An Uncommon Focus on "Common Questions": Two Problems with the Judicial Panel on Multidistrict Litigation's Treatment of the "One or More Common Questions of Fact" Requirement for Centralization

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An Uncommon Focus on "Common Questions": Two Problems with the Judicial Panel on Multidistrict Litigation's Treatment of the "One or More Common Questions of Fact" Requirement for Centralization

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Scant attention has been paid to a key criterion applied by the Judicial Panel on Multidistrict Litigation for transferring cases pending in multiple federal district courts to a single court for coordinated or consolidated pretrial treatment: the cases must share "one or more common questions of fact." This Article traces the history of the Panel and the "common questions of fact" requirement back to their origins and then forward through the legislative process. This examination reveals that the "common questions of fact" standard arose before the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure that created the modern class action. The Article then identifies two problems that arise when the Panel applies a preamendment mind-set to modern class action cases.

First, the Article observes that the Panel sometimes uses a term of art from Rule 23—whether common factual questions "predominate" over unique factual questions. The Article analyzes the problems that the Panel's use of this term for centralization purposes creates for defendants involved in multidistrict litigation which includes (or may include) putative class claims. The Article explains that to prevent these defendants from foregoing the potential benefits of transfer and centralization, the Panel should avoid relying on the presence or absence of predominating (rather than just "one or more") common facts as a ground for granting or denying a motion to centralize cases.

Second, by analyzing a recently decided case, the Article explains how the origins of the Panel and the "common questions of fact" standard cause the Panel to focus excessively on whether the common questions of facts are core liability issues subject to coordinated or consolidated discovery to be taken of defendants. The Article points out that cases, including putative class action cases, having other types of common factual questions, may benefit from centralization and coordinated or consolidated pretrial treatment as well. These other types of common factual questions include those affecting the plaintiffs' standing, statute of limitations issues, and defenses that may apply across-the-board to all plaintiffs' claims, such as federal preemption or the government contractor defense. The Article suggests that the Panel is missing

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an opportunity to promote the just and efficient conduct of cases having these other types of common factual questions.

I. INTRODUCTION

The process by which the Judicial Panel on Multidistrict Litigation (the MDL Panel or Panel) centralizes cases pending in different federal district courts for coordinated or consolidated pretrial treatment implicates grand ideals of fairness and efficiency.[1] Scholars have rightly focused on those grand ideals,[2] but in practice, those ideals take a back seat to the words in the statute that created the MDL Panel and governs its actions. Seven words in that statute, which scholars have largely taken for granted, make up the one and only objective threshold criterion for centralizing cases pending in different districts: the cases must share "one or more common questions of fact."[3] This Article analyzes two problems with the MDL Panel's application of the "one or more common questions of fact" requirement to related cases that include one or more putative class actions.

This Article begins by tracing the history of the MDL Panel and the "common questions of fact" requirement back to their origins and then forward through the legislative process. This history reveals that

1. *See* 28 U.S.C. § 1407(a) (2000).
2. *See, e.g.*, Wilson W. Herndon & Ernest R. Higginbotham, *Complex Multidistrict Litigation—An Overview of 28 U.S.C.A. § 1407*, 31 BAYLOR L. REV. 33, 44-46 (1979).
3. 28 U.S.C. § 1407(a).

the "common questions of fact" standard and the ends to which it is directed were conceived of before the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure that created the modern class action.[4] Two problems arise when the MDL Panel applies a preamendment mind-set to modern class action cases. First, the MDL Panel sometimes borrows a key term of art from Rule 23—whether common factual questions "predominate" over unique factual questions.[5] The Article analyzes the problems that the Panel's use of this term for centralization purposes creates for defendants involved in multidistrict litigation that includes putative class claims and explains why the Panel should avoid relying on the presence or absence of predominating (rather than just "one or more") common facts as a ground for granting or denying a motion to centralize.

Second, by analyzing a recently decided case, the Article explains how the origins of the MDL Panel and the "common questions of fact" standard cause the Panel to focus excessively on whether the common questions of fact relate to core liability issues and are subject to coordinated or consolidated discovery to be taken of the defendant or defendants. Cases, including putative class action cases, having other types of common factual questions, such as certain plaintiff-side questions, would benefit from centralization and coordinated or consolidated pretrial treatment, as well. The Article suggests that the MDL Panel is missing an opportunity to promote the just and efficient conduct of cases having these other types of common factual questions.

II. THE BACKGROUND OF THE MDL PANEL AND THE "ONE OR MORE COMMON QUESTIONS OF FACT" CRITERION

The statute authorizing the MDL Panel to transfer cases from different federal district courts to a single district court for coordinated or consolidated pretrial proceedings (to centralize the cases), 28 U.S.C. § 1407, applies only to cases "involving one or more common questions of fact."[6] This criterion, however, predates the enactment of § 1407 and the creation of the MDL Panel. Section 1407 became law, and the MDL Panel was created, in 1968.[7] Six years earlier, the Coordinating Committee for Multiple Litigation of the United States

4. *See* FED. R. CIV. P. 23; *infra* notes 60-61 and accompanying text.
5. *See infra* notes 80-81 and accompanying text.
6. 28 U.S.C. § 1407(a).
7. Pub. L. No. 90-296, 82 Stat. 109 (1968).

District Courts (the Coordinating Committee) was created to address the problem of duplicative discovery and pretrial proceedings spawned by so-called "multiple litigation."[8] Based on its experience, the Coordinating Committee later drafted the bill that became § 1407.[9] The Coordinating Committee defined "multiple litigation" as "a significant number of civil cases having one or more common issues of fact for which central or coordinated judicial management may be desirable."[10] Accordingly, a proper understanding of the MDL scheme as it exists today, and its "one or more common questions of fact" test, begins with an understanding of the Coordinating Committee and its experience.

In the early 1960s, the government pursued criminal and civil antitrust cases against many manufacturers of electrical equipment.[11] The government charged that the manufacturers engaged in "conspiracies to fix prices and allocate business in twenty separate product lines."[12] Many of the manufacturers pled guilty.[13] Predictably, after the guilty pleas, many purchasers of the manufacturers' products brought private antitrust suits for damages.[14] Because the conspiracies were so broad, more than 1800 private actions were filed.[15] Many actions were brought by multiple plaintiffs and involved multiple product lines; more than 1800 distinct claims were raised.[16] These

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8. *See* Phil C. Neal & Perry Goldberg, *The* Electrical Equipment *Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 622-23 (1964). Mr. Neal was the Coordinating Committee's Executive Secretary. *Id.* Mr. Goldberg was the Coordinating Committee's Administrative Assistant. *Id.*

9. *See* H.R. REP. NO. 90-1130, at 2 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 1898, 1899.

10. *A Proposal To Provide Pretrial Consolidation of Multidistrict Litigation: Hearings Before the S. Comm. on the Judiciary, Subcomm. on Improvements in Judicial Machinery*, 89th Cong. 61 (1966) [hereinafter *89th Cong. S. Subcomm. Hearings*] (Appendix A: Excerpts from Outline of Suggested Procedures and Materials for Pretrial and Trial of Complex and Multiple Litigation, Prepared by Coordinating Committee on Multiple Litigation). The Senate Subcommittee on Improvements in Judicial Machinery held hearings in the Eighty-Ninth Congress on Senate Bill 3815, which was the first bill submitted by the Coordinating Committee. H.R. REP. NO. 90-1130, at 1, *as reprinted in* 1968 U.S.C.C.A.N. 1898, 1898. The bill was reintroduced as Senate Bill 159 in, and was passed by, the Ninetieth Congress. *Id.*

11. *See* Neal & Goldberg, *supra* note 8, at 621.

12. *Id.* The product lines at issue included transformers, electricity meters, circuit breakers, generators, and other related items. *Id.* at 622.

13. *Id.* at 621.

14. *Id.* at 622.

15. *Id.*

16. *Id.*

actions were spread among thirty-five federal district courts.[17] It appears that none of the actions was brought as a putative class action.[18]

This "multiple litigation" threatened to overwhelm the federal judicial system.[19] The Judicial Conference of the United States recommended that a special ad hoc committee be created to address the problem.[20] In January 1962, Chief Justice Earl Warren established the Coordinating Committee and appointed its nine members.[21] The Coordinating Committee was charged with "considering discovery problems arising in multiple litigation with common witnesses and exhibits."[22] Because the Coordinating Committee lacked any authority to compel compliance with its proposals, its success depended upon the consent of the presiding judges and the parties.[23]

Twenty-five of the district judges overseeing the *Electrical Equipment* cases attended an initial conference with the Coordinating

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17. *Id.* at 623.

18. *See generally id.* at 621-22 (describing the nature of the cases).

19. *Id.* at 622.

20. *Id.* at 623. The Judicial Conference of the United States consists of the Chief Justice of the United States, the chief judge of each judicial circuit, the chief judge of the International Court of Trade, and a district judge from each judicial circuit. 28 U.S.C.A. § 331 (West Supp. 2008).

21. Neal & Goldberg, *supra* note 8, at 623. The Committee consisted of Chief Judge Alfred P. Murrah of the United States Court of Appeals for the Tenth Circuit and eight district court judges. *Id.* Three of these judges, Chief Judge Murrah and District Judges Edwin Robson and William Becker, were appointed to the first MDL Panel, Chief Judge Murrah as the Panel's chairman. *See In re Multidistrict Patent Infringement Litig. Involving the Eisler Patents*, 297 F. Supp. 1034, 1034 (J.P.M.L. 1968) (listing the original members of the MDL Panel).

22. Neal & Goldberg, *supra* note 8, at 623 (quoting Letter from Chief Justice Warren to the Honorable Edwin A. Robson (Jan. 26, 1962)). Although the Coordinating Committee was created in response to the *Electrical Equipment* cases, its work was not limited to those cases. When Congress was considering the Coordinating Committee's bills in the late 1960s, the Coordinating Committee was working on approximately 1000 antitrust, mass accident, product liability, and complex patent infringement cases in various coordinated proceedings. S. REP. NO. 90-454, at 7 (1967).

23. S. REP. NO. 90-454, at 3 ("Although the nine judges appointed to the Committee lacked statutory authority, through their prestige and persuasion they were able to bring about the coordination and consolidation of pretrial discovery proceedings in the electrical equipment cases . . . ."). While it is true that there was no "provision in the statutes or rules to require [the district court judges to participate in] a co-ordinated program" the Coordinating Committee was duly authorized to do what it did. Neal & Goldberg, *supra* note 8, at 623. The Judicial Conference is authorized to "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business." 28 U.S.C.A. § 331. The Chief Justice is authorized to appoint standing committees to execute the Judicial Conference's authority. *Id.*

Committee.[24] There, the district judges adopted a resolution appointing the Coordinating Committee "as a kind of executive committee for the judges assigned to the electrical equipment cases."[25] The Coordinating Committee would meet and develop recommendations to make to the judges.[26] Early on, these recommendations included uniform pretrial orders.[27] These orders secured the courts' control over discovery (such as by vacating previously served discovery requests and deposition notices).[28] To avoid duplicative depositions and conflicting demands, the Coordinating Committee recommended a single deposition, usable in all cases, for each of certain key witnesses.[29] The Coordinating Committee also recommended uniform sets of interrogatories for use in all cases.[30] The Coordinating Committee's uniform pretrial orders also required defendants to produce specified documents for use in all cases and to create a document depository in centrally located Chicago.[31]

The orders also identified key legal issues that would affect large numbers of cases and set a uniform schedule for addressing them.[32] Although the Coordinating Committee and judges sought to coordinate the schedule for deciding common issues, they were not able to coordinate the results.[33] For example, on the question of whether fraudulent concealment of the alleged conspiracies tolled the statute of limitations period, three district courts answered no and seven answered yes.[34]

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24. Neal & Goldberg, *supra* note 8, at 623.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 623-24.
29. *Id.* at 625. For the most part, depositions were conducted by lead plaintiff or defense counsel. *Id.* A district judge presided over the depositions to make prompt rulings on objections. *Id.* At the end of the examination the depositions were adjourned rather than terminated. *Id.* at 626. Transcripts were circulated and counsel for any party, whether present for the initial examination or not, had thirty days to request that the deposition be reconvened to ask additional questions. *Id.* This allowed counsel who expected the witness's testimony to be irrelevant to his case not to attend, while preserving his right to question the witness before the deposition was formally concluded. *Id.*
30. *Id.* at 624.
31. *Id.* at 626. The orders also contemplated that the defendants might be required to create duplicate depositories in other cities to provide document access to plaintiffs located far from Chicago. *Id.*
32. *Id.* at 624.
33. *See id.* at 627.
34. *Id.*

As the cases unfolded, national pretrial hearings were held.[35] First, the Coordinating Committee would meet with a group of the judges handling the cases to identify issues and recommend solutions.[36] Then, lead counsel for the plaintiffs and defendants would "present to a group of judges their comments on and objections to" the Committee's recommendations.[37] At this point, the judges would confer and reach tentative conclusions.[38] Then, counsel and a smaller group of the judges would draft specific orders to implement the judges' conclusions.[39] The order would then be circulated to all the judges handling the cases, with the recommendation that they enter it.[40] Each individual judge would then have a local proceeding to hear additional comments and objections to the order before entering it in his cases.[41]

By all accounts, the Coordinating Committee's efforts to coordinate discovery were highly effective.[42] Within five years, approximately ninety percent of the cases had been terminated; before the end of 1967, all of the federal proceedings had been concluded.[43] One member of the Coordinating Committee estimated that the cases might have taken twenty years to conclude without the Coordinating Committee's influence.[44]

As mentioned before, the Coordinating Committee's success depended entirely on the consent and cooperation of the parties and presiding judges.[45] Given the then-unprecedented volume of cases and the challenges they posed, the parties and judges were quick to cooperate.[46] There was concern, however, that in future cases that would benefit from coordination but might not present the same sprawl of cases as the *Electrical Equipment* cases, parties or courts might be less willing to cede control of their individual proceedings for the greater good.[47] It was also clear that despite the success achieved

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35. *Id.* at 624.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *See* S. REP. NO. 90-454, at 4 (1967).
43. *Id.*
44. *Id.* at 6.
45. *See id.*
46. *Id.* at 6-7.
47. *Id.* at 7.

by the Coordinating Committee, requiring the many presiding district judges to meet regularly to coordinate their cases was cumbersome and inefficient.[48] In March 1964, therefore, the Judicial Conference of the United States adopted a resolution authorizing the Coordinating Committee to explore whether new rules or statutes should be adopted to better address multiple litigation issues in the future.[49]

As a result of its experience in the *Electrical Equipment* cases, the Coordinating Committee recommended legislation to establish a regular process for coordinating pretrial proceedings in multidistrict litigation in a single federal district court.[50] The bill as originally proposed included the "one or more common questions of fact" requirement for centralizing cases.[51] During the congressional hearings on the bill there were several proposals to amend this requirement.

One proposal would have limited transfer to just the common questions of fact.[52] There was some debate whether "the 'unit' which is transferred under the bill—a claim—is too broad, and [whether]

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48. *Id.* at 4.

49. Neal & Goldberg, *supra* note 8, at 628. The resolution stated:

> RESOLVED, That the subcommittee appointed to consider discovery problems arising in multiple litigation with common witnesses and exhibits is authorized to conduct a thorough review and study of the program and of the unique experience of the judges having the responsibility for the private antitrust litigation in the electrical equipment industry so as to develop from this experience general principles and guidelines for use in other multiple litigation, including any recommendations for statutory change; and further, that the subcommittee is authorized to consult and co-operate with the Advisory Committee on the Federal Rules of Civil Procedure in the development of any desirable rules of procedure for multiple litigation. The Chief Justice is authorized in his discretion to expand the membership of the subcommittee.

Id. at 628 n.27.

50. *See* S. REP. NO. 90-454, at 4.

51. *89th Cong. S. Subcomm. Hearings*, *supra* note 10, at 1 (setting forth the text of Senate Bill 3815). The text of the first section of the Coordinating Committee's bills, Senate Bill 3815 (in the Eighty-Ninth Congress) and Senate Bill 159 (in the Ninetieth Congress) was the same as the current text of § 1407(a), except that the bills would have permitted transfer upon a finding that transfer would promote only "the just and efficient conduct of [the] actions." *Id.*; *A Proposal To Provide Pre-Trial Consolidation of Multidistrict Litigation: Hearings Before the S. Comm. on the Judiciary, Subcomm. on Improvements in Judicial Machinery*, 89th & 90th Cong. (1967) [hereinafter *89th and 90th Cong. S. Subcomm. Hearings*] (setting forth the text of Senate Bill 159). When § 1407(a) became law, the additional requirement that transfer would "be for the convenience of parties and witnesses" had been added. Pub. L. No. 90-296, 82 Stat. 109, 109-10 (1968).

52. *89th Cong. S. Subcomm. Hearings*, *supra* note 10, at 13-14 (statement of Phil C. Neal, Dean, The University of Chicago School of Law).

only 'issues of fact' need be transferred."[53] This suggestion was rejected, however, because it would inevitably lead to disputes about what should be transferred, it would be awkward for different courts to be deciding different parts of the same case simultaneously, and it would defeat some of the advantages of centralization.[54] Opponents of this suggestion also contended that "[i]t is impossible to separate discovery on factual issues from the power to make legal rulings."[55] For example, in the *Electrical Equipment* cases, the appropriate temporal scope of discovery on common factual issues depended in part on resolution of the legal issue of whether fraudulent concealment tolled the four-year statute of limitations.[56] If transferee courts were not permitted to decide legal issues such as this, then they would not be able to regulate the scope of discovery on common factual issues.[57]

Another proposal suggested permitting centralization when "common questions of fact or of mixed law and fact" are present, "since pure questions of fact are quite rare."[58] This proposal, too, was rejected, but without any extended explanation.

A third proposal was that the degree of factual commonality required to centralize cases should be the same as required to certify a class under the then-newly added Rule 23(b)(3) of the Federal Rules of Civil Procedure.[59] The plaintiffs in the *Electrical Equipment* cases on which the Coordinating Committee cut its teeth brought those cases

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53. *Id.*; *see also id.* at 86 (Appendix B3: Letter from Thomas S. Currier, Professor, University of Virginia Law School, to George B. Trubow, Deputy Counsel, S. Judiciary Subcomm. on Improvements in Judicial Machinery (Aug. 11, 1966) ("It thus appears that dispatch of litigation would be better served if the proposed legislation limited the scope of transfer to common issues of fact (including issues of mixed fact and law), and permitted the transferor court to conduct contemporaneous pretrial proceedings on the unique issues . . . . Transferring entire claims rather than common issues would serve a useful purpose only if the bill contemplated possible transfers for trial as well as for pretrial proceedings."). In fact, the Coordinating Committee's bills always provided for an entire "action" to be transferred. *Id.* at 1 (setting forth the text of Senate Bill 3815); *89th and 90th Cong. S. Subcomm. Hearings*, *supra* note 51, at 1 (setting forth the text of S. 159). But because the MDL Panel would be authorized to separate and remand any claim or cross-claim, "the minimum unit of litigation transferred is [effectively] a 'claim.'" *89th Cong. S. Subcomm. Hearings*, *supra* note 10, at 85.

54. *89th Cong. S. Subcomm. Hearings*, *supra* note 10, at 14 (statement of Phil C. Neal, Dean, The University of Chicago School of Law).

55. *Id.* at 21 (statement of Hon. William H. Becker).

56. *Id.*

57. *Id.*

58. *Id.* at 86 (Appendix B3: Letter from Thomas S. Currier, Professor, University of Virginia Law School, to George B. Trubow, Deputy Counsel, S. Judiciary Subcomm. on Improvements in Judicial Machinery (Aug. 11, 1966)).

59. *89th and 90th Cong. S. Subcomm. Hearings*, *supra* note 51, at 139.

before the 1966 amendments to Rule 23 created the modern class action.[60] Because the Coordinating Committee was working from its experience in those cases, developing proposed legislation as early as 1964[61] and submitting its first bill to Congress by 1966,[62] it seems a safe bet that the Coordinating Committee members did not rely on their experience (if any) with postamendment class actions. Nonetheless, by the time the Coordinating Committee's bill was being considered by Congress, Rule 23 had been amended, and one leading corporate defense law firm argued that the standard for centralization should be the same as the standard for class certification under new Rule 23(b)(3).[63] That firm noted that a "prerequisite to Section 1407 treatment is that the cases involve 'one or more common questions of fact.' Because the procedure is extraordinary and involves stripping the transferor court of some of its functions," that firm suggested that the Coordinating Committee's bill "be amended to incorporate language in the revised Fed. R. Civ. P. 23(b)(3): 'When civil actions in which questions of fact common to each predominate over any other questions affecting the outcome of any of such actions, are pending in different districts, such'" actions may be transferred to any district for coordinated or consolidated pretrial proceedings.[64] As discussed below, this firm (and other firms that primarily represent defendants in MDL proceedings that involve putative class claims) are probably glad that Congress rejected this suggestion.[65]

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60. *See* FED. R. CIV. P. 23(a) (amended 1966); Neal & Goldberg, *supra* note 8, at 622. Before the 1966 amendment to Rule 23, the primary provision of the class action rule provided:

> REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

FED. R. CIV. P. 23(a) (1938).

61. *See* Neal & Goldberg, *supra* note 8, at 628 n.27.

62. For the text of this first bill, see *89th Cong. S. Subcomm. Hearings*, *supra* note 10.

63. *89th and 90th Cong. S. Subcomm. Hearings*, *supra* note 51, at 139.

64. *Id.*

65. *See infra* notes 68-93 and accompanying text.

Ultimately, the "one or more common questions of fact" threshold criterion survived unchanged, primarily because Congress expected it to be modulated by common sense and the broader goals of "the convenience of parties and witnesses and . . . promot[ing] the just and efficient conduct of such actions."[66] The Senate Report predicted that

> [i]f only one question of fact is common to two or three cases pending in different districts there probably will be no order for transfer, since it is doubtful that transfer would enhance the convenience of parties and witnesses, or promote judicial efficiency. It is possible, however, that a few exceptional cases may share unusually complex questions of fact, or that many complex cases may share a few questions of fact. In either of these instances substantial benefit may accrue to courts and litigants through consolidated or coordinated pretrial proceedings.[67]

III. TWO PROBLEMS ARISING FROM THE MDL PANEL'S TREATMENT OF THE "ONE OR MORE COMMON QUESTIONS OF FACT" STANDARD

A. The Panel's Reliance on the Presence or Absence of "Predominating" Common Questions of Fact To Decide Motions To Centralize Cases Poses Needless Problems for Class Action Defendants

The MDL Panel reaches different conclusions about the degree of factual commonality in different cases, and it frequently uses stock language to explain its conclusions.[68] In some cases, the MDL Panel denies motions to centralize because, even though § 1407 requires just one common question of fact, the Panel determines that the cases being considered share too few common factual questions to benefit from centralization.[69]

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66. *See* 28 U.S.C. § 1407(a) (2000).

67. S. REP. NO. 90-454, at 4-5 (1967).

68. In its earliest years, the Panel did not often deny transfer motions for lack of common factual questions. *See* Herndon & Higginbotham, *supra* note 2, at 42 ("In fact, a review of the reported opinions of the Judicial Panel fails to reveal a single decision by the Panel denying transfer of an antitrust action for lack of a common question of fact."). The Panel first denied a motion to transfer products liability cases for lack of common factual questions in 1977. *In re* Asbestos & Asbestos Insulation Material Prods. Liab. Litig., 431 F. Supp. 906, 910 (J.P.M.L. 1977) ("Many factual questions unique to each action or to a group of actions already pending in a single district clearly predominate, and therefore transfer is unwarranted.").

69. *See In re Asbestos*, 431 F. Supp. at 910.

In *In re Not-For-Profit Hospitals/Uninsured Patients Litigation*, for example, the named plaintiffs, who had sued dozens of hospital systems in twenty-eight putative class actions filed in twenty-one district courts, asked the MDL Panel to centralize their cases.[70] The plaintiffs alleged that by failing to provide a certain level of charity care to uninsured, indigent patients, the defendants breached duties imposed by virtue of their "nonprofit" tax-exempt status.[71] The defendants opposed transfer and coordination.[72] They pointed out that the allegedly breached duties arose not only by virtue of the defendants' federal tax "nonprofit" status, but also under a variety of state and local tax laws, which did not apply commonly to all defendants.[73] The defendants also observed that they provided a "community benefit" (which could justify their tax status) in unique ways other than, or in addition to, providing charity care to uninsured, indigent patients, such as through medical research and physician training.[74] On these facts, the MDL Panel found that the cases against the defendants did not "share sufficient common questions of fact to warrant Section 1407 transfer."[75]

In other cases, the Panel focuses not only on how many common factual questions exist, but also on how thorny those questions are. Thus, the Panel sometimes states that although there may be some common questions of fact among the cases, those common questions "are [not] sufficiently complex" to warrant centralization.[76]

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70. 341 F. Supp. 2d 1354, 1355-56 (J.P.M.L. 2004); Defendants Banner Health, Sutter Health, Presbyterian Healthcare Services, Catholic Healthcare Partners, Community Health Partners, Community Health Partners Hospital and Surgical Center, The Cleveland Clinic Foundation, Fairview Hospital, UPMC Presbyterian Shadyside, UPMC St. Margaret, UPMC Southside, UPMC Emergency Medicine, and UPMC Braddock's Memorandum in Opposition to Plaintiffs' Motion To Transfer & Consolidate at 1, *In re Not-For-Profit Hospitals/Uninsured Patients Litig.*, MDL No. 1641 (filed Aug. 18, 2004) [hereinafter Not-For-Profit Hospital Reply Brief].

71. Motion To Transfer and Consolidate Pursuant to 28 U.S.C. § 1407 at 1-2, *In re Not-For-Profit Hosp. Charitable Trust Litig.*, MDL No. 1641 (filed July 26, 2004).

72. *See* Not-For-Profit Hospital Reply Brief, *supra* note 70, at 1.

73. *Id.* at 1-2, 7; *see* 26 U.S.C.A. § 501(c)(3) (West 2006).

74. Not-For-Profit Hospital Reply Brief, *supra* note 70, at 1-2, 7.

75. *In re Not-For-Profit Hospitals/Uninsured Patients Litig.*, 341 F. Supp. 2d at 1356; *see, e.g.*, *In re* Midpoint Dev., LLC, Litig., 341 F. Supp. 2d 1353, 1354 (J.P.M.L. 2004) (finding that unspecified claims did not "share sufficient common questions of fact to warrant Section 1407 transfer"); *In re* Boeing Co. Employment Practices Litig. (No. II), 293 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) (finding that employment discrimination cases did not "involve sufficient common questions of fact to warrant Section 1407 centralization").

76. The Panel tends not to explain its conclusion that common questions are not "sufficiently complex" to warrant transfer. *See* Mark Herrmann & Pearson Bownas, *Making*

Still other times when considering the degree of commonality required for centralization under § 1407, the MDL Panel uses words that are potentially dangerous for multidistrict litigation defendants facing putative class action claims. On the one hand, the Panel has specifically rejected the argument against centralization that "common facts do not predominate among the actions."[77] The Panel has announced that centralization does not "require a complete identity or even a majority of common factual or legal issues as a prerequisite."[78] Indeed, during the legislative process, the proposal that the "predominance" requirement be added to § 1407 was rejected.[79] On the other hand, the Panel has repeatedly denied motions to centralize cases where it has found that "unique questions of fact" in individual plaintiffs' claims "predominated over any common questions" of fact.[80] Even more significantly, the Panel has granted motions to centralize based on the presence of predominating common factual questions.[81]

Book on the MDL Panel: Will It Centralize Your Products Liability Cases?, 8 BNA CLASS ACTION LITIG. REP. 110, 113 (2007) (analyzing every MDL Panel products liability decision and identifying factors that increase and decrease the odds that the Panel will centralize products liability cases). The common thread among these decisions is that they involve relatively few cases. *Id.*; *see, e.g.*, *In re* Circuit City Stores, Inc., Restocking Fee Sales Practices Litig., 528 F. Supp. 2d 1363, 1364 (J.P.M.L. 2007) (involving three actions; the court held that "the proponents of centralization have failed to persuade us that any common questions of fact are sufficiently complex and/or numerous to justify Section 1407 transfer"); *In re* Insulin Mfg. Antitrust Litig., 487 F. Supp. 1359, 1359, 1361 (J.P.M.L. 1980) (involving three actions; the court held that "movants have not met their burden of convincing us that these common factual questions are sufficiently complex and that the accompanying discovery will be so time consuming as to justify transfer under Section 1407"); *In re* Wyeth Patent Infringement Litig., 445 F. Supp. 992, 992-93 (J.P.M.L. 1978) (involving three actions; same); *In re* S. Ry. Employment Practices Litig., 441 F. Supp. 926, 926, 927 (J.P.M.L. 1977) (involving two actions; same).

77. *E.g.*, *In re* Kugel Mesh Hernia Patch Prods. Liab. Litig., 493 F. Supp. 2d 1371, 1373 (J.P.M.L. 2007).

78. *Id.*

79. *See supra* text accompanying notes 61-66.

80. *E.g.*, *In re Boeing Co.*, 293 F. Supp. 2d at 1383; *In re* Nat'l Ass'n of Att'ys Gen. Air Travel Indus. Enforcement Guidelines Litig., MDL No. 813, 1989 U.S. Dist. LEXIS 19091, at *2 (J.P.M.L. Oct. 5, 1989) (denying a motion to centralize where the Panel was "not persuaded that these common questions of fact will predominate over individual questions of fact"); *In re* Dep't of Energy Stripper Well Exemption Litig., MDL No. 378, 1988 U.S. Dist. LEXIS 17030, at *2 (J.P.M.L. Oct. 5, 1988) (denying motion to centralize where "movants . . . have not established the existence of predominating common factual issues"); *In re* Royal Regency, Mt. Vernon, Bishops Glen, N. River & Mt. Royal Towers Sec. Litig., MDL No. 770, 1988 U.S. Dist. LEXIS 17035, at *2 (J.P.M.L. Aug. 15, 1988) (noting that factual questions do not predominate).

81. *In re* RadioShack Corp. "Erisa" Litig., 528 F. Supp. 2d 1348, 1349 (J.P.M.L. 2007) (centralizing cases because, among other reasons, "common factual questions clearly predominate over any unique questions of fact").

The Panel's decisions whether to centralize cases based on whether common facts predominate are not only inconsistent with the Panel's decisions rejecting predominance as a requirement for centralization, but they also put defendants who might favor centralization but later oppose class certification in a pretty pickle. One criterion for certifying a class under Rule 23(b)(3) is that "questions of law or fact common to class members predominate over any questions affecting only individual members."[82] There are, of course, many cases that would benefit from coordinated or consolidated pretrial treatment as part of an MDL proceeding but that should not be certified as class actions.[83] Centralizing product liability cases seeking recovery for personal injuries, for example, might "promote the just and efficient conduct of such actions."[84] Indeed, the MDL Panel has centralized products liability cases for consolidated or coordinated pretrial treatment with great frequency.[85] Federal courts, however, almost never certify those types of cases for class treatment.[86]

Suggesting that common questions of fact must predominate to warrant centralization creates problems for defendants who favor coordinated or consolidated pretrial treatment of claims that are (or

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82. FED. R. CIV. P. 23(b)(3).

83. *See, e.g.*, *In re* Fosamax Prods. Liab. Litig., MDL No. 1789, 2008 U.S. Dist. LEXIS 199, at *1, 48 (S.D.N.Y. Jan. 3, 2008) (denying motion to certify a class where more than 360 actions had been centralized by the MDL Panel); *In re* Aredia & Zometa Prods. Liab. Litig., MDL No. 1760, 2007 U.S. Dist. LEXIS 75458, at *1-2, 6 (M.D. Tenn. Oct. 10, 2007) (same for 285 related actions); *In re* Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 282, 316 (N.D. Ohio 2007) (same for 9750 related actions); *In re* Gen. Motors Corp. Dex-Cool Prods. Liab. Litig., 241 F.R.D. 305, 307 n.1, 327 (S.D. Ill. 2007) (same for dozens of related actions); *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 453, 463 (E.D. La. 2006) (same for thousands of individual claims and 160 putative class actions); *In re* Prempro Prods. Liab. Litig., 230 F.R.D. 555, 557, 573 (E.D. Ark. 2005) (same for alleged conduct involving over 161,000 women); *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 615, 623 (W.D. Wash. 2003) (same for putative class involving all purchasers in a $440 million market); *In re* Paxil Litig., 212 F.R.D. 539, 548, 554 (C.D. Cal. 2003) (same for putative class possibly involving thousands of plaintiffs); *In re* Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 75 (S.D.N.Y. 2002) (same for hundreds of related actions); *In re* Propulsid Prods. Liab. Litig., 208 F.R.D. 133, 136, 147 (E.D. La. 2002) (same for thousands of related actions).

84. 28 U.S.C. § 1407(a) (2000).

85. Of 137 motions to centralize products liability cases that the MDL Panel had decided through late 2006, the Panel had granted 103. Herrmann & Bownas, *supra* note 76, at 111.

86. *See, e.g.*, *In re Fosamax*, 2008 U.S. Dist. LEXIS 199, at *20 ("Lower courts almost unanimously have rejected class certification in pharmaceutical products liability actions . . . ."); *In re Rezulin*, 210 F.R.D. at 65-66 (observing "that all relevant Court of Appeals and the bulk of relevant district court decisions have rejected class certification in products liability cases" (footnotes omitted)); cases cited *supra* note 83.

may be) brought on behalf of a putative class. These defendants may forego the benefits of the MDL process because they fear that the arguments they would be forced to make, or the conclusions the MDL Panel might reach, would be used against them when class certification is decided.[87] If these defendants do participate in the MDL process, arguments they make in favor of transfer, or conclusions the MDL Panel reaches in a transfer order, might be misused by plaintiffs' lawyers or misunderstood by courts at the class certification stage. This could result in classes being improperly certified.

For class certification purposes, the determination that common factual questions predominate over individual ones can be made only after "a rigorous analysis" that includes considering how the case will be tried.[88] A class certification opinion can easily run more than ten or twenty pages, and a district court's decision whether to certify a class is potentially subject to immediate appellate review.[89] For § 1407 purposes, by contrast, there is no explicit requirement that the Panel's analysis be rigorous, and the focus is decidedly on discovery and not how the case will be tried.[90] A typical MDL Panel transfer order is

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87. California's "mini-MDL" statute raises these concerns even more squarely by expressly requiring the coordination motion judge to consider, among other factors, "whether the common question of fact or law is predominating." CAL. CIV. PROC. CODE § 404.1 (West 2004); *see also* MARK HERRMANN ET AL., STATEWIDE COORDINATED PROCEEDINGS: STATE COURT ANALOGUES TO THE FEDERAL MDL PROCESS 129-30 (2d ed. 2004) (discussing California's MDL analogue); Drug and Device Law, Amending California's "Mini MDL" Statute, http://druganddevicelaw.blogspot.com/2006_12_01_archive.html (Dec. 27, 2006, 13:07 EDT) (exploring these concerns and advocating an amendment to the California statute).

88. *See, e.g.*, Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982) (a class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied"); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 33 n.3 (2d Cir. 2006) ("We see no reason to doubt that what the Supreme Court said about Rule 23(a) requirements applies with equal force to all Rule 23 requirements, including those set forth in Rule 23(b)(3)."); Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218 (5th Cir. 2003) ("To decide whether common issues predominate, the district court must consider how a trial on the merits would be conducted if a class were certified.").

89. FED. R. CIV. P. 23(f).

90. 28 U.S.C. § 1407(a) (2000) ("[E]ach action so transferred shall be remanded by the panel at or before the conclusion of . . . pretrial proceedings to the district from which it was transferred . . . ."); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 39-40 (1998) (holding that the MDL transferee court may not use 28 U.S.C. § 1404(a) to assign itself a transferred case for trial).

only two or three pages long.[91] And the MDL Panel's decisions are reviewable, if at all, only by extraordinary writ.[92]

To be sure, concluding that common factual questions predominate over individual ones necessarily means that "one or more common questions of fact" exist, but because the existence of "one or more common questions of fact" is what the MDL Panel must find to centralize cases, the MDL Panel should say only that this requirement has been satisfied. Concluding that individual issues predominate over common issues may necessarily mean that centralizing the cases would not "promote the[ir] just and efficient conduct,"[93] but the Panel need not, and should not, reach so far. Because promoting the just and efficient conduct of cases is what centralization must accomplish, the MDL Panel should say only that this requirement would not be satisfied. The Panel should strive to avoid making unnecessary statements using terms of art from the class certification context to support its conclusions that the § 1407 criteria have or have not been met.

B. The MDL Panel's Heavy Reliance on Coordinated Defense-Side Discovery as the Primary Basis for Centralizing Cases Misses an Opportunity To Promote Other Efficiencies

A recent decision by the MDL Panel raises questions about the Panel's near exclusive focus on one particular type of "common questions of fact": facts relating to core liability issues that are subject to coordinated or consolidated discovery to be taken from the defendant or defendants.[94] This bias is likely rooted in the Panel's origins and represents a missed opportunity for the Panel to promote the just and efficient conduct of certain actions, including some putative class actions that contain other types of common factual issues.

The MDL Panel regularly centralizes cases based on common factual issues, even though many equally important unique factual

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91. *See, e.g.*, *In re* Radioshack Corp. "Erisa" Litig., 528 F. Supp. 2d 1348, 1349 (J.P.M.L. 2007); *In re* Kugel Mesh Hernia Patch Prods. Liab. Litig., 493 F. Supp. 2d 1371, 1371-73 (J.P.M.L. 2007).

92. 28 U.S.C. § 1407(e).

93. *Id.* § 1407(a).

94. *See In re* Engle Progeny Tobacco Prods. Liab. Litig., MDL No. 1887, 2007 U.S. Dist. LEXIS 93627, at *1-2 (J.P.M.L. Dec. 12, 2007).

issues will require individualized discovery and resolution.[95] The Panel also regularly centralizes cases to avoid inconsistent rulings on important issues that will have a common effect across the cases.[96] In a recent case, *In re Engle Progeny Tobacco Products Liability Litigation*, however, the MDL Panel refused to centralize cases that seemed to fit both criteria.[97]

In the underlying *Engle* litigation, a Florida trial court certified nationwide class claims on behalf of cigarette smokers against tobacco companies and industry groups.[98] On an interlocutory appeal, the Florida Third District Court of Appeal affirmed the class certification order but limited the class to Florida smokers only.[99] The trial court issued a trial plan for the class claims that consisted of three phases.[100] Phase I covered issues of general liability and the class's entitlement to punitive damages.[101] At the end of Phase I, the jury made several findings against the tobacco companies.[102] Phase II covered compen-

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95. *See, e.g.*, *In re* Classicstar Mare Lease Litig., 528 F. Supp. 2d 1345, 1346 (J.P.M.L. 2007) (centralizing cases involving thoroughbred horse-breeding transactions over objection that cases "will likely depend on facts unique to various representations made to each plaintiff" because, "[r]egardless of any differences among the actions, all actions arise from the same factual milieu"); *In re* Protegen Sling & Vesica Sys. Prods. Liab. Litig., MDL No. 1387, 2001 U.S. Dist. LEXIS 1438, at *4-6 (J.P.M.L. Feb. 7, 2001) (centralizing products liability cases despite "unique questions regarding liability, causation and damages" to eliminate duplicative discovery on common questions regarding "development, testing, manufacturing and marketing" of products and manufacturers' "knowledge concerning the possible adverse effects" from using products).

96. *E.g.*, *In re* Imagitas, Inc. Drivers' Privacy Prot. Act Litig., 486 F. Supp. 2d 1371, 1372 (J.P.M.L. 2007) (centralizing "eight actions [that] contain competing class allegations and involve allegations that could spawn challenging procedural questions and pose the risk of inconsistent and/or conflicting rulings"); *In re* Practice of Naturopathy Litig., 434 F. Supp. 1240, 1243 (J.P.M.L. 1977) ("Nor is transfer under Section 1407 premature because of defendants' desire to challenge the sufficiency of the complaints and/or the jurisdiction of the federal courts. Indeed, presentation of these matters to a single judge will further the purposes of Section 1407."); *see also In re* Multidistrict Private Civil Treble Damage Litig. Involving Plumbing Fixtures, 308 F. Supp. 242, 244 (J.P.M.L. 1970) ("[A] potential for conflicting or overlapping class actions presents one of the strongest reasons for transferring such related actions to a single district for coordinated or consolidated pretrial proceedings which will include an early resolution of such potential conflicts.").

97. 2007 U.S. Dist. LEXIS 93627, at *1-3.

98. Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1256 (Fla. 2006), *cert. denied sub nom.* R.J. Reynolds Tobacco Co. v. Engle, 128 S. Ct. 96 (2007).

99. *Id.*

100. *Id.*

101. *Id.* at 1256-57 & n.4.

102. *Id.* at 1256-57. The findings in Phase I were all focused on the defendants' alleged conduct. They included "that cigarettes cause some of the diseases at issue," "that nicotine is addictive," "that the defendants placed cigarettes on the market that were defective

satory damages to the named plaintiffs and the amount of punitive damages to be awarded to the class.[103] Phase III was to cover individual liability and compensatory damage determinations for each of the estimated 700,000 class members.[104] The case, however, never got that far.

At the end of Phase II, the defendants moved to decertify the class.[105] The trial court denied the motion.[106] The Florida appellate court reversed.[107] The Florida Supreme Court split the difference.[108]

The Florida Supreme Court held that under the law-of-the-case doctrine, the appellate court's previous affirmance of the trial court's order certifying the class precluded the appellate court from later reversing that order.[109] As a higher reviewing court, however, the Florida Supreme Court was not bound by law-of-the-case.[110] It "agree[d] with [the intermediate appellate court] that problems with the three-phase trial plan negate the continued viability of this class action."[111] The Florida Supreme Court found that "individualized issues such as legal causation, comparative fault, and damages predominate."[112] However, rather than tossing out the trial court proceedings entirely, as the appellate court would have done, the Florida Supreme Court let most of the Phase I findings stand.[113] The court ruled that "[c]lass members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials."[114] Many class members chose to do exactly that and, within a year, there were

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and unreasonably dangerous," and "that the defendants made a false or misleading statement of material fact with the intention of misleading smokers." *Id.* at 1257 n.4.

103. *Id.*

104. *Id.* at 1258.

105. *Id.* at 1257.

106. *Id.* at 1257-58.

107. *Id.* at 1258.

108. *Id.* at 1266-69.

109. *Id.* at 1266-67.

110. *Id.* at 1267.

111. *Id.* at 1267-68.

112. *Id.* at 1268.

113. *Id.* at 1269. The Florida Supreme Court did not preserve the findings pertaining to the class's fraud and intentional infliction of emotional distress claims, because they "involved highly individualized determinations," or the punitive damages claims, because they were prematurely made before compensatory damages were awarded. *Id.*

114. *Id.*

approximately fifty cases by former *Engle* class members pending in federal courts in Florida.[115]

The *Engle* defendants perceived that trial courts would struggle to apply the *Engle* Phase I findings to the former class members' individual lawsuits.[116] The cigarette manufacturers therefore asked the MDL Panel to centralize the *Engle* cases so that uniform determinations of the following common questions could be made:

- the nature and factual extent of the effect, if any, of the preserved *Engle* Phase I jury findings in the individual progeny cases, if those findings are properly invoked;
- the criteria that the plaintiffs must satisfy to prove membership in the *Engle* class, and the kind and quality of evidence needed to prove satisfaction of those criteria; and
- whether the joinder of Vector Group Ltd. . . . , a holding company that has never manufactured or sold cigarettes but that some plaintiffs claim is a successor to *Engle* Defendants Liggett Group, Inc. and Brooke Group, Ltd., is fraudulent.[117]

The cigarette manufacturers noted that "[w]ere it not for their common derivation from the same decertified class action, their reliance on the preserved Phase I findings, and other circumstances unique to the *Engle* progeny cases, MDL treatment of these cases would not be appropriate."[118] However, because of those unique circumstances, the cigarette manufacturers were able to identify common issues that raised the risk of inconsistent or conflicting rulings and would have benefited from coordinated or consolidated pretrial treatment.[119] Nevertheless, the MDL Panel declined to centralize the cases.[120] The Panel found that the cigarette manufacturers failed to establish "that any remaining and unresolved common questions of fact among these actions are sufficiently

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115. *In re* Engle Progeny Tobacco Prods. Liab. Litig., MDL No. 1887, 2007 U.S. Dist. LEXIS 93627, at *1-3 (J.P.M.L. Dec. 12, 2007). The *Engle* defendants' transfer motion covered twenty-one cases. *Id.* at *1 & n.1. Plaintiffs in twenty-seven other related cases also appeared before the MDL Panel. *Id.*

116. Reply Brief in Support of Defendants' Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 at 4, *In re* Engle Progeny Tobacco Prods. Liab. Litig., MDL No. 1887 (filed Sept. 4, 2007) [hereinafter Reply Brief].

117. *Id.* The joinder of Vector Group was an issue because Vector Group had its principal place of business in Florida, which made it a Florida citizen for jurisdictional purposes. 28 U.S.C. § 1332(c)(1) (2000). Its joinder would therefore make removal from Florida state court improper. *Id.* § 1441(b).

118. Reply Brief, *supra* note 116, at 3 n.2.

119. *Id.* at 4.

120. *In re Engle*, 2007 U.S. Dist. LEXIS 93627, at *1-3.

complex and/or numerous to justify Section 1407 transfer at this time."[121]

One possible explanation for the Panel's decision is that the Panel considered the issues raised by the tobacco defendants to be issues of law, or mixed issues of fact and law, not pure issues of fact.[122] The Panel has held that even where one or more common factual questions exist, if the common thread among cases is mainly legal, not factual, then centralization is not appropriate.[123] The Panel has also previously held, however, that centralization to insure consistent resolution of mixed questions of fact and law serves the purposes of § 1407.[124] And the Panel has also relied on common questions of law as a basis to centralize cases when the legal questions arise from a common set of facts.[125]

In *In re Fourth Class Postage Regulations*, for example, the Panel centralized cases over the defendants' objection that "only questions of law are raised by the complaints."[126] The cases sought injunctive relief to enjoin postal officials from enforcing certain regulations.[127] The Panel found that "[a]lthough the constitutional issues presented by each complaint are, indeed, questions of law, their resolution will require determination of common underlying facts."[128] While the underlying facts may have needed to be discovered, most of them likely were not subject to serious dispute, such as "the historical development of postal sorting, the presence or absence of studies

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121. *Id.* at *2.

122. *See, e.g.*, *In re* Okla. Ins. Holding Co. Act Litig., 464 F. Supp. 961, 965 (J.P.M.L. 1979) (denying a motion to centralize cases because "while the purportedly common questions listed by movants . . . may involve some subsidiary factual inquiries, we are convinced that each of these questions is, at best, a mixed question of fact and of law, and that the legal aspects of these questions clearly predominate").

123. *See, e.g.*, *In re* Pharmacy Benefit Plan Adm'rs Pricing Litig., 206 F. Supp. 2d 1362, 1363 (J.P.M.L. 2002) (denying a motion to centralize cases despite finding that "actions clearly share common legal questions and, perhaps, a few factual questions"); *In re* U.S. Navy Variable Reenlistment Bonus Litig., 407 F. Supp. 1405, 1407 (J.P.M.L. 1976) (declining to transfer cases where "questions of law rather than common questions of fact are significantly preponderant").

124. *See, e.g.*, *In re* Imagitas, Inc., Drivers Privacy Prot. Act. Litig., 486 F. Supp. 2d 1371, 1372 (J.P.M.L. 2007); *In re* Dep't of Energy Stripper Well Exemption Litig., 472 F. Supp. 1282, 1285-86 (J.P.M.L. 1979).

125. *See, e.g.*, *In re* Multidistrict Civil Actions Involving Fourth Class Postage Regulations, 298 F. Supp. 1326, 1327 (J.P.M.L. 1969).

126. *Id.*

127. *Id.* at 1326.

128. *Id.* at 1327.

supporting the regulation," and "the savings accruing to the Post Office Department by virtue of the regulation."[129]

Another, and perhaps more likely, explanation for the Panel's decision not to centralize the *Engle* cases stems from the Panel's historical roots. In the *Electrical Equipment* cases, the Coordinating Committee's efforts were focused on coordinating the discovery of facts relating to core liability issues from the defendants: depositions of key defense witnesses and written interrogatories were coordinated and supervised, and defense document depositories were created.[130] While the *Engle* cases seem to involve one or more common questions of fact, and centralizing them would, according to MDL Panel precedent, serve the purposes of § 1407, the *Engle* cases would not lend themselves to coordinated discovery from the cigarette manufacturer defendants (because of the Florida Supreme Court's ruling that the Phase I findings would have res judicata effects).[131] This may have been the determining factor for the Panel.

Another recent decision seems to tip the Panel's hand. In *In re Ephedra Products Liability Litigation*, the Panel centralized personal injury, wrongful death, and consumer fraud claims against manufacturers and sellers of dietary supplement products containing ephedra.[132] The common questions of fact on which the Panel based its ruling were all defense-specific facts relating to the plaintiffs' prima facie elements and discovery that would benefit from the same type of coordinated discovery procedures recommended by the Coordinating Committee in the *Electric Equipment* cases, namely: "alleged side effects of ephedra-containing products, and whether defendants knew of these side effects and either concealed, misrepresented or failed to warn of them."[133] The Panel held that "[c]entralization under Section 1407 is thus necessary in order to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary."[134]

Of these three goals of centralizing the *Ephedra* cases, two are certainly present in the *Engle* cases. Absent centralization, there is a

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129. *Id.*

130. *See* Neal & Goldberg, *supra* note 8, at 623-26; *supra* notes 29-31 and accompanying text.

131. *See* Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1277 (Fla. 2006), *cert. denied sub nom.* R.J. Reynolds Tobacco Co. v. Engle, 128 S. Ct. 96 (2007).

132. *See* 314 F. Supp. 2d 1373, 1374-76 (J.P.M.L. 2004).

133. *Id.* at 1375.

134. *Id.*

risk that different district judges in Florida could rule differently on how the *Engle* Phase I findings should be applied, or what plaintiffs must prove to establish their membership in the *Engle* class and claim the benefits of the Phase I findings. Also, absent centralization, the parties will have to present evidence and argument on common issues multiple times, to different judges, which does not maximize efficiency or conservation of resources. The major difference between the *Ephedra* cases and the *Engle* cases is that centralizing the *Engle* cases would not create the opportunity for coordinated, streamlined discovery to be taken from the cigarette manufacturer defendants on core liability issues. Indeed, as the MDL Panel emphasized, "[d]iscovery On [sic] common factual issues"—i.e., common core liability defense-side factual issues—"occurred in the underlying state court action, which gave rise to the fact findings relied upon by the plaintiffs in the present actions."[135]

There are, however, other types of common issues of fact, or common issues of mixed fact and law, that could benefit from coordinated discovery and uniform resolution. These include certain plaintiff-side issues, such as whether a certain group of plaintiffs have standing to sue (or, in the case of the *Engle* cases, whether they have standing to avail themselves of previous factual determinations), and, if relevant to the statute of limitations, when a group of similarly situated plaintiffs knew or should have known they had a potential claim against the defendant.[136] Even though the *Engle* cases presented to the MDL Panel did not involve putative class claims,[137] the Panel's reasons for denying centralization of those cases could be used to oppose centralization of putative class actions that would seemingly benefit from being centralized.

Of course, if there are fifteen named plaintiffs in fifteen putative class actions that are centralized by the MDL Panel, then the defendant may, depending on procedural rulings by the transferee court, still have to depose all fifteen named plaintiffs. However, because the plaintiff-side issues in putative class actions are likely to involve mixed issues of fact—which satisfies § 1407—and law, centralizing cases based on plaintiff-side issues would permit a uniform resolution of related

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135. *In re* Engle Progeny Tobacco Prods. Liab. Litig., MDL No. 1887, 2007 U.S. Dist. LEXIS 96327, at *2 (J.P.M.L. Dec. 12, 2007).

136. *See, e.g., id.* (failing to take into account defendant's interest in coordinating discovery of plaintiffs' information).

137. *See supra* note 118 and accompanying text.

common legal issues arising from potentially common facts. These could include statute of limitations issues, standing issues, certain comparative fault issues, certain issues regarding class certification, and any other issues affecting the plaintiffs' claims or potential defenses that would be decided based on facts to be obtained in discovery from plaintiffs. Other common issues arising from common facts—but not defense-side core liability common facts—to be discovered from still other sources may benefit from uniform pretrial treatment too. These include, for example, federal preemption or government contractor defenses, which may require developing a common federal regulatory or factual record.[138] This is not to say that all cases raising preemption or government contractor defenses should be centralized, but only that the MDL Panel should be sensitive to common questions of fact that may exist on both sides of a lawsuit, or with nonparties.

Indeed, but for the Panel's genesis, it would seem odd that the Panel puts so much stock in the benefits of coordinated defense-side discovery on core liability issues—to the exclusion of other benefits of centralized pretrial proceedings—when the Panel has repeatedly acknowledged that core liability discovery can be coordinated even without formal centralization under § 1407.[139] In its orders denying motions to centralize cases that involve common questions of fact, the Panel typically cites its decision in *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litigation*.[140] There, the Panel

> observe[d] that suitable alternatives to Section 1407 transfer are available in order to minimize the possibility of duplicative discovery. For example, notices for a particular deposition could be filed in all actions, thereby making the deposition applicable in each action; the

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138. *See, e.g.*, Colacicco v. Apotex, Inc., 432 F. Supp. 2d 514, 525-27 n.10 (E.D. Pa. 2006), *aff'd*, 521 F.3d 253 (3d Cir. 2008) (discussing "evidence" supporting the court's finding that a failure-to-warn claim against a pharmaceutical company was preempted by FDA regulation).

139. *See, e.g.*, *In re* Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig., 446 F. Supp. 242, 244 (J.P.M.L. 1978).

140. *Id.*; *see, e.g.*, *In re Engle*, 2007 U.S. Dist. LEXIS 93627, at *2-3; *In re* DuPont Benlate Settlement Agreements Litig., MDL No. 1340, 2000 U.S. Dist. LEXIS 7378, at *2 (J.P.M.L. May 25, 2000); *In re* Royal Regency, Mt. Vernon, Bishops Glen, N. River & Mt. Royal Towers Sec. Litig., MDL No. 770, 1988 U.S. Dist. LEXIS 17035, at *2-3 (J.P.M.L. Aug. 15, 1988). The Panel also sometimes cites *In re Chromated Copper Arsenate (CCA) Treated Wood Products Liability Litigation*, 188 F. Supp. 2d 1380, 1381 (J.P.M.L. 2002), instead of *In re Eli Lilly*. *See, e.g.*, *In re* Bank of Am. Fiduciary Accounts Litig., 435 F. Supp. 2d 1349, 1350 (J.P.M.L. 2006). That case, however, merely cites the *In re Eli Lilly* decision. 188 F. Supp. 2d at 1381.

> parties could seek to agree upon a stipulation that any discovery relevant to more than one action may be used in all those actions; and any party could seek orders from [all the district courts where the cases are pending] directing the parties to coordinate their pretrial efforts.[141]

By contrast, there is no obvious way to achieve other aims the Panel has advocated, such as coordinated rulings on common questions of law that arise from or are mixed with common factual issues, short of transferring cases to one judge to make uniform determinations.[142] The Panel paid lip service to the risk of inconsistent rulings in its *In re Eli Lilly* decision, suggesting that "consultation and cooperation among the . . . concerned district courts, if deemed appropriate by those courts, coupled with the cooperation of the parties, would be sufficient to minimize the possibility of conflicting pretrial rulings."[143] While this abstract proposal sounds lovely in concept, it likely would achieve nothing in practice. Just because judges consult and cooperate does not mean they will decide like issues alike.[144] The *Electrical Equipment* cases represent the zenith of consultation and cooperation between and among judges and parties.[145] Yet, because the Coordinating Committee lacked any power to transfer cases to a single district judge who could make uniform rulings on legal issues or issues of mixed fact and law,[146] those proceedings yielded conflicting rulings on common issues.[147] When the Coordinating Committee's bills to create the MDL Panel were being debated, the proposal to transfer just common questions of fact, and not the ability to make legal rulings, was rejected.[148] It was not rejected

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141. 446 F. Supp. at 244.

142. *See In re* Ephedra Prods. Liab. Litig., 314 F. Supp. 2d 1373, 1375 (J.P.M.L. 2004) (stating that consolidation is necessary to prevent inconsistent rulings).

143. *In re Eli Lilly*, 446 F. Supp. at 244.

144. Indeed, certain issues of due process and judicial integrity may arise if judges attempting to coordinate their cases committed always to decide common issues alike. The New Jersey Supreme Court, for example, expressed concern about these issues when it refused to follow another court's ruling on a common issue solely for the sake of avoiding conflict because, in its view, doing so would be "abdicating our undoubted responsibility to pass on issues of constitutionality and justice as we see them." New Jersey v. Coleman, 214 A.2d 393, 404-05 (N.J. 1965).

145. *See* Neal & Goldberg, *supra* note 8, at 623 (noting the frequent meetings of the presiding judges); *supra* note 23 and accompanying text.

146. *See* Neal & Goldberg, *supra* note 8, at 627-28; *supra* note 23 and accompanying text.

147. *See* Neal & Goldberg, *supra* note 8, at 627-28; *supra* note 34 and accompanying text.

148. *See supra* notes 53-57 and accompanying text.

because the ability to make uniform legal rulings on common issues was seen as virtuous in its own right.[149] Rather, it was rejected because allowing the transferee judge to decide legal issues could serve the primary purpose of coordinating discovery.[150]

This is not to say that different courts reaching different results on the same issue is always and entirely bad from every perspective. Indeed, some believe that "'distribut[ing] business among . . . courts and . . . allow[ing] important issues to percolate through multiple circuits'" is "valuable from a policy standpoint."[151] But, of course, just because an MDL transferee judge decides a legal issue arising from common facts, or a mixed issue of fact and law, one way in the cases transferred to him or her does not mean that a judge in another case not part of the MDL proceedings could not decide the same issue differently. For example, when the cases being considered by the MDL Panel have been removed to federal court on diversity subject matter jurisdiction, cases that share common legal or mixed factual and legal questions with the transferred cases can be remanded (to state court) before the MDL Panel is able to transfer them, or by the MDL transferee court itself.[152] Or cases involving common questions may otherwise be pending in state courts. The transferred cases in the federal MDL proceeding may share a common issue arising from common facts with the state court cases. If the state court were to

149. *See supra* notes 53-57 and accompanying text.

150. *See supra* notes 53-57 and accompanying text.

151. *See* Kholyavskiy v. Achim, 443 F.3d 946, 951 (7th Cir. 2006) (first ellipsis in original) (quoting Al-Marri v. Rumsfeld, 360 F.3d 707, 710 (7th Cir. 2004)). Scholars have observed, in different ways, that multiple adjudications of common issues allow controversial questions to settle, and that, while inconsistent outcomes may cause some inefficiencies, they nevertheless have a beneficial breaking effect on the potential runaway case that gets it all wrong. One commentator, for example, views the various state and federal courts as "norm articulation sources," and considers it "likely, as a practical matter, that the many centers will include among themselves norm articulators both more and less risk averse than would be a single national source." Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 673 (1981). "With adequate communication, successful experience with an innovation will persuade others, slightly more risk averse, to follow suit." *Id.* at 673-74. "The multiplicity of centers means an innovation is more likely to be tried and correspondingly less likely to be wholly embraced. The two effects dampen both momentum and inertia." *Id.* at 674. "Assuming a general readiness to take risks, the array of multiple norm articulation sources, some of which will not go so far in innovation, will then mitigate the damages suffered through risky experiments." *Id.*

152. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., ATX, ATX II & Wilderness Tires Prods. Liab. Litig., MDL No. 1373, 2000 U.S. Dist. LEXIS 15926, at *1-2 & n.1 (J.P.M.L. Oct. 24, 2000) (centralizing sixty-three actions, but noting that "four actions that were subject to a Section 1407 motion have been remanded to their respective state court" making "the question of Section 1407 transfer with respect to these actions . . . moot").

decide the issue differently than the transferee court, then the issue would still "percolate."[153]

More importantly, however, the MDL Panel is decidedly not interested in percolation.[154] When core liability defense-side common questions of fact exist to be discovered, the MDL Panel has extolled the benefits of uniform rulings on common questions by the transferee judge as a benefit to be gained by centralizing the cases.[155] It seems, however, that when other types of common questions of fact exist, this benefit is not enough to warrant centralizing cases.[156] In some cases, this may represent a missed opportunity for the MDL Panel to "promote the just and efficient conduct" of cases that satisfy the "one or more common questions of fact" threshold criterion by centralizing them so the parties can avoid duplicative presentations of facts and arguments, and the courts can avoid conflicting rulings on common legal questions arising from common facts or on common mixed issues of fact and law.

There is just one objective criterion that cases pending in different districts must satisfy to be centralized by the MDL Panel under § 1407: they must share "one or more common questions of fact."[157] This seemingly simple requirement gives rise to two problems that the MDL Panel can cure rather easily. First, when discussing whether the "one or more common questions of fact" requirement is met, the Panel should avoid concluding that common factual questions do or do not predominate over unique factual questions. This conclusion, which goes beyond what the Panel must find to decide whether to centralize cases, raises problems for defendants participating in the MDL process who also face putative class claims. The MDL Panel should stick to the language of § 1407 to support its decisions. Second, the Panel should consider all types of common factual questions, not just those subject to coordinated or consolidated discovery taken from the defendant or defendants on core liability issues, when deciding whether to centralize cases. By adopting these two approaches, the MDL Panel can maximize the benefits, and minimize the harms, of § 1407.

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153. *See* Cover, *supra* note 151, at 673-74.

154. *See* cases cited *supra* note 96.

155. *See* cases cited *supra* note 96.

156. *See, e.g.*, *In re* Engle Progeny Tobacco Prods. Liab. Litig., MDL No. 1887, 2007 U.S. Dist. LEXIS 93627, at *2 (J.P.M.L. Dec. 12, 2007).

157. 28 U.S.C. § 1407(a) (2000).