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HARNESSING COMMON BENEFIT FEES TO PROMOTE MDL INTEGRITY

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Multidistrict litigation (MDL) has long been dogged by worries about illegitimate—or even fraudulent—claims. These claims, and public concern about them, damage the system; they erode confidence in judicial processes, increase costs, and contribute to rising caseloads. But, while many have noted the problem, and some have even sought to address it, so far, judges' arsenals have been limited. Some judicial efforts (such as Lone Pine *orders) amount to overkill: The entry of a* Lone Pine *order threatens to chill the vindication of important rights, not merely the initiation of bogus claims. Other efforts, such as plaintiff fact sheets and census orders, suffer from the opposite problem: Because they lack teeth, these orders can encourage a game of judicial whack-a-mole, as some nonmeritorious claims may be rooted out even as more such claims are ushered in.*

Against that backdrop, we offer an innovative and practical solution to address this problem head-on. In particular, we explain how MDL transferee judges can harness common benefit fees to induce plaintiffs' lawyers to improve their screening practices, encouraging lawyers to cull invalid claims before they are filed. By assessing common benefit fees on a sliding scale, judges can financially reward those lawyers who meaningfully vet would-be clients—and penalize those who don't. Over time, through tailored and targeted efforts, judges can ensure that attorneys are properly incentivized to review the factual basis of suits while also keeping courts open to claims of uncertain-but-possible merit.

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INTRODUCTION

MDLs currently account for slightly more than one out of every two civil cases pending in the nation's federal courts—a fact that is making waves and, not surprisingly, catalyzing calls to tame these "behemoth" actions.[1] In this debate, many MDL features are criticized, including their duration (too long), personnel (too reliant on repeat play), and modes of judicial administration (too managerial, improvisational, and reluctant to remand to the transferor court).[2]

Yet, one aspect of MDLs—and particularly mass tort MDLs, which comprise the lion's share of the MDL docket[3]—is garnering particular attention and is seen by experts on both sides of the proverbial aisle as especially problematic: MDLs' apparent tendency to attract patently nonmeritorious claims.[4] In moments of candor, plaintiffs' lawyers concede "that cases that truly have no merit are a real problem in MDLs."[5] Judges, too, are expressing

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[1] For statistics, see Ronen Avraham et al., *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143, 145–46 (2021). If one counts *filed* cases, rather than pending cases, MDLs are closer to 30 percent. *Cf.* Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1246 (2019) (suggesting that the "pending" statistic offers an exaggerated sense of MDLs' share of the civil docket).

[2] *E.g.*, Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd,* 107 CORNELL L. REV. 1835, 1836 (2023) (noting that MDLs "last almost four times as long as the average civil case"); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1514–15 (2017) (criticizing the prevalence of repeat play); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 15 (2021) (noting that "a remand is no longer a convenient fiction; it's a virtual impossibility").

[3] Avraham et al., *supra* note 1, at 145–46 (explaining that, as of 2019, 95% of all actions pending in MDLs involve mass torts).

[4] Here and below, we use "nonmeritorious claims" to refer to claims brought by plaintiffs with *no* cause of action (e.g., who never took the drug at issue). Jaime Dodge has called these "false claims," a specific category distinct from "exposure-only or otherwise difficult-to-prove claims." Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 349 (2014). For examples, see Part I.A. *infra*.

[5] Perry Cooper, *Defendants' Gripes With MDLs, and What to Do About Them*, BLOOMBERG LAW, Oct. 26, 2017 (quoting prominent plaintiffs' attorney Chris Seeger as agreeing with this assessment); *see also* Advisory Committee on Civil Rules, Agenda Book, Nov. 1, 2018, at 148 [hereinafter Nov. 1, 2018 Committee Report] (reporting that "plaintiff-side lawyers . . . recognize that other lawyers file cases without adequate investigation and, sometimes, in hope of a free ride to a profitable settlement"). *But cf.* Tricia L. Campbell & O. Nicole Smith, *Mandatory*

exasperation with suits "populated with many non-meritorious cases" that "probably should never have been brought in the first place."[6] The MDL Subcommittee of the Advisory Committee on Civil Rules has registered concern, lamenting the "unfortunate reality that . . . a significant number of claimants in [MDLs] turn out not to have supportable claims."[7] Congress has gone on record criticizing mass tort MDLs for becoming "magnets for . . . poorly investigated (and often patently invalid) personal injury claims."[8] Academics have joined the chorus.[9] And defense lawyers and their allies have doubled down, contending that "it is not uncommon for plaintiff counsel to file cases where the plaintiff was never exposed to the product that allegedly caused the injury, where the plaintiff never suffered the alleged injury, or where the statute of limitations that sets the deadline for filing the claim has expired."[10] Indeed,

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Early Vetting in MDLs: Just a Red Herring?, 89 UMKC L. REV. 865, 865 (2021) (insisting that "concrete data" has not "established" that "MDLs are being overrun with meritless cases").

[6] *In re* Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig., 2016 WL 4705827, at *2 (M.D. Ga. 2016). *See also* Nov. 1, 2018 Committee Report, *supra* note 5, at 142 ("There seems to be fairly widespread agreement among experienced . . . judges that in many MDL centralizations—perhaps particularly those involving claims about personal injuries resulting from use of pharmaceutical products or medical devices—a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit.").

[7] Nov. 1, 2018 Committee Report, *supra* note 5, at 143.

[8] H.R. Rep. No. 115-25, at 5 (2017).

[9] *E.g.*, Dodge, *supra* note 4, at 349–52 (discussing MDLs' propensity to attract "claims that, when investigated, reveal that the individual has no cause of action"); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688 (1989) (observing that "mature mass torts generate . . . a substantial number of false positive claims"); *cf.* D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEX. L. REV. __ (forthcoming 2023) (suggesting that the nonmeritorious claim problem is overstated but nevertheless concluding "it is quite plausible that MDLs bring more claims into the litigation systems and that, on average, those claims will tend to have lower expected values than claims that would have been filed in the absence of an MDL").

[10] DOUGLAS G. SMITH, THE RISING BEHEMOTH: MULTIDISTRICT AND MASS TORT LITIGATION IN THE UNITED STATES xii (2020); *see also, e.g.,* Jason R. Harmon, *Combatting "Count Me In" Pleadings*, 61 No. 2 DRI FOR DEF. 70 (2019) (lamenting "the explosion of meritless MDL filings"); Andrew J. Trask, *Ten Principles for Legitimizing MDLs*, 44 AM. J. TRIAL ADVOC. 113, 120 (2020) ("One of the unfortunate problems with modern MDLs is that the consolidated

some prominent defense-side interest groups identify nonmeritorious claims as the single biggest problem afflicting the contemporary MDL ecosystem.[11]

The prevalence of these claims is prompting calls for drastic action, for everything from heightened pleading standards,[12] to blatant end-runs around Rule 56,[13] to dramatically expanded interlocutory review.[14] Indeed, defendants are using the specter of spurious filings to resist the Judicial Panel on Multidistrict Litigation's (JPML's) front-end creation of MDLs,[15] and they are even citing the problem when seeking the wholesale departure from federal district court in favor of claim resolution through bankruptcy.[16]

And there is no doubt: some MDLs *do* feature a significant number of entirely nonmeritorious claims, and the prevalence of

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lawsuits are filled with junk claims."); WASH. LEGAL FOUND. (WLF), EARLY ASSESSMENT OF CLAIMS CAN HELP REDUCE THE MDL TAX 1 (2020) [hereinafter WLF] ("Instead of achieving efficiency, MDLs have encouraged plaintiffs' lawyers to file a massive number of unmeritorious claims.").

[11] *E.g.*, Comment from IADC to Committee on Rules of Practice and Procedure, Oct. 30, 2019, at 2 ("The most pressing problem with MDLs is that they are filled with what can only be called 'junk' claims."); Comment from WLF to the Advisory Committee on Civil Rules, Sept. 23, 2019, at 2 ("Perhaps the greatest source of MDL inefficiency is the tendency to attract meritless claims.").

[12] Nov. 1, 2018 Committee Report, *supra* note 5, at 145 (discussing this proposal).

[13] *See* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 105 (requiring, inter alia, that within forty-five days of transferring a personal injury action into an MDL, "counsel for a plaintiff . . . shall make a submission sufficient to demonstrate that there is evidentiary support . . . for the factual contentions in plaintiff's complaint").

[14] *See* Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, 107 KY. L.J. 467, 473 (2019).

[15] *E.g.*, *In re* Paragard IUD Prod. Liab. Litig., 510 F. Supp. 3d 1376, 1378 (JPML 2020) ("[D]efendants contend that creation of an MDL would lead to the filing of numerous non-meritorious cases that will evade individualized scrutiny, thereby creating pressure on defendants to settle.").

[16] *E.g.*, Brief for Nat'l Ass'n of Manufacturers and Product Liability Council, Inc., as Amici Curiae in Support of Appellee, Case No. 22-2003 et al. (3d Cir. Aug. 22, 2022), at 4 & 22 (promoting the channeling of talc claims into the bankruptcy system because, inter alia, "MDL produces significant unfairness to defendants by subjecting them to a flood of non-meritorious claims").

such claims imposes considerable costs.[17] Their inclusion complicates life for the defendant and may compel the filing of unnecessary (and, sometimes, downright misleading) adverse incident reports and SEC filings.[18] It's not good for plaintiffs, as *some* without meritorious claims are made to believe otherwise—and some are even made to believe they're sick when they are, in fact, well.[19] Then, *within* the MDL, the claims' inclusion confounds, prolongs, and undermines the bellwether selection process.[20] Dockets groaning under the weight of meritless claims erode confidence in the integrity of the MDL process—and tarnish Americans' perceptions of civil litigation more generally.[21] The inclusion of a significant-but-unspecified number of non-cognizable claims frustrates settlement discussions.[22] If a settlement *is* reached, and if some funds *are* diverted to those without a valid entitlement to relief, that leaves less for those with genuine impairments.[23] And, more broadly, as two-time transferee Judge M. Casey Rodgers has explained, simply "dealing with unsupportable claims . . . drains the time and resources of the parties, counsel, and the courts."[24]

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[17] For a thoughtful assessment of the costs these claims impose (or, sometimes, don't impose), see generally Rave, *supra* note 9.

[18] Nov. 1, 2018 Committee Report, *supra* note 5, at 145 (discussing these effects).

[19] *In re* Silica Prod. Liab. Litig., 398 F. Supp. 2d 563, 636 (S.D. Tex. 2005) (explaining that widespread misdiagnosis, as seen in *Silica*, causes some plaintiffs to believe they have a nontreatable condition—when, in fact, the affliction may be treatable—and also has ripple effects that adversely affect many facets of the plaintiffs' social, emotional, and financial wellbeing).

[20] Judge M. Casey Rodgers, *Vetting the Wether: One Shepherd's View*, 89 UMKC L. REV. 873, 873 (2021) (explaining that "high volumes of unsupportable claims . . . . interfere with a court's ability to establish a fair and informative bellwether process").

[21] For how perceived abuses affect public perception, see S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 425–27 (2013).

[22] Rodgers, *supra* note 20, at 873 (explaining that illegitimate claims "hamper settlement discussions").

[23] *Silica*, 398 F. Supp. 2d at 636 ("[E]very meritless claim that is settled takes money away from Plaintiffs whose claims have merit.").

[24] Rodgers, *supra* note 20, at 874. *See also Silica*, 398 F. Supp. 2d at 636 ("Limited judicial resources are consumed weeding out meritless claims, costing the judiciary, costing other litigants whose suits are delayed, and ultimately costing the public, who pays for a judicial system that is supposed to move with some degree of speed and efficiency.").

Yet, so far, judicial efforts to address the problem have had something of a Goldilocks quality, either too weak or too strong. On the weak end of the continuum, courts have attempted to knock nonmeritorious claims out of the MDL. Yet they have done so either very late in the case's lifecycle (at the time of settlement, after the claims have already taken a toll) or, in other instances, earlier but without accompanying steps to discourage such claims' future filing. On the opposite end of the continuum, courts have sought to cull nonmeritorious claims using strong medicine, such as *Lone Pine* orders. But this strong medicine comes with significant side effects: *Lone Pine* filings are expensive and time-consuming to complete—and the orders' entry perverts the Federal Rules of Civil Procedure and risks excluding suits that are, in fact, compensable under governing law.[25]

Recognizing these challenges, and also stepping back to pinpoint a root cause of the problem—chiefly, that the mass tort MDL process distorts contingency-fee-fueled screening incentives—we propose a third, more targeted and better calibrated, approach. In particular, we encourage transferee judges to deploy their existing discretion to take three simple steps. First, transferee judges should weed out nonmeritorious claims early in the litigation's lifecycle, using either no-frills plaintiff fact sheets or census orders. (The vast majority of transferee judges already require fact sheets, and they increasingly do so early in litigation, so the marginal burden of step one should be minimal.[26]) Second, transferee judges should assess how each personal injury (PI) lawyers' clients' claims fared when subject to the above scrutiny. Third, transferee courts should harness their well-established authority to set common benefit fees (CBFs) to penalize those who filed a high proportion of nonmeritorious claims and reward those who didn't. These simple steps, when combined, will restore a version of fee-based screening incentives—and will, in turn, encourage MDL lawyers to file only supportable suits.

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[25] *See generally* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2 (2019).

[26] Margaret S. Williams et al., Fed. Judicial Ctr., Plaintiff Fact Sheets in Multidistrict Litigation: Products Liability Proceedings 2008–2018, at 1–2 (Mar. 2019) (reporting that, between 2008 and 2018, fact sheets "were ordered in 87% of proceedings with more than 1,000 actions" and "81% of proceedings with more than 100 actions"). For further discussion, see generally MARGARET S. WILLIAMS ET AL., FED. JUDICIAL CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES (2019).

The remainder of this Essay proceeds as follows. Part I explores the persistent problem of nonmeritorious claiming. It compiles the best available evidence about the meritless claim problem and then, drawing on a deep understanding of contemporary contingency fee financing, explains why MDLs—and particularly certain large mass tort MDLs—are particularly susceptible to these filings. Part II then canvasses current approaches that seek to promote claim integrity and analyzes why these approaches predictably fall short. As Part II explains, some current tools are too strong, others are too weak, and all are inadequately forward-looking. Current screens may succeed at weeding out the bogus claims *already* in a given MDL, but they do nothing to recalibrate underlying incentives. Against that backdrop, Part III sketches a straightforward, flexible, and easy-to-implement CBF-based reform. This Part contends that, by using existing mechanisms that are already at a transferee judge's fingertips, the court can impose a (visible) financial penalty on PI lawyers who flood the MDL with noncolorable claims—and simultaneously reward those lawyers who don't. In so doing, the court can fortify PI lawyers' incentive to engage in rigorous pre-filing review and, by extension, promote the integrity of the MDL process.

I. THE MERITLESS CLAIM PROBLEM

Any discussion of nonmeritorious claiming must begin with the crucial point that, despite some assertions to the contrary, all available evidence suggests that the lion's share of filed tort lawsuits—*overall*—are genuine and meritorious.[27] The vast majority of federal judges—the individuals arguably in the best position to assess suits' validity—believe that "groundless litigation" is either "no problem" or is a "small" or "very small" problem.[28] And, the limited evidence available generally supports judges' assessments.[29]

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[27] Portions of Part I are adapted from Engstrom, *supra* note 25, at 23–33 and Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 650–65 (2017).

[28] Only 3 percent of judges believe that "groundless litigation is a "large" or "very large" problem. DAVID RAUMA & THOMAS E. WILLGING, FED. JUDICIAL CTR., REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCE AND VIEWS CONCERNING RULE 11, at 4 tbl. 1 (2005).

[29] In the medical malpractice realm, for example, the best evidence suggests that the majority of filed claims involve both a bona fide error and a genuine injury.

That said, the tort system consists of multiple "worlds."[30] And, within the broader whole, there are two areas where some non-trivial number of plaintiffs file claims without a valid entitlement to relief: car wreck cases, and particularly those cases where the plaintiff complains of soft-tissue injuries, and mass tort cases—the site of our current inquiry.[31]

A. Diagnosing the Problem

It is clear that MDLs—and especially large mass tort MDLs—have become home to at least some nonmeritorious claims. But how big of a problem is this, exactly? It is impossible to say for sure.[32] Further, even if we had a reliable *general* estimate (which we lack), the incidence of such claiming undoubtedly varies sharply

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David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2024 (2006).

[30] Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 307–08 (2018).

[31] For more on specious claims in the auto accident context, see Engstrom, *supra* note 27, at 641, 660–61.

[32] We do not hazard a guess—and we have doubts about others' estimates. Indeed, attempting to quantify the problem, many contend that 30 to 40 percent of all MDL filings are nonmeritorious. *E.g.,* Trask, *supra* note 10, at 120 ("Junk claims comprise an estimated forty percent of most MDL dockets."); Comment from WLF, *supra* note 11, at 2 ("In the largest MDLs, meritless claims account for between 30% to 40% of all claims."). The evidence commentators cite to justify that estimate is a roughly 14-minute video featuring Malini Moorthy, Vice President and Associate General Counsel of Bayer. In that frequently-cited video, Ms. Moorthy states, without support, that "in fact, if you look at these settlements, and one of the things that confounds judges today, is the fact that, you know, roughly anywhere from 30 to 40 percent of claimants actually get zeroed out at the end of that global settlement." Malini Moorthy, *Gumming Up the Works: Multi-Plaintiff Mass Torts*, U.S. CHAMBER INST. FOR LEGAL REFORM (2016), https://instituteforlegalreform.com/video/gumming-up-the-works-multi-plaintiff-mass-torts/.

Even if it is true that, at the time of settlement, "30 to 40 percent of claimants actually get zeroed out" (as Ms. Moorthy contends), that fact does not indicate whether front-end claim filings were too broad or, by contrast, the agreed-upon back-end settlement criteria were too onerous. We doubt, in other words, that (compromise) settlement criteria are always so exquisitely calibrated that they ensure the compensation of *all those* with valid entitlements to relief. *Accord* Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE L.J. FORUM 64 (2019) ("Of course, not all noncompensable claims are 'meritless'; some may simply fall outside the strict parameters that settling parties negotiate."). For further criticism of the 30 to 40 percent estimate, see Rave, *supra* note 9.

from litigation to litigation, based (at least in part) on three key variables:

> (1) *Injury Verifiability*: Whether the particular mass tort involves injuries that are or are not clearly verifiable. When injuries are not easily verifiable—and when even doctors may disagree about whether an individual suffers from the particular impairment—that lack of certainty breeds over-claiming.[33] Thus, in a mass tort involving a plane crash where the injury is death, there is apt to be zero over-claiming. On the other hand, when the mass tort involves a hard-to-diagnose malady (such as asbestosis, silicosis, or fibromyalgia), we would expect significant overclaiming.
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> (2) *Specific Causation*: Whether specific causation is obvious or contestable. When it is not clear that defendant's tortious conduct actually caused *this* plaintiff's injury, that ambiguity produces over-claiming. On the other hand, when specific causation is clear (as is true, for example, if the plaintiff is suffering from a signature disease such as chloracne, vaginal adenocarcinoma, or mesothelioma), that fact offers a strong brake on overclaiming.
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> (3) *Size:* Whether the mass tort is medium-size, large, or gigantic. All other things equal, the larger the MDL, the higher the risk of over-claiming, both because a high volume may indicate that there has been indiscriminate filing, and (less obviously but probably more importantly), it can also fuel it, since, as the MDL grows, each marginal claim is less likely to receive individualized scrutiny.[34]

But, while we hazard no guess of the percentage of nonmeritorious claims that, generally, make their way into large mass tort MDLs, we simultaneously observe that the nonmeritorious claim problem is well documented and enduring. For instance, in the *Silica* MDL, transferee Judge Janis Graham Jack concluded that the diagnoses underlying the claims of roughly 10,000 plaintiffs

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[33] Of note: uncertainty regarding injury verifiability and specific causation likely also yield substantial *under*-claiming. We do not hazard a guess as to the relative incidence of each phenomenon; nor do we know which phenomenon, in the aggregate, predominates.

[34] For further discussion of how a large claim volume might reflect—and also incentivize—the filing of nonmeritorious suits, see Engstrom, *supra* note 25, at 31 & 33.

were merely "manufactured for money."[35] In *Diet Drugs*, "numerous attorneys, some with nefarious intentions, operated echocardiogram mills to develop a vast inventory of claimants"[36] In the silicone gel breast implant litigation, some claims were generated by a few dozen physicians who set up assembly-line processes to diagnose women with a constellation of vague ailments.[37] And the problem has also plagued asbestos litigation, particularly among those seeking compensation for asbestosis, a lung disease that is notoriously difficult to identify.[38]

Meanwhile, in *Vioxx*, plaintiffs' lead lawyer recently explained that, of the roughly 48,000 claimants in the MDL, "there were a couple thousand claims of people that didn't take Vioxx, they couldn't produce a medical record that they even took the drug."[39] In *Deepwater Horizon*, a single lawyer (Mikal Watts of Texas) submitted more than 40,000 claims, the overwhelming majority (at least 39,900) of which were bogus.[40] Indeed, Watts's initial roster of clients—supposedly consisting of "deckhands"—was pulled seemingly at random from the telephone book and included, among others, a cosmetologist, a dog, a librarian, a Buddhist monk, and a person who, at the time of the rig explosion, had been dead for five years.[41] In *Fosamax*, the exasperated transferee judge observed that plaintiffs had something of a "habit" of dismissing cases once they

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[35] *In re Silica*, 398 F. Supp. 2d at 635–36.

[36] *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig., 553 F. Supp. 2d 442, 476 (E.D. Pa. 2008), *aff'd sub nom*. *In re* Diet Drugs, 582 F.3d 524 (3d Cir. 2009).

[37] Engstrom, *supra* note 25, at 26.

[38] Engstrom, *supra* note 27, at 657–60.

[39] Ctr. on Civil Justice at NYU Sch. of Law, MDL @ 50 – The 50th Anniversary of Multidistrict Litigation, Panel 1: Theory of Aggregation: Class Actions, MDLs, Bankruptcies, and More at 27:41–27:57 (Oct. 12, 2018) (statement of Chris Seeger, Seeger Weiss LLP), *available at* http://www.law.nyu.edu/centers/civiljustice/2018-early-fall-conference-mdl-at-50 [hereinafter MDL @ 50].

[40] *See* Reuters, *The Evil Corrupt Plaintiffs' Lawyers Do*, REUTERS, Oct. 30, 2015; Francesca Mari, *The Lawyer Whose Clients Didn't Exist*, ATLANTIC, May 2020; BP Exploration & Production, Inc. v. Watts, Complaint at ¶ 39, 2013 WL 6670034 (E.D. La. 2013) (No. 2:13CV06674).

[41] *See* Duncan Litig. Invs., LLC v. Baker, 2022 WL 3566848, at *3 (S.D. Tex. 2022); Nguyen v. Watts, 605 S.W.3d 761, 769 (Tex. App. 2020); Mari, *supra* note 40. Ultimately, the federal government indicted seven people (including Watts) on 95 felony counts related these federal court filings. A jury acquitted Watts of all charges.

were slated for scrutiny.[42] In *Digitek*, it is doubtful that *any* plaintiff actually came into contact with an allegedly defective pill.[43] In *Abilify*, even three years into the litigation, certain plaintiffs "conceded that they [were] unable to provide any evidence that they used" the targeted pharmaceutical.[44] In *Zostavax*, at least 173 complaints were dismissed because, among other infirmities, the plaintiffs alleged "that they were induced to obtain a Zostavax vaccination by advertisements that began running *years* after plaintiffs were inoculated."[45] And, in the *3M* litigation, where some 290,000 (supposed) veterans allege that the company's earplugs offered them inadequate protection, Judge M. Casey Rodgers recently dismissed about 20,000 claims for failure to provide "basic proof of military service."[46]

B. What Explains the Prevalence of Nonmeritorious MDL Claims?

What explains the relative prevalence of nonmeritorious claiming in mass tort MDLs, particularly given the paucity of such claims in the tort system more generally? In past work, one of us has interrogated that question in great detail.[47] Here, though, it makes sense to focus on two factors that are distinctive to MDLs and also clearly conducive to such activity.

First and critically, in mass tort MDLs, typical incentives embedded in the contingency fee are either wholly inoperative or substantially relaxed. Generally, PI lawyers are paid via contingency fees, meaning that the lawyer is paid—and also typically reimbursed for out-of-pocket expenses—if and only if the lawyer's client prevails. By tethering the lawyer's fortunes to the client's success, the contingency fee gives PI lawyers a powerful incentive to rigorously evaluate prospective clients prior to

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[42] *In re* Fosamax Prod. Liab. Litig., 2012 WL 5877418, at *3 (S.D.N.Y. 2012).

[43] *In re* Digitek Prod. Liab. Litig., 821 F. Supp. 2d 822, 836 (S.D.W. Va. 2011) ("[N]ot a single double-thick Digitek® was ever found outside the plant.").

[44] *In re* Abilify (Aripiprazole) Prod. Liab. Litig., 2019 WL 5445880, at *2 (N.D. Fla. 2019).

[45] *In re* Zostavax (Zoster Vaccine Live) Prod. Liab. Litig., 2019 WL 2137427, at *1 (E.D. Pa. 2019).

[46] *In re* 3M Combat Arms Earplug Prod. Liab. Litig., 2022 WL 2292862, at *2 (N.D. Fla. 2022).

[47] Engstrom, *supra* note 27, at 660–65; Engstrom, *supra* note 25, at 27–33.

acceptance. And, consistent with expectations, evidence shows that, in most areas of PI practice, plaintiffs' attorneys are highly selective. Most PI lawyers vet cases very carefully, rejecting the majority (often, the vast majority) of those who seek their services.[48]

When it comes to client selectivity, however, mass torts are distinctive—as, compared to "typical" PI lawyers, mass tort lawyers' capacity and incentive to screen is drastically reduced. On the former, the sheer volume of claimants, all seeking representation more-or-less simultaneously and often in response to the same stimuli—such as the recall of a product or the publication of a study showing a drug's significant risk—may overwhelm a lawyer's ability to perform requisite checks. Other features of the contemporary mass tort ecosystem, such as aggressive attorney advertising and the proliferation of for-profit claim generators, predictably compound these effects.[49]

On the latter, as against the "typical" PI lawyer, a mass tort lawyer's incentive to screen is also comparatively limited. Typically, the acceptance of a new client poses a substantial degree of risk and entails a non-trivial investment of time and money, creating (in a no-win, no-pay system) a powerful reason to represent only those with meritorious claims. By contrast, once the mass tort is in full swing, litigation costs are (basically) fixed, and they are also borne mostly by others—primarily those on the plaintiff steering committee, or "PSC."[50] But rewards largely depend on claim volume—meaning, as Francis McGovern has explained, it becomes a matter of "the more [clients] the better."[51]

Beyond all that, mass tort lawyers may decide it is *advantageous* to take all comers, both because defendants reportedly feel more "pressure" to settle when up against a lawyer

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[48] HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS 67–95 (2004).

[49] *E.g.,* Sara Randazzo & Andrew Scurria, *Boy Scouts' Liability Insurers Challenge Sex-Abuse 'Claim-Mining,'* WALL ST. J., JAN. 25, 2021 (explaining that, in the Boy Scouts litigation, "some attorneys" reportedly "signed hundreds of claims in a single day"); Sara Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine that Powers Thousands of Roundup Lawsuits*, WALL ST. J., Nov. 25, 2019 (reporting that, during one nine-month period, Roundup "appeared in 654,280 broadcast and cable-TV advertisements").

[50] For the (generally limited) responsibilities of individually retained counsel, see *infra* note 96 and accompanying text.

[51] Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022, 1026 (1995).

with a "volume of cases"[52] and because plum positions on the PSC are sometimes doled out based on the size of the lawyer's case inventory.[53] (Tellingly: Mikal Watts—the lawyer who had thousands of bogus *Deepwater Horizon* claims—scored a seat on that MDL's PSC after boasting on his leadership application that he "'represent[ed] over 40,000 plaintiffs' in the BP litigation."[54])

Meanwhile, as compared to conventional tort litigation, MDLs are also distinctive because the various procedural safeguards that, generally, test the validity of civil claims—such as Rule 26 discovery obligations, Rule 30 depositions, Rule 33 interrogatories, Rule 11 motions for sanctions, and individually-focused Rule 56 motions for summary judgment—are, as one federal judge has put it, "difficult to employ at scale in the MDL context, where the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of thousands."[55] In MDLs, transferee judges tend to focus on "common issues rather than the unique circumstances of each claimant"; with that focus, individual claim integrity (and the claim-by-claim scrutiny that promotes it) understandably takes a backseat.[56]

It is, in short, a two-layer problem. In mass tort MDLs, contingency-fee-powered lawyer-initiated screens—which, generally, impose the "first line of defense against frivolous claiming"—are mostly defunct.[57] Compared to the typical PI case, there is little time to engage in rigorous screening, and there is little incentive to do so. Then, rule-driven, transsubstantive procedural screens are mostly nonoperational. In such a world, it is no surprise that some nonmeritorious claiming activity comes to the fore and that, even years into litigation, some noncolorable claims persist.

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[52] Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1732 (2002).

[53] Dodge, *supra* note 9, at 350 (explaining that "highly coveted leadership positions are appointed, in part, based upon the size of counsel's inventory").

[54] Nguyen v. Watts, 605 S.W.3d 761, 769 (Tex. App. 2020).

[55] Rodgers, *supra* note 20, at 874.

[56] Nov. 1, 2018 Committee Report, *supra* note 5, at 144 (discussing these dynamics and the fact that "[t]he transferee judge may focus at first on the common issues rather than the unique circumstances of each claimant").

[57] Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 889 (1992).

II. CURRENT (MOSTLY UNSUCCESSFUL) STRATEGIES

Partly given the problems that have prominently plagued so many mass torts, there now exists a broad consensus that transferee courts need to "weed out non-meritorious cases early, efficiently, and justly."[58] Eager to heed that call, many transferee courts are taking steps to scrutinize claims prior to settlement—and they are frequently doing so using some combination of three mechanisms: *Lone Pine* orders, plaintiff fact sheets, and census orders. Yet, as it stands, none of these mechanisms quite works. Below, we sketch the main attributes of each, as well as each mechanism's core deficiencies.

A. *Lone Pine* Orders

Invented in 1986 and now a prominent feature of the mass tort landscape, *Lone Pine* orders are case-management orders issued by trial courts in mass tort cases, sometimes prior to and sometimes after the start of discovery.[59] They typically require each plaintiff swept into an aggregate action to make three distinct evidentiary showings: (1) that she was exposed to the defendant's product or contaminant and the circumstances of her exposure, (2) that she has suffered, or is suffering, a genuine impairment (and, frequently, the circumstances of her diagnosis), and (3) proof of specific causation—which is to say, either an expert affidavit or expert report expressly connecting (1) with (2). If a plaintiff fails to submit the requested information by the court-imposed deadline or if her submission is deficient, her suit may be dismissed with prejudice.[60]

Yet, while *Lone Pine* orders do, seemingly, help to surface unsupportable claims, they do so at considerable cost. In particular, in demanding proof of specific causation, some experts believe they go too far—as they "demand what amounts to an impossible and unrealistic level of certainty," and, in so doing, threaten to weed out not just noncolorable claims but, instead, claims that *are* entitled to

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[58] *In re* Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig., 2016 WL 4705827, at *2 (M.D. Ga. 2016).

[59] Courts have issued *Lone Pine* orders in many of the nation's most prominent mass tort cases, including litigation involving asbestos, Vioxx, Fosamax, Rezulin, Celebrex, Baycol, Avandia, and Fresenius. Nora Freeman Engstrom & Amos Espeland, Lone Pine *Orders: A Critical Examination and Empirical Analysis*, 168 U. PA. L. REV. ONLINE 91, 91–92 (2020).

[60] Engstrom, *supra* note 25, at 20.

compensation under governing law.[61] Furthermore, in requiring the plaintiff, essentially, to prove a prima facie case—but without the benefit of discovery—*Lone Pine* orders make an end-run around, and ultimately subvert, the carefully crafted safeguards that surround summary judgment.[62]

B. Plaintiff Fact Sheets and Census Orders

Fact sheets, meanwhile, have "grown up in the last few years" and have become "widespread in the largest MDL proceedings."[63] Usually answered under oath in lieu of interrogatories, plaintiff fact sheets (sometimes called PFSs, "Plaintiff Profile Forms," or "Preliminary Disclosure Forms") typically require each plaintiff swept into an aggregate action to submit basic information about her background, injury, past claims for compensation, and the identity of her diagnosing physician.[64] Plaintiff fact sheets also typically include a blanket authorization, which, once signed, permits the defendant to collect the plaintiff's medical and employment records.[65] Census orders, meanwhile, are similar to plaintiff fact sheets but are "more streamlined" and often used earlier in the case.[66]

Fact sheets and census orders differ from *Lone Pine* orders chiefly because, unlike the latter, they do not inquire into specific causation; they focus instead on information that the plaintiff already knows, should already know, or can easily learn.[67] As such, assuming they are appropriately targeted, fact sheets and census orders are not terribly burdensome to complete, and, unlike *Lone*

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[61] For more on this certainty problem, as well as how Lone Pine orders "impose a heavy (and lopsided) financial burden on plaintiffs," see Engstrom & Espeland, *supra* note 59, at 100–01.

[62] *See id.* at 101 (explaining that "*Lone Pine* orders function like summary judgment motions but simultaneously deprive plaintiffs of fundamental protections that Rule 56 generally affords").

[63] Draft Minutes, Civil Rules Advisory Committee, Apr. 23, 2021, at p. 21; Advisory Comm. on Civil Rules, Oct. 29, 2019, at 35 [hereinafter Oct. 29, 2019 Rep.]. For fact sheets' popularity and widespread usage, see *supra* note 26.

[64] WILLIAMS ET AL., *supra* note 26, at 1, 7.

[65] Engstrom, *supra* note 25, at 20.

[66] *See* Oct. 29, 2019 Committee Report, *supra* note 63, at 35.

[67] *Id*. at 21.

Pine orders, do not engender particular controversy.[68] As one leading plaintiffs' lawyer has explained, for instance: "I don't see a major problem with a plaintiff at some point early on in the case coming up with some basic documentation, like a medical record showing you were on the drug or a medical record indicating that you have at least suffered the type of injury that's at issue."[69] Prominent defense lawyers seem to agree that these simple mechanisms can pay large dividends. Defense counsel Douglas Smith, for instance, explains: "Simply requiring production of basic information can frequently lead to the prompt elimination of claims that are unsupported,"[70] while Lawyers for Civil Justice (LCJ) observes that "the early disclosure of evidence demonstrating both exposure to the alleged cause of an injury and the resulting injury would be a significant improvement for MDL judges and parties alike."[71]

And notably, there is evidence that even relatively bare-bones submissions can productively weed out invalid claims. According to the Federal Judicial Center, of 66 recent product-liability MDLs with plaintiff fact sheets, a solid majority (55%) "included evidence (including show-cause orders) of activity to

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[68] Unfortunately, in the past, some fact sheets have not been appropriately targeted and have, instead, become bloated and unwieldy. *See* Advisory Committee on Civil Rules, Agenda Book, Oct. 16, 2020, at 152 [hereinafter Oct. 16, 2020 Committee Report] (lamenting that some plaintiff fact sheets have become long and complicated, even though "the first page or few pages of a PFS . . . often will suffice"); Margaret S. Williams & Jason A. Cantone, *An Empirical Evaluation of Proposed Civil Rules for Multidistrict Litigation*, 55 GA. L. REV. 221, 264–65 n.183 (2020) (compiling examples of fact sheets that run for 53 pages, inquire into third-party financing, or ask the plaintiff to "list all places of residence for the past 10 years"); Burch, *supra* note 32, at 82 (describing some fact sheets that "span forty-eight pages (with forms and all), exceed 100 questions, and seek fifteen years of medical history, ten years of employment history, and information on everything from divorces to children's names, addresses, and birthdays").

As fact sheets' focus drifts, their value wanes. *See* WILLIAMS ET AL., *supra* note 26, at 7 ("[A]dding questions unrelated to the core issues in the litigation may cause inefficiencies or put an unreasonable burden on the plaintiff."); Amy Schulman & Sheila Birnbaum, *From Both Sides Now: Additional Perspectives on "Uncovering Discovery,"* at 7 ("[D]efendants should be judicious in seeking truly relevant data.").

[69] MDL @ 50, *supra* note 39, at 27:41-27:57 (statement of Chris Seeger).

[70] SMITH *supra* note 10, at 42.

[71] LCJ Comment to the Advisory Committee on Civil Rules, Mar. 8, 2022, at 3.

dismiss cases when substantially complete PFS had not been filed."[72]

Indeed, examples of such successes abound: In *Silica*, a bare-bones fact sheet ultimately triggered the dismissal of the entire litigation.[73] In *Phenylpropanolamine*, the trial court used fact sheets to cull more than 850 claims that had otherwise languished on the court's docket.[74] In *Welding Fumes*, transferee Judge Kathleen O'Malley required each plaintiff to certify that she had been examined by a licensed physician and that the physician had diagnosed her with a qualifying neurological disorder. This no-frills order reportedly cut the number of pending cases in half.[75] In *Avandia*, a straightforward disclosure requirement prompted the termination of roughly 1,000 cases.[76] In *Abilify*, at least 350 claims—more than 10% of the pending total—were dismissed when plaintiffs failed to submit supporting documentation, failed to submit proof of Abilify use, or some combination thereof.[77] In *Taxotere (Docetaxel)*, the fact sheet process triggered the dismissal of hundreds of claims.[78] And in *3M*, defendant reports that "[o]nce obligations to comply with basic filing requirements, serve

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[72] WILLIAMS ET AL., *supra* note 26, at 4.

[73] *See generally* STEPHEN J. CARROLL ET AL., THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA xi (RAND 2009).

[74] *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226 n.4 (9th Cir. 2006).

[75] Engstrom, *supra* note 25, at 59.

[76] GlaxoSmithKline LLC's Reply in Further Support of Motion for a Lone Pine Case Management Order at 4, *In re* Avandia Litig. (Phila. Ct. C.P. Jan. 28, 2011) (No. 080202733).

[77] *See, e.g.*, *In re* Abilify, No. 3:16-md-2734 (Sept. 24, 2019), ECF 1170 (dismissing 149 cases for failure to submit documentation); *In re* Abilify, No. 3:16-md-2734 (Sept. 3, 2019), ECF 1159 (dismissing 119 cases where plaintiffs had failed to respond to their attorneys); *In re* Abilify, No. 3:16-md-2734 (Oct. 17, 2019), ECF 1189 (dismissing 95 cases). *See also* Rodgers, *supra* note 20, at 875–76 ("[A]fter three years, more than 550 cases—representing over 18% of the litigation—had been dismissed with prejudice for failure to comply with court orders, failure to prosecute, and/or failure to provide even basic information regarding proof of use and/or injury.").

[78] WILLIAMS ET AL., *supra* note 26, at 12–13.

unverified census forms, and product proof of military service were imposed, dismissals began rolling in."[79]

Deficient submissions can also spur the informal (and less visible) exclusion of claims, as plaintiffs' lawyers will sometimes voluntarily dismiss claims once they see that essential evidence is wanting.[80]

But, despite these successes, even when judges are good at issuing relevant orders and following up to ensure timely compliance, both fact sheets and census orders suffer from a glaring drawback: They only cull noncolorable claims *from the instant MDL*, and they do so only after the claim is filed (and, for some claims and in some cases, after a lengthy stay on the docket). They do nothing to recalibrate broader incentives.

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The above shows that even simple plaintiff fact sheets or census orders can successfully weed out nonmeritorious claims. But, it also suggests that to rely *exclusively* on plaintiff fact sheets or census orders—or even *Lone Pine* orders—consigns courts to a game of judicial whack-a-mole. The court will probably, at some point and at some cost, figure out which extant claims are noncolorable and exclude them from further processing. But, the *root cause* of the problem—skewed incentives that invite the submission of nonmeritorious claims in the first instance—will remain unaddressed.

III. HARNESSING COMMON BENEFIT FEES TO FORTIFY SCREENING INCENTIVES

Currently, as one prominent defense lawyer explains, "there is little incentive not to file unsubstantiated claims because lawyers are not punished for doing so or given any financial disincentive that would discourage such filings."[81] In this Part, we explain how

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[79] Informational Brief of Aero Technologies, LLC, Case No. 22-02890-JJG-11, July 26, 2022, at 34. Defendant further reported that, out of 140,000 plaintiffs subject to these requirements, 18,000 "have already chosen to dismiss their claims rather than comply." *Id*.

[80] Smith, *supra* note 14, at 476–80, 484 (discussing this dynamic and providing examples).

[81] SMITH, *supra* note 10, at 12. *See also MDL Proceedings: Eliminating the Chaff*, U.S. CHAMBER FOR LEGAL REFORM 19 (Oct. 2015) ("The issue is . . . the lack of incentive on the part of plaintiffs' lawyers in mass tort litigation to investigate each one of the cases in their inventories on the front end."); *accord* S. Todd

plaintiff fact sheets and common benefit fees (CBFs), two prominent features of the MDL landscape that currently operate independently, can be coupled to operate in tandem and supply that now-missing incentive. Subpart A sketches the reform, while Subpart B addresses its advantages and possible drawbacks.

A. How Courts Can Deploy Common Benefit Fees to Promote MDL Integrity

We propose that transferee courts take three steps to ensure the integrity of MDL filings. In particular, courts should: (1) weed out nonmeritorious (i.e., entirely unsupported) claims early in the litigation's lifecycle, (2) assess how each lawyer's claims fared, when subject to the foregoing scrutiny, and (3) levy a higher CBF assessment on those lawyers who filed a high proportion of "failing" claims and a lower CBF assessment on those lawyers who didn't. We elaborate on each of these three steps below.

First, whether framed as a no-frills plaintiff fact sheet or an initial census, plaintiffs should, relatively early in an MDL, be made to offer straightforward information (including, in certain contexts, limited documentation) as to the following:[82]

> (1) *Injury* – Description of the plaintiff's symptoms and identification of, and information regarding, the plaintiff's diagnosis.[83]
>
> (2) *Exposure* – Underlying facts concerning the plaintiff's exposure to the defendant's conduct or product, including the (approximate) dates when the plaintiff was initially and most recently exposed.
>
> (3) *Counsel* – Identity of the plaintiff's lawyer or lawyers.

Brown, *Specious Claims and Global Settlements*, 42 U. MEM. L. REV. 559, 623 (2012) ("[I]n order to deter effectively, the costs associated with discovery of a pattern of specious filings may need to be far greater than mere rejection of the offending claims. Otherwise, repeat players may simply view rejection of frivolous claims as a no-risk proposition.").

[82] As noted, it is essential that these submissions zero in on only what is truly necessary. In the past, many fact sheets have become unnecessarily bloated, *see supra* note 68, which defeats their purpose, *see id*. and Engstrom, *supra* note 25, at 59 ("Scattershot or expansive disclosures are wasteful, intrusive, and self-defeating.").

[83] If the plaintiff's injury, illness, or condition is apt to develop over the course of the litigation, the plaintiff can be asked to furnish updates at specified intervals.

> (4) *Past Claiming* – (When warranted) Whether the plaintiff has previously sought compensation for the instant (or a similar) injury, illness, or condition, and the compensation sought and obtained.[84]

As Part II.B. explains, requiring these bare-bones disclosures is not particularly controversial,[85] experts agree that these straightforward and easy-to-answer questions can surface valuable information,[86] and a scan of past MDLs offers good evidence to support experts' assessments.[87] Furthermore, while our immediate focus is on how to promote MDL integrity, these disclosures will likely also promote MDL *efficiency*, as this information (which should provide an accurate bird's-eye-view of the litigation) will aid in the selection of truly representative bellwethers, inform the defendant's strategy regarding the filing of dispositive motions, and, ultimately, promote the parties' discussion of settlement.[88] Indeed, researchers have

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[84] This last question can be helpful as, in some past MDLs, it has come to light that certain claimants are "double dippers"—i.e., they have previously sought compensation for (arguably) the same affliction. For a discussion of this problem in *Silica* and asbestos respectively, see CARROLL ET AL., *supra* note 73, at 8, and Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Whole or New Paradigm?*, 23 WIDENER L.J. 97, 124–25 (2013). When double dipping is not a concern, this question should be omitted.

[85] *See supra* notes 26, 68–71, *infra* note 86, and accompanying text.

[86] For example, the Duke Best Practices advise: "At an early juncture, individual claimants should be required to produce information about their claims." Bolch Judicial Inst., *Guidelines and Best Practices for Large and Mass-Tort MDLs*, DUKE LAW SCH. 9 (2d ed. 2018) [hereinafter 2018 *Duke Guidelines*]. The Federal Judicial Center concurs. "Judges," it instructs, "should . . . consider using fact sheets as a tool for early identification and winnowing of unsupported claims." WILLIAMS ET AL., *supra* note 26, at 15. RAND likewise explains: "Requiring disclosure of the diagnosis, the identity of the diagnosing physician, and relevant medical records . . . as soon as the litigation has achieved a sufficient size would help ensure adherence to defensible diagnostic practices and allow defendants to more rapidly evaluate and value claims." CARROLL ET AL., *supra* note 73, at xiii. And at least some experienced transferee judges have joined the chorus. *E.g.,* Robreno, *supra* note 84, at 186–87 ("[C]ourts must establish procedures by which, at an early point, each plaintiff is required to provide facts which support the claim . . . or risk dismissal . . . .").

[87] *See supra* notes 72–79 and accompanying text.

[88] For discussion of these salutary ripple effects, see LCJ Comment, *supra* note 71, at 3.

found that, all else equal, "proceedings terminate 58% faster with either a plaintiff fact sheet or plaintiff profile form than without."[89]

Second, after an appropriate opportunity to cure deficiencies, claims that fail the above screen should be dismissed.[90] This means, for example, that in a case involving an allegedly defective drug, a plaintiff should see her claim dismissed if she is unable to furnish evidence that she: (1) has been diagnosed with an ailment allegedly linked to the drug, or (2) was ever prescribed the drug. Furthermore, the court ought to assess how *each lawyer's* clients fared—and, in particular, the court ought to tally the percentage of the lawyer's clients who passed (or, alternately, failed) the screen.

Third and finally, courts ought to announce that, at the back-end of litigation, CBFs will be assessed from lawyers based on the proportion of their "surviving" or "failing" claims. When it comes time to levy CBFs, sub-par screeners will have to pay somewhat more.

The third step of the proposal relies on adjustments to CBFs—and so, for the uninitiated, a word about CBFs is warranted. Transferee judges routinely require plaintiffs' lawyers with claims in an MDL to contribute a portion of their fee to the common benefit fund. Judges then channel these funds to the subset of PI lawyers who performed qualifying "common benefit work"—work that benefits all plaintiffs and their counsel. With roots in the doctrine of unjust enrichment, CBFs seek to ensure that the lawyers who perform the valuable joint tasks that assist all plaintiffs are appropriately compensated—and also that no lawyer can pocket a windfall by freeriding on others' efforts.[91] Although there are hearty disagreements as to the particulars (such as whether CBFs should be deducted from lawyers litigating in state, rather than just federal, court), judges' baseline authority to require CBF contributions is well-established.[92]

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[89] Williams & Cantone, *supra* note 68, at 270.

[90] "The monitoring process [to cure deficiencies and ensure adequate fact sheet compliance] can be conducted in a number of ways." For various strategies, see WILLIAMS ET AL., *supra* note 26, at 10–13.

[91] For a primer, see generally 2018 Duke Guidelines, *supra* note 86, at 64–80.

[92] For discussion of the state court question, as well as the baseline consensus that transferee courts are authorized to order the payment of *some* CBFs, see generally *In re* Roundup Prod. Liab. Litig., 544 F. Supp. 3d 950 (N.D. Cal. 2021); *In re*

Today, CBF deductions tend to hover in the range of 4% to 8% of the entire recovery, and they tend to be one-size-fits-all; on a percentage basis, all PI lawyers in the MDL are usually made to cough up the same amount.[93] But nothing compels that uniformity—and, importantly, there is ample precedent supporting more granular (and non-uniform) assessments.[94]

Turning to the nuts-and-bolts, the differential assessment could (and likely would) be reverse-engineered from the average CBF deduction the judge plans to impose or the total CBF the judge seeks to award—thereby ensuring that they add up to a sought-after total. Beyond that, a range of approaches are possible. For instance, a judge interested in administrative ease—and who prefers carrots to sticks—might levy a uniform CBF but simultaneously rule that certain lawyers (i.e., truly excellent gatekeepers) are entitled to a CBF discount.[95] (Here, the judge might rule that, if more than 90% of the lawyer's claims survived the screen, that lawyer ought to pay a CBF of 3% instead of the "general" 6% assessment.) Or, conversely, a judge who wants to single out only the handful of

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Gen. Motors LLC Ignition Switch Litig., 477 F. Supp. 3d 170 (S.D.N.Y. 2020). For a more skeptical take, see generally Charles Silver, *The Suspect Restitutionary Basis for Fee Awards in MDLs*, 101 TEX. L. REV. __ (forthcoming 2023).

[93] *See In re* Bos. Sci. Corp., Pelvic Repair Sys. Prod. Liab. Litig., 2019 WL 385420, at *6 (S.D.W. Va. 2019) (collecting authority revealing a range in large MDLs from 4.3% to 14.5%); 5 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 15:117 (6th ed., 2022 update) (reporting that, in one dataset, the mean CBF was 6.45% and the median was 6%); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and A Proposal*, 63 VAND. L. REV. 107, 109 ("Typically, fee awards range from 4 percent to 6 percent of total recoveries, but smaller and larger percentages can be found."); *but cf. In re* Genetically Modified Rice Litig., 2010 WL 716190, at *6 (E.D. Mo. 2010) ("Courts have ordered contributions between 9% and 17% in MDLs for common benefit work."), *aff'd*, 764 F.3d 864 (8th Cir. 2014).

[94] *See Genetically Modified Rice*, 2010 WL 716190, at *6 (ordering that different groups of plaintiffs contribute different percentages to the common benefit fund, while explaining that "[a]ll pools of plaintiffs need not contribute . . . equally"); *In re* Bextra & Celebrex Mktg. Sales Pracs. & Prod. Liab. Litig., 2006 WL 471782, at *2–3 (N.D. Cal. 2006) (levying differential assessments); RUBENSTEIN, *supra* note 93, at § 15:115 ("Courts may set different [CBF] levels for different types of cases within the litigation."); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 113–14 (2017) (describing various MDLs with non-uniform CBF assessments).

[95] Here, it bears emphasis: Even though financial incentives might militate against careful screening, many mass tort lawyers (nevertheless) continue to take their screening obligations seriously.

lawyers who truly default on their screening obligations can do that—by ruling, for instance, that a CBF "surcharge" will be levied if more than a specified percentage (perhaps 50%) of the lawyer's claims are deemed nonmeritorious. Or, seeking further specificity (and fewer knife-edge problems), a judge might impose a sliding scale roughly as follows.

Percentage of the lawyer's claims to "survive" the screen	**CBF Percentage**
95% to 100%	1%
90% to 95%	3%
80% to 90%	5%
70% to 80%	7%
60% to 70%	9%
50% to 60%	11%
40% to 50%	13%
Anything below 40%	15% or more

Likewise, judges can deploy the same essential mechanism to reward or penalize those lawyers who are *entitled* to CBFs because they performed common benefit work. So, for example, if a lead lawyer's own inventory of clients is shown to include a high proportion of "failing" claims—as, for example, Mikal Watts had in *Deepwater Horizon*—the lawyer's entitlement to CBFs might be reduced (which might, in turn, deter lawyers from obtaining a seat on the PSC by artificially inflating their client inventories).

B. Advantages, Complications, Criticisms, and Challenges

1. Advantages

Numerous advantages attend this reform. Here, we highlight five. First, as noted above, the proposal liberates judges from playing a game of claim integrity whack-a-mole. It does not just weed out nonmeritorious claims in *this* MDL; if widely embraced, it promises to recalibrate underlying financial incentives.

Second, the approach is conceptually sound. After all, current MDL payment structures reserve for individually retained

counsel (sometimes called "primary attorneys," "IRPAs" or "IRCs") the bulk of the contingency fee (typically, 33% to 40% of the client's recovery less the CBF) on the theory that these lawyers have furnished a valuable service and ought to be compensated accordingly. However, the chief services that IRPAs *supposedly* provide—and are *theoretically* being compensated for—are ex ante screening, client communication, assistance with individual discovery requests (including completion of questionnaires or fact sheets), and, at the back end of litigation, individualized advice regarding settlement.[96] To the extent that a given lawyer has neither screened her client nor ensured that her clients' fact sheets pass muster, it stands to reason that the lawyer should pay more into the CBF pot: She is not pulling her weight and is, instead, free riding on others' efforts and, rather than facilitating the broader litigation, is affirmatively frustrating it.[97]

Furnishing further conceptual support: It is exceedingly well established that payments *from* the common benefit fund ought to vary based on the lawyer's contribution to the litigation.[98] A lawyer whose contribution to the litigation is large is entitled to more than a lawyer whose contribution to the litigation is marginal. It logically follows that the lawyer's payment *to* the common benefit fund ought to, or at least *could*, vary based on the same metric.

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[96] *See In re* Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 605 (1st Cir. 1992) (describing IRPAs' tasks); *In re* Nat'l Football League Players' Concussion Injury Litig., 2021 WL 5299069, at *6 (E.D. Pa. 2021) (describing "seven non-exclusive categories of work undertaken by IRPAs"); Silver & Miller, *supra* note 93, at 129 (explaining that non-lead lawyers, critically, "evaluat[e] their [clients'] claims," and additionally "develop the history of each client's exposure to or use of a product and the details of each client's injury"). Theoretically, too, the non-lead lawyer would try the case after it is remanded back to the transferor court. However, in practice, remands are vanishingly rare. *See* Gluck & Burch, *supra* note 2, at 16 ("More than ninety-seven percent of cases centralized through MDLs are resolved there, either via settlement or dispositive action."). For the classic articulation of IRPAs' obligations, see generally Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 309–20 (1996).

[97] Currently, "not all [plaintiffs] receive attorney assistance" when completing fact sheets. Burch, *supra* note 32, at 82–83. For how lawyers with nonmeritorious claims complicate others' efforts, see *supra* notes 20–24 and accompanying text.

[98] *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig., 2003 WL 21641958, at *6 (E.D. Pa. 2003) ("As a general principle . . . [CBFs] are to be allocated in a manner that reflects the relative contribution of the individual firms and attorneys to the overall outcome of the litigation.").

Third, the approach will predictably unleash salutary reputational effects. After all, who gets what will be public. That means, going forward, other judges and lawyers can see who vetted their client inventories—and who didn't. In a world where lawyers negotiate with defendants for settlement funds,[99] jockey for judicial appointment to coveted leadership posts,[100] and also compete with one another for client referrals,[101] those reputational effects ought to matter, and indeed we predict they will super-charge upstream effects.

Fourth, the approach complements, rather than duplicates, *existing* litigation misconduct mechanisms such as sanctions pursuant to 28 U.S.C. § 1927 and Rule 11, malicious prosecution actions, bar disciplinary proceedings, and even criminal penalties.[102] In particular, to impose a sanction pursuant to one of these existing mechanisms, the court or state bar (in the case of disciplinary proceedings) or prosecutor, judge, and jury (in the case of criminal penalties) must make an explicit finding that the *lawyer erred*. To impose a sanction under § 1927, for instance, the court must find that the lawyer behaved "unreasonably and vexatiously."[103] Likewise, a court cannot impose a Rule 11 sanction absent a finding of "at least some level of culpability,"[104] sometimes in the form of an express determination that the lawyer not only advanced an "objectively frivolous" claim, but that the lawyer "should have been aware" that the claim was frivolous.[105] Similarly, liability for malicious prosecution hinges on a showing that the lawyer-

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[99] *Accord* Brown, *supra* note 81, at 617 (observing, in a related context, "firms known as effective gatekeepers should enjoy an advantage in negotiating individual or inventory settlement terms, and firms with equally poor reputations may find future settlement values discounted, if settlement is forthcoming at all").

[100] *See* FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 10.224, at 26 (4th ed. 2004) ("There is often intense competition for appointment by the court as designated counsel . . . .").

[101] For a discussion of plaintiff-side referral networks, see Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243 (2006).

[102] For more on these mechanisms, see Engstrom, *supra* note 27, at 680–89.

[103] *Id*. at 682–83.

[104] 5A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1336.1 (2022 update).

[105] Gulisano v. Burlington, Inc., 34 F.4th 935, 942 (11th Cir. 2022) (quotation marks omitted).

defendant acted with "malice,"[106] while bar disciplinary actions or criminal penalties come with a host of requirements, detailed procedures, and must be proved by an elevated standard (either by clear or convincing evidence or beyond a reasonable doubt, respectively). Such safeguards are useful and important. But they, understandably, complicate (and stunt) the mechanisms' application.[107] By contrast, the differential assessments we advocate are accompanied by no finding of fault.

Fifth and finally, the approach is flexible. As we demonstrate above, it need not be one-size-fits all, and transferee judges can tailor our basic proposal to the needs of the individual case.[108]

2. Complications, Criticisms, and Challenges

Against these advantages, we glimpse a number of possible complications, criticisms, and challenges. Below, we discuss five and also offer brief responses thereto.

First, some may worry that, to the extent lawyers are taxed for submitting claims that fail the relevant screen, unscrupulous lawyers may be tempted to double down—to fabricate fact sheets in order to evade detection—which would further subvert factfinding processes.

That concern, we believe, is genuine. But the critique is nevertheless unpersuasive. Unscrupulous lawyers are *already* tempted to fudge submissions—and, given baseline incentives, it is not obvious that the *extra* temptation (traceable to a marginally higher CBF assessment) is meaningful. The fact is: Lawyers who assist their clients in submitting false (sworn) affidavits are crossing a very clear very bright line. When that behavior comes to light,

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[106] Engstrom, *supra* note 27, at 684–85.

[107] Perhaps as a consequence, judges seem loath to impose sanctions pursuant to certain of these mechanisms. *Accord, e.g.,* Schulman & Birnbaum, *supra* note 68, at 26 (complaining that § 1927 "has been underutilized").

[108] Nov. 1, 2018 Committee Report, *supra* note 5, at 149 (noting the importance of flexibility); *accord* D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 L. & CONTEMP. PROBS. 21, 42 (2021) (underscoring that "no single model of case management" will work in all MDLs).

judges—and also bar authorities and, when appropriate, prosecutors—can and should take strong remedial action.[109]

Second, some might suggest that requiring plaintiffs to survive *any* screen is unfair—and penalizing lawyers, and not just litigants themselves, for failing to survive that screen is doubly unjustified.[110]

We agree that, especially early in the litigation, plaintiffs should not be bombarded with elaborate requests for detailed information. But as long as fact sheets hew to our recommendations above, we do not believe that these submissions (basically, simplified, cookie-cutter interrogatories) impose an unreasonable burden.[111] Moreover, the Federal Judicial Center has shown that transferee judges *already* demand that plaintiffs supply certain information[112]—meaning that, although our proposal is likely to change how information is used, it is relatively unlikely to increase the quantum of information that is collected. Put another way: Even without our intervention, judges already require certain plaintiff-

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[109] A lawyer who assists a client in the submission of a fictitious fact sheet violates numerous Rules of Professional Conduct, including Rules 3.3(a)(3), 8.4(c) and 8.4(d), as well as other authority.

[110] For example, Professor Burch has cautioned against courts' reliance on fact sheets because, she asserts, they are susceptible to sprawl and, if not reined in, can "impact parties disproportionately." Burch, *supra* note 32, at 83. Considering referral networks, see *supra* note 101, some might also say that it is unfair to impose a penalty on a lawyer when that lawyer is only in the case because of a client referral. We disagree. Under Model Rule of Professional Conduct 1.5(e)(1), when a client is referred, typically, both the referring and "receiving" lawyer are jointly responsible for the representation. It follows, then, that both might incur a CBF penalty if a sizable portion of the "inventory" lacks merit. (This approach has the collateral benefit of incentivizing lawyers to choose their referral partners carefully.)

[111] As noted, in the past, some fact sheets have become unnecessarily burdensome, see *id*. and *supra* note 68 (collecting authority). Some might also argue that an additional screen, accompanied by a financial penalty, risks causing lawyers to decline to represent litigants with claims of plausible-but-uncertain merit. We believe that such an effect will be minimal. The penalties described above do not overwhelm an attorney's potential fee, and careful judicial implementation can minimize the possibility of an overinclusive screen—e.g., by triggering penalties only after a sufficient opportunity to cure and only when cases are *truly* nonmeritorious.

[112] *See supra* note 26.

side disclosures; with our proposal, we're just trying to ensure that these disclosures are (i) narrowly tailored and (ii) put to good use.[113]

Nor do we believe, more generally, that it is unfair to levy a tax on lawyers who file high numbers of unsubstantiated claims.[114] After all, under the Model Rules of Professional Conduct, in place in some form in every state, lawyers may not "bring . . . a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[115] And under Federal Rule of Civil Procedure 11(b)(3), a lawyer who has assisted a client in filing a complaint has already represented that the complaint's "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Furthermore, although one might insist that it is wrong to require such exactitude of lawyers with a large inventory of clients, that argument is unavailing. It is legal ethics 101 that "[a] lawyer's work load must be controlled so that each matter can be handled competently."[116] If the size of the lawyer's inventory is not conducive to adequate screening, what needs to change is the size of the lawyer's inventory.

Third, some might criticize the approach because it adds to the already very heavy administrative burden that transferee courts must bear, as the court must now both verify the integrity of each

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[113] We offer the same general response to critics of common benefit fees—who might oppose our proposed reform because of a hostility to such fees writ large. Common benefit fees are a ubiquitous feature of contemporary MDL practice, and they do not appear to be going anywhere anytime soon. *See supra* notes 92–94. Given that, the relevant question becomes whether they should be levied in a one-size-fits-all way or, rather, with specificity—and to advance a salutary end.

[114] There is no question that a lawyer seeking payment *from* the common benefit fund would incur a penalty (in the form of a reduced allocation) if she shirked on her responsibilities. *See supra* note 98 and accompanying text. It follows, then, that when a court orders contributions *to* the fund, a lawyer who shirks can be made to incur a similar penalty.

[115] AM. BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT R. 3.1. A Comment explains that, although lawyers can file actions before the facts are "fully substantiated," lawyers are duty-bound to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."

[116] *Id*. R. 1.3, Comment [2].

fact sheet *and* calculate the percentage of claims within each lawyer's inventory that passes the relevant screen.[117]

This concern is valid, but possibly overstated: If the reform works, any additional judicial burden may well be partly offset (or more than offset) because fewer unfounded claims will be filed in the first instance.[118] Moreover, sophisticated tools are already available to help judges process fact sheets, so tracking and analysis may prove a light lift.[119]

Fourth, every reform is susceptible to gaming; when any change is made to one part of a complex system, sophisticated actors will change their behavior in response.[120] This reform is no different. In a world with graduated (and public) CBF assessments, sophisticated counsel will adjust their behavior to avoid ponying up.

We see two ways lawyers may seek to circumvent the reform. First, lawyers who have filed high volumes of nonmeritorious claims, seeing possible financial penalties on the horizon, might move to dismiss before the judge's screening mechanism is applied. Second, lawyers who are assessed penalties may seek to pass those costs on to others, most obviously, the claim aggregator or generator who sold them the bad "inventory."[121]

But *both of these changes are salutary*. If the reform spurs voluntary dismissals, it promotes judicial efficiency and MDL integrity—even if they does so via a potential (rather than imposed)

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[117] Compounding the burden, given ubiquitous referral networks, *see supra* note 101, many clients are simultaneously represented by multiple lawyers, and each lawyer's tally must be separately calculated, *see supra* note 110.

[118] Evidence suggests that "proceedings with more actions take longer to close," indicating that a reform that winnows the number of actions in an MDL ought to confer an efficiency dividend. Williams & Cantone, *supra* note 68, at 253.

[119] Third-party vendors already help litigants collect and analyze fact sheets. *See* WILLIAMS ET AL., *supra* note 26, at 9 n.29. For more on this third-party software, see Rodgers, *supra* note 20, at 877. Similarly, some might suggest that differential assessments would prove complex for judges and clerks—but judges have proven adept at these calculations. *E.g.*, *Genetically Modified Rice*, 2010 WL 716190, at *6 (dividing a case into three pools based on the type and location of the plaintiffs and then ordering differential assessments for each).

[120] Indeed, we would suggest that these changes are not so much "gaming" as predictable and sensible responses to a new equilibrium. And, as explained below, they are *desirable*—a feature, not a bug.

[121] For an inside look at the mass tort claim generation business, see Ex. to Compl., *Friedman v. Hammer*, No. 19-cv-62481 (S.D. Fla. 2019), ECF 1-1.

assessment. And, if the reform spurs cost shifting to claim aggregators or generators, it is apt to cause those firms to vet cases more carefully—again to positive effect.

Fifth and finally, a larger concern also lingers. This reform relies upon several MDL features that yield discomfort among scholars, judges, and policymakers—including judicial ad hocery, hands-on management, and (federal) interference with the attorney-client relationship. If widely embraced, this reform might justifiably heighten "the image of judges as purchasers and allocators of legal services,"[122] with an active role in who gets what, and who *pays* what, on an attorney-by-attorney basis. And indeed, we share, and have expressed, similar unease. But, for better or worse, judges are in this business, and their managerial load—and corresponding need for active case facilitation—shows no sign of easing. Given that, straightforward interventions, particularly those that simply repurpose long-established MDL practice, merit careful inspection and cautious implementation.

III. CONCLUSION

A Subcommittee of the Federal Civil Rules Committee has studied the problem this Essay addresses, but it has thrown up its hands, lamenting that whether the problem has a "manageable solution[] remains unclear."[123] Taking the baton, this Essay couples two familiar MDL mechanisms—plaintiff fact sheets and CBFs—which currently operate independently. And it offers a straightforward way to harness familiar financial incentives—which MDLs currently pervert—in order to give PI lawyers a strong reason to vet their claims prior to claim initiation. These incentives currently work well in most corners of the PI ecosystem.[124] By harnessing common benefit fees, the same incentives could work well to deter certain PI lawyers from flooding MDLs with unsupportable claims.

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[122] 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, 2162 (2000).

[123] Nov. 1, 2018 Committee Report, *supra* note 5, at 142. Likewise, some have shined a light on the problem but complained that "the current rules do not provide courts the necessary tools to tackle" it. Alan Rothman, *Managing MDL Mania: A Modest Early Vetting Proposal*, NEW YORK L.J., Oct. 16, 2019. We disagree. Our reform can be implemented tomorrow using tools already in possession of the transferee court.

[124] *See supra* notes 27 through 29 and accompanying text.