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## ALARM BELLS FOR MDLS: HOW BAD SCIENCE GETS THROUGH THE COURTROOM DOOR

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### INTRODUCTION

**D**uring the COVID-19 pandemic, polling suggested that more Americans trusted scientists and expert agencies—like the Centers for Disease Control and Prevention (CDC)—to provide accurate information about the pandemic than the national news media or elected officials.<sup>1</sup> Even before the pandemic, Americans had a favorable view of scientific experts. According to a 2019 Pew Research Center study, over 80 percent of U.S. adults are confident that scientists act in the public’s best interests.<sup>2</sup> Approximately 60 percent believe that scientists should play an active role in policy debates.<sup>3</sup>

These figures support the obvious. In many areas of life, the

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1. Margot Sanger-Katz, “On Coronavirus, Americans Still Trust the Experts,” *The New York Times*, Sept. 18, 2020. <https://www.nytimes.com/2020/06/27/upshot/coronavirus-americans-trust-experts.html>.

2. Cary Funk et al., “Trust and Mistrust in Americans’ Views of Scientific Experts,” Pew Research Center, Aug. 2, 2019. <https://www.pewresearch.org/science/2019/08/02/trust-and-mistrust-in-americans-views-of-scientific-experts>.

3. *Ibid.*

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public is exposed to numerous complexities. To make the best decision for themselves, people often rely on subject matter experts; people who have expertise in one area can distill all the available information into practical and independent advice. People with concerns about their health may be referred to a medical specialist. People with small businesses may work with specialized accountants and financial advisors. People interested in selling or buying a home will often work with a real estate agent. The experts change as the issue changes.

The same logic applies to public policy. Legislators at the state or federal level come from all walks of life, with various professional and personal experiences. As a result, legislators are often generalists tasked with addressing a problem with little background on the subject. To better address these issues, legislators rely on staff and consult outside experts, who often brief staffers and lawmakers or present their views during public hearings. Especially at the federal level, legislators often refer complex science and technology questions to agencies to create well-informed rules and requirements for businesses and individuals across the country.

Yet, this commonsense reliance on expertise found in other areas of society often stops at the courthouse door. In federal cases concerning complex scientific evidence and expert testimony, trial judges are tasked with weighing the available evidence and solely determining what evidence will be presented at trial, all with little outside assistance. As held in the 1993 Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals (Daubert)*, trial courts have the sole gatekeeping function to ensure both the relevance and reliability of scientific expert testimony.<sup>4</sup>

This is a difficult challenge for any decision maker—let alone a legal generalist with no unique familiarity with the scientific claims or dispute, and the conundrum it produces has

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4. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

not gone unnoticed. As Chief Justice Rehnquist warned in *Daubert*, this legal requirement forces trial judges “to become amateur scientists.”<sup>5</sup> Justice Stephen Breyer similarly warned a few years later that *Daubert* requires “judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer.”<sup>6</sup>

Beyond forcing judges to substitute their black robes for white lab coats, this approach offers numerous opportunities for abuse by litigants and the promotion of bad science before well-meaning judges and juries at trial. After all, good science is not necessarily the aspiration for litigants and their attorneys. When difficult science questions are debated at trial, they are done to secure a legal victory and likely monetary gain (or to prevent economic loss). As a result, thoughtfully resolving difficult science questions—although likely dispositive to a case—is ultimately irrelevant to most litigants who debate these questions in court.

Because of litigation’s misaligned incentive structure, good or reliable scientific claims are not necessarily presented to judges, who are nevertheless tasked with determining whether these potentially misleading claims should be presented to a jury. Consequently, judges are often unassisted when cutting through the fog of data and retained experts who all purport to be the authoritative voice on a particular issue. This fog potentially leads to several undesirable results, including the admittance of bad science or a “battle of the experts,” where a number of claims are introduced at trial with the intention of having a lay jury sort it all out.

Regrettably, the current tools offered to judicial factfinders to cut through this fog are unwieldy and defective. The problem becomes vastly more apparent in multi-district litigation (MDL), a situation where large numbers of cases that appear to have similar factual questions are consolidated and collectively sent to one court to resolve pretrial motions and discovery. Although the MDL system is intended to provide consistent rulings and conserve judicial resources, the process presents numerous challenges to judges as well as litigants, impacting litigation strategy, settlement and potential trial results.

Devised by Congress over 50 years ago, the MDL system has since concerned “over 600,000 cases and millions of claims therein.”<sup>7</sup> Today, it serves as a significant cornerstone of federal litigation, encompassing roughly half of all federal civil cases. Yet, unlike other civil litigation areas, judges are given

extraordinary discretion on how cases proceed and how dubious scientific claims advance to trial.

The most common culprits are strong judicial encouragements to settle and a lack of universal rules for MDL cases, resulting in unnecessary delays and inconsistent *Daubert* decisions that are often made without independent scientific analysis. Worse still, there is little opportunity to appeal these decisions until much later in the litigation, often draining litigant resources and forcing bad settlements that are based on a poor scientific foundation.

To improve how science is scrutinized in the courtroom, Congress and the federal judiciary must seek to improve the MDL process. This paper will provide an overview of common pitfalls in MDL litigation and offer several proposals intended to reverse the “settlement-at-all-costs” mentality in MDL cases, when *Daubert* hearings are held, and how judges solicit and consider difficult science questions.

## THE PROBLEM WITH MULTI-DISTRICT LITIGATION

### Overview of Multi-district Litigation

Fifty years ago, the federal courts were facing a potential crisis. Over two dozen electrical equipment manufacturers were convicted of antitrust violations, and roughly 2,000 civil suits followed in dozens of federal district courts around the country.<sup>8</sup> Fearing an onslaught of complicated cases, the Judicial Conference of the United States—the national policymaking body for federal courts—created a special committee to coordinate with the dozens of litigants and district judges to agree on universal pretrial orders.<sup>9</sup> The cases were successfully adjudicated, and the committee soon after convinced Congress to establish a more permanent litigation model.

Soon after, Congress passed the Multidistrict Litigation Act. The law provides that “[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”<sup>10</sup> Transfer is not automatic and is determined by the Judicial Panel on Multidistrict Litigation (JPML), which consists of seven sitting federal judges.<sup>11</sup> The JPML will authorize transfer if it determines that doing so “will be for the convenience of parties and witnesses and will promote the just and efficient con-

5. *Ibid.*, § 601.

6. *General Electric Co. v. Joiner*, 522 U.S. 136, 147 (1997).

7. “Overview of the Panel,” U.S. Judicial Panel on Multidistrict Litigation, April 27, 2021. <https://www.jpml.uscourts.gov/overview-panel-0>.

8. “The Judicial Panel on Multidistrict Litigation: Embryonic Guidelines for the Consolidation of Pretrial Proceedings,” *Fordham Law Review* 38:4 (1970) pp. 786-87. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2028&context=flr>.

9. *Ibid.*, p. 789.

10. 28 U.S.C. § 1407(a).

11. *Ibid.*, § 1407(d).

duct of such actions.”<sup>12</sup> The considerations for the JPML are threefold: whether a transfer would “avoid duplication of discovery,” “prevent inconsistent pretrial rulings,” and “conserve the resources of the parties, their counsel and the judiciary.”<sup>13</sup>

If the JPML authorizes a transfer, it will select a district judge (or judges) to conduct the pretrial proceedings.<sup>14</sup> After pretrial proceedings are completed, the cases are remanded back to their original districts.<sup>15</sup> Before cases are transferred back, transferee judges have tremendous discretion in how pretrial issues are presented and resolved. These case management decisions often have an immense impact on MDL litigation. Of the over 600,000 terminated cases centralized by the JPML, only 2.7 percent of terminated cases were remanded back to their original courts.<sup>16</sup> This is largely because of settlements that occur during the transferred stage of MDL litigation.

The types of cases considered by the JPML and ultimately transferred to MDL judges are incredibly varied and have included, according to the JPML, cases as wide ranging as suits following airplane accidents to drug product liability cases to litigation following mass data security breaches.

### Pitfalls of Multi-District Litigation

The MDL Act is substantively the same law as when it was passed fifty years ago, but nearly everything else in multi-district litigation has changed. For starters, MDLs are now a substantial portion of the federal civil docket. Recently—and for the first time—MDLs are now the majority of civil cases in federal court.<sup>17</sup> This increase is rapid, with the number of MDLs tripling over the last 16 years.<sup>18</sup> The scope of MDLs is also notable. Today, most MDLs are focused on product liability issues.<sup>19</sup> In addition, only a limited number of MDLs constitute the majority of consolidated cases. Currently, only “12 percent of the MDLs [contain] nearly 90 percent of all pending MDL cases.”<sup>20</sup>

Just one MDL has the potential to sway district resources and case allocations drastically. Looking at the percentage of civil filings from last year, it might seem odd that over 45 percent of all filings were in one district—the Northern District of Florida.<sup>21</sup> But this anomaly stems from a recent JPML transfer of tens of thousands of claims against 3M for purportedly defective earplugs.<sup>22</sup> Today, the suit against 3M’s military-issue earplugs is the largest MDL in history, with over 230,000 consolidated actions, beating the next largest, a lawsuit against Johnson & Johnson’s talc products.<sup>23</sup>

Concerningly, the rise of MDLs in federal court has demonstrated how its current structure has inadvertently allowed thousands of meritless cases to linger—exhausting both judicial and defendant resources. In a 2018 meeting of the Federal Judiciary’s Advisory Committee on Civil Rules, a “widespread agreement” emerged that in many MDL cases, particularly product liability claims, “a significant number of claimants ultimately . . . turn out to have unsupportable claims.”<sup>24</sup> According to meeting notes, “the figure most often used is 20 to 30%, but in some litigations it may be as high as 40% or 50%.”<sup>25</sup>

There are several potential causes—some point to misleading and deceptive advertising by plaintiffs’ attorneys to collect a large number of clients. Beyond potential financial gain, collecting a large number of claimants has been a fruitful litigation strategy. As summarized by one report:

A defendant faced with hundreds, perhaps thousands of legal suits—every one of which would have to be brought before a judge, potentially in different districts, to either accept or dismiss—will incur crippling, asymmetric legal expenses.<sup>26</sup>

A settlement in exchange for dismissing these overwhelming claims is a tempting offer.

Further, since most MDL cases are never transferred back to their original courts, an overwhelming number of plaintiffs before one judge complicates case management and promotes more surface-level scrutiny of valid legal and scientific

12. *Ibid.*, § 1407(a).

13. “Overview of the Panel,” <https://www.jpml.uscourts.gov/overview-panel-0>.

14. *Ibid.*

15. *Ibid.*, § 1407(a).

16. “Cumulative Summary of Multidistrict Litigation During the 12-Month Periods Ending September 30, 2018 Through 2020,” Admin. Office of U.S. Courts, 2020. [https://www.uscourts.gov/sites/default/files/data\\_tables/ib\\_s20\\_0930.2020.pdf](https://www.uscourts.gov/sites/default/files/data_tables/ib_s20_0930.2020.pdf).

17. Daniel S. Wittenberg, “Multidistrict Litigation: Dominating the Federal Docket,” *American Bar Association Litigation News*, Feb. 19, 2021. <https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/multidistrict-litigation-dominating-federal-docket>.

18. *Ibid.*

19. *Ibid.*

20. *Ibid.*

21. Taylor Dalton, “Civil Case Filings in Federal Court Decreased in 2020, but Expect More Filings as the Economy Improves,” *The Juris Lab*, March 4, 2021. <https://the-jurislab.com/civil-case-filings-decreased>.

22. See, e.g., “3M Products Liability Litigation, MDL No. 2885,” U.S. District Court, Northern District of Florida, April 27, 2021. <http://www.flnd.uscourts.gov/mdl2885>.

23. Brendan Pierson, “How 3M earplug litigation got to be biggest MDL in history,” *Reuters*, April 2, 2021. <https://www.reuters.com/article/us-products-3m/how-3m-ear-plug-litigation-got-to-be-biggest-mdl-in-history-idUSKBN2BP1BQ>.

24. Advisory Committee on Rules, *MDL Subcommittee Report*, Admin. Office of U.S. Courts, Nov. 18, 2018, p. 139. [https://www.uscourts.gov/sites/default/files/2018-11\\_civil\\_rules\\_agenda\\_book\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf).

25. *Ibid.*

26. “The Mass-Tort Machine: How law firms profit by suing businesses over questionable science,” *Center for Truth in Science*, April 27, 2021, p. 7. [https://truthinscience.org/wp-content/uploads/2020/05/CTS\\_Report\\_MassTortMachine.pdf](https://truthinscience.org/wp-content/uploads/2020/05/CTS_Report_MassTortMachine.pdf).

claims. This, of course, is no guarantee of legal victory. In one example, a district judge in a case concerning potential silica exposure found that most of the diagnoses and claims “were about litigation rather than health care” and were “manufactured for money.”<sup>27</sup> After all, the judge reasoned, “each lawyer had to know that Mississippi was not experiencing the worst outbreak of silicosis in recorded history.”<sup>28</sup>

Relatedly, others have argued that the meritless figure is so high because the MDL process lacks an effective way to screen out non-meritorious cases earlier in the MDL process. This problem is two-pronged, incorporating both the perceived role of MDL judges and little opportunity for interlocutory appeal.

As discussed previously, although the MDL Act envisions MDL cases ultimately transferred back to their original districts, fewer than 3 percent of cases are. Much of this is due to settlements that occur while the case is under an MDL judge. Of course, few federal civil cases in any subject area ever reach trial, but a unique “judicial culture” has developed in MDL cases. According to a judge, who notably handled the asbestos MDL docket, “remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case, by adjudication or settlement, during the MDL process,” and that perception has “interfered with the litigation of individual cases in the MDL court.”<sup>29</sup>

This observation is far from hyperbolic. Indeed, the *Manual for Complex Litigation*, published by the Federal Judicial Center as a resource for judges and court staff, states unequivocally that one of the “values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation.”<sup>30</sup> As a result, judges are encouraged “to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.”<sup>31</sup> This judicial mindset—especially early in the litigation—may lead to insufficient scrutiny of legal claims, and in product liability cases, little analysis of the underlying scientific evidence.

In some instances, this judicial mindset has prioritized settlement over all else. In 2017, the JPML transferred litigation against opioids manufacturers and distributors to Judge Dan Polster in the Northern District of Ohio, citing Ohio’s geo-

graphic convenience, “factual connection to this litigation,” and Judge Polster’s experience as a transferee judge.<sup>32</sup> Soon after, Judge Polster told litigants that his “objective [was] to do something meaningful to abate [the opioid] crisis and to do it [that year.]”<sup>33</sup> The Judge continued:

We have to make sure that those pills are only [available] when there’s an appropriate diagnosis and that we get some amount of money to government agencies for treatment . . . That’s what I’m interested in doing.<sup>34</sup>

MDL defendants have criticized this approach and renewed questions regarding the judicial role in MDL disputes.<sup>35</sup>

In combination with a “settlement first” mentality, the lack of opportunities for interlocutory appeal makes it difficult to fully scrutinize many of the underlying issues in MDL litigation—especially litigation alleging a correlation between a product and an alleged harm. Typically, parties in federal district court cannot file an appeal until the court has directed a “final judgement.”<sup>36</sup> But there is one notable exception: Section 1292(b) allows an interlocutory appeal if it concerns a ruling on “a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”<sup>37</sup> This determination, though, is not made by the potential appellant but by the court.<sup>38</sup> It comes as no surprise then that few petitions for interlocutory review are successful. For instance, one study reviewed 127 mass tort MDL cases from 2008 to 2018 and found only 15 petitions “of a potentially case-dispositive ruling.”<sup>39</sup> Of those 15, only one was granted.<sup>40</sup>

Since fewer than 3 percent of MDL cases ever make it back to their original courts, there is little appellate review of case management decisions (and rulings) being made by lower district courts. This leads to several unfortunate conse-

27. *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 635-36 (S.D. Tex. 2005).

28. *Ibid.*

29. Eduardo C. Robreno, “The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?”, *Widener Law Journal* 23 (2013), pp. 97, 144. [https://lawprofessors.typepad.com/files/robreno\\_v23il-2.pdf](https://lawprofessors.typepad.com/files/robreno_v23il-2.pdf).

30. *Manual for Complex Litigation (Fourth)*, Federal Judicial Center, 2004, p. 223. <https://www.uscourts.gov/sites/default/files/mcl4.pdf>.

31. *Ibid.*

32. Transfer Order *In Re: National Prescription Opiate Litigation*, MDL No. 2804 (J.P.M.L. 2017). <https://www.ohnd.uscourts.gov/sites/ohnd/files/2804TransferOrder.pdf>.

33. Emily Field, “Judge Urges Speedy Pace For Opioid MDL Amid Crisis,” *Law360*, Jan. 9, 2018. <https://www.law360.com/articles/1000087/judge-urges-speedy-pace-for-opioid-mdl-amid-crisis?copied=1>.

34. *Ibid.*

35. Jeff Overly, “Bias Charge Is ‘Dangerous Fiction,’ Opioid MDL Judge says,” *Law360*, July 7, 2020. <https://www.law360.com/articles/1290002/bias-charge-is-dangerous-fiction-opioid-mdl-judge-says>.

36. See, e.g., 28 U.S.C. § 1291; Fed. R. Civ. P. 54.

37. 28 U.S.C. § 1292(b).

38. *Ibid.*

39. Tim Pratt, “MDLs Need A New Path To Interlocutory Appeals,” *Law360*, April 10, 2020. <https://www.law360.com/articles/1261952/mdls-need-a-new-path-to-interlocutory-appeals>.

40. *Ibid.*

quences. For one, although MDLs are now a substantial portion of the federal docket, few appellate decisions mean there is little case law on material issues that arise again and again in MDL litigation, resulting in little uniformity among district courts.<sup>41</sup> In addition, as Professor Andrew Pollis argues, “the complexity of MDLs heightens the risk of serious error and the number of affected litigants increases the impact of that error.”<sup>42</sup> He further explains:

While an erroneous legal ruling in a single lawsuit can render it particularly difficult for a plaintiff to prove liability or for a defendant to escape it, the financial impact of the legal ruling is confined to that single dispute. The parties can make rational, if imperfect, choices about whether to settle, and no one else will be directly affected. By contrast, pretrial legal rulings in aggregated MDL cases have a dramatically larger impact.<sup>43</sup>

To provide one example, Professor Pollis cites an MDL case against the diabetes drug *Rezulin*. There were 1800 individual suits against the drug, meaning “every legal ruling that limited or expanded the right of recovery had an immediate impact of more than 1800 times what it would have had in a single lawsuit.”<sup>44</sup>

Scholars are not the only ones that have noticed the trend. In an MDL case concerning claims against certain vehicles, Judge Jesse Furman, overseeing the MDL stage of the case, recently granted a motion for interlocutory appeal following a calculation of potential damages.<sup>45</sup> Judge Furman wrote that “had the questions decided by the Court arisen in the context of simpler, more conventional litigation,” he would not have granted the interlocutory appeal. Yet he acknowledged “the practical reality” that because “the value of that settlement will be heavily influenced by the” Court’s pretrial order it was “appropriate to resolve doubt in favor of certification.” After all, Judge Furman humbly acknowledged, “the Court is not infallible” and “absent an interlocutory appeal, the Court might well have the only—and thus final—word on these important issues.”<sup>46</sup>

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41. Abbe R. Gluck, “Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure,” *University of Pennsylvania Law Review* 165 (2017), pp. 1669, 1706. [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6190&context=ffs\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6190&context=ffs_papers).

42. Andrew S. Pollis, “The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation,” *Fordham Law Review* 79:1643 (2011), p. 1668. [http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol\\_79/11\\_Article-Pollis\\_Mar.pdf](http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol_79/11_Article-Pollis_Mar.pdf).

43. *Ibid.*

44. *Ibid.*, p. 1669.

45. Jesse M. Furman, “Opinion and Order: Regarding Economic Loss Plaintiffs’ Motion for Reconsideration of the Court’s Summary Judgment Ruling or, in the Alternative, for Certification of Interlocutory Appeal, *In Re: General Motos LLC Ignition Switch Litigation*,” 14-MD-2543 (S.D.N.Y. 2019). <https://www.sdneyblog.com/files/2019/12/14-MD-2543-2019.12.12-Order-Certifying-Loss-Question-for-Appeal.pdf>.

46. *Ibid.*

Unfortunately, Judge Furman’s perspective appears to be in the minority. As a result, the combination of a judicial perspective focused on swift resolution combined with little opportunity for review leads to a potentially toxic result where truth seeking sometimes falls second to judicial administration.

### Daubert’s Unintentional Wrinkle

Historically, one of the greatest pretrial challenges that courts face is weighing and admitting expert evidence, including expert testimony around issues of scientific debate.<sup>47</sup> Over the decades in American courts, judges used various tests to determine what evidence a jury would hear. These tests were often applied loosely, with many courts subscribing to a “sporting theory of justice,” where as long as litigants “had an equal opportunity to bring forward opposing experts . . . then whatever the jury made of the competing experts’ stories was acceptable.”<sup>48</sup>

In recent times, a significant concern surrounding “questionable science” sneaking into the courtroom is its possible impact on “erroneous jury verdicts.”<sup>49</sup> In one example, by the early 1990s, “despite the lack of scientific evidence, the silicone litigation became an industry in itself.”<sup>50</sup> By 1993, implant manufacturers “had collectively set aside 4.75 billion dollars to settle claims filed over the next thirty years.”<sup>51</sup> That same year, the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals (Daubert)*, changing the admissibility standard for expert testimony.

In *Daubert*, two children were born with serious birth defects, impacting the growth of their limbs. On behalf of their parents, the children sued Merrell Dow Pharmaceuticals, alleging the morning sickness drug *Bendectin* was responsible. The District Court sided with the defendants, finding the plaintiffs’ evidence did not satisfy the often used “general acceptance” standard. The Ninth Circuit affirmed the District Court. The Supreme Court held that the Federal Rules of Evidence superseded the “general acceptance” test when considering the admittance of scientific testimony at trial and remanded the case back to the court of appeals.<sup>52</sup>

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47. See, e.g., Jim Hilbert, “The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of ‘Junk Science’ in Criminal Trials,” *Oklahoma Law Review* 71 (2019), pp. 759, 763-64. <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1461&context=facsch>.

48. Jennifer L. Mnookin, “Expert Evidence, Partisanship, and Epistemic Competence,” *Brooklyn Law Review* 73:3 (2008), pp. 1009, 1015. <https://core.ac.uk/download/pdf/228603292.pdf>.

49. Hilbert, p. 775. <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1461&context=facsch>.

50. *Ibid.*

51. *Ibid.*, p. 776. (emphasis in original).

52. 509 U.S. 579 (1993).

Looking to the Federal Rules, the Supreme Court concluded that trial judges have “a gatekeeping role” in admitting expert scientific evidence at trial.<sup>53</sup> This task includes “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, and of whether that reasoning or methodology properly can be applied to the facts in issue.”<sup>54</sup> The Court optimistically noted that it was “confident that federal judges possess the capacity to undertake this review.”<sup>55</sup>

Although judges had been considering the admissibility of science at trial for years, *Daubert* importantly “stressed the trial court’s obligation to exercise this power.”<sup>56</sup> Science debates now moved to the pretrial stage, with defendants seeking *Daubert* hearings to try and “seek pretrial rulings on the admissibility of expert testimony,” and, if successful, file a motion for summary judgment to end the case.<sup>57</sup>

This pretrial routine “put [judges] on notice that—like it or not—they were going to have to deal with science.”<sup>58</sup> Even early on, some judges offered hesitation. Writing separately in *Daubert*, Chief Justice Rehnquist agreed that the Federal Rules “[confide]” a “gatekeeping” responsibility to trial judges, but it did not force them “to become amateur scientists in order to perform that role.”<sup>59</sup> On remand back to the Ninth Circuit, the court skeptically summarized lower federal courts’ new task:

Our responsibility, then, unless we badly misread the Supreme Court’s opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not “good science,” and occasionally to reject such expert testimony because it was not “derived by the scientific method.” Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.<sup>60</sup>

Subsequent cases like *General Electric Co. v. Joiner* and *Kumho Tire v. Carmichael* confirmed that trial judges have significant discretion in their gatekeeping role, leading to incon-

sistent rulings and litigation results, some of which may be attributed to a “lack of scientific competency.”<sup>61</sup> The result is more profound—and concerning—in MDLs. Indeed, “[a] striking feature of MDL practice is its lack of a fixed order of battle.” In most civil cases in federal court, there is “a predictable order, with motion practice leading to discovery, summary judgment, *Daubert* motions, and, in rare cases that survive without settling or being dismissed, trial.” In MDLs, on the other hand, “this order of battle is often discarded.”<sup>62</sup>

As discussed previously, because MDLs are aggregated, pretrial decisions like scheduling orders and *Daubert* rulings can prove ultimately dispositive for a significant number of cases.<sup>63</sup> Yet, the economic (and judicial) pressure to settle often wins the day before the court reaches any substantive pretrial rulings. One study analyzing 34 MDLs that settled between 2013 and 2018, found that “[in] some instances, judges blessed the deal before ever ruling on the merits: judges in only 50% of those thirty-four proceedings had made at least three merits-related rulings,” including *Daubert* motions.<sup>64</sup>

During a 2019 conference, a number of federal judges—including a former chair of the JPML and MDL judges—came together to discuss “best practices” on how to manage *Daubert* issues. These judges discussed the challenges of MDL litigation; ways to manage and consider common MDL disputes and their gatekeeping role; and how they come to understand difficult science questions.

During the panel, the judges were asked how they evaluate complex scientific cases. The responses varied, but most indicated they read documents prepared by the litigants themselves or a limited number of outside resources.<sup>65</sup> One judge remarked that they most likely “won’t be able to figure out the entire science,” so they would see “where the parties are—what the points are that the parties are arguing about and . . . work backwards from there and figure [it] out.”<sup>66</sup> Another mentioned that it was “important to be very transparent about what you don’t know so the parties can

53. *Ibid.*, p. 597.

54. *Ibid.*, p. 592-93.

55. *Ibid.*, p. 593.

56. Margaret A. Berger, “Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court’s Trilogy on Expert Testimony in Toxic Tort Litigation,” *Law & Contemporary Problems* 64 (2001), pp. 289, 293. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1220&context=lcp>.

57. *Ibid.*

58. *Ibid.*

59. 509 U.S. 579, 601

60. *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995).

61. Hilbert, p. 795. <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1461&context=facsch>.

62. David L. Noll, “MDL as Public Administration,” *Michigan Law Review* 118:3 (2019), pp. 403, 419. <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=4493&context=mlr>.

63. See, e.g., M. Joseph Winebrenner and Nicholas D. Teichen, “Denture Cream MDL Loses Its Bite,” *American Bar Association*, Oct. 31, 2016. <https://www.americanbar.org/groups/litigation/committees/mass-torts/practice/2016/denture-cream-mdl-loses-its-bite-fixodent>.

64. Elizabeth Chamblee Burch, “Nudges and Norms in Multidistrict Litigation: A Response to Engstrom,” *The Yale Law Journal Forum* 129 (2019) pp. 64, 75. [https://www.yalelawjournal.org/pdf/Burch\\_NudgesandNormsinMultidistrictLitigation\\_2rdw9w5g.pdf](https://www.yalelawjournal.org/pdf/Burch_NudgesandNormsinMultidistrictLitigation_2rdw9w5g.pdf).

65. Edward K. Cheng, D. J. Capra, and et al, “Conference on Best Practices for Managing *Daubert* Questions,” *Fordham Law Review* 88 (2020), pp. 1215, 1220. <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2188&context=faculty-publications>.

66. *Ibid.*, p. 1222.

adequately educate you.”<sup>67</sup> In the end, though, the judges agreed that additional judicial education programs about *Daubert*—covering a variety of scientific topics—would be helpful in their cases.

## PROPOSALS

According to one law professor: “The objective of the law is justice; that of science is truth,” concluding that “[b]eyond the meanings of certain key words, science and the law differ fundamentally in their objectives.”<sup>68</sup> This natural friction is highly evident in MDLs, especially MDLs focused on mass tort cases concerning potentially thousands of claims, millions (or even billions) of alleged damages, and nuanced science debates. *Daubert*—which at times seems to promote inconsistent commands leading to inconsistent legal conclusions—is unlikely to go anywhere in the short term. As a result, if *Daubert* requires federal judges to serve as evidentiary gatekeepers, they must be afforded legal rules and scientific tools to handle the job.

This paper makes recommendations that would help bring difficult science questions more quickly to the forefront in MDL litigation, benefiting both the Court in its gatekeeping role and avoiding costly and burdensome delays for litigants.

### Standardize Rules and Reverse the “Settlement-above-all-else” Mentality

As discussed above, MDLs’ overly flexible approach leads to numerous inconsistencies across courts in how MDLs are litigated and how settlements are reached. Combined with a disproportionate judicial focus on settlement, rather than overseeing discovery and considering merits questions, many MDLs are resolved before claims are fully scrutinized and any difficult science questions are fully examined.

First, the federal judiciary should emphasize to potential and current MDL judges that the duties of an MDL judge are no different from the duties that judges have when considering any other case on the docket. Litigants should never feel pressured to settle, and scheduling orders should never be manipulated to compel litigants to resolve their cases before having the opportunity—if they choose—to litigate their claims or defenses fully.

Yet, today, according to one district judge, “it is almost a point of honor among transferee judges . . . that cases so transferred shall be settled rather than sent back to their home

courts for trial.”<sup>69</sup> This view, though, “reinforces the unfortunate tendency to hang on to transferred cases to enhance the likelihood of settlement.”<sup>70</sup>

The tendency to hold on to cases to encourage settlement goes beyond the original aim of the MDL Act. The MDL Act simply requires judges that are assigned an MDL case to conduct pretrial proceedings.<sup>71</sup> It does not demand that transferee judges ensure swift resolution or settlement. Indeed, the Act says that cases “shall be remanded” back “at or before the conclusion of such pretrial proceedings.”<sup>72</sup> The only exception is when the case had “been previously terminated.”<sup>73</sup> But today, fewer than 3 percent of MDL cases are ever remanded back to their original courts. The exception has swallowed the rule.

A part of the blame is that JPML’s method of choosing judges is far from random. Indeed, MDL judges are specifically chosen “for their expertise in practical administration.”<sup>74</sup> Yet, litigants are afforded little input and opportunity to participate in the selection process. When arguing for MDL centralization and transfer, litigants may brief the subject but are only typically given “between one and five minutes” to argue before the JPML where the case should be transferred.<sup>75</sup> Once the JPML agrees to transfer a case, it issues a short order, rarely “devot[ing] more than a few sentences to the selection of a transferee district and judge.”<sup>76</sup>

But since the court of an MDL judge is where a case is most likely to find its “final resting place,” litigants should be afforded more of an opportunity to be part of the consolidation and transfer process.<sup>77</sup> Greater collaboration by both plaintiffs and defendants with the JPML would be a better practice. It would help identify judges that may be familiar with both legal and scientific issues but also reassure litigants that their cases are not being sent to a certain judge for quick settlement but rather for careful and experienced consideration of their claims.

In place of settlement for the sake of settlement, once transferred, MDL judges should move quickly to the merits of the

67. *Ibid.*, p. 1224.

68. David Goodstein, *How Science Works: Reference Manual on Scientific Evidence (Third Edition)*, Federal Judicial Center, 2011, p. 52. <https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf>.

69. *Delavventura v. Columbia Acorn Trust*, No. CIV.A.05-10793 WGY, 152 (D. Mass. 2006).

70. *Ibid.*

71. 28 U.S.C. § 1407(a).

72. *Ibid.*

73. *Ibid.*

74. Gluck, p. 1674. [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6190&context=fsj\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6190&context=fsj_papers).

75. Daniel A. Richards, “An Analysis of the Judicial Panel on Multidistrict Litigation’s Selection of Transferee District and Judge,” *Fordham Law Review* 78 (2009), pp. 311, 318. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4496&context=flr>.

76. *Ibid.*, p. 319.

77. *Ibid.*, p. 317.

case and work to resolve pretrial issues in an expeditious way that is fair to all parties. According to the Federal Judicial Center’s “Pocket Guide for Transferee Judges,” MDL judges should quickly set a schedule for disclosing experts, expert reports and the resolution of any *Daubert* motions.<sup>78</sup> Because *Daubert* rulings can “largely avoid the litigation of a string of non-meritorious actions,” they should be considered early in the case.<sup>79</sup>

In product liability cases, a common—and often helpful—method of conducting discovery of scientific topics is a bifurcated discovery, focusing first on general causation. That is, whether a product could even cause a plaintiff’s alleged injury. As one judge observed, “if you [do not] have general causation, you [cannot] have specific.”<sup>80</sup> So often it is wise to consider “general causation first and figure out where the bodies are buried in that.”<sup>81</sup> If plaintiffs’ experts are unable to show this association, then the case may be over quickly, saving judicial and litigant time and resources.

Even if some substantively dispositive motions—like many *Daubert* rulings—are resolved early in the litigation, current rules prohibiting most interlocutory appeals still bar a faster and more cost-saving end to MDL litigation. As recognized by scholars, little opportunity for appellate review disproportionately impacts a large number of litigants (as pretrial motions apply to all consolidated parties in the MDL) and, in turn, offers little judicial precedent for other courts, limiting legal consistency and stable legal doctrines.<sup>82</sup>

Whether to change the Federal Rules of Evidence to include interlocutory review in MDL litigation has been debated for years within the Advisory Committee on Civil Rules. In a 2020 report, the MDL subcommittee considered additional routes for interlocutory review without the judicial “veto” provided to judges in 28 U.S.C. § 1292(b).<sup>83</sup> For now, the subcommittee recommended no change to the rules, citing in part “broad judicial opposition” and “difficulty” identifying what rulings and proceedings would apply for appeal.<sup>84</sup>

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78. Barbara J. Rothstein and Catherine R. Borden, “Managing Multidistrict Litigation in Products Liability Cases A Pocket Guide for Transferee Judges,” Federal Judicial Center, 2011, p. 35. <https://www.fjc.gov/sites/default/files/2012/MDLGdePL.pdf>.

79. Andrew K. Solow et al., “Mastery In The MDL: Maximizing The MDL Daubert Process,” *Law360*, Jan. 29, 2016. <https://www.law360.com/articles/751439/mastery-in-the-mdl-maximizing-the-mdl-daubert-process>.

80. Cheng and Chapra, p. 1222. <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2188&context=faculty-publications>.

81. *Ibid.*

82. Gluck, p. 1706. [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6190&context=fss\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6190&context=fss_papers); Pollis, p. 1667-69. [http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol\\_79/11\\_Article-Pollis\\_Mar.pdf](http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol_79/11_Article-Pollis_Mar.pdf).

83. Advisory Committee on Rules, p. 154. [https://www.uscourts.gov/sites/default/files/2020-10\\_civil\\_rules\\_agenda\\_book\\_final.pdf](https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf).

84. *Ibid.*, p. 157-58.

Broad judicial opposition is understandable. Adding the opportunity for an interlocutory appeal in MDL cases would mean litigants would have greater opportunity to appeal judicial decisions—potentially leading to a reversal and remand. Moreover, since some MDL judges prioritize settlement, an appeal is potentially disruptive to that goal. In addition, there are potential and reasonable criteria to establish when litigants could pursue interlocutory appeals in MDL litigation. Professor Andrew Pollis, for instance, has argued for a three-pronged criteria for when to appeal an MDL pretrial order: the order “must raise an issue of law;” have “no controlling law on point” or the controlling law was not followed by the district court; and appellate review “must be potentially dispositive” of a large number of cases in the MDL proceeding.<sup>85</sup> As just one example, this criteria offers a reasonable balance between the right to appeal and the judiciary’s search for a reasonable limit to appeals before final judgment.

MDLs are unique and an increasing share of the federal civil court docket. They offer tremendous savings in time and resources, but their unique flexibility and administration by courts should be matched by greater opportunities for appellate review. The best method is continued advocacy for modest changes to the Federal Rules of Civil Procedure. But Congress also has a potential role. Passed just over 50 years ago, the original MDL Act breezed through Congress without one dissenting vote.<sup>86</sup> Compared to other federal legislation, the law is fairly short, the same length as some newspaper editorials.<sup>87</sup> But given MDLs’ disproportionate share of the federal civil docket, Congress and its relevant committees need to continue to scrutinize the modern MDL process and debate whether legislative intervention is necessary.

## Improve Judicial Capacity and How Judges Consider Science

By their nature, federal judges are generalists, adjudicating a variety of legal claims encompassing nearly every corner of law. And there are a number of advantages of generalist jurists. As one judge argued, generalists “cannot become technocrats” or “hide behind specialized vocabulary and ‘insider’ concerns.” Moreover, generalist judges encourage lawyers, advocate for “demystifying” legal doctrines and make law more accessible to the public.<sup>88</sup>

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85. Pollis, p. 1685. [http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol\\_79/11\\_Article-Pollis\\_Mar.pdf](http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol_79/11_Article-Pollis_Mar.pdf).

86. Andrew D. Bradt and Zachary D. Clopton, “MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation,” *Cornell University Law Review* 112 (2018), pp. 905, 911. <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2720&context=facpub>.

87. See, e.g., 28 U.S.C. § 1407.

88. Diane P. Wood, “Generalist Judges in a Specialized World,” *University of Chicago Law Review* 50 (1997), pp. 1755, 1767. [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3047&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3047&context=journal_articles).



At the same time, when legal disputes venture into complex scientific corners and cases are potentially dispositive depending on what expert testimony is admitted or excluded, judges often need help. When exercising their gatekeeper role, MDL judges should not be hesitant to rely on independent experts and embrace resources available within the federal judiciary.

One common tool is a “science day” for judges. Typically, these are presentations to the court on medical and science issues relevant to the legal dispute. The Federal Judicial Center has agreed that science days help judges understand “the relevant science outside the context of normal motion practice” and offer “a more fulsome view of the science than the views advanced in legal briefs.”<sup>89</sup> In other words, science days help judges understand the debated science topics outside the partisan lens of the litigating parties before them. Science days are also effective case management tools, helping to “preview” issues the court may see, brief *Daubert* motions and finalized expert reports.<sup>90</sup>

Of course, there are several pitfalls underlying science days. They are of little use if they are presented by nonexperts (i.e., lawyers). Some science days also include presentations from party experts and, at times, a cross-examination from opposing attorneys.<sup>91</sup> But these quasi-judicial hearings may be counterproductive, as party experts and counsel will likely focus on litigating their claims and presenting the best “view” rather than a comprehensive understanding of the science issues at large. However, federal judges have several available resources to identify and deploy independent experts during science days.<sup>92</sup> For example, the American Association for the Advancement of Science has a referral system to identify relevant experts and generate educational materials.<sup>93</sup> Especially at an early litigation stage, independent experts may be useful to set the science groundwork well before litigants begin to present their own perspectives.

To varying degrees, court costs and potential forwarded costs to litigants will always be a concern. For science days, retaining independent experts to present complex science areas generates some cost. One idea is to film these presentations and make them available to other courts that may ultimately

handle a similar controversy.<sup>94</sup> These panels would naturally need to be updated over time but would nonetheless spare some judicial costs.

Another potential resource is independent science panels or technical advisors. A successful science day could suggest that the court may need an ongoing advisor or panel of advisors to assist the court during the MDL phase of litigation. According to three scholars from the Federal Judicial Center, “court-appointed experts are gaining acceptance, even though appointments remain rare.”<sup>95</sup>

Two of the most notable cases implementing technical advisors or a science panel were in cases from the early 1990s focusing on alleged injuries caused by silicone breast implants. One case was before Judge Robert Jones in the District of Oregon. The other was before Judge Sam Pointer in the Northern District of Alabama.<sup>96</sup> At the time, each court was considering a very different number of cases. In Oregon, it was 70; in Alabama, nearly 27,000.<sup>97</sup> The experts retained by each court also served different purposes and were appointed under different authorities. In Oregon, technical advisors were appointed under the court’s “inherent authority” and generated expert reports that the court used while considering *Daubert* motions.<sup>98</sup> In contrast, in Alabama experts were appointed under Federal Rules of Evidence 706 for testimony “regarding general causation for presentation at trial.”<sup>99</sup> The costs were also notably different. For example, in Oregon, the cost was \$76,000 and in Alabama costs rose to approximately \$1,000,000.<sup>100</sup>

There are a number of advantages to retaining independent advisors. To begin, judges have a number of legal authorities—whether from their inherent powers or the Federal Rules of Evidence—to seek and appoint technical advisors. In turn, judges are offered some flexibility in how advisors can help them consider novel science issues and competing expert testimonies. As one article observes, these advisors could provide a contemporaneous, peer review of expert opinions offered by litigants.<sup>101</sup> This would help courts “high-

89. Melissa J. Whitney, “Tutorials on Science and Technology,” Federal Judicial Center, 2018, p. 2. [https://www.fjc.gov/sites/default/files/materials/02/Tutorials\\_Science\\_Technology\\_2018.pdf](https://www.fjc.gov/sites/default/files/materials/02/Tutorials_Science_Technology_2018.pdf).

90. *Ibid.*, p. 4.

91. Isabelle Tully, “The Courtroom Turned Classroom: A Model Procedure for Educating the Gatekeepers of Expert Evidence in Complex Toxic Tort Cases,” *Cardozo Law Review* 40 (2019), pp. 2405-2419. [http://cardozolawreview.com/wp-content/uploads/2019/07/7.Tully\\_40.5.3.pdf](http://cardozolawreview.com/wp-content/uploads/2019/07/7.Tully_40.5.3.pdf).

92. Whitney, p. 8. [https://www.fjc.gov/sites/default/files/materials/02/Tutorials\\_Science\\_Technology\\_2018.pdf](https://www.fjc.gov/sites/default/files/materials/02/Tutorials_Science_Technology_2018.pdf).

93. “Court Appointed Scientific Experts (CASE),” American Association for the Advancement of Science, last accessed May 5, 2021. <https://www.aaas.org/programs/court-appointed-scientific-experts>.

94. Cheng and Chapra, p. 1261. <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2188&context=faculty-publications>.

95. Laural L. Hooper et al., “Assessing Causation in Breast Implant Litigation: The Role of Science Panels,” *Law & Contemporary Problems* 64 (2001), pp. 139, 140. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1229&context=lcp>.

96. See, e.g., *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996); *In re Silicone Gel Breast Implants Products Liability Litigation*, 793 F. Supp. 1098 (J.P.M.L. 1992).

97. Hooper et al., p. 145. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1229&context=lcp>.

98. *Ibid.*

99. *Ibid.*

100. *Ibid.*

101. Tully, p. 2438. [http://cardozolawreview.com/wp-content/uploads/2019/07/7.Tully\\_40.5.3.pdf](http://cardozolawreview.com/wp-content/uploads/2019/07/7.Tully_40.5.3.pdf).

light issues and flaws and methodology and reasoning” that would unlikely be spotted without independent aid. In addition, independent advisors can put paid experts on notice.<sup>102</sup> Indeed, “if experts are aware that their opinions will be regularly subjected to neutral peer review, they will likely apply a more rigorous standard in their own assessments.”<sup>103</sup>

Despite these merits, costs are a likely concern, especially if parties will be responsible for paying for the independent expert. Actual independence of the outside court expert is another factor. Although technical advisors would be retained by the court, potential bias may still exist. Outside experts may still be influenced by past research and hypotheses and past experiences with experts retained by the parties.

In the end, the merits of retaining a technical advisor for MDLs are largely determinative of the complexity of the scientific issues at hand, the number of consolidated cases and the estimated costs. In smaller cases, a science day or brief use of a technical advisor is enough. In wide-ranging cases where damages could exceed one billion dollars, a comprehensive panel may be more useful. Once a court determines how independent advisors could be used, they must be careful and rely on judicial resources and respected referral services to help select an independent expert.

## CONCLUSION

The federal court’s gatekeeping role is difficult. It requires judges to determine what expert testimony will be admitted at trial. This task is more difficult when novel and complex science disputes enter the courtroom. As former Chief Justice Rehnquist warned, at times, legal generalists are seemingly forced to play amateur scientist in making science determination clouded by self-interested representations by litigants and retained experts.<sup>104</sup> This dilemma is multiplied in MDLs, where one decision has the potential to apply to thousands of cases at one time—and to untold settlement figures.

Judges must resist the temptation to structure MDLs in a way that coerces premature settlement. This attitude allows bad litigation strategies and faulty science to creep through the courtroom door with little scrutiny or pushback. In turn, both the federal judiciary and Congress should seriously consider the value of amending the Federal Rules to allow interlocutory appeals of certain pretrial MDL orders. In addition, judges should more readily consider independent technical advisors to help them consider difficult science questions. Doing so would assist judges in their gatekeeping role and help ensure retained experts reach good-faith conclusions.

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102. *Ibid.*, p. 2439.

103. *Ibid.*

104. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

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