MDL practice and secured leadership positions in the federal opioid litigation, as well as two state MDLs. Marc J. Bern & Partners LLP appears to have focused solely on state practice in the opioid cases.

111. *See* Request for Negotiation Class, *supra* note 35 (listing municipalities that opted out of the negotiation class).

112. Brief *Amici Curiae* of Certain Opted-Out Entities in Support of Appellants and Requesting a Reversal of the Certification Decision Below, *In re Nat’l Prescription Opiate Litig.*, Nos. 19-4099 & 19-4097 (6th Cir. Feb. 14, 2020) (including lawyers from Watts Guerra LLP (lead in

of outside lawyers to use state aggregation to push their cases in a different direction from the federal leaders.

2. *Collective Action Problems in Litigation*

Even if state MDLs are successful at reducing attorney agency costs, they do so at a price.¹¹³ One part of that price is that the disaggregation of mass torts reintroduces collective action problems among plaintiffs that justified aggregation in the first place.¹¹⁴

Mass tort plaintiffs have built-in disadvantages when they face off against mass tort defendants. Plaintiffs are typically dispersed and uncoordinated, and they are often first-time users of the legal system who have an interest only in their own cases.¹¹⁵ Mass tort defendants, by contrast, tend to be experienced repeat players who can spread costs and risk across the entire series of cases filed against them.¹¹⁶ This imbalance is perhaps less stark in the opioid litigation, where most of the plaintiffs are public entities and there are many defendants who must coordinate their responses, but the basic dynamic still holds.¹¹⁷ The plaintiffs face a collective action problem.

Texas), Reich & Binstock LLP (lead in Texas), Marc J. Bern & Partners LLP (lead in Pennsylvania and South Carolina), Harrison White PC (lead in South Carolina), Kralovec, Jambois, & Schwartz (lead in Illinois)).

113. Of course, there is no guarantee that competing state MDLs will in fact reduce agency costs or will lead to optimal settlements. As Lahav explains: “Multiplicity is not a cure for the problems caused by the prevalence of private interests in litigation. It merely destabilizes the ability of some interests to completely control the litigation. In this way it is a weapon against control by particular interests.” Lahav, *supra* note 81, at 2403–04.

114. See, e.g., Judith Resnik, “Vital” *State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1779–82 (2017).

115. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

116. See *id.* In labeling the collective action problem a cost, we are obviously adopting the plaintiffs’ perspective. Defendants are quite happy to face opponents hampered by a collective action problem. There may be arguments that enabling plaintiffs to more effectively sue together leads to more efficient deterrence or more accurate enforcement of the substantive law. See, e.g., Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1079–81 (2012); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 852–53 (2002). Or, conversely, that aggregation may amplify errors in the substantive law. See, e.g., Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 478. We treat this as a cost consistent with the MDL reform literature, but readers are free to adopt the opposite perspective.

117. Indeed, some municipalities may be quite sophisticated litigants with their own law departments and considerable ability to either litigate on their own or monitor any private counsel they have retained. See, e.g., Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, in *HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY* (2016). But that level of sophistication does not hold across the board, and there are still many more munici-

A federal MDL can go a long way towards solving that collective action problem by collecting the bulk of the plaintiffs into a single forum and forcing them to work together. Lead lawyers do most of the important work driving the litigation forward during the pretrial phase and taking the lead in settlement negotiations with the defendant.¹¹⁸ The MDL court will “tax” the fees of non-lead lawyers in order to pay the lead lawyers for the “common benefit” work that they do.¹¹⁹ This allows the lead lawyers to invest in the litigation on nearly the same scale that defendants do, knowing that they will be able to recoup some of the benefit that their efforts provide to plaintiffs who are not their clients if the litigation is successfully resolved.¹²⁰

The existence of competing power centers in state MDLs may make it harder to coordinate the litigation among plaintiffs—without any changes on the defendants’ side. Plaintiffs and their lawyers in state court are beyond the jurisdiction of the federal MDL judge, which may complicate common-benefit fee assessments.¹²¹ Some state lawyers may attempt to free ride on the work done by the federal leadership in the hopes that their clients’ cases will be included in any global settlement, even if they did little work themselves. And they may resist paying into the common-benefit fund, which reduces the incentives of the federal lead lawyers to invest in the litigation. If the market for legal services works, then we should expect that federal lead lawyers secured their positions because they would deliver the best return to the plaintiffs—having inferior lawyers pursuing different strategies in state court may just mess everything up.¹²² Competing power centers, in other words, are not free.

pal plaintiffs involved in the opioid litigation than there are opioid defendants, making collective action on the plaintiffs’ side correspondingly more challenging.

118. See, e.g., Bradt & Rave, *supra* note 98, at 1271–72.

119. See, e.g., Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374–75 (2014); see also FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION § 14.12 (Stanley Marcus et al. eds., 4th ed. 2004).

120. See, e.g., Bradt & Rave, *supra* note 61, at 94–98.

121. That is not to say that there is no way to get state lawyers to contribute. Global MDL settlements negotiated by the federal leaders often require state lawyers to consent to paying into the common benefit fund if they want their clients to participate in the settlement. See, e.g., Burch & Williams, *supra* note 87, at 1512–13. Federal MDL judges sometimes assert power over lawyers who have cases in both federal and state court (though the practice is controversial). See, e.g., Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1368–69 (2014). And the federal lead lawyers may sell state lawyers “discovery packets” or “trial packets” in private transactions, though it can be difficult to capture all of the positive externalities created by the federal leaders’ efforts in those transactions.

122. George Conway—yes, that George Conway!—offered a solution to this problem when he suggested that the JPML should be able consolidate cases to and from state courts. See generally George T. Conway III, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE

3. *Collective Action Problems in Settlement*

Collective action problems also arise with respect to settlement. In many mass torts, defendants value finality and are sometimes willing to pay a premium for a settlement that can resolve all of the plaintiffs' claims and allow them to put the entire dispute behind them.¹²³ Plaintiffs therefore stand to gain if they can bundle all their claims together to settle in a single transaction.¹²⁴ Doing so allows them to credibly offer the defendant peace in exchange for a premium that they can share among themselves—a proposition that can leave both sides better off.¹²⁵ Indeed, this is the idea behind the novel negotiation class that Judge Polster certified in the opioid MDL.¹²⁶ The negotiation class essentially created a bargaining unit of all cities and counties in the nation—except those that affirmatively opt out at the outset—that would be bound by any settlement approved by a supermajority of the class members.¹²⁷ The class was thus a vehicle for the federal lead lawyers to offer the defendants peace and extract a premium in exchange.

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Competing power centers in state MDLs may complicate efforts to achieve global resolution, to the detriment of plaintiffs, defendants, and the court system alike. If plaintiffs find intermediate aggregation in state MDLs an attractive alternative to the federal MDL, the difficulty of piecing together a global settlement will likely increase. Instead of having nearly all of the claims pending in a single forum—and all the important players in a single room—they will be spread out all over the country. With more cooks in more kitchens, transaction costs will go up. Worse still, some lawyers may use the leverage they have attained at the head of competing state court proceedings to threaten to hold up a global settlement that could benefit all parties unless they are paid off.¹²⁹ In short, creating competing power centers within the litigation also enables strategic holdouts.

L.J. 1099 (1987). Even if we thought this were a good idea, we do not think this is in cards any time soon.

123. See Rave, *supra* note 82, at 1185; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 760–63 (1997).

124. See Rave, *supra* note 82, at 1185.

125. *Id.*

126. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2020).

127. See Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73 (2020).

128. *Id.* at 79, 104–07. The Sixth Circuit ultimately reversed Judge Polster's certification of the negotiation class, finding it inconsistent with the requirements of the federal class action rule. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 677 (6th Cir. 2020).

129. Walkaway provisions that allow the defendant to terminate the deal if a certain threshold of plaintiffs do not participate are common in mass tort settlements, creating an opportunity for

Again, the opioid litigation is illustrative. While no competing lawyers succeeded in holding up the negotiation class, many cities and counties with cases pending in state MDLs did opt out, retaining the right to negotiate separately with the defendants.¹³⁰ This makes it much harder for the federal leaders to offer the defendants the total peace that might be necessary to resolve the dispute.¹³¹

4. *Law Firm Dynamics*

Finally, before leaving our discussion of competing power centers, we want to acknowledge opportunities that state MDLs create for plaintiffs' law firms that may or may not inure to the benefit of plaintiffs themselves.¹³²

First, there are opportunities for strategic diversification.¹³³ There may not be a single optimal strategy to litigate a case. The creation of multiple power centers within the litigation—controlled by different lawyers operating in front of different judges—may allow the plaintiffs to pursue a “mixed strategy” that could produce a better overall expected outcome.¹³⁴ To be sure, the results in federal and state courts

small coordinated groups of plaintiffs to act strategically. *See, e.g.,* D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 *FORDHAM L. REV.* 2175, 2179–81 (2017).

130. Request for Negotiation Class, *supra* note 35. More than 98% of municipalities within the class definition did not opt out. *See id.*

131. The negotiation class would still offer the parties something quite valuable. It defines the universe of claims over which they are (and are not) negotiating in advance of the settlement. Thus, at the time the defendants make an offer to the negotiation class, they would already know that they need to negotiate separately with, for example, Houston and factor that information into their calculus. Without the negotiation class, defendants would open themselves up to adverse selection when they make an offer to settle all claims; they may end up overpaying the weakest claims only to learn at the end which claims are the strongest when they refuse to participate. *See* McGovern & Rubenstein, *supra* note 128. The bigger problem with the negotiation class in the opioid litigation—before the Sixth Circuit shut it down—was not that some municipalities had opted out, but that the state attorneys general were not on board. But, as noted above, although the state attorneys general are a powerful counterweight to the federal leadership, their interests may not align fully with either the municipalities in the class or those that have opted out. *See supra* note 87.

132. Whether one thinks that these options benefit plaintiffs themselves will depend on one's priors about (among others) the functioning of the market for legal services, the relative risk of agency problems in federal MDL, and the importance of distributional concerns among claimants.

133. This point connects with Cover's and Lahav's discussions of “innovation” in their work on jurisdictional redundancy. *See* Cover, *supra* note 80, at 672–74; Lahav, *supra* note 80, at 2404–07.

134. A somewhat related point is that the presence of different attorneys in different venues might permit for the inclusion of more diverse viewpoints. There is a large literature on the value of diversity that is beyond the scope of this project, but at a minimum it is important to note that diverse viewpoints can help correct cognitive biases only to the extent that they are uncorrelated, so merely identifying “new voices” does not ensure that they will serve the bias-correcting function of perspectival diversity.

are likely to be interdependent. Trial outcomes in one system will affect settlement values in the others.¹³⁵ And any global settlement that might emerge will have to account for cases in both federal and state courts. But the federal and state leaders might choose different approaches in their respective proceedings. Defendants do not like “bet the company” litigation.¹³⁶ Plaintiffs’ firms might also see some advantages in not putting all of their eggs in the federal leaders’ strategic basket.

In addition, state MDLs allow plaintiffs’ law firms to engage in portfolio diversification.¹³⁷ Plaintiffs’ firms often collect portfolios or “inventories” of clients to try to spread out the risk of any given case panning out and resulting in a contingency fee.¹³⁸ These firms also might attempt to diversify their portfolios across federal and state courts. Doing so gives plaintiffs’ firms more opportunities to win greater control in one or more consolidated proceedings, which could translate into leverage in settlement negotiations both with the defendant and vis-à-vis the federal lead lawyers.

Different types of firms may have different approaches to this form of diversification. Smaller firms might believe they have little chance of winning a leadership contest in the federal MDL. Therefore, they may attempt to keep as many of their cases as possible in state court, where they might have at least some shot of obtaining a leadership role in a state MDL. Some firms in the opioid litigation have behaved in ways that are at least consistent with this strategy.¹³⁹ Larger firms—even the top “repeat players” in federal MDL—will likely file at least some cases in state court as well. Doing so gives them a hedge against the chance of losing the federal leadership contest to another large firm. And even if they succeed in securing a leadership role in federal court, firms may try to gain control over as many state MDLs as possible to fend off any unwelcome competitors. Again, in the opioid litigation, there are examples of firms behaving consistently with this description.¹⁴⁰

135. See, e.g., J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-district Litigation*, 5 J. TORT L. 3 (2012).

136. Cf. Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

137. Here, we return to “interest” in the language of Cover and Lahav. See Cover, *supra* note 80, at 658–62; Lahav, *supra* note 80, at 2399–04.

138. See, e.g., Samuel Issacharoff, “Shocked”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1928 (2002).

139. See *supra* notes 109–110 and accompanying text.

140. See *supra* note 108 and accompanying text. It is important to note that not all mass tort lawyers aspire to leadership roles in MDLs. These positions can be very lucrative, but they also

The litigation ecosystem of a mass tort dispute like the opioid litigation is complex; state MDLs can make it more complex. For any number of reasons, some plaintiffs' firms will choose to take advantage of state MDL procedures. In doing so, they may form competing power centers that help control the principal-agent problem in mass representation. At the same time, they may also exacerbate the collective action problem that plaintiffs face in mass torts. And the ability to sue in multiple forums creates opportunities for strategic behavior among plaintiffs' lawyers that may or may not help their clients in the end.

The tradeoffs among reduced agency costs, increased collective actions problems, and law-firm dynamics are complex and case-specific, so we cannot offer a general accounting of them here. But, as demonstrated by the opioid litigation, the presence of state MDLs can affect those tradeoffs in ways that merit attention.

B. Consequences for Mass Tort Litigation

Thinking about state MDLs and the power centers they create suggests additional consequences beyond the plaintiffs' side dynamics discussed above. Here, we identify two such effects. First, at the beginning of the litigation, state MDLs interact with federal MDLs by creating options for parties who are uncomfortable with the judge selected to handle the federal MDL. Second, once the litigation is up and running, state MDLs facilitate interjurisdictional cooperation at least relative to a universe with satellite state cases but not state MDLs.

1. Alternative Forums

Both critics and proponents of federal MDL acknowledge the substantial power assigned to the MDL transferee judge.¹⁴¹ That single judge will rule on all matters in all consolidated cases until they settle

typically require specialized knowledge and sizable capital investment. Mass tort law firms have many different business models. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1042-43 (1993). Some lawyers carefully screen cases to find high-value claims to take to trial, others attempt to aggregate as many cases as possible in the hopes of funneling them into a global settlement, and still others act as lead generators who refer cases to aggregators. See Bradt & Rave, *supra* note 61, at 111. All those business models can provide their own forms of leverage in the mass litigation environment. Our point here is simply that among the subset of firms that do aspire to leadership roles, state MDLs provide opportunities for diversification.

141. See, e.g., Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131-35 (2010); Bradt & Rave, *supra* note 98, at 1290-92.

or that judge decides pretrial proceedings are over.¹⁴² Once cases are transferred to an MDL, there is practically no way for the parties to escape the chosen MDL judge.¹⁴³ If the chosen federal MDL judge is unfriendly or out to lunch, the parties are stuck.

State MDLs, however, give at least some parties additional options because they can direct later-filed cases to state MDLs instead of subjecting them to the federal MDL judge's influence.¹⁴⁴ This move is less about competing with the federal power center and more about avoiding it. For example, if the federal MDL Panel picks a judge that is perceived to be defendant-friendly, later-filing plaintiffs may prefer a lesser degree of aggregation over proceeding in front of an unfavorable judge. State MDLs give them that intermediate option; they can attempt to structure their cases to remain in state court without foregoing all of the advantages of consolidation.¹⁴⁵

If the federal MDL judge is truly rogue, plaintiffs and defendants might agree that proceeding in a state MDL is preferable. In that situation, defendants might forgo removal or objections to personal jurisdiction in state courts. The parties might even voluntarily dismiss cases from the federal MDL and refile them in state court. Because the state cases may be consolidated in a state MDL, these parties are able to avoid the federal MDL without forgoing the benefits of coordination.

To be clear, we do not think that Judge Polster has gone rogue, though we suspect that some of the parties in these state MDLs did!

2. Cooperating Power Centers

Once a mass tort litigation is proceeding in multiple courts, the question will arise how those aggregate proceedings might work together. In earlier sections, we have emphasized the role of state MDLs

142. See, e.g., Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 994–95 (2012).

143. There is a robust debate among complex litigation scholars as to whether a federal MDL more closely resembles a black hole or a roach motel. Fewer than 3% of cases are ever actually remanded to transferor courts. See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400–01 (2014).

144. One way to conceptualize what is going on in these situations is that state MDLs allow for diversification along the lines of “ideology.” See Cover, *supra* note 80, at 662–68; Lahav, *supra* note 80, at 2407–13.

145. For example, if the only potential basis for federal jurisdiction is diversity of citizenship, then removal is not proper if a properly joined and served defendant is a citizen of the forum state. See 28 U.S.C. § 1441(b)(2). Thus adding a claim against a local pharmacy in a drug defect case, for example, may be enough to keep the case in state court. See also *supra* note 33 and accompanying text (noting that plaintiffs can plead their cases to get into or out of federal court).

as competing power centers,¹⁴⁶ but these consolidated state proceedings also can serve as *cooperating* power centers. The straightforward idea here is that once there are related cases being litigated in parallel across different court systems, it helps to coordinate cases within each court system.

Without cooperation, parties and courts risk needless duplication of effort. For this reason, policymakers and scholars have long encouraged federal MDL judges to actively coordinate with state judges handling similar cases.¹⁴⁷ State MDLs can make the process of cooperation easier by consolidating cases at the state level. Put simply, it is easier to coordinate a set of 50 than 500.¹⁴⁸ Or, to put it in terms of the opioid litigation, Judge Polster could coordinate with more than three quarters of the state cases by talking to the nine judges handling state MDLs.¹⁴⁹

Of course, this idea assumes the existence of satellite state cases. We think this is a fair assumption, at least under current law. The rules of federal subject-matter jurisdiction mean that some cases related to a federal MDL will be litigated in state court.¹⁵⁰ And the rules of personal jurisdiction and other doctrines mean that not all state-court cases will be filed in a single state.¹⁵¹ In other words, alongside federal mass tort MDLs, there are nearly always satellite cases pending in state courts. And some commentators think that there are special reasons for certain cases to be their home state courts (*e.g.*, suits by state

146. See *supra* Part III.A.

147. See FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION § 10.225 (Stanley Marcus et al. eds., 4th ed. 2004); FED. JUD. CTR. ET AL., COORDINATING MULTIJURISDICTION LITIGATION: A POCKET GUIDE FOR JUDGES (2013). For earlier examples of interjurisdictional judicial cooperation, see generally Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851 (1997) (discussing *inter alia* asbestos and breast implant litigation).

148. See Clopton & Rave, *supra* note 5, at 1715–16.

149. See *supra* notes 41–51 and accompanying text. Indeed, Judge Polster has been actively coordinating with state proceedings. He appointed a committee of federal lawyers to coordinate discovery in related state and federal cases under the supervision of a special master. Order Designating Attorneys Address Coordination of State/Federal Discovery, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP, (N.D. Ohio June 13, 2018). And he issued a protocol for such coordination. Protocol for State and Federal Court Coordination, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Oct. 9, 2018).

150. See 28 U.S.C. § 1332; *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

151. That is, unless that state has general jurisdiction over the defendant. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). Though even states with general jurisdiction may not want to hear those cases. See, *e.g.*, *Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245, 1253 (Del. 2018) (“Delaware has no real connection to the dispute except for the defendants’ place of incorporation. It is not unfair to suggest that, rather than *requiring* cases to proceed in Delaware in the absence of an alternative forum, the Superior Court should consider, on a case-by-case basis, whether the court’s resources should be deployed to resolve cases with little connection to Delaware . . .”).

or local governments).¹⁵² For whatever reason some related cases remain in state courts, the idea here is that there is a benefit for them to remain *consolidated* in state courts.

IV. CONCLUSION

State MDLs are an important and underappreciated aspect of the mass tort ecosystem. In almost every nationwide mass tort litigation there will be state cases alongside the federal MDL, and the rise of state MDLs mean that many of those cases can be joined into competing power centers. This is neither a completely welcome nor unwelcomed development—but it is an important development deserving of further study.

As we conclude this Article, we want to step even further back to discuss the relationship between state MDLs and the structure of mass tort litigation. We need not take sides in ongoing debates about federal MDL reform in this forum. It suffices to say that virtually no one in the mass tort community thinks MDL is perfect.

There is a libertarian argument that a fully functioning market should do of the work of regulation without many of its costs. Similarly, a “mass-tort libertarian” might insist that the presence of a robust market for consolidated proceeding—*i.e.*, a mix of federal and state MDLs—should obviate the need for any reform of the MDL process. Or, to return to our federalism analogy, a form of Tieboutian sorting should allow dissatisfied litigants to exit the federal MDL for a system that is more precisely tailored to their needs.¹⁵³

We reject such market orthodoxy. Markets and regulation are not perfect substitutes, and it often takes a fine-grained contextual analysis to identify—let alone, resolve—the tradeoffs that they present. Even if state MDLs achieve all of the promise and avoid all of the pitfalls we identify above, the presence of state MDLs should not be an excuse to cover one’s eyes to the problems that may arise in mass tort litigation. Some problems are simply better addressed at the federal level.

But state MDLs do considerably complicate the picture of nationwide mass tort litigation. The federal MDL is not a black hole that sucks all related litigation into its vortex. State MDLs allow partially independent and potentially competing litigations to develop in the

152. See generally Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175 (2019) (arguing for an exemption from MDL consolidation for cases brought by or against public litigants).

153. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

states. And while they do not displace the federal MDL judge or federal lead lawyers at the center of the mass tort universe, the gravitational effects of satellite state MDLs should not be ignored.