

Judicial Supervision of Attorney Fees in Aggregate Litigation: The American Vioxx Experience as Example for Other Countries

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Expansive procedural devices for aggregating like cases—such as consolidation¹ and class actions²—are a unique feature of American law. Other countries have eyed the American approach to “aggregate litigation” with both interest and suspicion. There is recognition that the traditional single-party model of adjudication is not well-suited to situations today when the claims of many individuals arise from the same basic conduct of a defendant, whether it involves defective products, environmental hazards, or wrongful business conduct. But other countries have been troubled by what they consider to be the excesses of American class actions and “entrepreneurial litigation.” Horror stories about an overly litigious society, entrepreneurial plaintiff attorneys, runaway jury verdicts, abusive class action practices, and legal blackmail through meritless suits that drive up business costs are well-known abroad.³ Nevertheless experimentation with

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¹ Fed. R. Civ. Pro. 42(a): “If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.”

² Fed. R. Civ. Pro. 23(a): “One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. Pro. 23(b) lists three types of class actions, the most used of which is (b)(3), “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fair and efficiently adjudicating the controversy.”

³ An Australian proposal for representative proceedings commented:

A major reason for the Australian reticence about class actions is the horror stories from the United States. A Fortune Magazine headline says it all—*Lawyers from hell: slip up and guys like these will bankrupt your company*. A picture is painted of aggressive plaintiff lawyers conjuring massive class claims based on spurious product faults, ruining a company financially with no social benefit. The lawyers are regarded as the villains, often being the main financial beneficiaries of the litigation. ... The poor reputation of the US procedure has prompted many commentators in Australia to deliberately use the term “representative proceeding” rather than class action.

Proposal for a New Supreme Court Rule on Representative Proceedings in NSW to the Supreme Court Rule Committee. 1998 CENTRE FOR LEGAL PROCESS OF THE NSW L. FOUND. & PUB. INT. ADVOC. CENTRE 12.

aggregate procedures has quickened in other countries, and the U.S. is no longer alone in allowing a form of class, representative, or group litigation, or in consolidating similar litigation.⁴

Aggregation of cases has a direct impact on the relationship between client and attorney and on the fee arrangements between them. Large numbers of lawyers are likely to be involved, and many functions traditionally handled by an individual attorney have to be delegated to groups or committees within a consortium of the attorneys whose cases have been aggregated. Individual clients also become part of an aggregate group represented by layers of attorneys rather than their individual attorney.⁵ As a result, clear lines as to attorney compensation for service to an individual client may be blurred as a consortium of lawyers takes on the class, group, or consolidated representation.

American courts are now grappling with issues of attorney representation and compensation that arise out of the changed attorney-client relationship in aggregate litigation. Little attention has been given to these issues in other countries which are not as advanced in aggregate litigation and whose concerns have tended to focus on how to limit the size and scope of cases to prevent them from becoming unmanageable and unfair. In addition, most other countries have eschewed entrepreneurial conduct by attorneys and contingent fees. These features of American practice have made representation and compensation issues more pressing in the U.S. Nevertheless, the growing experience of American courts in dealing with these issues should be of interest to other countries as they move towards greater aggregate litigation.

I. JUDICIAL SUPERVISION OF ATTORNEY REPRESENTATION AND COMPENSATION IN THE U.S.

American courts in individual cases have little authority over the conduct of attorney representation and compensation. Rules of professional conduct in each state govern attorney performance and fees. Violations of those rules are within the purview of the state bar disciplinary apparatus, and a court in an individual case is not empowered to

⁴ See Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003) (account of fifteen years of experience with a class action statute reflecting both civil law and American influences); 3 COMMISSION OF INQUIRY INTO THE AFFAIRS OF THE MASTERBOUND GROUP AND INVESTOR PROTECTION IN SOUTH AFRICA 651-953 (recommending class actions); Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 Duke J. Comp. & Int'l. L. 125 (2003); Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130 (2003) (developments in the European Community, Germany, United Kingdom, Sweden, Australia, and Canada). The Supreme Court of Indonesia and Indonesian Center for Environmental Law held an International Conference on Class Action Procedures and Their Implementation in the Indonesian Courts in Jakarta on February 18-20, 2002. On April 26, 2002, the Chief Justice of the Indonesian Supreme Court issued Regulation Number 1 of 2002 Concerning Class Action Procedures permitting "filing a claim in which one or more persons representing a class files a claim having questions of fact or law in common among class representatives and class members concerned, for himself/herself or themselves and at the same time representing a large group of people." INDON. SUP. CT. REG. No. 1, art. 1 (2002).

⁵ Professor Judith Resnik has noted that there now exist layers of lawyers, such that "[c]lients had lawyers but those lawyers were no longer their only lawyers, nor were those lawyers necessarily allowed to speak to the court on behalf of 'their' clients." Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. Pa. L. Rev. 2119, 2152 (2000).

supervise those matters unless there is a direct violation of proper procedures before it. The terms of representation and compensation are established by contract between the attorney and client and are not generally reviewable by the court. A judge in an individual case will often not know the terms of the representation in the attorney-client contract and will never have occasion to consider them. The computation and collection of the attorney's fee at the end of the litigation usually takes place without any involvement of the court. Only if there is a dispute over the attorney's fees might a court be called on for review, either on a motion to the original court or in a separate action possibly in another court.

An exception to the "judicial hands-off" character of attorney fees may arise if a prevailing party seeks the recovery of attorney's fees in the case. The "American rule" that each party bears his own attorney's fees is contrary to the "loser pays" rule in most other countries.⁶ However, there are exceptions to the rule if fee-shifting is provided for in a statute⁷ or if a "common fund" is created by the litigation for the benefit of other persons⁸ (which is a feature of class actions and aggregate litigation but not most individual cases). In those situations the trial court is called upon to determine the amount of the attorney's fees.

There is another situation in which an American court might have supervisory authority to review attorney's fees – when there is a contingent fee contract. A sizable percentage of American lawsuits are undertaken by attorneys on a contingent fee under which only if the plaintiff wins will they be entitled to a fee of a specified percentage of the client's recovery.⁹ "Contingency fee agreements are of special concern to the courts" and thus subject to heightened review.¹⁰ The inherent power of a court generally to enforce lawyers' professional responsibility and regulate the bar has been said to include the specific right to review the reasonableness of contingency fees.¹¹ A court's power to regulate contingency fees stems from a lawyer's ethical duty to charge a reasonable fee,¹² and thus a court's power to monitor contingency fees for reasonableness has been recognized.¹³ The Fifth Circuit recognized a court's jurisdiction to regulate contingency

⁶ See Sherman, *From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 Tex. L. Rev. 1863, 1863-8 (1998).

⁷ Many federal statutes, in such areas as antitrust, securities fraud, and civil rights, provide for fee shifting. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 4.11 (2004) (describing grounds for fee awards).

⁸ See *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) ("[Class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs."); *Trustees v. Greenough*, 105 U.S. (15 Otto) 527 (1881) (premiering recovery of attorney's fees on a theory of unjust enrichment).

⁹ See Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473 (1981).

¹⁰ *Allen v. U.S.*, 606 F.2d 432, 435 (4th Cir. 1979).

¹¹ See, e.g., Task Force on Contingent Fees of the ABA's Tort Trial & Ins. Prac. Section, *Contingent Fees in Mass Tort Litigation*, 42 Tort Trial & Ins. Prac. L.J. 105, 127 (2006) ("[A] court that exercised inherent power to prevent a violation of the lawyers' professional responsibility to charge only reasonable rates would be acting within the parameters of inherent authority as described by the Supreme Court.").

¹² Model Rules of Professional Conduct R. 1.5(a) (2002). Contingency fees in particular are subject to a reasonableness standard. R. 1.5(a) cmt. 3.

¹³ See, e.g., *Karim v. Finch Shipping Co. Ltd.*, 374 F.3d 302, 309 (5th Cir. 2004) ("[T]his appeal does not present the issue of a federal court's well-recognized power, in general, to reform contingent fee

fees in *Hoffert v. General Motors*, where the district court *sua sponte*, limited plaintiffs' counsel's contingency fee to 20% despite a 40% contingent fee contract.¹⁴ Nevertheless, there is still disagreement as to the scope of a court's review power, and it is urged that deference should be given to the right of attorneys and clients to contract for a particular fee percentage.¹⁵

II. SUPERVISION OF ATTORNEY'S FEES IN CLASS ACTIONS

There is much greater judicial supervision of attorney's fees in American class actions. First, class action settlements must be approved by the court.¹⁶ A high percentage of cases that are certified as class actions are settled, and settlements generally provide for the payment of attorney's fees to plaintiff's counsel (either stated as an amount or percentage or left up to the judge to determine). Judges have been admonished by rule and case law to provide an intensive review of attorney's fees since the payment of attorney's fees generally reduces the recovery for class members. Second, in the rare case in which a class action is actually tried and there is a litigated, as opposed to settled, judgment, the court does not have the express power to supervise the amount and payment of attorney's fees, but can in reality play that role.¹⁷ Class actions often involve statutory exceptions to the American rule that authorize fee-shifting to the prevailing party, and thus the court will determine the amount of the fee. In addition, in certifying the class the court must determine that "the representative parties will fairly and adequately protect the interests of the class,"¹⁸ and that might well include review of the reasonableness of a contingent fee contract.

Class actions are a paradigm for judicial supervision of attorney's fees in American aggregate litigation. However, not all-aggregate litigation can qualify as a class action, and it is in such cases that there has been uncertainty as to a court's power to reject or "cap" attorney's fees despite a contingent fee contract. The *Vioxx* litigation provides an

contracts. Indeed, this power is reflected in the contingent fee contract's providing a fixed percentage for counsel, 'or as allowed by law.');

Rosquist v. The Soo Line R.R., 692 F.2d 1107, 1111 (7th Cir. 1982.); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1277 (8th Cir. 1980).

¹⁴ 656 F.2d 161, 164-66 (5th Cir. 1981).

¹⁵ See Memorandum in Support of Motion for Reconsideration/Revision of Order Capping Contingent Fees and Alternatively for Entry of Judgment, *In re: Vioxx Products Liability Litigation*, Dec. 10, 2008, at p. 21 (U.S. Dist. Ct. E.D. La.), ("The Task Force on Contingent Fees of the American Bar Association's Tort Trial & Insurance Practice Section confirms that no empirical evidence of a market failure for attorney's fee contracts exists in mass tort litigation that is not a class action.... Each plaintiff in a non-class MDL possesses the opportunity at the outset of his case to seek and hire an attorney who offers the best combination of quality, efficiency, price, and record of success. Courts should enforce fairly-negotiated fee contracts that at inception take into account the possibility of MDL proceedings and factor in whatever efficiencies they may bring.").

¹⁶ Fed. R. Civ. Pro. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."); Fed. R. Civ. Pro. 23(e)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.").

¹⁷ "Regardless of whether a fee agreement exists, the amount of attorneys' fees in class actions must ultimately be determined by the court. This is true whether the case goes to trial or results in a settlement. Courts have generally used two methods to set the amount of fees to be awarded to class counsel: the percentage of the fund method and the 'lodestar' approach." Klonoff, *Class Actions and Other Multi-Party Litigation* 200 (1999).

¹⁸ Fed. R. Civ. Pro. 23(a)(4).

interesting case study of the emerging procedural practice and representation/compensation issues that arise from aggregate litigation.

III. THE VIOXX LITIGATION

Between 1999 and 2004, some 105 million prescriptions for Merck Inc.’s popular pain-killing drug Vioxx were written, and the drug was taken by some 20 million persons.¹⁹ It was removed from the market in 2004 after evidence surfaced that it increased the risk of heart attacks and strokes. Thousands of individual suits and numerous class actions were filed against Merck in state and federal courts throughout the country alleging product liability, tort, fraud, and warranty claims.

On February 16, 2005, the Panel on Multidistrict Litigation transferred suits representing the claims of over 4,000 plaintiffs that had been filed in federal courts against Merck (ultimately increased to some 20,000) to the U.S. Court for Eastern District of Louisiana. The Multidistrict Litigation (MDL) device, created in the 1960’s in response to the crisis caused by electrical equipment price-fixing cases flooding the federal courts,²⁰ permits a panel of federal judges to transfer cases pending in federal courts with “common questions of fact” to a single federal judge “for coordinated or consolidated pretrial proceedings.”²¹ Coordinated discovery was the principal benefit, insuring that all the cases could share discovery that would be rationally scheduled and avoid wasteful repetition. But over the years the “transferee judge” to whom cases were transferred came to assert a more prominent managerial role over the litigation, making dispositive pretrial rulings on motions including class certification²² and encouraging settlement.²³ Thus the MDL has become a principal form of aggregate litigation, enabling the federal court system to transfer and consolidate like cases before a single judge who has a principal responsibility for accomplishing a settlement.²⁴

¹⁹ *In re: Vioxx Products Liability Litigation.*, 574 F. Supp. 2d 606 (E.D.La. 2008).

²⁰ See 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 386 (3d ed. 1998).

²¹ 28 U.S.C. § 1407.

²² “It is generally accepted that a transferee judge has authority to decide all pretrial motions, including motions that may be dispositive, such as motions for judgment approving a settlement, for dismissal, for judgment on the pleadings, for summary judgment, for involuntary dismissal under Rule 41(b), for striking an affirmative defense, for voluntary dismissal under Rules 41(a) and to quash service of process.” Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978). See also Heyburn, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225 (2008).

²³ See Nagareda, *Mass Torts in a World of Settlement* ix (2007)(the “endgame of mass tort litigation is a global settlement). The Supreme Court’s decision in *Lexecon Inc. v. Milberg Weiss Bershad & Lerach*, 523 U.S. 26 (1998), which required transferee judges to return all the cases to their original courts when pretrial is completed if there has not been a settlement, prevented the use of MDL for trial consolidation of all the cases. However, few cases are in fact returned, and today creative approaches by transferee judges are giving new importance to the MDL device for resolving all the litigation with finality through settlement.

²⁴ “One of the values of multidistrict proceedings is that they bring before a single judge all of the cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Experience shows that few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. In managing the litigation, therefore, the transferee judge should take appropriate steps to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.” MANUAL FOR COMPLEX LITIGATION (THIRD) § 31.132 (1995).

The *Vioxx* transferee judge, Judge Eldon E. Fallon, set about bringing the *Vioxx* litigation to a stage where a settlement was possible, overseeing coordinated discovery and ordering “bellwether trials” of a handful of selected cases.²⁵ Out of the hundreds of attorneys who had individual cases, a small number were appointed to serve in such positions as Lead Counsel, Plaintiff’s Liaison Counsel, Plaintiffs’ Steering Committee, and Negotiating Plaintiff Counsel. Plaintiffs’ motion for a class action as to damage claims was denied by Judge Fallon on the ground that the condition and circumstances surrounding the taking of the drug by each person were so individualized and based on potentially differing state laws that the “predominance of common questions” requirement could not be met.²⁶

IV. THE VIOXX GLOBAL SETTLEMENT

At the court’s encouragement, negotiations with the defendant Merck took place over an extended period. Settlement was complicated because an even larger number of *Vioxx* cases were pending in state courts (some 30,000), and the federal transferee court had no jurisdiction over them. However, representative counsel from the state cases were included in the negotiations, and on November 9, 2007, a global settlement was announced between Merck and the Executive Committee of the Plaintiffs’ Steering Committee in the federal MDL and representatives of plaintiffs’ counsel in the coordinated proceedings in the three state courts where most of the state cases were pending (New Jersey, California, and Texas).²⁷ Merck agreed to pay \$4.85 billion to be paid pursuant to a complex administrative and claims procedure.²⁸ Judge Fallon, sitting with the coordinated proceedings judges from New Jersey and California, received the agreement in open court. The agreement settled the claims in all *Vioxx* cases then pending in federal and state courts, and established an administrative framework, with Judge Fallon as Chief Administrator, and Special Masters to be appointed by him, to oversee the settlement.²⁹ The claims process was to be administered by a private claims consultant company.

²⁵ Bellwether trials are trials of individual cases selected by the judge in consultation with counsel to provide each side with a realistic view of how a jury would decide a range of cases within the aggregated litigation and thus assist them in reaching a settlement amount for all cases. For a description of the process in *Vioxx*, see Fallon, Grabill & Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323 (2008); Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 Tul. L. Rev. 2205 (2008).

²⁶ *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450 (2006). This was consistent with his earlier denial of certification in a similar pharmaceutical mass tort case, *In re Propulsid Products Liability Litigation*, 208 F.R.D. 133 (E.D. 2002) (finding choice of law rules required application of potentially conflicting laws of the fifty states in which the class members ingested the drug and lived, creating manageability and predominance problems). See also *In re Baycol Products Litigation*, 218 F.R.D. 197, 205 (D. Minn. 2003) (finding individual issues such as injury, causation, learned intermediary defense, and comparative fault prevented predominance). However, he deferred ruling on class claims by “third-party purchasers” (such as medical insurers) and for “medical monitoring,” which claims were not included in the settlement of damage actions.

²⁷ Together the MDL and three state coordinated proceedings included more than 95% of the plaintiffs in *Vioxx* cases.

²⁸ See “Analysts See Merck Victory in *Vioxx* Deal,” N.Y. TIMES, Nov. 10, 2007, at 1.

²⁹ Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto, at Article 8. The agreement can be found at www.seegerweiss.com/VioxxSettlement/docs/MSA_Exhibits.pdf.

This was a unique approach to resolving the problem of related cases pending in both federal and state courts. It could only have come about through coordination and collaboration between the representatives of the federal and state plaintiffs' counsel as well as between Judge Fallon and the state court judges. One reason for its success, in contrast to the asbestos global settlement which the U.S. Supreme Court had struck down in *Amchem*,³⁰ was its limited scope. It applied only to pending cases filed by persons who claimed to have suffered injuries from taking the drug. Unlike asbestos, a drug like Vioxx has a short latency period, and there was virtually no likelihood that, at the time of settlement, persons who took the drug had not yet manifested injury. Unlike a class action settlement, it was limited to pending cases and did not attempt to settle cases filed after the date of the settlement. Merck ran the risk of having to try or settle new cases filed after the date of settlement, but because of the short latency period and the passage of some three years since the drug was taken off the market, it was not expected that the number would be large. In order for Merck to have the security of settling most of the likely claims against it, the agreement required that 85% of the plaintiffs in pending cases would enroll in the settlement in order for it to take effect.³¹ This is a common provision in global settlements, and was not a problem here since more than 95% of plaintiffs ultimately enrolled in the settlement.³²

V. THE VIOXX CAPPING OF ATTORNEY'S FEES

As often occurs in settlements of aggregate litigation, the allocation of plaintiffs' attorney's fees among large numbers of attorneys who had individual cases was an issue. The settlement agreement provided for a Fee Allocation Committee of plaintiffs' attorneys to make recommendations to the judge as to fees to be paid to individual attorneys and as to the amount of fees to be deposited in a Common Benefit Fund.³³ But before the allocation of fees was finally made, Judge Fallon, acting *sua sponte*, entered an order capping all contingent fees at 32%, so that no attorney representing a Vioxx claimant could collect more than 32% of the claimant's settlement award.³⁴ He claimed inherent judicial authority, as well as authority under the settlement agreement and due to the nature of the MDL proceeding, to impose a cap to insure that the claimants were properly compensated. Citing case law and state statutes that limited contingent fees, he determined that 32% was a reasonable percentage. He noted that "this reduction will not result in a paltry award" since 32% of the settlement fund of \$4.85 billion would be \$1.55 billion for all attorneys.³⁵ A group of attorneys primarily from Texas and Louisiana (called the Vioxx Litigation Consortium or VLC), who had contingent fee contracts with their individual clients in excess of 32% (many of them at 40%), challenged this order.

In a motion for a rehearing, the VLC attorneys argued that the court lacked authority to supervise, and particularly to cap, contingent fees. They pointed out that this was not a

³⁰ *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D.Pa. 1994), *rev'd*, *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591(1997).

³¹ Settlement Agreement, *supra* note 29, Article 11.

³² See "Vioxx Settlement Gaining Ground, with 95 % of Plaintiffs Signing On," www.yourlawyer.com/articles/read/13728, Jan. 22, 2008; "Merck Says 44,000 Sign for Vioxx Settlement," www.msnbc.msn.com/id/23452135/, March 3, 2008.

³³ Settlement Agreement, *supra* note 29, Article. 9.2.4 and 9.2.5.

³⁴ *In re Vioxx Products Liability Litigation*, 574 F. Supp. 2d 606 (E.D.La. 2008).

³⁵ *Id.*

class action, where a court must approve a settlement, and that the MDL statute has no comparative requirement: "Class action rules do not become applicable simply because a large number of cases settle. Individual differences remain, not only as to the characteristics of each individual claim, but also as to the relationship between each plaintiff and his attorney."³⁶ The policy reasons for court review of attorney's fees in class actions, they argued, do not apply to this case transferred and consolidated under MDL: "Unlike a class action, there are no 'nonparty' or 'absentee' plaintiffs in this MDL. Each plaintiff is personally represented by the attorney of his choice."³⁷ The terms of a contingent fee, they maintained, are particularly a matter for the attorney and client, and imposition of this cap was unreasonable and could ultimately lead to clients being unable to engage skilled attorneys who would be willing to take the risk of financing a long and difficult piece of litigation.

This raises a question as to whether the analogy to a class action is valid or necessary for an MDL judge in a consolidated action to have the authority to supervise and review attorney's fees. Judge Fallon had used the phrase "quasi-class action" to describe MDLs in invoking the court's equitable powers to review the Vioxx Resolution Program.³⁸ Other courts have used the "quasi-class action" analogy to confer equitable authority to review attorney's fees.³⁹ They point out that policies supporting monitoring contingent fees in class actions also apply to MDL consolidations which have a large number of plaintiffs subject to one settlement matrix, use court-appointed special masters to help administer the settlement, create a large escrow fund, and involve other court interventions.⁴⁰ The argument seems to be that the MDL form of aggregate litigation has so altered the traditional single-party lawsuit through a high degree of court supervision and aggregate procedures that judicial supervision of attorneys' fees, a la class actions, is authorized.

The MDL statute itself provides some support for this position. It directs the MDL panel to centralize cases only when it is possible to strike a balance between efficiency and fairness.⁴¹ Since the Panel exerts no oversight once the cases are transferred, it is up to the transferee judge to use equitable authority to insure that the aggregate procedures achieve the proper balance. The transferee court is encouraged to be innovative, as "the complexity, diversity, and volume of mass tort claims require adapting traditional procedures to new contexts."⁴² Thus the argument is that whatever the strength of the class action analogy, consolidated MDL cases warrant judicial supervision of attorney's fees to protect the interests of the claimants against undue erosion of their recoveries by excessive attorneys fees.

³⁶ Memorandum in Support of Motion for Reconsideration, *supra* note 15, at 7.

³⁷ *Id.*

³⁸ *In re Vioxx Products Liability Litigation*, 574 F. Supp 2d 606, 612 (E.D. La 2008).

³⁹ *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008), *amended in part by In re Guidant*, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp 2d 488, 491 (E.D.N.Y. 2006). For an opposing view of judicial supervision of attorney's fees see Silver & Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigation: Problems and A Proposal*, NYU School of Law, Law & Economic Research Paper No. 09-09 (forthcoming in NYU Law & Econ. J.).

⁴⁰ See *In re Guidant*, 2008 WL 682174, at *18; *In re Zyprexa*, 424 F. Supp 2d at 491).

⁴¹ 28 U.S.C. § 1407(a) (2000).

⁴² MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.1 (2004).

Judge Fallon saw the interests of the claimants to be adverse to that of the attorneys as to attorney’s fees. "District courts," he said, "necessarily retain the authority to examine attorney fees *sua sponte* because the attorneys' interests in this regard are in conflict with those of their clients."⁴³ Two MDL cases also premised judicial review of contingent fees on the proposition that plaintiffs' counsel have a built-in conflict of interest.⁴⁴ The VLC attorneys saw a court’s legitimate concerns as much more limited, pointing out that two circuit court cases permitting courts to monitor contingent fees had been in the context of seamen and children, who required special protection.⁴⁵ They focused on a Fifth Circuit case that reversed a sanction against attorneys and its language that a federal court’s inherent powers consist of those “necessary” for the courts to manage their affairs and extend only to litigation before the court, or, in the case of a sanction, to disobedience of the court’s orders.⁴⁶

If the mix of inherent judicial powers, analogy to class actions, the MDL statute, and the altered status of the attorney-client relationship under MDL consolidation is enough to justify Judge Fallon’s capping order, the question is how far that authority goes. Is it present in all MDL consolidations (even though the statute does not specifically provide for it)? Is it present in all consolidated cases since they necessarily involve replacing the primary representation of the individual’s attorney with an altered aggregate form of representation? Or is it present only in some MDL and ordinary consolidation cases in which there are special concerns over a conflict of interest between attorneys and clients or special needs for a more expansive form of case management? These questions might be answered in an appeal to the 5th Circuit.

VI. CONCLUSION

Aggregate litigation – whether in class actions or consolidation of individual cases – invariably impacts the individual attorney-client relationship. What was once understood between the attorney and client as to the attorney’s responsibilities and expected functions may be altered as committees of attorneys assume principal roles in the litigation. Nevertheless, in consolidated cases the individual attorney-client relationship remains, with attorneys continuing to perform services on behalf of their individual clients (which may or may not ultimately benefit the aggregate plaintiffs). The fact that under MDL, cases must be transferred back to their original courts for individual resolution⁴⁷ signifies that the individual attorney-client relationship remains. However, return of cases is rare, and once there is a settlement in the MDL court, as in *Vioxx*, the aggregate interests take on special importance. The experience of the *Vioxx* consolidated MDL case, with its unique global settlement extending across jurisdictional lines and with Judge Fallon’s capping order as to contingent fees, provides a crucible for testing the

⁴³ *In re Vioxx*, 574 F. Supp. 2d at 612.

⁴⁴ *In re Guidant*, 2008 WL 682174, at *18 (D. Minn. March 7, 2008); *In re Zyprexa*, 424 F. Supp. 2d 488, 491-92 (E.D.N.Y. 2006)). *See also Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 87, 90 n.62 (holding that a court has the authority to examine contingency fee contracts in order to ensure that it is not an unwitting accessory to excessive, unreasonable fees being charged).

⁴⁵ *Karim v. Finch Shipping Co. Ltd.*, 374 F.3d 302 (5th Cir. 2004); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982).

⁴⁶ Memorandum in Support of Motion for Reconsideration, *supra* note 15, at 9. citing *F.D.I.C. v. Maxxam, Inc.*, 523 F. 3d 566 (5th Cir. 2008).

⁴⁷ *See supra* note 23.

parameters of judicial supervision in aggregate litigation. If the capping order is upheld on appeal, it will confirm greater judicial authority over attorney representation and compensation in the management of aggregate litigation.