

## JUDICIAL ADJUNCTS IN MULTIDISTRICT LITIGATION

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*Peeking under the tent of our nation's largest and often most impactful cases reveals that judges often act like ringmasters: They delegate their authority to a wide array of magistrate judges, special masters, and settlement administrators. Some, like the American Bar Association, see this as a plus that promotes efficiency and cost savings. Critics, however, contend that delegating judicial power, especially to private citizens, removes adjudication from public scrutiny, injects thorny ethical questions about ex parte communications, and risks cronyism and high costs.*

*By constructing an original dataset of ninety-two multidistrict products liability proceedings centralized over fourteen years, we introduce the first taxonomy of the diverse adjuncts working within them. Testing adjuncts' effects with a multivariate analysis, we found that proceedings with special masters lasted 66% longer than those without, and appointing any kind of adjunct meant that the proceeding was 43% less likely to end. Not only did justice take longer, it cost more: 74% of the adjuncts were not magistrate judges, meaning that the parties paid them.*

*Digging deeper, we interviewed some of the lawyers, judges, and adjuncts who participated in these proceedings. Attorneys' experiences moved scholars' concerns from law review pages to real life: Rather than improving justice, some adjuncts cajole parties through off-the-record discussions; repeat players tap one another for business; and plaintiffs' outcomes may depend more on whether they picked an attorney with the inside track than their suits' merits. Collectively, our findings support existing reservations about allocating judicial power to those in the private sector.*

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## INTRODUCTION

Shortly after he received the massive *Opiate* multidistrict litigation (MDL), the transferee judge appointed three special masters to do everything from meeting with the parties and mediating disputes to analyzing legal submissions, coordinating with other courts, and interpreting parties' agreements.<sup>1</sup> Indeed, it was his special master who proposed a novel "negotiation class" as a means to unite cities and counties pre-settlement.<sup>2</sup> The court compensated these special masters "at their current MDL rates" but did not disclose them, allowing each to file itemized fee statements under seal instead.<sup>3</sup> Appointments included Cathy Yanni, an arbitrator who works for the for-profit arbitration company JAMS; the late Francis McGovern, who was a professor at Duke Law School; and David Cohen, a professional special master and former president of the Academy of Court-Appointed Masters.<sup>4</sup>

For more than two decades, judges presiding over mass-tort proceedings like these have parceled their authority out to a range of "judicial adjuncts"—non-Article III judges who are judicially appointed to perform judicial or administrative tasks within a specific proceeding and range from public magistrate judges to privately paid special masters, claims administrators, escrow agents, and settlement masters.<sup>5</sup> Often appointed and rarely studied, these adjuncts work behind the scenes, out of the spotlight, yet wield enormous power over the nation's largest and often most significant cases.

Outsourcing judicial power to private adjuncts raises no shortage of questions about cost, transparency, horizontal equity, oversight, and accountability. On the defense side, companies pay private adjunct fees on

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1. Appointment Order at 1–3, In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804 (N.D. Ohio Jan. 11, 2018).

2. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, *Tex. L. Rev.* (forthcoming 2020) (manuscript at 22–23), <https://papers.ssrn.com/abstract=3403834> (on file with the *Columbia Law Review*).

3. Appointment Order, *supra* note 1, at 5–6.

4. E.g., David R. Cohen, *Special Masters Versus Magistrate Judges: No Contest*, *Fed. Law.*, Sept. 2014, at 73, 73 [hereinafter Cohen, *Special Masters Versus Magistrate Judges*]. We were deeply saddened to learn of Francis McGovern's recent death.

5. "Judicial adjunct" is a short-hand umbrella term that encompasses a wide array of positions that range from special masters appointed under Federal Rule of Civil Procedure 53 to magistrate judges appointed under Article I of the U.S. Constitution. See *infra* note 29 and accompanying text. For readability, we sometimes use the shorthand term "magistrate" rather than the full title "magistrate judge," which is the proper title. We mean no offense by this.

top of their white-shoe lawyers' hourly rates.<sup>6</sup> And on the plaintiffs' side, contingent-fee attorneys eventually deduct adjunct fees as a litigation cost, which means that it is not typically lawyers' bottom line that suffers but plaintiffs' settlement amounts.<sup>7</sup> Deeper questions abound as well: If private adjuncts must depend on the attorneys for future appointments and income, can they be neutral? What effect might their appointment have on creating precedent and adhering to the rule of law?

Without addressing these questions, the American Bar Association (ABA) recently called for courts to appoint one type of adjunct, special masters, regularly in MDLs.<sup>8</sup> Creating an MDL means that the Judicial Panel on Multidistrict Litigation has decided that dispersed federal cases share enough factual similarities that transferring and centralizing them before the same judge for pretrial purposes promotes justice and efficiency.<sup>9</sup> MDL has thus become the go-to mechanism for handling complex, high-profile mass torts,<sup>10</sup> such as cases against Juul over e-cigarettes<sup>11</sup> and Johnson & Johnson over talcum powder.<sup>12</sup> The "transferee judge," the judge who receives these cases, bears enormous responsibility: The vast majority of cases are resolved by motion or settlement within the MDL. Historically, fewer than 3% of all transferred cases are ever remanded to their court of origin.<sup>13</sup>

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6. See Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan & John Shapard, *Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters* 42 (2000), <https://www.fjc.gov/sites/default/files/2012/SpecMast.pdf> [<https://perma.cc/BXX3-M3TQ>].

7. See *infra* section III.B.3.

8. ABA, *Resolutions with Reports to the House of Delegates: 2019 Midyear Meeting Res. 100*, at 51 (2019), [https://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/ebook-of-resolutions-with-reports/2019-midyear-ebook-of-resolutions-with-reports.pdf](https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/ebook-of-resolutions-with-reports/2019-midyear-ebook-of-resolutions-with-reports.pdf) [<https://perma.cc/LGH7-8EDF>] [hereinafter ABA Resolutions]; ABA, *Summary of Action of the House of Delegates: 2019 Midyear Meeting 20–21* (2019), [https://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/summary-of-action/summary-of-action-midyear-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/summary-of-action/summary-of-action-midyear-2019.pdf) [<https://perma.cc/TE56-7YYB>] (adopting the guidelines). Multidistrict litigation is a procedure that the federal courts use to coordinate cases with at least one common factual question before the same judge for pretrial handling. See 28 U.S.C. § 1407 (2018). In practice, however, few cases are ever remanded to their court of origin, which makes what happens in the MDL all the more important. See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 *La. L. Rev.* 399, 400 (2014) [hereinafter Burch, *Remanding Multidistrict Litigation*] ("As of 2010, the Panel remanded only 3.425% of cases to their original districts.").

9. 28 U.S.C. § 1407(a).

10. See Burch, *Remanding Multidistrict Litigation*, *supra* note 8, at 417 (recognizing the expediency of settling complex cases as a key success of multidistrict litigation).

11. See Transfer Order at 1–2, *In re Juul Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig.*, MDL No. 2913 (J.P.M.L. Oct. 2, 2019).

12. See Transfer Order at 1–2, *In re Johnson & Johnson Talcum Powder Prods.*, MDL No. 2738 (J.P.M.L. Oct. 4, 2016).

13. Burch, *Remanding Multidistrict Litigation*, *supra* note 8, at 400–01.

The ABA's report proposed that MDLs in particular could "benefit from specialized expertise" and that "[e]ffective special masters reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise."<sup>14</sup> The ABA's resolution thus urged judges to appoint special masters at "the outset of litigation" and permit them to do everything from overseeing discovery and pretrial litigation to conducting trials based on parties' consent, allocating settlements, and administering claims.<sup>15</sup> Failing to do so, it cautioned, "[r]egardless of the reason, . . . may disserve the goal of securing 'a just, speedy, and inexpensive determination.'"<sup>16</sup> Yet neither this reproach nor the ABA's claims about special masters' utility included systematic empirical support.<sup>17</sup>

In contrast to the ABA's position, Federal Rule of Civil Procedure 53 condones appointing special masters for issues "that cannot be effectively and timely addressed by an available district court judge or magistrate judge."<sup>18</sup> Put simply, it creates a presumption in favor of appointing magistrates in lieu of special masters.<sup>19</sup> And though the *Manual for Complex Litigation* suggests that courts enjoy broad authority to designate experts, technical advisors, and special masters, it too cautions that these judicial adjuncts can increase the already high costs of complex cases, warns that "[t]ruly neutral experts are difficult to find," and suggests that it may be hard to know early on whether appointments are warranted.<sup>20</sup> "Reference to a special master must be the exception and not the rule," the *Manual* explains.<sup>21</sup> Even the Federal Judicial Center's *Pocket Guide for Transferee Judges* warns, "In a products liability MDL, it may be particularly difficult to appoint a completely disinterested special master with no prior relationship to any of the parties, since special masters are often practicing attor-

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14. ABA Resolutions, *supra* note 8, at 56–57. But see Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 *Yale L.J.* 1442, 1466 (1983) [hereinafter Fiss, *Bureaucratization*] ("There is an undeniable freshness and richness to the judgments of a non-specialist. There is also less chance of capture by a special interest group.").

15. ABA Resolutions, *supra* note 8, at 59–60.

16. *Id.* at 59 (quoting Fed. R. Civ. P. 1).

17. The ABA commissioned a study of the use of special masters. Data collection problems resulted in case studies that highlighted, but could not test, how special masters were used and what their impact was. The two case studies did not involve multidistrict proceedings. Barbara Meierhoefer, *Special Master Case Studies 31* (2018), [https://www.americanbar.org/content/dam/aba/publications/judicial\\_division/2018lc-specialmasterscasestudy.pdf](https://www.americanbar.org/content/dam/aba/publications/judicial_division/2018lc-specialmasterscasestudy.pdf) [<https://perma.cc/7A5V-N2LL>] (noting that the response rate to the attorney survey pool was only 14%).

18. Fed. R. Civ. P. 53(a)(1)(C).

19. Fed. R. Civ. P. 53 advisory committee's note on 2003 Amendment (noting that "appointment of a master must be the exception and not the rule"); George C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 8 *Fed. Cts. L. Rev.* 35, 44 (2015).

20. Fed. Jud. Ctr., *Manual for Complex Litigation* §§ 11.51–11.52 (4th ed. 2004), <https://www.uscourts.gov/sites/default/files/mcl4.pdf> [<https://perma.cc/9P72-5PQV>].

21. *Id.* § 11.52.

neys and tend to have substantial experience with similar disputes.”<sup>22</sup> In other words, special mastering is a business, and like most businesses, it requires repeat patrons.

Of course, the latest version of the *Manual* was written in 2004 and the *Pocket Guide* in 2011. The Federal Judicial Center last studied special masters twenty years ago.<sup>23</sup> Considering all civil cases, not just complex ones, that study found that judges appointed special masters in fewer than two of every 1,000 cases (0.2%).<sup>24</sup> But several years thereafter, one federal judge predicted “that we will see more and varied appointments of such adjuncts by the year 2020, to the benefit of the courts.”<sup>25</sup>

It’s now 2020. This Article wades into this controversy to set aside the crystal ball and offer a fresh empirical look at *all* court-appointed adjuncts in products liability MDLs—not just special masters and magistrates. We built and hand coded an original dataset from all products liability proceedings centralized from 2004 to 2017 that closed by April 15, 2019—ninety-two proceedings that included class and nonclass settlements.<sup>26</sup> It is, to our knowledge, the first attempt that anyone has made to look under the tent and document courts’ interaction with and oversight of a growing industry that thrives upon settlements.<sup>27</sup> Our deep dive into appointments, costs, and proceedings’ duration ultimately prompts us to raise a caution flag about outsourcing judicial duties to private adjuncts.

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22. Barbara J. Rothstein & Catherine R. Borden, Fed. Jud. Ctr., *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges* 38 (2011), <https://www.fjc.gov/sites/default/files/2012/MDLGdePL.pdf> [<https://perma.cc/B3MD-YCLH>].

23. See Willging et al., *supra* note 6.

24. *Id.* at 3. Judges were slightly more likely to consider appointing a special master in cases involving patents, environmental matters, and airplane personal injuries. *Id.*

25. Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 *DePaul L. Rev.* 479, 486 (2009).

26. For a breakdown of outcomes, see *infra* section III.A.2. When a proceeding “closes,” it means that the entire proceeding and all of the actions within it have either concluded or been remanded to their courts of origin such that the transferee judge has nothing left to do. See, e.g., U.S. Jud. Panel on Multidistrict Litig., *MDL Statistics Report – Docket Summary Listing 1* (2020), [https://www.jpml.uscourts.gov/sites/jpml/files/Recently\\_Terminated\\_MDLs-January%201-September-15-2020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%201-September-15-2020.pdf) [<https://perma.cc/ND52-C3N4>] (citing date closed).

27. As Professor Deborah Hensler observed, there is a particular need for legal scholarship on claims resolution facilities, or what we call settlement programs. See Deborah R. Hensler, *Alternative Courts? Litigation-Induced Claims Resolution Facilities*, 57 *Stan. L. Rev.* 1429, 1435–36 (2005) [hereinafter Hensler, *Alternative Courts*] (“[L]egal scholars have not delved deeply into the rules that govern claims resolution facilities or how those rules are implemented.”); Deborah R. Hensler, *Assessing Claims Resolution Facilities: What We Need to Know*, 53 *Law & Contemp. Probs.* 175, 176–78 (1990) (proposing “an agenda for research on claims resolution facilities” that could assist in providing better alternatives for the future). We join Professor Hensler in requesting more transparency as to what happens within these settlement programs such that scholars can empirically assess the many substantive and procedural questions that remain unanswered.

In the existing academic literature, outsourcing has been both celebrated and condemned, often as the judicial role itself changes. Part I situates the debate amid judges' shift from dispassionate arbiters to case managers to, now, supervisors. It also debunks some persistent myths about "burgeoning" caseload statistics along the way. Although surveying the existing literature on magistrates and special masters exposes a turf war between their various proponents, the primary purpose is to set the stage for our inquiry into how judges use these adjuncts in MDLs and highlight the remarkable scarcity of work on less traditional adjuncts like claims administrators, lien resolution companies, banks, and escrow agents.

Part II dives into the MDL ecosystem, placing our dataset within the world of multidistrict proceedings and debuting a taxonomy of the cast of characters who appear within it. Despite a call to arms over "a crisis in the courts,"<sup>28</sup> this Part demonstrates that today's judges appoint what we collectively dub "judicial adjuncts" with no greater frequency than they did in past years with a lighter workload.<sup>29</sup> Adjuncts still appear at every stage: pretrial, settlement negotiations, and post-settlement.<sup>30</sup> What we did discover, however, was a vast settlement support network comprised of banks, claims administrators, notice experts, certified public accountants, and lien resolution administrators.<sup>31</sup>

Part III moves from tallying and classifying these adjuncts to statistically analyzing their effects. In so doing, we are mindful that data and analytics can tell us only so much; justice cannot be measured solely by how long a proceeding lasts nor can one measure intangibles like the benefits or drawbacks of allowing adjuncts to operate behind the scenes.<sup>32</sup> Nevertheless, these findings should help inform courts' cost-benefit calculus, and two key results are highlighted here.

First, it was surprising to find that proceedings with special masters lasted *66% longer* than those without.<sup>33</sup> Of course, this raised a causal which-came-first question: Did judges appoint special masters to larger proceedings anticipating that they would be more difficult (and thus take

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28. Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 *Wm. Mitchell L. Rev.* 1269, 1287 (2005).

29. This Article builds on Professor Linda Silberman's term. Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 *U. Pa. L. Rev.* 2131, 2131–32 (1989) [hereinafter Silberman, *Judicial Adjuncts Revisited*] (using the term "judicial adjuncts" primarily to refer to masters and magistrates, who customize procedure for specific cases).

30. See *id.* at 2135–36, 2139–40, 2169–70 (describing some of the roles played by judicial adjuncts in litigation).

31. See *infra* section II.B.3.

32. See generally Miguel F. P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 *Cornell L. Rev.* 363 (2020) (finding evidence suggesting that the six-month list, which evaluates how long a motion has been pending on a judge's docket, may prompt judges to make more errors).

33. See *infra* section III.A.4.

longer) to resolve? Or did the special masters themselves cause that delay? Using a duration model made it possible to screen some noise by controlling for a proceeding's outcome (settlements uniformly took longer), personal injury claims (which likewise took longer), and the number of actions (the more actions, the longer the proceeding lasted).<sup>34</sup> We found that appointing a judicial adjunct of any kind made the proceedings continue longer than they otherwise would, all else being equal.<sup>35</sup> Although adding another plaintiff's action to a proceeding had almost no effect on how long it lasted, designating an adjunct meant that the proceeding was 43% less likely to end.<sup>36</sup> And for every additional adjunct appointed, there was a 12% decrease in the probability of a proceeding ending.<sup>37</sup>

These findings raise questions about whether efficiency claims can justify appointing judicial adjuncts. To be sure, there may be other benefits such as specialized expertise and, perhaps more controversially, the ability to talk with parties behind closed doors,<sup>38</sup> but if judges rely on adjuncts primarily to ease their caseload and speed proceedings along, then they ought to reconsider.

Second, costs rise to the fore because parties are paying for both lengthier lawsuits and private adjuncts. But in considering adjuncts' costs, we ran into a significant roadblock: Compensation information was either undisclosed or affirmatively sealed for 62.8% of private adjunct appointments.<sup>39</sup> Even though we couldn't always identify the amounts charged, we were able to discern that plaintiffs *alone* bore the costs for 54% of private adjuncts, meaning that in over half of the appointments, defendants did not contribute.<sup>40</sup> Some of the payments that we could unearth ran into the millions. In the *Actos* proceeding, for instance, Special Master Gary Russo charged over \$4.7 million, and Deputy Special Master Kenneth DeJean charged over \$1.3 million.<sup>41</sup> To administer the *Zyprexa* settlement, Special Settlement Masters Ken Feinberg, Michael Rozen, Cathy Yanni, and John Trotter collectively charged over \$9.4 million.<sup>42</sup>

If proceedings with adjuncts cost more and last longer, why do judges appoint them? To piece together this puzzle, we supplemented our quan-

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34. See *infra* section III.A.4.

35. See *infra* section III.A.4.

36. See *infra* section III.A.4.

37. See *infra* section III.A.4.

38. See Silberman, *Judicial Adjuncts Revisited*, *supra* note 29, at 2147 (discussing the potential for abuse that arises from *ex parte* communication with adjuncts).

39. See *infra* Table 15.

40. See *infra* section III.B.3.

41. Order Appointing Special Masters at 1, 6, In re *Actos* (Pioglitazone) Prods. Liab. Litig., No. 6:11-md-02299-RFD-PJH (W.D. La. Apr. 11, 2012); *infra* Table 16. We tabulated sixty-five docket entries to calculate the aggregate numbers for DeJean and sixty-four docket entries for Russo.

42. Order at 1, In re *Zyprexa* Prods. Liab. Litig., No. 1:04-md-01596 (E.D.N.Y. Jan. 29, 2007).

titative analysis with twenty-two semi-structured, confidential interviews. These interviews include conversations with special masters, magistrate judges, claims administrators, district judges, and plaintiffs' and defense attorneys with a wealth of experience not only in our proceedings but also in MDLs spanning back to the 1960s.<sup>43</sup> Interviews revealed two competing narratives, which Part IV highlights. In one version, courts outsourced to effectively manage complex cases behind the scenes and closely monitored those appointed. In the other, repeat players in both the bar and the private-adjunct sector came to mutually beneficial arrangements that exposed real-life problems over capture, self-dealing, bias, transparency, and ad hoc procedures.<sup>44</sup>

Shining light into this segment of the MDL world made it clear that privatization no longer exists on a parallel track with Article III courts—judges outsource their own power to private actors. As privatization occurs under the aura of the federal courts, it raises central questions about court access, cost, impartiality, and fairness, which intersect with existing literatures debating courts' purpose, ad hoc rulemaking, and the judicial role.

Part V thus steps back to offer some larger institutional lessons and chart a path forward. As courts delegate authority to private adjuncts who, more often than not, plaintiffs must compensate, justice may come with a heavier price tag for those least able to afford it. Judges sometimes cite the enormous expense of complex proceedings as a whole as a reason to appoint an adjunct, but moving from the grandiose to the granular shows that those choices have real impact on individual plaintiffs. In the pelvic-mesh proceedings, for instance, one plaintiff's settlement statement revealed a \$6,200 fee for "settlement program expense allocation" plus a "Cathy Yanni Appeal Cost" of \$2,000.<sup>45</sup> Costs, attorneys' fees, and mandatory medical-lien holdbacks whittled a settlement offer of \$195,000 down

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43. For more on methodology, see *infra* Appendix.

44. See *infra* Part IV.

45. Confidential Claim Closing Statement (on file with authors). In the *Ethicon* proceeding, of all the private adjunct appointments, only Cathy Yanni's settlement-master fee was sporadically disclosed, and it varied. To "appeal" whatever amount she awarded, a plaintiff always had to pay \$2,000, but her initial review in one settlement cost \$300 per claim plus \$10,000 per calendar quarter. In another she charged \$350 per claim, and in yet a third, claim review cost a flat \$300. See Pretrial Order #335 (Order Appointing Cathy Yanni as Special Master for Private Settlement Agreements Between Ethicon & Certain Plaintiffs' Counsel) at 3, *In re Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2327 (S.D. W. Va. Mar. 15, 2019); Pretrial Order #253 (Order Appointing Cathy Yanni as Special Master for Private Settlement Agreements Between Ethicon & Certain Plaintiffs' Counsel) at 3, *In re Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2327 (S.D. W. Va. filed Apr. 28, 2017); Pretrial Order #236 (Order Appointing Cathy Yanni as Special Master for Private Settlement Agreements Between Ethicon & Certain Plaintiffs' Counsel) at 3, *In re Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2327 (S.D. W. Va. filed Sept. 8, 2016). Yanni's contrasting charges, with some mesh plaintiffs having to pay more for administrative costs than others, illustrate some of the controversies these appointments entail. Orders are available at <https://www.wvsd.uscourts.gov/MDL/ethicon/orders.html>.

to less than \$60,000.<sup>46</sup> As the *New York Times* reported, this plaintiff's experience was not an anomaly: The average pelvic-mesh plaintiff received "less than \$60,000" despite horrific injuries.<sup>47</sup> Medical costs alone can wipe plaintiffs out financially, and one claims administrator estimated that at least 15% of mesh plaintiffs were bankrupt.<sup>48</sup> Reducing costs—measured in both time and actual dollars—is thus crucial.

Appointing magistrate judges, whose salaries come from the general tax revenue, is often a better alternative. As salaried public employees, magistrates are further insulated from the capture, bias, and self-interest concerns that plague party-selected, party-compensated private adjuncts.<sup>49</sup> They can (and have) performed the same work as special masters, and sometimes even claims administrators, for far less expense.<sup>50</sup> They are already ensconced within the federal courthouse and they possess the legitimacy of federal office.<sup>51</sup> Plus, they are accustomed to the ways in which judges review their decisions, and clear paths exist for correcting error.<sup>52</sup> Far from complaining about the workload, our interviews suggest, in harmony with previous findings, that many magistrate judges want and enjoy MDL work.<sup>53</sup> As products liability MDLs play a policing role that impacts public health, it makes sense to use the general tax base to compensate the public servants who help resolve these disputes and to ensure that the work itself is both public and reviewable.<sup>54</sup>

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46. Confidential Claim Closing Statement, *supra* note 45.

47. Matthew Goldstein, *As Pelvic Mesh Settlements Near \$8 Billion, Women Question Lawyers' Fees*, *N.Y. Times* (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/business/pelvic-mesh-settlements-lawyers.html> (on file with the *Columbia Law Review*).

48. Telephone and In-Person Interviews with Products Liability MDL Actors (Dec. 1, 2019 through Mar. 1, 2020) (transcript on file with authors) [hereinafter Interviews].

49. See *infra* Part V.

50. See *infra* section III.B.

51. See *infra* section I.A.

52. See *infra* section V.B.

53. Interviews, *supra* note 48; see also Hanks, *supra* note 19, at 52–53.

54. In this Article, "policing" means investigating wrongdoing and holding companies civilly responsible for faulty products by seeking compensatory and, when warranted, punitive damages. Ensuring that this work occurs in the open addresses a recent criticism that MDLs lack transparency. See, e.g., Michelle Conlin, Dan Levine & Lisa Girion, *Why Big Business Can Count on Courts to Keep Its Deadly Secrets*, *Reuters* (Dec. 19, 2019), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lobbyist> [<https://perma.cc/R2YU-BT6H>]; Jaimi Dowdell & Benjamin Lesser, *These Lawyers Battle Corporate America—and Keep Its Secrets*, *Reuters* (Nov. 7, 2019), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lawyers> [<https://perma.cc/SA4V-SBWP>]; Benjamin Lesser, Dan Levine, Lisa Girion & Jaimi Dowdell, *How Judges Added to the Grim Toll of Opioids*, *Reuters* (June 25, 2019), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges> [<https://perma.cc/768U-KBHL>]; Dan Levine, *Court Let Merck Hide Secrets About a Popular Drug's Risks*, *Reuters* (Sept. 11, 2019), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-propecia> [<https://perma.cc/7Z8H-PACV>].

## I. OUTSOURCED JUDGING

For decades now, a rising caseload has prompted concerns within both the judiciary and the academic community about how to best serve justice. In 1995, the Judicial Conference (the federal courts' policy-making body) painted a doomsday scenario: "If the federal courts' civil and criminal jurisdiction continues to grow at the same rate it did over the past 53 years, the picture in 2020 can only be described as nightmarish. Should that occur, in twenty-five years the number of civil cases commenced annually could reach 1 million . . . ."<sup>55</sup> Thankfully, those estimates did not pan out: In 1995, there were 239,013 civil filings in federal court;<sup>56</sup> in 2019, there were 293,520.<sup>57</sup> In the state courts, civil filings *decreased* 11% from 2006 to 2015.<sup>58</sup>

Nevertheless, workloads were increasing in federal courts. As cases rose faster than Article III judgeships, calls for judicial adjuncts mounted.<sup>59</sup> Initially, magistrate judges assisted: Their ranks swelled from 470 magistrates in 1990 to 570 in 2012, and their share of case terminations increased "227 percent" during this time.<sup>60</sup> Nevertheless, pleas for support continued. One district judge went so far as to proclaim that "[i]f the court refuses to get the help it needs, it will not be able to effectively deal with its docket."<sup>61</sup>

Enter special masters. Once the workhorses for managing institutional reform outside the court context, special masters became the proposed savior of the courts, especially in the context of MDLs. Interestingly, cries for more special masters were made by the special masters themselves: Several years before his appointment as special master in the *Opiate* proceeding, David Cohen published an article titled *Special Masters Versus Magistrate Judges: No Contest*.<sup>62</sup> "It is clear that federal judges do, in fact, need more help, which is why I believe they should ask for it more often,"

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55. Jud. Conf. of the U.S., Long Range Plan for the Federal Courts 18 (1995), [https://www.uscourts.gov/sites/default/files/federalcourt\\_federalcourtsl\\_0.pdf](https://www.uscourts.gov/sites/default/files/federalcourt_federalcourtsl_0.pdf) [<https://perma.cc/973R-HW33>].

56. *Id.*

57. Table C—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary, U.S. Cts. (June 30, 2019), <https://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2019/06/30> (on file with the *Columbia Law Review*).

58. Nat'l Ctr. for State Cts., Examining the Work of State Courts: An Overview of 2015 State Court Caseloads 4 (2016) ("Though the decrease in incoming Civil cases was 11 percent for the entire 10-year period, caseloads have declined 21 percent since reaching an apex of 19.5 million cases in 2009.").

59. See Cohen, *Special Masters Versus Magistrate Judges*, *supra* note 4, at 73 (noting that the increase in caseloads has outpaced the increase in number of judges).

60. *Id.* at 74.

61. Scheindlin, *supra* note 25, at 486; see also Cohen, *Special Masters Versus Magistrate Judges*, *supra* note 4, at 73–74 (describing the federal caseload increase and district judges' need for assistance).

62. Cohen, *Special Masters Versus Magistrate Judges*, *supra* note 4.

he wrote.<sup>63</sup> He cited several claims in support: Civil and criminal caseloads have increased 17%, complexity makes that number even more compelling, and clerks' offices have less staff.<sup>64</sup> "The calculus is inescapable—district judges are being asked to do more with less. They need help."<sup>65</sup> Despite noting that the number of magistrates increased, and despite the fact that high caseload projections had already missed their mark when Cohen made his push, he nevertheless concluded that "the support provided by our magistrate judges doesn't change the calculus."<sup>66</sup> Cohen surmised that "[j]udges should appoint special masters when circumstances call for it, and increasing caseloads indicate those occasions are arising more and more frequently."<sup>67</sup>

Both the increase in magistrates' use and the demands for more special masters highlight how judicial roles have changed steadily over the past fifty years. In his canonical work, *The Role of the Judge in Public Law Litigation*, Professor Abram Chayes chronicled the shift, noting the judge's move from passive arbiter to actively "shaping, organizing and facilitating the litigation."<sup>68</sup> As Professor Arthur Miller observed, "Other than a few experiments after the Second World War," judicial management "was virtually non-existent."<sup>69</sup> By the 1980s, however, judges began "playing a critical role in shaping litigation and influencing results," wrote Professor Judith Resnik; yet they have been doing so by working "beyond the public

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63. Id. at 73.

64. Id.

65. Id. at 74. Cohen's sentiment is widely shared by special masters' proponents. See, e.g., ABA Resolutions, supra note 8, at 55–56 ("[C]ourts often lack sufficient resources to manage certain cases—particularly complex commercial cases."); Kenneth R. Feinberg, Creative Use of ADR: The Court-Appointed Special Settlement Master, 59 Alb. L. Rev. 881, 885–86 (1996) [hereinafter Feinberg, Creative Use of ADR] (noting the burden placed on the court system by the modern trial docket and the resulting need for special masters); Fellows & Haydock, supra note 28, at 1287–97 (noting the need for special masters to help cover the demands on the federal judiciary due to the increase in case filings, complexity of cases, and average duration); Scheindlin, supra note 25, at 481–82 (detailing the circumstances when special masters should be used to ease the caseload burden on the federal judiciary).

66. Cohen, Special Masters Versus Magistrate Judges, supra note 4, at 74. But see Philip M. Pro & Thomas C. Hnatowski, Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System, 44 Am. U. L. Rev. 1503, 1506 (1995) ("From its inception, the magistrates system has evolved to meet the needs of the federal judiciary . . ."); Joe Palazzolo, Magistrate Judges Play a Larger Role, Wall St. J. (Apr. 6, 2015), <https://www.wsj.com/articles/magistrate-judges-play-a-larger-role-1428355226> (on file with the *Columbia Law Review*) (noting the importance of magistrate judges in helping parties avoid years long delays in overburdened federal courts).

67. Cohen, Special Masters Versus Magistrate Judges, supra note 4, at 76.

68. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1298 (1976).

69. Arthur R. Miller, What Are Courts For? Have We Forsaken the Procedural Gold Standard?, 78 La. L. Rev. 739, 795 (2018).

view, off the record, with no obligation to provide written, reasoned opinions.”<sup>70</sup>

Today’s judges still play a managerial role, but, as Cohen’s work conveys, it is not just cases they manage—it’s people.<sup>71</sup> Surveying the existing literature on special masters and magistrate judges, this Part sets the stage for an inquiry into how and why judges delegate in MDLs. It also introduces a core question about who is best suited to perform judicial tasks: public servants like magistrates, or private actors like special masters?

#### A. *Magistrates*

Magistrate judges are judicial officers who assist district court judges by handling a wide array of civil and criminal pretrial (and sometimes trial) matters.<sup>72</sup> Selected by the judges of a particular district, they serve eight-year terms when in a full-time capacity<sup>73</sup> and may be reappointed indefinitely.<sup>74</sup> When the Advisory Committee on the Rules of Civil Procedure amended Rule 53 in 1983, its members noted that creating full-time magistrates eliminated the need for “standing masters” and would help alleviate the need for special masters.<sup>75</sup> In amending Rule 53 again in 2003, the Advisory Committee cautioned that “[p]articular attention should be paid to the prospect that a magistrate judge may be available for special assignments.”<sup>76</sup> And, as the oft-quoted treatise *Federal Practice and Procedure* warns, “[I]tigators ought not be asked to bear the expense of a reference if the matter is one that the judge easily might hear and determine.”<sup>77</sup> In other words, special masters—as private adjuncts paid by the parties—must take a backseat to district and magistrate judges.

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70. Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 377–78 (1982) [hereinafter Resnik, *Managerial Judges*].

71. See Kenneth R. Feinberg, *Response to Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 Tex. L. Rev. 1647, 1647 (1995) (noting that managerial judging is a necessity and that using special masters is critical because “there is no better alternative”); Dionne Searcey, *Judges Outsource Workloads as Cases Get More Complex*, Wall St. J. (Sept. 29, 2013), <https://www.wsj.com/articles/judges-outsource-workloads-as-cases-get-more-complex-1380490748> (on file with the *Columbia Law Review*) (explaining the role of the special master in a hip-implant MDL, which includes handling “spats over attorneys’ fees,” “pretrial issues,” and “tasks as small as circulating lunch menus in advance of meetings”).

72. See 28 U.S.C. § 636 (2018) (detailing the various powers of U.S. magistrate judges, including civil and criminal issues).

73. *Id.* § 631(e).

74. *Federal Magistrates Act*, Pub. L. No. 90-578, § 401(b), 82 Stat. 1107, 1118 (1968) (codified as amended at 28 U.S.C. § 631). For more about magistrate judges, see *Questions and Answers About Magistrate Judges*, U.S. Dist. Ct. of Utah, <https://www.utd.uscourts.gov/questions-and-answers-about-magistrate-judges> [<https://perma.cc/Y3TA-88EE>] (last visited Sept. 2, 2020).

75. Fed. R. Civ. P. 53 advisory committee’s note on 1983 Amendment.

76. Fed. R. Civ. P. 53 advisory committee’s note on 2003 Amendment.

77. 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2603 (3d ed. 2014).

When magistrate judges first entered the legal landscape, however, scholars raised separation of powers concerns and questioned their authority as Article I judges who lack Article III's life tenure.<sup>78</sup> Despite these early objections, the Supreme Court found the use of magistrates constitutional, noting that they are subject to the district court's discretion and control.<sup>79</sup> And the Supreme Court later declared that magistrates are "nothing less than indispensable."<sup>80</sup> Without them, the Court concluded, "the work of the federal court system would grind nearly to a halt."<sup>81</sup>

Today, when it comes to pretrial matters in civil cases, magistrates may do everything except dismiss cases without the parties' consent and decide judgments on the pleadings and motions for injunctive relief, failure to state a claim, summary judgment, and class certification.<sup>82</sup> They can conduct evidentiary hearings, preside over discovery, and even serve as special masters under Rule 53.<sup>83</sup> Magistrate judges handle over a million civil and criminal matters per year, and there are nearly as many magistrates as there are district judges.<sup>84</sup>

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78. 28 U.S.C. §§ 604, 631–39; see also Note, Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 *Yale L.J.* 1023, 1051 (1979) ("Even without judicial coercion, however, routinization and expansion of consensual reference must eventually come to violate Article III constraints."). This began to change in the 1980s and 1990s when magistrates "were renamed 'magistrate judges.'" Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 *Harv. L. Rev.* 924, 989 (2000) [hereinafter Resnik, Trial as Error] (citing Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117 (codified as amended at 28 U.S.C. § 631)). As Professor Resnik explains, when the Act was first passed, the idea was that magistrates were "assistants to district judges, appointed by district judges, but were not themselves 'judges.'" *Id.* (quoting Federal Magistrates Act: Hearings on S. 995 Before the Subcomm. on Improvements in Jud. Mach. of the S. Comm. on the Judiciary, 90th Cong. 241j–245 (1967) (statement of Warren Olney and accompanying reports from the Judicial Conference Committee on the Administration of Criminal Law)).

79. See *United States v. Raddatz*, 447 U.S. 667, 681–84 (1980) ("[T]he magistrate acts subsidiary to and only in aid of the district court.").

80. *Peretz v. United States*, 501 U.S. 923, 928 (1991) (internal quotation marks omitted) (quoting *Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989)).

81. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015).

82. 28 U.S.C. § 636(b). The Federal Magistrate Act of 1979 enlarged magistrates' powers substantially, even allowing them to preside over trials if the parties consent. *Id.* § 631(c)(1).

83. *Id.* § 636(b)(2).

84. Christina L. Boyd & Jacqueline M. Sievert, Unaccountable Justice? The Decision Making of Magistrate Judges in the Federal District Courts, 34 *Just. Sys. J.* 249, 249 (2013). There are 549 authorized, full-time magistrates, 29 part-time, and 3 combination clerk/magistrate judge positions. Status of Magistrate Judge Positions and Appointments—Judicial Business 2019, U.S. Cts., <https://www.uscourts.gov/status-magistrate-judge-positions-and-appointments-judicial-business-2019> [<https://perma.cc/NTQ7-EBFX>] (last visited Sept. 2, 2020). There are 677 authorized district court judgeships, 115 vacancies, and 412 senior judges. Status of Article III Judgeships—Judicial Business 2018, U.S. Cts., <https://www.uscourts.gov/statistics-reports/status-article-iii-judgeships-judicial-business-2018> [<https://perma.cc/58PT-H4HC>] (last visited Sept. 2, 2020).

### B. *Special Masters*

Even as courts relied routinely upon magistrates, the need for long-term monitoring in civil rights settlements and other institutional-reform litigation prompted judges to seek external help. In suits that require structural changes, like school desegregation, someone must ensure that the parties comply with the court-ordered declaratory or injunctive relief.<sup>85</sup> But neither district judges nor magistrate judges can drop their other cases to focus fully on something like integrating schools, so courts began outsourcing to special masters (court-appointed adjuncts who perform particular tasks on a given case and tend to come from the private sector), citing their inherent equity power to do so.<sup>86</sup> As Justice Brandeis once explained, courts have “inherent power to provide themselves with appropriate instruments required for the performance of their duties,” which includes “authority to appoint persons unconnected with the court to aid [them].”<sup>87</sup>

Because many of these early structural-change lawsuits concerned Rule 23(b)(2) class actions, the court’s equitable duty to enforce remedial decrees dovetailed with its class action monitoring role.<sup>88</sup> Scholars and courts then carved a path for judges to supervise class counsel,<sup>89</sup> so it made sense that judges would likewise have the power to appoint a special master to implement class settlements.

As special masters’ use evolved to include settlement administration, so too did Rule 53, which authorizes courts to appoint special masters.<sup>90</sup> In

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85. See, e.g., Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 Colum. L. Rev. 707, 710 (1978) (describing the role of the special master in the integration of Coney Island schools). “It is fundamental that equity will not issue a decree it cannot enforce,” so the maxim goes. *United States v. Ga. Power Co.*, 528 F. Supp. 951, 954 (N.D. Ga. 1981) (citation omitted).

86. Samuel Jan Brakel, *Special Masters in Institutional Litigation*, 4 Am. Bar Found. Rsch. J. 543, 544–45, 549 (1979); Vincent M. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. Tol. L. Rev. 419, 419–23 (1979).

87. *Ex parte Peterson*, 253 U.S. 300, 312–13 (1920).

88. Fed. R. Civ. P. 23.

89. E.g., *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (recognizing a judicial duty to protect the members of a class in class action litigation from “lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class”); Chris Brummer, Note, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 Colum. L. Rev. 1042, 1060–62 (2004) (outlining how the vigilance required of district judges in scrutinizing proposed class settlements creates questions of “judicial conduct, rather than unmet legal standards”).

90. See Brakel, *supra* note 86, at 546–49 (outlining the history and emergence of special masters in litigation); Resnik, *Trial as Error*, *supra* note 78, at 988 (describing how the use of special masters developed through Judicial Conference Committees in the 1950s and 1960s); James S. DeGraw, Note, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. Rev. 800, 800 (1991) (“[T]he roles played by judicial adjuncts, and more specifically special masters, have become crucial to the smooth functioning of courts.” (footnotes omitted)).

overhauling the rule in 2003, the Advisory Committee retained its core precaution “that appointment of a master must be the exception and not the rule,”<sup>91</sup> but allowed special masters to perform an array of duties with the parties’ consent.<sup>92</sup> Even if the parties refuse to consent, judges may still appoint special masters if matters “cannot be effectively and timely addressed by an available district judge or magistrate judge.”<sup>93</sup>

Despite the rule’s precaution, special masters’ proponents argue that complex MDLs regularly need specialized expertise that magistrates lack.<sup>94</sup> Precisely because they are not judges, special masters often have a backstage pass that allows them to go, do, and see things that district and magistrate judges cannot.<sup>95</sup> An authorizing order licensing them to communicate with the parties *ex parte* liberates special masters to cinch deals that might otherwise fail.<sup>96</sup> (Of course, designating a magistrate as a special master under Rule 53(h) technically gives them the same freedoms.<sup>97</sup>)

Special masters’ critics, on the other hand, worry about high costs, ever expanding authority, lack of oversight, and added delay.<sup>98</sup> They suggest that paying judicial appointees by the hour can incentivize them to

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91. Fed. R. Civ. P. 53 advisory committee’s note on 2003 Amendment.

92. Fed. R. Civ. P. 53(a). As Professor Silberman suggested many years ago, nothing in Article III prohibits magistrate judges from exercising a district court judge’s power so long as the parties consent. She reasoned that because Rule 53’s restrictions “are designed largely for [parties’] protection, litigants should be able to knowingly waive the protection thus afforded.” Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 *N.Y.U. L. Rev.* 1297, 1354 (1975) (footnote omitted).

93. Fed. R. Civ. P. 53(a)(1).

94. See, e.g., ABA Resolutions, *supra* note 8, at 56 (“Special masters who have specialized expertise in relevant fields can provide a practical resource to courts in cases that would benefit from subject-matter expertise.”); Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 *Widener L. Symp. J.* 235, 255, 273 (1997) [hereinafter Farrell, *The Function and Legitimacy of Special Masters*] (describing the different roles special masters have played in toxic tort litigation).

95. See Feinberg, *Creative Use of ADR*, *supra* note 65, at 885–86, 891–92 (noting that *ex parte* communications allow special masters to “obtain information which, if conveyed to the court, might prejudice any subsequent trial”); Fellows & Haydock, *supra* note 28, at 1281–82 (“Some level of *ex parte* communication with the parties is required for the master to adequately perform mediation or facilitated negotiation roles.”).

96. See ABA Resolutions, *supra* note 8, at 56 (highlighting the ethical constraints on judges, which limit their ability to participate in *ex parte* communications); Feinberg, *Creative Use of ADR*, *supra* note 65, at 891–92 (discussing a special masters’ ability to “coordinate and effectuate settlement discussions” through *ex parte* communications).

97. When judges appoint magistrates as special masters under Rule 53(h), the provisions of that rule govern. See *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 445 (3d Cir. 2005) (“[T]he District Court claims that it reviewed both the Magistrate Judge’s factual findings and its legal conclusions *de novo*. This is inconsistent with Rule 53(e)(2) . . . .”); *Richardson v. Bedford Place Hous. Phase I Assocs.*, 855 F. Supp. 366, 368 (N.D. Ga. 1994) (finding that Rule 53 conferred upon a magistrate judge the power to prepare a special master’s report, not a judicial order).

98. See Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 *U. Chi. L. Rev.* 394, 396 (1986); Farrell, *The Function and Legitimacy of Special Masters*, *supra* note 94, at 273–74; Hanks, *supra* note 19, at 47.

expand proceedings unnecessarily, thereby delaying justice and undermining the efficiency sought.<sup>99</sup> Cost implications led some scholars and courts to suggest that appointing special masters creates a two-tiered justice system in which parties who can afford them might receive swifter justice than everyone else or, conversely, that slower justice may come at a steeper price.<sup>100</sup>

Addressing the use of alternative decisionmakers in *Managerial Judges*, Professor Resnik warned, “[o]ne disadvantage of this proposal is that, by creating some set of ‘others’ to perform managerial tasks, it causes yet another transformation of the courts—this time into a ‘bureaucratic’ judiciary.”<sup>101</sup> Delegating, she notes, “provides little assurance that the power will be exercised more fairly or efficiently than it would be if judges retained such authority.”<sup>102</sup> Privatizing judicial duties, in particular, has prompted wide-ranging debates about partiality, legitimacy, transparency, and ad hoc procedures.<sup>103</sup>

Special masters do not stumble into their court-appointed positions; they are selected by the parties, or sometimes by the judge, and thus share certain attributes with arbitrators.<sup>104</sup> Those accepted into this elite cadre, says Professor and former Director of the American Bar Foundation Bryant Garth, “must be people acceptable to the parties who are repeat players.”<sup>105</sup> As both attorneys and special masters develop expertise, repeat players on both sides emerge. Special masters’ livelihood depends on their next assignment, which means they must ensure that whoever is likely to produce that next job is pleased with their work.<sup>106</sup> That, in turn, can prompt concerns about favoritism, particularly if the master serves in concurrent proceedings with the same attorneys.

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99. See Silberman, *Judicial Adjuncts Revisited*, supra note 29, at 2137, 2150–51 (“The addition of a special master, who usually charges a normal hourly fee, can be staggering.” (footnotes omitted)).

100. See *Adventures in Good Eating v. Best Places to Eat*, 131 F.2d 809, 815 (7th Cir. 1942) (“It is a matter of common knowledge that references greatly increase the cost of litigation and delay and postpone the end of litigation.”); Farrell, *The Function and Legitimacy of Special Masters*, supra note 94, at 273; Fellows & Haydock, supra note 28, at 1271; DeGraw, supra note 90, at 803 (“[B]road delegation of judicial powers to special masters can abrogate the various safeguards of the Federal Rules of Civil Procedure, Federal Rules of Evidence, and canons of judicial conduct.”).

101. Resnik, *Managerial Judges*, supra note 70, at 437.

102. *Id.*

103. See Farrell, *The Function and Legitimacy of Special Masters*, supra note 94, at 275 (“[T]here are few institutional mechanisms to safeguard the neutrality of special masters and eliminate possible conflicts of interest.”); Hanks, supra note 19, at 49–51 (noting that “litigants may worry that special masters are not truly neutral” because special masters “tend to have substantial experience with similar disputes” and may have a prior relationship with some or all of the parties).

104. See *infra* section II.D.

105. Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 Ga. St. U. L. Rev. 927, 930, 939 (2002).

106. Hanks, supra note 19, at 49.

Special masters, like magistrates, are subject to the same Code of Conduct as U.S. judges as well as the disqualification standards in 28 U.S.C. § 455.<sup>107</sup> Nevertheless, if the parties consent to the master's appointment despite a conflict, they can waive circumstances that would otherwise require judicial recusal.<sup>108</sup> And unlike merit-selection panels for magistrates (who are appointed for eight-year terms), no standards exist to guide judges in choosing special masters.<sup>109</sup>

As judges outsource authority to special masters in lieu of magistrate judges, critics lament the demise of trans-substantive rules. Using private adjuncts, they say, makes adjudication too informal, takes proceedings away from officers of the court, raises thorny ethical issues about ex parte communications, and removes key decisionmaking from public scrutiny and challenge.<sup>110</sup> Using special masters might thus lead to less process and insulate decisions from judicial review, triggering concerns about fairness.<sup>111</sup>

Rule 53, for example, pads special masters' decisions with some judicial deference, stating that judges review procedural matters for abuse of discretion and factual findings *de novo*.<sup>112</sup> But those standards are all subject to one important caveat: Parties can agree otherwise, and everything might be final depending on the appointment order.<sup>113</sup> Magistrate judges, on the other hand, are subject to the district court's constant control—parties must consent before a magistrate enters a final judgment, and their decisions may be appealed to an Article III court.<sup>114</sup> Summarizing these

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107. *Jenkins v. Sterlacci*, 849 F.2d 627, 630–31 (D.C. Cir. 1988).

108. Fed. R. Civ. P. 53(a) advisory committee's note on 2003 Amendment.

109. See Tracey E. George & Albert H. Yoon, Article I Judges in an Article III World: The Career Path of Magistrate Judges, 16 *Nev. L.J.* 823, 830–32 (2016); Silberman, *Judicial Adjuncts Revisited*, *supra* note 29, at 2133–34. Compare 28 U.S.C. § 631 *et seq.* (2018) (detailing the standards for appointing magistrate judges), with Fed. R. Civ. P. 53 (setting no parameters on selecting special masters).

110. *Brazil*, *supra* note 98, at 421; Feinberg, *Creative Use of ADR*, *supra* note 65, at 885 (“Increased use of such Special Masters has given rise to provocative ethical questions concerning the relationship of the Master to both the parties and the appointing court.”); Silberman, *Judicial Adjuncts Revisited*, *supra* note 29, at 2136, 2176–77 (“[T]he use of judicial adjuncts has pushed formalized procedure into retreat.”); DeGraw, *supra* note 90, at 804. Early critics likewise raised legitimacy questions. Given the proliferation of agencies, bankruptcy courts, and magistrate judges, however, this legitimacy concern may be less poignant today than it was in the 1980s and 90s. See, e.g., Farrell, *The Function and Legitimacy of Special Masters*, *supra* note 94, at 286.

111. See *Brazil*, *supra* note 98, at 418 (comparing special masters with court appointed experts and noting that the former lack the procedural safeguards of the latter).

112. Fed. R. Civ. P. 53(f)(3)–(5).

113. Fed. R. Civ. P. 53(f)(3)(B).

114. Judges review nondispositive decisions to determine whether they are clearly erroneous and dispositive motions on a *de novo* basis. Fed. R. Civ. P. 73(a), (b); Wright & Miller, *supra* note 77 (citing H.R. Rep. No. 1629, at 8 (1968), reprinted in 1968 U.S.C.A.N. 4254). Federal Rules of Civil Procedure 72 and 73 spell out magistrates' statutory authority. Fed. R. Civ. P. 72 (discussing pretrial orders); Fed. R. Civ. P. 73 (discussing trial by consent).

concerns, Professor Silberman explained, “To the extent that cases are shaped, ad hoc procedures embraced, settlements influenced and even coerced, and law articulated, special masters may represent an even greater threat to the integrity of the process because they are private individuals who are not institutionally entrusted with judicial powers.”<sup>115</sup>

## II. A TAXONOMY OF JUDICIAL ADJUNCTS IN MDLS

As judges rely on special masters and magistrates to assist them in traditional civil suits where caseloads have remained relatively steady, how might the picture change as cases become more complex? Although civil filings have not risen much since 1995, the number of actions included in MDLs has slowly but steadily increased.<sup>116</sup> Large mass torts, proceedings with 1,000 or more actions, have likewise grown in recent years.<sup>117</sup> And though proceedings with 1,000 or more total actions range in type from products liability to common disaster, miscellaneous, and sales practices, 92% are products liability.<sup>118</sup> Known to be some of the most difficult proceedings to manage,<sup>119</sup> it is within this world of products liability MDLs that we gathered data on transferee judges’ use of judicial adjuncts.

### A. *Dataset Description*

We built an original dataset by collecting and hand coding data from all products liability proceedings that the Judicial Panel on Multidistrict Litigation (the Panel) centralized between 2004 and 2017 that had ended by April 15, 2019.<sup>120</sup> Those dates allow us to examine an array of ninety-two proceedings centralized and closed over a substantial period of time. It likewise enables us to make more accurate apples-to-apples comparisons about whether appointing a judicial adjunct speeds a proceeding along—or not.<sup>121</sup> Collectively, those ninety-two proceedings involved 79,641 actions.

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115. Silberman, *Judicial Adjuncts Revisited*, supra note 29, at 2137.

116. Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 *Ga. L. Rev.* 1245, 1270 (2019).

117. Still, even when they reached a high of nine proceedings in 2011, those large proceedings were never more than 15% of all the proceedings centralized. *Id.* at 1275.

118. *Id.*

119. E.g., Deborah R. Hensler, *Glass Half Full, Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 *Tex. L. Rev.* 1587, 1602 (1995) [hereinafter Hensler, *Glass Half Full*] (describing the challenges that courts face in mass torts).

120. Centralization refers to the date the Panel issued an order to transfer related cases from across the country to the same judge for coordinated pretrial handling. See, e.g., U.S. Jud. Panel on Multidistrict Litig., *Calendar Year Statistics (2019)*, [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics-2019\\_1.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2019_1.pdf) [<https://perma.cc/3TG3-LAV2>] (referring to motions for centralization and dates for granting those motions).

121. For a list of those proceedings and a detailed description of our methodology, see *infra* Appendix.

Before delving into our findings, we first explore the variations among these proceedings by considering the year they were centralized, the outcomes, the length of the proceedings, the number of actions within each, which federal districts handled the proceedings, and the transferee judge's prior MDL experience. This exercise demonstrates that our dataset provides a robust sample. Of course, given our emphasis on closed proceedings, more of the proceedings began earlier in our time period than later, but they nevertheless vary considerably by age.<sup>122</sup> A sample more heavily weighted toward older proceedings is also consistent with the recent decline in the Panel's grant rate given that fewer proceedings are now centralized.<sup>123</sup> Some readers may consider proceedings over or resolved once a settlement program is announced, but courts appoint many of the adjuncts we examine to help with administering the settlement, which makes settlement the beginning of their work, not the end. Thus, the date that the court formally closes the proceeding remains an important milestone in measuring adjuncts' contributions and efficiency. We do, however, include settlement dates and analyze that data in section III.A.

Variety among centralization dates suggests that our sample proceedings will differ in how long they last, which they do, substantially: Proceedings were open an average of 1,743 days (4.7 years), with a minimum of 202 days (*In re Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Products Liability Litigation*,<sup>124</sup> open for less than one year) and a maximum of 4,964 days (*In re Vioxx Products Liability Litigation*, open for 13.6 years).<sup>125</sup> Considering how long a proceeding lasts, on average, by centralization year shows that a proceeding's length tends to vary, with newer proceedings ending somewhat sooner than those centralized earlier. Again, however, this is likely a function of our focus on closed proceedings; we note it here for the sake of comparison outside the bounds of our analysis. Figure 1 simply shows that a proceeding's average length changes by centralization year.

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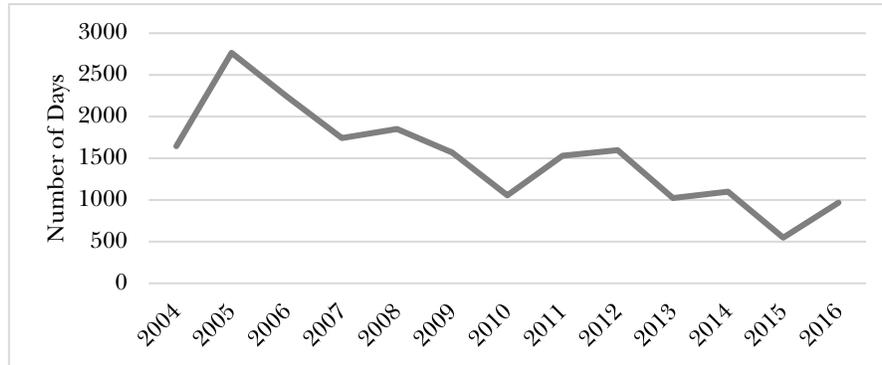
122. We used the closed date because it is a uniform metric across all of the proceedings that encompasses the time that it takes to complete all activities to end a proceeding. We realize that an MDL may have settled long before it officially closes and that a proceeding may remain open just so that the parties can complete time-consuming tasks like lien resolution. Because those tasks are often outsourced to judicial adjuncts (and plaintiffs will not receive final payments until they are completed), those delays are important to our study as well.

123. See Williams, *supra* note 116, at 1266.

124. 598 F. Supp. 2d 1372 (J.P.M.L. 2009).

125. 360 F. Supp. 2d 1352 (J.P.M.L. 2005); see *infra* Table 18.

Figure 1: Average Proceeding Duration by Centralization Year

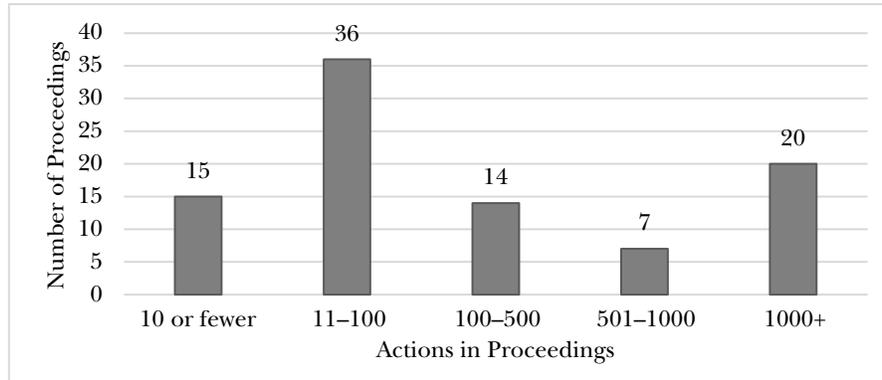


The number of actions within a proceeding can considerably impact its longevity. All else being equal, larger proceedings take longer to close than do smaller ones. The number of actions in a given proceeding differed markedly in our dataset: Our proceedings included an average of 866 actions, with a low of three (*In re Saturn L-Series Timing Chain Products Liability Litigation*<sup>126</sup>) to a high of 11,860 (*In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Products Liability Litigation*<sup>127</sup>). Not surprising given our focus on closed proceedings, those centralized more recently tend to be smaller than those centralized earlier—smaller proceedings tend to conclude more quickly than do larger ones. Figure 2 highlights our sample proceedings’ diversity by size.

126. 536 F. Supp. 2d 1367 (J.P.M.L. 2008).

127. 655 F. Supp. 2d 1343 (J.P.M.L. 2009); see U.S. Jud. Panel on Multidistrict Litig., Multidistrict Litigation Terminated Through September 30, 2019, [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Cumulative\\_Terminated\\_Litigations-FY-2019.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_Litigations-FY-2019.pdf) [<https://perma.cc/3TG3-LAV2>] (last visited Sept. 2, 2020). These numbers likely undercount the actions affected by the MDL for two reasons: (1) Global settlements often include state-court plaintiffs and unfiled claims as well, and (2) judges have begun to create inactive shadow dockets and parties institute tolling agreements, such that claims do not actually appear on the docket. See, e.g., Transcript of Status Conference at 7, *In re Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-2325 (S.D. W. Va. Apr. 1, 2019) (“As of now, we have approximately 2,000 MDL cases on the inactive docket, and we are aiming to have an additional 6,000 on the inactive docket by the end of this month, for a total of 8,000 by the end of the month.”). Unfortunately, systematic data is not available to remedy either deficiency.

Figure 2: Number of Actions in Proceedings



The Panel centralized these ninety-two proceedings in thirty-five districts across the United States, with a plurality in the District of Minnesota. Table 1 shows the variety among the number of proceedings in each district, from most to fewest. Although our dataset included only thirty-five districts, those districts represent ones that the Panel typically selects for mass torts over time. While the Southern District of New York is considered to be a frequent transferee district, for example, it does not typically receive mass torts.<sup>128</sup> Other districts such as the District of New Jersey and the Northern District of Ohio—found in our data as well—are more common transferee courts for products liability proceedings.<sup>129</sup>

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128. See Williams, *supra* note 116, at 1277–78 (noting that the Southern District of New York typically handles antitrust and securities proceedings).

129. *Id.*

Table 1: Transferee Districts by Number of Proceedings, with Total Actions

District	Proceedings	Actions	District	Proceedings	Actions
D. Minn.	8	6887	N.D. Al.	2	3053
D.N.J.	7	551	E.D.N.C.	1	12
N.D. Ohio	6	3086	M.D. Tenn.	1	667
D.S.C.	6	3802	D.R.I.	1	2233
C.D. Cal.	6	130	D. Neb.	1	3
N.D. Cal.	5	2320	W.D. Wash.	1	4
N.D. Ill.	5	109	M.D. Ga.	1	862
E.D. Pa.	5	1001	S.D. Iowa	1	23
S.D.N.Y.	4	3782	W.D. La.	1	5193
E.D. La.	4	15204	W.D. Mo.	1	38
S.D. Ill.	3	14494	E.D. Mich.	1	172
S.D. W. Va.	3	1043	N.D. Tex.	1	25
S.D. Fla.	2	2057	E.D. Ky.	1	279
E.D.N.Y.	2	2035	E.D. Wis.	1	8
M.D. Fla.	2	8396	S.D. Ohio	1	8
N.D. Ga.	2	429	W.D. Okla.	1	13
D. Kan.	2	65	E.D. Mo.	1	57
W.D. Ky.	2	1580			

Within our dataset, the Panel selected transferee judges with a wide range of previous MDL experience. Of the ninety-two proceedings, for instance, thirty-five judges (38%) were receiving their first assignment. Overall, judges within our sample had an average of three assignments, with a low of one and a high of ten: Thirty-five received their first assignment, twenty-two their second, seventeen their third, eight their fourth, three their fifth, two their sixth, and one their tenth. Note two caveats about these numbers: First, where more than one judge presided over a proceeding, we used the terminating judge's experience because of our focus on closed proceedings.<sup>130</sup> Second, a number of transferee judges in

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130. Seven proceedings saw more than one judge assigned over the life of the proceeding: In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II), In re American Honda Motor Co., Inc., Oil Filter Products Liability Litigation, In re CertainTeed Corp. Roofing Shingles Products Liability Litigation, In re Aqua Dots Products Liability Litigation, In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation, In re Oral Sodium Phosphate Solution-Based Products Liability Litigation, and In re Kitec Plumbing System Products Liability Litigation. See *infra* Table 18.

our dataset received multiple MDLs in our sample. Consequently, we measured the level of experience as the count of proceedings assigned to the judge, so the same judge can have increasing levels of experience throughout our data.

Finally, we collected information on how the proceedings concluded.<sup>131</sup> We coded for the following outcomes: class action settlements, aggregate (nonclass) settlements,<sup>132</sup> individual settlements, defense wins,<sup>133</sup> bankruptcy, and remand. Our coding focused on how the majority of actions in the proceeding ended. This means, for example, that if there were some individual settlements before a defendant's motion for summary judgment terminated the proceeding, we still coded the outcome as a defense win.

Of the ninety-two proceedings, 32.6% ended in aggregate settlements (seventeen of which were global settlements (18.4%) and thirteen of which were inventory settlements (14.1%)), 32.6% concluded as class action settlements, 21.7% ended with defense wins of various sorts, 6.5% concluded in individual settlements, 4.3% ended in bankruptcy, and 2.1% were remanded or dismissed for lack of subject matter jurisdiction. These different results allow us to examine whether appointing judicial adjuncts affects the outcomes within the dataset.

Overall, we find that our sample proceedings accurately represent the world of products liability MDL and provide a robust and prototypical sample in which to explore the gamut of court-appointed judicial adjuncts. The proceedings vary by centralization year, duration, size, judicial experience, and district. Outcomes, while heavily weighted toward settlement—like the rest of MDL—show substantial variety. All of these factors provide sufficient variation for testing assumptions about the uses and effects of appointing judicial adjuncts.

#### B. *A Typology of Adjuncts in MDL*

To the extent that judges delegate to address burgeoning caseloads, one would expect them to do so in products liability proceedings. But what we found was that transferee courts in our dataset appointed judicial adjuncts no more often today than they did in years past. As Figure 1 illustrates by organizing MDLs by docket number, which corresponds with its centralization date, courts' reliance on adjuncts varies substantially. Order-

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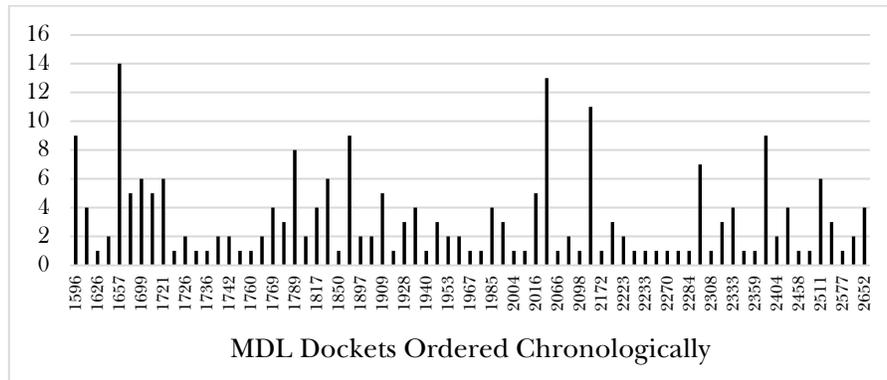
131. If a proceeding's resolution was not clear from its docket, then we searched news reports, such as Bloomberg's Class Action Litigation Report and Law360, to find the information.

132. Some of the aggregate settlements were "inventory," or law firm-by-law firm settlements, and some were global deals. See *infra* Part III.A.3.

133. There may have been some individual settlements within what we coded as a "defense win." Defense wins included dismissals after the judge denied class certification, stays followed by dismissals for arbitration, and summary judgement decisions granted in defendants' favor on *Daubert* motions, on the merits, or through preemption.

ing the proceedings chronologically reveals no clear trend and the number of adjuncts used does not appear to change over time.

Figure 3: Number of Judicial Adjuncts Appointed by MDL Docket Number



We gathered information on when and how courts used these judicial adjuncts, including the dates upon which courts appointed a range of judicial adjuncts, settlement and dispositive decision dates, and the dates upon which judges closed the centralized proceeding.<sup>134</sup> Unlike the existing literature's exclusive focus on magistrate judges and special masters, we found a host of different judicial appointments. We categorized them into five groups, each of which are explained in more detail below: (1) magistrate judges; (2) special masters; (3) mediators; (4) settlement/accounting, which includes escrow agents, certified public accountants, claims/fund/settlement administrators, lien-resolution administrators, auditors, common-benefit fund administrators, and qualified-settlement-fund trustees; and (5) other, which includes court-appointed counsel, inspectors, data consultants, medical experts, and external review specialists.

Judges in nineteen proceedings did not use any adjuncts at all. In the remaining seventy-three, they appointed a total of 233 adjuncts, designating an average of three adjuncts, with a range from one to fourteen. Table 2 shows the most common types of judicial adjuncts and the number of proceedings that appointed each category.

134. Details on our methodology appear in section A of the Appendix.

Table 2: Number of Judicial Adjunct Appointments by Type and Proceeding

Adjunct Type	Total Count	Percentage	Number of Proceedings Appointed
Settlement/Accounting	77	33%	37
Special Master	59	25%	31
Magistrate Judges <sup>135</sup>	59	25%	42
Mediator	29	12%	21
Other	9	4%	8
<b>Total:</b>	233		

1. *Magistrate Judges and Special Masters.* — By looking across the lifecycle of the proceedings, one can determine when courts appoint judicial adjuncts and who they typically appoint first. Table 3 below shows the average time to each appointment, the number of proceedings with that many appointments, and the type of appointment made.

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135. In the ninety-two proceedings, seventy-four magistrate judges were referenced on the docket, but only fifty-three appeared to work on the MDL proceeding—by entering orders or being assigned specific tasks, for instance. We excluded those magistrate judges assigned to the proceeding who did not appear to manage any tasks (signing orders, holding hearings, managing discovery, etc.).

Table 3: Judicial Adjunct Appointments by Type

Appointment Number	Magistrate	Special Master	Mediator	Settlement/Accounting	Other	Total	Average Days to Appointment
First	38	16	6	12	0	72 <sup>136</sup>	308
Second	10	14	10	9	1	44	768
Third	3	4	6	15	2	30	893
Fourth	5	9	3	7	0	24	1183
Fifth	1	4	3	6	3	17	1176
Sixth	1	2	1	8	1	13	1236
Seventh	0	3	0	6	0	9	1293
Eighth	0	3	0	3	1	7	1404
Ninth	0	3	0	2	1	6	1410
Tenth	0	1	0	2	0	3	2073
Eleventh	0	0	0	3	0	3	2076
Twelfth	0	0	0	2	0	2	2223
Thirteenth	1	0	0	1	0	2	2448
Fourteenth	0	0	0	1	0	1	4213
<b>Total:</b>	59	59	29	77	9	233	872 <sup>137</sup>

Table 3 demonstrates that courts overwhelmingly assign magistrate judges first. Many courts do so shortly after the Panel centralizes the proceeding in their district, and some transferee judges actively refer MDL matters to magistrates.<sup>138</sup> Initial appointments occur early in the proceeding's life—on average, less than a year after centralization—a statistic driven largely by appointing magistrate judges upon arrival. The broad swath of pretrial powers that judges may designate to magistrates under § 636 overlaps neatly with transferee judges' authority under the Multidistrict Litigation Act, which Congress also passed in 1968: Both stat-

136. The total for this row is lower than the number of proceedings with at least one adjunct appointed because one appointment did not have a date on the docket.

137. This is a weighted average of the days to appointment. We used the weighted average because so few proceedings had more than a handful of adjuncts appointed.

138. Some districts pair magistrates with district judges such that their appointment is automatic. See *infra* section IV.B.

utes afford substantial discretion over pretrial matters but limit trial authority.<sup>139</sup>

When Professor Abbe Gluck interviewed MDL judges, however, some stated a preference for working with special masters.<sup>140</sup> That helps to explain the substantial number of appointments in the other categories. While some courts turn to special masters, mediators, and settlement/accounting adjuncts early on in the proceedings, others often wait until later to designate special masters and settlement/accounting adjuncts.<sup>141</sup> As the clusters around average days to the appointment depict, judges frequently employ special masters and settlement/accounting adjuncts together, in part to assist with administering the settlement, which is discussed further below.

Looking solely at the number of appointments indicates that judges designated special masters and magistrates at roughly the same rate, with both special masters and magistrates occupying 25% of the judicial-adjunct positions. But that distorts the picture a little, for when judges turned to special masters, they often appointed more than one in the same proceeding. Examining the count as a percentage of the number of proceedings in our dataset shows that judges in forty-two of the ninety-two proceedings appointed magistrate judges (45.6%), whereas judges in only thirty-one of ninety-two proceedings appointed special masters (33.6%). These results are thus roughly consistent with a previous study, which found that in all MDLs closed from 2011 to 2012, judges appointed magistrate judges in 54% and special masters in 20%.<sup>142</sup> There did not appear to be a substantial difference in how the proceedings concluded when judges used one versus the other, as Table 4 below demonstrates. Judges do rely heavily on special masters in aggregate settlements, however.

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139. See 28 U.S.C. §§ 636(b), 1407(a) (2018). For an excellent history of the MDL statute, see generally Andrew D. Bradt, “A Radical Proposal”: The Multidistrict Litigation Act of 1968, 165 U. Pa. L. Rev. 831 (2017) (analyzing the origins of MDL using legislative history); Andrew D. Bradt, Something Less and Something More: MDL’s Roots as a Class Action Alternative, 165 U. Pa. L. Rev. 1711 (2017) (exploring MDL’s origin story through two influential elements of the drafting process).

140. See Abbe R. Gluck, Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure, 165 U. Pa. L. Rev. 1669, 1693–94 (2017); see also Fed. R. Civ. P. 53(f)(3); Philip M. Pro, United States Magistrate Judges: Present but Unaccounted for, 16 Nev. L.J. 783, 807 (2016) (“Why should magistrate judges get all the good civil cases?”).

141. *Supra* Table 3.

142. Hanks, *supra* note 19, at 37.

Table 4: Magistrates Versus Special Masters by Proceeding Outcome

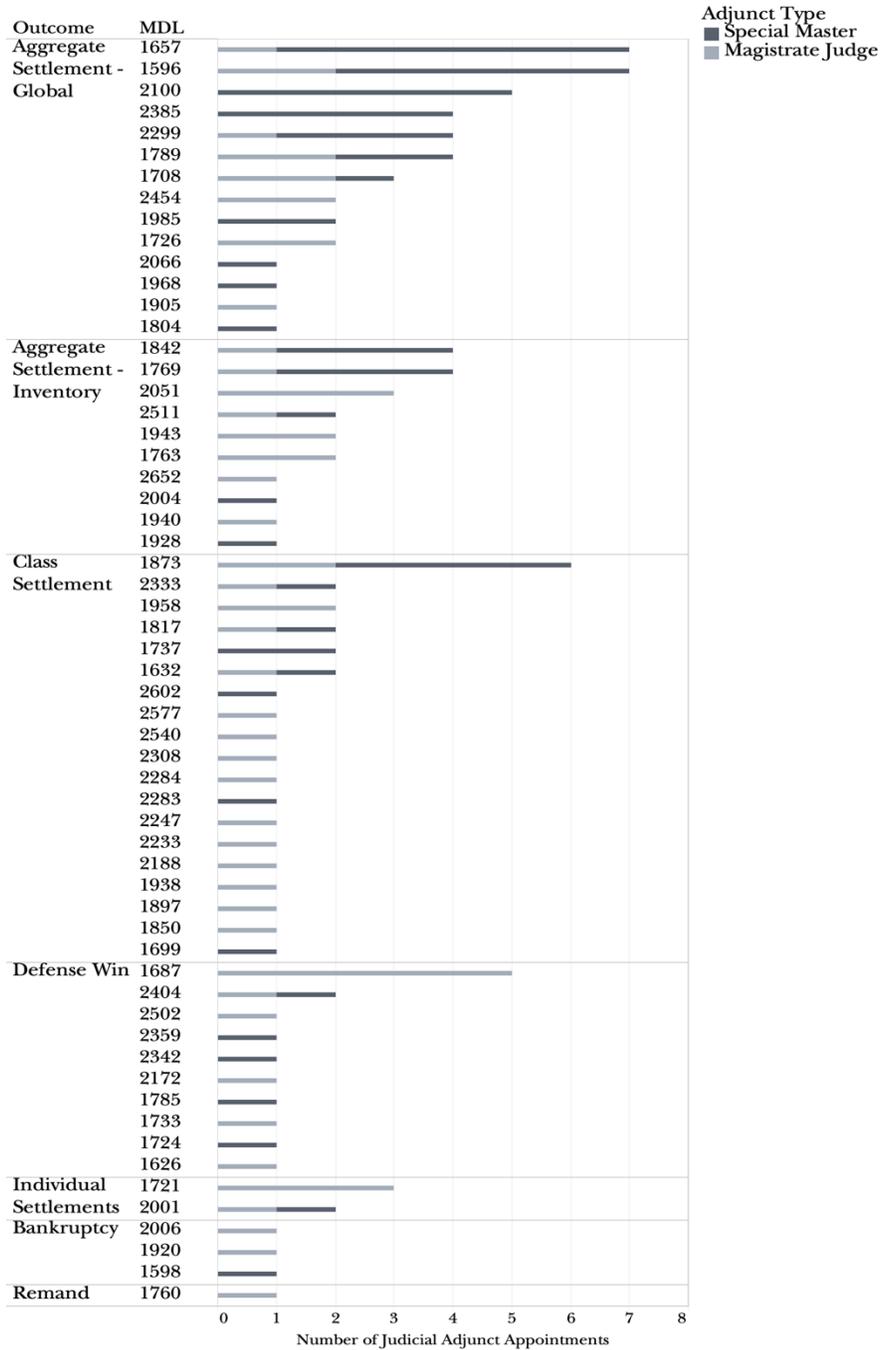
Proceeding Outcome	Magistrate	Special Master
Aggregate Settlement	25	40
Class Settlement	17	12
Defense win	10	5
Individual Settlements	4	1
Bankruptcy	2	1
Remand	1	0
<b>Total:</b>	59	59

Of the fifty-nine proceedings that employed either a special master or a magistrate, fourteen used both (23.7%). By highlighting magistrate appointments in light grey and special master appointments in dark grey, Figure 4 below illustrates which proceedings used magistrates, special masters, or both, as well as how many of each appeared in the proceeding.<sup>143</sup> When judges appointed a special master, they sometimes appointed more than one, thus raising the special master count within the dataset. That judges in forty-two proceedings appointed magistrate judges and did so more often than special masters is not surprising given that magistrates are a readily available resource, have substantial expertise in resolving cases, and impose no added cost on the parties.

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143. Readers may access a larger, interactive version at: [https://public.tableau.com/views/Figure4MagistrateVersusSpecialMastersbyOutcomeandMDLNumber/Mag\\_v\\_SM?:language=en&:display\\_count=y&publish=yes&:origin=viz\\_share\\_link](https://public.tableau.com/views/Figure4MagistrateVersusSpecialMastersbyOutcomeandMDLNumber/Mag_v_SM?:language=en&:display_count=y&publish=yes&:origin=viz_share_link).

Figure 4: Magistrate Versus Special Masters, by Outcome and MDL Number



2. *Mediators.* — In addition to magistrate judges and special masters, judges appointed mediators in twenty-one proceedings, and more than one mediator appeared on the docket in six proceedings. The mediators within our dataset often come from private dispute-resolution groups such as JAMS<sup>144</sup> and some names were already quite familiar from the special-master roster. When parties mediate, they engage in private dispute resolution. Thus, we were able to decipher the least about this group.<sup>145</sup>

As frequent special master and mediator Ken Feinberg explained, a mediator's role differs depending upon whether mediation is court-initiated or party-initiated. When the court appoints a mediator, "the mediator acts as a type of quasi-judicial official and enjoys the benefit of important leverage associated with such court sponsorship."<sup>146</sup> "[T]he entire process has the imprimatur and encouragement of the court," Feinberg notes.<sup>147</sup> This gives mediators more power but may likewise prompt parties to push back. Party-initiated mediation, on the other hand, is "marginally better and more likely to succeed than one involving the court," according to Feinberg.<sup>148</sup> Parties have a "stake in the venture," so mediation often leads "to a more satisfactory—if not quicker—consensus."<sup>149</sup> The distinction between a court-appointed and party-appointed mediator might likewise affect a mediator's cost since courts sometimes offer free or low-cost mediation services.<sup>150</sup>

Because so little information appeared on the dockets and in court orders about mediation, it was difficult to tell which mediators were court-initiated versus party-initiated. From the docket entries and what few court orders we could find, it appeared that parties suggested mediators in nine proceedings and courts suggested mediators in four proceedings, but we could not gather enough data on the remaining proceedings to indicate one or the other. Given that parties must pay for the costs of private mediation, the absence of information about initiation and cost is concerning.

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144. JAMS was formerly an acronym for Judicial Arbitration and Mediation Services, Inc. See The 'JAMS' Name, JAMS, <https://www.jamsadr.com/about-the-jams-name> [<https://perma.cc/TC3G-KVCS>] (last visited Sept. 2, 2020).

145. There is, of course, a broad pre-existing literature on the topic. E.g., Francis E. McGovern, Mediation of the Snake River Basin Adjudication, 42 Idaho L. Rev. 547, 550 (2006) (describing mediation strategy).

146. Kenneth R. Feinberg, Reporting from the Front Line—One Mediator's Experience with Mass Torts, 31 Loy. L.A. L. Rev. 359, 362 (1998) [hereinafter Feinberg, Reporting from the Front Line].

147. *Id.* Others caution that if the mediator or master "is effective because of leverage that comes from behind the scenes contact between the master and judge, serious questions of ethics and policy are presented." Silberman, *supra* note 29, at 2159.

148. Feinberg, Reporting from the Front Line, *supra* note 146, at 362.

149. *Id.* at 363.

150. See generally Roselle L. Wissler, Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 Ohio St. J. Disp. Resol. 641, 644–45 (2002).

3. *Settlement/Accounting*. — The settlement/accounting category comprised the largest segment of judicial adjuncts in the dataset.<sup>151</sup> Adjuncts' identities ranged from banks who held settlement funds, to accountants who kept track of common-benefit fees for plaintiffs' attorneys who lead the proceeding, to claims administrators, lien resolution administrators, and trustees.<sup>152</sup> Each comes from the private sector and appointing one is thus likely to increase litigation costs.<sup>153</sup> Because their work occurs principally in administering plaintiffs' settlement proceeds and plaintiffs' attorneys common-benefit fees, those costs tend not to be split evenly among the parties.<sup>154</sup> Given the frequency with which courts appoint these adjuncts, costs are especially important.<sup>155</sup> Table 5 shows this category's breakdown by type.

Table 5: Settlement/Accounting Adjuncts by Type

Settlement/Accounting Adjunct	Number of Appointments
Claims Administrator	27
Certified Public Accountants	15
Bank	15
Escrow Agent	11
Lien Resolution Administrator	4
Common Benefit Fund Administrator	2
Auditor	2
Trustee	1

To avoid the ethical conundrums inherent in divvying up settlement proceeds among their clients, lawyers ask judges to designate adjuncts like *claims/fund administrators*, *escrow agents*, and *trustees*.<sup>156</sup> On one hand, this avoids importing obvious bias and favoritism into the allocation process.<sup>157</sup>

151. Supra Table 2.

152. See, e.g., infra Table 16 & Table 17.

153. See infra Table 16 & Table 17.

154. See infra Figure 12.

155. See infra section III.B for an exploration of costs.

156. Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 *Tex. L. Rev.* 1165, 1169–70 (2020). But as Professor Lynn Baker points out, “To the extent that the third party is retained by plaintiffs’ counsel to perform this task on behalf of the covered clients, plaintiffs’ counsel arguably has simply delegated the allocation problem.” *Id.*

157. For example, lawyers might allocate more to their direct clients and less to referred clients to increase their attorneys’ fees. See *Huber v. Taylor*, 469 F.3d 67, 70–71 (3d Cir. 2006); Paul H. Edelman, Richard A. Nagareda & Charles Silver, *The Allocation Problem in Multiple-Claimant Representations*, 14 *Sup. Ct. Econ. Rev.* 95, 99–100 (2006); see also John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent to Give Away Their Clients’ Money*, 84 *Va. L. Rev.* 1541, 1544–50 (1998).

On the other, it means that clients must pay—as a separate cost—for a service that the attorney’s contingent fee would otherwise cover and risks making the judicial adjunct financially beholden to the attorney who appointed them.<sup>158</sup>

When defendants settle personal injury claims, they care little about these allocation questions, but they do want to ensure that they will not incur penalties for failing to resolve healthcare liens from private insurance companies or Medicare, for instance.<sup>159</sup> Consequently, most settlement agreements require plaintiffs to indemnify defendants for those statutory liens.<sup>160</sup> As Lynn Baker and Charles Silver have explained, because of the complexity and time it takes to resolve liens, “an occupation known as a *Lien Resolution Administrator (LRA)* now exists.”<sup>161</sup>

Without such a service, however, the responsibility to handle liens once again falls to plaintiffs’ lawyers. Ethically, attorneys cannot charge clients extra for this service unless: (1) their retainer agreement permits it, (2) a valid lien against a particular client exists, (3) the total of both the lien-resolution fee and the client-paid lien amount is less than the original lien amount (meaning that the client benefits), and (4) the client’s charge is the actual amount the lien-resolution service cost (meaning that the attorney can’t make money off of the cost or charge interest).<sup>162</sup> Paying these costs out of the gross settlement proceeds violates these requirements because clients who have no liens share in the expense.

Judges tend to appoint *certified public accountants (CPAs)* and *auditors* at one of two points: at the beginning, where they keep track of the money that plaintiffs’ attorneys front for joint litigation costs, or at the end, where they audit lead attorneys’ billable hours and expenses and divvy up common-benefit fees among them.<sup>163</sup> Here’s how this process works: Outside of class actions where judges award class counsel the entirety of their fee, plaintiffs hire individual lawyers.<sup>164</sup> In nonclass MDLs, judges then select

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(arguing that conflicts of interest are worse at the allocation stage than during settlement negotiations).

158. See *infra* Part IV.C.1.

159. Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 *Fordham L. Rev.* 1833, 1864–65 (2011).

160. *Id.* at 1860–61.

161. *Id.* at 1861 (emphasis added).

162. *Id.* at 1862 n.116 (citing a consensus of state ethics opinions).

163. *Infra* Figure 10.

164. See Mark Fainaru-Wada & Steve Fainaru, *Concerns over Lawyer Pay in NFL Deal*, *ESPN* (Dec. 16, 2013), [https://www.espn.com/espn/otl/story/\\_/id/10146287/nfl-settlement-awaits-preliminary-approval-concern-arises-attorneys-double-billing-plaintiffs](https://www.espn.com/espn/otl/story/_/id/10146287/nfl-settlement-awaits-preliminary-approval-concern-arises-attorneys-double-billing-plaintiffs) [<https://perma.cc/2XKJ-D5J4>] (describing how many NFL players faced the possibility of paying part of their settlement awards to their individual counsel). There are exceptions, of course. The NFL Concussion litigation, for instance, was certified as a class but most players had individual counsel as well. *Id.*

lead attorneys from among that group.<sup>165</sup> Those selected must pay for expenses like expert witnesses, special masters, travel, and discovery costs.<sup>166</sup> Sometimes leaders ask the court to appoint a CPA or bank (or even a special master) early in the proceeding to keep track of their funds, spot billing outliers early on, ensure compliance with their joint venture agreement, and invest the money until they spend it. As cases settle, if lead attorneys' work benefits all plaintiffs as opposed to just their own clients, judges then award them a common-benefit fee that often comes out of the plaintiffs' gross settlement award.<sup>167</sup> As one might imagine, skirmishes can arise among leaders over who gets what, so they hire a special master, CPA, or auditor to decide.<sup>168</sup>

Court-appointed *banks* in our dataset either held common-benefit funds or settlement money. Their duties ranged from establishing noninterest-bearing accounts and disbursing funds to holding, managing, investing, and reinvesting settlement funds. When banks appeared alongside trustees, courts charged them with administering and investing funds in accordance with the trust agreements.

4. *Other*. — The “other” category includes a hodgepodge of only nine adjuncts that did not fit neatly under one of our previous labels: data consultants, medical experts, court appointed counsel, external review specialists, and ethics advisors. Their highly-specialized duties ranged from providing special masters with data management services to advising the parties on mass-tort ethics. Relatively few proceedings included these adjuncts. We note both the presence and the types of adjuncts in this group to permit scholars to extend our work in the future.

### C. *Outsourced Duties*

How do the types of adjuncts map onto the duties they handle within MDL proceedings? Although some of the category titles like settlement/

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165. Elizabeth Chamblee Burch & Margaret S. Williams, Repeat Players in Multidistrict Litigation: The Social Network, 102 Cornell L. Rev. 1445, 1460–61 (2017). Orders differ as to how exactly this all occurs, but typically in nonclass MDLs judges deduct common-benefit fees from the individually retained attorney's contingent fee and costs from the client's portion of a settlement award. See, e.g., Second Amended Case Management Order No. 9 Common Benefit Order at 5, In re Ortho Evra Prods. Liab. Litig., No. 1:06-cv-40000-DAK (N.D. Ohio Sept. 19, 2006) (“One and one-half percent (1 ½%) shall be deemed fees to be subtracted from the attorneys' fees portions of individual fee contracts, and one and one-half percent (1 ½%) shall be deemed costs to be subtracted from the client portion of individual fee contracts.”).

166. E.g., Case Management Order No. 12 on Plaintiffs' Common Benefit Time & Expenses Submission at 4–5, In re Fosamax Prods. Liab. Litig., No. 1:06-MD-1789 (S.D.N.Y. Sept. 18, 2007).

167. These percentages tend to range from 4–15%. Burch & Williams, *supra* note 165, at 1510 tbl.8.

168. See, e.g., Amanda Bronstad, Plaintiffs Firm Takes Growing Fee Spat in Mesh Cases to Appeals Court, Law.com (Aug. 12, 2019), <https://www.law.com/2019/08/12/plaintiffs-firm-takes-growing-fee-spat-in-mesh-cases-to-appeals-court> (on file with the *Columbia Law Review*).

accounting or mediator already hint at the adjunct's job, we downloaded and examined each appointment order to catalogue adjuncts' duties into four areas—pretrial, settlement, common-benefit fee, or other. Of course, these categories are not hermetically sealed. We cataloged adjuncts based on the order *initially* appointing them, but oftentimes an adjunct's role evolved over the proceeding's life.<sup>169</sup> Some magistrates and special masters, for example, initially handled pretrial duties but their roles morphed into providing settlement functions without a separate appointment order. When the judge formally appointed the magistrate or special master to a second role like settlement, we coded it accordingly.<sup>170</sup> Table 6 below displays the breakdown of duties by type of adjunct, with the percentage of each row highlighted.

*Pretrial* duties covered a wide range of responsibilities such as hearing motions, mediating, handling discovery disputes, deciding motions to remand to state court, admitting attorneys to the court on a pro hac vice basis, conducting scheduling conferences and settlement discussions, and imposing discovery sanctions. Across all judicial adjuncts, 49.3% (115) handled pretrial matters.

*Settlement* covered an array of settlement-related tasks such as notifying class members, collecting opt-out forms, advising lawyers on ethical issues, administering claims under class or aggregate settlements, retaining and investing settlement money, administering trust agreements, identifying and resolving healthcare liens, creating and maintaining settlement websites and hotlines, and presiding over claimants' allocation disputes.

*Common-benefit fee* duties included managing the common-benefit fund, allocating common-benefit money among plaintiffs' attorneys, holding funds in escrow, and maintaining and auditing plaintiffs' attorneys' billable-hour records.

*Other* contained only two instances: one where the court appointed counsel to represent plaintiffs whose interest conflicted with their own attorneys' interests and one in which the court asked the adjunct to assist the court with administrative, ministerial duties post-settlement.

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169. For more information on methodology, see *infra* Appendix A.

170. Where a judge initially appointed a magistrate or special master to perform pretrial duties and later entered a separate order assigning that person to a different task, it was recorded as two appointments. This rationale is explained more fully in the Appendix's methodology section. *Id.*

Table 6: Judicial Adjunct Duties, Percentage of Row

Adjunct Type	Pretrial	Settlement	Common Benefit Fee	Other
Magistrate Judge	53 (89.8%)	6 (10.2%)	–	–
Mediator	29 (100%)	–	–	–
Special Master	32 (54.2%)	23 (40.0%)	4 (6.8%)	–
Settlement/Accounting	–	52 (67.5%)	25 (32.5%)	–
Other	1 (11.1%)	5 (55.6%)	1 (11.1%)	2 (22.2%)
<b>Total:</b>	115	86	30	2

As Table 6 shows, of the fifty-nine special masters in our dataset, transferee judges initially appointed thirty-two to oversee aspects of pretrial litigation, twenty-three to implement settlements, and four to aid in keeping and allocating common-benefit fees. When special masters conduct pretrial proceedings (matters that magistrate judges often handle), academics have worried that because masters bill by the hour, they may “encourage more elaborate procedures and, in the end, lengthen pre-trial time”<sup>171</sup> or become dependent on the steady paycheck and prolong the proceeding unnecessarily.<sup>172</sup>

It is also interesting to note that several magistrate judges administered settlements, sometimes in the same way that a private special master or claims administrator would. For instance, in litigation over Medtronic’s defibrillators, the magistrate judge presided over the private settlement as the special master, where he used parties’ agreed upon guidelines to set up and administer a claims program that was subject to review by the district court judge.<sup>173</sup> The magistrate judge likewise presided over the private inventory settlements in *Levaquin*, where he alone had the final, binding,

171. Silberman, *Judicial Adjuncts Revisited*, supra note 29, at 2151.

172. See Margaret G. Farrell, *Special Masters*, in *Reference Manual on Scientific Evidence* 614 [hereinafter Farrell, *Special Masters*] (1st ed. 1994); Hanks, supra note 19, at 48. Special masters have nevertheless created a handbook for judges and lawyers that lists sixteen types of appointments that they can perform. Acad. of Ct. Appointed Masters, *Appointing Special Masters and Other Judicial Adjuncts: A Benchbook for Judges and Lawyers* 4–7 (2013), [https://nys-fjc.ca2.uscourts.gov/programs/11-16-15%20-%20Appointing%20Special%20Masters%20and%20Other%20Judicial%20Adjuncts%20\(January%202013%20Edition\).pdf](https://nys-fjc.ca2.uscourts.gov/programs/11-16-15%20-%20Appointing%20Special%20Masters%20and%20Other%20Judicial%20Adjuncts%20(January%202013%20Edition).pdf) [https://perma.cc/JF7W-V5KX].

173. Order for Approval of Allocation & Resolution Process at 1, *In re Medtronic, Inc. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1726 (D. Minn. Jan. 14, 2008).

and non-appealable authority to craft allocation plans, award settlement money, and resolve Medicare and Medicaid liens.<sup>174</sup>

Other times, magistrates and private adjuncts worked side by side in settlements. For example, with the help of ophthalmologist Lance Turkish, whom the transferee judge appointed as an expert under Federal Rule of Evidence 706, the magistrate judge developed and implemented a protocol to allocate private settlement funds to claimants suing Franck's Compounding Lab.<sup>175</sup> And in *Fosamax*, the magistrate judge worked alongside private special master John Feerick, Fordham Law School's former dean.<sup>176</sup> Dean Feerick served as the allocation special master and determined claimants' eligibility and settlement amounts, and the magistrate judge (as the General Special Master) heard appeals and resolved disputes arising from Feerick's decisions.<sup>177</sup> Similarly, the transferee judge appointed the magistrate judge as a special master to work alongside private, assistant special master Patrick Juneau to implement and administer the *Guidant* settlement.<sup>178</sup>

Although magistrates and special masters routinely appear in the same proceedings together, the appointment of other adjuncts co-occurs in noticeable patterns. Table 7 below demonstrates which types of adjuncts tend to appear together and the correlations among appointment types, with statistically significant relationships (at the  $p < 0.05$  level or higher) starred. Assuming the value in the table is starred, the larger the number, the stronger the correlation between the two types of adjuncts. Said differently, the larger the positive coefficient, the more likely the adjuncts are to be appointed together in the same MDL. Looking at these relationships

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174. Order Appointing Magistrate Judge Boylan as Special Settlement Master at 1–2, In re Levaquin Prods. Liab. Litig., No. 08-md-01943 (JRT) (D. Minn. Jan. 15, 2013) (order appointing the magistrate judge as special settlement master).

175. Order at 1, In re Franck's Lab, Inc. Prods. Liab. Litig., No. 2:13-md-02454-KDE-KWR (E.D. La. June 4, 2014). The settlement fund covered Dr. Turkish's charges of \$400 per hour, up to \$40,000. Id. at 3.

176. See Master Settlement Agreement ¶ 60, In re Fosamax Prods. Liab. Litig., No. 1:06-md-01789-JFK-JCF (S.D.N.Y. Mar. 24, 2014) (initially appointing Dean Feerick as special master); John D. Feerick, Fordham Univ. Sch. of L., [https://www.fordham.edu/info/23130/john\\_d\\_feerick](https://www.fordham.edu/info/23130/john_d_feerick) [<https://perma.cc/LGF6-7MX7>] (last visited Sept. 25, 2020) (stating that Feerick is a former dean of Fordham Law School).

177. Order Appointing General Special Master; Allocation Special Master; Mass Tort Settlement Ethics Advisor; Settlement Fund Escrow Agent; & Lien Resolution Administrator, *Fosamax Prods. Liab. Litig.*, No. 1:06-md-01789-JFK-JCF; Master Settlement Agreement, supra note 176, ¶ 60. Note that the magistrate judge was appointed as the general special master after the plaintiffs' steering committee filed a consent motion asking for his appointment. See Plaintiffs' Steering Committee Amended Consent Motion to Appoint: General Special Master; Allocation Special Master; Mass Tort Settlement Ethics Advisor; Settlement Fund Escrow Agent; & Lien Resolution Administrator at 1–2, *Fosamax Prods. Liab. Litig.*, No. 1:06-md-01789-JFK-JCF.

178. Order Appointing Special Master Pursuant to Fed. R. Civ. P. 53 & Appointing Claims Administrator, In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-md-01708-DWF-AJB (D. Minn. Dec. 20, 2007).

illustrates that one appointment tends to beget another, suggesting that appointments might be “contagious.”<sup>179</sup> In other words, when appointing adjuncts becomes the norm, then that behavior can spread, leading the same judge to make more appointments.

Table 7: Correlations by Type of Judicial Adjunct

Adjunct Type	Magistrate	Special Master	Mediator	Settlement/Accounting	Other
Magistrate	1.00	-0.0070	-0.1345	0.0938	0.2593*
Special Master		1.00	0.0506	0.3064*	0.2697*
Mediator			1.00	0.2934*	0.0160
Settlement/Accounting				1.00	0.3763*
Other					1.00

As this Article discusses in more detail shortly, given their related work on settlement and claims administration, it is not unusual that special masters and settlement/accounting adjuncts tend to appear in proceedings together. The relationship between appointing a mediator and a settlement/accounting adjunct, however, is somewhat less clear, though it is possible that mediation leads to settlement. The “other” category of judicial adjuncts correlates with most types, but the small number of technical appointments explains these relationships. Perhaps the most surprising finding from this exercise is the absence of any other relationship between adjuncts. Courts that appoint a magistrate judge, for instance, do not do so at the exclusion of others.

#### D. *Adjuncts’ Origins*

How do all of these actors become court-appointed adjuncts? As section I.B suggests, like most other professions, much of it is about who they know—but who they must know seems to have changed over time. In its study of special masters in 2000, the Federal Judicial Center found that judges proposed 54% of the special masters.<sup>180</sup> Subsequent anecdotal evidence, however, suggests that the trend has shifted.<sup>181</sup> In 2004, for instance, at a conference for special masters, Francis McGovern observed,

179. See generally Nicholas A. Christakis & James H. Fowler, *Connected: The Surprising Power of Our Social Networks and How They Shape Our Lives* 16, 104 (2009) (explaining how contagion flows across social network ties and influences behavior).

180. Willging et al., *supra* note 6, at 27–28; see also Farrell, *The Function and Legitimacy of Special Masters*, *supra* note 94, at 275 (“Most often, the initial suggestion regarding the need for a special master comes from the judge, and not the parties.”).

181. Hanks, *supra* note 19, at 70.

“When I started out, it was *judges* who found you. We are now seeing much more in terms of attorney-initiated appointments.”<sup>182</sup> Similarly, in interviewing judges about using special masters, one study reported that the parties “were often directly involved in making suggestions for potential masters.”<sup>183</sup> Of course, given that many of these discussions may take place behind the scenes, it is not always easy to pinpoint whether the judge proposed appointing an adjunct and the parties simply provided names or whether the parties suggested using an adjunct in the first place.

Bearing that caveat in mind, our findings are consistent with this more recent trend—that parties typically suggest using an adjunct or, as may sometimes have been the case, using a particular adjunct. Overall, parties suggested 50.2% of the adjuncts (primarily the settlement/accounting adjuncts and special masters) and the court selected 33% (primarily by assigning a magistrate judge). We were unable to identify the origin of the adjunct’s nomination in 16.7% of the appointments, principally in the special master and mediator categories.

Table 8 below shows that judges cited seven sources of appointment authority, with party consent as the primary rationale across all appointments. Where the judge cited no authority but the parties proposed the appointment, we coded the basis as the parties’ consent. And where no order appointing a magistrate judge appeared on the docket, but the magistrate was nevertheless active in the proceeding, we coded the authority as 28 U.S.C. § 636.<sup>184</sup> Few orders appointing mediators specified any authority for doing so, and many appointments simply appeared as docket notations without an accompanying order. District courts have, however, each adopted local rules governing alternative dispute resolution.<sup>185</sup> Consequently, where judges did not list any authority to appoint a mediator or cited to a local rule, we coded the authority as “Mediation Rules.”

Consistent with the Federal Judicial Center’s prior study of special masters, none of the orders that were found discussed the court’s legal authority to appoint the adjunct at any length.<sup>186</sup> Rather, courts frequently assumed they had the authority when parties suggested (and consented to) the adjunct and, if the judge cited any authority at all, it was in passing.

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182. 2004 Special Masters Conference: Transcript of Proceedings, 31 Wm. Mitchell L. Rev. 1193, 1255 (2005) (transcribing remarks by Francis McGovern on the future of judicial masters).

183. Hanks, *supra* note 19, at 70; see also Baker, *supra* note 156, at 1181 (“When an allocation Special Master is involved in a private, aggregate settlement, she will sometimes be appointed by a court to serve in that capacity. Importantly, however, such an appointment is sought by the parties; it does not originate with the court.”).

184. Title 28 U.S.C. § 636(a)–(b) (2018) permits judges to designate magistrate judges to conduct pretrial activities and other judicial functions.

185. See DOJ, ADR in the Federal District Courts: District-by-District Summaries (Mar. 2016), <https://www.justice.gov/olp/file/827536/download> [<https://perma.cc/TX3X-2VA3>].

186. See Willging et al., *supra* note 6, at 32–33 (“It is worth noting, however, that none of these orders of appointment contained extended discussion of legal authority. Most, if not all, simply cited an authority in passing.”).

Courts cite positive authority—28 U.S.C. § 636 (magistrate judges) and Federal Rule of Civil Procedure 53 (special masters)—most frequently at the pretrial stage, and rely more heavily on parties’ consent at the settlement stage and to assist with plaintiffs’ attorneys common-benefit fees. It is worth noting, however, that Rule 53(a)(1)(A) likewise allows the court to appoint a special master to “perform duties consented to by the parties,” so party consent likely plays a more substantial role than the numbers indicate. Of course, district judges may also refuse to refer a matter to a special master despite the parties’ consent.<sup>187</sup>

Table 8: Authorities Cited in Orders or Motions to Appoint Judicial Adjuncts

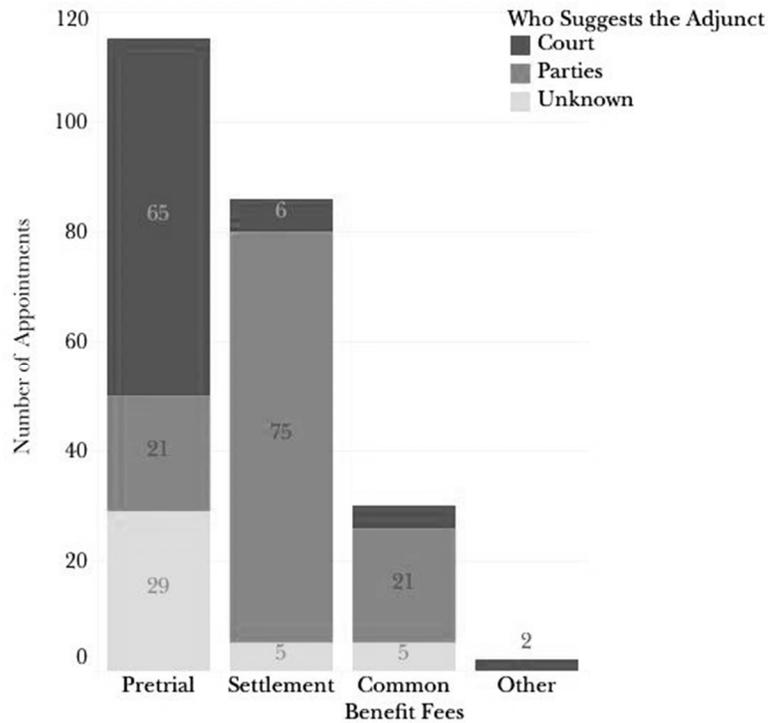
Authority	Number of Appointments	Percentage of Appointments
Parties’ Consent	71	30%
28 U.S.C. § 636	59	25%
Fed. R. Civ. P. 53	37	15%
Mediation Rules	22	9%
Treasury Regulation § 1.468B	10	4%
Fed. R. Civ. P. 53 & Inherent Authority	8	3%
Consent & Inherent Authority	1	0.4%
Fed. R. Evid. 706	1	0.4%
Unspecified	24	10%

Figure 5 illustrates who suggested adjuncts to perform various duties.<sup>188</sup> Courts assigned most magistrate judges and special masters to perform pretrial duties, whereas parties proposed more special master and settlement/accounting adjuncts at the settlement stage. Not surprisingly, lead plaintiffs’ attorneys were the primary drivers behind designating banks, certified public accountants, and escrow agents (all ensconced within the settlement/accounting category) to preside over, administer, and allocate common-benefit fees.

187. See Fed. R. Civ. P. 53 advisory committee’s notes on 2003 Amendment; *Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546, 550 (10th Cir. 1967) (“[T]hough the parties agreed to reference to a Master, we are constrained to suggest that there was no justification for such action.”).

188. Readers may access a larger, in color interactive version at: [https://public.tableau.com/views/JudicialAdjunctsinMultidistrictLitigationFigure5/Adjunctproposedbyappt\\_authority?:language=en&:display\\_count=y&:publish=yes&:origin=viz\\_share\\_link](https://public.tableau.com/views/JudicialAdjunctsinMultidistrictLitigationFigure5/Adjunctproposedbyappt_authority?:language=en&:display_count=y&:publish=yes&:origin=viz_share_link).

Figure 5: Adjunct Suggested by Whom, for Which Duties



One thing in particular stands out about Figure 5: The parties exercise extraordinary control at the settlement stage in both suggesting the adjunct and consenting to their subsequent appointment. This is an important point to keep in mind when considering compensation, as this Article does later, for it is the parties who must bear potentially significant costs associated with non-magistrate, “private” adjuncts.<sup>189</sup>

Note too that “party” control and consent can mean different things across the proceedings. In class action settlements, class counsel has formal authority under Rule 23 to bind absent class members and consent on their behalf.<sup>190</sup> Yet concerns about whether class counsel’s self-interest will trump their ability to faithfully serve absent class members have prompted courts to act as fiduciaries to the class.<sup>191</sup> Thus, it stands to reason that

189. See *infra* section III.B.

190. Fed. R. Civ. P. 23; see also *Taylor v. Sturgell*, 553 U.S. 880, 899–901 (2008) (explaining that a class member who has been adequately represented can be precluded from bringing a later suit).

191. See *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002); *Brummer*, *supra* note 89, at 1060–61 (2004).

judges presiding over certified classes and settlements have an independent obligation to assess the propriety of appointing a private adjunct.<sup>192</sup>

In aggregate settlements, on the other hand, judges appoint lead lawyers as an organizational tool to streamline the proceedings.<sup>193</sup> But unlike class settlements, judges have no formal monitoring authority nor do they typically appoint lead lawyers based on adequate representation.<sup>194</sup> Plaintiffs themselves have no say in which leaders the court selects.<sup>195</sup> And as the Supreme Court's opinion in *Taylor v. Sturgell* made plain: There is no such thing as virtual representation.<sup>196</sup> There are thus significant questions about whether leadership's "consent" on plaintiffs' behalf (particularly in global settlements) can bind nonclients even when judicial orders purport to give them that authority.<sup>197</sup>

With ample money invested in a proceeding, lead plaintiffs' lawyers may feel substantial pressure to settle.<sup>198</sup> Plaintiffs, too, might find settlement desirable. But if leaders think that appointing an adjunct furthers settlement, they may be inclined to do so regardless of cost, knowing that costs will be passed on to the plaintiffs. Moreover, when adjuncts review claims and allocate attorneys' fees, they shoulder some of the work that lawyers would otherwise have to bear. So, one cannot assume that leaders' self-interest overlaps with plaintiffs' self-interest when employing a special master to preside over aggregate settlements.

Finally, out of the 233 appointments, we found only five objections. The lack of objections was unsurprising given that: (1) parties often overtly consent to appointing an adjunct, (2) when appointed, the adjunct may take on an adjudicative role in the proceedings, and (3) if the person is likely to be appointed over the objection, it may be difficult for a party to

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192. As Professor Resnik recognized over thirty years ago, however, judges may have disincentives to perform this role rigorously. "If the parties can agree to something, then that decision can at least be rationalized as in service of the parties' interest," she writes. She thus concludes that "[j]udges and lawyers may become willing to ignore or downplay the problems of self-interest (of attorneys, representatives, special masters, or others) in the eagerness to centralize authority and dispose of the mega-cases that they have created." Judith Resnik, From "Cases" to "Litigation", 54 *Law & Contemp. Probs.* 5, 60 (1991) [hereinafter Resnik, From Cases to Litigation].

193. See, e.g., David M. Jaros & Adam S. Zimmerman, Judging Aggregate Settlement, 94 *Wash. U. L. Rev.* 545, 576 (2017) (explaining that judges can appoint "lead lawyers" in aggregate settlements for coordination purposes).

194. See Elizabeth Chamblee Burch, *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation* 94–96 (2019) [hereinafter Burch, *Mass Tort Deals*] ("Some judges . . . take measures to ensure that leaders will properly represent potentially warring factions.").

195. Elizabeth Chamblee Burch, Judging Multidistrict Litigation, 90 *N.Y.U. L. Rev.* 71, 88 (2015) [hereinafter Burch, *Judging Multidistrict Litigation*].

196. See 553 U.S. 880, 901 (2008).

197. In instances where the aggregate settlement was an inventory settlement, where the defendant bargained with each law firm to settle all of its clients' cases, and the judicial adjunct was categorized as settlement/accounting, then the plaintiff's lawyer would likely play a more direct role in consenting on the plaintiff's behalf.

198. See Burch, *Mass Tort Deals*, supra note 194, at 96–98.

say no.<sup>199</sup> As one magistrate judge we interviewed noted, “[L]awyers are in a tough position; they can’t object meaningfully to special masters.”<sup>200</sup> Granted, it is also possible that informal opposition occurred in a pretrial conference or proceeding and would therefore not appear on the docket sheet.

### III. AN EMPIRICAL INVESTIGATION INTO JUDICIAL ADJUNCTS’ IMPACT ON MDL

Now that we have a better idea of who judges designate to perform what tasks, we can do more than just scratch the surface. Section III.A explores the following questions: First, what drives courts to entrust their power to others? Is it the sheer size and complexity of the multidistrict proceeding, or are cultural practices at work? As it turns out, both factors play a role, with some surprising results. Second, does the way that a proceeding ends affect how courts use adjuncts? Yes. More adjuncts appear when proceedings conclude with aggregate settlements, suggesting (at least on this metric) that it may cost more to put money into plaintiffs’ hands than class members’ hands. Third, and perhaps most critically, how does appointing an adjunct affect efficiency? Are special masters’ advocates correct in asserting that they reduce delay? The analysis in section III.A suggests not.

If litigation costs in terms of time are high, what about the actual dollars adjuncts charge? Section III.B attempts to round out this cost-benefit calculus by identifying those monetary costs. Yet, outside of magistrates’ public salaries, judges and parties disclosed precious little information on private adjuncts’ compensation. The total payments found sometimes ranged in the millions for a single adjunct.<sup>201</sup> And across all private appointments, plaintiffs alone bore the costs for 54% of those adjuncts, raising questions about how private adjunct appointments affect plaintiffs’ bottom line.<sup>202</sup>

#### A. *Statistically Assessing the Why, When, and Effect of Outsourcing*

1. *Proceeding Size and District Culture.* — The literature suggests that the larger the proceeding, the more likely judges are to need help managing it.<sup>203</sup> Considering the relationship between the number of actions filed in the proceeding and the number and type of adjunct appointments

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199. See Silberman, *Judicial Adjuncts Revisited*, supra note 29, at 2159 (“[T]he danger is that the ‘consent’ is not always so voluntarily forthcoming.”).

200. Interviews, supra note 48.

201. See infra Table 16.

202. See infra Figure 12.

203. In considering a proceeding’s size, there is an important caveat: In products liabilities with personal injuries, reported actions likely undercount the true number of actions affected by the MDL. See supra note 127. Unfortunately, systematic data is not available to fill those knowledge gaps.

shows that this is true: Overall, the correlation between total actions and total adjuncts is 0.6148, and is statistically significant at the  $p < 0.001$  level. Put simply, as the number of actions increases, so too does the likelihood that judges will appoint a judicial adjunct.

If courts rely more on judicial adjuncts in proceedings with more actions, which adjuncts do they use? Larger proceedings are associated with more appointments of all types, particularly special masters and settlement/accounting adjuncts like claims administrators. But the number of actions is not associated with whether the court appoints a magistrate or mediator in the proceeding. Table 9 shows the correlations between actions and the number of appointments of each type. For the statistically significant relationships in the second column (shown by the asterisk), the higher the value, the more likely the adjunct is to be appointed as the number of actions rise. Relatedly, the third column shows the relationship between the number of actions and the number of adjuncts of each type, with higher numbers of actions associated with higher numbers of adjuncts, especially special masters.

Table 9: Correlations Between Number of Actions and Appointment of Judicial Adjuncts

Adjunct Type	Any Appointment	Number of Appointments
Magistrate	0.1208	0.0652
Special Master	0.3734*	0.7540*
Mediator	-0.0256	-0.0557
Settlement/Accounting	0.2872*	0.4736*
Other	0.2385*	0.3579*

How judges use adjuncts may differ as a matter of court culture as well as by the size of the proceeding. Prior studies suggested that districts' culture and norms varied significantly: Those with standing orders that routinely refer pretrial matters to magistrate judges were, not surprisingly, more likely to use magistrate judges to handle MDLs than districts without standing orders.<sup>204</sup> Likewise, districts using a "team approach to case management" where magistrates and district judges worked side by side were also more likely to prefer magistrate judges over special masters.<sup>205</sup> Both approaches would affect the number of adjunct appointments in those districts.

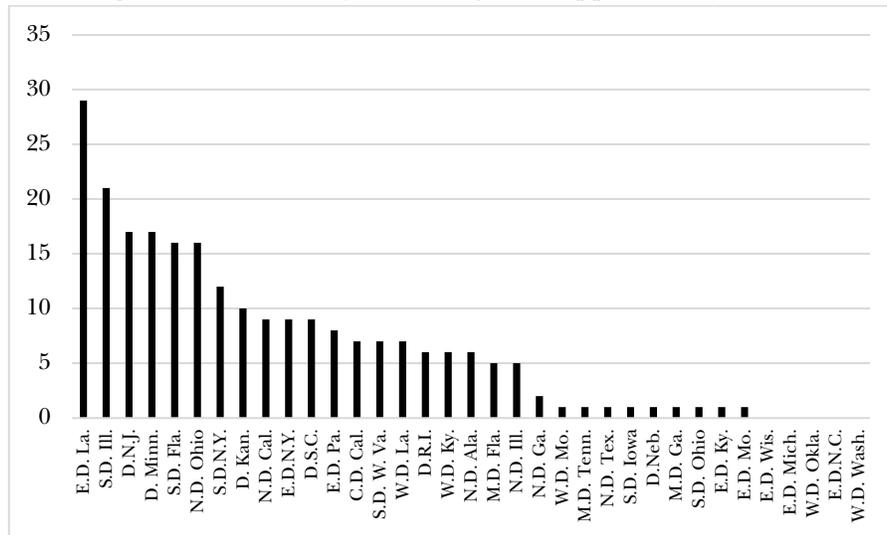
As Table 1 shows, the Panel tends to select certain districts to handle mass-tort proceedings with greater frequency than others. If these courts

204. Hanks, *supra* note 19, at 68; Pro, *supra* note 140, at 807–09.

205. Hanks, *supra* note 19, at 68.

have standing orders for referral, we may see more adjuncts appointed. We examined the number of judicial adjuncts appointed across the districts, as Figure 6 illustrates, beginning with the district appointing the most judicial adjuncts and ending with those appointing the least.

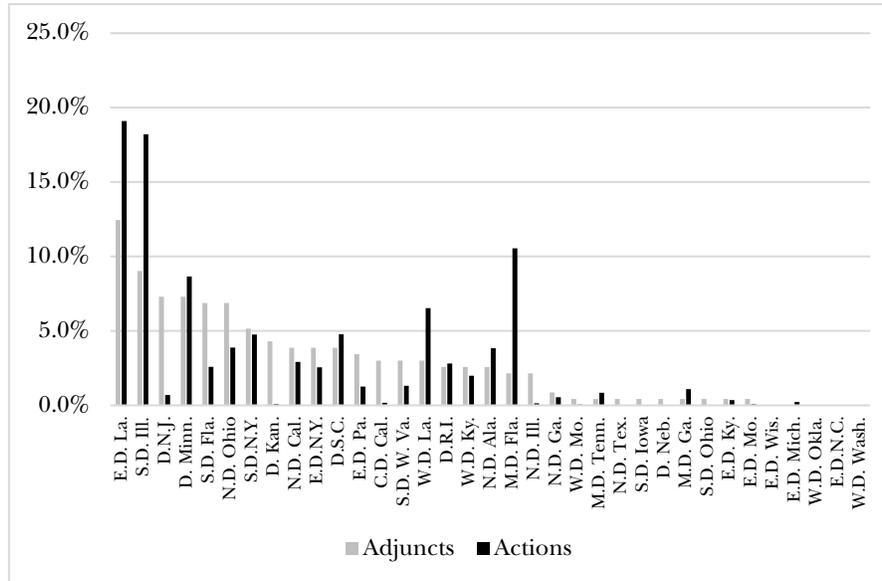
Figure 6: Number of Judicial Adjuncts Appointed by District



As expected, some districts appoint judicial adjuncts more frequently than others. Districts with more proceedings have more opportunity to appoint adjuncts, and some, such as New Jersey and the Eastern District of Louisiana, rely heavily on magistrate judges. Of course, districts with larger proceedings may have more need for adjuncts, so that is taken into consideration as well.

To see whether the MDL caseload affected a district's adjunct use, adjuncts and actions are plotted in the same figure, still sorted by districts with the most adjunct appointments. Because the scales for the two variables are so different, however, the appointment of adjuncts and actions are examined as a percentage of the total. Figure 7 shows the surprising lack of a relationship (at least in some districts) between a district's percentage of adjunct appointments and its percentage of the MDL caseload in our data.

Figure 7: Percentage of Judicial Adjuncts and MDL Actions, by District



The districts with the heaviest MDL caseloads (the percentage of actions is shown in darker grey) are not necessarily those that appoint the most judicial adjuncts. Several districts, including the Northern District of Ohio, the District of New Jersey, the Southern District of Florida, the District of Kansas, the Central District of California, and the Northern District of Illinois appoint a greater share of judicial adjuncts than their share of the MDL caseload. Not only are some districts appointing more adjuncts than would be expected based on MDL caseloads, others, like the Middle District of Florida, do not appoint nearly as many as their caseload might merit. This suggests that the number of adjuncts and MDL actions are not perfectly related, or, said differently, appointing judicial adjuncts is related to district practices in ways that are not explained by the district's MDL caseload.<sup>206</sup>

2. *Proceedings' Complexity.* — As a proceeding becomes more complex, courts may increasingly turn to judicial adjuncts. Some complexity is not easily reduced to categorization. For instance, the difficulty of proving causation is typically contested within the proceeding itself and may be entangled with thorny issues of scientific proof. Nevertheless, we classify complexity along six intertwined dimensions.

First, as noted above, we included the number of reported actions in a proceeding, assuming more actions means increased complexity. Second, using court dockets and examining the complaints within the pro-

206. It is also possible that a district's overall civil and criminal caseload would affect whether a court can devote a magistrate judge to an MDL matter.

ceedings,<sup>207</sup> we determined whether a proceeding involved a single event or multiple events and found that all but one of our proceedings (*In re Cessna 208 Series Aircraft Products Liability Litigation*) involved multiple events.<sup>208</sup> Third and fourth, we documented whether the complaints included allegations against a single defendant (32.6%), multiple related defendants (23.9%), or multiple unrelated defendants (43.4%),<sup>209</sup> as well as whether the litigation included a single product (71.7%) or multiple products (28.2%).<sup>210</sup> Again, one might guess that complexity would increase with additional products and defendants who are not part of the same parent corporation. Fifth, we distinguished between those proceedings that included personal injury claims (55.4%) and those that did not (44.5%). Proceedings seeking recovery for personal injuries are likely to last longer because the lien-resolution process can be particularly time consuming.<sup>211</sup> Yet the line between personal injury and nonpersonal injury was not absolute. Complaints' facts sometimes included statements about bodily harm, but, to facilitate class certification, the counts focused only on economic claims like breach of warranty and consumer laws. Thus, we categorized those as nonpersonal injuries.

These first five measures of complexity are likely to be related to several factors that we consider in more detail including the appointment of an adjunct and the duration of the proceeding. When we looked at the correlations among these factors, however, not all of our expectations played out. The presence of personal injury claims was unrelated to the appointment of any adjunct and to the number of adjuncts. Personal injury claims were, however, related to the number of actions in a proceeding in two ways: (1) Proceedings with personal injury claims averaged more actions than those without such claims (the difference was significant), and (2) proceedings with personal injury claims took longer to close, averaging 2,215 days, while those without averaged 1,155 days.

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207. In proceedings where no complaint was included on the MDL docket, we pulled complaints from several member cases. Where master, consolidated, or class complaints existed, we used those rather than complaints filed in member cases.

208. Judge Jack B. Weinstein, for instance, classifies mass torts into four categories based on somewhat similar factors to those we use here. However, he distinguishes between "clear cause" and "unclear cause," which is typically a heavily contested question in the proceedings we examined. Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* 16–19 (1995).

209. Multiple unrelated defendants might, for instance, span a supply chain as in *Aqua Dots*, which included not just the manufacturer but retailers such as Target and Toys "R" Us. See Consolidated Amended Class Action, *In re Aqua Dots Prods. Liab. Litig.*, 1:08-cv-02364 (N.D. Ill. May 30, 2008), 2008 WL 2913049. We classified defendants based upon the complaints filed on the MDL docket, which were often class or master/consolidated complaints. Note that sometimes docket sheets listed multiple defendants that were not included in these complaints. See *infra* Table 18.

210. Figure 8 below includes more detail on these findings. See *infra* Figure 8. Where a single component product, such as a defective engine or heart valve, was incorporated into multiple product lines, we still coded it as a single product.

211. Interviews, *supra* note 48.

The relationship among defendants, however, was unrelated to any of the other measures we included thus far, including the number of actions in a proceeding. This is somewhat surprising as one would imagine that bringing other parties into the litigation adds to the number of issues, discovery time, and the potential for side disputes to prolong the proceeding. Nevertheless, our consideration of this factor showed mixed results.

Finally, as we explore in detail below, we coded for the proceeding's outcome. Class actions allow for a unified resolution and those without personal injuries may have lower claims-filing rates, meaning that one might expect a quicker resolution compared with aggregate settlements.<sup>212</sup> As Figure 8 illustrates, most personal injury claims that settled did so as aggregate, nonclass settlements.<sup>213</sup> We further classified those aggregate settlements into global settlements (sometimes referred to as "master settlement agreements") and inventory settlements, which settle all or most of a single law firm's clients. Most plaintiffs in proceedings ending in aggregate settlement have their own attorneys, meaning that claims processing may take longer, both because plaintiffs with counsel are more likely to file a claim than an absent class member and because resolving medical liens for personal injury claims can take time.<sup>214</sup> Figure 8 depicts this in days from centralization to closure, with personal injuries highlighted in dark grey and non-personal injury proceedings in light grey. We did not find a significant difference between inventory and global settlements, either in the average number of adjuncts appointed or the length of time it took to conclude the proceeding. Yet, as Figure 11 shows, global settlements with multiple unrelated defendants took slightly longer to resolve, on average, than inventory settlements with the same features.

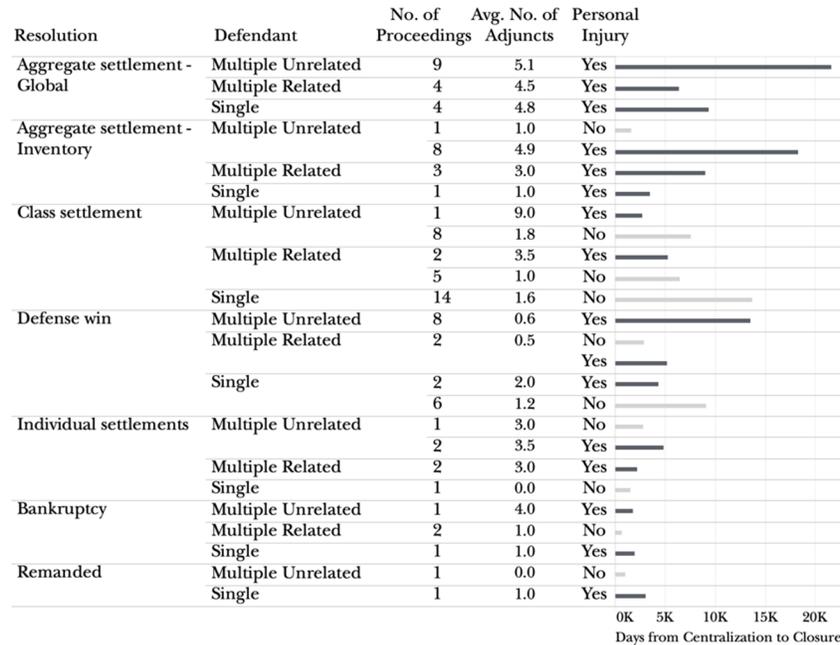
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212. See generally FTC, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns 1*, 11 (2019) (analyzing claims rates from 149 consumer class actions—including product malfunctions—and finding that the overall claims rate was less than 10%).

213. Readers may access a larger, interactive version at: [https://public.tableau.com/views/JudicialAdjunctsinMultidistrictLitigationFigure8/Dashboard2?:language=en&:display\\_count=y&publish=yes&:origin=viz\\_share\\_link](https://public.tableau.com/views/JudicialAdjunctsinMultidistrictLitigationFigure8/Dashboard2?:language=en&:display_count=y&publish=yes&:origin=viz_share_link).

214. See Baker & Silver, *supra* note 159, at 1861.

Figure 8: Complexity Measures, Adjuncts, and Average Time to Closure



3. *Adjunct Appointments and Outcomes.* — As noted, the ninety-two proceedings in our data resulted in six different categories of outcomes: class settlement, aggregate settlement (subclassified into inventory and global deals), defense win, individual settlements, bankruptcy, and remand. While most proceedings concluded in some type of settlement, courts may rely on more judicial adjuncts to administer aggregate settlements.<sup>215</sup> Reaching a settlement does not immediately result in plaintiffs receiving cash awards. Unlike most class settlements, which may have a few overall claims categories demanding differing levels of proof, claimants in aggregate settlements must typically provide detailed medical and pharmacy records that connect their claim to the defendant's product.<sup>216</sup> Accordingly, administering aggregate settlements may entail more work and thus more judicial adjuncts than class settlements.

215. Figure 8 illustrates little difference, on average, between the number of adjuncts or the time to closure in global versus inventory settlements. See *supra* Figure 8.

216. See, e.g., Master Settlement Agreement, at Article IV Claims Valuation, In re Actos (Pioglitazone), No. 6:11-md-02299 (W.D. La. Apr. 28, 2015).

Table 10: Use of Judicial Adjuncts by Outcome, with Percentage of Row

Outcome	Adjunct	No Adjunct	Total Proceedings
Class Settlement	24 (33%)	6 (32%)	30
Aggregate Settlement	28 (38%)	2 (11%)	30
Defense Win	11 (15%)	9 (47%)	20
Individual Settlements	5 (7%)	1 (5%)	6
Bankruptcy	4 (5%)	0 (0%)	4
Remand	1 (1%)	1 (5%)	2
<b>Total:</b>	73	19	92

As Table 10 illustrates, across our outcome categories, there is little difference in appointing a judicial adjunct (regardless of type). Adjuncts appear less frequently in proceedings when the defense wins, likely because the proceeding ended during the pretrial stage. Any settlement outcome often results in designating a judicial adjunct, though there were a few aggregate settlements without a judicial adjunct appointed. One would expect adjuncts to frequently appear in settlements of all types because administering a settlement is part of why transferee judges turn to judicial adjuncts in the first place. Table 11 considers whether the number of adjuncts varies across outcome category, which it does.

Table 11: Adjunct Appointments by Outcome

Total Adjuncts Appointed	Number of Proceedings by Outcome Type					
	Class Settlement	Aggregate Settlement	Defense Win	Individual Settlements	Bankruptcy	Remanded
0	6	2	9	1	0	1
1	10	4	8	2	3	1
2	6	7	1	0	0	0
3	3	2	1	1	0	0
4	3	4	0	0	1	0
5	0	2	1	1	0	0
6	1	2	0	1	0	0
7	0	1	0	0	0	0
8	0	1	0	0	0	0
9	1	2	0	0	0	0
10	0	0	0	0	0	0
11	0	1	0	0	0	0
12	0	0	0	0	0	0
13	0	1	0	0	0	0
14	0	1	0	0	0	0
<b>Total:</b>	30	30	20	6	4	2

As Table 11 shows, judges tend to appoint far more judicial adjuncts when the proceeding ends in an aggregate settlement than when it ends in any other way. One aggregate inventory settlement designated thirteen adjuncts and one global settlement used fourteen. So, while courts often appoint at least one adjunct before a proceeding concludes via a class settlement, they are more likely to appoint multiple adjuncts (again, up to fourteen) when a proceeding ends in an aggregate settlement.

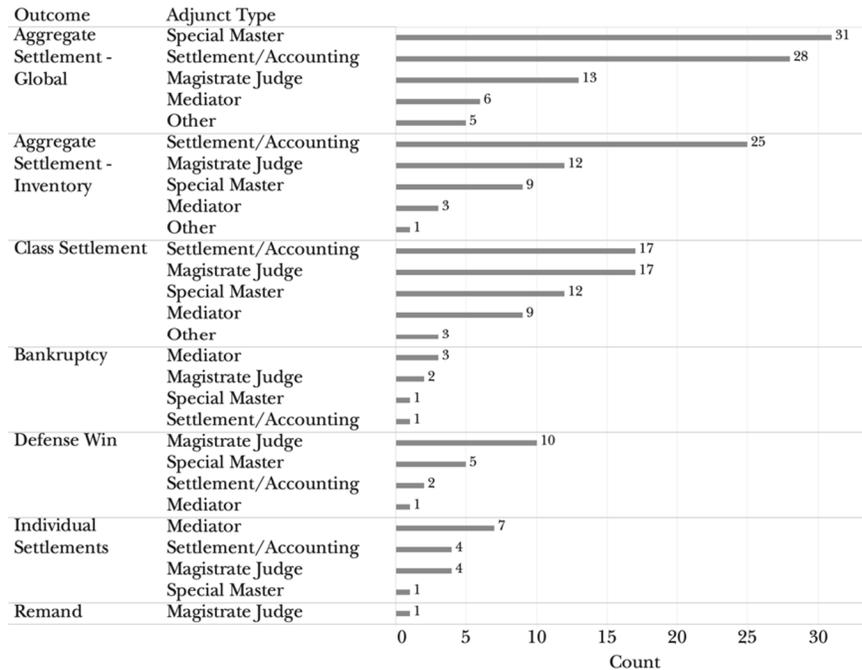
What kind of adjuncts do they appoint? As Figure 9 depicts, courts rely heavily on magistrate judges and mediators in class and individual settlements.<sup>217</sup> Aggregate settlements, on the other hand, include far more special masters and settlement/accounting adjuncts—all of which increase costs, unlike magistrate judges. Thus, one can infer that the cost of adjuncts in proceedings that end in aggregate settlement is likely to be

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217. Readers may access a larger, interactive version at: [https://public.tableau.com/views/JudicialAdjunctsinMultidistrictLitigationFigure9/Mag\\_v\\_SM?:language=en&:display\\_count=y&publish=yes&:origin=viz\\_share\\_link](https://public.tableau.com/views/JudicialAdjunctsinMultidistrictLitigationFigure9/Mag_v_SM?:language=en&:display_count=y&publish=yes&:origin=viz_share_link).

greater (perhaps substantially so) than proceedings that end any other way.

Figure 9: Number and Type of Adjuncts Appointed by Outcome

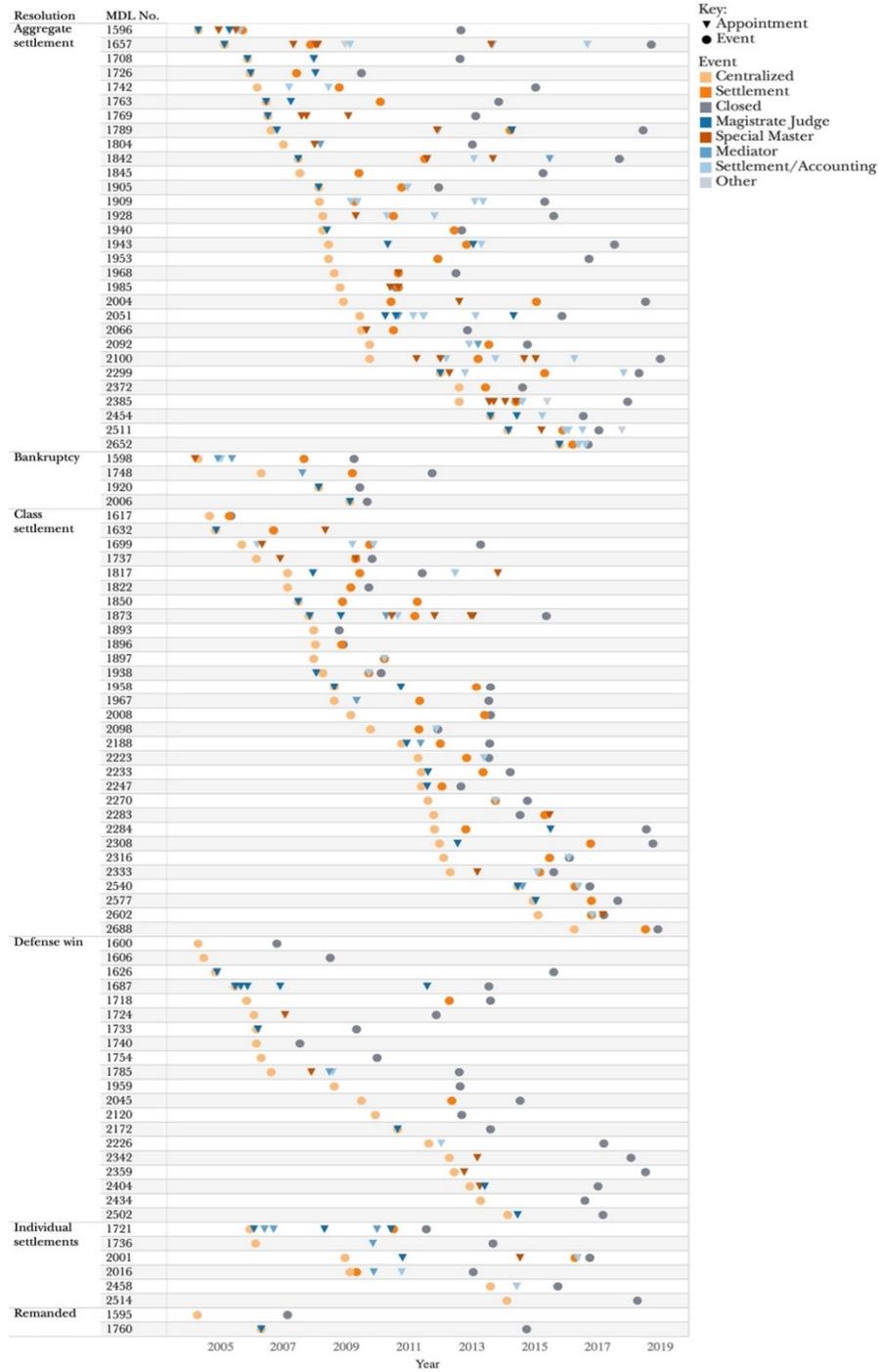


Finally, Figure 10 illustrates when, in the lifecycle of a proceeding, courts appoint adjuncts. A close look at the granular details<sup>218</sup> in Figure 10 allows readers to identify, by outcome then by proceeding number,<sup>219</sup> when the transferee judge appointed which type of adjunct and whether the appointment occurred before or after the first documented settlement. As noted, magistrates tend to be appointed toward the beginning of the proceeding, whereas special masters enter a bit later. Clustering the proceedings by outcome visually illustrates a proceeding's duration and adjunct use in relation to its peers, thereby elucidating the trends that we have previously identified such as the heavier use of adjuncts in aggregate settlements versus lighter use in defense wins.

218. Readers may access a larger, interactive version at: [https://public.tableau.com/views/TimelineofMDLEventsandJudicialAdjunctAppointments/Dashboard1?:display\\_count=y&publish=yes&:origin=viz\\_share\\_link](https://public.tableau.com/views/TimelineofMDLEventsandJudicialAdjunctAppointments/Dashboard1?:display_count=y&publish=yes&:origin=viz_share_link).

219. Note that proceeding names and their corresponding MDL numbers are included below. See *infra* Appendix B.

Figure 10: Timeline of MDL Events and Adjunct Appointments



4. *Proceedings with Adjuncts Last Longer.* — Given that most judges appoint more adjuncts when proceedings settle, we would expect those appointments to relate to how long a proceeding lasts as well. All proceedings ending in settlement take longer to close than those resulting in defense wins. So, to the extent courts use more adjuncts in settlements, we should also see a greater number of appointments in proceedings that last longer, which we do. The relationship between use of judicial adjuncts and the proceeding's duration is a strong, positive linear one: The correlation between adjuncts and duration is 0.48 and is statistically significant at the  $p < 0.001$  level. Of course, a bivariate correlation doesn't tell us what we'd really like to know—whether the judge's appointment of an adjunct caused the proceeding to last longer or if a proceeding's anticipated length and complexity prompted the court to appoint the adjunct in the first place. Nevertheless, this relationship between a proceeding's duration and number of adjuncts is important moving forward.

How appointing an adjunct relates to a proceeding's length may depend on the particular types of adjuncts courts appoint. After all, we now know that judges use special masters and settlement/accounting adjuncts more often in aggregate settlements and that those proceedings tend to last longer. We also know that, of the seventy-three proceedings that included at least one judicial adjunct, judges appointed an average of three adjuncts per proceeding.<sup>220</sup> To figure out whether the proceeding's duration relates to the type of adjunct appointed, we examine whether designating an adjunct of *any* type relates to duration, as well as whether the number of adjuncts of *each type* relate to duration. Table 12 shows the correlations and indicates those that are statistically significant at the  $p < 0.05$  level or higher with an asterisk.

Table 12: Correlations Between Duration and Appointment of Judicial Adjuncts

Adjunct Type	Any Appointment	Number of Appointments
Magistrate	0.1066	0.2304*
Special Master	0.3258*	0.4702*
Mediator	0.1009	0.0703
Settlement/Accounting	0.1985	0.3406*
Other	0.1705	0.2501*

Table 12 demonstrates that appointing a specific type of adjunct does not relate to duration except for special masters, which are correlated with longer proceedings. Likewise, as proceedings last longer, we are more likely to see more than one special master appointed (the same is true for

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220. See *supra* Table 2 and accompanying text.

the numbers of magistrates, settlement/accounting adjuncts, and other adjuncts). The question is how much longer are proceedings taking with the appointment of each type of adjunct. Table 13 shows the difference in a proceeding's average duration for each type of adjunct and for proceedings with and without any adjunct appointed. Put simply, more adjuncts means longer proceedings.

Table 13: Relationships Between Appointments and Duration

Type of Adjunct	Average Days (Number of Proceedings)	
	Appointed	Not Appointed
Special Master*	2,201 (32)	1,510 (60)
Magistrate Judge	1,859 (42)	1,644 (50)
Mediator	1,929 (21)	1,688 (71)
Settlement/Accounting	1,985 (37)	1,579 (55)
Other	2296 (8)	1690 (84)
Any Adjunct*	1,879 (73)	1,218 (19)

As Table 13 shows, while the difference in average proceeding time between those with and without any judicial adjunct is statistically significant (denoted by asterisks), most of the individual types of adjuncts didn't rise to the level of statistical significance.<sup>221</sup> (Settlement/accounting adjuncts fell just outside the bounds of statistical significance.) One relationship did stand out, however: Proceedings with special masters last about 66% longer than those without such appointments, and the difference is statistically significant at conventional levels. Our findings are thus consistent with a prior study's observation that, when comparing proceedings with only special masters to those with only magistrates, "cases that used only a special master took longer to resolve than cases using only a magistrate judge."<sup>222</sup>

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221. For information on the conventional level of significance, see Damodar N. Gujarati, *Basic Econometrics* 134 (4th ed. 2003).

222. Hanks, *supra* note 19, at 62.

Proponents of special masters' use in MDLs suggest that masters can speed a proceeding along "much more efficiently, effectively, and economically," but tend to offer few comparisons and no cost assessments.<sup>223</sup> The ABA's recent call for judges to use special masters routinely in MDLs asserted that they "reduce costs" by heading issues off at the pass and "by swiftly and efficiently disposing of disputes that do arise."<sup>224</sup> It likewise warned that failing to appoint a special master at the outset of the proceeding, "[r]egardless of the reason," "may disserve the goal of securing 'a just, speedy, and inexpensive determination.'"<sup>225</sup>

Our findings thus far suggest otherwise. In practice, appointing special masters "at the outset of the litigation"<sup>226</sup> would mean adding special masters alongside magistrate judges to preside over pretrial duties that magistrates typically handle without additional cost to the litigants. As Table 3 shows, the first appointment is almost always a magistrate. But like having too many cooks in the kitchen, any appointments beyond that first one slow down the proceeding even more. And even though special masters are not *always* the first appointment a court makes, they are often the first or second. So, the ABA's position that routinely appointing a special master will speed proceedings up seems dubious in light of our finding that proceedings with special masters last 66% longer on average. We thus share a concern voiced by past researchers: that private adjuncts may prolong the litigation to stay employed.<sup>227</sup>

Regardless of motive, our finding that proceedings with special masters last 66% longer warrants closer scrutiny. A proceeding's duration is affected both by appointing adjuncts and the number of actions it contains, but what happens when you look at duration while controlling for both complexity and adjuncts simultaneously? To come closer to answering this question, we estimated a duration model. Duration models are a form of regression analysis, allowing researchers to consider the time to a particular event (here, from the adjunct's appointment to closing the proceeding), while also controlling for a number of other factors (number of actions, type of termination, etc.) and allowing us to determine the impact of each.<sup>228</sup>

When we look at the duration of proceedings and control for factors that make proceedings more complex—whether the proceeding ended in

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223. Fellows & Haydock, *supra* note 28, at 1271, 1280.

224. ABA Resolutions, *supra* note 8, at 57.

225. *Id.* at 7 (quoting Fed. R. Civ. P. 1).

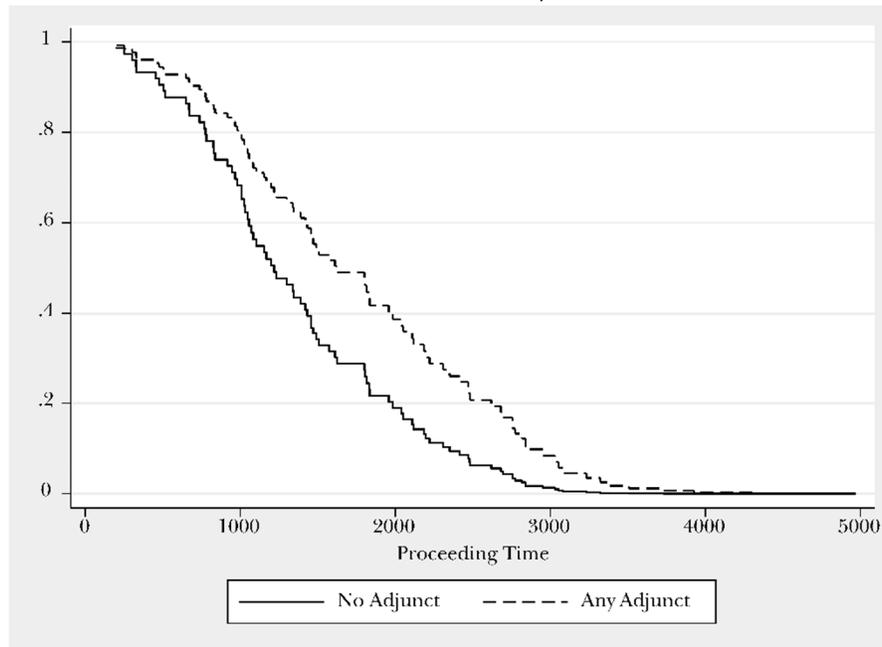
226. *Id.* at 51.

227. Farrell, *Special Masters*, *supra* note 172 at 614; Hanks, *supra* note 19, at 48.

228. We estimated a Cox proportional hazard model with dichotomous variables for settlement (individual or aggregate) and any adjunct, plus the number of actions. We also included a continuous measure of the number of adjuncts appointed. Because the proceedings were all closed, there was no censoring of outcomes in the model. See, e.g., Janet M. Box-Steffensmeier & Bradford S. Jones, *Event History Modeling: A Guide for Social Scientists* 48 (2004) (describing the Cox proportional hazards model).

any kind of settlement (relative to other outcomes), the number of actions involved, personal injury claims, multiple unrelated defendants, and the use of any judicial adjunct—we find a significant effect for the use of judicial adjuncts.<sup>229</sup> How a proceeding ends (the outcome) does not significantly relate to the proceeding duration once we control for other factors, but the number of actions and the use of judicial adjuncts are both associated with longer proceeding times. These results are statistically significant at conventional levels. Figure 11 illustrates proceeding times for those with and without judicial adjuncts, controlling for the number of actions in the proceeding, personal injury claims, multiple unrelated defendants, and the proceeding's outcome.

Figure 11: Probability of Proceeding Survival by Adjunct Appointment, Measured in Days



Even after controlling for all of these other factors, appointing a judicial adjunct makes proceedings last longer than they otherwise would, all else being equal. Although one additional action in a proceeding has almost no effect on how long it lasts, designating any judicial adjunct means the proceeding is 43% less likely to close. In fact, as the number of adjuncts goes up, there is a 12% decrease in the probability of a proceeding closing. While the effects for type of adjunct and the frequency of the

229. Because there are so many districts and so few proceedings in our data, we are unable to test the effect of district practice.

type of adjunct are not significant, there is some preliminary evidence that proceedings with lots of judicial adjuncts tend to last longer.

As section I.A notes, efficiency is but one reason that judges employ adjuncts. Nevertheless, judges should bear in mind that appointing an adjunct does not just affect a proceeding's length; unless the chosen adjunct is a magistrate judge, that decision will affect parties' costs as well. Having considered costs in terms of time, we now turn to actual dollars and who pays.

B. *The Missing Cost in Cost-Benefit Analysis: Judicial Adjuncts' Compensation*

Rule 1 makes it plain that courts should construe all Federal Rules of Civil Procedure—including Rule 53 on special masters—“to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>230</sup> Federal magistrate judges are salaried court employees and make around \$185,000 annually.<sup>231</sup> Public servants' compensation comes from taxpayers and is fixed by statute even when magistrate judges serve as special masters under Rule 53.<sup>232</sup> Like district court judges, magistrates are ensconced in the federal courthouse,<sup>233</sup> which means they have staff, law librarians, and law clerks at their fingertips as well as immediate access to court records and transcripts. Parties pay for costs associated with all other adjuncts.

Many years ago, the Supreme Court recognized that special masters' “compensation should be liberal, but not exorbitant.”<sup>234</sup> “The rights of those who ultimately pay must be carefully protected,” and though judicial salaries “are valuable guides,” higher compensation rates may be necessary.<sup>235</sup> Given this general latitude, appellate courts rarely disturb fees. But the Supreme Court did find that awarding a special master fifteen times the amount of a district judge's salary (currently around \$210,900 annually) and eight times the Justices' own salary (currently around \$258,900) for a year's work abused the court's discretion.<sup>236</sup>

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230. Fed. R. Civ. P. 1.

231. The Federal Judicial Center notes that as of October 1, 1988, magistrates can receive up to 92% of the salary of a district judge. In 2019, district judge salaries were \$210,900, meaning that a magistrate could earn up to \$185,748. Judicial Compensation, U.S. Cts., <https://www.uscourts.gov/judges-judgeships/judicial-compensation> [<https://perma.cc/3K9T-7FCD>]; Judicial Salaries: U.S. Magistrate Judges, Fed. Jud. Ctr., <https://www.fjc.gov/history/judges/judicial-salaries-u.s.-magistrate-judges> [<https://perma.cc/JX6T-8UH8>].

232. 28 U.S.C. § 634 (2018).

233. See Hanks, *supra* note 19, at 47.

234. *Newton v. Consol. Gas Co.*, 259 U.S. 101, 105 (1922).

235. See *id.*; see also Farrell, *The Function and Legitimacy of Special Masters*, *supra* note 94, at 274 (suggesting that judges have looked to the usual hourly rate for private practitioners in the area where they practice).

236. *Newton*, 259 U.S. at 106.

Rule 53 requires courts to “fix the special master’s compensation” either in the appointment order or after judgment.<sup>237</sup> But if the court sets that compensation later, it must notify the parties and give them an opportunity to be heard.<sup>238</sup> No comparable rules govern appointing settlement/accounting adjuncts, which judges typically install at the parties’ request, but which also increase parties’ cost.

1. *Compensation Lacks Transparency.* — Outside of magistrates’ public salaries, we found relatively little information about judicial adjuncts’ compensation. Rule 53’s advisory committee notes direct judges to state the “basis and terms for fixing compensation” “in the order of appointment.”<sup>239</sup> Yet, of the 174 non-magistrate (or “private”) appointments, judges disclosed no payment information for 60%, full information for 25%, partial information (such as hourly rates or payment ceilings) for 11.5%, and affirmatively sealed information for 2.8%. Table 14 shows disclosures by type of adjunct. Courts provided the least compensation information for mediators, followed by settlement/accounting adjuncts and special masters.

Table 14: Compensation Disclosures for Non-Magistrate Judicial Adjuncts, Percentage of Row

Adjunct Type	Undisclosed	Disclosed	Partial Disclosure	Sealed
Mediator	27 (93.1%)	1 (3.4%)	1 (3.4%)	–
Special Master	20 (33.9%)	22 (37.3%)	14 (23.7%)	3 (5%)
Settlement/Accounting	53 (68.8%)	17 (22%)	5 (6.4%)	2 (2.6%)
Other	5 (55.5%)	4 (44.4%)	–	–

As Justice Louis Brandeis famously quipped, “Sunlight is said to be the best of disinfectants . . . .”<sup>240</sup> Any attempt at balancing the costs and benefits of appointing judicial adjuncts necessarily falls short without being able to assess what those costs are. The absence of publicly available compensation data in 62.8% of adjunct appointments is a noteworthy red flag, especially considering the emphasis the ABA places on special masters’ ability to reduce cost and delay in complex litigation and circuit

237. Fed. R. Civ. P. 53(g)(1).

238. Fed. R. Civ. P. 53.

239. Fed. R. Civ. P. 53(h) advisory committee’s note on 2003 Amendment.

240. Louis D. Brandeis, What Publicity Can Do, *Harper’s Wkly.*, Dec. 20, 1913, at 10.

courts' heightened attention to transparency in proceedings that impact public health and safety.<sup>241</sup>

How much must parties pay private adjuncts to perform judicial duties or judicially condoned activities? Framed this way, the question purposely differentiates the sought-after information from alternative dispute resolution like private arbitration, for these judicial adjuncts exist not outside the federal courts but *within* them. Moreover, the missing information that we seek involves neither secret settlements nor company data typically divulged in now-vanishing trials—the two traditional areas in which scholars have traced a decline in transparency.<sup>242</sup> Instead, it concerns something much more fundamental: the price of court adjudication.

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241. See, e.g., *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 934, 939 (6th Cir. 2019) (noting that transparency is important to allow the public to assess judicial decisions); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1178–79, 1181 (6th Cir. 1983) (“[P]ublic access provides a check on courts. Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court.”). Compensation seems to have rarely been disclosed even in the 1990s. Farrell, *The Function and Legitimacy of Special Masters*, *supra* note 94, at 275 (“[I]t is difficult to determine the total cost of many masterships . . .”).

242. See, e.g., Nicholas Pace, *Introduction to Confidentiality, Transparency, and the U.S. Civil Justice System*, at xvii–xviii (Joseph W. Doherty, Robert T. Reville & Laura Zakaras eds., 2012) (discussing how the rising use of private judges and of secret settlements contribute to the lack of transparency in civil litigation); Laurie Kratyk Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 *Notre Dame L. Rev.* 283, 371–401 (1999) (discussing how courts can seal confidential filings and settlement agreements); Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data 2* (RAND Inst. for Civ. Just. Working Paper No. WR-599-ICJ, 2008), [https://www.rand.org/pubs/working\\_papers/WR599.html](https://www.rand.org/pubs/working_papers/WR599.html) (on file with the *Columbia Law Review*) (“[L]ittle information is available to the public about how many class members actually received compensation and to what degree.”).

Table 15: Compensation Disclosures for Private Adjuncts by Resolution

Disclosure	Resolution	Number of Adjuncts
No Disclosure (105 total)	Aggregate Settlement	61
	Class Settlement	27
	Individual Settlement	11
	Bankruptcy	3
	Defense Win	3
Sealed (5 total)	Aggregate Settlement	5
Disclosed (42 total)	Aggregate Settlement	30
	Class Settlement	9
	Bankruptcy	2
	Individual Settlements	1
Partial Disclosure (22 total)	Aggregate Settlements	12
	Class Settlement	5
	Defense Win	5
<b>Total Private Adjuncts:</b>		174

As Table 15 illustrates by extracting the fifty-nine magistrates and focusing on the 174 remaining private adjuncts, transparency is lacking across all outcomes. It is, however, particularly pronounced in aggregate and class action settlements.

Class and aggregate settlements are the primary areas in which principal-agent problems between attorneys and their clients (or class members) are most acute and thus where sunshine on lawyers' spending would be most important. Because all plaintiff-side tort lawyers work on a contingent-fee basis, they get paid only upon winning a judgment or negotiating a settlement, with the latter being far more statistically likely.<sup>243</sup>

In the class context, Rule 23(e) requires judges to ensure that deals are fair, reasonable, and adequate, and class counsel's ethical obligations run to class members as a whole.<sup>244</sup> Moreover, judges award class counsel the entirety of their fee under Rule 23(h).<sup>245</sup> But judges have no formal role in reviewing the terms of aggregate settlements; they award only a portion of attorneys' fees via leadership's common-benefit fees, and lead

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243. Burch, *Mass Tort Deals*, supra note 194, at 20, 224.

244. Fed. R. Civ. P. 23(e).

245. Fed. R. Civ. P. 23(h).

plaintiffs' lawyers' ethical duties to nonclients are less defined.<sup>246</sup> Unlike class settlements where members are bound unless they affirmatively opt out, lawyers in aggregate settlements must convince plaintiffs to dismiss their claims and enter into a settlement program without knowing what exactly they will receive.<sup>247</sup>

Because aggregate settlements are private deals, parties could simply hire special masters and claims administrators on their own without judicial approval.<sup>248</sup> But scholars speculate that having the imprimatur of the courts may help convince plaintiffs to agree to a settlement they might otherwise reject—a result that would jeopardize the deal given the required participation thresholds that many contain.<sup>249</sup> Even though Rule 23(e) has no place here, nonlegally sophisticated plaintiffs may not realize this. In their eyes, judicially appointing an adjunct may (falsely) legitimize the deal.<sup>250</sup>

Moreover, when judges award leaders attorneys' fees based on a percentage of the gross settlement fund and that fund includes administrative costs, those attorneys will receive more. Leaders in neither class nor aggregate settlements have a self-interested reason to keep costs low if settle-

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246. See Burch, *Mass Tort Deals*, *supra* note 194, at 54–62, 96–99, 130–33 (“This status quo is worth emphasizing: absent affirmative consent, judges have no authority to coerce or police private settlements.”).

247. *Id.* at 40–54; Resnik, *From Cases to Litigation*, *supra* note 192, at 49 (“Further, when using MDL in mass torts, its inability to reach unfiled, potential claims becomes a limitation. When seeking to settle mass torts, judges and lawyers have learned that, absent ‘global peace’ (preclusion of all future claims), settlements are hard to achieve.”).

248. See Baker, *supra* note 156, at 1173 (outlining “three general scenarios under which a special master assists with allocating a lump-sum mass tort settlement”). In a global settlement, the plaintiffs’ steering committee might not be able to charge a mediator or settlement master as a common-benefit fee without judicial approval, but the committee could always require participating plaintiffs to consent to the costs of administering the program as part of the price of admission (e.g., consent to settle, consent to the administration fees that settlement entails). See Burch, *Mass Tort Deals*, *supra* note 194, at 62 (discussing how the steering committee includes their common benefit fees in a global settlement’s terms).

249. See Burch & Williams, *supra* note 165, at 1496–516 (finding overall claimant participation requirements between 85 and 100%); Raymond L. Mariani, *The Mass Disaster Mediator: Can One Person Really Serve Two Masters?*, 18 *Disp. Resol. Mag.* 8, 9 (2011) (noting plaintiffs’ confusion over neutrality); Byron G. Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 *Miss. C.L. Rev.* 255, 256–57 (2011) (noting that claimants may be confused about “whether a quasi-public claims fund is like a private fund”). But see Baker, *supra* note 156, at 1181 (contending that the benefits of having a court-appointed special master include claimants seeing it “as more ‘legitimate’ and more ‘fair’ than an allocation determined by plaintiffs’ counsel,” and that “in turn can be expected to result in a higher rate of claimant participation in the settlement and increased claimant satisfaction”).

250. See Burch, *Mass Tort Deals*, *supra* note 194, at 116–19. As communication theorist Marshall McLuhan explained, “The medium is the message,” meaning that the person delivering the message—the judges themselves—have special significance for legitimacy in plaintiffs’ eyes. Marshall McLuhan, *Understanding Media: The Extensions of Man I* (1964).

ment is inevitable.<sup>251</sup> If their retainer agreements allow them to charge plaintiffs interest on those costs—and some charge 12% annually—then private adjuncts may actually become a source of profit for plaintiffs’ attorneys.<sup>252</sup> The longer the proceedings last, the more some attorneys stand to gain from those interest rates. Of course, at some point, attorneys’ desire to recoup fees will conflict with the desire to profit from costs, but the incentive structure does little to inspire confidence in an opaque system.

2. *Disclosed Private Adjuncts’ Fees.* — Although relatively little overall information about private adjuncts’ fees appeared within the dockets, the information that we could obtain showed quite a range: Some adjuncts charged by the hour, while others took a lump sum, often for settlement administration. As Table 16 reveals by proceeding, judicial adjuncts can cost a good bit, but seemingly the costs have not increased over time. In the 2004 *Zyprexa* litigation, for instance, the four special settlement masters (Ken Feinberg and Michael Rozen, of what was then Feinberg Rozen and Cathy Yanni and John Trotter of JAMS) charged a total of \$9,403,293.00 to administer a fund of \$690,000,000.<sup>253</sup> As Table 16 shows, although there are several adjuncts who cost millions of dollars, others cost far less.

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251. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640 (E.D. La. 2010) (awarding \$315,250,000 in common benefit expenses to attorneys); Pretrial Order 51A at 1, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-1657 (E.D. La. Sept. 11, 2013) (awarding additional reimbursement for common benefit expenses to attorneys); Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 *DePaul L. Rev.* 377, 425 (2014) (noting that the gross, client deduction approach makes the client wholly responsible for expenses and “insulates the lawyer from the effects of exorbitant spending”).

252. See, e.g., *Transvaginal Mesh Litigation: Attorneys Contingent Fee & Cost Employment Agreement between clients and Aylstock, Witkin, Kreis & Overholtz, P.L.L.C. and Ennis & Ennis, P.A.* ¶ 3 (on file with the *Columbia Law Review*) (“All costs advanced on our behalf, whether individually and/or common benefit, shall bear interest at the rate of one percent (1%) per month (12% per year) until such time as the costs are paid by us.”).

253. This suggests a fairly substantial increase from the early Agent Orange litigation in which Ken Feinberg and his firm reportedly received more than \$3 million in fees and expenses. Silberman, *Judicial Adjuncts Revisited*, supra note 29, at 2150 n.105.

Table 16: Disclosed Judicial Adjunct Fees<sup>254</sup>

Type of Adjunct	Name or Company	Disclosed Fees	MDL Proceeding	MDL No.
Special Settlement Masters	Feinberg, Ken Rozen, Michael Trotter, John K Yanni, Cathy	\$9,403,293.00 (total)	<i>Zyprexa</i>	1596
Special Master	Niss, James	\$615,637.79	<i>Ephedra</i>	1598
CPA	Page, Janice	\$102,164.23	<i>Ephedra</i>	1598
Special Master	Juneau, Patrick A.	\$91,917.65	<i>High Sulfur Content</i>	1632
Claims Administrator	BrownGreer, PLC	\$1,552,595.62	<i>Vioxx</i>	1657
Special Master	Juneau, Patrick A.	\$334,788.07	<i>Vioxx</i>	1657
Special Master	Rice, Paul	\$175,000.00	<i>Vioxx</i>	1657
Special Counsel	Barriere, Brent B.	\$111,470.68	<i>Vioxx</i>	1657
Court Appointed Counsel	Tulane Civil Litigation Clinic	\$10,000.00	<i>Vioxx</i>	1657
CPA	Garrett, Philip A.	\$1,371.00	<i>Vioxx</i>	1657
Special Master	Carroll, John	\$17,838.00	<i>American Honda</i>	1737
CPA	Mahler, Andrew H. Gilmore, Kevin	\$21,511.38	<i>OrthoEvra</i>	1742
Special Master	Holstein, James R.	\$9,968.75	<i>Stand 'N Seal</i>	1804
Claims/ Notice Administrator	BMC Group	\$1,369,695.42	<i>CertainTeed</i>	1817

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254. As we note in the text, parties involved in these proceedings told us that the amounts disclosed in the dockets were far less than the amounts actually charged. See *supra* section III.B.

Type of Adjunct	Name or Company	Disclosed Fees	MDL Proceeding	MDL No.
Special Master	Juneau, Patrick A.	\$100,000.00	<i>Kugel Mesh</i>	1842
Disbursing Agent	Postlethwaite & Netterville	\$3,076,195.08	<i>FEMA Trailer</i>	1873
Special Master	Balhoff, Daniel J.	\$318,308.07	<i>FEMA Trailer</i>	1873
Mediator	Yanni, Catherine	\$138,574.19	<i>Gadolinium</i>	1909
Common Benefit Accountant	Dantio, Gregory	\$46,062.44	<i>Gadolinium</i>	1909
Escrow Agent	National City Bank, now a part of PNC	\$2,500.00	<i>Gadolinium</i>	1909
Claims Administrator and Class Notice Consultant	Class Action Settlement Services LLC Miller, Eric J. Kinsella, Katherine	\$1,200,000.00 (total)	<i>Vytorin/Zetia</i>	1938
Special Master	Chuck Smith	\$2,000,000.00	<i>Digitek</i>	1968
Special Master	Gentle, III, Edgar C.	\$178,005.33	<i>Total Body Formula</i>	1985
Mediator	Max, Rodney A.	\$11,464.54	<i>Total Body Formula</i>	1985
Special Master	Cohen, David R.	\$374,188.98	<i>Whirlpool Front-Loading Washer</i>	2001
Special Settlement Master	Buchanan, Jerry A.	\$7,705.00	<i>Mentor Corp. ObTape</i>	2004
Claims Administrator	Soloranzo, Tricia M.	\$5,000,000.00	<i>Kitec Plumbing System</i>	2098
Special Master	Russo, Gary J.	\$4,790,405.99	<i>Actos</i>	2299

Type of Adjunct	Name or Company	Disclosed Fees	MDL Proceeding	MDL No.
Deputy Special Master	DeJean, Kenneth W.	\$1,353,199.85	<i>Actos</i>	2299
Accountant	Arsement, Redd, and Morella, LLC	\$4,837.97	<i>Actos</i>	2299
Special Discovery Master	Andrew Chirls	\$324,561.37	<i>Zoloft</i>	2342
Special Master	Jonathan Lebedoff	\$2,100.00	<i>Hardieplank</i>	2359
Medical Expert	Turkis, Lance	\$41,000.00	<i>Franck's Lab, Inc.</i>	2454
CPA	Demonte & Falgoust, CPAs, LLC	\$3,475.06	<i>Franck's Lab, Inc.</i>	2454
Claims Administrator	BMC Group Class Action Services	\$1,469,796.31	<i>Guidant</i>	1708
Assistant Special Master	Juneau, Patrick A.	\$252,000.54	<i>Guidant</i>	1708
Escrow Agent	Wells Fargo Bank, N.A.	\$252,000.54	<i>Guidant</i>	1708
Settlement Administrator	Epiq Systems Class Action and Claims Solutions	\$1,000,000.00	<i>Caterpillar, Inc., C13 and C15 Engine</i>	2540
Common Benefit Fund Administrator	Ellison, Larry Liggett, Brooke	\$1,565.00	<i>Power Morcellator</i>	2652

Hourly rates varied by adjunct, ranging from \$250–\$600 per hour for special-master services (and averaging \$395.40/hour), to \$165 per hour for an escrow agent,<sup>255</sup> as Table 17 below illustrates. These rates have increased significantly from those reported in earlier studies where special

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255. Anecdotally, we were told that these numbers seem quite low. Indeed, given how few numbers were available on the record, they may well be at the low end of the spectrum. But without more transparency, we have no reliable way of indicating true costs and averages.

masters typically charged \$200 per hour and the rates ranged from \$150–250.<sup>256</sup>

Table 17: Disclosed Hourly Rates for Judicial Adjuncts

Type of Adjunct	Name or Company	Who Pays	Hourly Fees	MDL Proceeding	MDL No.
Certified Public Accountant	Page, Janice	Plaintiff - cost	\$260.00	<i>Ephedra</i>	1598
Special Master	Niss, James	Defendant	\$250.00	<i>Ephedra</i>	1598
Special Master	Rice, Paul	Split equally	\$600.00	<i>Vioxx</i>	1657
Special Master	Juneau, Patrick A.	Plaintiff - fund	\$400.00	<i>Vioxx</i>	1657
Special Counsel	Barriere, Brent B.	Split equally	\$300.00	<i>Vioxx</i>	1657
Special Master	Johnston, Robert M.	Plaintiff - fund	\$250.00	<i>Vioxx</i>	1657
Special Master	Smith, Fern	Split equally	\$600.00	<i>Bextra and Celebrex</i>	1699
Special Master	Juneau, Patrick A.	Plaintiff - fund	\$350.00	<i>Guidant</i>	1708
Special Master	Borg, John W.	Split - unknown	\$395.00	<i>Viagra</i>	1724
Escrow Agent	Mahler, Andrew H.	Plaintiff - cost	\$215.00	<i>OrthoEvra</i>	1742
Special Master	Capra, Daniel	Split equally	\$500.00	<i>Bausch &amp; Lomb Inc.</i>	1785
Certified Public Accountant	Beauston, John	Plaintiff - fund	\$225.00	<i>Bausch &amp; Lomb Inc.</i>	1785
Special Master	Little, Jr., F.A.	Plaintiff - cost	\$350.00	<i>FEMA Trailer</i>	1873
Special Master	Balhoff, Daniel J.	Plaintiff - fund	\$275.00	<i>FEMA Trailer</i>	1873
Special Master	Ellis, Randi	Plaintiff - fund	\$250.00	<i>FEMA Trailer</i>	1873

256. Willging et al., *supra* note 6, at 7.

Type of Adjunct	Name or Company	Who Pays	Hourly Fees	MDL Proceeding	MDL No.
Claims Administrator	Urbatsch, Kevin	Plaintiff - fund	\$400.00	<i>Gadolinium</i>	1909
Auditor	FSM Capital Management	Plaintiff - cost	\$275.00	<i>Gadolinium</i>	1909
Escrow Agent	Dantio, Gregory	Plaintiff - cost	\$165.00	<i>Gadolinium</i>	1909
Special Master	Borg, John W.	Split equally	\$395.00	<i>Trasylol</i>	1928
Accountant	Winikur, Alan B.	Plaintiff - fund	\$300.00	<i>Trasylol</i>	1928
Special Master	Gentle, III, Edgar C.	Plaintiff - fund	\$250.00	<i>Total Body Formula</i>	1985
Special Master	Cohen, David Rosenblum	Split equally	\$450.00	<i>Whirlpool Corp. Washer</i>	2001
Special Master	Cohen, David	Split equally	\$345.00	<i>Oral Sodium</i>	2066
Special Master	Stack, Dan	Split equally	\$400.00	<i>Yasmin and Yaz</i>	2100
Special Master	Donovan, James	Split equally	\$400.00	<i>Yasmin and Yaz</i>	2100
Certified Public Accountant	Fitzgerald, Michael E.	Plaintiff - cost	\$350.00	<i>Yasmin and Yaz</i>	2100
Special Master	DeJean, Kenneth W.	Plaintiff - cost	\$400.00	<i>Actos</i>	2299
Special Master	Rodriguez, Carmen M.	Split equally	\$400.00	<i>Actos</i>	2299
Special Master	Russo, Gary J.	Split equally	\$400.00	<i>Actos</i>	2299
Special Master	Capra, Daniel	Split equally	\$500.00	<i>MI Windows &amp; Doors</i>	2333
Special Master	Chirls, Andrew	Split equally	\$525.00	<i>Zoloft</i>	2342
Special Master	Lebedoff, Jonathan	Split - unknown	\$400.00	<i>HardiePlank</i>	2359

Type of Adjunct	Name or Company	Who Pays	Hourly Fees	MDL Proceeding	MDL No.
Special Master	Stack, Dan	Split equally	\$400.00	<i>Pradaxa</i>	2385
Special Master	Donovan, James	Split equally	\$400.00	<i>Pradaxa</i>	2385
Medical Expert	Turkis, Lance	Split unequally	\$400.00	<i>Franck's Lab, Inc.</i>	2454

Some of the attorneys we interviewed suggested that the information gleaned from the dockets underestimated adjunct costs. One reported paying special masters “between \$50,000–\$60,000 a month” and noted some information found on the docket was “so skewed to the downside as to not be relevant.”<sup>257</sup> Yet this is the information publicly available on costs, and some of the costs are surprisingly high. Concerns over whether these data paint the full picture on costs only highlight the need for more public disclosure. Thus, the numbers in Table 16 may be just the tip of the iceberg.

3. *Plaintiffs Bear the Costs of Most Private Adjuncts.* — We were able to discern more information about which party paid for the private adjunct’s services. Settlement agreements, for example, often specified that administrative costs would be taken out of the settlement fund.<sup>258</sup> And the norm when a certified public accountant oversees plaintiffs’ attorneys’ common-benefit fees (or when a special master divvies up fees among plaintiffs’ leaders) is that it counts as a cost attributed to plaintiffs.<sup>259</sup> Using those norms and data collected from judicial orders, parties’ motions, and settlement agreements, we coded who paid for each non-magistrate adjunct.

After removing the fifty-nine magistrate judges, we found that plaintiffs *alone* pay for 54% of the remaining 174 private adjuncts. That percentage includes instances when the costs of administering the settlement came out of the fund as well as when plaintiffs paid for an adjunct’s services as a litigation cost. In settlement funds, one might argue that because defendants pay settlement money, those costs should be attributed to them.<sup>260</sup> But when claims administration fees come out of the fund, that

257. Interviews, *supra* note 48.

258. See e.g., Brief in Support of Plaintiffs’ Unopposed Motion for Certification of Settlement Class, Preliminary Approval of Settlement, & Approval of Class Notice at 25, In re Caterpillar, Inc., C13 & C15 Engine Prods. Liab. Litig., No. 14-cv-03722 (JBS) (JS) (D.N.J. Apr. 11, 2016) (“The cost of notice will be paid out of the Settlement Fund.”).

259. E.g., Case Management Order: Special Master DeJean’s Fees & Costs at 1, In re Actos (Pioglitazone) Prods. Liab. Litig., No. 6:11-md-2299 (W.D. La. Nov. 16, 2012).

260. One might argue that this suggests that costs paid directly by the defendant should also be attributed to the plaintiffs under this logic (for it is money that could have gone toward the settlement), but defendants are often willing to expend substantial amounts of money paying lawyers and litigation costs that they are unwilling to put toward settlement.

depletes the money available to plaintiffs. Accordingly, we categorize those costs as costs incurred to plaintiffs.

Of the remaining appointments, parties shared costs 20% of the time, though they did not always do so equally. One court, for instance, ordered the defendant to bear 90% of the pretrial special master's cost.<sup>261</sup> Defendants bore sole responsibility for only 6.9% of the appointments (again, in contrast with plaintiffs bearing sole responsibility for 54%), and we were unable to discern information on who paid for the adjunct in 18% of appointments. Figure 12 breaks down which side paid for the adjunct by type of appointment.<sup>262</sup>

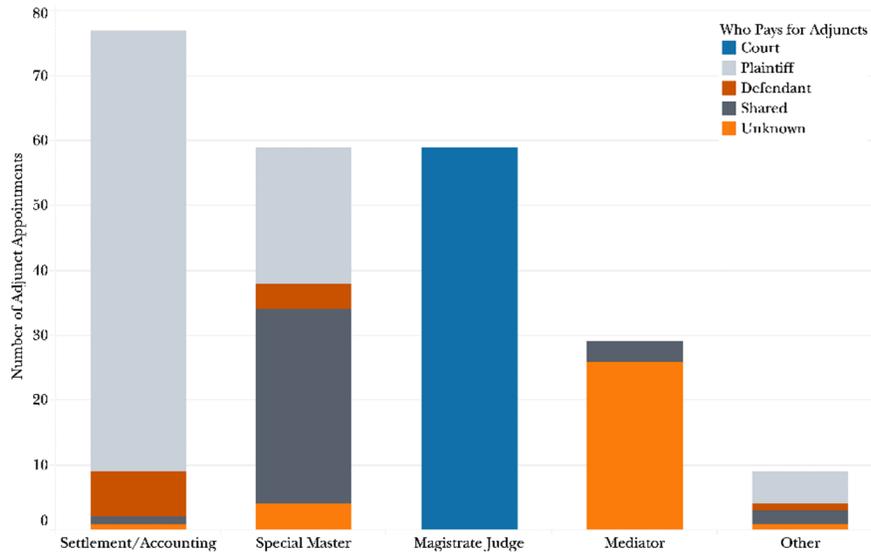
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The early tobacco lawsuits are but one example. E.g., *Haines v. Liggett Grp., Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (“[T]he aggressive posture we have taken . . . continues to make these cases extremely burdensome and expensive for plaintiffs’ lawyers . . . . To paraphrase General Patton, the way we won these cases was not by spending all of [Reynolds’] money, but by making that other son of a bitch spend all of his.”) (alteration in original) (quoting Memorandum from J. Michael Jordan, Att’y., R.J. Reynolds, to unspecified Smoking and Health Attorneys (Apr. 29, 1988)).

261. Order at 3, *In re Seroquel Prods. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB (M.D. Fla. Nov. 16, 2007).

262. Readers may access a larger, interactive version at: [https://public.tableau.com/views/JudicialAdjunctsinMultidistrictLitigationFigure12/WhoPaysbyTypeofAdjunct?:language=en&:display\\_count=y&:publish=yes&:origin=viz\\_share\\_link](https://public.tableau.com/views/JudicialAdjunctsinMultidistrictLitigationFigure12/WhoPaysbyTypeofAdjunct?:language=en&:display_count=y&:publish=yes&:origin=viz_share_link).

Figure 12: Who Pays for Judicial Adjuncts, by Type of Adjunct



#### IV. A QUALITATIVE LOOK INTO MDL'S DELEGATION PUZZLE

Our findings thus far on delay and dollars add significantly to the cost side of the cost-benefit ledger. And yet, as our data also demonstrate, parties request and judges appoint adjuncts regularly in MDLs. Why? Maybe they need help managing thousands of personal injury plaintiffs, lengthy privilege logs, complex scientific and epidemiological data, and lawyers with personality to spare. Or, as the literature on special masters suggests, maybe it is adjuncts' specialized expertise, ability to operate behind the scenes, nip disputes in the bud, and work collaboratively with the litigants in ways that would otherwise endanger a judge's neutrality.<sup>263</sup> Maybe it's all of these things or none of them.

Rather than speculate, we conducted twenty-two semi-structured interviews with randomly selected plaintiff and defense lawyers, special masters, claims administrators, magistrate judges, and district court judges.<sup>264</sup> The purpose of these interviews is to better understand our

263. See Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. Rev. 87, 113–114 (2011); Kenneth R. Feinberg, *Democratization of Mass Litigation: Empowering the Beneficiaries*, 45 Colum. J.L. & Soc. Probs. 481, 494 (2012); Fellows & Haydock, *supra* note 28, at 1271, 1280–85.

264. We explain our methodology in more detail in the Appendix. See *infra* Appendix. Our interviews include fourteen lawyers, six adjuncts, and two transferee judges. We had more interviews planned but were forced to cancel them as courts, lawyers, and judicial adjuncts scrambled to address the COVID-19 pandemic. Nevertheless, even with more interviews, we are likely to gain little additional information. The patterns established in the quantitative data are clear, these interviews support those findings, and additional anecdotal

quantitative (and statistically significant) findings regarding the use of judicial adjuncts in these proceedings. By themselves, the interviews do not offer (nor are they intended to offer) statistical significance. The actors we selected have a range of experience—some are in the midst of their first products liability MDL, whereas others have decades of MDL experience dating back to the 1960s. They participated in at least twenty-seven of the proceedings within our dataset that concluded in a range of outcomes and collectively they appear to have worked in over one hundred different MDLs. Although our principal aim is to supplement our quantitative findings with qualitative evidence, we have no reason to doubt that this group represents the gamut of perspectives.

Our discussions yielded two broad narratives. One perspective suggested that all is well in this corner of the MDL world: Judges appropriately delegate when proceedings demand too much of the court's time or where specialized expertise would serve both the court and the parties. Judges then carefully select and supervise those adjuncts. The other account is darker. Rather than improving justice, adjuncts cajole parties through non-reviewable, *ex parte* discussions; repeat players on all sides thrive through preferential treatment; and plaintiffs are left playing the lawyer lottery, where their outcomes may depend more on selecting the "right" lawyer and less on their suit's merits.<sup>265</sup> Of course, both accounts can be right: Perspectives may vary and adjuncts can be both ideal and abused. The one thing that everyone agreed on was that who the adjunct is matters enormously.

#### A. *The Benefits of Delegation*

MDL judges delegate for many of the same reasons that courts outsource more generally: It can save courts' time, protect parties, and tap into adjuncts' specialized expertise. Commenting first on time, one attorney put it simply: "The system asks a lot of judges."<sup>266</sup> "Contrary to the original rules [of civil procedure], everything has gotten front loaded. Everything gets tried on motions to dismiss, motions to strike, and motions to certify."<sup>267</sup> Those issues are "magnified when there are complex cases—we're in the capillaries from day one."<sup>268</sup> Said another, we're "asking

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dots, though interesting, are unlikely to change the findings. Judicial adjuncts as an industry may number in the thousands, but in our data we found just over two hundred appointments (fewer total people). We generalize to our data, as we should, and hint about what we may find outside our data given that we have a representative sample of proceedings and spoke to a representative sample of participants in those proceedings.

265. To be sure, litigants' chances always depend on the quality of their attorney, but what we mean here is that even highly qualified lawyers may not get top dollar for their meritorious clients if they do not know the right people, are not appointed to a proceeding's leadership, or are on the outs with the leaders in a particular proceeding.

266. Interviews, *supra* note 48.

267. *Id.* (same interviewee).

268. *Id.* (same interviewee).

[judges] to be generalists, so if you can have smart, qualified, incentivized people who will work hard under the oversight of the judge, then that's probably a good thing."<sup>269</sup> Judges, too, reiterated this theme. One noted that appointing a special master who could timely address the defendant's lengthy privilege log became necessary, for it would otherwise occupy all of the magistrate's time and energy.<sup>270</sup>

Second, if judges themselves come into close contact with the lawyers and engage in what one MDL judge described as "off the record, roll-up sleeves work,"<sup>271</sup> it can affect their impartiality when later ruling on the facts and law. Adjuncts act as a buffer, filtering through select information while keeping the court at arm's length. "My [special master] can do a lot of things behind the scenes that I can't do in terms of getting parties to talk about the case," explained one district judge.<sup>272</sup>

Third, outsourcing allows judges to tap into adjuncts' specialized expertise. "My special master has a long history with [complex proceedings] . . . . He's been around . . . . He knows all the settlement administrators all over the country," noted a district judge.<sup>273</sup> Interviewees identified expertise as especially important for settlement administration and broadly concurred on the benefit of appointing claims and lien resolution administrators (LRA): "We don't really do [settlement administration] much," said one magistrate.<sup>274</sup> Attorneys likewise noted that LRAs are "necessities from an administrative standpoint."<sup>275</sup> But, from a pricing perspective, they "can be problematic," one observed.<sup>276</sup> "We don't have empirical data on what percentage of reductions we actually obtained from the LRA," despite getting bids from different companies.<sup>277</sup> Part of the difficulty, the same lawyer explained, is that four of the major providers (Providio, Archer, Garretson Group, and Epiq) have now merged into two: Archer Systems, LLC and Epiq.<sup>278</sup>

Settlement administrators underscored the difficulty and tediousness of their work:

Technology is hard to come by in the lien space, Medicare doesn't have a great process. Sometimes you get blurry PDFs as to what a lien amount is and you have to manually scratch out the codes. It's a complicated process and so much of it has to be done by hand.<sup>279</sup>

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269. Id. (different interviewee).

270. Id. (same interviewee).

271. Gluck, *supra* note 140, at 1700–01 (internal quotation marks omitted).

272. Interviews, *supra* note 48.

273. Id. (same interviewee).

274. Id. (different interviewee).

275. Id. (different interviewee).

276. Id. (same interviewee).

277. Id. (same interviewee).

278. Id. (same interviewee).

279. Id. (different interviewee).

As for payment, “we often do a flat bid, but then the workload turns out to far exceed the administrative fund.”<sup>280</sup>

Despite these upsides, some interviewees voiced general concerns about delegating: When the judge proposes using a special master, “sometimes it feels like a threat, not as a need to get more help,” one attorney said.<sup>281</sup> “It’s an abdication of power,” said another.<sup>282</sup> A third noted that when judges appoint adjuncts to assist with settlement committees as soon as MDLs begin, it can be “hard to tell whether parties really do want to settle the case [at that point].”<sup>283</sup> But you “have two tracks going on at the same time, running up costs” when what you really need to do “is go through discovery first.”<sup>284</sup> “Sometimes there are just too many special masters appointed,” conceded a special master.<sup>285</sup> “A green MDL judge might think you need multiple people,” but instead they “should be doing a cost-benefit analysis.”<sup>286</sup>

#### B. *Special Masters Versus Magistrates in MDLs*

District courts’ local practices and culture played a central role when opting for magistrates or special masters, sometimes seeming to overshadow a reflective cost-benefit analysis.<sup>287</sup> Unlike special masters, who may be party-selected or judicially chosen, magistrates are always appointed by the court.<sup>288</sup> Magistrate judges explained that districts vary in how they assign them cases: Some randomly pair district and magistrate judges for each case, others assign magistrates to a district judge, and still others typically use random pairings but make exceptions for MDLs to allow magistrates to develop expertise.<sup>289</sup>

Culture matters, too. One district judge reported “not really using magistrates” because the “magistrate may not have any unique ability or

280. *Id.* (same interviewee). To adjust, some adjuncts bid for projects with an initial fee-per-claim, but considered changing that charge after processing a certain percentage of those claims. *Id.* (same interviewee).

281. *Id.* (different interviewee).

282. *Id.* (different interviewee).

283. *Id.* (different interviewee).

284. *Id.* (same interviewee).

285. *Id.* (different interviewee).

286. *Id.* (same interviewee).

287. Past studies demonstrate wide disparities among districts in preferences for magistrates or special masters. See Tracey George, Christina L. Boyd & Albert Yoon, *From Wall Street to Main Street: A Multidimensional Map of the Impact of Magistrate Judges on Federal Courts* 15, 50–51 (Vanderbilt Univ. L. Sch. Working Paper No. 18-57, 2018), <http://ssrn.com/abstract=3262302> (on file with the *Columbia Law Review*) (“Just as district judges differ from one another in their reliance upon law clerks, so too do they vary in their delegation to magistrate judges. In some instances, the delegation is infrequent; for others, it is standard protocol.”).

288. See 28 U.S.C. § 636(b)(1) (2018).

289. This became apparent through conversations with multiple interviewees. Interviews, *supra* note 48.

acumen,”<sup>290</sup> whereas a magistrate judge noted the opposite: “In my district, it’s not the culture to use special masters.”<sup>291</sup> Continuing, the magistrate judge said, “In other parts of the country, [district judges] look down on magistrates. You have to understand the culture . . . . We handle a ton [of the MDL work], but we aren’t even invited to the transferee judges’ conference.”<sup>292</sup> Recalling one such conference that took place years ago, one district judge mentioned using magistrates to manage MDL cases: “The other judges at my table were appalled that they were using magistrates in any manner for MDLs. The Panel selects district judges to handle these cases, not magistrates.”<sup>293</sup> “Even those who were on the Panel weren’t happy [with my use of magistrates] back then.”<sup>294</sup> “But,” the judge concluded, “in my district we use magistrates for all pretrial nondispositive work. And I think the culture might be changing.”<sup>295</sup>

Attorneys’ comments often reflected longstanding themes that we pinpoint in Part I: Expertise, efficiency, cost, settlement pressure, and ex parte communication all played a role in whether they preferred using a magistrate judge or special master. On expertise, when parties proposed using a special master, sometimes they did so to “get away from the district judge,” and other times because they worried that the district judge was too busy or inexperienced.<sup>296</sup>

As for efficiency, an adjunct’s available time factored into parties’ preferences in different ways. Most of the special masters in our dataset seemed to work full-time as masters, meaning that they did not need to juggle a law practice on top of their appointment and could instead commit fully to addressing parties’ issues. They ranged from specialists employed by JAMS like Cathy Yanni, to retired judges (who often work for JAMS) such as John Trotter, Dan Stack, and Marina Corodemus, to lawyers who serve only as special masters and mediators like Patrick Juneau, Ken Feinberg, Randi Ellis, and David Cohen.<sup>297</sup>

In contrast with some judges’ sentiments, some lawyers saw special masters’ ability to devote their full attention to a matter as a drawback, particularly when it came to costs. Attorneys reported that the high costs of special masters trouble them, but that they are reluctant to object to a master’s appointment or fee given the master’s authority over their cases. “Lawyers who are connected who don’t have a thriving practice or retired judges tend to get the [special master] work and they have an incentive to

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290. *Id.*

291. *Id.* (different interviewee).

292. *Id.* (same interviewee); see also Pro, *supra* note 140, at 806–07 (noting that the change from “magistrate” to “magistrate judge” in 1991 was designed to ease some of the hierarchical stratification, but that there was a lag in changed thinking).

293. Interviews, *supra* note 48.

294. *Id.* (same interviewee).

295. *Id.* (same interviewee).

296. *Id.* (multiple interviewees).

297. For more examples, see *supra* Table 16 & Table 17.

draw out the proceedings, not to conclude them quickly,” one said.<sup>298</sup> “The ABA’s statement [on reducing delay] is so not true, but nobody wants that to be public. Special masters don’t reduce cost or delay.”<sup>299</sup> And, reflecting on costs, another attorney noted that “in some cases, I’ve had special masters sitting in the room for long depositions literally trimming their nails.”<sup>300</sup>

One defense attorney further explained, “I have somebody who’s willing to pay versus a plaintiff’s lawyer who’s paying out of pocket. Special masters tend to take their appointments as an annuity.”<sup>301</sup> They tend to come in two forms: (1) a “lawyer who’s well connected but not overly busy, who sees it as a financial opportunity,” and (2) a “lawyer who’s well connected but very busy and doesn’t have time to dedicate to it. Which one it is will drive how you manage the special master—both are problems of a different sort.”<sup>302</sup> A special master who falls into the first category “is motivated to keep the case going.”<sup>303</sup> Magistrates, on the other hand, “are motivated to end the case and keep it off the court’s docket. But they can be rougher on and more threatening to lawyers because they’re connected with the judge.”<sup>304</sup>

As to this settlement pressure, attorneys also observed “a leverage component that magistrates can exert that special masters can’t.”<sup>305</sup> Said one: “Magistrates try to use that influence to coerce you into settling or penalize you for not settling.”<sup>306</sup> This is problematic—whoever spearheads settlement discussions shouldn’t “have decisionmaking power over the case because they can threaten you or carry out penalties for refusing to settle . . . . It’s payback.”<sup>307</sup> Of course, that criticism isn’t unique to magistrates or even district judges—it illustrates the broader need to have someone handle discovery who isn’t facilitating settlement negotiations.<sup>308</sup>

In his earlier study, Judge George C. Hanks, Jr. noted that one judge he interviewed “reported being particularly aware of the risk that a special master might take on the mantle of the courts’ authority and act as a ‘de

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298. Interviews, *supra* note 48.

299. *Id.* (same interviewee).

300. *Id.* (different interviewee).

301. *Id.* (different interviewee).

302. *Id.* (same interviewee).

303. *Id.* (same interviewee).

304. *Id.* (same interviewee).

305. *Id.* (same interviewee).

306. *Id.* (same interviewee).

307. *Id.* (same interviewee).

308. See Brazil, *supra* note 98, at 405–06 (noting that special master Francis McGovern “believes that facilitating communication and promoting agreements is largely incompatible with wielding actual or apparent power to decide important disputes”); Ellen E. Deason, Beyond “Managerial Judges”: Appropriate Roles in Settlement, 78 *Ohio St. L.J.* 73, 127–44 (2017) (arguing for reforms that would separate those presiding over pretrial and trial from those conducting settlement conferences or mediation).

facto' federal judge."<sup>309</sup> We heard similar reservations over deputizing special masters to broker deals, essentially giving them free reign and the imprimatur of the court. "[The special master] wants to control every aspect of the case . . . [and] does things that if [the judge] knew, he would cut his head off," declared a lawyer.<sup>310</sup>

Nevertheless, some attorneys indicated that informality and the ability to have ex parte communications with special masters was often key: "You feel like you can let your guard down a little more," and "it's nice for the parties to be able to reach out to someone other than the judge or magistrate to be able to resolve issues," one reported.<sup>311</sup> Additionally, there are things "you don't want to bother the judge with; they don't want to hear whining."<sup>312</sup> But because "special masters are being paid to hear all of these issues, you feel free to use them."<sup>313</sup> This was especially true, said another attorney, of common-benefit fees. Submitting time and expenses to a special master as the proceeding unfolded is "such a great idea, so that at the end of the case, it's not some complex mess of arguing about who did what."<sup>314</sup>

Others disagreed, with one attorney noting that a special master in one proceeding "was changed to a settlement specialist to shield him from the laws that applied as a special master . . . I feel like the special master deliberately overlooked self-dealing [on fees]."<sup>315</sup> Said another, "The special master was a friend of the plaintiffs' steering committee, it didn't matter what the nonleaders time was, it got discounted. I didn't feel like it was fair. Had it been a judge, I would have had a greater feeling of fairness."<sup>316</sup> Another lawyer agreed, citing a better experience with magistrate judges overseeing common-benefit funds: "[The magistrate judge] gave us a lot of requirements as a common-benefit committee. We had to share everything with everybody and everyone got to object."<sup>317</sup>

### C. *Privatization Concerns Revisited*

Apart from magistrates wearing dual hats as settlement mediators and pretrial judges, attorneys' concerns fell principally on special masters. The positives and negatives largely mirrored those articulated in traditional civil suits.<sup>318</sup> But one unique theme emerged: Specialty in the bar and among private adjuncts of all kinds, from special masters to settlement spe-

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309. Hanks, *supra* note 19, at 61.

310. Interviews, *supra* note 48 (different interviewee).

311. *Id.* (different interviewee).

312. *Id.* (same interviewee).

313. *Id.* (same interviewee).

314. *Id.* (different interviewee).

315. *Id.* (different interviewee).

316. *Id.* (different interviewee).

317. *Id.* (different interviewee).

318. See *supra* note 29 and accompanying text.

cialists, created unique opportunities for mischief. Concerns about special masters spilled over into the entire settlement industry: Private adjuncts may be partial to the people who appoint them; as repeat players, their interests may conflict with one-shot plaintiffs' best interests; and, as disputes shift from Article III courts into claims administration, adjuncts can create ad hoc procedures insulated from judicial and appellate review that may affect plaintiffs' substantive outcomes.

1. *Capture and Cronyism.* — In law, the word “capture” brings to mind agencies unduly influenced by members of the industries that they regulate: The agency is the marionette, the industry the puppeteer. That traditional Stiglerian account is not what we have in mind here, however.<sup>319</sup> Rather, the word is a heuristic for interviewees' softer concerns about entry barriers and subtle scenarios in which incentives and self-interest align to favor insiders over outsiders.<sup>320</sup>

The revolving door described in regulatory capture bears a passing resemblance to concerns raised in our interviews. But instead of FDA employees seeking jobs in the pharmaceutical industry, for instance, MDLs present a situation in which repeat-player attorneys have opportunities to hire repeat-player special masters and claims administrators.<sup>321</sup> Special masters may then have opportunities to suggest those same plaintiffs' attorneys for lucrative leadership positions and to award them common-benefit fees thereafter.<sup>322</sup> Claims administrators, too, could be in a position to provide preferential treatment for plaintiffs with the right lawyers.<sup>323</sup>

As early as 1994, when writing about special masters, the Federal Judicial Center observed that “a small group of ‘repeat players’ has devel-

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319. See generally George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 3, 3 (1971) (explaining the regulatory capture hypothesis).

320. See Daniel Carpenter, Susan I. Moffitt, Colin D. Moore, Ryan T. Rynbrandt, Michael M. Ting, Ian Yohai & Evan James Zucker, *Early Entrant Protection in Approval Regulation: Theory and Evidence from FDA Drug Review*, 26 *J.L. Econ. & Org.* 515, 516 (2009) (“As interpreted by capture theory, early entrant protection would provide market incumbents with added and prolonged shelter from competition (e.g., regulatory delay in approving later entrants) . . .”).

321. In some cases, claims administrators hire employees from law firms, which is a side subject in an attorney malpractice suit over the pelvic mesh settlements. Pamela Johnson's First Amended Complaint ¶ 103, *Alvarado v. Clark, Love & Hutson, G.P.*, No. 4:19-CV-02148 (S.D. Tex. filed Nov. 15, 2019) (“As it turns out, employees from [Clark, Love & Hutson] and [Lee Murphy] have found their way to Archer Systems, including employees who may have knowledge of the blown statute of limitations issue and subsequent efforts to conceal the same.”).

322. See, e.g., *In re Syngenta Mass Tort Actions*, No. 3:16-cv-00255-NJR, No. 3:15-cv-01221-NJR, 2019 WL 3887515, at \*2–3, \*10 (S.D. Ill. Aug. 19, 2019) (citing Special Master Dan Stack as conducting both an objective and a subjective analysis to divvy up common-benefit fees among law firms and reducing one award to a single law firm from 79% of the Illinois common-benefit fund down to 49%).

323. See Farrell, *The Function and Legitimacy of Special Masters*, *supra* note 94, at 277 (“The neutrality of masters is not assured by life tenure, fixed salaries, or even special codes of professional ethics.”).

oped—masters who have served in many cases and are invested in their reputations as successful settlement masters.”<sup>324</sup> One study warned that “special master appointments have become a lucrative ‘cottage industry’ for the bar.”<sup>325</sup> One of the judges interviewed “was particularly surprised by the several phone calls received from special masters ‘offering their services’ once an MDL case had been announced.”<sup>326</sup>

Lawyers also specialize. As Special Master (and Professor) Francis McGovern observed of the bar back in 2005, “[W]e are seeing the same faces over and over and over again . . .”<sup>327</sup> Our prior empirical work demonstrated the truth of McGovern’s intuition about MDLs: A small cadre of repeat players (on both the plaintiff and defense sides) consistently occupies the most powerful leadership positions.<sup>328</sup>

Putting two and two together, with insider attorneys selecting special masters and special masters suggesting which attorneys should spearhead the proceeding, these dynamics could produce an insular world in which slights in one proceeding have repercussions in another. Our attorney interviews highlighted these concerns. “You have the same frequent flyers in all of these cases,” said one.<sup>329</sup> “[Special masters] are in bed with the plaintiffs’ leadership,” and “the economic interest of these people is so self-aligned.”<sup>330</sup> When special masters are involved in choosing the plaintiffs’ lawyers who will lead the MDL, “they’re always going to be deferential to people they’ve worked with in the past and they’re always looking for their next gig,” said another.<sup>331</sup> “When you look at the roster in [proceeding name], you see way too many friends and family. It’s clearly [the special master’s] posse.”<sup>332</sup> Concluded a third: “There may be exceptions where special masters are objective and fair, but they are the exception rather than the rule. They shouldn’t be allowed to be in multiple MDLs at the same time with the same leadership.”<sup>333</sup>

Yet, when the Advisory Committee amended class settlement rules in 2018, it entrusted adjuncts with a role in safeguarding the integrity of settlement negotiations. Rule 23(e) requires judges to consider, among other things, whether “the proposal was negotiated at arm’s length,”<sup>334</sup> and the

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324. Farrell, *Special Masters*, supra note 172, at 604 (footnote omitted) (citing Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 *Nw. U. L. Rev.* 469, 558 (1994)).

325. Hanks, supra note 19, at 72.

326. *Id.*

327. 2004 Special Masters Conference, supra note 182, at 1253 (remarks by Francis McGovern on the Future of Judicial Masters).

328. Burch & Williams, supra note 165, at 1495 (discussing findings on the influence of a small number of well-connected repeat players).

329. Interviews, supra note 48.

330. *Id.* (same interviewee).

331. *Id.* (same interviewee).

332. *Id.* (different interviewee).

333. *Id.* (different interviewee).

334. Fed. R. Civ. P. 23(e)(2)(B).

Advisory Committee's notes suggest that "the involvement of a neutral or court-affiliated mediator or facilitator in those [settlement] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."<sup>335</sup> Some courts have even gone so far as to reason that subclassing and separate class representatives are less necessary if judicial adjuncts facilitated the deals.<sup>336</sup>

But if cronyism concerns are to be credited, then they suggest that private adjuncts may not be as ideally suited to play this prophylactic role as the Advisory Committee hoped. Still, the point would not be that the negotiating parties want a special master biased to one side or the other; rather, it is that they would prefer one who will not upset the status quo.<sup>337</sup> So, if a settlement includes features that harm class members but benefit class counsel and defendants (spurious injunctive relief, coupons, burdensome claims procedures, and monetary reversions back to corporate defendants), expand class counsel's franchise and promote closure for corporate defendants (broad class definitions and releases), or discourage class objectors (bonuses to class representatives and clear-sailing agreements for attorneys' fees),<sup>338</sup> the issue is whether a private adjunct would be willing to wave a red flag if doing so jeopardized future work. After all, class members do not hire adjuncts; class counsel and defense attorneys do.

2. *Self-Dealing and Bias.* — Attorney interviews raised somewhat similar concerns with claims administrators. One defense attorney speculated, "I think there's some financial arrangement between those companies and plaintiffs' lawyers—they're getting a referral fee or kickback of some sort from the claims administrators. They're such advocates for a particular administrator."<sup>339</sup> A plaintiffs' attorney conceded, "[T]here's probably something worth looking into there."<sup>340</sup> Another said, "[Claims administrators] gave out ski trips and World Series tickets to lawyers all the time."<sup>341</sup> Claims administrators, on the other hand, noted that their business was "very competitive; we get hired based on relationships."<sup>342</sup> Yet,

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335. Fed. R. Civ. P. 23 advisory committee's note on 2018 Amendment.

336. See *In re NFL Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 377 (E.D. Pa. 2015) ("Moreover, the presence of Mediator Judge Phillips and Special Master Golkin helped guarantee that the Parties did not compromise some Class Members' claims in order to benefit other Class members."). As the Second Circuit recognized, however, private adjuncts are a poor substitute for separate representation: "Only the creation of subclasses, and the advocacy of an attorney representing each subclass, can ensure that the interests of that particular subgroup are in fact adequately represented." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011).

337. Garth, *supra* note 105, at 941.

338. See Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 *Notre Dame L. Rev.* 859, 864–65 (2016).

339. Interviews, *supra* note 48.

340. *Id.* (different interviewee).

341. *Id.* (different interviewee).

342. *Id.* (different interviewee).

one observed that a particular proceeding seemed “all sewn up—we didn’t get any of it and I can’t understand why.”<sup>343</sup>

Unlike magistrate judges and special masters, no disqualification standards or ethics rules exist to guide claims administrators. Parties, principally plaintiffs’ lawyers, hire them and ask the judge to formally appoint them. But in past writings, most administrators acknowledge that their obligations lie with the claimants. In administering the *Sulzer Inter-Op Hip Prosthesis* settlement, a former state court judge noted, “Basically I’m in a situation while where people’s claims are pending, that I owe my fiduciary relationship to those people who are adverse to me. And that’s sort of a funny situation to be in. But it goes on on a daily basis.”<sup>344</sup> Claims administrator Orran Brown likewise noted that whoever pays his bills, “his firm is in the neutral role of being a trustee or a fiduciary who has to safeguard plaintiffs’ money,” meaning that the “ultimate duty is owed to the beneficiaries of the claims program.”<sup>345</sup>

All settlement designers (plaintiff and defense attorneys) must typically agree on the person or entity selected. Special masters and claims administrators who favor one side outright are unlikely to be retained again. The conventional thought then is that with repeat players on both sides, it’s a wash—no need for concern.<sup>346</sup> Nevertheless, when judgment calls pit insiders against one-shot plaintiffs (or one-shot attorneys), once again, there could be a tendency to err on the side of keeping one’s future employers happy.<sup>347</sup>

As prior research has shown, what’s good for defendants and plaintiffs’ lead lawyers isn’t always good for the plaintiffs themselves or their individual counsel.<sup>348</sup> For instance, when a plaintiffs’ law firm requested a second claims administrator and bank to deliver settlement money to its clients, the MDL judge refused. “The court’s concern is the plaintiffs,” he wrote.<sup>349</sup> “This is just another step in receiving the money they are entitled to. Furthermore, there is no indication each of the 450 clients has agreed

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343. Id. (same interviewee).

344. Symposium, A Novel Approach to Mass Tort Class Actions: The Billion Dollar Settlement in the Sulzer Artificial Hip and Knee Litigation: A Symposium, 16 J.L. & Health 169, 196 (2002).

345. Amaris Elliott-Engel, Mass Money in Claims Administration Raises Questions, *Legal Intelligencer* (Nov. 27, 2012), [https://www.law.com/thelegalintelligencer/almID/1202579410212/?hubtype=main\\_page&id=1202579410212](https://www.law.com/thelegalintelligencer/almID/1202579410212/?hubtype=main_page&id=1202579410212) (on file with the *Columbia Law Review*).

346. Garth, *supra* note 105, at 930, 934.

347. See generally Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 *Law & Soc’y Rev.* 95 (1974) (theorizing that repeat players who encounter the legal system time and again will have different goals than one shotters).

348. Burch, *supra* note 194, at 63–71.

349. Order at 2, *In re Benicar (Olmesartan) Prods. Liab. Litig.*, No. 1:15-md-02606-RBK-JS (D.N.J. Nov. 22, 2019), 2019 WL 6271285.

to this proposal, particularly in light of the proposed requirement they indemnify the proposed Fund Administrator for certain claims.”<sup>350</sup>

Claims administrators do far more than run numbers and cut checks—they can, for example, determine the sequencing and priority of payouts as well as award money from extraordinary injury funds.<sup>351</sup> That discretion fosters opportunities for preferential treatment. In litigation over BP’s Deepwater Horizon oil spill, for instance, allegations surfaced that special master Patrick Juneau’s claims team favored the repeat players who appointed them by expediting steering committee members’ clients over earlier filed claims.<sup>352</sup> More generally, one claims administrator noted that in one settlement, “[Well-known plaintiffs’ attorney’s] claims didn’t get paid as much as he wanted them to. If you do what [that attorney] wants you to, then he’ll hire you again; if not, he won’t.”<sup>353</sup>

Certain court-appointed banks, which also perform adjunct functions, may be susceptible to claims of self-dealing and conflicts of interest as well. Esquire Bank, for instance, is founded and run by repeat-player plaintiffs’ lawyers in the mass-tort bar, who likewise hold shares in its publicly traded parent company, Esquire Financial.<sup>354</sup> The bank loans money to plaintiffs while they await their settlement checks from claims administrators; it also holds attorneys’ fee funds and settlement money, like the Vioxx Consumer Settlement Funds.<sup>355</sup> Interests can quickly intertwine. In the *Chinese Drywall* litigation, for instance, three of Esquire Bank’s founders and board members sat on the attorney’s fee allocation committee and the Bank held those funds.<sup>356</sup> Other attorneys accused committee members of waylaying fee payments as a means to preserve the bank’s ability to loan money to retired NFL players awaiting their payouts in the concurrent *NFL Concussion* litigation; one of the bank’s former board members

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350. *Id.*

351. E.g., Actos Master Settlement Agreement § 7.02(G), *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-MD-2299 (W.D. La. Apr. 28, 2015) (explaining the extraordinary injury fund process and stating that the “Special Master’s resolution of all appeals relating to EI Payments shall be final, binding and Non-Appealable”).

352. Independent External Investigation of the Deepwater Horizon Court Supervised Settlement Program: Report of Special Master Louis J. Freeh at 8–9, 74, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, 2:10-md-02179-CJB-SS (E.D. La. Sept. 6, 2013); Jason Brad Berry, DHECC—Proof Positive of Claims Being Expedited by the PSC, *Am. Zombie* (Mar. 11, 2014), <http://www.theamericanzombie.com/2014/03/dhecc-proof-positive-of-claims-being.html> [<https://perma.cc/ZY9N-QLAA>].

353. Interviews, *supra* note 48.

354. See Declaration of Arnold Levin ¶ 6, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 2:09-md-2047-EEF-JCW (E.D. La. June 27, 2018) (“I personally purchased 8,000 shares of Esquire Financial Holdings, Inc. for \$100,000.00 on November 30, 2012, and continue to hold this investment.”).

355. Order at 2, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-01657 (E.D. La. Aug. 19, 2013) (appointing Esquire Bank as the financial institution for the Consumer Settlement Fund).

356. Order and Reasons, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 2047, 2018 WL 5251849 (E.D. La. Oct. 22, 2018); Burch, *Mass Tort Deals*, *supra* note 194, at 154–55.

also served as the NFL's class counsel.<sup>357</sup> These questions over conflicts prompted the transferee judge to transfer *Chinese Drywall's* fee fund out of Esquire Bank and into the court registry.<sup>358</sup> Reflecting on Esquire Bank, one of our interviewees said that "it is actually conflicted, it is unsavory, it is unpleasant, it doesn't feel right."<sup>359</sup>

3. *Bureaucratization, Ad Hoc Procedure, and Transparency.* — Judicial outsourcing in MDL has become a given: That's one theme that emerged implicitly from our attorney interviews. Although many interviewees raised process-related questions about adjunct selection, debated whether special masters or magistrates were better equipped for particular tasks, and disputed the wisdom of hiring particular special masters, no one suggested that judges should shoulder the burden alone. As hierarchies become ingrained, however, they layer in new decisionmakers and demand coordination between them. Each proceeding that employs adjuncts and particularly those with many adjuncts (again, up to fourteen) forms a mini-bureaucracy.

Professor Owen Fiss's work, *The Bureaucratization of the Judiciary*, suggests that delegating decisionmaking itself as opposed to hiring an expert to aid judicial understanding "insulates the judge from the presentation of the facts and the law on that particular issue."<sup>360</sup> Splintered decisionmaking may lead judges to defer too heavily to adjuncts' decisions, review those decisions with only a partial understanding of the full picture, and rob them of the "human experience that is otherwise endemic to adjudication and the idea of a case."<sup>361</sup> The dangers of what Fiss labels "bureaucratic insularity" include diluted responsibility and endangered legitimacy.<sup>362</sup> "The larger the bureaucracy," he warns, "the greater the diffusion of responsibility."<sup>363</sup> He thus urged judges to hire special masters only as a last resort (even in structural-reform cases) and curtail the use of magistrates.<sup>364</sup>

Since Fiss's writing in 1983, outsourcing has become so interwoven into the judicial fabric that it is rarely scrutinized. Yet attorney interviews reflected some of the pathologies that Fiss identified. Fractured deci-

357. Yance Law Firm's Memorandum in Support of Motion to Immediately Transfer Attorney Fee Qualified Settlement Fund to a Different Depository Bank or Back into the Court Registry, *Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 2:09-md-02047-EEF-JCW; Letter to The Honorable Anita Brody from Craig Mitnick, In re NFL Players' Concussion Inj. Litig., 307 F.R.D. 351 (E.D. Pa. 2015) (No. 2:12-md-02323-AB); Burch, *Mass Tort Deals*, supra note 194, at 149–55.

358. Order, *Chinese Manufactured Drywall Prods. Liab. Litig.*, No. 2:09-md-2047.

359. Interviews, supra note 48.

360. Fiss, *Bureaucratization*, supra note 14, at 1455.

361. *Id.* at 1454–55.

362. *Id.* at 1455–57 ("A judge who exercises power without fully engaging in the dialogue that is the source of his authority . . . is like a biologist who reports an opinion he has not tested by the scientific method . . . [T]here is no reason for us to believe that he is right.").

363. *Id.* at 1465.

364. *Id.* at 1463.

sionmaking persists. One attorney remarked, “[Transferee judge] wanted to wrap up the MDL before he retired but he doesn’t want to walk away until then. But he wants it to be done. [Transferee judge] trusts [special master] and doesn’t want to get into the middle of it.”<sup>365</sup> Accountability too may wane. As Professor Abbe Gluck’s interviews with fifteen federal and five state MDL judges revealed, some judges prefer working with special masters precisely because any appeal from magistrate judges requires written opinions and thus undermines their focus on efficiency.<sup>366</sup> But open reasoning is important both to adjudicators’ decisionmaking process and to litigants’ feelings of fairness.<sup>367</sup>

Claims administrators, in particular, bring Fiss’s concerns over dif-fused decisionmaking and accountability into sharper focus. Unlike mag-istrate judges and special masters, whose decisions are subject to judicial review through statutory and rule-based mechanisms, claims administra-tors who run settlement programs (as well as the special masters who some-times preside over them) often sit as judge, jury, and final arbiter.<sup>368</sup> They seldom explain their decisions, and although judges appoint them, they rarely review their decisions.<sup>369</sup> As one claims administrator explained:

If the dollar value is of any magnitude, there will be some oppor-tunity to appeal the claims administrator’s award. Sometimes you have to pay an appeal fee. Normally, we decide an initial out-come, then [the settlement] allows a request for reconsideration to us and that’s the way it ought to be done. It lets us fix mistakes and most people are happy with that. Programs vary in terms of how you appeal beyond that. It used to go back to the court, but judges didn’t want those. Sometimes it’s a committee of plaintiff and defense lawyers. People don’t trust that, so you have a neutral put into place as an appeal. A special master or something. That’s the going trend now. Very often now those people have been the

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365. Interviews, *supra* note 48.

366. Gluck, *supra* note 140, at 1693–94. Some magistrate judges that we interviewed noted that they sat on the bench with the district judge during hearings and co-signed orders. Interviews, *supra* note 48. District judges review magistrate judges’ nondispositive orders on a clear error standard, and dispositive orders on a *de novo* basis. Fed. R. Civ. P. 72; see also *Equal Emp. Opportunity Comm’n v. City of Long Branch*, 866 F.3d 93, 98 (3d Cir. 2017) (“Unlike a nondispositive motion (such as a discovery motion), a motion is dispositive if a decision on the motion would effectively determine a claim or defense of a party.”).

367. See Michael D. Bayles, *Procedural Justice: Allocating to Individuals* 41 (1990) (noting the importance of reasoned opinions to litigants’ perception of fairness); Richard A. Posner, *Reflections on Judging* 240 (2013) (observing that “the process of writing, which means searching for words, for sentences, in which to express meaning, is a process of discovery rather than just of expressing preformed ideas”). For history on devising global settle-ments, see Hensler, *Glass Half Full*, *supra* note 119, at 1612–18.

368. See *supra* note 351 (describing the Actos Settlement). As Professor Teddy Rave argues, that’s the point of settling—achieving dispute resolution in a lower-cost, alternative form. See D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 *J. Tort L.* 91, 98 (2012).

369. The Vioxx settlement is a notable exception; the transferee judge sat as the chief administrator. Settlement Agreement, art. 6, § 1.1, *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897 (E.D. La. filed Nov. 9, 2007) (No. 2:05-md-01657).

settlement master or mediator appointed by the judge that brought the case to the settlement and they stay involved . . . . Some programs have a standard of review—de novo, abuse of discretion. There are ways to control things like that.<sup>370</sup>

While Fiss's concerns about judicial engagement and diffused decisionmaking haven't aged, they now raise second-generation issues: As transferee judges' organizational needs grow amidst a backdrop of fragmented responsibility and piecemeal decisionmaking, ad hoc procedures can flourish and transparency may decline. Of course, a busy transferee judge might be quick to question both whether feasible alternatives exist and, on balance, whether broadscale settlement administration isn't a net good. After all, tailoring justice to a claimant's unique circumstances is part of what special masters and claims administrators do best. Private adjuncts' allure and the appeal of ADR more broadly is that rules of procedure and evidence operate not as a mandate, but as a menu of options where substitutions are welcome and anything can be cooked to parties' preference.<sup>371</sup> Moreover, ad hoc procedures are prevalent in MDL: From plaintiff fact sheets to *Lone Pine* orders, judges regularly invent and implement procedures outside of the Federal Rules.<sup>372</sup>

But whether multiple decisionmakers and procedural customization are flexible, commendable responses to new challenges—or are abdications of power and process susceptible to insider influence and abuse—is hotly contested.<sup>373</sup> By design, settlement programs will compensate some at greater amounts than others. Some interviewees noted that claims are treated “more uniformly in a global deal [than a law-firm-by-law-firm inventory settlement].”<sup>374</sup> Others disagreed: “It all depends on who's in the lead. If the firm isn't a big player in the proceeding, it doesn't have all the facts, depositions, and information. The firm is left trying to find out what the defendant has paid to other, bigger players.”<sup>375</sup> So, a global settle-

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370. Interviews, *supra* note 48.

371. See Hensler, *Alternative Courts*, *supra* note 27, at 1432–34 (describing twelve decision points that claims facility designers face).

372. See Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 *Yale L.J. Forum* 64, 68–70 (2019) (concluding from a dataset of products liability MDLs that 47% of judges issued *Lone Pine* orders and showing that plaintiff fact sheets were used in thirty-three out of thirty-four products liability MDLs); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 *Yale L.J.* 2, 17 (2019) (observing that while it is difficult to precisely quantify their prevalence, state and federal courts have issued at least ninety-seven *Lone Pine* orders); Gluck, *supra* note 140, at 1677–81; David L. Noll, *MDL as Public Administration*, 118 *Mich. L. Rev.* 403, 411–21 (2019); Margaret S. Williams & Jason A. Cantone, *An Empirical Evaluation of Proposed Civil Rules for Multidistrict Litigation*, 54 *Ga. L. Rev.* (forthcoming 2020) (manuscript at 14) (on file with the *Columbia Law Review*).

373. Compare Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 *U. Chi. L. Rev.* 440, 491 (1986) (discussing the benefits of judges using flexible procedures), with Brazil, *supra* note 98, at 417–20 (“The achievements of special masters in the areas of case management . . . [are] at best partial.”).

374. Interviews, *supra* note 48.

375. *Id.* (different interviewee).

ment's winners and losers might be based less on the merits of individual claims (particularly when those merits remain uncertain at the time of settlement) than on whose attorneys sit around the negotiation table.<sup>376</sup> Informality and nonreviewable decisions can invite improper influences and imprecision, and off-the-record discussions could lead to favoritism or cajoling.<sup>377</sup>

When it came to inventory settlements, attorneys differed as to whether private adjuncts were even necessary. "Yes, it can create a bit of an ethical dilemma," said one, "and some people believe the solution is to appoint a special master, but I don't like doing that. It's not fool proof. I'd rather the defendant actually make offers, but it doesn't work that way all the time."<sup>378</sup> Few independent checks exist on this otherwise opaque process. Without transparency as to who gets what and why, litigants may fairly question whether horizontal equity exists.

Similar transparency issues plagued adjuncts' fees. At times even the lead plaintiffs' lawyers who weren't on fee committees were not privy to special master or mediator costs. The "expense was paid out of the common benefit fund . . . but the plaintiffs' lawyers don't know."<sup>379</sup> "[The special master] ran sham mediation sessions, and I bet that [special master] made more than a million," said one attorney.<sup>380</sup> Another said simply, "[T]he court doesn't want [costs] on the record."<sup>381</sup>

#### V. INSTITUTIONAL IMPLICATIONS OF JUDICIAL ADJUNCTS

Collectively, our findings reveal a somewhat startling conclusion: Seventy-six of ninety-two proceedings included a special master, settlement/accounting adjunct, or another private adjunct—not counting private mediators. In other words, in 82.6% of the proceedings, courts delegated judicial authority to private actors. This fits snugly into a larger trend toward privatization through alternative dispute resolution (ADR) except that it occurs within the auspices of the federal courthouse.<sup>382</sup> Yet both private judicial adjuncts and ADR raise a similar, elemental question: What are courts for?

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376. Others have also expressed these concerns. Hensler, *Alternative Courts*, *supra* note 27, at 1434; Mark D. Plevin, Robert T. Ebert & Leslie A. Epley, *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 *S. Tex. L. Rev.* 883, 907–08 (2003).

377. Brazil, *supra* note 98, at 420–22.

378. Interviews, *supra* note 48; see Baker, *supra* note 156, at 1171 ("Rule 1.8(g) does *not* state that the attorney can or should resolve her concurrent conflict of interests under Rule 1.7 by handing off to a third party the making of the aggregate settlement or the allocation of any attendant lump-sum settlement fund.").

379. Interviews, *supra* note 48.

380. *Id.* (same interviewee).

381. *Id.* (different interviewee).

382. See Burch, *Mass Tort Deals*, *supra* note 194, at 134–37.

Responses vary, but they tend to divide over whether courts should aim to provide justice and articulate legal standards or resolve disputes.<sup>383</sup> Pushed to their extremes, however, both may sometimes lead to unsatisfactory results. For instance, if courts' chief goal is to resolve disputes, then secret settlements, like those that once threatened to conceal ignition-switch defects in GM cars, must trump public safety concerns.<sup>384</sup> Conversely, prodding litigants to fully adjudicate their disputes' merits—to dig to the heart of doing justice—might prove so cost prohibitive for even meritorious disputes that it would chill attorneys from bringing them at all.

The aim of this Article is not to proclaim what courts are for or to replicate the tomes dedicated to the debate.<sup>385</sup> Rather, it is to inform the discussion by situating some of what takes place under the auspices of Article III courts within the larger literature on privatization. For example, when private settlement programs divert MDL claims out of court, they often mirror arbitration: The special master (or sometimes the claims administrator) sits as a final, binding arbitrator.<sup>386</sup> When this occurs in arbitration, there is no surprise. But what about when the district judge appoints a special master to preside over that private settlement? Are there new issues scholars should grapple with as ADR occurs not parallel to court adjudication but under its umbrella?

This Part adds data to this debate by illustrating how privatization costs within the federal courts tend to fall more harshly on the plaintiffs—those who may be least able to afford it. In so doing, we tie our empirical results back into our theoretical foundation to raise philosophical questions about who should pay for the system: its users or the public? Grappling with this question, particularly in the area of mass torts, which historically impacts public health and safety, leads us to propose that judges turn to magistrate judges first. When caseloads or lengthy settlement oversight

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383. See generally, e.g., Amy J. Cohen, Revisiting *Against Settlement*: Some Reflections on Dispute Resolution and Public Values, 78 *Fordham L. Rev.* 1143, 1145 (2009); Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984) (arguing that settlement should not be preferable to judgment); Owen M. Fiss, *The History of an Idea*, 78 *Fordham L. Rev.* 1273 (2009) (arguing that settlements are characterized “by the pursuit of self-interest, imbalances of material resources, inequalities of information, and strategic behavior”).

384. Alexandra Lahav, *In Praise of Litigation* 48–49 (2017); see also Bill Vlasic, G.M. Settles Switch Suit, Avoiding Depositions, *N.Y. Times* (Mar. 13, 2015), <https://www.nytimes.com/2015/03/14/business/general-motors-ignition-flaw-victim-settlement.html> (on file with the *Columbia Law Review*).

385. On the question, see generally Miller, *supra* note 69. On the costs and benefits of ADR, see J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *Yale L.J.* 3052, 3059–64 (2015); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 *Just. Sys. J.* 151, 151–55 (1984); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *Yale L.J.* 2804, 2838–40 (2015); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 *Ohio St. J. on Disp. Resol.* 241, 256–63 (1996).

386. Burch, *Mass Tort Deals*, *supra* note 194, at 135–37. Professor Hensler pointed out some early parallels between claims facilities, special masters, and ADR as early as 1995. See Hensler, *Glass Half Full*, *supra* note 119, at 1622–23.

prompt the need for private adjuncts, courts should play a supervisory role by considering multiple candidates and seeking budgets, bids, or other assurances that the appointee will be a faithful steward not only of the judicial office, but of the parties' money.

A. *Privatizing Justice Comes with a Price—Principally for Plaintiffs*

Plaintiffs' attorneys ultimately bill adjunct charges as "costs" on top of attorneys' fees, which means that those expenses do not typically affect lawyers' take-home pay unless there is no settlement or the settlement is too low. When Special Master David Cohen told an attorney he "felt slightly guilty about the parties having to pay my fees," the lawyer "laughed."<sup>387</sup> "[C]ompared to expert witness fees, deposition travel expenses, and paying platoons of brief-writing attorneys, his client's half-share of my cost was 'a rounding error,'" Cohen explained.<sup>388</sup> But what's a mere rounding error to the attorney is serious money to injured plaintiffs.

As plaintiffs alone bear the full brunt of 54% of private adjuncts' fees,<sup>389</sup> evidence from our interviews drove home the true toll of that statistic. One claims administrator, for instance, recounted a situation in which the judge appointed a special master to preside over the inventory settlement of around one hundred plaintiffs with diverse settlement awards. The special master charged around \$250,000 on a per capita basis, meaning that each client paid the same amount for administrative costs. After the attorney's one-third contingent fee, "the client was netting less than 50% of her award. The lawyer didn't want or hire the special master. What do you do in those situations? . . . I do the math and tell every law firm when they don't pass the 50% test before liens," the administrator concluded.<sup>390</sup> Similarly, one attorney said: "When you have all those [settlement] categories based on the severity of the injury, the least compensated category gets totally devoured by the fees. With [lien resolution administrators], special master, common benefit fees, etc., if someone gets a \$10,000 payout, they end up getting maybe \$1,500."<sup>391</sup>

Costs can impact plaintiffs disproportionately in other ways too, including their right to access the justice system. Despite later employing a team of four special masters to administer the *Zyprexa* settlement, one transferee judge questioned whether litigant-paid adjuncts might raise constitutional problems for violating the Appropriations Clause:

The practice is analogous to the National Park Service deciding that, if it does not have enough money to run a park, it will charge a new user fee without specific statutory

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387. Cohen, *Special Masters Versus Magistrate Judges*, *supra* note 4, at 75.

388. *Id.*

389. See *supra* Figure 12.

390. Interviews, *supra* note 48. The 50% test determines whether a plaintiff nets less than 50% of their settlement award.

391. *Id.* (different interviewee).

authorization. Taken to the extreme, the constitutional argument might mean that a court must deny plaintiffs access if they cannot pay certain expenses.<sup>392</sup>

Adjuncts increase costs in two ways: time to resolution and actual dollars. Plaintiffs feel the impact of both. And as monetary costs mount, lawyers may be less inclined to pursue those cases at all. One magistrate judge noted, “[U]nless special masters are used only in select instances, it could end up being a constitutional bar to a person’s right of access to the court.”<sup>393</sup> Making “money off that gateway to the court has a significant impact on the community.”<sup>394</sup> Likewise, one defense attorney said, “[S]pecial masters are like renting a new judge, it’s not fair. Filing fees should entitle you to a public adjudication.”<sup>395</sup> “Who’s going to pay for all the privatization if defendants win? [Settlement] becomes a self-fulfilling prophecy to make sure all of these parties get paid.”<sup>396</sup> Although judges appoint fewer adjuncts in proceedings where defendants win, that outcome is certainly not a foregone conclusion when courts make those initial decisions.

#### B. *Judges Should Prioritize Public Resources*

Instead of turning reflexively to private adjuncts, judges should first consider appointing a magistrate judge in MDLs. The overall caseload statistics presented in Part I illustrate that federal courts’ civil burden has not increased much at all since 1995, and state courts’ civil caseload has decreased.<sup>397</sup> The one increase that we observed was in MDL filings. That doesn’t suggest a crisis in the courts; rather, it reflects a predictable shift: As companies globalize their products and new forms of social media and interactivity lend themselves to expansive advertisement opportunities, it would be expected that if a faulty product hits the market, it would produce widespread harm. That intuition is reflected in the increased number of products liability MDLs from 2007 to 2017.<sup>398</sup> Instead of showing cause for alarm, these statistics simply illustrate a need to deploy resources accordingly.<sup>399</sup>

Magistrate judges, whose salaries come from the general tax revenue, are a preferable first-best solution for several reasons. First, as salaried, public employees, magistrates are better insulated from the capture, bias, and self-dealing concerns that plague party-selected, party-compensated

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392. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 *Nw. U. L. Rev.* 469, 501 (1994).

393. Interviews, *supra* note 48.

394. *Id.* (same interviewee).

395. *Id.* (different interviewee).

396. *Id.* (same interviewee).

397. *Supra* notes 57–58 and accompanying text (providing caseload statistics).

398. Williams, *supra* note 116, at 1267–68.

399. See Pro, *supra* note 140, at 809 (noting that magistrate judge use is driven by a variety of factors, including the district’s caseload and the magistrate’s experience level and skill set).

private adjuncts.<sup>400</sup> They can (and have) performed the same work as special masters, and sometimes even claims administrators, for far less expense. As one attorney we interviewed noted, “[T]he magistrate is free; that’s always a preference among litigants to have no cost.”<sup>401</sup> Because they are not paid by the hour, magistrates’ incentives better align with judges’ aim to move the proceedings along. When appointed as a special master under Rule 53, they have the same freedom to operate behind the scenes as does any private special master, but magistrates’ decisions need not be colored by a desire for future business.

Second, magistrates are already ensconced within the federal courthouse. They possess the legitimacy of federal office, know the court’s culture, and have staff and law clerks that do not add to parties’ expenses. Plus, they are accustomed to the ways in which judges review their decisions, and clear paths exist for judicial review and error correction. So long as the same magistrate does not issue pretrial rulings and conduct settlement discussions, using magistrates may reduce behind-the-scenes coercion that some attorneys reported, while judicial review sheds light on ad hoc procedures.

One attorney mentioned that magistrates who work regularly with the same district judges “may have developed practices over time that they believe provide efficiency, plus the magistrate may have insight into what the judge thinks about the case.”<sup>402</sup> Studies interviewing magistrates bear this out: In some districts at least, expectations between district and magistrate judges “were understood even when unspoken.”<sup>403</sup> Conversely, said the lawyer, if the special master “is outside of the courthouse and doesn’t have experience with the federal judge (maybe expertise in the subject but not experience in pretrial proceedings or with this judge), then there may be more efficiency with the magistrate.”<sup>404</sup>

Third, our interviews suggested that magistrate judges wanted opportunities to take on MDLs, and previous work indicates that they are capable of becoming experts themselves.<sup>405</sup> As one magistrate noted, “I haven’t had a case I didn’t think I could handle.”<sup>406</sup> Said another of the work, “[M]agistrates would welcome it—MDL work is great and interesting.”<sup>407</sup> Judge Hanks’s interviews with magistrate judges likewise indicated that even though MDL proceedings “did consume a large amount of time,

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400. See *supra* section I.B.

401. Interviews, *supra* note 48.

402. *Id.* (same interviewee).

403. *Pro*, *supra* note 140, at 805.

404. Interviews, *supra* note 48.

405. Hanks, *supra* note 19, at 68, 79; see also Jack B. Weinstein & Jonathan B. Wiener, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 *St. John’s L. Rev.* 429, 439 (1988) (“Magistrates who are given full power to manage discovery can do so exceptionally well.”).

406. Interviews, *supra* note 48.

407. *Id.* (different interviewee).

their dockets did not become unmanageable.”<sup>408</sup> Moreover, despite a heavier workload, magistrate judges who handled MDLs “reported they enjoyed the challenges” and “appreciated their role,”<sup>409</sup> a similar sentiment to that expressed by the transferee judges that Professor Abbe Gluck interviewed.<sup>410</sup>

One district judge we spoke with noted that magistrates are particularly well equipped to handle smaller MDLs and that it was only in a larger, more contentious proceeding with a substantial privilege log that the magistrate felt overwhelmed, leading the judge to appoint a special master. “The magistrate was very appreciative. She felt burdened and felt badly that she couldn’t do it all. But that wasn’t at the outset of the case, it was on down the line.”<sup>411</sup>

Litigants might worry that magistrates, as salaried employees, would be less willing to spend nights and weekends working on their case. The data collected could not address this concern, for courts often appointed both magistrates and special masters—making it impossible to untangle their effects. Nevertheless, the magistrate judges with whom we spoke, as well as previous studies, belie such criticisms of public servants, and parties appeal both magistrate and special master decisions at similar rates with similar outcomes.<sup>412</sup>

Fourth and finally, successful mass-tort proceedings benefit the public, not just the plaintiffs. Why should litigation costs fall disproportionality on the latter? We are, after all, each better off for not having our cars turn off while we drive them. Everyone can lead better lives when pharmaceutical companies adequately warn doctors about risky side effects and when lawsuits force medical-device companies to pull faulty products off the market. In short, products liability MDLs play a policing role that impacts public health. Using the general tax base to compensate the public servants who help resolve these disputes makes sense. Appointing private judicial adjuncts, on the other hand, taxes those who use the system but not everyone who benefits from it.

### C. *Judges as Supervisors*

To be sure, the justice system isn’t free: Plaintiffs pay filing fees, contingent fees, and litigation expenses. But private-adjunct expenses indicate that there can be additional costs, too. That does not mean that judges must tackle MDLs alone, but it does suggest a need for closer attention to

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408. Hanks, *supra* note 19, at 69.

409. *Id.* This also suggests that magistrate judges may be able to handle MDL work in addition to (rather than in lieu of) their work on habeas and social security cases, which one of our interviewees noted can be “time consuming, rote, and mind numbing.” Interviews, *supra* note 48.

410. See Gluck, *supra* note 140, at 1693–94.

411. Interviews, *supra* note 48.

412. See Hanks, *supra* note 19, at 59.

the cost-benefit calculus. Of course, there may be times when judicial vacancies or the court's overall caseload make the volume overwhelming, or even when a proceeding truly does require specialized expertise that a magistrate lacks. For these instances, this Article offers a few guidelines.

Unless magistrate resources are scarce, special masters should be used sparingly for overseeing pretrial activities—an area in which magistrates are particularly experienced and adept. Special masters are best used in long-term projects like medical-monitoring programs that demand continuity and in “nation-building” type projects where they have to gain the trust of neighbors or those incarcerated to implement a court's decree.<sup>413</sup> Likewise, in toxic torts or geographically centric accidents where plaintiffs can come together to discuss their desires and settlement options, special masters and mediators may play a useful role.

Special masters and accountants may also be advantageous in overseeing plaintiffs' attorneys' common-benefit fees and in administering settlements, but only with appropriate checks in place. Lawyers raised concerns about their fees being undervalued by special masters who are beholden to the same attorneys in other concurrent proceedings, suggesting that judges should seek input on conflicts from non-lead attorneys and be willing to review special masters' decisions *de novo*. Others worried about the same special master moving from, for instance, leadership selection and common-benefit fees to a role overseeing settlement negotiations. Conflicts are nearly unavoidable when the same person moves from a trusted plaintiffs-side confidante to a settlement facilitator for both sides.

When selecting a private adjunct, attorney interviews proposed that judges “should have buy-in from both sides.”<sup>414</sup> “Everyone should get to put three people in a hat, like when you're picking a mediator. There should be more choice.”<sup>415</sup> This strikes at the heart of anxieties over both pricing structures and repeat play; diverse options may allow parties to discuss costs and benefits more openly.

Disclosing adjunct candidates' budgets on the record likewise fosters transparency and frugality. “Costs and the number of special masters are legitimate concerns,” acknowledged one district judge; these appointments are “not an opportunity for you to take care of your buddy who owns a document management company . . . . The district court must have some oversight.”<sup>416</sup> Special Master Ed Gentle issued a “Pepsi challenge”: “If the

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413. See, e.g., Berger, *supra* note 85, at 710 (describing the special master's role in integrating a school and revitalizing the area of Coney Island); Brakel, *supra* note 86, at 543 (discussing the special master's role in implementing decrees reforming prisons and mental hospitals); Edgar C. Gentle, III, Administration of the 2003 Tolbert PCB Settlement in Anniston, Alabama: An Attempted Collaborative and Holistic Remedy, 60 Ala. L. Rev. 1249, 1258 (2009) (discussing the special master's role in remedying the long-term, community-wide impacts of a toxic tort).

414. Interviews, *supra* note 48.

415. *Id.* (same interviewee).

416. *Id.* (different interviewee).

special master takes on a task, she should come up with a budget and try to stick with it; as services are rendered she should then report progress against task milestones for each invoice (a speaking bill) so the parties can evaluate the costs and benefits.”<sup>417</sup>

With the power to appoint comes the power—and obligation—to monitor.<sup>418</sup> Some judges, however, seemed hesitant to intervene when all parties agreed. One said, “Some special masters charge exorbitant hourly rates,” but “that comes into play [for me] only if there was a dispute as to who the special master should be based on the rates . . . . Otherwise, there’s no reason for me to get involved.”<sup>419</sup> Another judge disagreed: “Rule 1: Just, speedy, and inexpensive—that’s the hook for judges to get involved for holding down costs. Runaway costs don’t help anyone.”<sup>420</sup> Instead, the “number one thing is transparency. The special master has to keep everyone informed about his role and what he’s doing.”<sup>421</sup>

Scholarship about the potential for class counsel to abuse their power at class members’ expense has existed for decades.<sup>422</sup> And recent amendments to Rule 23(e) suggest that judges should approve a class settlement only after considering whether the relief offered is adequate, including “the method of processing class-member claims.”<sup>423</sup> If judges ever doubted their power to demand information on settlement administration or to ensure cost effectiveness, this change should allay those fears. Granted, some judges exhibited an exemplary fly’s eye for detail even before that amendment: In presiding over the *Ephedra* litigation, for example, the transferee judge had the special master file every proposed bill on the docket and gave parties an opportunity “to object to or otherwise comment” on it to him, *ex parte*.<sup>424</sup>

Similar fiduciary concerns arise in nonclass MDLs, where judges call upon substantially more adjuncts to help administer aggregate settlements. Not only are those costs likely to be greater, meaning that it is likely to be more expensive to put money in plaintiffs’ hands in those settlements than in class action deals,<sup>425</sup> but lead lawyers’ fiduciary obligations toward

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417. *Id.* (different interviewee).

418. For proposed standards for approving claims administrators and their programs, see Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 *Stan. L. Rev.* 1361, 1386–89 (2005).

419. Interviews, *supra* note 48.

420. *Id.* (different interviewee).

421. *Id.* (same interviewee).

422. See, e.g., Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 *Cornell L. Rev.* 1045, 1057, 1090–92 (1995).

423. Fed. R. Civ. P. 23(e)(2).

424. Notice of Opportunity to Object to Special Master’s Bill Dated 8/2/04 at 1, In re *Ephedra Prods. Liab. Litig.*, No. 04-MD-1598 (S.D.N.Y. Aug. 2, 2004); see also Order at 1, In re *Ephedra Prods. Liab. Litig.*, No. 04-MD-1598 (S.D.N.Y. May 19, 2004).

425. Of course, claims rates in both class actions and aggregate settlements are difficult to find, so we were unable to consider anything approaching a cost per claimant. We explain

nonclient plaintiffs are muddled at best.<sup>426</sup> Most judges do not appoint lead lawyers based on adequate-representation principles. Yet, they allow those attorneys to “consent” to adjunct appointments on behalf of the plaintiffs.<sup>427</sup> The worry then is that those leaders may lack a strong incentive toward frugality. Some lawyers’ retainer agreements, for example, allow them to charge clients interest on costs—up to 12% annually.<sup>428</sup> Those attorneys stand to profit both from private adjuncts’ appointment and the delay they create.

The method that some judges use to award common-benefit fees and class counsel’s fees may likewise give plaintiffs’ lawyers an incentive to *increase* costs.<sup>429</sup> In *Vioxx*, for example, the transferee judge capped the total amount of attorneys’ fees at 32% of the gross recovery (an amount that included administrative costs) and awarded leaders 6.5% of that gross

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further possibilities for these discrepancies, including a lower claims rate, *supra* section III.A.2.

426. See Memorandum & Order at 12–13, *Casey v. Denton*, No. 3:17-cv-00521 (S.D. Ill. Sept. 4, 2018) (discussing whether leaders owe duties to nonclients); Opinion & Order at 14, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-md-2543 (S.D.N.Y. Apr. 12, 2016) (same); Principles of the Law of Aggregate Litigation § 1.04 reporter’s notes on cmt. a (Am. L. Inst. 2010) (same); Burch, *Mass Tort Deals*, *supra* note 194, at 96–98 (same); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 *Fordham L. Rev.* 1985, 1989–90 (2011) (same). As one academic has argued, fiduciary obligations are what separate lawyers from car dealers and construction workers, which spills over into billing arrangements: When clients are oversold in those situations, “there is social harm, to be sure, but there is no disloyalty or betrayal, because these service providers deal at arm’s length with everyone and do not (seriously) profess otherwise.” W. William Hodes, *Cheating Clients with the Percentage-of-the-Gross Contingent Fee Scam*, 30 *Hofstra L. Rev.* 767, 782 (2002).

427. See Hensler, *Alternative Courts*, *supra* note 27, at 1434 (resolving claims “depends on who is at the negotiating table,” as claimants “represented by lawyers who have a good deal at stake in the outcomes of the claims resolution design process . . . are likely to do better than categories of claimants who are unrepresented or whose lawyers are edged out of the process by legal maneuvering”).

428. *Transvaginal Mesh Litigation: Attorneys Contingent Fee & Cost Employment Agreement* between clients and Aylstock, Witkin, Kreis & Overholtz, P.L.L.C. and Ennis & Ennis, P.A., *supra* note 252, ¶ 3 (“All costs advanced on our behalf, whether individually and/or common benefit, shall bear interest at the rate of one percent (1%) per month (12% per year) until such time as the costs are paid by us.”); see also First Amended Complaint, Exhibit A at 1, *Plummer v. McSweeney*, No. 4:18-cv-00063-JM (E.D. Ark. Aug. 27, 2018), 2018 WL 1789882 (exhibiting a contingency fee retainer agreement allowing law firms to recover “reasonable interest on all expenses that are advanced (not to exceed the ‘prime’ rate published in the Wall Street Journal)”; Complaint, Exhibit 1 at 2, *Morrison v. Blasingame*, Burch, Garrard & Ashley, P.C., No. 2:17-cv-04133 (S.D. W. Va. June 14, 2017) (“All costs and expenses associated with the litigation which are advanced or paid by the Firms shall accrue interest at the maximum rate of interest authorized by applicable law, but not to exceed seven percent (7%) per annum . . .”).

429. Engstrom, *Lawyer Lending*, *supra* note 251, at 425 (“The problematic scenario is thus chiefly confined to the gross, client deduction approach, as it alone makes the client wholly responsible for expenses and thereby insulates the lawyer from the effects of exorbitant spending.”).

recovery in common-benefit fees.<sup>430</sup> He subtracted costs thereafter.<sup>431</sup> Including costs and expenses in plaintiffs' gross recovery and awarding attorneys' percentage fees out of that lump sum does little to encourage frugality. So long as settlement is likely, this method may encourage lead lawyers or class counsel to spend freely, for it permits them to receive a portion of that fund as fees in addition to being reimbursed for clients' costs. Moreover, *Vioxx* is not an outlier. Given that it is in their best financial interests to do so, it is no surprise that where ethics rules permit attorneys to deduct their fees from the gross settlement award and then deduct expenses thereafter (as most ethics rules do), that seems to be precisely what most choose.<sup>432</sup>

Rule 23(h) gives judges clear authority over class counsel's fees, and a similar restitution theory supports judicial oversight in awarding common-benefit fees in nonclass aggregate settlements.<sup>433</sup> Consequently, in addition to requesting budgets, pricing structures, and costs from private adjuncts (and disclosing them on the record), one straightforward proposal to encourage fiscal responsibility would be to first subtract and reimburse common-fund costs and expenses from plaintiffs' gross settlement amount, then award leaders a percentage of plaintiffs' net recovery.<sup>434</sup> At

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430. See *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 646, 661 (E.D. La. 2010); see also Pretrial Order 51A, *supra* note 251, at 2–3.

431. Pretrial Order 51A, *supra* note 251, at 1.

432. See, e.g., Stephen D. Annand & Roberta F. Green, *Legislative and Judicial Controls of Contingency Fees in Tort Cases*, 99 W. Va. L. Rev. 81, 95 (1996) (“Almost without exception, plaintiffs’ attorneys’ fees are calculated from the *total* amount of the settlement or verdict *before* costs are taken into consideration.”); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *Fordham L. Rev.* 247, 248 (1996) (observing that standard contingency fees are “usually thirty-three percent to forty percent of gross recoveries”). On ethics, the Model Rules of Professional Conduct permit attorneys to deduct fees from either the gross award or the net award so long as the agreement notifies the client of the method. Model Rules of Pro. Conduct r. 1.5(c) (2020); see also Engstrom, *Lawyer Lending*, *supra* note 251, at 425 (“Some states . . . demand that expenses be deducted before the contingency fee is calculated. The bad news, though, is that the gross, client deduction approach is permissible in most states. Where it is permissible it appears to be utilized by the majority or vast majority of contingency fee practitioners.”).

433. Fed. R. Civ. P. 23(h) (“In a certified class action, the court may award reasonable attorney’s fees . . .”); see also Burch, *Judging Multidistrict Litigation*, *supra* note 195, at 102–03 (noting that judges may apply the common-fund doctrine even after denying class certification); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 *Vand. L. Rev.* 67, 146–48 (2017) (“Judges and lead lawyers routinely invoke the common-fund doctrine to justify awarding leadership’s fees.”). Judges might reach the same result by using a reasonableness test, which acknowledges that reasonableness must reflect what’s rational and appropriate in light of the settlement amounts. See Hodes, *supra* note 426, at 773–75, 782 (suggesting that attorneys and ethics rules focus on “value added” by the lawyer and arguing that “the percentage-of-the-gross contingent fee should be deemed per se unreasonable”).

434. For a detailed proposal along these lines, see Burch, *Mass Tort Deals*, *supra* note 194, at 190–200; see also Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 *Cornell L. Rev.* 529, 592 n.216 (1978) (explaining how clients’ net recovery is likely to increase overall using a similar approach); Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 *Geo. Wash. L. Rev.* 767, 788 (2014) (proposing that judges

the least, it means that lead plaintiffs' attorneys do not stand to profit from the expenses they incur on plaintiffs' behalf.

#### CONCLUSION

What does justice cost and who should deliver it? What started as a simple idea to assess the costs and benefits of appointing judicial adjuncts quickly morphed into that much larger question. Looking under the hood of MDLs opened our eyes to an entire industry that thrives upon mass-tort settlements. These deals plainly compensate far more people than just the plaintiffs. Although we could not obtain substantive payouts for the plaintiffs or class members within our proceedings, our interviews with those involved raised concerns over how private actors' appointments affect plaintiffs' payouts. As one magistrate lamented, "[O]nce you get that [special master] gig, it's like a gold mine, it's like a golden ticket."<sup>435</sup>

If that golden ticket becomes self-perpetuating, with attorneys appointing private adjuncts, and private adjuncts repaying those appointments with leadership positions, common-benefit fee allocations, preferential expedited claims processing, greater awards in extraordinary injury funds, or lighter scrutiny of class settlements, then the effects on our nation's largest cases are significant. By pulling back the curtain on judicial adjunct appointments in MDLs, we aim both to shed light on the subject and to situate it within the broader currents of privatization. When privatization moves from outside the courthouse into its chambers, it raises access-to-justice and oversight issues. As private actors begin to reshape the American judiciary, Article III judges have a tremendous opportunity: They can reclaim adjudication for themselves or for magistrate judges, or they can use the power to appoint (or not) as a crowbar into the black box of private settlements, thereby illuminating and, perhaps improving, what they find within.

#### APPENDIX

##### A. *Methodology*

Section II.A explains how we created our dataset and selected the ninety-two proceedings within it. We pulled each proceeding's docket on Bloomberg Law and ran several searches to identify whether the court appointed a judicial adjunct: "*appoint*," "*master*," "*magistrate*," "*medial*" (for mediator), "*administ*" (for administer and administrator), and "*settle*" (for settlement master). As part of our search for complexity measures in section III.A.2, outcomes in sections III.A.2 through III.A.3, and adjunct fees in section III.B, we also downloaded and scoured complaints, orders

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should "use the net recovery to the class, rather than the gross recovery" when awarding class counsel's fee).

435. Interviews, *supra* note 48.

approving settlements, and orders awarding fees. This exercise sometimes revealed additional adjunct appointments that did not appear in our initial docket search.

We considered the adjunct to be appointed (or assigned as it sometimes pertained to magistrates) if there was a docket entry, order to appoint, or judicial order to pay the judicial adjuncts. Where multiple orders existed appointing the same person or entity to perform different jobs in the same proceeding, we recorded these as separate appointments.<sup>436</sup> We deemed magistrates as part of a proceeding only if a referral was made or the magistrate judge was appointed in a specific capacity (discovery master, etc.) *and* there was evidence on the docket of the magistrate carrying out that duty. We initially relied on student coders to search many of the dockets, but we subsequently doubled back, verified, and added to their findings in each proceeding, increasing our confidence in the results.

Using the same ninety-two proceedings, we also collected information on adjuncts' fees, including amount and, for private adjuncts, which party paid. Within each Bloomberg Law docket report, we ran several searches to identify documents that might contain fee-related information: "*disburse*," "*distribut*" (for distribute or distribution), "*fees*," "*cost*," "*award*," and "*expenses*." Because judicial adjunct fees are sometimes included with motions to disburse common-benefit attorneys' fees, we downloaded and analyzed those documents as well. When adjuncts were paid as the proceeding progressed, we created an Excel spreadsheet tracking payouts per adjunct. Again, we initially relied on student coders to search many of the dockets, but we subsequently doubled back, added to, and verified their coding in each proceeding, increasing our confidence in the results.

Our first goal in this Article is to provide quantitative evidence of how judicial adjuncts are used within products liability MDLs. Second, we add narrative to those findings with our interviews, aiming to provide greater insight into the costs and benefits of those appointments. Thus, to supplement our empirical data, we conducted semi-structured interviews with twenty-two people involved in products liability MDLs (including twenty-seven of the proceedings in our dataset and over a hundred proceedings

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436. Each time a judge appoints an adjunct, they are outsourcing their power to someone else or authorizing someone to do something. Each appointment is thus a decision point at which judicial power could stay with the judge, go to a magistrate, or go to a private adjunct. Accordingly, when a judge initially appointed a magistrate or special master to perform pretrial duties and later entered a separate order assigning that person to a different task, we recorded it as two appointments. As noted in the text, there is some creep between these categories. A magistrate or master appointed to handle pretrial proceedings could also wind up handling settlement. But without a separate order of appointment, we coded that situation as only one appointment.

overall): special masters,<sup>437</sup> magistrates,<sup>438</sup> district judges,<sup>439</sup> claims administrators,<sup>440</sup> and plaintiff and defense attorneys.<sup>441</sup> Each conversation lasted about an hour. We interviewed fourteen lawyers (from both the plaintiff and defense sides), six adjuncts, and two transferee judges.

Though the interviews themselves are not a comprehensive review of all the participants in our proceedings, they are not meant to be. Random selection of interviewees allows us to control for experience, adjunct roles, and a host of other factors.<sup>442</sup> Moreover, the purpose of these interviews is to better understand the quantitative (and statistically significant) findings regarding the use of judicial adjuncts in these proceedings. By themselves, the interviews do not offer (nor are they intended to offer) statistical significance. Instead, the interviews provide more richly detailed information about how adjuncts were used within these MDL proceedings, why they were used, and what issues arose in their use. Assuring interview participants of confidentiality allows them to speak freely about their experiences without fear of consequence, allowing them to be candid in answering our questions.<sup>443</sup> Thus, the surveys provide additional detail, support our quantitative analysis, and reflect a representative and (to the best of our

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437. We asked whether special masters knew if their appointment stemmed from the judge or the parties; whether a magistrate was assigned to proceedings that they worked on as well and, if so, how responsibilities were allocated among them; and whether questions of cost typically get negotiated and whether those costs appear on the record.

438. We asked magistrates how they were appointed; whether a special master appeared in proceedings alongside them and, if so, how responsibilities were allocated among them; whether they wanted to take on MDL cases and, if so, whether barriers existed to them doing so; what advantages or disadvantages might exist as to appointing a special master or magistrate; and if they had any sense as to how appointing a magistrate or special master might affect cost or delay.

439. We asked district judges how magistrates are appointed in their district; whether they have a preference for working with special masters or magistrates; whether they have cost concerns when it comes to one or the other; whether the parties suggested that cost was an issue for them with special masters; and whether parties kept them informed about the total special master costs.

440. We asked claims administrators whether there were any particular issues that we should be thinking about and addressing in this Article; how parties typically select them; whether a special master was assigned in the MDL cases that they worked on and, if so, how settlement responsibilities were allocated.

441. We asked attorneys if there were any particular issues that we should be thinking about and addressing in this Article; whether they had a preference for special masters or magistrates; how mediators are selected and compensated; who tends to suggest the use of a special master; whether the judge oversees the special masters' bills; whether cost was a concern; and how claims and lien-resolution administrators are selected and compensated.

442. See generally Gary King, Robert O. Keohane & Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (1994) (explaining methods to control variables and avoid selection bias in qualitative research).

443. See *The SAGE Handbook of Applied Social Research Methods* 20 (Leonard Bickman & Debra J. Rog eds., 2d ed. 2009) ("Making the data collection anonymous may improve the accuracy of [self-reported] data, especially about sensitive topics.").

knowledge) honest accounting of the use of adjuncts in these MDL proceedings.

Although we had additional interviews planned, the advent of the novel coronavirus precluded us from conducting them. We might add, however, that little additional information is likely to be gained from further interviews. The patterns established in the quantitative data are clear, these interviews support those findings, and additional anecdotes, though interesting, are unlikely to change the findings. Judicial adjuncts as an industry may number in the thousands, but in our data we found just over two hundred appointments (fewer total people). We generalize from our data, as we should, and hint about what we may find outside our data given that we have a representative sample of proceedings and spoke to a representative sample of participants in those proceedings.

#### B. *Included Proceedings*

Table 18: List of Included Proceedings in the Dataset, by MDL Number

MDL No.	Master Docket	Filed	Centralized	Closed	District
<i>In re Elect. Receptacle Prods. Liab. Litig.</i>					
1595	N/A	12/31/03	4/8/04	2/21/07	D.S.C.
<i>In re Zyprexa Prods. Liab. Litig.</i>					
1596	1:04-md-1596	12/31/03	4/14/04	8/24/12	E.D.N.Y.
<i>In re Ephedra Prods. Liab. Litig.</i>					
1598	1:04-md-1598	1/8/04	4/13/04	4/3/09	S.D.N.Y.
<i>In re Gen. Motors Corp. "Piston Slap" Prods. Liab. Litig.</i>					
1600	04-mdl-01600	1/13/04	4/15/04	10/20/06	W.D. Okla.
<i>In re Deep Vein Thrombosis Litig.</i>					
1606	3:04-cv-1606	2/5/04	6/22/04	7/3/08	N.D. Cal.
<i>In re Maytag Corp. Neptune Washer Prods. Liab. Litig.</i>					
1617	2:04-md-1617	4/20/04	8/24/04	5/3/05	S.D. W. Va.
<i>In re Accutane (Isotretinoin) Prods. Liab. Litig.</i>					
1626	8:04-md-2523	6/7/04	11/1/04	8/4/15	M.D. Fla.
<i>In re High Sulfur Content Gasoline Prods. Liab. Litig.</i>					
1632	2:04-cv-1595	6/25/04	11/5/04	9/7/06	E.D. La.
<i>In re Vioxx Prods. Liab. Litig.</i>					
1657	2:05-md-1657	10/8/04	2/16/05	9/20/18	E.D. La.

MDL No.	Master Docket	Filed	Centralized	Closed	District
<i>In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)</i>					
1687	2:03-cv-4558	3/16/05	6/16/05	7/15/13	D.N.J.
<i>In re Bextra &amp; Celebrix Mktg., Sales Prac. &amp; Prods. Liab. Litig.</i>					
1699	3:05-md-1699	5/13/05	9/6/05	4/11/13	N.D. Cal.
<i>In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.</i>					
1708	0:05-md-1708	6/16/05	11/7/05	8/20/12	D. Minn.
<i>In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.</i>					
1718	2:05-md-1718	7/15/05	10/28/05	8/6/13	E.D. Mich.
<i>In re Cessna 208 Series Aircraft Prods. Liab. Litig.</i>					
1721	2:05-md-1721	8/2/05	12/7/05	7/21/11	D. Kan.
<i>In re Viagra Prods. Liab. Litig.</i>					
1724	0:06-md-1724	8/25/05	1/26/06	11/14/11	D. Minn.
<i>In re Medtronic, Inc., Implantable Defibrillators Prods. Liab. Litig.</i>					
1726	0:05-md-1726	9/1/05	12/7/05	6/30/09	D. Minn.
<i>In re Teflon Prods. Liab. Litig.</i>					
1733	4:06-md-1733	10/24/05	2/21/06	5/5/09	S.D. Iowa
<i>In re Celexa &amp; Lexapro Prods. Liab. Litig.</i>					
1736	4:06-md-1736	11/9/05	2/16/06	9/4/13	E.D. Mo.
<i>In re Am. Honda Motor Co., Inc., Oil Filter Prods. Liab. Litig.</i>					
1737	2:06-ml-1737	11/9/05	2/24/06	10/26/09	C.D. Cal.
<i>In re Canon USA, Inc., Digit. Cameras Prods. Liab. Litig.</i>					
1740	1:06-md-1740	11/16/05	2/24/06	7/16/07	S.D.N.Y.
<i>In re Ortho Evra Prods. Liab. Litig.</i>					
1742	1:06-cv-40000	11/28/05	3/1/06	1/7/15	N.D. Ohio
<i>In re Profiler Prods. Liab. Litig.</i>					
1748	3:06-cv-1748	12/19/05	4/24/06	9/29/11	S.D. Ill.
<i>In re Apple iPod Nano Prods. Liab. Litig.</i>					
1754	N/A	12/28/05	4/17/06	12/23/09	N.D. Cal.
<i>In re Aredia &amp; Zometa Prods. Liab. Litig.</i>					
1760	3:06-md-1760	1/27/06	4/18/06	9/26/14	M.D. Tenn.
<i>In re Hum. Tissue Prods. Liab. Litig.</i>					
1763	2:06-cv-135	2/7/06	6/21/06	11/5/13	D.N.J.

MDL No.	Master Docket	Filed	Centralized	Closed	District
<i>In re Seroquel Prods. Liab. Litig.</i>					
1769	6:06-md-1769	2/22/06	7/6/06	2/14/13	M.D. Fla.
<i>In re Bausch &amp; Lomb, Inc., Contact Lens Sol. Prods. Liab. Litig.</i>					
1785	2:06-mn-77777	5/4/06	8/14/06	8/7/12	D.S.C.
<i>In re Fosamax Prods. Liab. Litig.</i>					
1789	1:06-md-1789	5/24/06	8/16/06	6/11/18	S.D.N.Y.
<i>In re Stand 'N Seal Prods. Liab. Litig.</i>					
1804	1:07-md-1804	8/18/06	1/5/07	1/10/13	N.D. Ga.
<i>In re CertainTeed Corp. Roofing Shingles Prods. Liab. Litig.</i>					
1817	2:07-md-01817	10/23/06	2/15/07	6/7/11	E.D. Pa.
<i>In re Bluetooth Headset Prods. Liab. Litig.</i>					
1822	2:07-ml-1822	11/16/06	2/20/07	9/25/09	C.D. Cal.
<i>In re Kugel Mesh Hernia Patch Prods. Liab. Litig.</i>					
1842	1:07-md-1842	2/28/07	6/22/07	9/8/17	D.R.I.
<i>In re Conagra Peanut Butter Prods. Liab. Litig.</i>					
1845	1:07-md-1845	3/6/07	7/17/07	4/2/15	N.D. Ga.
<i>In re Pet Food Prods. Liab. Litig.</i>					
1850	1:07-cv-2867	3/30/07	6/19/07	11/18/08	D.N.J.
<i>In re FEMA Trailer Formaldehyde Prods. Liab. Litig.</i>					
1873	2:07-md-1873	6/12/07	10/24/07	5/11/15	E.D. La.
<i>In re RC2 Corp. Toy Lead Paint Prods. Liab. Litig.</i>					
1893	1:07-cv-7184	8/28/07	12/19/07	10/17/08	N.D. Ill.
<i>In re Gen. Motors Corp. Speedometer Prods. Liab. Litig.</i>					
1896	2:07-cv-291	9/6/07	1/8/08	12/2/08	W.D. Wash.
<i>In re Mattel, Inc., Toy Lead Paint Prods. Liab. Litig.</i>					
1897	2:07-ml-1897	9/7/07	12/18/07	3/26/10	C.D. Cal.
<i>In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.</i>					
1905	0:08-md-1905	10/19/07	2/21/08	12/12/11	D. Minn.
<i>In re Gadolinium Contrast Dyes Prods. Liab. Litig.</i>					
1909	1:08-gd-50000	10/26/07	2/27/08	4/30/15	N.D. Ohio
<i>In re Saturn L-Series Timing Chain Prods. Liab. Litig.</i>					
1920	8:07-cv-298	11/30/07	2/19/08	6/10/09	D. Neb.

MDL No.	Master Docket	Filed	Centralized	Closed	District
<i>In re Trasylol Prods. Liab. Litig.</i>					
1928	1:08-md-1928	1/3/08	4/7/08	8/10/15	S.D. Fla.
<i>In re Vytorin/Zetia Mktg., Sales Pracs. &amp; Prods. Liab. Litig.</i>					
1938	2:08-cv-285	1/24/08	4/8/08	2/9/10	D.N.J.
<i>In re Aqua Dots Prods. Liab. Litig.</i>					
1940	1:08-cv-2364	1/25/08	4/9/08	9/7/12	N.D. Ill.
<i>In re Levaquin Prods. Liab. Litig.</i>					
1943	0:08-md-1943	2/19/08	6/13/08	7/19/17	D. Minn.
<i>In re Heparin Prods. Liab. Litig.</i>					
1953	1:08-hc-60000	4/4/08	6/6/08	9/23/16	N.D. Ohio
<i>In re Zurn Pex Plumbing Prods. Liab. Litig.</i>					
1958	0:08-md-1958	4/21/08	8/21/08	8/1/13	D. Minn.
<i>In re Panacryl Sutures Prods. Liab. Litig.</i>					
1959	5:08-md-1959	4/21/08	8/18/08	8/15/12	E.D.N.C.
<i>In re Bisphenol-A (BPA) Polycarbonate Plastics Prods. Liab. Litig.</i>					
1967	4:08-md-1967	5/23/08	8/13/08	7/19/13	W.D. Mo.
<i>In re Digitek Prods. Liab. Litig.</i>					
1968	2:08-md-1968	5/23/08	8/13/08	7/3/12	S.D. W. Va.
<i>In re Total Body Formula Prods. Liab. Litig.</i>					
1985	2:08-cv-1946	7/22/08	10/21/08	8/4/10	N.D. Ala.
<i>In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.</i>					
2001	1:08-wp-65000	9/26/08	12/20/08	9/29/16	N.D. Ohio.
<i>In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.</i>					
2004	4:08-md-2004	10/14/08	12/3/08	7/10/18	M.D. Ga.
<i>In re Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prods. Liab. Litig.</i>					
2006	2:07-cv-1740	10/21/08	2/10/09	8/31/09	D.N.J.
<i>In re Land Rover LR3 Tire Wear Prods. Liab. Litig.</i>					
2008	8:09-ml-2008	10/29/08	2/23/09	8/7/13	C.D. Cal.
<i>In re Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig.</i>					
2016	3:09-md-2016	12/2/08	2/13/09	1/16/13	W.D. Ky.
<i>In re Apple iPhone 3G Prods. Liab. Litig.</i>					
2045	5:09-md-2045	3/11/09	7/1/09	7/10/14	N.D. Cal.

MDL No.	Master Docket	Filed	Centralized	Closed	District
<i>In re Denture Cream Prods. Liab. Litig.</i>					
2051	1:09-md-2051	3/24/09	6/9/09	11/16/15	S.D. Fla.
<i>In re Oral Sodium Phosphate Sol.-Based Prods. Liab. Litig.</i>					
2066	1:09-sp-80000	4/15/09	6/23/09	11/8/12	N.D. Ohio
<i>In re Chantix Prods. Liab. Litig.</i>					
2092	2:09-cv-2039	7/8/09	10/1/09	10/6/14	N.D. Ala.
<i>In re Kitec Plumbing Sys. Prods. Liab. Litig.</i>					
2098	3:09-md-2098	7/28/09	10/7/09	11/28/11	N.D. Tex.
<i>In re Yasmin &amp; Yaz (Drospirenone) Mktg., Sales Practs. &amp; Prods. Liab. Litig.</i>					
2100	3:09-md-2100	7/30/09	10/1/09	1/4/19	S.D. Ill.
<i>In re Pamidronate Prods. Liab. Litig.</i>					
2120	1:09-md-2120	10/6/09	12/2/09	9/6/12	E.D.N.Y.
<i>In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practs., &amp; Prods. Liab. Litig.</i>					
2172	8:10-ml-2172	4/21/10	8/17/10	8/6/13	C.D. Cal.
<i>In re Apple Inc. iPhone 4 Prods. Liab. Litig.</i>					
2188	5:10-md-02188	7/15/10	10/8/10	7/29/13	N.D. Cal.
<i>In re Navistar 6.0 Diesel Engine Prods. Liab. Litig.</i>					
2223	1:11-cv-2496	12/10/10	4/13/11	7/18/13	N.D. Ill.
<i>In re Darvocet, Darvon, &amp; Propoxyphene Prods. Liab. Litig.</i>					
2226	2:11-md-2226	12/15/10	8/16/11	3/16/17	E.D. Ky.
<i>In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.</i>					
2233	2:11-md-2233	2/16/11	5/23/11	3/19/14	S.D. Ohio
<i>In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.</i>					
2247	0:11-md-2247	4/7/11	5/23/11	8/22/12	D. Minn.
<i>In re CertainTeed Fiber Cement Siding Litig.</i>					
2270	2:11-md-2270	6/3/11	8/8/11	10/6/14	E.D. Pa.
<i>In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig.</i>					
2283	8:11-mn-2000	7/14/11	10/11/11	7/15/14	D.S.C.
<i>In re Imprelis Herbicide Mktg., Sales Practs. &amp; Prods. Liab. Litig.</i>					
2284	2:11-md-2284	7/22/11	10/20/11	7/25/18	E.D. Pa.
<i>In re Actos (Pioglitazone) Prods. Liab. Litig.</i>					
2299	6:11-md-2299	8/31/11	12/29/11	4/25/18	W.D. La.

MDL No.	Master Docket	Filed	Centralized	Closed	District
<i>In re Skechers Toning Shoe Prods. Liab. Litig.</i>					
2308	3:11-md-2308	9/30/11	12/19/11	10/4/18	W.D. Ky.
<i>In re Ford Motor Co. Spark Plug &amp; 3-Valve Engine Prods. Liab. Litig.</i>					
2316	1:12-md-2316	10/21/11	2/8/12	2/5/16	N.D. Ohio
<i>In re MI Windows &amp; Doors, Inc., Prods. Liab. Litig.</i>					
2333	2:12-mn-00001	12/8/11	4/23/12	8/4/15	D.S.C.
<i>In re Zolofit (Sertraline Hydrochloride) Prods. Liab. Litig.</i>					
2342	2:12-md-2342	1/18/12	4/17/12	1/25/18	E.D. Pa.
<i>In re HardiePlank Fiber Cement Siding Litig.</i>					
2359	0:12-md-2359	3/6/12	6/11/12	7/11/18	D. Minn.
<i>In re Watson Fentanyl Patch Prods. Liab. Litig.</i>					
2372	1:12-cv-6296	4/13/12	8/7/12	8/15/14	N.D. Ill.
<i>In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.</i>					
2385	3:12-md-2385	5/30/12	8/8/12	12/18/17	S.D. Ill.
<i>In re Nexium (Esomeprazole) Prods. Liab. Litig.</i>					
2404	2:12-ml-2404	8/27/12	12/6/12	1/4/17	C.D. Cal.
<i>In re Mirena IUD Prods. Liab. Litig.</i>					
2434	7:13-md-2434	1/16/13	4/8/13	8/9/16	S.D.N.Y.
<i>In re Franck's Lab, Inc., Prods. Liab. Litig.</i>					
2454	2:13-md-2454	4/12/13	8/7/13	7/15/16	E.D. La.
<i>In re Effexor (Venlafaxine Hydrochloride) Prods. Liab. Litig.</i>					
2458	2:13-md-2458	4/24/13	8/6/13	9/22/15	E.D. Pa.
<i>In re Lipitor (Atorvastatin Calcium) Mktg., Sales Prac. &amp; Prods. Liab. Litig. (No. II)</i>					
2502	2:14-mn-2502	10/10/13	2/18/14	2/27/17	D.S.C.
<i>In re Neomedic Pelvic Repair Sys. Prods. Liab. Litig.</i>					
2511	2:14-md-2511	11/8/13	2/18/14	1/10/17	S.D. W. Va.
<i>In re Pella Corp. Architect &amp; Designer Series Windows Mktg., Sales Prac. &amp; Prods. Liab. Litig.</i>					
2514	2:14-mn-00001	11/19/13	2/14/14	4/3/18	D.S.C.
<i>In re Caterpillar, Inc., C13 &amp; C15 Engine Prods. Liab. Litig.</i>					
2540	1:14-cv-3722	3/18/14	6/11/14	9/27/16	D.N.J.
<i>In re GAF Elk Cross Timbers Decking Mktg., Sales Prac. &amp; Prods. Liab. Litig.</i>					
2577	2:15-cv-00018	8/20/14	12/12/14	8/18/17	D.N.J.

MDL No.	Master Docket	Filed	Centralized	Closed	District
<i>In re Rust-Oleum Restore Mktg., Sales Prac. &amp; Prods. Liab. Litig.</i>					
2602	1:15-cv-1364	11/12/14	2/6/15	3/15/17	N.D. Ill.
<i>In re Ethicon, Inc., Power Morcellator Prods. Liab. Litig.</i>					
2652	2:15-md-2652	6/18/15	10/15/15	9/9/16	D. Kan.
<i>In re Windsor Wood Clad Window Prods. Liab. Litig.</i>					
2688	2:16-md-2688	12/8/15	4/7/16	11/30/18	E.D. Wis.

