

PART X

COLLECTIVE LITIGATION

CHAPTER FOUR

AGGREGATE LITIGATION

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<https://www.cplj.org/publications/10-4-aggregate-litigation>

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1 AGGREGATION

- 1 Using representative collective litigation – ‘class actions’ – to manage and resolve mass claims raises a variety of concerns among public policymakers and private interest groups. Assigning a single party, whether a class member, an association, special purpose vehicle, or other ‘qualified entity’ to represent the interests of a large number of claimants who are not before the court and may not be aware that litigation implicating their rights is proceeding, raises obvious due process concerns. Requiring absent claimants to ‘opt in’ or ‘opt out’ at some stage of the litigation process may assuage this concern but is not completely satisfying to many critics. Simply put, it is not obvious that a representative whom a party does not choose themselves can be depended upon to fully represent that party’s interests. Opponents of representative collective litigation also worry about conflicts of interest among those who are represented en masse, rather than individually or in carefully distinguished groups whose interests are explicitly aligned. It seems possible that in such cases a single representative would share some class members’ interests more than others’. Moreover, as a practical matter, many collective litigation procedures require judges to take on more responsibility than they are accustomed to in order to manage the litigation, including reviewing proposed settlements and even attorney fees. Even when judges are comfortable with these new roles, crowded court dockets may limit their capacity to handle these tasks.
- 2 Given these concerns about representative collective litigation, some jurisdictions have opted for aggregative mechanisms instead. In contrast to representative collective litigation, aggregation permits courts to treat individually represented and filed claims together for some specified purposes. As a formal matter, aggregation leaves control of litigation in the hands of individual litigants and their lawyers, ostensibly mitigating due process challenges. Perhaps as a consequence, rule-makers and rule-interpreters seem to adopt more relaxed standards for aggregation, by comparison to representative collective litigation. However, in practice, individual control of aggregate litigation is likely to be minimal, as courts in jurisdictions that permit aggregate litigation usually select lead plaintiffs and lead counsel to pursue the litigation. Whether aggregate litigation mitigates conflicts of interest is not clear, and aggregate litigation, like representative collective litigation, imposes unusual management burdens on judges. Typically, public policy makers’ choices between representative collective litigation and aggregate litigation reflect preconceptions of the consequences of each strategy, rather than objective empirical research.
- 3 Just as there are many variants of representative collective litigation, there are many versions of aggregation. Interestingly, whereas common law and civil law jurisdictions have chosen different models of representative collective litigation, aggregative mechanisms do not differ sharply between common law and civil law regimes. However, they do vary across national jurisdictions, perhaps reflecting different legal cultures and the different factual situations that have led to adoption of aggregation. Also, although at one time one might have distinguished among jurisdictions by whether they had

chosen a representative collective litigation or an aggregation procedure to address mass claims, an increasing number of jurisdictions now offer both mechanisms, for different factual and legal circumstances.

1.1 The English Group Litigation Order (GLO)

- 4 An early common law example of aggregation is the English Group Litigation Order or 'GLO', which some analysts describe as a special form of joinder.¹ Under the GLO rules, a party applies to a judge for an order to be issued, according to which individual claims that share factual and legal elements can be entered on a register for the purpose of being managed together. The test for declaring a GLO is whether the claims are 'related,' rather than the stricter 'same interest' test that pertains to representative collective litigation in England.² Parties may decide whether to enter their claims on the register, in which case they will be bound by the judge's pre-trial orders, unless they seek exceptions to the orders. The goal of the GLO is efficiency: by making orders on common issues that pertain to multiple claims the court should be able to reduce costs and time to disposition, by contrast to treating each claim separately. Aggregating claims also facilitates settlement. However, if trial on common facts or law is required, a single claim will be selected for trial and the decision in that trial will bind all of the claims on the register. In this respect, the GLO borrows from the English 'test case' procedure, according to which a large number of claims sharing the same facts and law may be temporarily suspended while a single claim is selected to proceed to trial, in order to clarify the application of the relevant law(s) to the facts of the body of cases.³
- 5 Like representative collective actions, the GLO aggregation procedure requires the judge to take on special responsibilities, including selecting a solicitor to represent the claims should common issues be tried, and deciding group members' contributions to costs should the defendant prevail. Aggregating claims may also require a host of other 'house-keeping' tasks that judges might not perform in individual litigation.
- 6 The first Group Litigation Order was issued in 1999 in a lawsuit claiming maltreatment and abuse of inmates of a children's home. A commercial case brought against Daimler/Chrysler Ltd by a group of their automobile dealers soon followed. Over the next 20 or so years, parties and courts deployed the GLO procedure in a wide variety of cases including nursing home abuse claims, medical negligence, pharmaceutical product defect, toxic exposure, shareholder and privacy breach cases, and a variety of consumer

¹ This description of the GLO is drawn primarily from N Andrews, 'Multi-party Litigation in England' (2013) 39 Legal Studies Research Papers Series https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330329 accessed 28 August 2024. Although often described as an English procedure, the GLO is available within Wales, as well.

² *Ibid* 8.

³ *Ibid* 2-3.

claims. Through November 2022 (the latest report date), 111 GLOs had been issued by the English courts.⁴

- 7 Notwithstanding the withdrawal of public funding for private group claims,⁵ and occasional anecdotal assertions that mass claims resolution can be achieved more easily and less expensively outside the GLO framework, the GLO procedure has emerged as the workhorse for court management of mass claims in England and Wales. In recent years it has been used to resolve consumer claims against Volkswagen arising out of the ‘diesel-gate’ scandal, and has been held by the High Court to be purpose suited for personal injury and environmental damage claims brought by Zambian mineworkers,⁶ and 200,000 victims of a massive dam collapse in Brazil.⁷ A key criticism of the GLO – voiced most consistently by commentators who favour representative collective litigation⁸ but also occasionally by defendants who value closure when faced with mass claims – is that it requires claimants to ‘opt-in’. On the other hand, claimants and defendants covered by Group Litigation Orders are free to settle confidentially, without court approval (as is required, by contrast, under the Competition Appeals Tribunal collective action).⁹

1.2 The German Capital Markets Model Proceeding (KapMuG)

- 8 An example of an aggregate procedure from the civil law world is the German KapMuG or Capital Markets Model Proceeding (Kapitalanleger-Musterverfahrensgesetz). In contrast to the English Group Litigation Order, which is trans-substantive, the KapMuG is available only for shareholder litigation. As has been true of many aggregate and representative collective procedures adopted around the world, the genesis of the KapMuG was a flood of mass claims after widespread losses to ordinary citizens, in this instance, retail investors. In the early 2000s, after the privatization of state-owned

⁴ Gov.UK, HM Courts and Tribunals Services, ‘Transparency Data: List of Group Litigation Orders’, updated 10 November 2022 <https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders> accessed 28 August 2024. The first children’s home case, registered in 1999, is numbered 67 on this list, whereas the first numbered GLO, also against a children’s home, was registered in November 2000.

⁵ Andrews (n 1) 9.

⁶ S Pickford and M Robinson, ‘Group Litigation in the U.K.: High Court Emphasises Need for Robust Approach to Case Management as Collective Actions Continue to Grow’ (2020) Mayer-Brown <https://www.mayerbrown.com/en/insights/publications/2020/05/group-litigation-in-the-uk-high-court-emphasises-need-for-robust-approach-to-case-management-as-collective-actions-continue-to-grow> accessed 28 August 2024.

⁷ A Salem, M Felwick, S Kalro and E Le Marchand, ‘ESG Litigation: English Court Not Fazed By Complex Group Litigation – Key Takeaways For Multi-National Businesses’ (2022) Hogan Lovells <https://www.engage.hoganlovells.com/knowledgeservices/news/esg-litigation-english-court-not-fazed-by-complex-group-litigation-key-takeaways-for-multinational-businesses> accessed 28 August 2024.

⁸ See, eg, R Mulheron, ‘Justice Enhanced: Framing An Opt-Out Class Action for England’ (2007) 70(4) *Modern Law Review*, 550-580.

⁹ L Rigby, E Powell and L Grimes, ‘UK: Settling Collective Actions’ (2021) *Global Competition Review* <https://www.hausfeld.com/media/n0tb5ujq/uk-settling-collective-actions.pdf> accessed 28 August 2024.

Deutsche Telekom, a popular publicity campaign encouraged widespread purchases by German citizens of the newly public company's shares.¹⁰ When the share value subsequently plummeted, 17,000 shareholders filed individual civil lawsuits against the company. With conventional court procedures not able to keep up with the claims – all of which were assigned to a single court – the German legislature in 2005 adopted an aggregate procedure that it hoped would expedite dispositions. The legislators viewed this new procedure as preferable to a US-style securities class action,¹¹ which (ironically) by 2005 had been successfully deployed by Deutsche Telekom investors in the US to secure compensation under US securities law.¹²

- 9 Under the KapMug statute, when cases with common facts and law arise, a party may apply to the court for a model proceeding to be declared. Once the court accepts the application, individual plaintiffs with related claims may register on a special docket, which has the effect of tolling the limitation period while the model case proceeds to decision. The register is only open for a set period of time, and once registered, plaintiffs may not opt out. When the court accepts the application for a model case proceeding, it specifies what issues will be decided on a group-wide basis and appoints a 'model' (lead) case. Court decisions in the model case are binding on all who have registered. During the litigation, if new issues that would affect the model case disposition arise, in order to ensure due process, notice must be provided to all those who have registered to be included in the proceeding, which in the Deutsche Telekom case initially created additional expense and delay. Subsequently, information about the progress of the model case was posted on a court website, reducing this burden on the court and parties.¹³
- 10 The technical requirements of the KapMuG, including easy access to interlocutory appeals that meant that the model case repeatedly moved up and down between the court of first instance and the appellate court, led to a very lengthy process in the Deutsche Telekom case. Whereas the US securities class action against the company was resolved within five years,¹⁴ resolving the German model case proceeding required more than two decades.¹⁵

¹⁰ D Baetge, 'Germany' (2009) 622(1) *Annals of the American Academy of Political and Social Science*, 125-137.

¹¹ A Halfmeier, 'Litigation Without End? The Deutsche Telekom Case and the German Approach to Private Securities Enforcement' in D Hensler, C Hodges and I Tzankova (ed), *Class Actions in Context: How Culture, Economics And Politics Shape Collective Litigation* (Edward Elgar Publishing 2016), 279-298.

¹² *In re Deutsche Telekom AG Securities Litigation* (District Court for the Southern District of New York, US) 229 F. Supp. 2d 277 (S.D.N.Y. 2002).

¹³ Halfmeier (n 11).

¹⁴ The US case was settled in 2005 for \$120 million.

¹⁵ Halfmeier (n 11). For a detailed comparison of the US and German proceedings in the *Deutsche Telekom* case, see M Halberstam, 'The American Advantage in Civil Procedure? An Autopsy of the Deutsche Telekom Litigation' (2016) 48(3) *Connecticut Law Review*, 817-872.

- 11 While the model case proceeding is ongoing, the defendant(s) and model plaintiff may negotiate a settlement. The original version of the KapMuG required that every individual who had registered their claim approve the settlement for it to be effectuated, so steep a requirement that it might mean that no settlement would ever be approved. Because the Deutsche Telekom case was commenced under the original statute, this was the formal rule that prevailed at the time that the defendant offered a settlement. However, on November 23, 2021, the Oberlandesgericht (Higher Regional Court) Frankfurt approved a settlement of the Deutsche Telekom case that instead permitted each individual to decide whether or not they wanted to accept the defendant's offer,¹⁶ the rule incorporated in later versions of the statute. The settlement offered plaintiffs full compensation plus 70 percent interest accrued over time plus a significant share of their legal expenses.¹⁷ The court approved the settlement as 'adequate' and recommended that the registered individual plaintiffs accept it as final resolution of the litigation.¹⁸
- 12 Under the current version of the KapMuG statute, when a defendant offers to settle a KapMuG proceeding, the settlement is not binding on the individuals who registered in the proceeding. As one commentator explains¹⁹:

[T]he KapMug [now] starts as an opt-in proceeding and after settlement, becomes an opt-out one. However, as a practical matter, using a KapMug for settlement is problematic given the sheer number of plaintiffs and the high likelihood of (sic) many will opt-out.

- 13 Originally, German legislators viewed the KapMuG as an experiment and therefore included a provision for it to sunset in 2010. When that year rolled around without resolution of the Deutsche Telekom model case proceedings, the legislature extended the KapMuG to 2012, only to later extend it again to 2020 and subsequently to the end of 2023. Apparently, the Ministry of Justice each time proposed extending the KapMuG without limit, but the legislature did not agree.²⁰ The 2012 extension simplified technical

¹⁶ 'Der Fall Deutsche Telekom - OLG Frankfurt billigt Vergleich im Mammutprozess gegen die Deutsche Telekom AG' (2021) Tilp Rechtsanwälte <https://tilp.de/deutsche-telekom/> accessed 28 August 2024.

¹⁷ I am grateful to Prof Axel Halmeier of Leuphana University (DE), a leading German legal researcher who has been following the KapMuG since its inception, for this information about the *Deutsche Telekom* settlement and judicial decision. Prof Halfmeier offered that most of the Deutsche Telekom plaintiffs would likely accept this offer, which their main legal representative described as a substantial success, notwithstanding its long-time in coming.

¹⁸B Schneider, J Conrady and T Schreiber, 'In brief: Preparing Securities Claims in Germany' (2024) Lexology <https://www.lexology.com/library/detail.aspx?g=68381c1c-8738-44b0-b171-3ee3662788bd> accessed 28 August 2024.

¹⁹ M Lange, 'German KapMug' (2017) Financial Recovery Technologies <https://frtservices.com/german-kapmug/> accessed 28 August 2024.

²⁰ I am grateful to Prof Halfmeier for this information. Prof Halfmeier opined that the legislature's intention had been to conduct an evaluation of the procedure before deciding conclusively whether to extend it, but that such an evaluation never took place. An evaluation was commissioned and conducted by Prof Halfmeier earlier in the history of the KapMuG. Prof Halfmeier notes that of the time

aspects of the procedure that are said to have increased its popularity. According to Judge Fabian Reuschle, a German judge with some experience addressing mass claims, since 2005, there have been about 1400 applications for KapMuG proceedings, 405 court decisions approving the start of a proceeding and more than 60 ‘model’ judgments.

1.3 The United States Multi-District Litigation Procedure (MDL)

- 14 A third example of aggregate litigation, from the United States, pre-dates both the GLO and the KapMuG. The federal multi-district litigation procedure (MDL), 28 USC §1407, was adopted by Congress in 1968, as an alternative to the Rule 23 class action, which was significantly modernized via amendment by the federal judiciary in 1966. Whereas the adoption of the modern Rule 23 was driven significantly by a desire to facilitate civil rights cases, such as *Brown v Board of Education*,²¹ the federal MDL statute was intended to facilitate aggregation of mass claims, including multi-party contract based commercial claims.²²
- 15 The federal MDL statute applies only to cases filed or removed to federal courts. In the United States, the overwhelming majority of civil lawsuits are filed in state courts. As of 2020, about half of the states had adopted procedures for collecting similar cases within their states for management purposes similar but not identical to the federal MDL.²³

of this writing, the legislature has made no provision for cases pending when the statute sunsets at the end of 2023 and that this might force a further extension.

²¹ For what was on the minds of the drafters of the 1966 amendments to Rule 23, see NYU School of Law Center on Civil Justice, ‘RULE 23 @ 50: THE 50th Anniversary of Rule 23, An Interview of Professor Arthur Miller by Professor Samuel Issacharoff’ (2016) (oral history transcript available at http://www.law.nyu.edu/sites/default/files/ICCVJUS17.1-CCJ%20Rule%2023%4050%20Booklet%20Project_RELEASE.pdf); and J Frank, ‘Response to 1996 Circulation of Proposed Rule 23 on Class Actions: Memorandum to My Friends on the Civil Rules Committee’ (1996) as quoted in D R Hensler, N M Pace, B Dombey-Moore, E Giddens, J Gross and E Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand 2000) 12. Both Prof Miller, who was the clerk to Prof Ben Kaplan, the Reporter for the 1966 Civil Rules Advisory Committee, and John Frank, who was a member of that committee, recalled that facilitating access to the courts for social policy litigation, including but not limited to civil rights, was top of mind for the committee members.

Although contemporary readers may associate the ground-breaking school desegregation decision with class actions, *Brown v Board of Education of Topeka* (Supreme Court, US), Judgment 17 May 1954 [347 US 483 (1954)] was decided a decade before the 1966 Rule 23 amendments. In *Brown*, the US Supreme Court actually decided four consolidated cases, each of which had been brought by Black plaintiffs seeking to enjoin enforcement of state laws maintaining racially segregated schools. Injunctive actions do not require multi-party litigation, although bringing such actions in class form (eg, under Rule 23 (b)(2)) may ensure that if plaintiffs prevail the decision will not be limited to the individual(s) who brought the action.

²² For a detailed history of the adoption of the MDL statute, based on extensive archival research, see A Bradt, ‘A Radical Proposal: The Multi-district Litigation Act of 1968’ (2017) 165(4) *University of Pennsylvania Law Review* 831. For those interested in a deep dive into the comparative history of the MDL and Rule 23, Bradt’s article includes extensive citations to the relevant academic literature.

²³ Z D Clopton and D T Rave, ‘MDL In the States’ (2021) 115(6) *Northwestern Law Review* 1649. Some states have formal institutions that decide whether to collect cases, similar to the federal MDL process. Others leave to the decisions to individual trial judges or have more ad hoc arrangements. *Ibid* at 1657.

- 16 Unlike federal Rule 23, which includes numerous detailed provisions for the certification (ie, approval), management and resolution of class actions, the federal MDL statute simply provides for the aggregation of individual claims filed in different federal courts but arising out of the same facts and law, for the purpose of pre-trial management.²⁴ Under the statute, a special panel of federal judges, acting in response to party motions or *sua sponte*, decides when it is appropriate to collect (or coordinate) such claims, and also what court and judge to transfer the aggregated cases to. Once a transfer order is issued, both pending claims and similar claims filed subsequently (deemed ‘tag alongs’) are automatically transferred to the MDL transferee court. The special panel’s decisions regarding coordination and transfer are not appealable.
- 17 The MDL procedure is distinguished from both the GLO and the KapMuG in that except in rare circumstances, claimants cannot independently ‘register’ (‘opt in’) to be a part of the aggregate proceeding: once the judicial panel decides to collect cases that share enough facts and law to be considered part of the same ‘litigation’, a plaintiff’s claim filed in any federal district court becomes part of the aggregate litigation.²⁵ However, the MDL is similar to the GLO and KapMuG in that once claims are transferred, plaintiffs may not exclude themselves (‘opt out’) from the procedure except by dropping or settling their claims. These restrictions on plaintiffs’ choices may be a consequence of the fact that the original conception of the MDL procedure focused on pre-trial management of claims, not final resolution by judgment on the merits. To achieve the management efficiency benefits of coordination, all of the claims needed to be corralled in a single court.
- 18 Indeed, unlike the GLO and KapMuG, the federal MDL procedure is not intended to finally dispose of the litigation by trial; a 1998 US Supreme Court decision²⁶ held that judges presiding over MDLs (termed ‘transferee judges’) may not try cases that were filed outside their own district courts. If, having completed pre-trial motion practice and discovery, a case is deemed ready for trial, it must be remanded to the court in which it was originally filed for individual disposition. In practice, most MDL cases are never remanded but instead are resolved in the transferee court, as a result of pretrial dispositive rulings or by settlement. In recent years, however, with the agreement of parties, transferee judges have remanded a small number of cases for so-called ‘bellwether’ trials, intended to help the lawyers evaluate the value of cases with different

²⁴ The MDL statute’s seemingly more relaxed standards for determining whether cases can be collected, by comparison to Rule 23 and court decisions interpreting it, is similar to the more relaxed standard of the English GLO by comparison to the English representative collective action. See *supra* at fn 2.

²⁵ In a widely cited article of a couple of decades ago, Prof Judith Resnik highlighted the transformation of lawsuits to ‘litigation’ in the mass tort context. See J Resnik, ‘From Cases to Litigation’ (1991) 54(3) *Law and Contemporary Problems*, 5-68.

²⁶ *Lexecon Inc v Milberg Weiss Bershad Hynes & Lerach* (Supreme Court, US), 3 March 1998 [523 US 26 (1998)].

characteristics and hence to help them evaluate the *total* value of all of the aggregated cases (or distinctive sub-groups of them) as a basis for settlement negotiations.²⁷

- 19 As mass claims proliferated in the United States, parties and judges sought to find procedures that would enable their efficient and fair resolution.²⁸ An advisory committee note to Rule 23 warned judges that class actions would not usually be appropriate for mass personal injury claims because of the heterogeneity of such claims, but a few trial court judges nonetheless certified mass catastrophe claims, only to be overturned by appellate courts.²⁹ Ultimately, in two instances where trial court judges had certified asbestos cases as class actions as precursors to large-scale settlements, the US Supreme Court explicitly ruled that certification would rarely be supported for such mass personal injury claims,³⁰ and thereafter the treatment of such claims in federal courts shifted almost universally to multidistrict litigation. Today, it is asserted that a substantial fraction of civil damage suits in federal courts are collected and resolved via the MDL procedure,³¹ although measuring the percentage of MDL suits precisely has proved elusive.
- 20 As with the English GLO, federal judges presiding over MDLs appoint ‘lead counsel’ to organize and manage the litigation on behalf of plaintiffs (and sometimes, when there is a significant number of defendants, lead defense counsel as well). Assigning the primary responsibility for managing claims to a small number of lawyers and law firms – commonly termed the ‘plaintiff steering committee’ – inevitably leads to issues about how to allocate legal fees if plaintiffs prevail. In US class actions, judges are required to determine plaintiff class counsel fees,³² but the MDL statute does not contain any provisions for managing legal representation or awarding fees – not surprising, since the aggregate litigation comprises individual claims, with almost all plaintiffs represented by lawyers under individual retention agreements. Nonetheless, over time, MDL transferee

²⁷ The outcome of the bellwether trial binds only the parties whose case was tried; it only provides advice on how other similar cases might fare at trial.

²⁸ Asbestos personal injury claims, which were in the forefront of this development, led to considerable procedural experimentation. Over several decades, federal and state judges, used ad hoc and formal consolidation, multidistrict litigation procedures and class actions to attempt to resolve huge numbers of asbestos claims that tended to be concentrated in a small number of courts. Ultimately, attorneys abandoned the MDL procedure, which seemed only to delay resolution, and attempts to arrive at a ‘global resolution’ using federal Rule 23 failed when the US Supreme Court ruled in 1997 and 1999 that the class action procedure was not appropriate for the heterogeneity that characterized asbestos caseloads. See S J Carroll, D R Hensler, J Gross, E M Sloss, M Schonlau, A Abrahamse and J S Ashwood, *Asbestos litigation* (Rand 2005) chapter 3.

²⁹ D R Hensler, W L F Felstiner, M Selvin and P A Ebener, *Asbestos in the Courts: The Challenge of Mass Torts* (Rand 1985) 53-57.

³⁰ *Amchem Products v Windsor* (Supreme Court, US), Judgment 25 June 1997 [521 U.S. 591 (1997)] and *Ortiz v Fibreboard* (Supreme Court, US), Judgment 23 June 1999 [527 U.S. 815 (1999)].

³¹ Because of the vagaries of court filing statistics, the precise percentage has been difficult to pin down. However, it appears that it is close to a third of all civil filings in federal courts. See M S Williams, ‘The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years’ (2019) 53 *Georgia Law Review* 1245, 1246.

³² F.R.C.P. 23 (h). Judges are also responsible for *appointing* class counsel. F.R.C.P. 23 (g).

judges have used the ‘common fund’ doctrine enunciated by the US Supreme Court in 1980³³ as a basis for requiring all of the individually retained lawyers to contribute to the costs of the plaintiff steering committee. Over time, judges’ selection of lead plaintiff attorneys has proved increasingly controversial, with some critics decrying ‘repeat player’ effects on litigation dynamics³⁴ and others charging that judges’ appointments have created an ‘elite’ mass tort plaintiff bar that is an obstacle to diversification of the legal profession.³⁵ When plaintiffs prevail in MDLs, their attorneys may contest judicial decisions on the allocation of legal fees.³⁶

- 21 The consequence of these and other critiques over MDLs has led some to argue for fundamental change in the management of individually-represented mass claims, including the adoption of rules akin to Rule 23. But to date, no viable alternative to the MDL procedure has emerged in the US.³⁷

1.4 Conclusion

- 22 For policy-makers concerned about the threats to individual rights, autonomy, and due process posed by collective litigation procedures that permit one or a few individuals or entities to represent absent plaintiffs in court proceedings, aggregating individual lawsuits, with all or most plaintiffs represented by attorneys they have retained for themselves, appears to be a promising solution to the challenge of managing and resolving mass claims. Allowing the aggregation of claims for judicial management offers the potential for cost and time savings for judicial personnel, claimants and defendants. However, whether such savings are realized depends critically on specific technical aspects of the management approach that is selected; experience shows that efficiency does not always and necessarily flow from aggregation. Moreover, aggregation inevitably impairs individual autonomy: when hundreds or thousands of similar claims are collected in a single proceeding, one or a few attorneys will be asked to take the lead in preparing and presenting the cases and one or a few ‘model’ or ‘test’ cases will be chosen for resolution to guide or bind the outcome of all of the aggregated claims.

³³ *Boeing v Gemert* (Supreme Court, US), Judgment 19 February 1980 [444 U.S. 472 (1980)].

³⁴ E C Burch and M S Williams, ‘Repeat Players in Multidistrict Litigation: The Social Network’ (2017) 102(6) *Cornell Law Review* 1445 (arguing that a small number of plaintiff lawyers are involved in a majority of federal product liability and sales practices multidistrict litigations, based on litigation pending as of 2013).

³⁵ D L Noll and A S Zimmerman, ‘Diversity and Complexity in MDL Leadership: Evidence from Case Management Orders’ (2023) 101 *Tex Law Review*, 1679 *forthcoming* (Citing media commentary on efforts to diversify leadership).

³⁶ See eg, C L Becker, S Specter and T R Kline, ‘How Not to Manage a Common Benefit Fund: Allocating Attorneys Fees in Vioxx Litigation’ (2016) 9 *Drexel Law Review* 1.

³⁷ As of February 2023, the Judicial Panel on Multidistrict Litigation reported that there were 176 multidistrict proceedings ongoing in the US federal courts, accounting for over half a million individual claims. See Judicial Panel on Multidistrict Litigation, ‘Pending MDLS’ https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-February-16-2023.pdf.

- 23 Ultimately, no matter what group or collective procedure is selected to resolve mass claims, there is no escaping the impairment of individualization. However, when jurisdictions insist on traditional individual case-at-a-time dispute resolution, the resulting costs and delay are more likely to lead a denial of justice altogether, than to carefully crafted individual outcomes promised by formal law. How to design an aggregate procedure that simultaneously offers efficiency, fairness and individualized due process to date remains elusive.

ABBREVIATIONS AND ACRONYMS

ch	chapter
DT	<i>Deutsche Telekom</i>
ed	editor/editors
eg	<i>exempli gratia</i> (for example)
EU	European Union
ff	following
GLO	Group Litigation Order (England)
Ibid/id	<i>Ibidem/idem</i> (in the same place)
ie	<i>id est</i> (that is)
KapMuG	<i>Das Kapitalanleger-Musterverfahrensgesetz</i> (Germany)
MDL	Multidistrict Litigation
no	number/numbers
NYU	New York University
para	paragraph/paragraphs
UK	United Kingdom
US / USA	United States of America
v	versus

LEGISLATION

National

Civil Procedure Rules, Rule 19-III: Rules 19.21 – 19.26 (United Kingdom)

The Capital Markets Model Case Act (Kapitalanleger-Musterverfahrensgesetz, KapMuG) (Germany)

U.S. Code, Title 28, Part IV, Chapter 87, §1407 – Multidistrict Litigation (MDL) (United States)

Federal Rules of Civil Procedure, Rule 23. Class Actions (United States)

CASES**International/Supranational**

In re Deutsche Telekom AG Securities Litigation (District Court for the Southern District of New York, US) 229 F. Supp. 2d 277 (S.D.N.Y. 2002).

National

Amchem Products v Windsor (Supreme Court, US), Judgment 25 June 1997 [521 U.S. 591 (1997)]

Boeing v Gemert (Supreme Court, US), Judgment 19 February 1980 [444 U.S. 472 (1980)]

Brown v Board of Education of Topeka (Supreme Court, US), Judgment 17 May 1954 [347 US 483 (1954)]

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