

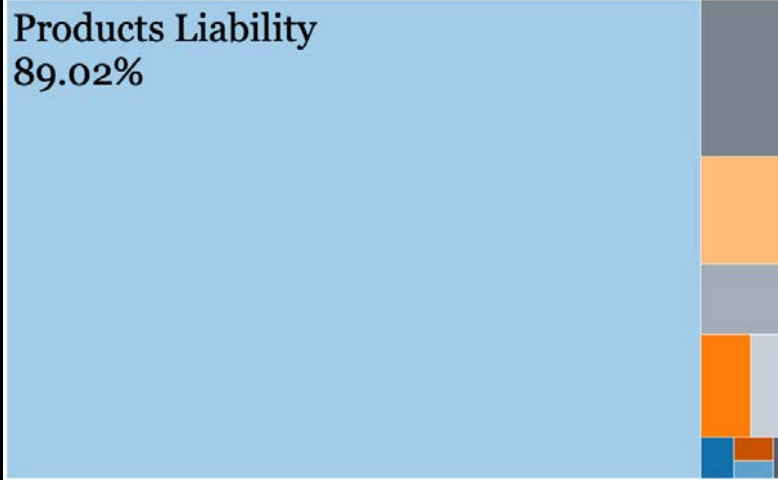
1

What we still  
don't know  
(but would  
really like to):

- How do outcomes in nonclass proceedings compare with those in class actions?
- How much money is actually paid out in private nonclass settlements and to whom (and does this differ from comparable class actions if such things exist)?
- How long does claims administration take in nonclass proceedings versus class actions?
- Are like plaintiffs treated similarly?
- How much does it cost to deliver the benefits in a class action versus a nonclass, private settlement?

2

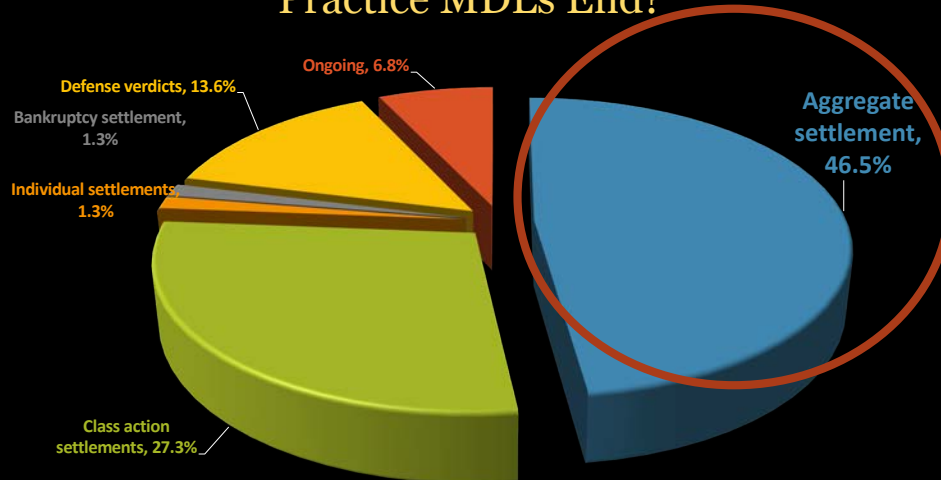
## Pending Multidistrict Litigation



- As of April 15, 2019 205 MDLs were pending in federal courts, the majority of these are products liability (thanks to JPML for this data!).
- My Dataset: 73 product liability and sales practice MDLs pending as of May 2013
- Includes MDLs aggregated over a 22-year span (approx. 313,000 actions) and settled over 14 years

3

## How do Product Liability and Sales Practice MDLs End?



34 (45.6%) MDLs concluded through private aggregate settlements  
 10 of those private agreements were publicly available  
 (3 of the 10 produced two settlement each, for a total of 13)

4

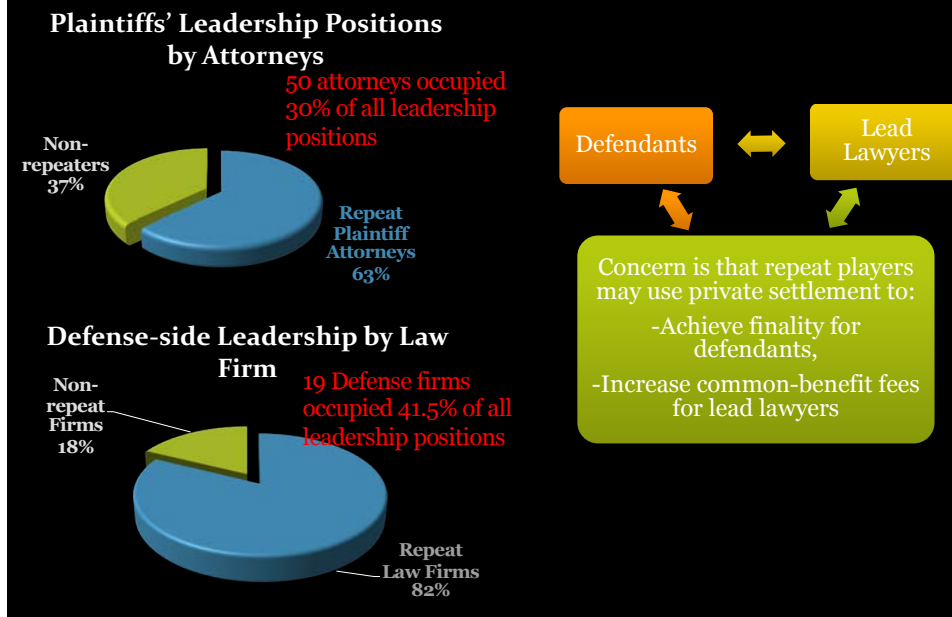
4

## Rule 23: Class Actions

- Judges appoint class counsel
- Certifying a class requires judges to ensure that class members are adequately represented
- Judges must ensure that class settlements are fair, reasonable, and adequate
- Judges award class counsel's attorney's fee
- Objectors can object & appeal

5

## Repeat Players within the Dataset



6

## ~~Class Actions~~

- Judges appoint leaders based on experience, financing abilities, and cooperative tendencies, not adequate representation
- Most proceedings concluded in aggregate settlements
  - No appellate review
  - Judicial oversight varies
  - Norms and past practices govern more than formal legal precedent
- Susceptible to influence from repeat play

7

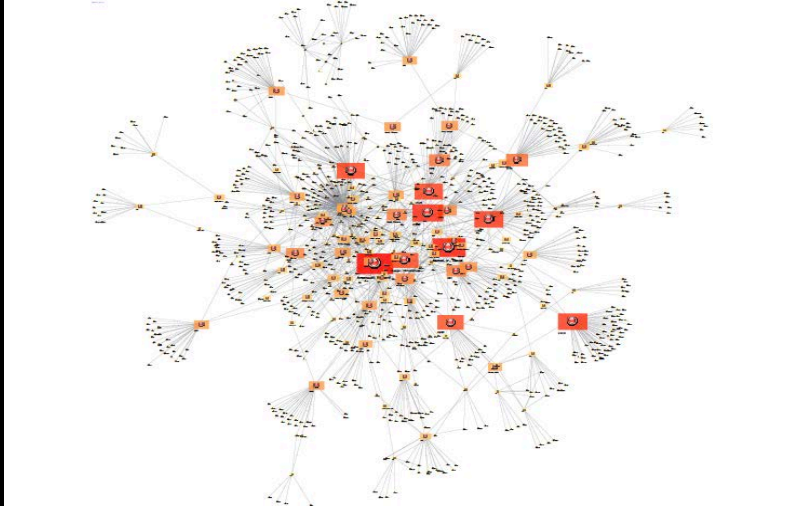
## Settlements within the Dataset

- 20 MDLs concluded through class action settlements (mostly sales practice cases)
- 34 MDLs concluded through private, aggregate (or inventory) settlements
  - 10 of those private settlements were publicly available
  - 3 of the 10 produced 2 settlements each
    - Examined 13 total settlements
    - Those settlements covered more than **65,000** total federal actions (this number does not include related state cases settling under the same deals)
  - Confirmed that 1 of the top 5 most connected repeat players participated directly in each settled proceeding's leadership

8

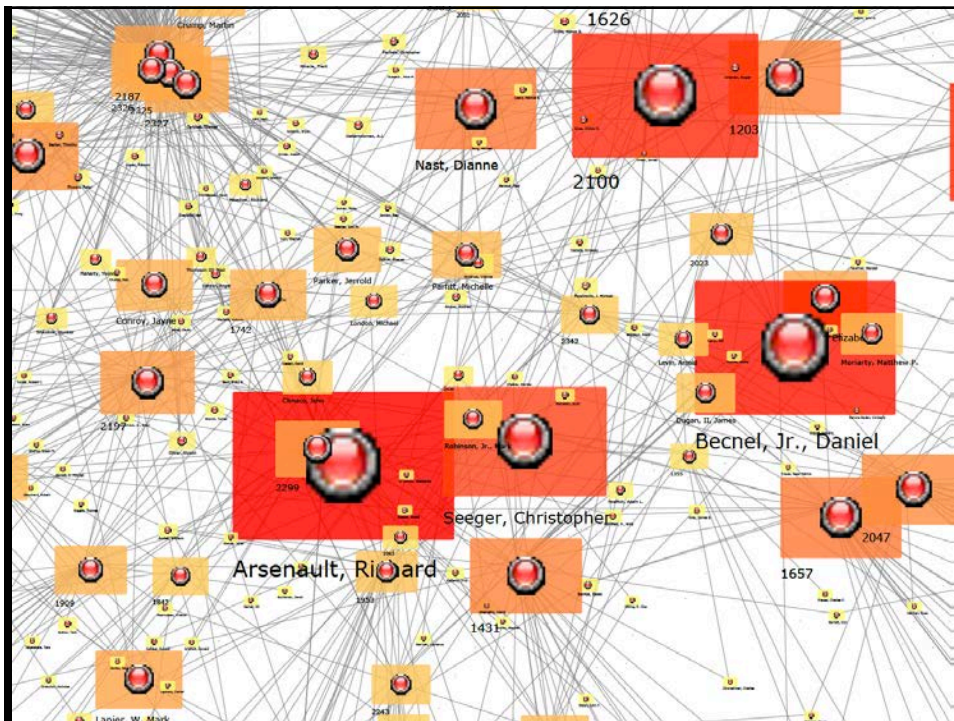
8

# The Social Network

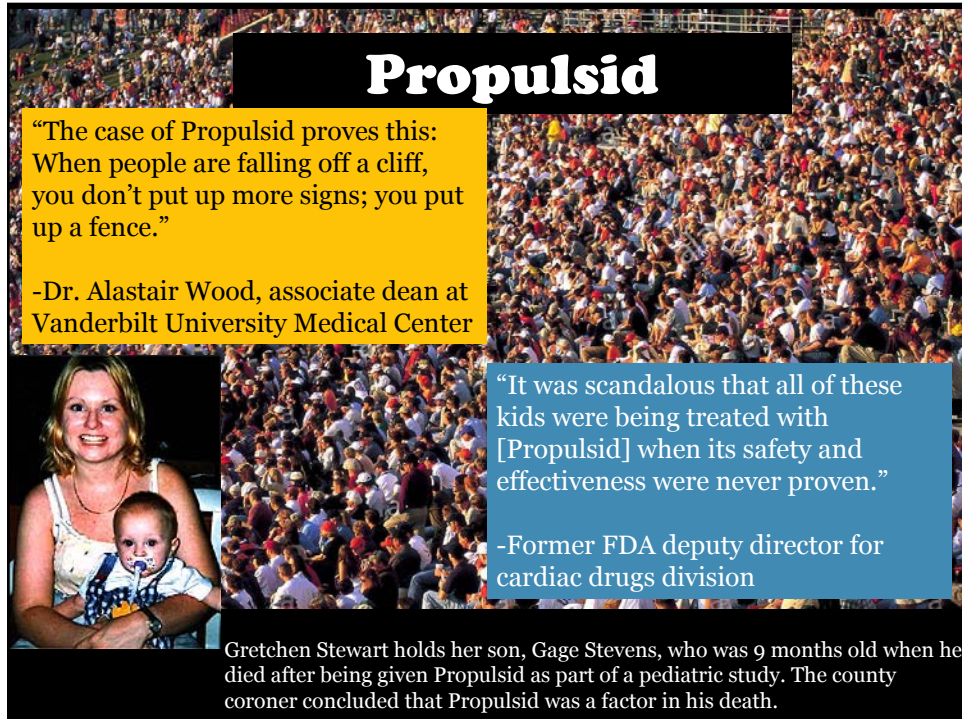


Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017) .

9



10



# Propulsid

“The case of Propulsid proves this:  
When people are falling off a cliff,  
you don’t put up more signs; you put  
up a fence.”

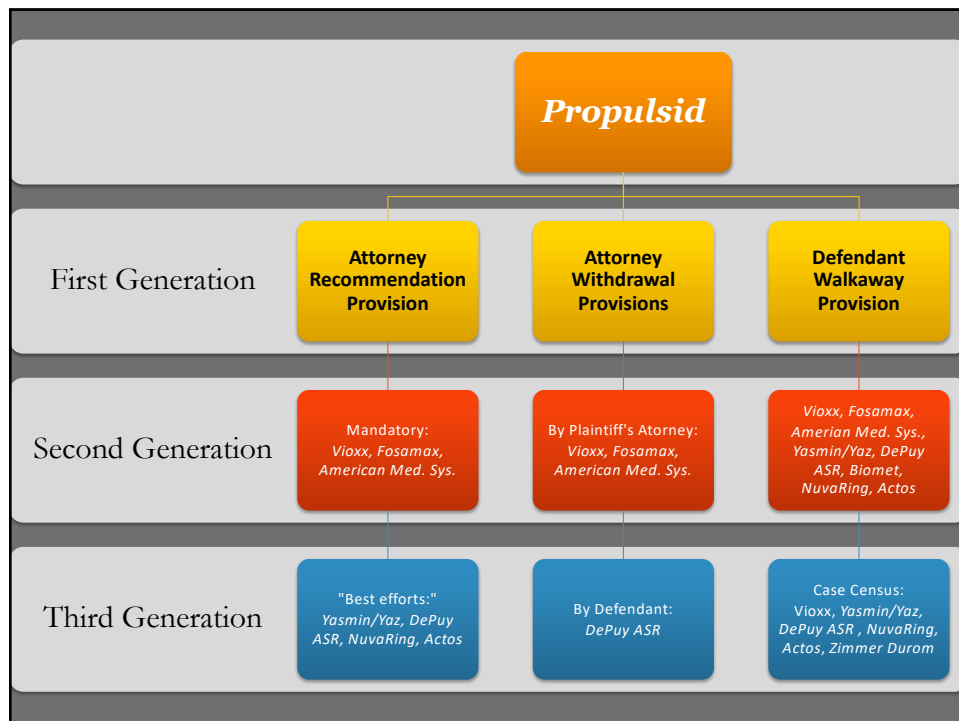
-Dr. Alastair Wood, associate dean at  
Vanderbilt University Medical Center

“It was scandalous that all of these  
kids were being treated with  
[Propulsid] when its safety and  
effectiveness were never proven.”

-Former FDA deputy director for  
cardiac drugs division

Gretchen Stewart holds her son, Gage Stevens, who was 9 months old when he died after being given Propulsid as part of a pediatric study. The county coroner concluded that Propulsid was a factor in his death.

11



12

### Publicly Available Private Settlements

1. Generated closure for the defendant
  - Walkaway provisions (100%)
  - Census/claims registration (9/13 - 69%)
  - Plaintiffs' attorneys must recommend the deal to all their clients (11/13 - 84%)
  - Plaintiffs' attorneys must withdraw from representing non-settling clients (7/13 - 53%)
2. Compensated lead lawyers (11/13 - 84%)
3. Reverted unclaimed funds to defendant (3/13 - 23%)

### Propulsid by the Numbers

- Total fund: \$84-105 million
- 37 of 6,012 claims deemed eligible for relief (.6 %)
  - \$6.5 million distributed to claimants in total
  - \$27 million in common-benefit fees & costs negotiated directly with the defendant
  - \$8.3 million to Canada's Prepulsid Resolution program
  - \$8.3 million to Louisiana Health Public Initiative
  - rest reverted to defendant Johnson & Johnson (at least \$45 million)

13

## The Judicial *nudge*

Of the 34 proceedings concluding in private settlements to date within the dataset, 53% federal judges **approved** those deals to varying degrees.

- Before the first aggregate settlement occurred, nearly 1/3 of the judges had not ruled on summary judgment, *Daubert* motions, or class certification.
- Nor had they conducted bellwether trials.
- But they nevertheless approved the resulting settlement.

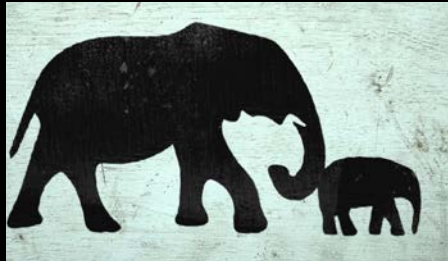


Plaintiffs may feel  
that their consent  
is coerced by  
judges



14

# The Medium is The Message



- 64.7% appointed claims administrators or settlement masters to preside over private settlements
- 35% issued census orders, requiring attorneys to register all of their clients (whether in state or federal court)
- 35% allowed attorneys to withdraw from representing nonsettling clients
- 67.6% issued Lone Pine orders, which impose evidentiary burdens on nonsettling plaintiffs, sometimes with very short deadlines
- Only 8% took none of these steps

15

## Building Structural Assurances of Fairness

### 1. Leadership selection

- Use competitive-selection process
- Allow challengers who demonstrate the existence of an unaddressed structural conflict of interest to presumptively join or replace leaders who ignored the conflict

### 2. Episodic remands

- Remand plaintiffs at key points: when claims fall outside those developed by the leaders, once coordinated discovery ends, and after a global deal (for non-settling plaintiffs)

16

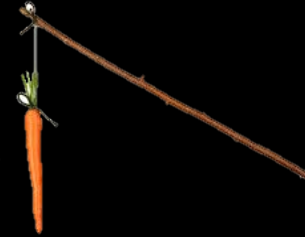
16

## Incentivizing Lawyers with Fees

### 3. Award common-benefit fees using quantum meruit principles

Judges can incentivize lead plaintiffs' lawyers by tempting them with a powerful carrot: tie their common benefit fees explicitly to the benefit those attorneys confer on the plaintiffs.

- Tying fees to a settlement's merits provides a check on self-dealing, even for repeat players.
- It also realigns common-benefit fees with basic contingency principles: the better the plaintiffs fare, the better leadership fares.



17