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LAW SUMMARY

A Blatant Inequity: Contributions to the Common Benefit Fund in Multidistrict Litigation

*Jack Downing**

I. INTRODUCTION

The U.S. legal system is a remarkable mechanism that strives to operate with justice and efficiency. However, it is not without flaws and loopholes. Upon discovery, these defects are often exploited for the material benefit of those involved.¹ In a profession where every hour is counted, practicing attorneys often attempt to earn as much money as possible while expending the least amount of time.² Somewhere along the line, many attorneys lose sight of what really matters – serving their clients and the justice system.

This Note discusses a growing problem in cases with an established common benefit fund (“CBF”) for attorneys’ fees, where a judge orders all parties involved to set aside a percentage of the recovery to ensure that each attorney is adequately compensated for his or her services. Specifically, in federal multidistrict mass tort litigation, plaintiffs’ attorneys often have clients in both federal and state court who have been harmed by the same party and through the same conduct.³ In these circumstances, if a CBF is established in federal court, all attorneys involved will have access to the work product conducted in furtherance of the federal litigation.⁴ There is nothing stopping those attorneys from applying the common work product to their

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1. See Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179, 180 (2001).

2. Joseph E. La Rue, Note, *Redeeming the Lawyer’s Time: A Proposal for a Shift in How Attorneys Think About – and Utilize – Time*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 473, 499 (2006).

3. See Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 915–16.

4. *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2015 WL 2165341, at *2 (D. Kan. May 8, 2015).

current and future cases filed in state court.⁵ Accordingly, if plaintiffs' attorneys are successful in their state court litigation, they will not have to contribute any portion of their state court recovery to the federal court CBF.⁶ As a result, attorneys can effectively obtain the benefit of work product created by other attorneys without paying for it. Federal multidistrict litigation ("MDL") often involves hundreds of depositions, dozens of experts, and millions of documents for review.⁷ The cost of this work product can amount to millions of dollars and tens of thousands of hours of time.⁸ This inherent unfairness should not exist in our justice system.

This Note analyzes the nuances of this issue and offers resolutions to its fundamental problems. Part II includes an overview of the MDL litigation, the plaintiffs' lead counsel selection process, and the function and nature of CBFs. This Part will also include the judicial justification for creating a CBF in federal MDLs. Part III examines current problems with CBFs. In particular, this Part will focus on plaintiffs' attorneys' ability to use work product obtained for the federal MDL in their concurrent state court cases without having to contribute any portion of their recovery in state court to the federal CBF. Part IV will then examine the arguments for and against ordering plaintiffs' attorneys to contribute a portion of their state court recoveries to the federal CBF.

II. LEGAL BACKGROUND

In order to conserve judicial resources, the Judicial Panel on Multidistrict Litigation ("JPML") assigns a single district court, one with personal jurisdiction and proper venue, to an MDL pursuant to 28 U.S.C. § 1407.⁹ This allows all relevant federal cases to be consolidated into a single proceeding.¹⁰ For purposes of efficiency, similar cases in state court may be removed to the federal district court if diversity exists and the removal requirements are satisfied.¹¹ After the JPML assigns the case to the proper district court, the judge in that district will appoint a leadership counsel on behalf of all the plaintiffs in the MDL.¹² In making his or her decision, the judge considers a variety of different factors, including "the attorneys' ability to command the respect of their colleagues and work cooperatively" with everyone involved

5. *Id.* at *7–8.

6. *Id.* at *4.

7. See Danielle Oakley, Note, *Is Multidistrict Litigation a Just and Efficient Consolidation Technique? Using Diet Drug Litigation as a Model to Answer This Question*, 6 NEV. L.J. 494, 497–98 (2006).

8. See Tanya Pierce, *It's Not Over 'Til It's Over: Mandating Federal Pretrial Jurisdiction and Oversight in Mass Torts*, 79 MO. L. REV. 27, 36 (2014).

9. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION 11 (Stanley Marcus et al. eds., 4th ed. 2004), <https://public.resource.org/scribd/8763868.pdf>.

10. *Id.*

11. *Id.*; see also 28 U.S.C.A. §§ 1441–1452 (West 2016).

12. See FED. JUDICIAL CTR., *supra* note 9, at 26–27.

in the MDL.¹³ Courts believe this is especially important, because the leadership counsel determines the plaintiffs' strategic course of action and establishes a CBF to which all of the plaintiffs' attorneys involved must contribute.¹⁴

The prevalence of MDL lawsuits has increased over the past several decades.¹⁵ In 2014, 120,449 MDL actions were pending in federal courts, affecting hundreds of thousands of attorneys and plaintiffs across the country.¹⁶ In total, MDLs make up nearly forty percent of all federal civil actions.¹⁷

The common benefit governing principles are derived from the common benefit doctrine, which was initially established in *Trustees v. Greenough*.¹⁸ The *Manual for Complex Litigation* outlines the doctrine.¹⁹ It states:

Lead and liaison counsel may have been appointed by the court to perform functions necessary for the management of the case but not appropriately charged to their clients. Early in the litigation, the court should . . . determine the method of compensation . . . and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions. Guidelines should cover staffing, hourly rates, and estimated charges for services and expenses.²⁰

13. *Id.*

14. See *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, 2002 WL 32154197, at *6–8 (E.D. Pa. Oct. 3, 2002) modified by MDL No. 1203, 2003 WL 22218322 (E.D. Pa. May 15, 2003).

15. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2014: CUMULATIVE FROM SEPTEMBER 1968 THROUGH SEPTEMBER 30, 2014, 3 (2014), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2014.pdf.

16. Amaris Elliott-Engel, *Study: MDLs See Bigger Chunk of Federal Dockets*, NAT'L LAW J. (Oct. 29, 2014), <http://www.nationallawjournal.com/id=1202675010547/Study-MDLs-See-Bigger-Chunk-of-Federal-Dockets>.

17. *Id.*

18. *Internal Imp. Fund Trs. v. Greenough*, 105 U.S. 527, 532–33 (1881) (“It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts.”).

19. See FED. JUDICIAL CTR., *supra* note 9, at 202.

20. *Id.*

For decades, CBFs have been used as a means to justly compensate attorneys for their services in MDLs.²¹ Traditionally, in a single action, an attorney receives a fixed percentage of the recovery, as a contingency fee, if there is a settlement or if the plaintiff is awarded damages.²² In an MDL, attorneys, including those in the leadership group, often perform “duties beyond their responsibilities to their own clients.”²³ These duties include taking depositions, hiring experts, and reviewing documents to an extent well beyond what would be required in an individual case.²⁴ Attorneys assume these duties to benefit all plaintiffs as a whole, and the work product obtained by the leadership counsel is accessible to all plaintiffs’ attorneys involved in the litigation.²⁵ Since every attorney receives the benefit of the work product obtained by only a few, creating a CBF is “a necessary incident to achievement of the goals of multidistrict litigation.”²⁶ In order to prevent this inequity, it is necessary to implement a proportional payment system based on the amount of work performed by each attorney.²⁷ The costs of which will be distributed among those who benefit from the common work product.²⁸

To establish a CBF, the plaintiffs’ attorneys involved must meet before the litigation begins to determine a fair amount to be allocated as a fixed percentage of the recovery.²⁹ The court effectuates the CBF by requiring the defendant to “hold back” the amount of the CBF from the total recovery.³⁰ The defendant must then pay a percentage to the CBF, pursuant to the court’s determination made at the outset of the litigation.³¹ Therefore, upon recovery, the only party over which the court exercises jurisdiction in dealing with

21. *In re Air Crash Disaster at Fla. Everglades* on Dec. 29, 1972, 549 F.2d 1006, 1011 (5th Cir. 1977).

22. *Legal Fees and Expenses: What are Contingent Fees?*, AM. BAR ASS’N, http://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/lawyerfees_contingent.html (last visited June 26, 2016).

23. *Air Crash Disaster*, 549 F.2d at 1011.

24. *Id.*

25. *See generally In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190 (E.D. Mo. Feb. 24, 2010), *aff’d*, 764 F.3d 864 (8th Cir. 2014).

26. *Air Crash Disaster*, 549 F.2d at 1011.

27. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

28. *Id.*

29. *Genetically Modified Rice*, 2010 WL 716190, at *6 (“Courts have ordered contributions between 9% and 17% in MDLs for common benefit work.”). These percentages come from pretrial contract negotiations between the plaintiffs in the action. Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 *FORDHAM L. REV.* 1985, 1986 (2011); *see also* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 *N.Y.U. L. REV.* 71, 101–02 (2015).

30. *Turner v. Murphy Oil USA, Inc.*, 422 F. Supp. 2d 676, 680 (E.D. La. 2006) (“[I]t has been a common practice in the federal courts to impose set-asides in the early stages of complex litigation in order to preserve common-benefit funds for later distribution.”).

31. *Id.*; *see also In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 267 (E.D.N.Y. 2006).

the CBF is the defendant; the court does not “levy” the assessment directly on the plaintiff, but rather orders the defendant to “set aside” a determined percentage as the CBF.³² During the litigation, each attorney logs the number of hours spent and the type of work conducted.³³ Once the recovery is made, each attorney performing common benefit work is paid from the CBF based on the number of hours logged, quality of work, overall size of the recovery, and other factors.³⁴

This system has several loopholes that allow attorneys to avoid fully contributing to the CBF – a full contribution being one based on the recovery of every client for whom the MDL work product is applied. As will be discussed below, attorneys will strategically choose to file as many cases as they can in state court. This prevents them from having to contribute to the CBF in the MDL for their recovery in state court. As long as these attorneys have at least one client in the MDL, they will have access to the work product obtained by the leadership group and any other attorney working on the litigation.³⁵ Several courts have addressed this issue.³⁶

III. RECENT DEVELOPMENTS

With the presence of a federal MDL, there are often state court cases involving the same core dispute.³⁷ This can happen when there is a local defendant destroying federal diversity jurisdiction.³⁸ If a plaintiff’s attorney believes the laws to be more favorable in a certain state, he or she may join a defendant in that state to defeat diversity and keep the case in that state.³⁹ With no legitimate grounds for joinder other than defeating diversity jurisdiction, a court may rule that the joinder is fraudulent, in which case the judge will remove the case to the federal MDL.⁴⁰ For those cases that do not get removed, the question remains: Does the MDL court have jurisdiction to re-

32. See *Zyprexa Prods.*, 467 F. Supp. 2d at 266–68; *Genetically Modified Rice*, 2010 WL 716190, at *1 (“The proposed [CBF] would be funded by defendants’ setting aside a percentage of awards or settlements in all cases related to the MDL.”).

33. See *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 869 (8th Cir. 2014).

34. *Id.* Additionally, some types of work are often given more value than others, e.g., taking depositions versus reviewing documents. Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 389 (2014).

35. See generally *In re Latex Gloves Prods. Liab. Litig.*, MDL No. 1148, 2003 U.S. Dist. LEXIS 18118 (E.D. Pa. Sept. 5, 2003).

36. See, e.g., *id.*

37. See *Genetically Modified Rice*, 2010 WL 716190, at *2 (“Many plaintiffs’ lawyers represent plaintiffs in the federal cases as well as plaintiffs in the state cases. In fact, all of the producer plaintiffs’ attorneys who object to this motion represent plaintiffs in cases before me and in cases pending in state courts.”).

38. *Id.*

39. See *id.*

40. *Id.*

quire the defendant to hold back a percentage of the state court recovery from attorneys representing clients in both the federal MDL and state court?

A. *The Federal MDL Court's Jurisdiction Restrictions*

There is a split of authority regarding the jurisdiction issue. Federal courts are hesitant to assert jurisdiction over matters brought in state court, but in cases in which there is a federal MDL and accompanying state court litigation sharing the same core controversy, the jurisdictional limitations of each court become unclear.⁴¹ With a lack of case law on this particular issue, some courts have taken into account the issues raised in *In re Showa Denko*.⁴² In *Showa Denko*, the U.S. Court of Appeals for the Fourth Circuit reviewed an MDL district court's order of a holdback assessment that applied not only to the cases transferred to the MDL court, but also to the related state court cases and non-transferred federal cases.⁴³ The court held that the MDL trial court did not have jurisdiction to order a contribution from parties who appeared before different courts and not also before that MDL trial court.⁴⁴ Further, the court concluded the authority to consolidate cases before one MDL judge "is merely procedural and does not expand the jurisdiction of the district court to which the cases are transferred."⁴⁵ Other courts have also accepted this notion.⁴⁶

However, the situation changes when the attorneys are before both state and federal courts on behalf of multiple clients in the same dispute. As mentioned earlier, any attorney involved in the federal MDL will have access to the work product obtained by the leadership group, regardless of whether he or she is representing a client in the same dispute in state courts.⁴⁷ The U.S. District Court for the Eastern District of Pennsylvania analyzed both the ramifications of this work product accessibility and the contributions to the CBF in *In re Latex Gloves Products Liability Litigation*.⁴⁸ This court rejected the application of *Showa Denko*, concluding, "[I]t is unnecessary to theorize that every claimant benefits from the discovery completed by the plaintiffs' steering committee, regardless [of] whether the case is in federal or state court,

41. *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 165 (4th Cir. 1992).

42. *Id.* See *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 873–74 (8th Cir. 2014); *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2015 WL 2165341, at *2–3 (D. Kan. May 8, 2015); *In re Baycol Prods.*, No. MDL 1431MJD/JGL, 2004 WL 1058105, at *2 (D. Minn. May 3, 2004).

43. *Showa Denko*, 953 F.2d at 165.

44. *Id.*

45. *Id.*

46. See cases cited *supra* note 42. *Contra In re Latex Gloves Prods. Liab. Litig.*, MDL No. 1148, 2003 U.S. Dist. LEXIS 18118, at *4–5 (E.D. Pa. Sept. 5, 2003).

47. See *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190 (E.D. Mo. Feb. 24, 2010), *aff'd*, 764 F.3d 864 (8th Cir. 2014).

48. See *Latex Gloves Prods.*, 2003 U.S. Dist. LEXIS 18118, at *2, *5.

and whether suit has been instituted.”⁴⁹ The court further reasoned, “Permitting [the plaintiffs’ counsel] to use discovery information in their state cases without charge would produce an anomalous and undesirable predicament.”⁵⁰

The U.S. Court of Appeals for the Eighth Circuit has also discussed the problems stemming from this situation.⁵¹ In *Walitalo v. Iacocca*, the court stated: “It is well established that courts can impose liability for court-appointed counsel’s fees on all plaintiffs benefitting from their services.”⁵² In this case, attorneys attempted to avoid contributing their share to the CBF by dismissing their cases from the MDL proceeding at the last minute before settlement.⁵³ When the lead counsel in federal court presented this dismissal as an argument against allowing such conduct, the court found the argument to be “completely without merit.”⁵⁴ It found that if a court were to allow a dismissal in this context, “[the court’s] power to appoint attorneys to act on behalf of other attorneys and parties in complex litigation would be meaningless.”⁵⁵ This is because, in a situation where attorneys are allowed to drop from MDL litigation before settlement, they would still have access to the federal MDL work product.⁵⁶ Therefore, the plaintiffs’ steering committee would have no incentive to produce the work product, knowing they would not be justly compensated.⁵⁷

Similar to the court in *In re Latex Gloves Products Liability Litigation*, the court in *Walitalo* also identified an instance where attorneys attempted to maneuver around their obligations to contribute to the CBF – in this case, by withdrawing their clients from the MDL after receiving the benefit of work product conducted by the leadership group.⁵⁸ The court therefore required the plaintiffs’ attorneys, who benefited from the work product obtained for the purposes of the MDL, to contribute to the CBF.⁵⁹

Conversely, some MDL courts have found a lack of jurisdiction to enforce the assessments for CBF purposes in related state court recoveries involving the same attorneys.⁶⁰ In *In re Genetically Modified Rice*, a case

49. *Id.* at *4–5.

50. *Id.* at *5.

51. *See, e.g.*, *Walitalo v. Iacocca*, 968 F.2d 741 (8th Cir. 1992).

52. *Id.* at 747; *see also* FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION 29 (3d ed. 1995), <http://www.classactionlitigation.com/library/mcl.pdf> (“Whether or not agreement is reached, the judge has the authority to order reimbursement and compensation and the obligation to ensure that the amounts are reasonable.”).

53. *See Walitalo*, 968 F.2d at 745.

54. *Id.* at 750 n.11.

55. *Id.*

56. *Id.* at 749.

57. *Id.* at 747.

58. *Id.* at 745.

59. *Id.* at 749.

60. *See In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010), *aff’d*, 764 F.3d 864 (8th Cir. 2014); *see also* *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976).

heard by the U.S. District Court for the Eastern District of Missouri involving many plaintiffs and attorneys from Missouri, the court offered a particularly important remark regarding its jurisdiction over state court cases:

Plaintiffs' leadership group asks me to include the state court cases in this order, so that defendants would be required to hold back and contribute a portion of any settlements or judgments from those cases as well as from the MDL cases. . . . I do not have jurisdiction to do this. . . . I reach this conclusion reluctantly. Requiring all the lawyers who have benefitted from the work of the leadership team to contribute to their fees would be in the interests of justice, but it is beyond my jurisdiction to order.⁶¹

This court further recognized the injustice in its holding by mentioning that attorneys who use the work product obtained from the MDL in their state court case will be unjustly enriched.⁶² However, it felt that there was no way to remedy the problem without exceeding its jurisdiction.⁶³ This court placed the onus on the state court to rectify the issue.⁶⁴

The most recent opinion on this issue came from the U.S. District Court for the District of Kansas in *In re Syngenta AG MIR 162 Corn Litigation* and also involved attorneys and plaintiffs in the state of Missouri.⁶⁵ Here, the court similarly ruled that it did not have jurisdiction to impose assessments on state court plaintiffs.⁶⁶ It reasoned that if it were to exercise jurisdiction over the defendant regarding the state court recoveries, there would be a possibility that it would affect parties outside of the MDL (i.e., the state court plaintiffs).⁶⁷ In support of its position, the court offered a hypothetical where the CBF assessment in the MDL exceeded the total amount of state court attorneys' fees.⁶⁸ In that instance, "the Court would effectively be exerting its authority over parties in cases not before it," because the state court plaintiffs' recovery amounts would be affected.⁶⁹ For this reason, the court held that it did not have the authority to order the defendant to hold back the CBF percentage on related state court cases.⁷⁰ As mentioned above, this provides no remedy or prevention method for the federal plaintiffs' attorneys regarding

61. *Genetically Modified Rice*, 2010 WL 716190, at *4–5.

62. *Id.* at *5.

63. *Id.*

64. *Id.*

65. *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2015 WL 2165341, at *1 (D. Kan. May 8, 2015).

66. *Id.* at *2–3.

67. *Id.*

68. *Id.*

69. *Id.* at *3.

70. *Id.* at *4.

the improper use of federal work product in state court.⁷¹ The court found that attorneys who use this work product in state court are unjustly enriched.⁷²

Fearful of unjust enrichment litigation after the MDL, the attorneys involved in the federal MDL, *In re Syngenta*, who have several state court plaintiffs, took steps to solve the problem from the outset.⁷³ They did so by making “efforts to promote appropriate federal-state cooperation and coordination.”⁷⁴ Additionally, to avoid varying contributions to the CBF of the state court and the CBF of the federal MDL, the state court matched the assessment percentage of the federal MDL.⁷⁵ Furthermore, for plaintiffs’ attorneys in both state and federal court, an identical percentage was set aside to help prevent duplicate assessment in both state and federal court.⁷⁶ This, however, did not prevent attorneys with cases involving the same core dispute in both the state court and the federal MDL from using the work product produced for the federal MDL in their concurrent state court cases without having to contribute any portion of the state court recoveries to the CBF established for the federal MDL.⁷⁷ Thus, this result did not prevent the unjust enrichment at the expense of attorneys only involved in the federal MDL.

B. Circuits Finding Jurisdiction over the MDL Defendant to Order Holdbacks of State Court Recoveries

Other circuits have been more aggressive in preventing the unjust enrichment problem involving plaintiffs’ attorneys not having to contribute to the federal CBF for their related state court cases. These courts cite “equity” and “fairness” as appropriate justifications for stretching their jurisdiction in these types of situations.⁷⁸ In circumstances such as these, “allowances” can be made “for dominating reasons of justice.”⁷⁹ This idea was introduced by the Supreme Court of the United States in *Sprague v. Ticonic National Bank*. Since then, many courts have echoed this belief, especially regarding recent CBF assessments.⁸⁰

71. See generally *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010), *aff’d*, 764 F.3d 864 (8th Cir. 2014).

72. *Id.*

73. *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, slip op. at 5–6 (D. Kan. Jan. 22, 2015).

74. *Id.* at 5.

75. *Id.* at 5–6.

76. *Id.* at 6.

77. *Id.*

78. *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 167 (1939).

79. *Id.*

80. See generally *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 10-2771, 2011 WL 6817982, at *5 (E.D. La. Dec. 28, 2011) (quoting Case Management Order No. 17 at ¶ 3(f)(3), *In re Fosamax Prods. Liab. Litig.*, No. 1:06-md-1786 (S.D.N.Y. Apr. 28, 2011)), *order amended and*

Specifically, the court in *Oil Spill* referenced the above-cited cases on both sides in its analysis – *Genetically Modified Rice* (for a lack of jurisdiction) and *Latex Gloves* (for jurisdiction).⁸¹ The *Oil Spill* court first noted that *Genetically Modified Rice* stated “that requiring all lawyers – including those with cases in state courts – who benefit from the work of appointed counsel to contribute to a common benefit fund avoids unjust enrichment and therefore is in the interest of justice.”⁸² The court in *Oil Spill* went on to mention that perceived jurisdictional restrictions were the only issues preventing the *Genetically Modified Rice* court from ordering the defendant to hold back the CBF percentage on related state court recoveries.⁸³

The *Oil Spill* court contrasted *Genetically Modified Rice* with the holding in *Latex Gloves*, where the court found that no such jurisdictional restrictions existed.⁸⁴ Ultimately, after analyzing and weighing the arguments on both sides, the *Oil Spill* court found that, in the interest of justice, it should order the holdback on related state court recoveries.⁸⁵ It applied the CBF holdback “to all actions filed in or removed to federal court that have been or become a part of the MDL . . . or state court plaintiffs represented by counsel who have participated in or had access to the discovery conducted in this MDL.”⁸⁶

The *Oil Spill* holding was a product of several other cases before it, including *Fosamax Products Liability Litigation* and *Latex Gloves*.⁸⁷ In *Fosamax*, the opinion states that “any plaintiff’s counsel with cases not in the MDL who utilizes any aspect of the MDL common benefit work product . . . shall be subject to [a holdback assessment].”⁸⁸ Therefore, the *Fosamax* court also had no problem exercising its jurisdiction.⁸⁹ In *Latex Gloves*, the court recognized the equitable compulsion to assert its jurisdiction.⁹⁰ It upheld an agreement made between all of the plaintiffs’ attorneys in the MDL.⁹¹ The

superseded on reconsideration, 2012 WL 161194 (E.D. La. Jan. 18, 2012); *In re Latex Gloves Prods. Liab. Litig.*, MDL No. 1148, 2003 U.S. Dist. LEXIS 18118, at *1–2 (E.D. Pa. Sept. 5, 2003); *Walitalo v. Iacocca*, 968 F.2d 741, 748 (8th Cir. 1992).

81. *Oil Rig Deepwater Horizon*, 2011 WL 6817982, at *5.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at *6.

86. *Id.* (emphasis added).

87. *Id.* at *5 (quoting Case Management Order No. 17 at ¶ 3(f)(3), *In re Fosamax Prods. Liab. Litig.*, No. 1:06-md-1786 (S.D.N.Y. Apr. 28, 2011)); *In re Latex Gloves Prods. Liab. Litig.*, MDL No. 1148, 2003 U.S. Dist. LEXIS 18118, at *5 (E.D. Pa. Sept. 5, 2003).

88. *Oil Rig Deepwater Horizon*, 2011 WL 6817982, at *5 (quoting Case Management Order No. 17 at ¶ 3(f)(3), *In re Fosamax Prods. Liab. Litig.*, No. 1:06-md-1786 (S.D.N.Y. Apr. 28, 2011)).

89. *Id.*

90. *Latex Gloves Prods.*, 2003 U.S. Dist. LEXIS 18118, at *5.

91. *Id.*

agreement was created “to obtain equitable sharing of litigation expenses incurred and compensation for professional services provided by the [plaintiffs’ leadership committee].”⁹² It applied “to all actions in which plaintiffs may enjoy the common benefit work product made available in this multi-district litigation.”⁹³ This would include those actions in related state court cases in which the work product of the federal MDL can be applied.

C. A Recent Key Jurisdictional Case

The notion of equitable sharing of litigation expenses was affirmed in *In re Avandia Marketing, Sales Practices & Products Liability Litigation*.⁹⁴ This case was filed in federal court when a law firm refused to contribute a stipulated seven percent of the total recovery to the CBF of the MDL proceeding.⁹⁵ The firm only had twenty-five clients in federal court and thousands in state court, yet it had access to the entire work product collected by the MDL plaintiffs’ steering committee.⁹⁶ The firm then used that work product in its California state court cases.⁹⁷ Before the case was appealed to the U.S. Court of Appeals for the Third Circuit, the U.S. District Court for the Eastern District of Pennsylvania held that all settled claims, in both MDL and California state court, were subject to the seven percent assessment, and it ordered defendant to hold back that amount for the CBF.⁹⁸ The Third Circuit affirmed this ruling, finding the district court did not exceed its jurisdiction.⁹⁹ In reaching its decision, the court discussed much of the relevant case law, including two important cases, discussed previously in this Note, which found a lack of jurisdiction – *Genetically Modified Rice* and *Showa Denko*.¹⁰⁰

The Third Circuit began by referencing *Showa Denko*, stating, “[A]n order requiring state-court plaintiffs to contribute a portion of any recovery in their cases to pay for the MDL coordinating counsel exceed[s] the district court’s jurisdiction because those plaintiffs have not voluntarily entered the litigation before the district court nor have they been brought in by process.”¹⁰¹ It then mentioned *Genetically Modified Rice*, which reiterated that federal courts are without “jurisdiction to order state-court plaintiffs to contribute to a common benefit fund for MDL coordinating counsel,” as a lack of

92. *Id.* at *3.

93. *Id.*

94. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 617 F. App’x 136, 138 (3d Cir. 2015).

95. *Id.*

96. *Id.* at 139.

97. *Id.*

98. *Id.* at 138.

99. *Id.*

100. *Id.* at 141.

101. *Id.*

authority over parties not involved in cases before it is not overcome by equity considerations.¹⁰²

In response to these holdings finding a lack of jurisdiction, the Third Circuit summarized its finding as follows:

We agree with [the law firm] that had the District Court simply ordered the firm, as total strangers to the litigation, to contribute to the common benefit fund from the settlement of its clients' state-court cases, it would have exceeded its jurisdiction. However, that is not what the District Court did here. The proper question we must ask is did the District Court properly exercise jurisdiction to enforce the contract [the law firm] made with the [MDL] Plaintiffs' Steering Committee. We conclude that it did.¹⁰³

Thus, because the law firm received the benefits of the MDL work product, and they were involved in the MDL, the federal court did not abuse its discretion in ordering the defendant to hold back seven percent of the *entire* recovery – including the state court recovery.¹⁰⁴ For purposes of fairness, the court in *In re Avandia* held that the parties were permitted to “trade work product for a share in the recovery in cases *not* before the MDL,” and the district court will not exceed its jurisdiction in enforcing this agreement.¹⁰⁵

D. Principles of Comity and Federalism

The court in *Zyprexa* avoided deciding the jurisdictional issue entirely by citing the principles of comity, a federalism doctrine, as a reason not to order the holdback.¹⁰⁶ Judicial comity involves a “courtesy of the court that respects [the] judicial decisions of another state.”¹⁰⁷ Generally speaking, courts defer to other courts in matters that they believe belong to those courts.¹⁰⁸

Specifically, the court in *Zyprexa Products* found that “[t]here [was] no need . . . to reach the issue of whether a federal MDL court has the power to compel attorneys who represent both state and federal plaintiffs to set aside a

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 268 (E.D.N.Y. 2006).

107. *What is Judicial Comity*, LAW DICTIONARY, <http://thelawdictionary.org/judicial-comity/> (last visited June 27, 2016).

108. *Definition of Comity*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/comity> (last visited Aug. 30, 2016); Telephone Interview with Gretchen Garrison, Attorney, Gray, Ritter & Graham, P.C. (Oct. 7, 2015). Ms. Garrison has dealt with these issues firsthand and worked on cases cited in this Note. Audio recording on file with the author.

portion of their fee recoveries in state cases for use in a common benefit fund.”¹⁰⁹ In its reasoning, the court stated: “Principles of comity and respect for the state courts’ supervision of their own dockets and the attorneys before them lead to the conclusion that such compulsion would be inappropriate.”¹¹⁰ Instead of seeing free work product for attorneys with state court clients as a problem, as courts previously have, this court believed the result to be “desirable.”¹¹¹ It believed this allowance helped prevent “duplication and repetition” in discovery, meaning attorneys will not have to obtain the same work product for both state and federal court.¹¹² Upon consideration of the unjust enrichment problem, the court in *Zyprexa Products* refused to take any remedial action – saying it was not its responsibility to address the problem.¹¹³

D. Summary of Modern Trends

A pattern has emerged from these situations. Courts have repeatedly recognized the inherent problems in allowing every attorney involved in the litigation access to the work product obtained by the leadership group – specifically, those with coexisting state court cases.¹¹⁴ It has been established that an attorney’s use of work product that was obtained for the MDL in state court constitutes an unjust enrichment.¹¹⁵ This makes a subsequent unjust enrichment lawsuit likely, especially when the unjust enrichment amounts to many millions of dollars. As discussed above, authority is split on whether or not MDL courts have jurisdiction to order the defendants to hold back the CBF assessment on attorneys in both state court and the federal MDL.¹¹⁶ One court has found an inability to make such an order, not based on jurisdiction but on the general concept of comity.¹¹⁷ The following Part discusses the options that the MDL courts have in determining the assessments for different parties, as well as possible ways the attorneys themselves can prevent this problem.

109. *Zyprexa Prods.*, 467 F. Supp. 2d at 268.

110. *Id.*

111. *Id.*

112. *Id.* (citing *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir.1958)).

113. *Id.* at 268–69 (“The issue of assessing state cases with the costs of a discovery process that benefits all cases, state and federal, should, in the first instance, be left to state court judges.”).

114. *See, e.g., In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2015 WL 2165341, at *4–5 (D. Kan. May 8, 2015).

115. *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010), *aff’d*, 764 F.3d 864 (8th Cir. 2014).

116. *See generally In re Latex Gloves Prods. Liab. Litig.*, MDL No. 1148, 2003 U.S. Dist. LEXIS 18118 (E.D. Pa. Sept. 5, 2003); *Walitalo v. Iacocca*, 968 F.2d 741 (8th Cir. 1992).

117. *Zyprexa Prods.*, 467 F. Supp. 2d at 267–68.

IV. DISCUSSION

As indicated in the previous Parts, there are a number of MDLs with accompanying state court litigation. As is the case in many situations where there is a split of authority, the problem stems from a fundamental difference of interpretation regarding the court's scope of jurisdiction. The main argument against allowing a federal court to order CBF assessments on the plaintiffs' attorneys present in the federal MDL with related state court recoveries is that the federal court lacks the jurisdiction to issue an order that impacts parties not before it.¹¹⁸ However, those who argued that a federal court has the authority to hold back the amount of the federal CBF assessment claim jurisdiction is not an issue, because the court has authority over the party that creates and controls the fund, i.e., the defendant.¹¹⁹ As will be discussed below, courts denying jurisdiction have struggled to respond to this argument.

In all likelihood, there are underlying public policy considerations playing a role in the federal courts' decisions. In particular, the concept of federalism, often not explicitly mentioned in court opinions, is an ever-present factor of consideration. The concept of federalism has been promoted since the early days of the U.S. legal system.¹²⁰ Whenever there is an issue regarding matters of federal court versus matters of state court, the principles of federalism should be considered.¹²¹ In applying the concept of federalism to this case, courts have referenced the "policy of comity."¹²² Comity protects the individual acts of each court through mutual recognition of and acknowledgment by other courts.¹²³ In essence, due to the principles of comity, federal courts will likely try to limit their involvement with the affairs of state courts.

Thus, a number of reasons prevent courts from ordering holdbacks on plaintiffs' attorneys in state court cases, including lack of jurisdiction and principles of comity. But when an attorney takes work product obtained strictly for a federal MDL and uses it for his or her related state court cases, it is quite clear that the attorney has been unjustly enriched.¹²⁴ Currently, there are few remedies for this problem aside from subsequent litigation, which is highly inefficient. The following section analyzes these considerations and discusses possible resolutions that can be reached from the outset of the litigation.

118. *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 166 (4th Cir. 1992); *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976).

119. *Genetically Modified Rice*, 2010 WL 716190, at *5.

120. *See, e.g.*, THE FEDERALIST NO. 46 (James Madison).

121. *Id.* ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers . . .").

122. *Showa Denko*, 953 F.2d at 166.

123. *Comity Definition*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/comity> (last visited June 26, 2016).

124. *Genetically Modified Rice*, 2010 WL 716190, at *3.

A. *Jurisdictional Issues*

When determining whether a court can exercise its jurisdiction in a given situation, one of the main concerns is that the court must not exercise jurisdiction over parties that are not in the litigation.¹²⁵ In *Genetically Modified Rice*, the Eighth Circuit addressed this issue.¹²⁶ The plaintiffs' lead counsel argued that the court had jurisdiction over the defendant in the federal MDL and, therefore, had jurisdiction to order the defendant to hold back the percentage of the CBF for related state-court recoveries for those plaintiffs' attorneys with clients in both the federal MDL and state court.¹²⁷ The court responded to this argument by stating: "But state-court cases, related or not, are not before the district court."¹²⁸ It went on to say, "The state-court plaintiffs at issue neither agreed to be part of the federal MDL nor participated in the MDL Settlement Agreement."¹²⁹ Additionally, the court found that "[e]ven if the state plaintiffs' attorneys participated in the MDL, the district court overseeing the MDL does not have authority over separate disputes between state-court plaintiffs and [the defendant]."¹³⁰ This is a valid argument only if the state court plaintiffs will be affected by the holdback. If they are not, then the only parties involved in the CBF assessment are the plaintiffs, plaintiffs' attorneys, and the defendant in the federal MDL. The MDL court clearly has jurisdiction over each of these parties.

On the other hand, if the plaintiffs in state court are affected by a holdback ordered by the federal MDL court, that court has exceeded its jurisdiction.¹³¹ Judge Lungstrum of the U.S. District Court for the District of Kansas provided a hypothetical where the state court plaintiffs would be impacted negatively as a result of the defendant withholding the percentage allocated to the federal CBF for the related state court recoveries.¹³² He illustrated a situation where the assessment percentage "could exceed the attorney's own fees paid by his client [in state court] (for instance, because the attorney

125. *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976).

126. *In re Genetically Modified Rice Litig.*, No. 12-4045, slip op. at 16–17 (8th Cir. Aug. 22, 2014).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* (emphasis omitted).

131. *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 165–66 (4th Cir. 1992).

132. *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2015 WL 2165341, at *3 (D. Kan. May 8, 2015) ("As [defendant] points out, the effect of a holdback may be to interfere with a state-court plaintiff's total recovery, which belongs to the plaintiff and not to its attorney. Moreover, the assessment only of the attorney's share, as [the attorney group representing state court plaintiffs] describes the assessment, could exceed the attorney's own fees paid by his client (for instance, because the attorney agreed to a lower percentage fee or was paid by the hour).")

agreed to a lower percentage fee or was paid by the hour).¹³³ However, given the traditional percentages of the state court attorneys' contingency fees, and the much lower CBF assessment percentage, it would be highly unlikely for this situation to arise.¹³⁴ While the CBF assessment percentages range from only nine percent to seventeen percent, the typical contingent fee percentage for plaintiffs' attorneys ranges from thirty-three percent to forty percent.¹³⁵ As such, while it is hypothetically possible for the attorney to negotiate a contingency fee lower than the federal CBF assessment, in reality, this would not occur.¹³⁶ Even if there also existed a state court CBF, the sum of both the federal and state court CBF contribution percentages would not exceed the total contingent fee percentage in state court.¹³⁷ Thus, if an MDL court orders its defendant to hold back the amount of the CBF assessment percentage for the related state court recoveries, it would not affect parties not before the MDL court.¹³⁸

As mentioned above, the Eighth Circuit and District of Kansas have declined to recognize jurisdiction in this matter.¹³⁹ Both *Syngenta* and *Genetically Modified Rice* were massive MDLs involving many attorneys and plaintiffs within the State of Missouri.¹⁴⁰ The holdings in these cases have directly impacted the CBF assessments in federal and state court cases around

133. *Id.*

134. Telephone Interview with Gretchen Garrison, *supra* note 108.

135. See David Goguen, *Lawyers' Fees in Your Personal Injury Case*, ALLLAW, <http://www.alllaw.com/articles/nolo/personal-injury/lawyers-fees.html> (last visited June 27, 2015). Hourly rates will rarely apply in this type of plaintiff representation; the majority of the time, plaintiffs' attorneys are working on a contingency fee basis. *Id.* See also *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *6 (E.D. Mo. Feb. 24, 2010) ("Courts have ordered contributions between 9% and 17% in MDLs for common benefit work."), *aff'd*, 764 F.3d 864 (8th Cir. 2014).

136. Telephone Interview with Gretchen Garrison, *supra* note 108.

137. *Id.*

138. Typically, the CBF is divided into an "attorneys' fees" portion and a "costs" portion. *Genetically Modified Rice*, 2010 WL 716190, at *6. The costs portion is typically allocated to the plaintiffs. *Id.* at *2. Therefore, a federal MDL court-ordered assessment on related state court cases would theoretically affect the state court plaintiffs not before the federal court, but the costs of litigation are discussed and negotiated from the outset of the attorney's representation in the litigation. *Id.* The contractual relationship determines this extra expense, so although the court determines the additional assessment, this assessment is executed pursuant to a negotiated agreement between the plaintiffs and their attorneys. *Id.* As such, the cost portion does not necessarily offer any additional unexpected burden to the plaintiffs. *Id.* at *7. However, for the purposes of this analysis, only the attorneys' fees portion of the CBF is to be considered. It is this portion that undoubtedly will not affect parties not before the federal MDL. *Id.* at *6.

139. *Id.* at *4; *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2015 WL 2165341, at *4 (D. Kan. May 8, 2015).

140. *Genetically Modified Rice*, 2010 WL 716190, at *1.

the region and have made it possible for plaintiffs' attorneys to use the federal courts' jurisdictional argument to their advantage.

Other courts across the country, however, have disregarded these perceived jurisdictional restrictions and ordered defendants to hold back the amount of the federal MDL CBF contribution percentage from state court recoveries for overriding purposes of equity.¹⁴¹ Indeed, few would argue that it is fair to allow less involved attorneys access to work product, gathered through conducting thousands of hours of work and hiring expensive experts, without having to contribute any portion of their attorney's fees to the attorneys who actually created the work product. While the federal MDL courts have limited jurisdiction over such matters, several courts have been able to find a solution to the unjust enrichment problem while operating within their jurisdiction.¹⁴²

In coming to this solution, federal MDL courts seeking to prevent unjust enrichment have limited the scope of their jurisdiction regarding holdbacks to orders that only affect parties before the MDL court.¹⁴³ As the courts in *Avandia* and *Oil Spill* determined, they can stay within their bounds and yet still prevent the unjust enrichment.¹⁴⁴ Specifically, the court in *Avandia* acknowledged the main restriction outlined in *Showa Denko* and *Genetically Modified Rice* – i.e., the MDL court will not be able to order contributions to the CBF from parties not before it.¹⁴⁵ The existence of this restriction is one on which all federal MDL courts have agreed. The source of the disagreement has come when determining the perceived effects of an order given to the defendant to hold back the federal MDL CBF percentage on all concurrent state court recoveries obtained after receiving the benefits of the work product.¹⁴⁶

As analyzed in Part III, the probability that a holdback order of a small percentage of the overall state court recovery would affect a party not before

141. See generally *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 10-2771, 2011 WL 6817982 (E.D. La. Dec. 28, 2011) (quoting Case Management Order No. 17 at ¶ 3(f)(3), *In re Fosamax Prods. Liab. Litig.*, No. 1:06-md-1786 (S.D.N.Y. Apr. 28, 2011)), *order amended and superseded on reconsideration*, 2012 WL 161194 (E.D. La. Jan. 18, 2012); *In re Latex Gloves Prods. Liab. Litig.*, MDL No. 1148, 2003 U.S. Dist. LEXIS 18118 (E.D. Pa. Sept. 5, 2003); *Walitalo v. Iacocca*, 968 F.2d 741 (8th Cir. 1992).

142. See generally *Oil Rig Deepwater Horizon*, 2011 WL 6817982, at *5 (quoting *Fosamax Prods.*, No. 1:06-md-1786); *Latex Gloves Prods.*, 2003 U.S. Dist. LEXIS 18118.

143. See generally *Oil Rig Deepwater Horizon*, 2011 WL 6817982, at *5 (quoting *Fosamax Prods.*, No. 1:06-md-1786); *Latex Gloves Prods.*, 2003 U.S. Dist. LEXIS 18118.

144. See generally *Oil Rig Deepwater Horizon*, 2011 WL 6817982; *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 617 F. App'x 136 (3d Cir. 2015).

145. *Avandia Mktg.*, 617 F. App'x at 141.

146. *Id.*

the federal MDL court is insignificant.¹⁴⁷ Even if the attorneys with concurrent individual state court cases formed an MDL and created a CBF of their own in state court, the sum of the state court and federal contributions to their respective CBFs would virtually never exceed the percentage of total attorney's fees.¹⁴⁸ An average contribution is between nine percent and eleven percent and has been determined unreasonable if it exceeds seventeen percent.¹⁴⁹ Given that the lower end of plaintiff's attorney's contingent fees in state court is one third,¹⁵⁰ even a larger contribution made twice, for the state and federal MDL CBF, would not surpass the total contingent fee percentage. Thus, a holdback order in the federal MDL would only affect the attorneys before the federal MDL, not the state court plaintiffs or any other party.

Considering these limited effects, courts should freely issue such orders in the interests of justice and equity. The cited jurisdictional restrictions do not limit the courts' ability in this situation. Therefore, this is ultimately an issue that should be resolved by the federal MDL court through an order issued to the defendant to hold back the CBF percentage for all recoveries – state and federal – obtained by attorneys who received the benefit of the work product created for the purposes of the federal MDL.

C. Conclusion Regarding the Issue of Jurisdiction

In sum, several courts have been hesitant to exercise jurisdiction in these matters. Courts around Missouri, involving Missouri lawyers and plaintiffs, have found that they do not have jurisdiction to order the defendant to hold back the CBF assessment amount.¹⁵¹ However, several courts around the country have extended their jurisdiction, allowing them to make such an order.¹⁵² These courts have done so for purposes of fairness, in order to prevent

147. Telephone Interview with Gretchen Garrison, *supra* note 108.

148. See *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *6 (E.D. Mo. Feb. 24, 2010) (discussing reasonable CBF percentages), *aff'd*, 764 F.3d 864 (8th Cir. 2014).

149. *Id.*

150. Telephone Interview with Gretchen Garrison, *supra* note 108; Goguen, *supra* note 135.

151. *Genetically Modified Rice*, 2010 WL 716190, at *1; see also Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds, *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2015 WL 2165341, at *3 (D. Kan. May 8, 2015).

152. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939). See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 10-2771, 2011 WL 6817982, at *4, *6 (E.D. La. Dec. 28, 2011) (quoting Case Management Order No. 17 at ¶ 3(f)(3), *In re Fosamax Prods. Liab. Litig.*, No. 1:06-md-1786 (S.D.N.Y. Apr. 28, 2011)), *order amended and superseded on reconsideration*, 2012 WL 161194 (E.D. La. Jan. 18, 2012); see also *In re Latex Gloves Prods. Liab. Litig.*, MDL No. 1148, 2003 U.S. Dist. LEXIS 18118, at *5 (E.D. Pa. Sept. 5, 2003); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 617 F. App'x 136, 143–44 (3d Cir. 2015).

unjust enrichment.¹⁵³ In these instances, a court is left in a difficult predicament: it can either make sure it does not stretch its jurisdictional restrictions and ensure that it is operating within its boundaries, or it can risk exceeding its jurisdiction for the overriding purpose of fairness. Courts that have done the latter have done so understanding that, given the nature of the CBF assessment system, with the federal court defendant holding back the funds from the attorneys in state court, the court's order will not affect parties not before it.¹⁵⁴

These courts have resolved this issue without exceeding their perceived jurisdiction. Furthermore, the plaintiffs' attorneys will be free to apply the work product conducted in furtherance of the federal MDL to their state court cases after agreeing to contribute a portion of those recoveries to the federal MDL CBF. Not only is this just, but it also produces an efficient result. Attorneys will no longer have an incentive to file as many suits as possible in state court and as few as possible in the federal MDL. They will simply file wherever they believe they can legitimately obtain the best result for their clients. This is the ideal solution.

D. Issue of Comity Raised in Zyprexa

Not only did the court in *Zyprexa Products* refuse to take any action to remedy the problem, it openly encouraged the attorneys to use the federal work product to their advantage in state court.¹⁵⁵ As mentioned by the court, the free flow of work product between attorneys in different courts is efficient and desirable,¹⁵⁶ but it also causes serious problems if there is no way to adequately compensate the plaintiffs' attorneys in the federal court who are actually creating the work product.¹⁵⁷ Not only does it lead to an inequitable result, but it also creates a disincentive for the MDL plaintiffs' lead counsel to do the work necessary to adequately try a case – knowing they will not be justly compensated.¹⁵⁸

153. *Sprague*, 307 U.S. at 167; see also *Genetically Modified Rice*, 2010 WL 716190, at *1.

154. See *Sprague*, 307 U.S. at 167; *Oil Rig Deepwater Horizon*, 2011 WL 6817982, at *6 (quoting *Fosamax Prods.*, No. 1:06-md-1786); *Latex Gloves Prods.*, 2003 U.S. Dist. LEXIS 18118, at *5.

155. *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 268 (E.D.N.Y. 2006) (“Those attorneys are free to use relevant knowledge gained in the federal litigation for the benefit of their state clients. The court has consistently refused to erect any artificial barrier, or ‘Chinese wall,’ between the federal and state cases that would limit state attorneys’ ability to profit from federal discovery.”).

156. *Id.* at 268–69.

157. *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010) (“The lawyers and plaintiffs who have not agreed to join in the trust will have been unjustly enriched if they are not required to contribute to the fees of the leadership lawyers.”), *aff’d*, 764 F.3d 864 (8th Cir. 2014).

158. *Zyprexa Prods.*, 467 F. Supp. 2d at 268.

The *Zyprexa Products* court took an idealistic view of state courts' and attorneys' abilities to resolve this issue. The only advice offered by the court was a suggestion that "the parties voluntarily resolve the issue of payment for [plaintiffs' leadership group] work by agreeing that attorneys with state cases will assume an equitable proportionate share of the costs of discovery in this litigation."¹⁵⁹ This typically involves a contract between the attorneys in which they all agree to contribute a percentage to the federal CBF for all recoveries – state and federal.¹⁶⁰

In reality, however, these types of contracts are difficult to create and enforce, because they are often contingent on court rulings regarding the allocation of the CBF.¹⁶¹ Furthermore, because of the advantages of being in state court, attorneys are reluctant to make contractual agreements with the plaintiffs' leadership group in federal court.¹⁶² Attorneys recognize that they will not be ordered to contribute to the CBF in the concurrent federal MDL.¹⁶³ For this reason, many attorneys simply do not want to contribute to the federal MDL from their state court recoveries or negotiate any contractual agreement, which would require them to contribute a portion of their state court cases to the federal MDL.¹⁶⁴ Accordingly, they are difficult to bargain with when attempting to make a contractual agreement regarding the CBF contributions.¹⁶⁵ Even when threatened with unjust enrichment litigation at the conclusion of the MDL,¹⁶⁶ attorneys representing state court plaintiffs are still reluctant to agree to any contract that would require them to contribute to the federal CBF from their state court recoveries.¹⁶⁷

Considering these factors, the court in *Zyprexa Products* overestimated the plaintiffs' attorneys' ability to resolve the issue themselves.¹⁶⁸ If the attorneys cannot voluntarily resolve the issue, and the federal MDL court refuses to act, then only one remedy remains for the plaintiffs' leadership counsel – to sue for unjust enrichment.¹⁶⁹

159. *Id.* at 269.

160. Telephone Interview with Gretchen Garrison, *supra* note 108.

161. *Id.*

162. *Id.*

163. *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010), *aff'd*, 764 F.3d 864 (8th Cir. 2014).

164. Telephone Interview with Gretchen Garrison, *supra* note 108.

165. *Id.*

166. *Genetically Modified Rice*, 2010 WL 716190, at *1.

167. Telephone Interview with Gretchen Garrison, *supra* note 108.

168. *See In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 269 (E.D.N.Y. 2006).

169. Telephone Interview with Gretchen Garrison, *supra* note 108; *see Genetically Modified Rice*, 2010 WL 716190, at *1.

E. Subsequent Unjust Enrichment Litigation

Rather than coming to an equitable contractual agreement with the plaintiffs' leadership counsel for the federal MDL, many attorneys would prefer to wait it out and possibly face subsequent unjust enrichment litigation.¹⁷⁰ Not only is this strategy foolish, but it is also highly inefficient.¹⁷¹ Numerous courts have expressly stated that attorneys will be unjustly enriched if they use the work product of the federal MDL in related state court cases without making any contribution to the federal CBF.¹⁷² Because of the findings of these courts, unjust enrichment lawsuits are quite difficult to defend against.¹⁷³

With a low probability of success in subsequent unjust enrichment litigation, it seems the attorneys who are unwilling to make a contractual agreement with the federal MDL plaintiffs' lead counsel are banking on the fact that, due to the expenses of litigation, the plaintiffs' lead counsel will decide not to pursue subsequent litigation against them.¹⁷⁴ However, due to the scale of these cases, the amount of money potentially owed to the federal CBF as a result of the state court recoveries can be in the tens of millions of dollars.¹⁷⁵

Moreover, unjust enrichment litigation such as this taxes the judicial resources of the courts and the attorneys involved.¹⁷⁶ When attorneys have to sue other attorneys for money, the focus is shifted away from their clients, who they will have less time to help. Nevertheless, if the federal MDL court declines to hear these cases on the basis of lack of jurisdiction or principles of comity, subsequent litigation is the only legitimate remedy afforded to the plaintiffs' leadership counsel.¹⁷⁷ This is the worst outcome for both the attorneys and the courts.

170. Telephone Interview with Gretchen Garrison, *supra* note 108.

171. *Id.*

172. *Genetically Modified Rice*, 2010 WL 716190, at *1. *See also In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 10-2771, 2011 WL 6817982, at *5-6 (E.D. La. Dec. 28, 2011) (quoting Case Management Order No. 17 at ¶ 3(f)(3), *In re Fosamax Prods. Liab. Litig.*, No. 1:06-md-1786 (S.D.N.Y. Apr. 28, 2011)), *order amended and superseded on reconsideration*, 2012 WL 161194 (E.D. La. Jan. 18, 2012); *In re Latex Gloves Prods. Liab. Litig.*, MDL No. 1148, 2003 U.S. Dist. LEXIS 18118, at *5 (E.D. Pa. Sept. 5, 2003).

173. Telephone Interview with Gretchen Garrison, *supra* note 108.

174. *Id.*

175. *See, e.g.*, Order Adopting the Report and Recommendations of the Special Master for the Allocation and Distribution of Common Benefit Fees and Expenses at 3-4, *In re Genetically Modified Rice Litig.*, No. 4:06MD1811 CDP (E.D. Mo. Dec. 6, 2012). In this case, there were 918 million dollars in total recovery, and only 577 million was recovered in federal court. *See id.* The other 341 million was recovered in state court. *See id.* The state court plaintiffs' attorneys refused to pay the federal MDL's CBF assessment of 7.8 percent on those recoveries. *See id.* Therefore, roughly 26.6 million dollars were left out of the federal CBF. *See id.*

176. Telephone Interview with Gretchen Garrison, *supra* note 108.

177. *Id.*

V. CONCLUSION

The use of work product conducted for federal MDLs in related state court cases, with no contribution to the federal CBF, is an issue that will continue to present itself in courts across the country. Due to jurisdictional restraints, some courts have declined to take action that would impact the state court attorneys' fees. These courts have expressly stated they cannot make an order that would impact parties not before the court. However, as shown in Part III, it is unlikely that ordering a defendant in federal court to hold back the amount of the CBF assessment percentage from related state court recoveries will impact parties not before the MDL court. Conversely, other courts have made such orders due to overriding purposes of equity and fairness. This is the most efficient and ideal resolution of the problem. It requires no additional litigation and allows for the most efficient exchange of discovery information.

Before addressing issues of jurisdiction, one court held that issues of federalism, specifically the principles of comity, must first be addressed.¹⁷⁸ Here, the court refused¹⁷⁹ to involve itself in matters of the state court out of respect for those courts and the judicial system as a whole.¹⁸⁰ It placed the onus on the attorneys to come to a resolution on their own. If they are unable to reach an agreement, a subsequent unjust enrichment lawsuit is likely to take place. This result places a burden on judicial resources and the attorneys.

Ultimately, it is the duty of the courts to ensure the proceedings are equitable and fair to all parties, attorneys included. MDL courts have the ability to operate within their jurisdiction by ordering their defendants to incorporate the state court recoveries in its CBF holdbacks. Doing so serves the highest purpose of the judicial system.

178. *See id.*

179. *Id.*

180. *Id.*