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Driving Diverse Representation of Diverse Classes

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DRIVING DIVERSE REPRESENTATION OF DIVERSE CLASSES

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ABSTRACT

Why have federal courts overwhelmingly appointed white men to represent diverse consumer classes? *Rule 23(g) of the Federal Rules of Civil Procedure requires courts to appoint the attorneys "best able to represent the interests of class members" to serve as class counsel. But courts' recurrent conclusion that white men best fit the federally mandated job description not only gives the appearance of discrimination, but harms class members that suffer from outcomes plagued by groupthink and cognitive biases. This Article sets out to uncover why white male repeat players continue to dominate class counsel appointments and proposes a practical and immediately implementable solution for the judiciary to improve class counsel diversity.*

The Article examines all class action auto defect multidistrict litigation suits. By focusing on this subset of cases that span across five decades, it observes potential tendencies of certain courts (i.e., white, Republican-appointed, and female courts) to appoint white men and identifies different processes and criteria courts have implemented and considered that have resulted in the appointment of more female and minority attorneys. The Article finds, however, that the gender and racial gaps remain stark, largely because courts understandably place an almost dispositive value on attorneys' prior experience serving as class counsel, a role white men have traditionally monopolized. It proposes a way to resolve this Catch-22 problem—a two-tier joint appointment structure that collectively evaluates the experience and diversity of counsel and removes the insurmountable entry barriers to the plaintiffs' counsel class action bar.

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INTRODUCTION

Courts have overwhelmingly appointed white, male attorneys to represent consumers in class action lawsuits.[1] Unlike most civil litigation, where individual and corporate clients hire counsel of their choosing, federal courts appoint counsel for class action lawsuits without input from class members.[2] These appointed attorneys then decide, with again little to no input from class members,[3] what remedies to pursue and settlements to accept on behalf of the class.[4] Although courts are required to appoint the attorneys best able to adequately and fairly represent the interest of *all* class members, few courts consider counsel's ability to relate to class members, particularly class members with different backgrounds, demographics, or life experiences. Instead, pursuant to Rule 23 of the Federal Rules of Civil Procedure, courts focus almost exclusively on counsel's prior leadership experience in similar cases, resulting in the continued appointment of the same usual white male suspects.

Indeed, courts' appointment of counsel often fails to consider the potentially unique interests of diverse class members. For example, in 2009, a district court appointed three white men to represent a diverse group of women who purchased defective birth control that caused

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1. *See* DANA ALVARÉ, VYING FOR LEAD IN THE "BOYS' CLUB": UNDERSTANDING THE GENDER GAP IN MULTIDISTRICT LITIGATION LEADERSHIP APPOINTMENTS 6 (2017), https://law.temple.edu/csj/wp-content/uploads/sites/3/2017/03/Vying-for-Lead-in-the-Boys-Club.pdf [https://perma.cc/V7LF-Q834] (women were appointed in a lead role in only 16.55% of 145 multidistrict litigation cases between 2011 to 2016 where formal leadership appointments were made by a court of the time); STEPHANI A. SCHARF & ROBERTA D. LIEBENBERG, AM. BAR FOUND., FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 12 (2015) (taking a random sample of all cases filed in federal courts in the Northern District of Illinois in 2013 and finding only 13% of class lead counsel were women); Amanda Bronstad, *Despite Diversity Efforts, Fewer Than 10% of MDL Leadership Posts Are Going to Attorneys Who Are Not White*, LAW.COM (Aug. 17, 2020) (on file with author); Julie Steinberg, *Women See No Gains as Plaintiffs-Side Complex Case Leaders*, BLOOMBERG L. (May 21, 2018), https://news.bloomberglaw.com/business-and-practice/women-see-no-gains-as-plaintiffs-side-complex-case-leaders/ [https://perma.cc/SUB3-RJ25].

2. FED. R. CIV. P. 23(g).

3. Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 659 (1994); Russell M. Gold, *"Clientless Lawyers"*, 92 WASH. L. REV. 87, 88 (2017); Jonathan R. Macey & Geoffrey P. Miller, *Auctioning Class Action and Derivative Suits: A Rejoinder*, 87 NW. U. L. REV. 458, 459 (1993); *see* Geoffrey C. Hazard, Jr., *Modeling Class Counsel*, 81 NEB. L. REV. 1397, 1402 (2003).

4. Although under Rule 23(e) of the Federal Rules of Civil Procedure courts must find the relief provided adequate, courts frequently acknowledge that the risks of further litigation and appeals to class members often require the compromises reached as part of the settlement. *See, e.g.*, *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., No. 17-MD-2785, 2021 WL 5369798, at *2 (D. Kan. Nov. 17, 2021); Hameed-Bolden v. Forever 21 Retail, Inc., No. CV 18-3019, 2021 WL 5107729, at *6 (C.D. Cal. Sept. 27, 2021).

blood clots, strokes, and heart attacks.[5] In 2016, another district court appointed six white men to represent a purchasing and lessee class of Jeep Grand Cherokee (approximately 40% of whom are women),[6] Chrysler 300s (a large percentage of whom are Black),[7] and Dodge Charger (a model that prides itself on its diverse consumer base)[8] customers whose vehicles had defective gearshifts.[9] These and several other all-male, all-white lead counsel teams have been appointed to make decisions on behalf of all class members that impact what relief they receive.[10]

This lack of diversity or—in more troubling terms, courts' recurrent conclusion that white male attorneys are better at representing the interests of all class members than female or nonwhite attorneys—has gained increased attention from the judiciary, practitioners, and academics. In 2020, one district court denied an application for class counsel because it was concerned by the legal team's lack of diversity—as all eleven attorneys put forward were male.[11] The application, the court noted, highlighted the repeat player problem that plagues the plaintiffs' class action bar in multidistrict proceedings.[12] In previous years, this white male dominated repeat player system in class actions and

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5. Order #2: Order Appointing Plaintiffs' Steering Committee, *In re* Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Prod. Liab. Litig., No. 09-md-02100, MDL No. 2100 (S.D. Ill. Nov. 10, 2009) https://www.ilsd.uscourts.gov/Documents/mdl2100/order2.pdf [https://perma.cc/U5L8-H2Q5], ECF No. 180; *Michael S. Burg*, BURG SIMPSON P.C., https://www.burgsimpson.com/attorney/michael-s-burg/ [https://perma.cc/MXU4-GXD6]; *Michael A. London*, DOUGLAS & LONDON P.C., https://www.douglasandlondon.com/attorneys/michael-a-london/ [https://perma.cc/V5R2-QSBC]; Roger Denton, SCHLICHTER, BOGARD & DENTON, LLP, https://uselaws.com/people/attorney/roger-denton/ [https://perma.cc/6RVR-4GWD].

6. Todd Goyer, *Press Kit: 2014 Jeep Grand Cherokee*, STELLANTIS (Jan. 13, 2014), https://media.stellantisnorthamerica.com/newsrelease.do?id=13701&fIId=13704&mid= [https://perma.cc/TH2C-RYY7]; *see also* Jennifer Newman, *Most Popular Cars for Women Vs. Men*, CARS.COM (Nov. 19, 2019), https://www.cars.com/articles/most-popular-cars-for-women-vs-men-412828/ [https://perma.cc/DD85-HGYD].

7. *African-Americans and Their Wheels*, JACKSONVILLE FREE PRESS, Feb. 2006 (on file with author); *see also* Murry Feldman, *Urban Market Key to Automakers' Success*, MICH. CHRON., Jan. 2005, at A1 (on file with author).

8. Manoli Katakis, *Today's Dodge Customer: Young, Rich, and Divers*, MUSCLE CARS & TRUCKS (May 21, 2021) https://www.musclecarsandtrucks.com/todays-dodge-customer-young-rich-and-diverse/ [https://perma.cc/4SPH-CFA4] (discussing traditional purchasers of Dodge Charger).

9. *See* Pretrial Order No. 2: Appointment of Lead Counsel, *In re* FCA US LLC Monostable Elec. Gearshift Litig., No. 16-md-02744, (E.D. Mich. Nov. 16, 2016), ECF No. 16.

10. *See, e.g.*, Order Granting Motion For Appointment Of Leadership Structure By All Plaintiffs, *In re* Smitty's/CAM 203 Tractor Hydraulic Fluid Mktg., Sales Pracs., & Prod. Liab. Litig., 4:20-MD-02935 (W.D. Mo. July 9, 2020), ECF No. 27; Order Appointing Counsel, *In re* EpiPen Mktg., Sales Pracs. & Antitrust Litig., 17-md-2785, (D. Kan. Sept. 12, 2017), ECF No. 40; Order No. 2: Organization and Appointment of Counsel, *In re* Vizio, Inc., Consumer Privacy Litig, No. 16-ml-02693, (C.D. Cal. June 8, 2016), ECF No. 85.

11. *In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 7330596, at *2 (N.D. Cal. July 14, 2020).

12. *Id.*

multidistrict litigations (MDLs) was anecdotal, but recent studies have produced sobering statistics.

One study found that between 2011 and 2015 women were appointed to less than 17% of leadership positions in MDLs.[13] While leadership appointment rates for women seemed to be steadily improving, reaching nearly 28% in 2015, an update to the study noted that appointments for 2016 decreased to 24%.[14] Another study found that from 2015 to 2019, only approximately 5% of lawyers appointed to leadership positions in MDLs identified as nonwhite.[15] Similarly, a study that looked at 73 products liability and sales practices MDLs pending in 2013 (spanning from 1991 to 2013)[16] found that 62.8% of leadership roles went to the same repeat players, who were mostly male and white.[17] Although these studies have been instrumental in providing windows into the anecdotal gender and racial or ethnic gap in MDL and class action litigation, they provide limited statistical insight into the reasons behind these gaps.

Looking at data from cases spanning from 1977 to 2020, this Article sets out to identify the potential roots of this systemic problem. By focusing on a narrow subset of class actions, specifically class action auto defect (CAAD) MDLs,[18] it offers some possible explanations for the exclusion of diverse attorneys. This Article then delves into the demographics of the transferee court and examines decades of class counsel selection methods, including criteria considered by courts employing evolving methods and their potential effects on the identity of the attorneys appointed to represent the class.

CAAD MDLs were chosen because they provide nearly half a century of data, tend to include diverse classes, and afford a representative sample of class action MDLs. In 2020, for example, 68.1% of all MDLs contained class action allegations, and approximately 80% involved

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13. ALVARÉ, *supra* note 1, at 5–6.

14. DANA ALVARÉ, VYING FOR LEAD IN THE 'BOY'S CLUB' 2018 UPDATE: UNDERSTANDING THE GENDER GAP IN MULTIDISTRICT LITIGATION LEADERSHIP APPOINTMENTS 7–8 (2018), https://law.temple.edu/csj/wp-content/uploads/sites/3/2018/12/Vying-for-the-Lead-2018-Revised-Update.pdf [https://perma.cc/3BV9-TUMB].

15. Bronstad, *supra* note 1.

16. ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS 77 (2019) [hereinafter BURCH, MASS TORT DEALS]; Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1450 (2017); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 95–96 (2015) [hereinafter Burch, *Judging*].

17. Burch & Williams, *supra* note 16, at 1471.

18. Prior to joining academia, the Author worked for appointed counsel in two cases included in Appendix A: *In re* ZF-TRW Airbag Control Units Prod. Liab. Litig., No. 19-ml-02905 (C.D. Cal.) and *In re* Takata Airbag Prod. Liab. Litig., No. 15-md-02599 (S.D. Fla.).

products liability and deceptive marketing practices claims.[19] While observations may not be entirely reflective of all other class action cases, they provide some insight into *class action* appointments, which studies to date have not pointedly targeted, focusing instead on MDLs generally or non-class action MDLs specifically that are not governed by Rule 23's appointment adequacy considerations in class actions.[20] Thus, several of the repercussions of the repeat player system addressed by scholars and commentators to date have eluded Rule 23's effects and required considerations.[21]

This Article addresses that void, focusing its observations and recommendations on class action cases governed under Rule 23 as opposed to MDLs generally. While the data set examined was purposefully limited and hinders the possibility of confidently drawing some conclusions herein with certainty, the findings largely confirm earlier studies—white men dominate the plaintiffs' MDL class action bar. Women and minorities are appointed more frequently than in the past, but progress is slow and limited to a few elite minority players. This Article additionally finds this incremental improvement in CAAD MDLs coincides with a number of factors: a more developed and judicially managed application process, an increasing number of appointments, a greater number of CAAD MDLs being transferred to district courts appointed by Democratic presidents, and the emergence of repeat female and other minority players. Although only one CAAD MDL specifically indicated an intention to appoint more diverse newcomers, the ten most recent CAAD MDLs had markedly improved demographic diversity. That said, the gender and racial or ethnic gaps are still vast and the barriers to entry are high, as courts almost exclusively make appointments based on counsel's experience managing similar litigation—experience attorneys are not likely to gain unless appointed by a court.

This Article proposes a dual appointment organizational structure for counsel to solve this Catch-22 conundrum: the appointment of two attorneys from the same law firm for leadership positions. Courts, moreover, must assign specific duties to junior attorneys serving in these positions to ensure they meaningfully participate in the litigation. These duties should include assuming an active role in hearings, discovery, and settlement negotiations and taking the lead in conducting

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19. *Fiscal Year Statistics 2020*, U.S. JUDICIAL PANEL FOR MULTIDISTRICT LITIGATION, https://www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf [https://perma.cc/6YM3-6X6J].

20. *See, e.g.*, ALVARÉ, *supra* note 1 (looking at MDLs regardless of whether class claims were asserted); Burch & Williams, *supra* note 16 (looking at MDLs regardless of whether class claims may have been asserted and focusing recommendations on non-class action MDLs).

21. *See generally*, BURCH, MASS TORT DEALS, *supra* note 16; Burch & Williams, *supra* note 16; Burch, *Judging*, *supra* note 16.

defensive discovery and coordinating class communications. Dual appointments admittedly further entrench repeat *law firm* players,[22] but they facilitate the entry of new, diverse *attorney* players into the class action bar without increasing litigation costs. These appointments will expediently diversify the current (mostly male and white) repeat player attorneys that control litigation strategies, negotiations, and settlement terms on behalf of plaintiffs.

Part I describes the current class counsel appointment landscape. It discusses Rule 23(g)'s mandated and suggested criteria for appointment. It then outlines the most common class counsel roles and describes the different procedures courts have employed to appoint class counsel, noting drawbacks and criticisms of each.

Part II focuses on the exclusive effects the appointment procedures outlined in Part I have had on women and other minority attorneys. This part begins by summarizing available data on the demographics of class counsel and then explains why the lack of diversity is a problem. In addition to tarnishing the integrity of the judiciary and perpetuating discriminatory practices, this lack of diversity harms class members. Part II then describes courts' efforts to date to make more diverse appointments.

Part III provides an analysis of CAAD MDLs. It explains the methodology behind the selection of these cases and the specific data gathered. It then analyzes the demographics of lead counsel, executive committee, liaison counsel, and special liaison counsel appointees. Part III next looks at demographic characteristics of the transferee court that may have impacted appointed counsel, including the district court's age, gender, race or ethnic background, and political appointment. This part then reviews appointment and application orders entered by the district courts, specifically focusing on criteria courts state to be important in those orders and resulting outcomes. Part III ends by highlighting some of the more nuanced or novel observations impacting courts' appointment of counsel.

Part IV proposes a practical solution to the institutional white male repeat player problem—joint dual appointments. Part IV begins by discussing the implications of the findings detailed in Part III in terms of

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22. *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1011, 1037 (2016) (noting that "a handful of firms dominate plaintiff representation" in class actions and MDLs); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 364–65 (2003) (discussing the "rise of an elite segment of the plaintiffs' bar involved in class action litigation on a repeated basis"); Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 774–82, 821–22 (2012) (describing plaintiffs' class action bar as one composed of large insider law firms, which MDL judges naturally gravitate towards when appointing class counsel).

other proposals aimed at improving the diversity of class counsel.[23] It then proposes a practicable and immediately implementable solution—the creation of two-tier appointments that provide the experience courts have considered necessary for new entrants. These second-tier positions, combined with courts' commitment to diversity, will encourage firms to hire, train, retain, and promote qualified diverse candidates, who can become the next leaders of the class action bar without sacrificing the value that experience provides class members. This Article also provides in appendices two model orders to assist courts in implementing dual appointments. Part V concludes.

Class counsel is singularly charged with providing remedies to injured class members in a growing number of contexts—product defects,[24] data breaches,[25] misleading marketing and sales practices,[26] privacy violations,[27] etc.[28] Entrenched, similarly-thinking players who currently dominate litigation strategies and settlement terms are prone to groupthink and cognitive biases.[29] The potential negative conse-

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23. *See generally* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017) (concluding, amongst other things, that the same repeat players dominate leadership and decision-making in MDLs and proposing changes in selection and compensation methods of attorneys); Burch, *Judging*, *supra* note 16 (finding that judges appoint an overwhelming number of repeat players in MDLs and recommending courts appoint cognitively diverse attorneys, permit third-party financing, encourage objections to appointments, and avoid permanent appointments, amongst other things).

24. *See, e.g.*, Complaint at 7–14, McCarthy v. Toyota Motor Corp., No. 18-cv-00201 (C.D. Cal. Feb. 5, 2018) (asserting class claims for alleged defect involving intelligent power modules plaguing more than a million Toyota Prius vehicles); Class Action Complaint at 1–2, Kavehrad v. Vizio, Inc., No. 21-cv-01868 (C.D. Cal. Nov. 12, 2021) (asserting class claims on behalf of all purchasers of OLED allegedly defective televisions).

25. *In re*: U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig., 266 F. Supp. 3d 1, 11–13 (D.D.C. Sept. 18, 2017) (asserting class claims on behalf of current and former government employees that may have had personal data compromised in data breach); *In re* Marriott Int'l, Inc., Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447, 453 (D. Md. Feb. 21, 2020) (alleging class claims resulting from data breach).

26. *See, e.g.*, Complaint at 1–7, Owen v. Nestle Healthcare Nutrition, Inc., No. 22-cv-02855 (D.N.J. May 16, 2022) (asserting false advertising class claims on behalf of a class of customers claiming that Nestle deceptively marketed that its Boost-brand Glucose Control products helped diabetic patients maintain blood sugar levels); Class Action Complaint at 1–24, Chimienti v. Wendy's Int'l, LLC, No. 22-cv-02880 (E.D.N.Y. May 17, 2022) (class claims asserted against Wendy's and McDonald's for alleged misrepresentation of their burger sizes).

27. *See, e.g.*, *In re*: TikTok, Inc. Consumer Privacy Litig., 565 F. Supp. 3d 1076 (N.D. Ill.) (alleging biometric and other data privacy claims on behalf of TikTok users); Garner v. Amazon.com, Inc., No. 21-cv-00750, 2022 WL 2275410 (W.D. Wash.) (asserting privacy related claims for alleged unauthorized recording through Alexa).

28. *See, e.g.*, Ewing v. Geico Indemnity Co., No. 20-cv-165, 2020 WL 5995589 (M.D. Ga.) (asserting claims on behalf of class of Geico insurance policyholders that claimed Geico underpaid for their vehicles by miscalculating applicable taxes); Lipsett v. Banco Popular N. Am., No. 22-cv-03901 (S.D.N.Y.) (class action lawsuit alleging bank customers were wrongfully charged overdraft fees).

29. *See* Brooke D. Coleman, *A Legal Fempire: Women In Complex Litigation*, 93 IND. L.J. 617, 638 n.157 (2018); Burch & Williams, *supra* note 16, at 1530 n.333; Burch, *Judging*, *supra* note 16, at 99–100 n.138.

quences of these biases are exacerbated because class counsel operates with little to no guidance from the members of the class they represent. This Article provides insight into the effects of the appointment processes courts have implemented and offers courts a new tool to increase diversity in the role of class counsel without sacrificing any of Rule 23(g)'s requirements. While this proposal is directed to the judiciary, it has lasting implications for the plaintiffs' class action bar, which should respond by making more strenuous commitments to not only employing diverse attorneys, but also to training, mentoring, retaining, and empowering them.

I. THE CLASS COUNSEL "HIRING PROCESS"

For approximately a half-century, attorneys have competed for class counsel positions in federal actions.[30] Historically, class counsel competitions occurred without the court's blessing, outside of the courtroom, and away from the public eye. Deals were struck in offices and country clubs over handshakes and drinks.[31] These deals resulted in a lawyer, law firm, or a combination of both assuming control of the litigation without court-stamped approval until class certification, when the bulk of the pretrial work had been completed and courts could assess counsel's fitness for appointment based on their prior performance. This is no longer the case—at least not entirely. Over the last few decades, courts have been increasingly tasked with appointing *interim* counsel for the class at the outset of the litigation.[32] Shortly after news breaks that a product, drug, or pharmaceutical device is defective, or a company's data practices threaten users' privacy, or a data breach compromises individuals' personal data, competing class action lawsuits are often filed by different attorneys on behalf of the same class members. If filed in the same district, these actions are typically consolidated before one judge in that district.[33] If filed in different districts,

30. THIRD CIRCUIT TASK FORCE REPORT ON SELECTION OF COUNSEL, FINAL REPORT 6 (Jan. 2002), https://www.ca3.uscourts.gov/sites/ca3/files/final%20report%20of%20third%20circuit%20task%20force.pdf [https://perma.cc/NLH7-GGJU] (noting competition to control common fund class action litigation amongst lawyers has existed for over a quarter of a century), *reprinted in* 74 TEMP. L. REV. 685 (2002). References use the pagination of the electronic version of the Report.

31. BURCH, MASS TORT DEALS, *supra* note 16, at 90.

32. Bruce A. Green & Andrew Kent, *May Class Counsel Also Represent Lead Plaintiffs?*, 72 FLA. L. REV. 1083, 1120 (2020); *see* FED. R. CIV. P. 23(g) advisory committee's note to 2003 amendment (discussing that inclusion of interim counsel appointment in the Rule was made "recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel under Rule 23(g)(2)(A)").

33. This can occur if the defendant is incorporated or headquartered in a particular state and plaintiffs seek to avoid personal jurisdiction issues or the class involves only members of a particu-

the parties often move for consolidation and centralization for pretrial purposes before the Judicial Panel for Multidistrict Litigation (JPML), a panel of seven federal judges appointed by the United States Supreme Court Chief Justice, which was created by Congress in 1968.[34] If the JPML decides consolidation and centralization are appropriate, it transfers the actions to one district court—the transferee court—for pretrial purposes.[35] In deciding which court to transfer the action to, the JPML looks for a nexus to the claims asserted (be it the residency of the defendant, where the brunt of the harm occurred, or the residency of the majority of class members) and considers the transferee court's experience and willingness to accept the MDL.[36]

In either situation, the district court is faced with multiple plaintiffs' counsel from various actions, all of whom typically want to control or play a pivotal role in the litigation. The court, plaintiffs, and defendants cannot wait until class certification to sort out which attorneys represent the class. Appointing interim class counsel thus becomes necessary to protect the interests of the class and avoid duplicative and inconsistent prosecution on multiple fronts.[37]

Appointing counsel is not an inconsequential administerial task for courts.[38] Unlike other litigation where the client or clients take a more active role monitoring their counsel, appointed counsel is the driving force behind class litigation. It is exclusively up to counsel to vindicate, through its representation, the wrongs perpetrated against the class.[39] Appointed counsel has an extremely significant impact on the litigation, including whether a motion to dismiss is defeated, crucial discovery is obtained, the correct witnesses are deposed, settlement negotiations are successful, the terms of such a settlement are favorable to the class, etc.[40] The court's appointment of counsel can thus determine

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lar state. *See* Troy Stacy Enters., Inc. v. Cincinnati Ins. Co., 337 F.R.D. 405, 409 (S.D. Ohio 2021) ("Designation of interim counsel is particularly appropriate when there have been overlapping, duplicative, or competing suits filed in other courts.").

34. 28 U.S.C. §§ 1407, 2112.

35. 28 U.S.C. § 1407; Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV., 1713, 1716–18 (2019).

36. Coleman, *supra* note 22, at 1033; Martin H. Redis & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 119–21 (2015).

37. *Troy Stacy Enters.*, 337 F.R.D. at 409 (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.111 (2004)); Bernstein v. Cengage Learning, Inc., No. 18-cv-7877, 2019 WL 6324276, at *2 (S.D.N.Y. Nov. 26, 2019).

38. *See* Elizabeth Chamblee Burch, *Diversity in MDL Leadership: A Field Guide*, 89 UMKC L. REV. 841, 841 (2021) (noting that "[p]icking the right lawyers to spearhead these proceedings on plaintiffs' behalf is pivotal").

39. THIRD CIRCUIT TASK FORCE, *supra* note 30, at 3.

40. *Id.* (noting that in class litigation seeking to address financial injury "the injured find that justice depends on the availability of plaintiffs' counsel of sufficient experience, skill, and re-

whether class members obtain any relief and the form that such relief takes.[41] But how do courts decide what lawyer(s) or law firm(s) to appoint? What criteria do courts use to appoint the "best" counsel?[42]

This Part begins by presenting an overview of Rule 23(g), which provides both authority and (albeit limited) instruction for courts appointing interim class counsel. It discusses factors courts must and may consider when appointing class counsel. It then outlines common appointment roles and their archetypical functions. Finally, this Part describes how courts have applied Rule 23(g) in practice when appointing counsel and how these processes have contributed to the current white male repeat player system.

A. *Adequacy as a Job Description*

District courts draw their authority to appoint interim class counsel from Rule 23.[43] In 2003, Congress amended the Rule to add subsection (g), which exclusively addresses the appointment of class counsel.[44] Under Rule 23(g), a court certifying a class *must* appoint *adequate* class counsel.[45] Recognizing that certification may not occur until several months or years into the litigation, the Rule permits district courts to appoint interim class counsel—counsel that will manage the litigation prior to certification.[46] The Rule provides criteria courts must and may consider when determining whether counsel is adequate and able to fairly represent the interests of the class.[47] This section discusses how courts determine adequacy.

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sources"); *see also* FED. R. CIV. P. 23(g) advisory committee's notes on 2003 amendment (noting that Rule 23(g) "responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action").

41. While courts must review any settlement attained by class counsel under Rule 23(e), courts may only green or red light the settlement, either finding its terms fair, reasonable, and adequate or not.

42. FED. R. CIV. P. 23(g)(2).

43. FED. R. CIV. P. 23(g)(2); *In re* Air Cargo Shipping Serv. Antitrust Litig., 240 F.R.D. 56, 57 (E.D.N.Y. 2006).

44. Richard Marcus, *Once More Unto the Breach? Further Reforms Considered for Rule 23*, 99 JUDICATURE 57, 59–60 (2015) (discussing 2003 amendments to Rule 23(g) regarding the appointment of class counsel).

45. FED. R. CIV. P. 23(g)(1) (emphasis added).

46. FED. R. CIV. P. 23(g)(3); *see* Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1737 (2004).

47. FED. R. CIV. P. 23(g).

1. Rule 23(g)'s Adequacy Requirements and Permissible Considerations

In determining whether counsel is "adequate," Rule 23(g), specifically Rule 23(g)(1)(A), *requires* courts to consider: (i) the work counsel has performed identifying and investigating potential claims in the action; (ii) counsel's prior experience handling class actions or other complex litigation involving similar claims; (iii) "counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class."[48] While Rule 23 does not expressly state that these factors also apply to interim counsel appointments, courts have interpreted that to be the case.[49] Rule 23 also requires counsel to fairly and adequately represent the interests of the class.[50] And if more than one qualified attorney seeks appointment, the court must appoint "the applicant *best* able to represent the interests of the class."[51]

Rule 23(g) does not otherwise define adequacy, and caselaw interpreting the Rule is not extensive, as courts often issue appointment orders without specifically discussing adequacy.[52] Those that do issue more detailed orders often choose not to publish them.[53] Critics have noted that adequacy is somewhat of an ambiguous term that is neither easy to measure nor guarantee.[54]

However, courts applying Rule 23(g)(1)(A)'s mandatory considerations listed above generally discuss counsel's efforts researching relevant caselaw and reviewing all relevant publicly available information, counsel's efforts consulting industry experts, the time counsel dedicated to such endeavors, whether counsel was the first to file a lawsuit, and

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48. FED. R. CIV. P. 23(g)(1)(A).

49. *See, e.g.*, *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MD 2262, 2011 WL 5980198, at *2 (S.D.N.Y. Nov. 29, 2011); *In re* Shop-Vac Mktg. & Sales Pracs. Litig., No. 12-MD-2380, 2013 WL 183855, at *1–2 (M.D. Pa. Jan. 17, 2013); Crocker v. KV Pharma. Co., No. 09–CV–198, No. 09-CV-222, No. 09-CV-297, 2009 WL 1297684, at *1 (E.D. Mo. May 7, 2009).

50. FED. R. CIV. P. 23(g)(4).

51. FED. R. CIV. P. 23(g)(2) (emphasis added).

52. *See, e.g.*, Order Following February 24, 2020 Case Management Conference, *In re* ZF-TRW Airbag Control Units Prod. Liab. Litig., No. 19-ml-02905 (C.D. Cal. Mar. 6, 2020), ECF No. 106; Order Re Application for Appointment of Lead Counsel and Liaison Counsel and Application for Appointment of Interim Class Counsel, *In re* Land Rover LR3 Tire Wear Prod. Liab. Litig., No. 09-ml-02008 (C.D. Cal. Sept. 22, 2009), ECF No. 8; *see also* Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 689 (2004); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 94–96 (1991).

53. *See, e.g.*, Pretrial Order No. 3: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel, *In re* Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., & Prod. Liab. Litig., 17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173; Pretrial Order No. 7: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, & Government Coordinating Counsel, *In re* Volkswagen 'Clean Diesel' Mktg., Sales Pracs., & Prod. Liab. Litig., MDL No. 2672, (N.D. Cal. Jan. 21, 2016), ECF No. 1084.

54. *See* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1137–38 (2009).

the hours counsel has spent on the action to date.[55] Analysis of proposed counsel's experience is usually combined with discussion regarding counsel's knowledge of the law.[56] Courts typically focus on counsel's prior experience in class action or complex litigation and/or experience litigating similar types of claims.[57] And when discussing the resources counsel will commit to representing the class, courts typically focus on counsel's law firm—the number of attorneys the firm employs, the location of the firm's offices, and the firm's financial resources.[58] These factors tend to favor larger, more established law firms.

In addition to Rule 23(g)(1)(A)'s mandatory adequacy considerations, Rule 23(g)(1)(B) and (C) permit courts to consider *any* other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[59] and order prospective counsel to provide information on any subject pertinent to the appointment.[60] Specifically, Rule 23(g)(1)(B) states that courts "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interest of the class" and "may order potential class counsel to provide information on any subject pertinent to the appointment[.]"[61] However, the Rule does not provide any examples or suggest any matters or criteria that would additionally be pertinent to counsel's ability to fairly and adequately represent the interests of the class. Courts do often rely on Rule 23(g)(1)(B)'s broad language when inquiring into counsel's diversity, finding diversity relevant to counsel's ability to represent the interests of class members fairly and adequately.[62]

2. Adequacy According to the Manual for Complex Litigation

Courts also frequently consult the Manual on Complex Litigation (the Manual), created to assist courts in managing complex cases in-

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55. *See, e.g.*, Smallman v. MGM Resorts Int'l, No. 20-cv-00375, 2021 WL 326135, at *3 (D. Nev. Feb. 1, 2021); City of Providence, R.I. v. AbbVie, Inc., No. 20-cv-5538, 2020 WL 6049139, at *4 (S.D.N.Y. Oct. 13, 2020); Bernstein v. Cengage Learning, Inc., No. 18-cv-7877, 2019 WL 6324276, at *1 (S.D.N.Y. Nov. 26, 2019); Bounasera v. Honest Co., 318 F.R.D. 17, 18–19 (S.D.N.Y. 2016); *In re* Municipal Derivatives Antitrust Litig., 252 F.R.D. 184, 186 (S.D.N.Y. 2008).

56. *See, e.g.*, *AbbVie*, 2020 WL 6049139, at *5–6; *Bernstein*, 2019 WL 632476, at *1; Walker v. Discover Fin. Servs., No. 10-cv-6994, 2011 WL 2160889, at *4 (N.D. Ill. May 26, 2011).

57. *See, e.g.*, *Bounasera*, 318 F.R.D. at 19; Bates v. Kashi Co., No. 11-CV-1967-H, 2012 WL 12846999, at *3 (S.D. Cal. Jan. 18, 2012).

58. *See, e.g.*, *AbbVie*, 2020 WL 6049139, at *4; *Bernstein*, 2019 WL 632476, at *1–2; *Bounasera*, 318 F.R.D. at 19.

59. FED. R. CIV. P. 23(g)(1)(B).

60. FED. R. CIV. P. 23(g)(1)(C).

61. FED. R. CIV. P. 23(g)(1)(B) & (C).

62. *See infra* Part II.B.

cluding MDLs and class actions,[63] when determining additional adequacy appointment criteria.[64] Last updated in 2004, the Manual encourages courts to allow plaintiffs' attorneys to coordinate the structure of their legal team without court intervention.[65] It, however, instructs courts to evaluate the agreed proposed structure for adequacy by considering, *inter alia*: the function, organization, and compensation of counsel; the existence and nature of any agreements or understandings between counsel; the proposed attorneys' competence for particular assignments; whether proposed counsel can fairly represent the various interests in the litigation; and proposed counsel's reputation and ability to command the respect of colleagues and work cooperatively with opposing counsel.[66]

If plaintiffs' counsel cannot independently agree on an organizational structure, the Manual advises courts to institute appointment procedures that consider counsel's: (1) willingness and ability to commit time to the litigation; (2) ability to work cooperatively with others; (3) professional experience in this type of litigation; and (4) access to sufficient resources to advance the litigation in a timely manner.[67] The third and fourth criteria correspond directly to Rule 23(g)(1)(A),[68] and the first and second criteria provide little aid, as applicants universally claim they are able and willing to commit time to the litigation and cooperate with other counsel.[69]

B. *Class Counsel Positions and Organizational Structures*

Courts have significant discretion to appoint and structure the organization of counsel to fit the needs of each case. As a result, class

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63. *In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 427–28 (9th Cir. 1979); *Introduction* to MANUAL FOR COMPLEX LITIGATION (FOURTH) 1 (2004).

64. *See, e.g.*, Baker v. Saint-Gobain Performance Plastics Corp., Nos. 16-CV-0220, 16-CV-0292, 16-CV-0394, 16-CV-0476, 2016 WL 4028974, at *4 (N.D.N.Y. July 27, 2016); *In re* Parking Heaters Memo. Antitrust Litig., 310 F.R.D. 54, 57 (E.D.N.Y. 2015); Nicolow v. Hewlett Packard Co., Nos. 12-cv-05980, 12-cv-06003, 12-cv-06074, 12-cv-06410, 12-cv-06199, 13-cv-00301, 2013 WL 792642, at *6–7 (N.D. Cal. Mar. 4, 2013).

65. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22 (2004).

66. *Id.*

67. *Id.*

68. *In re* New Jersey Tax Sales Certificates Antitrust Litig., No. 12-1893, 2012 WL 5214598, at *2 (D.N.J. Oct. 22, 2012) (noting the Manual largely mirrors Rule 23(g)(2)).

69. *See, e.g.*, Application. For Appointment of Roland Tellis as Plaintiffs' Co-Lead Counsel at 3, *In re* ZF-TRW Airbag Control Units Prod. Liab. Litig., No. 19-ml-02905 (C.D. Cal. Jan. 21, 2020), ECF No. 67; Application For Appointment Of Rosemary M. Rivas As Co-Lead Counsel Or, In The Alterative, to the Plaintiffs' Steering Committee at 3, *ZF-TRW Airbag*, No. 19-ml-02905, ECF No. 86.

counsel teams vary in size, structure, and depth.[70] Even the tasks assigned and the discretion provided to counsel vary across cases.[71] The three most common appointed positions, however, are lead counsel, plaintiffs' executive or steering committee member, and liaison counsel.[72] Courts have appointed both individual attorneys and law firms to serve in these roles.[73] Demands of a particular litigation, however, might require the court to appoint counsel to serve in a more unique role, such as liaison counsel to other state or government enforcement actions or task specific counsel. This section describes these positions and their common duties and responsibilities.

1. Lead Counsel

Lead counsel is typically the face of a class counsel's team. It is the most common appointment and sometimes the only one made by the court, particularly if the case is small or straightforward. Courts typically appoint one to three lawyers to serve as lead counsel but can also appoint law firms, leaving unclear which lawyer in the firm will be charged with spearheading the litigation. Lead counsel is ordinarily charged with coordinating the litigation and presenting the plaintiffs' position on substantive and procedural issues that arise during the litigation in written and oral argument.[74] Appointment orders typically task lead counsel with primary responsibility for creating and implementing a litigation strategy, initiating discovery, responding to discovery, deposing witnesses, employing experts, managing other attorneys who form part of class counsel by assigning them tasks and ensuring their work is both efficient and non-duplicative,[75] and negotiating settlements with opposing counsel on behalf of all plaintiffs.[76]

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70. *See* Jaime Dodge, *Facilitative Judging: Organization Design in Mass-Multidistrict Litigation*, 64 EMORY L. J. 329, 370 (2014).

71. Kjessler v. Zaappaaz, Inc., No. 18-cv-430, 2018 WL 8755737, at *3 (S.D. Tex. Aug. 31, 2018) (noting courts' "great deal of flexibility with regard to appointing representative counsel"); *In re*: Wells Fargo Wage & Hour Emp't Pracs. Litig. (No. III), No. H-11-2266, 2011 WL 13135156, at *3 (S.D. Tex. Dec. 19, 2011) (same).

72. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221.

73. *Compare* Il Fornaio (America) Corp. v. Lazzari Fuel Co., Nos. 13-cv-05197; 13-cv-05331, 2014 WL 806203, at *1 (N.D. Cal. Feb. 27, 2014) (appointing individual attorney to serve as interim counsel), *with In re* Crude Oil Commodity Futures Litig., No. 11-cv-3600, 2012 WL 569195, at *3 (S.D.N.Y. Feb. 14, 2012) (appointing two law firms to serve as interim co-lead counsel).

74. *See, e.g.*, Outten v. Wilmington Tr. Corp., 281 F.R.D. 193, 202 (D. Del. 2012); *In re* Payment Card Interchange Fee & Merch. Discount Antitrust Litig., No. MDL 05-1720, 2005 WL 2038650, at *5 (E.D.N.Y. Feb. 24, 2006); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221.

75. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221.

76. *Id.* § 40.22; *see, e.g.*, Order No. 8 at 3–4, *In re* General Motors LLC Ignition Switch Litig., 14-cv-06018 (S.D.N.Y. Aug. 15, 2014), ECF No. 12; Order [Resolving ECF Nos. 6, 16, and 22] at 3–6,

2. Plaintiffs' Executive or Steering Committees

A Plaintiffs' Executive or Steering Committee is not always appointed.[77] When a Plaintiff's Executive Committee (PEC) or Plaintiffs' Steering Committee (PSC) is created,[78] it is typically because the nature of the litigation requires the depth and resources of a committee. A PEC could be required because of the number of defendants involved,[79] the costs associated with the litigation,[80] and/or the presence of class members with diverging interests such that giving them different representation on a committee is merited.[81] The size of the PEC also varies across cases. Some PECs have few members, while others have more than twenty.[82] However, PEC appointments are typically seen as second-tier appointments unless lead counsel is not appointed in the action.[83] Courts can assign tasks to the committee, including conducting portions of discovery or handling particular legal issues or tasks associated with a particular defendant in the litigation. Courts, however, may also choose to leave assignments to the committee to lead counsel's discretion.[84]

In re Ford Motor Co. Spark Plug & Valve Engine Prod. Liab. Litig., No. 12-md-2316 (N.D. Ohio May 4, 2012), ECF No. 29.

77. *See, e.g.*, Rubenstein v. Scripps Health, Nos. 21-cv-1135, 21-cv-1143, 21-cv-1238, 2021 WL 4554569, at *3–4 (S.D. Cal. Oct. 5, 2021) (denying to appoint a PSC because plaintiffs failed to explain how the interests of the committee would be different from those necessary to protect all class members' interest); Aberin v. Am. Honda Motor Co., No. 16-cv-04384, 2017 WL 3641793, at *2–3 (N.D. Cal. Aug. 24, 2017) (same).

78. While the functions of a PEC and PSC may vary in different litigations and in some complex MDLs courts have appointed both in the same litigation, for ease of reference the Article will refer to PECs and PSCs throughout as PECs.

79. *See, e.g.*, Brigiotta's Farmland Produce & Garden Ctr., Inc. v. United Potato Growers Idaho, Inc., No. 4:10-cv-307, 2010 WL 3928544 at *1 (D. Idaho Oct. 4, 2010).

80. *See, e.g.*, Klein v. Facebook, Inc., No. 20-cv-08570, 2021 WL 4620963, at *1 (N.D. Cal. Mar. 18, 2021).

81. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221; *In re* SSA Bonds Antitrust Litig., No. 16-cv-3711, 2016 WL 7439365, at *3 (S.D.N.Y. Dec. 22, 2016).

82. *Compare, e.g.*, Order Appointing Plaintiffs' Counsel and Setting Schedule at 4–5, *In re* Takata Airbag Prod. Liab. Litig., No. 15-md-02599 (S.D. Fla. Mar. 17, 2015) (appointing three-member PEC), ECF No. 393, *with* Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 3–4, *In re* Volkswagen 'Clean Diesel' Mktg., Sales Pracs., & Prod. Liab. Litig., No. 15-md-02672 (N.D. Cal. Jan. 21, 2016) (appointing twenty-two member PEC), ECF No. 1084.

83. ALVARÉ, *supra* note 1, at 5.

84. *See, e.g.*, *In re* Shop-Vac Mktg. & Sales Pracs. Litig., No. 12-md-2380, 2013 WL 183855, at *4 (M.D. Pa. Jan. 17, 2013).

3. Liaison Counsel

Liaison counsel usually serves a more administrative role, primarily coordinating communications between the court and other counsel.[85] Liaison counsel may also serve and distribute filings and orders to other counsel, receive communications on behalf of plaintiffs, maintain service lists, and coordinate scheduling among plaintiffs' counsel.[86] Given today's electronic court filing system, discovery document databases, and the general ease of electronic communications, liaison counsel serves a less essential role than it once did. However, liaison counsel may be helpful when the attorney or attorneys serving as lead counsel are not barred or do not have offices in the transferee district or state.[87] In such cases, liaison counsel can assist with ensuring compliance with local rules and providing office space for pretrial meetings, depositions, settlement negotiations, etc.[88]

4. Task-Specific Counsel

Depending on the needs of a particular case, courts have the discretion to appoint counsel specifically tasked with certain authority, assignments, or communications. Frequently, additional counsel will serve in some liaison role, including acting as liaison to similar actions

85. It is worth noting that in earlier cases courts appointed liaison counsel to serve as lead counsel, assigning them as the point of contact between other plaintiffs' counsel and the court and requiring them to coordinate efforts amongst plaintiffs' counsel without appointing lead counsel. Similarly, other times, courts appointed the same attorney(s) or law firm(s) to serve as lead and liaison counsel.

86. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221, § 40.22 (2004).

87. *See In re* Dairy Farmers Am., Inc. Cheese Antitrust Litig., MDL No. 2031, 2013 WL 6050431, at *2 (N.D. Ill. Nov. 15, 2013) (noting liaison counsel not necessary where interim counsel was local); Walker v. Discover Fin. Servs., No. 10-cv-6994, 2011 WL 2160889, at *5 (N.D. Ill. May 26, 2011) (explaining appointment of liaison counsel appropriate where lead counsel does not have offices in the district).

88. It is yet to be seen, however, how valuable this will be in post-pandemic environment that has seen many depositions and pretrial hearings migrate to digital platforms.

in state court,[89] the government in another proceeding,[90] or other counsel representing a different group of plaintiffs in the litigation.[91]

C. *Appointment Procedures*

Rule 23 is also silent as to the procedure courts should employ to appoint counsel. Courts to date have relied heavily on the Manual for guidance, but different procedures have emerged. Although "conventional wisdom encourages" judges to schedule initial conferences and begin the leadership appointment process early on,[92] sometimes courts wait to see if plaintiffs' counsel file a joint motion for appointment of class counsel wherein they have agreed *ex-ante* on their organization and leadership structure.[93]

Today courts typically enter an order early in the litigation regarding applications for class counsel.[94] In this initial order, courts either encourage counsel to meet and attempt to agree on which attorneys will serve as lead counsel and other appointments or solicit competitive individual applications for leadership positions. These two processes are briefly explained below as are their effects on the identity of the attorneys ultimately appointed to serve as class counsel.

1. Private Ordering

Private ordering or slate appointments (as they are often referred to) consist of counsel privately coming to an agreement amongst them-

89. *See, e.g.*, *In re* Syngenta AG MIR162 Corn Litig., MDL No. 2591, 2015 WL 13679782, at *2 (D. Kan. Feb. 13, 2015); Adoption of Organization Plan and Appointment of Counsel at 2, 6, *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig., No. 10-ml-021511 (C.D. Cal. May 14, 2010), ECF No. 169.

90. *See, e.g.*, Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, & Government Coordinating Counsel at 5, *In re* Volkswagen 'Clean Diesel' Mktg., Sales Pracs., & Prod. Liab. Litig., No. 15-md-02672 (N.D. Cal. Jan. 21, 2016) (appointing Government Coordinating Counsel), ECF No. 1084.

91. *See, e.g.*, Adoption of Organization Plan and Appointment of Counsel at 6–7, *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig., No. 10-ml-021511 (C.D. Cal. May 14, 2010) (appointing liaison committee for personal injury and wrongful death cases), ECF No. 169.

92. Dodge, *supra* note 70, at 342; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.22 (2004).

93. *See, e.g.*, Memorandum in Support of Plaintiffs' Motion to Appoint Plaintiffs' Co-Lead Interim Class Counsel and Executive Committee at 1, *In re* Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prod. Liab. Litig., No. 2:11-md-02233 (S.D. Ohio July 15, 2011), ECF No. 13; Case Management Order, *In re* Mercedes-Benz Tele Aid Contract Litig., No. 07-cv-02720 (D.N.J. Apr. 11, 2008), ECF No. 34.

94. *See infra* Part III.C.

selves as to which attorneys will represent the class and their organization. Whereas before counsel waited until class certification for the court's blessing, today counsel frequently jointly move for the court to approve their internal agreements at the outset of the litigation. Private ordering, however, has fallen out of favor, because of its tendency to perpetuate the 'boys' club' of exclusively white male repeat players.[95]

Several commentators, including a Third Circuit Task Force formed to provide guidance to courts appointing counsel, have warned that private ordering can create cartel-like groupings that benefit some lawyers and disadvantage others, usually women and other minority groups, as counsel may be appointed based on factors that have nothing to do with their adequacy.[96] Moreover, to reach a consensus, lead attorneys may make deals that are not in the best interest of the class, such as including too many attorneys.[97] Because the plaintiffs' bar is relatively small, attorneys may also be encouraged to broker a deal to avoid any possible reputational repercussions.[98] These deals can transcend the instant case and solidify the repeat player system.[99]

Furthermore, qualities that appeal to co-counsel, such as deference and cooperation, do not necessarily benefit the class.[100] Private ordering may also align with the implicit gender and racial biases of the attorneys proposing the slate.[101] Nevertheless, both the Manual and the Task Force encourage courts to support counsel's efforts at private ordering but warn courts to not abdicate their responsibility under Rule 23 to ensure that counsel is adequate.[102]

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95. *See* Coleman, *supra* note 29, at 649 (noting that slate or joint proposals exclude new entrants because repeat players dominate the proposals made to the court).

96. THIRD CIRCUIT TASK FORCE, *supra* note 30, at 10; Redis & Karaba, *supra* note 36, at 124.

97. THIRD CIRCUIT TASK FORCE, *supra* note 30, at 10; Burch, *Judging*, *supra* note 16, at 93 (discussing "tit-for-tat" reciprocity among repeat players [and] "'good ol' boy networks'" that can result from private ordering).

98. *See* Burch, *Judging*, *supra* note 16, at 94.

99. *Id*. at 93.

100. *Id*. at 98.

101. JAMES F. HUMPHREYS COMPLEX LITIG. CTR. G.W. L. SCH., INCLUSIVITY AND EXCELLENCE: GUIDELINES AND BEST PRACTICES FOR JUDGES APPOINTING LAWYERS TO LEADERSHIP POSITIONS IN MDL AND CLASS-ACTION LITIGATION 7 (2020) [hereinafter HUMPHREYS COMPLEX LITIG. CTR.], https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads /Diversity%20Master%20Revised_1123.pdf [https://perma.cc/YF56-R9AJ].

102. *See* THIRD CIRCUIT TASK FORCE, *supra* note 30, at 95–97; *see* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221, § 40.22 (2004); *see* Mullenix, *supra* note 46, at 1733–34.

2. Individual Competing Applications

There has been a relatively recent shift from private ordering to a competitive application process.[103] Under the competitive application process, the court enters an order early in the litigation inviting counsel to individually apply for a leadership position or positions. The order typically provides the organizational structure contemplated by the court, the criteria under which the court will evaluate applicants, and the materials applicants must submit (a curriculum vitae, a motion or letter containing information requested by the court, etc.). A competitive individual application process in theory has few drawbacks other than the work it creates for the court when many applications are submitted, though it could be argued that other counsel are better situated to evaluate applicants' adequacy than courts. That said, the effectiveness of the process in appointing the best counsel and its ability to remain truly competitive is largely dependent on the criteria courts weigh most heavily in appointing counsel.[104]

For example, basing appointment decisions in a competitive application process on class counsel's proposed billing rates and fees, a process often referred to as auction bidding, has received significant criticism.[105] While those advocating in favor of auction bidding argue it is a way to recreate the private marketplace where clients shop around for the best fees,[106] others note that auctions fail to appoint the most qualified attorneys and can be problematic for several other reasons. For example, it may be difficult for counsel to determine whether a fee is reasonable early in the litigation.[107] If counsel bids too low and it becomes clear they will not be properly compensated, they may lose motivation to zealously advocate during the case.[108] Auctions can also result in the appointment of the least qualified counsel, simply because their fees are the lowest[109]—penny wise and pound foolish. The auction bidding process might also discourage more qualified counsel from applying and

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103. Louis W. Hensler III, *Class Counsel, Self-Interest and Other People's Money*, 35 U. MEM. L. REV. 53, 97–98 (2004) (attributing this shift to Rule 23(g)'s enactment); HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 10.

104. *See infra* Part III.C.

105. *See, e.g.*, THIRD CIRCUIT TASK FORCE, *supra* note 30 at 19–29; Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 667–70, 685–98 (2002); Andrew K. Niebler, *In Search of Bargained-For Fees for Class Action Plaintiffs' Lawyers: The Promise and Pitfalls of Auctioning the Position of Lead Counsel*, 54 BUS. LAW. 763, 777–802 (1999).

106. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 82 (S.D.N.Y. 2000); *In re* Oracle Sec. Litig., 131 F.R.D. 688, 693 n.12 (N.D. Cal. 1990); Fisch, *supra* note 105, at 670.

107. THIRD CIRCUIT TASK FORCE, *supra* note 30, at 46–50.

108. *Id.* at 10–12.

109. *See id.* at 11–12.

result in a smaller pool of applicants.[110] Bidding also encourages similar backroom deals between attorneys or firms, wherein bid-rigging agreements are formed to submit similar fee proposals or propose slate appointments.[111]

Many have argued that competitive applications processes may break the repeat player dynamic.[112] But in practice individual competitive applications have not significantly reduced repeat player appointments because, as a few have warned, they tend to favor larger, prominent law firms when too much emphasis is placed on reputation or experience.[113] The competition is frequently won by repeat players because courts, under Rule 23(g), must give weight to counsel's experience and resources.[114] Moreover, courts' emphasis on the support each individual applicant receives from other attorneys can lead to coordinated individual applications that mimic private ordering, where attorneys submit individual applications that unanimously support each other's appointment for various positions.[115]

II. DIVERSITY AS BAROMETER FOR ADEQUACY

This Part argues that diverse counsel is the best counsel to adequately and fairly represent the interests of all class members. Diversity at the class counsel's table enhances the quality of the representation by bringing a wider range of ideas, approaches, perspectives, and lenses.[116] This is important in any case, but more so in class actions and particularly in class actions with diverse class members. Yet to date, diversity is severely lacking in the role of class counsel. Women and other minorities have been overwhelmingly underrepresented in the role of class counsel. A study that looked at Northern District of Illinois cases in 2013 found that only 13% of lead lawyers in class actions were women.[117] The most recent data on the gender gap found that women attained only 25% of class counsel appointments in 2017, which was up from 24% in

110. *Id*. at 54–55.

111. *Id*. at 36.

112. Dodge, *supra* note 70, at 366; BURCH, MASS TORT DEALS, *supra* note 16, at 92; HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 15.

113. *See infra* Part III; Burch, *Judging*, *supra* note 16, at 95.

114. HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 10; Burch & Williams, *supra* note 16, at 1488.

115. *See, e.g.*, Application For the Appointment of David Stellings As Co-Lead Counsel and a Proposed Leadership Group at 9–10, *In re* ZF-TRW Airbag Control Units Prod. Liab. Litig., No. 19-ml-02905, (C.D. Cal. Jan. 21, 2020), ECF No. 68.

116. *See* HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 3.

117. SCHARF & LIEBENBERG, *supra* note 1, at 12.

2016, but down from 28% in 2015.[118] Although this was an improvement from earlier years when women averaged only 14% of class counsel appointments,[119] it is still remarkably lower than the percentage of women entering and in the legal profession, which was 54.1% in 2020.[120] But this statistic is more commensurate with the number of female equity partners in the profession, which is approximately 21%, and female non-equity partners at an estimated 31%.[121] The study also found that the recent increase in female appointments was primarily due to secondary class counsel appointments. For example, women in 2017 received approximately 25% of PEC appointments, compared to 19% of lead counsel appointments.[122]

Data regarding racial and ethnic minorities' participation in class action litigation and MDLs is very limited.[123] A 2020 study of MDLs created between 2016 and 2019 that did not differentiate between lead counsel and PEC appointments found that fewer than 10% of leadership appointments went to non-white attorneys and on average only 5% of appointments went to attorneys identifying as "nonwhite."[124] The study did not show particularly significant yearly progress either. In 2016, 4% of attorneys appointed identified as nonwhite, 5% in 2017, 4% in 2018, and 7% in 2019.[125] These figures, according to the study, are nearly two-thirds less than the correlating representation in the legal profession, wherein approximately 17% of attorneys identify as nonwhite.[126]

This discouraging data has not gone unnoticed. In recent years, several courts have made conscious efforts to curb the gender and racial or ethnic gaps. This Part begins by explaining why diversity at the class counsel table is always an asset, but more so in class actions with diverse classes. The first sub-section builds on prior research, discussing

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118. ALVARÉ, *supra* note 14, at 8.

119. *Id.*

120. Women In the Legal Profession, ABA Legal Profile, https://www.abalegalprofile.com/women/#:~:text=Women%20in%20Law%20Schools,male%20students%20was%20in%202014 [https://perma.cc/6F8Z-TYES] (last accessed June 15, 2022); Patrick Smith, *There Are More Women Lawyers Than Ever, and They're Not Pleased With Legal Industry Norms*, AM. LAW. (July 29, 2021), https://www.law.com/americanlawyer/2021/07/29/there-are-more-women-lawyers-than-ever-and-theyre-not-pleased-with-legal-industry-norms/#:~:text=Even%20as%20women%20lawyers%20start,last%20decade%2C%20the%20ABA%20found [https://perma.cc/J256-MFUK]; Abigail Rowe, *The Parity Paradox*, BEST LAWS. (June 25, 2018), https://www.bestlawyers.com/article/women-now-outnumber-men-in-law-school/2029 [https://perma.cc/DSB8-RT9G] (noting that women made up 50.3% of law school graduates entering the profession in 2017).

121. Smith, *supra* note 120.

122. ALVARÉ, *supra* note 14, at 8.

123. HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at iii (noting the lack of data on people of color, disabled individuals, and LGBTQ lawyers' underrepresentation in class actions and MDLs).

124. Bronstad, *supra* note 1.

125. *Id.*

126. *Id.*

the importance of diverse representation and diverse groups. This research serves to illustrate why a lack of diversity can impact counsel's ability to fairly and adequately represent the interests of the class under Rule 23(g). This Part then explains why diversity is even more dire in a removed representative context—where homogenic attorneys are tasked with representing the interests of a diverse number of class members with little to no communication with those members throughout the entire litigation. Lastly, courts' efforts to date to address the current gender and minority gap are discussed.

A. *Diversity Impacts Adequacy*

Imagine if the Supreme Court today were composed solely of men, or the compensation board of a Fortune 500 company with hundreds of employees were all white and all male, or the empaneled jury in an employment sexual harassment lawsuit were all affluent white men, or the promotion and tenure committee of a university were all white. These examples raise eyebrows, make headlines, and cause concern for legitimate reasons. First, they reek of discrimination in the selection or appointment of these bodies. Second, they raise questions as to the integrity and impartiality of any outcome stemming from these bodies. And lastly, regardless of how fair, socially aware, or "woke" a homogenous group is, implicit and unconscious cognitive biases prevent one gender, race, ethnicity, socio-economic class, etc. from adequately and fairly speaking for all.[127] These concerns have been echoed in different representative contexts. For example, in political science, researchers have focused on the legitimacy of representative decision-making by considering the identity of the representatives in relation to those they represent, how representatives are chosen, and both the perceived and actual outcomes of such representative decision-making process.[128]

First and foremost, courts' continuous implicit conclusion that white male attorneys are the best attorneys suited to represent the interest of class members *is* structural and institutional discrimination, be it conscious or unconscious. While efforts have been made to diversify the federal bench, judges' selection of counsel continues to reflect the white male privilege that has traditionally plagued the legal profes-

127. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 384, 436 (2000) (questioning the homogenous preference of all members across a class and noting that "there is seldom a single best solution for all class members").

128. *See* Sveinung Arnesen & Yvette Peters, *The Legitimacy of Representation: How Descriptive, Formal, and Responsiveness Representation Affect the Acceptability of Political Decisions*, 51 COMP. POL. STUD. 868, 870 (2017).

sion. Women and minorities are effectively discouraged from joining or advancing in the plaintiffs' class action bar because the odds of being appointed over white male repeat players remain slim. The competitive appointment process courts have implemented in the last few decades has in large part perpetuated the discriminatory process that older white male attorneys previously created by private ordering, but it now also has the taste of government-sponsored discrimination from the judiciary.

Second, current appointment processes that at least one scholar has described as "rigged to benefit those [attorneys] who sit in these elite circles"[129] tarnish the integrity of the legal system.[130] It is troubling that courts consistently appoint white men over women and other racial and ethnic minority attorneys, particularly to represent diverse classes. Indeed, some have argued that courts' continued appointment of white male repeat players may reflect courts' own biases or, at least, benign-intentioned neglect.[131] These attorneys are then often relied upon for their exclusive expertise as to how class litigations can best function, a privilege they can take advantage of to continue to exclude competition and promote their best interests.[132] Professor Brooke D. Coleman describes this as a procedural process where the elite 1% of attorneys and judges control the litigation to the disadvantage of the 99%.[133]

Third—and certainly most important from a utilitarian perspective—the discriminatory effects of the class counsel gender and racial or ethnic gap harm *class members*. Multiple studies have shown the importance in practice of enhancing representation that reflects its constituents, i.e., descriptive representation.[134] Descriptive representation has been defined as representation by "individuals who in their own backgrounds mirror some of the more frequent experiences and outward manifestations of belonging to the group."[135] For example, researchers have found that the inclusion of female and LGBTQIA+ representatives in legislatures impacts the legislation produced on topics relevant to these groups[136] and that Black representatives similarly bet-

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129. Coleman, *supra* note 22, at 1036.

130. Coleman, *supra* note 29, at 618 (noting that appearances of inequity call the system into question).

131. HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 4; Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2207 (1993).

132. *See* Coleman, *supra* note 22, at 1008–09.

133. *Id.* at 1007–10, 1013–37.

134. Arnesen & Peters, *supra* note 128, at 871.

135. Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"*, 61 J. POLITICS 628, 628 (1999).

136. Kathleen A. Bratton & Leonard P. Ray, *Descriptive Representation, Policy Outcomes, and Municipal Day-Care Coverage in Norway*, 46 AM. J. POL. SCI. 428, 429 (2002); Emanuela Simona Garboni, *The Impact of Descriptive Representation on Substantive Representation of Women at European and National*

ter represent Black constituents.[137] These studies thus conclude that descriptive representation has a palpable effect on substantive representation.[138]

The gender and racial and ethnic gaps in representation, moreover, is exacerbated in class action litigation. Unlike in democratic politics, where constituents vote to elect their representative, class members do not vote, hire, or really have a say as to which attorneys will represent them. Furthermore, unlike in other cases where clients can continuously communicate their interests and make decisions regarding the course of the litigation, class members cannot. Only a few class members serve as class representatives and even they have little, if any, say in what remedies are pursued or achieved in a settlement.[139] Even though class members suffer the same or similar injuries because of a defendant's uniform conduct, the effects of such injury (i.e., consequential damages) can vary,[140] as can the relief that makes different class members whole.

For example, a settlement against an automaker that knowingly installed faulty sparkplugs in its vehicles could provide compensation for time taken off work to have the vehicle repaired, but not for childcare expenses incurred to take the vehicle to be repaired. It could compensate for expenses renting an alternative vehicle, but not expenses incurred taking public transportation. The settlement could also require certain paperwork to make a claim, but the paperwork was only emailed by car dealerships if requested and not maintained by other dealerships. A settlement could also call for the automaker to pay for a national advertising campaign to ensure all class members are aware of the dangerous defect, but what if such advertising were only made on National Public Radio, the Wall Street Journal, or during the Super Bowl?

The impact is that childless class members or class members who are not primarily responsible for childcare are unequally compensated. Similarly, class members who could afford a rental car are compensated, but those that could not afford a rental car or chose for other reasons to take public transportation are not. Finally, how notice is distributed to class members could also impact whether certain classes are compensated at all. National Public Radio's median listener makes approximately $103,000 a year, and its listeners in general tend to attain

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Parliamentary Levels. Case Study: Romania, 183 SOC. & BEHAV. SCI. 85, 85–86 (2015); Andrew Reynolds, *Representation and Rights: The Impact of LGBT Legislators in Comparative Perspective*, 107 AM. POL. SCI. REV. 259, 260 (2015); Leslie A. Schwindt-Bayer & William Mishler, *An Integrated Model of Women's Representation*, 67 J. POLITICS 407, 410 (2005).

137. Mansbridge, *supra* note 135.

138. *See id*.

139. Gold, *supra* note 3, at 88–90, 97–98; Macey & Miller, *supra* note 3, at 459.

140. Gold, *supra* note 3, at 99–102.

higher levels of education.[141] Readers of the Wall Street Journal also share similar demographics with subscribers having an average household income of $240,000, average household net worth slightly under $1.5 million, and an 80% college education rate.[142] Superbowl viewers, putting aside that men watch at significantly greater rates than women, tend to be between ages 18 and 44.[143] Thus, the channels and means by which notice is provided of a defect or a settlement could impact who among those in a diverse class receives relief.

None of these distinctions are gender, age, or race specific, but they may inadvertently disparately impact class members of a certain gender, race, age, or income level. Although every settlement is a compromise where optimal relief can rarely, if ever, be attained because defendants' funds are limited and practicalities require certain terms, often the same funds can lead to different results. When disparities, potential avenues for relief, or barriers to obtaining relief do not even surface on class counsel's radar, the interests of class members are not adequately represented.[144] Indeed, it seems difficult to serve as a fiduciary to a class of clients whose interests counsel neglects or fails to understand. Thus, while expertise is necessary in these cases to bring fruitful results for the class and navigate the complexities of class and MDL litigation, the implication that enough expertise will result in the correct strategies and decisions ignores that class counsel carries their own preferences that can bias their decision-making.[145] The concept of representation, leading American political theorist Hanna Pitkin explains, requires that a representative's decisions and actions reflect the wishes, needs, and interests of the people.[146] Thus, to adequately represent class members, class counsel's decisions should reflect class members' actual wishes, needs, and, as Rule 23(g) requires, interests.[147]

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141. Harry Clark, *By the Numbers: Who Is Actually Listening to Public Radio?*, MKT. INGENUITY BLOG (last visited Aug. 24, 2022) https://blog.marketenginuity.com/by-the-numbers-who-is-actually-listening-to-public-radio [https://perma.cc/3885-JD2T].

142. *WSJ.com Audience Profile*, WALL ST. J. (May 9, 2018), https://images.dowjones.com/wp-content/uploads/sites/183/2018/05/09164150/WSJ.com-Audience-Profile.pdf [https://perma.cc/JR6K-ALE5].

143. Alex Silverman, *Super Bowl Viewership Poised to Increase this Year Thanks To Gen Zers, Millennials*, MORNING CONSULT (Feb. 8, 2022), https://morningconsult.com/2022/02/08/super-bowl-viewership-increase/#:~:text=This%20year%2C%20however%2C%20adults%20ages,plan%20to%20watch%20the%20game [https://perma.cc/9T2U-W4RY].

144. *See* Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1824 (1992) (noting that cross cultural lawyering is only effective when attorneys are fully conscious and sensitive of their clients' needs).

145. *See* Arsen & Peters, *supra* note 129, at 873.

146. *See* HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 209–12 (1972).

147. FED. R. CIV. P. 23(g)(1)(B).

Additionally, diversity provides functionalities and contributions to innovation, which are necessary to protect diverse class members' interests. Indeed, research has demonstrated time and time again that diverse teams provide better net results for the audiences or entities they serve.[148] This is because diverse groups include members with different reasoning, interpretation, and problem-solving skills.[149] Researchers have found that identification with a particular group, be it gender, race, socio-economic status, etc., produces a "bonus effect" when different actors come together to find solutions.[150] Moreover, diverse groups are better able to identify errors in group predictions.[151] A study found that the best predictor of a group's performance was not its individual members' IQ, but rather its collective intelligence, which increased with the greater number of women in the group, because women read more social cues and allowed for more varying opinions and interjections.[152] Another study found that businesses with diverse teams were 15% more likely to have returns above the industry mean.[153] The study attributed such success to diverse groups' tendency to notice more facts and make fewer factual errors.[154]

Diverse teams can also combat groupthink, a mode of thinking that occurs when individuals in a cohesive group are more prone to strive for unanimity than the best course of action.[155] The more homogenous the group, the more likely it is to confirm its individuals' tendency to overestimate agreement with their own beliefs.[156] Similarly, homogenous

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148. Coleman, *supra* note 29, at 641 (citing Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* 16 (Peterson Inst. for Int'l Econ, Working Paper No. 16-3, 2016), https://piie.com/publications/wp/wp16-3.pdf [https://perma.cc/JE5Z-25D6]); Lois Joy, Nancy M. Carter, Harvey M. Wagner & Sriram Narayanan, *The Bottom Line: Corporate Performance & Women's Representation on Boards*, CATALYST (2007), https://www.catalyst.org/wp-content/uploads/2019/01/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf [https://perma.cc/8633-7RJV]); Sian Beilock, *How Diverse Teams Produce Better Outcomes*, FORBES (Apr. 4, 2019), https://www.forbes.com/sites/sianbeilock/2019/04/04/how-diversity-leads-to-better-outcomes/?sh=6db165465ced [https://perma.cc/TYC6-CRSW].

149. SCOTT PAGE, THE DIVERSITY BONUS 13–28 (2017); Burch & Williams, *supra* note 16, at 1529–30; Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71, 77–84 (2000).

150. PAGE, *supra* note 149, at 15–16.

151. *Id*.

152. Anita Williams Woolley, Christopher F. Chabris, Alex Pentland, Nada Hashmi & Thomas W. Malone, *Evidence for a Collective Intelligence Factor in Performance of Human Groups*, 330 SCIENCE 686, 688 (Oct. 29, 2010).

153. David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter [https://perma.cc/54WQ-NUP7].

154. *Id*.

155. IRVING JANIS, VICTIMS OF GROUPTHINK 9 (1972).

156. *See* Cameron J. Bunker & Michael E.W. Varnum, *How strong is the association between social media use and false consensus?*, 125 COMPUTERS IN HUMAN BEHAV. 1, 5 (2021) (discussing how false consensus bias can be exacerbated in online groups where most users share similar thoughts); Kathleen P. Bauman & Glenn Geher, *We Think You Agree: The Detrimental Impact of the False Consensus Ef-*

groups are prone to confirmation bias, where views contrary to their own are sweepingly discounted.[157] Groupthink and other cognitive biases can cause stagnation, lack of creativity, overconfidence in wrong decisions, poor analysis and problem solving, and has often been blamed for companies' or products' extinction.[158] In contrast, heterogenous groups introduce creative decision-making based on their varied perspectives and experiences and are less likely to fall victim to groupthink or other cognitive biases.[159]

Diversity in the role of class counsel is also important, as Professors Julie Lawton and Melissa Mortazavi point out, because attorneys are more likely to be empathetic and loyal to clients with which they share some demographic overlap.[160] Indeed, clients often look for racial and ethnic commonality with their attorneys, expecting them to be more empathetic and better fiduciaries than other attorneys without such commonalities.[161] While ethical rules require lawyers to be neutral as to color, race, and gender and not allow these to impact a lawyer's representation of a client,[162] some have argued that gender and race neutrality is simply impossible.[163] Instead, scholars explain, attorneys, as humans, categorize individuals into groups that they share similarities

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fect on Behavior, 21 CURRENT PSY. 293, 314 (2002); *see generally* Christopher G. Wetzel & Marsha D. Walton, *Developing Biased Social Judgments: The False-Consensus Effect*, 49 J. PERSONALITY & SOC. PSY. 1352 (1985) (explaining false consensus bias phenomenon that allows humans to falsely over attribute to others agreement with their own beliefs, which is exacerbated in homogenous groups).

157. Coleman, *supra* note 22, at 1052–55; Michela Del Vicario, Antonio Scala, Guido Caldarelli, H. Eugene Stanley & Walter Quattrociocchi, *Modeling confirmation bias and polarization*, SCI. REPS. Jan. 11, 2017, at 1–2, 7, https://doi.org/10.1038/srep40391 [https://perma.cc/3NPH-97TW].

158. Forbes Coaches Council, *10 Effects of Groupthink and How to Avoid Them*, FORBES (Nov. 4, 2016), https://www.forbes.com/sites/forbescoachescouncil/2016/11/04/10-effect-of-groupthink-and-how-to-avoid-them/?sh=44f434614cef [https://perma.cc/35DJ-JL43].

159. HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 8.

160. Julie D. Lawton, *Am I the Client? Revisited: The Role of Race in Intra-Race Legal Representation*, 22 MICH. J. RACE & L. 13, 31 (2016); Melissa Mortazavi, *Blind Spot: The Inadequacy of Neutral Partisanship*, 63 UCLA L. REV. DISCOURSE 16, 21–22 (2015) (citing Roland Acevedo, Edward Hosp, Rachel Pomerantz, *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 BUFF. PUB. INT. L. J. 40 (2000)); *see also* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 41 (2001); Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J. L. & PUB. POL'Y 1, 15–16 (2008); Alexis Anderson, Lynn Barenberg & Carwina Weng, *Challenges of "Sameness": Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339, 388 (2012)).

161. Lawton, *supra* note 160, at 23–24.

162. MODEL RULES OF PROF'L CONDUCT 8.4. (AM. BAR ASS'N 2016) ("It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.").

163. *See* Lawton, *supra* note 160, at 26–29.

with, be it race, gender, sexual orientation, life experiences, etc.[164] Indeed, another study found that descriptive representation in the political context was more important to women and politically marginalized racial or ethnic groups.[165] Women in that study wanted to be represented by women more than men wanted to be represented by men, and those that lived in politically peripheral regions found it more important that representatives also come from that region.[166]

For cross cultural representation (i.e., white attorneys representing minority clients) to be effective, the attorney *and* the client must explicitly acknowledge their differences and maintain an open dialogue regarding the same,[167] a dialogue that is notably absent between class counsel and most class members. Indeed, the majority of communication that occurs between class members and class counsel is with class representatives, who class attorneys have specifically chosen to represent absent class members through a process that also likely reflects counsel's biases. Largely because of this and Rule 23(g)'s adequacy requirements that include an implicit duty of loyalty,[168] Professor Mortazavi argues courts must consider the gender and race of counsel when making appointment decisions.[169]

Descriptive representation also has the effect of, rightfully or wrongly, legitimizing the outcome achieved by representatives.[170] This is because, as discussed above, principles have a greater sense of trust in representatives that look like them and trust those representatives will make decisions that better align with their interests and preferences.[171] And even when representatives do not make decisions that perfectly coincide with their preferences, constituents will assume it is for a good reason that is in their best interest.[172] Much of the criticism surrounding class actions is targeted at the assumed motivations of class counsel and the settlements they achieve.[173] For example, critics have accused class counsel of being solely motivated by their own fees and

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164. *Id.* at 27; Anderson, *supra* note 160, at 341.

165. Arnesen & Peters, *supra* note 128, at 892.

166. *Id.*

167. *See* Bryant, *supra* note 160, at 55; Russell G. Pearce, *White Lawyers: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2089 (2005).

168. *See* Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 71 (2004); Nagareda, *supra* note 22, at 288.

169. Mortazavi, *supra* note 160, at 21–22.

170. Arnesen & Peters, *supra* note 128, at 875, 882 (citing Bratton & Ray, *supra* note 136); Mansbridge, *supra* note 135, at 634–35 (1999)).

171. Arsnesen & Peters, *supra* note 128, at 875.

172. *Id.*

173. *See, e.g.*, Hensler, *supra* note 103, at 55; Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 145-55 (2001); Martin Redis, *The Liberal Case Against the Modern Class Action*, 73 VAND. L. REV. 1127, 1139–42 (2020).

self-interest.[174] And perhaps a change in those assumptions might correlate with a different perception of the remedies achieved in the litigation. It could also potentially lead to fewer objections to class settlements, presuming, of course, objections are not made by serial objectors and that those objecting were aware of the identity of counsel. Perhaps descriptive representation of class members could increase confidence in class actions as an effective redress for injured consumers.

Professor Elizabeth Chamblee Burch, however, argues that not all class counsel diversity is created equally and that diversity of identity is too blunt a tool to provide the benefits that come with employing a diverse group of actors as class counsel.[175] She contends that demographically diverse attorneys do not necessarily lead to diverse opinions, arguing that an affluent Mexican American female Harvard Law School graduate is likely to have the same analytical tools and training as a white male and brings no varied experience or perspective.[176] Instead, she advocates for cognitive diversity that focuses on appointing individuals with diverse knowledge, experience, and expertise.[177] But cognitive diversity, as Chamblee Burch herself recognizes, is extremely difficult to measure or assess.[178] And despite its intrinsic appeal, it should not, respectfully, replace diversity of identity.[179] As Professor Brooke Coleman explains, cognitive diversity may be a more nuanced approach to diversity, but it ignores the role identity diversity plays and the independent value of identity diversity.[180]

In sum, diversity amongst class counsel has obvious benefits to the profession, the validity of the application process, and the substantive interests of class members, as it avoids the pitfalls that plague homogenous groups and increases the perceived legitimacy of class actions and their outcomes.

B. *Diversity Efforts from the Bench*

Based on emerging statistics and much of the research above, courts are beginning to recognize the many assets diversity at class counsel's table provides class members. Efforts to include diverse attorneys to represent the class began approximately a decade ago, but

174. *See* Hensler, *supra* note 103.
175. Burch, *Judging*, *supra* note 16, at 120–21.
176. Burch, *supra* note 23, at 140.
177. Burch, *Judging*, *supra* note 16, at 120–21.
178. Coleman, *supra* note 29, at 640.
179. *Id.* at 638–39.
180. Burch, *supra* note 23, at 140.

only recently have those efforts become more pronounced. Although neither Rule 23 nor the Manual discusses adequacy in terms of diversity, courts, recognizing the benefits a diverse group of attorneys brings to a class, are more frequently making efforts to appoint diverse counsel. Initial efforts on this front are often credited to former Southern District of New York Judge Harold Baer Jr., who pushed "to ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics."[181]

Appointed to the bench in 1994 by President Clinton, Judge Baer frequently required counsel to provide information regarding the demographics of the attorneys who would work on the case and, when available, the demographics of the class.[182] Judge Baer also required that counsel make "every effort" to assign at least one female and minority attorney with the necessary experience to the matter.[183] He, however, was not the only judge striving for more diversity. At least one other district court judge in the early 2010s similarly stated in open court that she hoped women would be included in the ranks of leadership (although she appointed a four-male lead attorney team in a multidistrict class action litigation involving defective intrauterine devices).[184] But Judge Baer's efforts were the most vocal and caught the attention of the Supreme Court.

In a somewhat bizarre statement accompanying a denial of certiorari in 2013, Justice Alito argued that Judge Baer's practice constituted "[c]ourt-approved discrimination based on gender" and "racial discrimination" that did not pass Constitutional muster.[185] Justice Alito also intimated that—despite Rule 23(g)(1)(B)'s broad language permitting courts to consider anything pertinent to counsel's ability to fairly and adequately represent the interests of the class—deviations from the Rule's required criteria would be chaotic and intolerable[186] and that counsel's race or gender was not in any way pertinent to their ability to

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181. *See* Martin v. Blessing, 571 U.S. 1040, 1041 (2013) (Alito, J.) (denial of cert.); *see also* Public Emp. Ret. Sys. Miss. v. Goldman Sachs Grp., Inc., 280 F.R.D. 130, 142 n.6 (S.D.N.Y. 2012); Spagnola v. Chubb Corp., 264 F.R.D. 76, 95 n.23 (S.D.N.Y. 2010); Class Action Order, *In re* Gildan Activewear Inc. Securities Litig., No. 08-cv-05048 (S.D.N.Y. Sept. 20, 2010), ECF No. 59; *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007).

182. *See, e.g.*, *Public Emp. Ret. Sys. Miss.*, 280 F.R.D. at 142 n.6; New Jersey Carpenters Health Fund v. Residential Capital, LLC, Nos. 08-CV-8781, 08-CV-5093, 2012 WL 4865174, at *5 n.5 (S.D.N.Y. Oct. 15, 2012); *Spagnola*, 264 F.R.D. at 95 n.23.

183. *See, e.g.*, Class Action Order at 1, *Gildan*, No. 08-cv-05048 (S.D.N.Y. Sept. 20, 2010).

184. Stephanie Francis Ward, *Women Should Be Among Lead Lawyers in IUD Case, Federal Judge Says*, ABA J. (May 20, 2013), https://www.abajournal.com/news/article/iud_litigation_needs_some_women_as_lead_lawyers_says_federal_judge [https://perma.cc/5CAW-HSNB].

185. *Martin*, 571 U.S. at 1042.

186. *Id.* at 1043 (stating it "would be intolerable if each judge adopted a personalized version of the criteria set out in Rule 23(g)").

fairly and adequately represent the class.[187] No other member of the Court joined Justice Alito's statement, but that is not to say others did not agree. Furthermore, the Court's makeup today is not what it was in 2013.

Justice Alito was not the only critic of Judge Baer's appointment practices.[188] Professor Dawinder Sidhu argued these practices implicated the Equal Protection Clause,[189] and SEC attorney Michael Hurwitz contended they were an inappropriate means for a court to push its socio-political agenda.[190] Judge Baer claimed to be undeterred by criticism and welcomed a Supreme Court challenge,[191] but he passed away less than a year after Justice Alito's critique. Courts, at least for a period, appeared to have been discouraged from considering diversity when appointing counsel.

In the last few years, however, several courts have taken up Judge Baer's baton.[192] For example, in 2020 the *In re Robinhood Outage Litigation* district court rejected a joint motion to appoint counsel specifically because of counsel's lack of diversity.[193] The court sent plaintiffs' counsel back to the drawing board after sharing its concerns about their lack of diversity.[194] In that case, all four of the attorneys proposed for lead counsel and seven of the attorneys proposed to serve on the PEC were male.[195]

Courts' efforts, however, appear to be focused on PECs or second-tier leadership positions. Because PECs can have several members, the opportunity to include diverse members is greater. Courts sometimes

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187. *Id.* at 1043–45.

188. *See* Dawinder S. Sidhu, *Racial Mirroring*, 17 FEDERALIST SOC'Y REV. 14, 15 (2016) (arguing that Judge Baer's practice in selecting class counsel, along with other practices discussed in the article, violates the Equal Protection Clause); Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity*, 17 CARDOZO J. L. & GENDER 321, 327–30 (2011).

189. Dawinder S. Sidhu, *Racial Mirroring*, 17 U. PA. J. CONST. L. 1335, 1351 (2015); Sidhu, *supra* note 188, at 16.

190. Hurwitz, *supra* note 188, at 330–31.

191. Bernard Vaughn, *Federal Judge Criticized by Supreme Court Justice Fires Back*, REUTERS (Dec. 13, 20), https://www.reuters.com/article/us-federal-judge/federal-judge-criticized-by-supreme-court-justice-fires-back-idUSBRE9B510520131206 [https://perma.cc/HEF9-RBU2].

192. *See In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 7330596, at *2 (N.D. Cal. July 14, 2020); City of Providence, R.I. v. AbbVie, Inc., No. 20-cv-5538, 2020 WL 6049139, at *6 (S.D.N.Y. Oct. 13, 2020) (finding relevant counsel's gender and racial diversity for appointment); *In re* Stubhub Refund Litig., No. 20-md-02951, 2020 WL 8669823, at *1 (N.D. Cal. Nov. 18, 2020) (noting counsel's efforts to create a diverse legal team as a reason for appointment); Pretrial Order # 20 at 2–3, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-md-02924 (S.D. Fla. May 8, 2020) ("The Court also sought to appoint a diverse leadership team that is representative of the inevitable diversity of the Plaintiffs in this case, and a team that affords younger and slightly less experienced attorneys an opportunity to participate in a leadership role in an MDL.").

193. *See Robinhood*, 2020 WL 7330596, at *2.

194. *Id.*

195. *Id.*

appoint younger attorneys with less experience and whose inexperience will be balanced by other members of the PEC and lead counsel.[196] But other courts have rejected invitations to include additional diverse PEC members, finding that increasing the legal team and possible legal costs was not worth the tradeoff.[197]

Additionally, diversity considerations have not always led to the appointment of diverse counsel. Some courts have focused on counsel's firm's commitment to diversity or commitment to assign work in the case to women and minorities.[198] Other courts have expressed orally at pretrial conferences expectations that counsel give diversity serious consideration when proposing candidates for appointment, but then failed to place any explicit value on counsel's diversity when making appointments.[199] Regardless of how courts have considered diversity and its resulting effects, it is an increasingly surfacing topic in class counsel appointment discussions.[200] These efforts and heightened awareness have not yet, as Part III finds, translated to dramatic improvements.

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196. *See* Elizabeth A. Fegan, *An Opportunity or Landmine: Promoting Gender Diversity from the Bench*, FED. LAW. 38, 41 (2016) (quoting class counsel repeat player Steve Berman as opining that if a judge believes diversity is relevant, then the place for diversity is a PEC); *see, e.g.*, Pretrial Order No. 3: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 4, *In re* Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., & Prod. Liab. Litig., 17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173 (selection of PSC involved "balanc[ing] the desire for continuity with the interest in diversity and to provide opportunities for new attorneys to leadership positions").

197. *See, e.g.*, Rubenstein v. Scripps Health, Nos. 21-cv-1135, 21-cv-1143, 21-cv-1238, 2021 WL 4554569, at *3–4 (S.D. Cal. Oct. 5, 2021); *In re* Nat'l Football Leagues Sunday Ticket Antitrust Litig., No. ML 15-02668 (JEMx), 2016 WL 6693146, at *3–4 (C.D. Cal. May 23, 2016).

198. *See, e.g.*, City of Providence, R.I. v. AbbVie, Inc., No. 20-cv-5538 (LJL), 2020 WL 6049139, at *6 (S.D.N.Y. Oct. 13, 2020); Class Action Order, *In re* Gildan Activewear Inc. Securities Litig., No. 08-cv-05048 (S.D.N.Y. Sept. 20, 2010), ECF No. 59; Nate Raymond, *Judge Pushes Diversity in Picking Lawyers to Lead Zantac Litigation*, WESTLAW NEWS (May 11, 2020, 2:41 PM), https://www.reuters.com/article/products-zantac/judge-pushes-diversity-in-picking-lawyers-to-lead-zantac-litigation-idUSL1N2CT1BD [https://perma.cc/35V3-5LRP].

199. HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 19; Jody Godoy, *Ohio Judge Calls for Diverse Counsel to Lead First Energy Shareholder Lawsuit*, WESTLAW NEWS (Nov. 17, 2020, 7:44 PM), https://www.reuters.com/article/securities-firstenergy-leadplaintiff/ohio-judge-calls-for-diverse-counsel-to-lead-first-energy-shareholder-lawsuit-idUSL1N2I301E [https://perma.cc/JQ2A-C4CM].

200. *See Robinhood*, 2020 WL 7330596 at *2; *AbbVie, Inc.*, 2020 WL 6049139, at *6 (finding relevant counsel's gender and racial diversity for appointment); *see also* Lauren Berg, *Diverse Atty Group Wins Lead Counsel In Elmiron MDL*, LAW360 (Jan. 22, 2021), https://www.law360.com/articles/1347858/diverse-atty-group-wins-lead-counsel-in-elmiron-mdl [https://perma.cc/5TLW-R975] (district court "repeatedly asked for diversity in the representation because plaintiffs in the MDL are expected to be mostly women" and appointed by consensus a group of mostly female attorneys and 12 attorneys that had never served in a PSC, 11 of which had practiced for less than 10 years).

III. CLASS COUNSEL APPOINTMENTS IN DIVERSE AUTO CONSUMER CLASSES

Not all classes are diverse. A few of them look much like the lawyers that represent them. This Part, however, dissects a subset of consumer classes that are at least somewhat diverse—auto consumers. Specifically, it looks at all economic loss auto defect MDLs. Non-personal injury product defect cases were chosen because class membership is less dependent on individual choices made by the consumer (such as participating in a federal program that would provide aid for student loan debt in exchange for public service,[201] investing in a particular company,[202] employment,[203] etc.) other than buying or leasing an auto vehicle. Moreover, product liability and sales practice cases constitute over one-third of all multidistrict proceedings both today and in the recent past.[204] Indeed in 2020, nearly half of MDLs involved products liability and deceptive marketing practices claims.[205]

Auto defect cases were chosen specifically because they typically involve a more diverse class than other products, such as purchasers of a particular medication or medical device,[206] a high-end washing machine,[207] or other specialized items.[208] While there are other types of class actions and MDLs that may involve similarly diverse classes, such as data breach and privacy-related actions, auto defect MDLs have a longer history to draw data from. Moreover, access to certain services and products involved in cases alleging privacy violations and data

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201. *See* Consolidated Amended Class Action Complaint at 8–50, *In re* FedLoan Student Loan Servicing Litig., No. 18-md-02833 (E.D. Pa. Nov. 12, 2019), ECF No. 49 (noting plaintiffs' decisions to participate in federal loan programs).

202. *See, e.g.*, *In re* SunEdison, Inc. Sec. Litig., No. 16-md-02742 (S.D.N.Y. Jan. 16, 2017), ECF No. 119 (noting plaintiffs, which included investment companies, pensions funds, and individual traders' decision to purchase Terraform Global stock).

203. *See, e.g.*, Second Amended Class Action Complaint at 7–11, *In re* Amazon.com, Inc., Fulfillment Center Fair Labor Standards Act (FSLA) & Wage & Hour Litig., No. 14-md-02504 (W.D. Ky. June 12, 2014), ECF No. 61 (describing plaintiffs' status as hourly employees of Amazon).

204. Burch & Williams, *supra* note 16, at 1470.

205. U. S. JUDICIAL PANEL FOR MULTIDISTRICT Litigation, *supra* note 19.

206. *See, e.g.*, Memorandum and Order at 1, *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., No. 17-md-2785 (D. Kan. Dec. 15, 2021), ECF No. 2531 (describing class of EpiPen purchasers).

207. *See, e.g.*, Order at 10, *In re* Samsung Top-Load Washing Machine Mktg., Sales Pracs. & Prod. Liab. Litig., No. 17-ml-02792 (W.D. Okl. Jan. 8, 2019), ECF No. 138 (class members defined as purchasers of new 2011 to 2016 Samsung top load washers).

208. *See, e.g.*, Consolidated Amended Complaint at 1–2, *In re* Fisher-Price Rock 'n Play Sleeper Mktg. Sales, Pracs., & Prod. Liab. Litig., No. 19-md-02903 (W.D.N.Y. Oct. 28, 2019), ECF No. 19 (describing class as purchasers of baby rocking chairs).

breaches may have wider age,[209] gender,[210] and socio-economic[211] gaps than auto consumers.

However, this is not to say that the same issues do not occur in CAAD MDLs. For example, not everyone can afford to purchase or lease a vehicle. While licensed female drivers currently slightly surpass licensed male drivers, that was not the case in earlier CAAD MDLs.[212] The level of diversity also varies across consumer classes in CAAD MDLs. For example, consumers in the *In re Porsche Cars N.A. Plastic Coolant Tubes Products Liability Litigation*[213] are likely less diverse than consumers that make up the *In re Takata Airbag Products Liability Litigation*, which included, at least initially, all current owners (even second and third-hand owners) and lessees of a wide subset of Honda, Toyota, Subaru, BMW, Volkswagen, Fiat, Chrysler, Nissan, Mazda, Mercedes, and General Motors makes and models that spanned over a decade.

Despite these drawbacks, findings from CAAD MDLs are instructive and may provide a window into the demographics of representation of diverse consumer classes. This Part begins with a brief discus-

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209. *See, e.g.*, Memorandum Opinion and Order at 6, *In re* TikTok, Inc., Consumer Privacy Litig., No. 20-cv-04699 (N.D. Ill. Sept. 30, 2021) , ECF No. 161 (preliminarily certifying class of all persons that used the TikTok platform prior to the settlement); *Distribution of TikTok users worldwide as of April 2022, by age and gender*, STATISTA (May 13, 2022), https://www.statista.com/statistics/1299771/tiktok-global-user-age-distribution/ [https://perma.cc/FRH8-H6GS] (noting that 72.7% of TikTok users are under the age of 35 and 41.7% are under 25).

210. *See, e.g.*, Amended Consolidated Complaint at 2–3, *In re* Zappos.com, Inc., Customer Data Sec. Breach Litig., No. 3:12-cv-00325 (D. Nev. Nov. 13, 2012), ECF No. 59; Zappos.com, SIMILARWEB, https://www.similarweb.com/website/zappos.com/#geography [https://perma.cc/B6QL-A947] (in July 2022 nearly 61% of Zappos users were female).

211. *See, e.g.*, Memorandum Opinion at 70–72, *In re* Marriott Int'l, Inc. Customer Data Sec. Breach Litig., No. 19-md-02879 (D. Md. May 3, 2022), ECF No. 1015 (certifying state classes of Marriott customers whose data was compromised as a result of the Marriott/Starwood data breach). *Compare* S. Lock, *Monthly average daily rate of United States hotels from 2011 to 2020*, STATISTA (Mar. 10, 2022), https://www.statista.com/statistics/208133/us-hotel-revenue-per-available-room-by-month/#:~:text=Monthly%20average%20daily%20rate%20of%20U.S.%20hotels%202011%2D2020&text=The%20average%20daily%20rate%20(ADR,compared%20to%20last%20year's%20figure [https://perma.cc/PN5L-8FSB] (noting average price of hotels between $96 and $135) *with* S. Lock, *Average daily rate of Marriot International Hotels worldwide from 2010 to 2021, by region*, STATISTA (Apr. 22, 2022), https://www.statista.com/statistics/271127/average-daily-rate-marriott-international-inc-hotels-worldwide/ [https://perma.cc/2ZPH-XW3A] (noting average daily rate of Marriott owned hotels from $142 to $203).

212. *See* Joan Lowy, *More Women Drivers Than Men on U.S. Roads Now*, USA TODAY (Nov. 12, 2012, 4:33 PM), https://www.usatoday.com/story/money/cars/2012/11/12/women-drivers-men-licenses-roads/1700185/ [https://perma.cc/J574-HCEQ]; *see also* Morgan Korn, *'It's Time for Car Companies to Wake Up': Women Now the Focus of the Industry*, ABC NEWS (July 3, 2019, 1:13 PM), https://abcnews.go.com/Business/time-car-companies-wake-women-now-focus-industry/story?id=64087181 [https://perma.cc/VXD4-GTYL].

213. The class included owners and lessees of 2003 to 2006 V8 Porsche Cayennes with allegedly faulty plastic cooling tubes. *See* Kurt Ozreck, *Porsche Reaches $45M Settlement in Cooling Tube MDL*, LAW360 (July 26, 2013), https://www.law360.com/articles/460481/porsche-reaches-45m-settlement-in-cooling-tube-mdl [https://perma.cc/X6RS-YVK3].

sion on the methodology employed to identify the MDLs discussed and the data obtained from their respective dockets. It then discusses different findings across the attorneys who were appointed or served different class counsel roles in these MDLs, the transferee courts which presided over these actions, and the orders issued by the transferee courts. This Part concludes by discussing the broader implications of these findings.

A. *Methodology*

The Article looks at all class action auto defect cases consolidated for pretrial management by the JPML from 1977 to 2022[214] wherein consumers asserted economic loss claims.[215] Auto defect MDLs where claims were not being asserted on behalf of a class were excluded. Over 500 actions and 44 consolidated CAAD MDLs, which form part of Appendix A, were reviewed. For each case, several documents were gathered and reviewed from the publicly available federal court Case Management/Electronic Case Files (ECF) for the JPML and the transferee district court. These included: the JPML docket, the JPML transfer order, the transferee district court docket, all case management or pretrial orders relating to class counsel application processes, class counsel applications granted by the transferee court, and appointment orders.

From these documents, several data points were reviewed: the district of transfer, the transferee court, the date of transfer, information requested by the transferee court when soliciting applications for class counsel, the date class counsel was appointed, criteria listed by the transferee court as relevant to its selection of counsel, and the attorneys or law firms appointed to serve as class counsel. Where information was not readily available on the docket, additional searches of publicly available documents and Westlaw were examined.

Additional information was also gathered from other publicly available sources regarding appointed counsel and the transferee district court judge. For class counsel, data was obtained, where available, on

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214. The JPML was established in 1968. The first CAAD MDL, however, was formed in 1977. *See In re General Motors Corporation Engine Interchange Litigation*, MDL-308 (N.D. Ill.).

215. Although not technically a product defect case, *In re* Mercedes-Benz Tele Aid Contract Litig., MDL 1914 (D.N.J.) was included because the claims asserted were essentially the same as those in other economic loss product defect cases, only these claims benefited from the presence of a contract which barred, under the economic loss rule, overlapping tort claims. *See* Consolidated Class Action Complaint at 2, *In re* Mercedes-Benz Tele Aid Contract Litig., 07-cv-02720 (D.N.J. May 2, 2008), ECF No. 38 (defining class as purchasers of Mercedes 2001-2006 vehicles equipped with Tele Aid, equipment Mercedes allegedly knew would cease to work in 2008 but concealed that fact from consumers and actively marketed the safety feature's efficacy).

their identified gender and ethnicity or race. For the transferee district court judge, data was obtained, where available, on their gender, ethnicity, race, date of birth, age when the MDL was transferred, and the president who appointed them to the federal bench.

Filings and orders for cases transferred before the early 2000s were limited, as dockets were kept either entirely or largely locally and never uploaded to ECF.[216] However, there were only two cases for which docket sheets could not be located.[217] More commonly, dockets and docket sheet entries were publicly available, but certain relevant documents were not accessible.[218] Where documents were not available in a few CAAD MDLs, data from other publicly available documents in those cases often contained information necessary to determine at least some of the individual lawyers or law firms serving as class counsel. Only two MDLs were excluded from the discussion of class counsel: one because the action was stayed pending a bankruptcy proceeding and ultimately dismissed before the transferee court could appoint counsel,[219] and another because insufficient data was available to identify the attorneys that participated in the litigation.[220]

In some cases, law firms, as opposed to individual attorneys, were appointed to serve as interim class counsel.[221] Rather than exclude these cases from the analysis, they were analyzed separately, and docket entries were reviewed to determine the identity of the lead attorney from each firm that served. The firm's lead attorney's gender, race, and repeat player status were then determined and added to individual appointee statistics as noted.

The data collected was analyzed for possible correlations. While many of the resulting observations are discussed below, not all were statistically significant. Some findings or observations were less significant than others because the datasets from which they were drawn were relatively small, limiting the ability to make correlations or draw conclusions. For example, only one female transferee court issued an

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216. *See, e.g.*, *In re* General Motors Corp. 1980 X-Body Car Braking Sys. Warranty Prod. Liab. Litig., No. 84-cv-0888 (D.D.C.).

217. *See In re* Suzuki Samurai Prod. Liab. Litig., MDL No. 784 (E.D. Pa.); *In re* General Motors Engine Interchange, MDL No. 308 (N.D. Ill.).

218. *See, e.g.*, *In re* General Motors Pick Up Truck Fuel Tank, No. 92-cv-06450 (E.D. Pa.) (like many earlier in time cases, docket sheet records most, if not all, entries but the documents are not electronically accessible).

219. *See* Order, *In re* Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prod. Liab. Litig., No. 07-cv-01740 (D.N.J. May 12, 2009), ECF No. 94 (staying case pursuant to bankruptcy filing); Order, *In re* Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prod. Liab. Litig., No. 07-cv-01740 (D.N.J. May 26, 2009), ECF No. 97 (administratively closing case pursuant to bankruptcy stay).

220. *In re* Suzuki Samurai Prod. Liab. Litig., MDL No. 784 (E.D. Pa.).

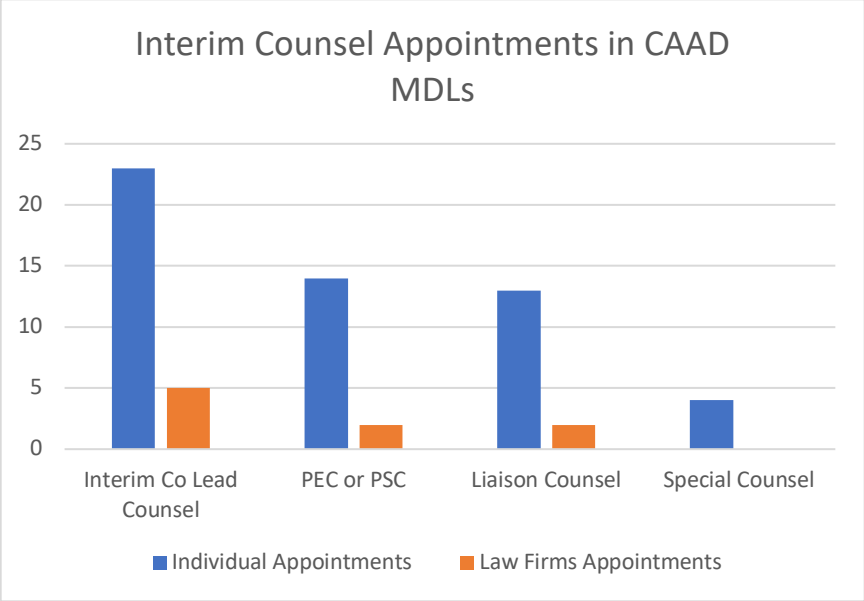
221. *See, e.g.*, Order at 2, *In re* Porsche Cars N.A., Inc. Plastic Coolant Tubes Prods. Liab. Litig., No. 2:11-md-02233 (S.D. Ohio July 26, 2011), ECF No. 19.

application order, rendering any finding about application orders issued by female district courts unreliable. Observations are discussed below along with their potential limitations.

B. *Findings*

1. Class Counsel Appointees

Orders appointing counsel were identified for 28 CAAD MDLs. Individual appointments were made in 23 of the 28 MDLs, law firms were appointed in 4 MDLs, and for 1 MDL it was not determinable whether an individual or firm was appointed.[222] Interim counsel was appointed in the 10 most recent MDLs and in 18 of the 20 most recent MDLs. Individuals were appointed as interim lead counsel in 23 MDLs, as members of a PEC in 14 MDLs, liaison counsel in 13 MDLs, and special liaison counsel in 4 MDLs.



Often, when appointing lead counsel, courts note that appointment of a PEC or liaison counsel was unnecessary. In only 6 of the 10 most recent CAAD MDLs did the court appoint a PEC and in only half did the court appoint liaison counsel. A few transferee courts maintained prior

222. Memorandum and Order at 3–6, *In re* General Motors Corp. Dex-Cool Litig., No. 03-cv-10562 (S.D. Ill. Jan. 21, 2004), ECF No. 19 (seemingly appointing law firms but then naming individual attorneys from the law firm later in the appointment order).

actions separate from the MDL docket and each action maintained its own lead counsel. No appointment orders were issued or identified for cases consolidated and transferred by the JPML prior to 1995, but the attorneys serving as counsel for the class were, with few exceptions, identified in other filings.

a. *Lead Counsel*

Orders appointing interim lead counsel were entered in approximately half of CAAD MDLs. Overall, men were 9 times more likely than women to be appointed to the role of lead counsel in auto defect class action MDLs. White men were also approximately 9 times more likely to be appointed than non-white men. No woman of color has ever been appointed to serve as lead counsel in a CAAD MDL. Repeat player appointments are common, even more so in recent CAAD MDLs.[223] Indeed, in more than half of the cases examined, a repeat player was appointed as lead counsel. And in 5 of the 6 most recent MDLs, 1 of 3 individual attorneys served as lead counsel or part of a lead counsel team. And in more than half of those, they were the only attorney serving as lead counsel.

Women were appointed interim lead counsel or part of an interim lead counsel team in only 4 CAAD MDLs.[224] In 3 of those 4 MDLs, the same female attorney was appointed.[225] In the fourth action, another female attorney from the same law firm was appointed. In the remaining 19 cases, the court appointed only men to serve as lead counsel. Women were thus appointed to a lead counsel role in 17.4% of CAAD MDLs. Viewed by appointment slots, as opposed to MDLs, the gender gap is starker. A total of 47 lead counsel appointments were made in

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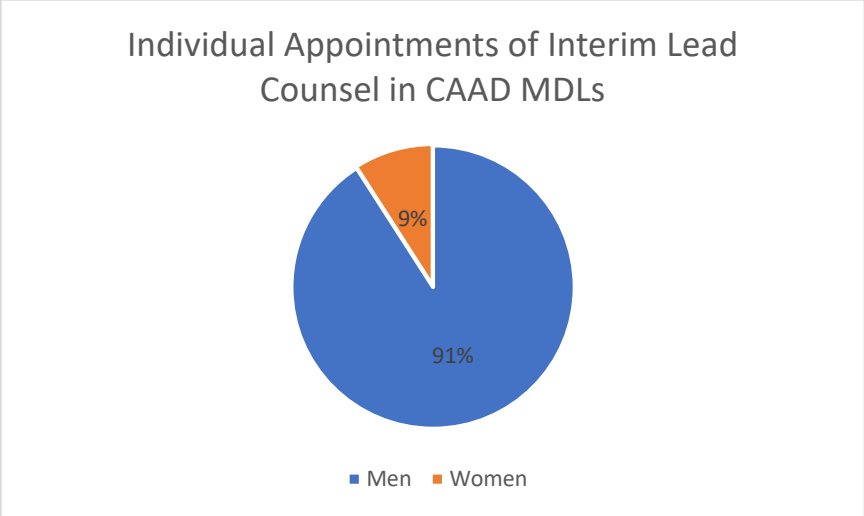
223. An attorney was determined to be a repeat player if they were previously appointed to or served as lead counsel or member of a PEC in another CAAD MDL. Repeat player status thus did not account for attorneys that appeared in non-CAAD MDLs or non-MDL CAADs. If those cases had been considered, the number of repeat players would undoubtedly have been higher.

224. *See* Order Appointing Lead Plaintiffs' Counsel and Setting Date for Objections to Common Benefit Work and Expenses Order at 1, *In re* General Motors Air Conditioning Mktg. & Sales Pracs., No. 18-md-02818 (E.D. Mich. Apr. 11, 2018), ECF No. 13 (appointing Annika K. Martin as part of a four-member co-lead counsel team); Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 2, *In re* Chrysler-Dodge-Jeep Eco Diesel Mktg., Sales Pracs., & Prod. Liab. Litig., No. 17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173 (appointing Elizabeth Cabraser as lead counsel); Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 1–2, *In re* Volkswagen Clean Diesel Mktg., Sales Pracs. & Prod. Liab. Litig., No. 15-md-02672 (N.D. Cal. Jan. 21, 2016), ECF No. 1084 (appointing Elizabeth Cabraser as lead class counsel); Order No. 8 at 3, *In re* General Motors Ignition Switch Litig., No. 14-md-02543 (S.D.N.Y. Aug. 15, 2014), ECF No. 249 (appointing Elizabeth Cabraser as part of a three-member co-lead counsel team).

225. *See supra* note 223.

CAAD MDLs. Women occupied 4 of those 47 slots or 8.5% of those appointments. And prior to 2014, no woman had ever been appointed to serve as lead counsel in a CAAD MDL.



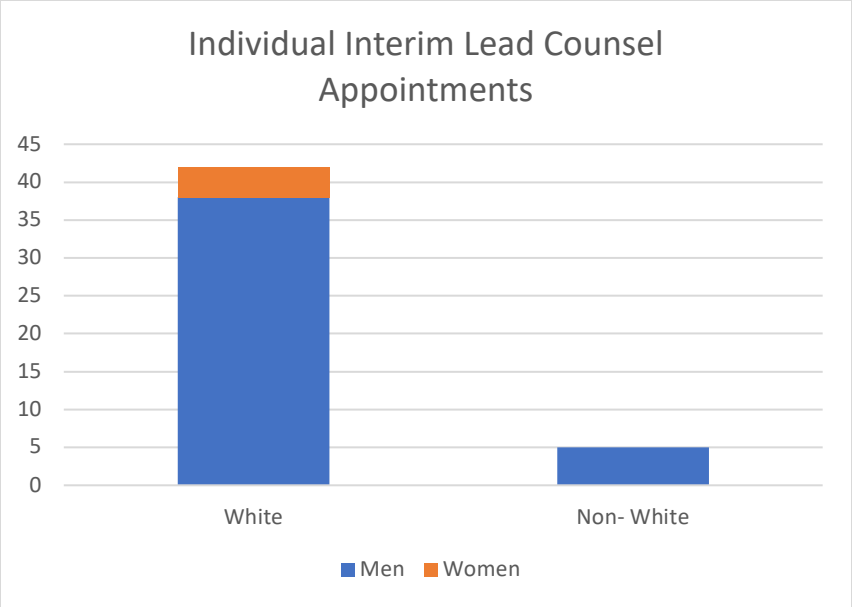
In the 4 MDLs where the transferee court appointed law firms and the 1 in which it was unclear whether it appointed individuals or law firms, the lead attorney appearing for each firm, except in 1 case, were men. Among the 5 cases, a total of 12 firms were appointed with 11 male attorneys serving as lead counsel. If added to the individual appointment numbers discussed above, women were appointed as lead counsel in 17.8% of MDLs and occupied 8.5% of lead counsel slots.

Courts appointed lead counsel in 2 other cases, but only as part of a settlement approval order. The 5 leadership positions from those 2 cases were all held by men.[226] In 1 case, the court appointed a male attorney as lead counsel and in the other, it appointed 4 law firms whose lead attorneys were all male. When added to the figures above, women were appointed to the role of lead counsel in 5 of 30 MDLs (or 16.7% of cases) and occupied 7.9% of lead counsel positions. Finally, despite no appointment order identifying them as such, the attorneys that served as lead counsel were identifiable by other filings and documents in 2 other MDLs. Each of these cases was composed of a 2-person co-lead team, 1

226. Amended Order Preliminarily Approving Settlement Agreement Certifying Settlement Class, Appointing Class Counsel, Setting a Settlement Fairness Hearing, Setting Hearing on Final Approval of Settlement, and Directing Notice to the Class at 7, *In re* Am. Honda Motor Co. Oil Filter Prods. Liab. Litig., No. 06-cv-01301 (C.D. Cal. Apr. 17, 2009), ECF No. 28; Preliminary Order Approving Settlement, Directing Issuance of Class Notice, and Scheduling Fairness Hearing at 3, *In re* General Motors Corp. Speedometer Prod. Liab. Litig., No. 07-cv-00291 (W.D. Wash. Mar. 4, 2008), ECF No. 72.

male[227] and 1 female.[228] Adding these 2 cases to the ones above, women served as lead or co-lead counsel in 18.7% of the 32 MDLs and occupied 10.4% of available lead counsel positions.

Publicly available information regarding lead counsel's ethnicity and race was scant. However, based on publicly available sources, it appears that from the CAAD MDLs in which individual interim lead counsel appointments were made, approximately 90% of appointments went to white attorneys.



In cases where law firms were appointed instead of individual attorneys, nonwhite attorneys served as lead attorney in 40% of cases and occupied approximately 15% of leadership positions. In the 2 MDLs where the court appointed lead counsel for settlement purposes, no nonwhite lawyers were appointed. Adding these appointments to the other cases where lead counsel was not appointed, but identifiable from other pleadings, nonwhite attorneys formed part of the leadership team in less than 20% of MDLs and occupied approximately 10% of lead counsel slots. No Black attorneys were appointed to serve as lead counsel in any CAAD MDL, and no leadership positions went to female attorneys

227. Consolidated Amended Class Action Complaint at 31, *In re* Ford Motor Co. E-350 Van Prod. Liab. Litig. (No. II), No. 03-cv-04558 (D.N.J. Jan. 31, 2006), ECF No. 27.

228. Supplemental Brief of Plaintiff Class Appellees Concerning the *Bloyed* Decision at 1, *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., Consolidated Nos. 93-1064, 94-1194, 94-1195, 94-1198, 94-1202, 94-1203, 94-1207, 94-1208, 94-1219 (3d Cir. June 22, 1994).

of color. None of the minority lawyers that were appointed to lead counsel positions mentioned diversity in their applications.

b. *PECs*

The transferee court appointed a PEC in 16 CAAD MDLs. In 14 of these, individuals were appointed to serve as members of the committee, but in 2 of those, the individual members of the committee could not be identified.[229] Repeat players were also common in PECs, particularly in more recent cases. Repeat players occupied 34 of the 54 (62.9%) of all committee slots in the 5 most recent MDLs to appoint PECs.

PEC appointments were more gender diverse. In only 4 of the CAAD MDLs where PECs were formed were women not appointed. Women thus formed part of a plaintiffs' committee in 66.7% of CAAD MDLs with plaintiffs' committees. However, women only occupied 21 of the 102 or 20.5% of individual appointments made to PECs. In no MDL did women form more than 40% of the appointed committee, and in 40% of the MDLs where women formed part of a PEC, only 1 woman served on the committee. More than half of the women appointed to PECs were also repeat players.

The transferee court appointed law firms to serve on a PEC in 2 cases,[230] appointing a total of 9 law firms between both cases. For each firm, the lead attorney to serve on the PEC was male. Adding these cases to the individual appointments above, women served on a PEC in 57.1% of CAAD MDLs and occupied 21 of 111 (18.9%) of plaintiff committee appointments. Finally, despite no appointment order, a 1-member law firm PEC with 2 male members was established in 1 CAAD MDL.[231] Adding that case to the numbers above, women served on plaintiff committees in 62.5% of MDLs and occupied 18.6% of PEC positions.

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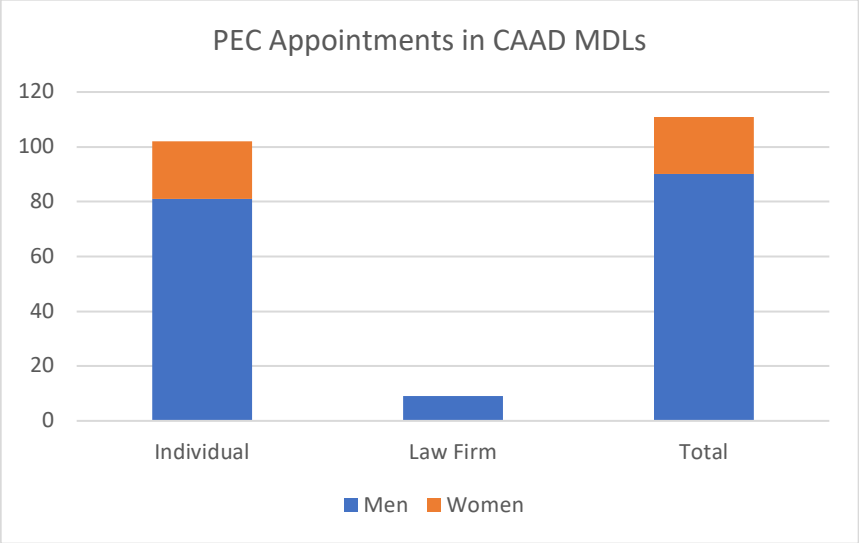
229. *In re* Ford Motor Co. Vehicle Paint, MDL No. 1063 (E.D. La.); *In re* General Motors Corp. Engine Interchange Litig., MDL No. 308 (N.D. Ill.).

230. Order at 3, *In re* Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prod. Liab. Litig., No. 11-md-02233 (S.D. Ohio July 26, 2011), ECF No. 19; Memorandum and Order at 3–6, *In re* General Motors Corp. Dex-Cool Litig., No. 03-cv-10562 (S.D. Ill. Jan. 21, 2004), ECF No. 19.

231. *See* Supplemental Brief of Plaintiff Class Appellees Concerning the *Bloyed* Decision at 1, *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., Consolidated Nos. 93-1064, 94-1194, 94-1195, 94-1198, 94-1202, 94-1203, 94-1207, 94-1208, 94-1219 (3d Cir. June 22, 1994).



More recent CAAD MDLs' PECs were more gender diverse. In 4 of the 5 most recent CAAD MDLs to appoint a PEC, which date back to 2015, at least 1 woman was appointed to each PEC. And in all 4 of those cases, women formed more than 30% of the committee. Overall, women occupied 28.1% of PEC appointments in CAAD MDLs from 2015 to present date. Prior to 2014, only 3 women had ever been appointed to serve as part of a PEC in a CAAD MDL. In the 5 most recent cases the size of the PEC correlated with the number of women appointed, so the larger the size of the PEC, the greater number of women were appointed.

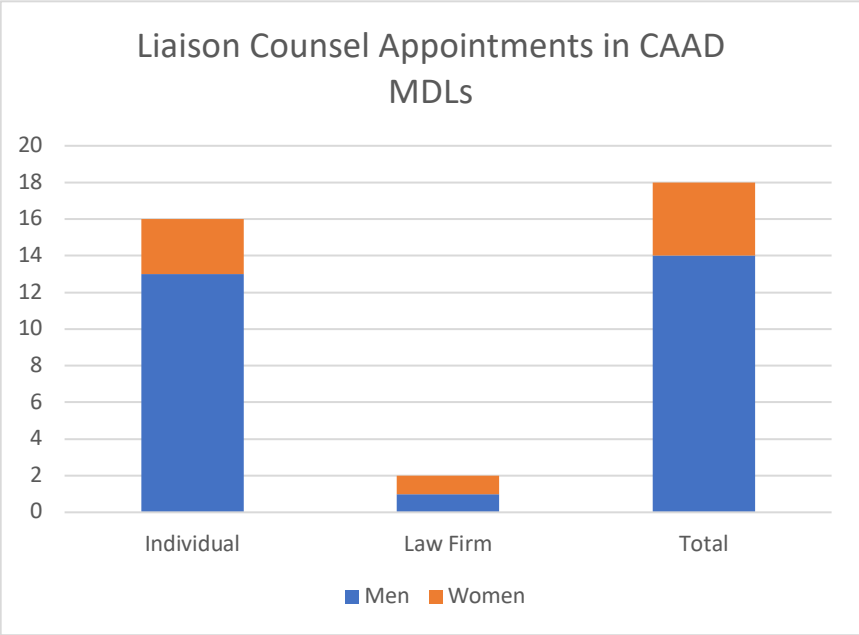
Based on available information, at least 90% of attorneys appointed to a PEC were white. Of the remaining PEC slots that went to nonwhite attorneys, approximately half went to the same lawyer and another 4 went to 2 other lawyers, meaning only about 5 racially diverse attorneys have been appointed to serve on PECs in CAAD MDLs. In 4 of the 5 most recent MDLs, however, at least 1 racially diverse attorney was appointed to the PEC. Prior to 2008, it appears that no or very few PEC appointments went to nonwhite attorneys. No Black attorneys have ever been appointed to or served as part of a PEC in CAAD MDLs.

c. *Liaison Counsel*

Liaison counsel appointments were less common. The transferee court often concluded the position was unnecessary, despite individual motions seeking the appointment. Other times the lead attorney(s) in the case also served as liaison counsel. Of 15 CAAD MDLs where liaison counsel was appointed, individuals were appointed in 13 MDLs and law

firms were appointed in 2. In total, CAAD MDL transferee courts appointed 14 individuals across 13 MDLs and 2 law firms in another 2 MDLs to serve as liaison counsel.

In 3 of those MDLs women were individually appointed to serve as liaison counsel, occupying 18.8% of appointed slots. Adding the attorneys that appeared for each firm as appointed liaison counsel, women fared slightly better, occupying 22.2% of slots.

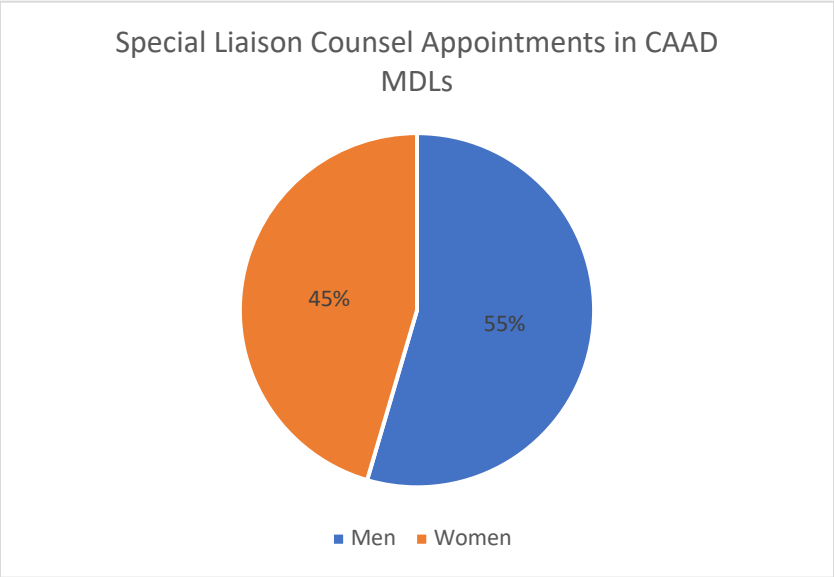


Attorneys served as liaison counsel in 4 other MDLs, but there was no order appointing them to the position. From these CAAD MDLs, 1 woman served as part of a 4-person liaison counsel team, occupying 1 of 8 or 12.5% of non-appointed liaison counsel positions. Adding these to the figures above, women served as liaison counsel in 5 of 19 or 26.3% of MDLs and occupied 19.2% of liaison counsel slots. Over 90% of liaison counsel appointments went to white lawyers.

d. *Special Liaison Counsel*

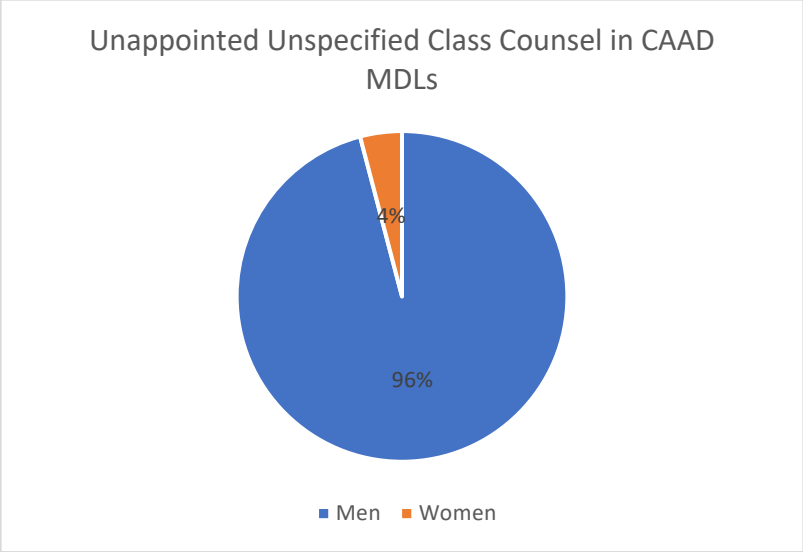
Special liaison counsel was appointed in 5 CAAD MDLs. These positions included liaison counsel to other state and federal actions; liaison counsel between settling and non-settling classes; liaison counsel for recall and non-recall plaintiffs; liaison counsel between personal injury and wrongful death cases and economic loss cases; and liaison counsel for intervenors. These special liaison counsel positions resulted in 11

additional appointments, and nearly half (45%) went to women. While most of these appointments also went to white lawyers, the exact percentage is unclear from publicly available information.



e. *Unspecified Class Counsel*

Despite no order appointing counsel, 49 additional plaintiffs' attorneys were identifiable in 9 other CAAD MDLs. It was not clear from the docket or other publicly available documents whether these attorneys served as lead counsel, part of a PEC, liaison counsel, or jointly without specific designations. Eight of these CAAD MDLs were composed of all male attorney teams. And only 4.1% of these attorneys were women.



While this is a staggeringly low statistic, it is worth noting that most of these CAAD MDLs were consolidated and transferred before 2000. Given the age of some of these MDLs, it was not possible to find enough data on these attorneys to make any meaningful comment on their ethnicity or race.

2. The Transferee Court

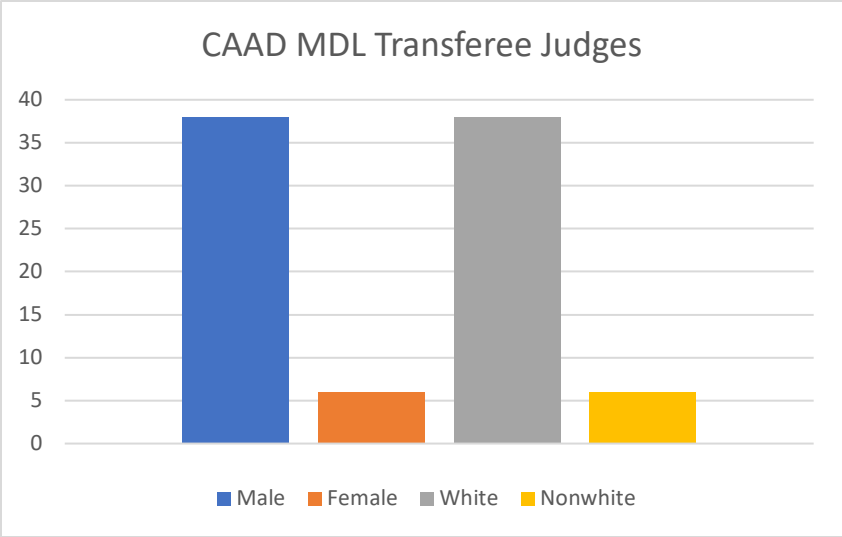
The following section discusses data regarding the transferee judge and the orders they entered relating to the appointment of class counsel. Orders are classified as either application orders, wherein the court explained the application process, or appointment orders, wherein the court appointed counsel and assigned certain duties or responsibilities to counsel.

a. *District Court Judge*

CAAD MDL judges were overwhelmingly male, white, and over the age of 55. The JPML transferred 84.1% of CAAD MDLs to male judges and 89.7% to white judges. The average age of the district court judge when a CAAD MDL was transferred was 60. With the exception of age,[232] these percentages do not represent the makeup of today's federal

232. The average age of sitting federal district court judges in 2017 was 60.8 years old. BARRY J. MCMILLION, CONG. RES. SERV, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT

judiciary— where 32.7% of federal district court judges are women and 27.5% are nonwhite[233]—but they could reflect averages across the 43 years (1977 to 2021) CAAD MDLs span. In the past 10 years, however, 84.6% of CAAD MDLs were transferred to male judges and 69.2% to white judges.



CAAD MDLs were overwhelmingly transferred to male district courts. Women presided over 15.9% of CAAD MDLs and 17.6% of CAAD MDLs where an order appointing class counsel was entered. In the past 10 years, women similarly presided over only 15.4% of CAAD MDLs. Indeed, only 1 of the 10 most recent CAAD MDLs was transferred to a female judge. Additionally, women on the bench were less likely than men to appoint a female attorney to serve as lead counsel or part of a PEC. Female judges appointed no women to serve as lead counsel or a member of a PEC. Only 2 liaison counsel appointments and less than 10% of all appointments made by a female district court judge in a CAAD MDL went to female attorneys. Similarly, 2 or fewer appointments made by a female district court judge went to nonwhite attorneys. More than half of appointments made by female judges went to repeat players.

CAAD MDL transferee judges also tended to be overwhelmingly white. Eleven percent of transferee judges identified as part of an eth-

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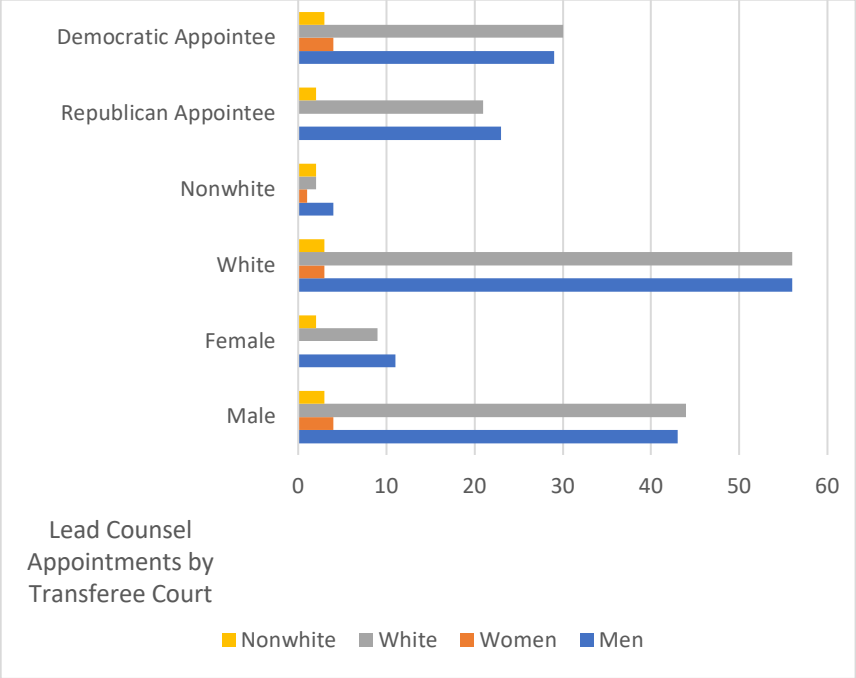
CHARACTERISTICS 23 (2017), https://sgp.fas.org/crs/misc/R43426.pdf [https://perma.cc/DA42-C25D].

233. *January 20, 2021 Snapshot: Diversity of the Federal Bench*, AM. CONST. SOC'Y (Jan. 20, 2021), https://www.acslaw.org/judicial-nominations/january-20-2021-snapshot-diversity-of-the-federal-bench/ [https://perma.cc/26R4-VNRX] (noting that 72.46% of district court judges were white, 12.88% Black, 8.7% Latinx, 3.54% Asian-American, .16% Native American, 2.09% two or more races, and .16% other).

nic minority group. Fifty percent of minority judges appointing lead counsel appointed minority lawyers to serve in the role. White judges, by comparison, appointed nonwhite attorneys to serve as lead counsel in less than 10% of CAAD MDLs. Only 1 judge that identified as part of a minority group did not appoint a minority lawyer to serve as either lead counsel or part of a PEC. When appointing interim counsel, these judges were more likely on average to appoint women and ethnic minorities to serve as lead counsel or part of a PEC. The only ethnic minority judge that did not appoint another ethnic minority lawyer or female lawyer to serve as class counsel was female. More than half of appointments by minority judges went to repeat players, but more than half of their appointments were competitive and not agreed to by counsel.

Nearly 60% of CAAD MDLs were transferred to judges appointed by a Republican president. No Republican district court appointee chose a woman to serve as lead counsel. By contrast, Democratic appointees selected women to serve as lead counsel in 28.6% of the cases where they appointed interim counsel. Democratic appointees appointed women to PECs in 50% of the cases where they appointed individuals to the PEC, but Republican appointees only appointed women to a PEC in 30% of the cases where they appointed individuals to the PEC. Republican appointees appointed all-male class counsel teams in 70% of CAAD MDLs, whereas Democratic appointees appointed all-male teams in 38.5% of CAAD MDLs. Democratic appointees were also significantly more likely to appoint nonwhite attorneys to serve as counsel, appointing at least 1 minority attorney to serve in over 1/3 of cases. Republican appointees, on the other hand, appointed non-white attorneys to serve as lead counsel or on a PEC in less than 10% of CAAD MDLs.



More than half of CAAD MDLs were transferred to district courts in 5 states: California, Michigan, Illinois, Ohio, and New Jersey. The remaining states had 2 or fewer MDLs transferred to them. The Central District of California hosted the most CAAD MDLs, followed by the Eastern District of Michigan, and in the last 10 years these 2 states have gained a greater percentage of all CAAD MDLs. In the past 10 years, 30.8% of CAAD MDLs were transferred to either the Northern or Central District of California and 23.1% to the Eastern District of Michigan, and 60% of the last 10 MDLs went to either California or Michigan. District courts in California tended to appoint more women and minority lawyers to serve as class counsel whereas Michigan courts were more divided, but ultimately these appointment trends tracked the party of the president appointing the district court judge. In approximately 3/4 of all cases, the district court appointed at least 1 attorney or law firm based out of the state in which the district court was located to serve as lead counsel.

b. *Application Orders*

Sixteen application orders were identified in the 44 CAAD MDLs.[234] The mere issuance of an order by the court had little to do with the judge's age, gender, or race or ethnicity. Rather, the practice of issuing application orders in CAAD MDLs appears to have become standard in the 2010s. All application orders identified were entered in the 20 most recent MDLs. Women and ethnic minority applicants were at least twice as likely to serve as lead counsel in CAAD MDLs where an application order was entered by the court.

Application orders were not perfectly uniform. However, most courts borrowed language from the Manual and other courts from their district. Earlier application orders were simpler and encouraged counsel to privately agree before submitting an application.[235] More recent orders continued to place value on consensus by asking counsel to indicate how many other plaintiffs' counsel involved in the action supported their application[236] or by providing other counsel an opportunity to support or object to applications.[237]

Nearly all courts—copying some, if not all, of the proposed language from the Manual—stated that the main criteria for appointment regardless of the position counsel sought were counsel's: (1) willingness and ability to commit time to the litigation; (2) ability to work cooperatively with co-counsel and opposing counsel; (3) professional experience with this type of litigation; and (4) access to resources necessary to fund efficiently prosecuting the litigation.[238] The factor courts placed the most emphasis on was prior experience. Additional factors considered by courts included those required under Rule 23(g).

One-fourth of transferee courts required applicants to submit fee proposals, including billing rates or the percentage of any common fund that they would seek. In most of these cases, few applications were submitted, or applicants coordinated before filing and either filed a joint application or individual applications that supported each other's individual applications. Moreover, no court commented on any dispari-

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234. A minute entry inviting applications for lead counsel was located in *In re Ford Motor Co. Bronco II Products Liability Litigation*'s docket, but it was not in order format and no applications or appointment order were identified on the docket. The minute entry was thus not considered for analysis purposes in this section. No. 94-md-00991 (E.D. La. July 20, 1995), ECF No. 209.

235. *See, e.g.*, Order Number 1 at 5, *In re* Ford Fusion & C-Max Fuel Economy Litig., No. 13-md-02450, (S.D.N.Y. July 10, 2013), ECF No. 18; Order at 1, *In re* Nissan N. Am., Inc. Odometer Litig., No. 08-md-1921 (M.D. Tenn. May 5, 2008), ECF No. 4.

236. *See, e.g.*, Pretrial Order No. 1: Initial Conference at 5, *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs., & Prod. Liab. Litig., No. 17-md-02777, (N.D. Cal. Apr. 14, 2017), ECF No. 6.

237. *See, e.g.*, *id.*

238. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.1 (2004).

ty among fees proposed by applicants in an appointment order. And one court concluded that it would ultimately decide the fee award at class certification, and, as such, information on competing fees was not relevant.[239]

c. *Appointment Orders*

Courts issued interim counsel appointment orders in 28 CAAD MDLs. While appointment orders have become more common recently, they have been issued for over 25 years in CAAD MDLs, but less uniformity previously existed across these orders. While some courts thoroughly explained and justified their appointments, others simply listed appointees without explanation for their selection. Indeed, only 25% of CAAD MDLs appointment orders contained any significant explanation for appointments. Orders typically went into greater detail justifying lead counsel appointments, and detailed explanations were more common when the court appointed a woman.[240] Ironically, in the CAAD MDLs that received the most appointment applications, courts entered orders with the least amount of explanation for their appointments. Courts usually provided little to no explanation for PEC and liaison counsel appointments. The few courts that did address reasons for PEC appointments focused on the experience and resources PEC members could draw from their respective law firms.

The most cited reason for appointing counsel was experience. For lead counsel, courts often noted attorneys' previous appointments or service as lead counsel in similar class actions or MDLs.[241] Other factors courts routinely weighed in favor of particular applications included the time and resources applicants spent investigating the alleged defect at issue,[242] ability to work cooperatively with co-counsel and opposing

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239. Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 4–5, *In re* Volkswagen Clean Diesel Mktg., Sales Pracs. & Prod. Liab. Litig., No. 15-md-02672 (N.D. Cal. Jan. 21, 2016), ECF No. 1084.

240. *See, e.g.*, Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 2–4, *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs., & Prod. Liab. Litig., No. 17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173; Order Appointing Plaintiffs' Lead Counsel, et al. at 1–2, *Volkswagen Clean Diesel*, No. 15-md-02672 (N.D. Cal. Jan. 21, 2016), ECF No. 1084.

241. *See, e.g.*, Order Appointing Lead Plaintiffs' Counsel at 3, *In re* General Motors Corp. Air Conditioning Mktg. & Sales Pracs. Litig., No. 18-md-02818 (E.D. Mich. Apr. 11, 2018), ECF No. 13; Order Appointing Plaintiffs' Lead Counsel, et al. at 2, *Chrysler EcoDiesel*, No. 17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173.

242. *See, e.g.*, Order Appointing Lead Plaintiffs' Counsel at 2, *General Motors Air Conditioning*, No. 18-md-02818 (E.D. Mich. Apr. 11, 2018), ECF No. 13; Order Appointing Plaintiffs' Leadership Positions at 2–3, *In re* Am. Honda Motor Co. CR-V Vibration Mktg. & Sales Pracs. Litig., No. 15-md-02661 (S.D. Ohio Dec. 18, 2015), ECF No. 15.

counsel,[243] and previous positive results in similar litigation.[244] With the exceptions of experience, cooperation, and commitment of resources, however, only one court discussed other criteria referenced in its application order in its appointment order.[245] The factors considered by the court also did not seem to correlate with the gender or ethnicity of the applicant appointed.

In nearly half of CAAD MDLs with appointment orders, plaintiffs' counsel either submitted a single joint application or multiple applications that supported all other counsels' applications. With few exceptions,[246] the respective district courts granted these joint applications or proposals.[247] Even courts that issued application orders that stressed the court would not delegate its authority to appoint to plaintiffs' counsel, issued appointment orders highlighting the unanimity of agreement among plaintiffs' counsel.[248] And in cases involving more competition, courts emphasized the level of support an applicant received from other plaintiffs' counsel.[249] Only 1 court in 2017 specifically addressed counsel's diversity. In *In re Chrysler Dodge EcoDiesel Litigation*, the district court stated that in appointing a PEC, it "attempted to balance desire for continuity with interest in diversity to provide opportunities for new attorneys to leadership positions."[250]

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243. *See, e.g.*, Order Appointing Lead Plaintiffs' Counsel at 3, *General Motors Air Conditioning*, No. 18-md-02818; Order at 2, *In re* Porsche Cars N.A. Plastic Coolant Tubes Prod. Liab. Litig., No. 11-md-02233 (S.D. Ohio July 26, 2011), ECF No. 19.

244. *See, e.g.*, Order Appointing Lead Plaintiffs' Counsel at 3, *General Motors Air Conditioning*, No. 18-md-02818; Order Appointing Plaintiffs' Lead Counsel, et al. at 2, *Chrysler EcoDiesel*, No. 17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173.

245. Order Appointing Plaintiffs' Lead Counsel, et al. at 4, *Chrysler EcoDiesel*, No. 17-md-02777.

246. For example, in *In re FCA Monostable Electronic Gearshift Litigation*, the joint application was granted, but instead of firms being appointed, the lead attorney for each proposed firm was appointed. Pretrial Order No. 9: Appointment of Lead and Liaison Counsel at 1–2, No. 16-md-02744 (E.D. Mich. Nov. 16, 2016), ECF No. 16.

247. Even when court expressed disagreement with an agreed to proposal, it acquiesced. *See, e.g.*, Order, *In re* Nissan N. Am., Inc. Odometer Litig., No. 08-md-01921 (M.D. Tenn. June 11, 2008), ECF No. 21.

248. *See, e.g.*, Order Appointing Lead Plaintiffs' Counsel at 1, *General Motors Air Conditioning*, No. 18-md-02818; Order [Resolving ECF Nos. 6, 16, and 22] at 3–6, *In re* Ford Motor Co. Spark Plug & Valve Engine Prod. Liab. Litig., No. 12-md-2316 (N.D. Ohio May 4, 2012), ECF No. 29.

249. *See, e.g.*, Order Appointing Lead Plaintiffs' Counsel at 2, *General Motors Air Conditioning*, No. 18-md-02818 (E.D. Mich. Apr. 11, 2018), ECF No. 13; Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 2, *In re* Volkswagen Clean Diesel Mktg., Sales Pracs. & Prod. Liab. Litig., No. 15-md-02672 (N.D. Cal. Jan. 21, 2016), ECF No. 1084.

250. Order Appointing Plaintiffs' Lead Counsel, et al., *Chrysler EcoDiesel*, No. 17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173.

C. *Discussion*

The findings above are fairly consistent with previous studies' findings but also provide additional insight into the diversity gap. Women and ethnic minorities, in accord with earlier studies' findings, were underrepresented in all class counsel positions. Repeat players, as noted in other studies, frequently occupied the majority of leadership positions. Indeed, of the top 10 plaintiffs' MDL repeat players identified in Professors Chamblee Burch and Margaret Williams' 2013 study, 5 appeared in leadership positions in CAAD MDLs.[251] This Section discusses certain novel potential findings.

1. The Gender Gap

Whereas previous studies found that women were appointed to 15% of lead counsel slots in MDLs and occupied 13% of lead counsel slots in class actions,[252] the data here found that women occupied less than 10% of the lead counsel appointments in CAAD MDLs. This difference is likely attributable to the fact that previous studies spanned from 2011 to 2017, while appointment orders analyzed here included cases dating as far back as 1995. Using data from only 2012 forward indicates that women were appointed to 16.7% of lead counsel positions, which more closely mirrors prior findings and demonstrates an improvement from earlier years.

Moreover, in the last 5 years (4 of which prior studies did not cover), women accounted for 33.3% of lead counsel appointments in CAAD MDLs. Significantly, women formed part of lead counsel in 50% of the last 6 CAAD MDLs. Although this is a promising finding, these improved statistics are primarily attributable to the same woman being appointed again and again and again,[253] suggesting that entry into the market has not really improved but rather that courts feel comfortable appointing a token female repeat player with considerable experience and a history of getting along with other white male repeat players.

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251. *See* Burch & Williams, *supra* note 16, at 1486.

252. ALVARÉ, *supra* note 1, at 6-7; SCHARF & LINDENBURG, *supra* note 1, at 12.

253. Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 2–4, *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs., & Prod. Liab. Litig., No. 17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173; Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 2, *In re* Volkswagen Clean Diesel Mktg., Sales Pracs. & Prod. Liab. Litig., No. 15-md-02672 (N.D. Cal. Jan. 21, 2016), ECF No. 1084; Order No. 8 at 3, *In re* General Motors Ignition Switch Litig., No. 14-md-02543 (S.D.N.Y. Aug. 15, 2014), ECF No. 249.

At the PEC level, despite slightly lower percentages of women being appointed to PECs in more recent years, the story is more positive. In cases from 2015 to present day that appointed a PEC, women have occupied 29.6% of PEC appointments and in the 3 most recent cases 32.6% of appointments. Moreover, in 80% of the 5 most recent cases where a PEC was appointed, a woman served on the PEC. Although repeat female players were also common, about half of female-occupied PEC spots went to non-repeat players in the last 5 years—seemingly suggesting that PECs are the place for diversity and newcomers. These findings are consistent with prior studies that found women occupied 29% of PEC appointment slots in more recent years[254] and demonstrate a continued, albeit slow, trend to include more women. The findings here also reflect prior findings that the greater the size of the committee, the more likely women will be included and in increasingly greater numbers.[255]

The slight tightening of the gender gap, however, applies only to white women. No women of color were appointed to serve as lead counsel and only 1 woman of color was appointed to a PEC in CAAD MDLs. This is also consistent with research from recent years observing that only white women were being appointed to serve as leaders of MDLs.[256]

Perhaps because liaison counsel occupies a less crucial role in the litigation, 22.2% of liaison counsel appointments went to women. And 46% of special liaison appointments went to women. These appointments, however, impacted the litigation even less and were primarily created to coordinate efforts with existing actions or prosecutions.

Curiously, women on the bench tend not to appoint other women, at least not in CAAD MDLs. However, this could be because only 2 women in the previous 10 years have been transferred a CAAD MDL. This underrepresentation of women as transferee judges is also consistent with prior research that found women served in a lesser percentage as MDL transferee courts than their respective representative percentage on the bench.[257] But a prior study found there was no gender correlation between the district court and counsel appointed.[258]

254. ALVARÉ, *supra* note 14, at 8–9.
255. ALVARÉ, *supra* note 1, at 8.
256. Coleman, *supra* note 29, at 637 (noting feminism was an elite white woman's movement).
257. *Id.* at 635.
258. ALVARÉ, *supra* note 1, at 7.

2. The Racial or Ethnic Gap

The precise number of minority attorneys to serve as class counsel, as discussed above, was more difficult to determine. Numbers and percentages are less precise, but a few conclusions can be drawn. Consistent with previous findings that focused on more recent MDLs, it appears that less than 10% of lead counsel, PEC, and liaison counsel appointments went to minority attorneys. At least 90% of appointments that did go to minority attorneys were made in the last 15 years and at least 80% went to repeat players. As such, approximately 5 lawyers accounted for all minority appointments in CAAD MDLs. No Black attorneys have been appointed to serve or have served in any position as class counsel in a CAAD MDL.

Minority judges were considerably more likely to appoint minority attorneys. Judges appointed by a Democratic president also tended to appoint more minority attorneys than those appointed by a Republican president. In cases where a nonwhite attorney was appointed lead counsel, either a consensus was reached amongst counsel or the district court judge appointing counsel belonged to an ethnic or racial minority group. Given the limited data available, however, this could be coincidental.

3. Appointment Processes and Considerations

The Article set out to identify which processes courts employ and criteria they consider that positively correlate with the appointment of women and minority attorneys. The data suggests that while certain processes are more conducive to appointing women and minorities, the criteria considered by the court or stated to be of value to the court (other than counsel's experience and perhaps diversity) seemed to matter less. Indeed, most appointment orders failed to mention more than half of the criteria in corresponding application orders, and most appointment orders (75%) failed to give any meaningful explanation for the decision behind appointment of counsel. It appears that while application procedures are becoming more transparent, courts' reasons for appointments are not.

The Article also set out to determine whether women or minorities were more often appointed if courts appointed a law firm versus an individual attorney in the law firm. While individual over law firm appointments did not significantly impact women's chances of being appointed lead counsel (8.5% versus 8.3% of appointments respectively), individual appointments to a PEC did have a significant impact on the

number of women that served (20.6% versus 0% of appointments respectively).

Overall, women and minorities appeared to benefit from a formal application process. Women and minorities were collectively appointed to serve as lead counsel in approximately 25% of CAAD MDLs where application orders were entered and in no CAAD MDLs where application orders were not. But this could also be correlated with recent trends in issuing application orders and coordinated efforts by courts to appoint more diverse counsel. Women were appointed to serve more frequently on PECs when applications orders were entered (80% versus 50%) and occupied a greater percentage of PEC slots (20.2% versus 9.5%), as did attorneys of color (at least 16% versus approximately less than 5%).

Women and minorities also had more success in obtaining lead counsel and PEC membership positions when the process was competitive and required individual applications, as opposed to when courts adopted a joint proposal application. Both women and attorneys of color were also more likely to form part of larger PECs. Similarly, CAAD MDLs where only men were appointed to serve as lead counsel tended to have fewer applications and greater consensus among counsel on the appointment of lead counsel.

There appeared to be no correlation between the criteria courts stated to be important in their application orders and the appointments made by the court, other than counsel's experience and perhaps diversity. Indeed, most courts copied and pasted nearly verbatim language from the Manual in both application and appointment orders. In appointment orders, experience was by far the most important criteria for the appointment of lead counsel; every order that afforded some explanation for the court's selection cited the appointee's experience. The next most common criteria courts listed supporting lead counsel's appointment was the support the applicant received from other candidates. In two-thirds of the CAAD MDLs where the support a candidate received was considered, a woman was appointed, but it was always the same female repeat player. Courts that appointed women to serve as lead counsel tended to provide a greater explanation for their appointment selection, but those that appointed minority attorneys to serve as lead counsel coincidentally provided no explanation for their selection.

The next 2 most cited criteria for appointment were work done by counsel investigating and identifying claims and the depth and quality of counsel's firm and resources. While in the abstract neither of these factors favors repeat players, discussions of the same invariably resulted in the appointment of a repeat player. References to the depth and quality of applicants' law firms also limit the pool of institutional players and naturally encourage attorneys seeking leadership appointments

to associate themselves with these firms. Two courts also stated that they considered counsel's ability to work cooperatively.[259]

Despite the attention auction bidding has received from scholars, counsel's fees did not appear to be a discerning consideration in CAAD MDLs. That said, courts' inquiry into counsel's fees appears to have encouraged cooperation amongst counsel and led to fewer competing applications. This cooperation itself did not seem to negatively impact female or minority candidates, but it did tend to result in the appointment of repeat players.

Finally, there is a notable home court advantage favoring attorneys located in the state where the action is transferred, perhaps stemming from a familiarity with the court.[260] This homecourt advantage, however, applied to all attorneys regardless of gender or race.

Given these findings, the next Part evaluates existing recommendations to increase diversity in class counsel appointments and proposes a practical solution that promotes diversity without compromising Rule 23(g)'s adequacy mandates—joint dual appointments.

IV. DRIVING EFFORTS TO APPOINT DIVERSE CLASS COUNSEL

Progress has been made in the last decade, but not nearly enough. Defining diversity as the continuous appointment of the same token minority lawyers, again and again, affords little opportunity for new entrants or diverse representation that reflects both the profession and the class. PEC appointments have been more diverse, but when discussing relevant experience courts almost invariably reference counsel's prior experience serving as lead counsel, not as members of a PEC. While some have criticized this overemphasis on experience,[261] there is no denying that experience is a necessary consideration under Rule 23(g), and rightfully so. Instead of advocating shying away from this practical reality, solutions should be provided that afford new, more diverse attorneys such necessary experience.

This Part evaluates prior efforts and proposals to improve diversity, based largely on the findings in Part III. It concludes that many of these efforts are contributing to diverse appointments, but others either need tweaking, are not being applied in practice, or may have other troubling

259. Pretrial Order No. 1: Initial Conference, *In re* Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., & Prod. Liab. Litig., 17-md-02777 (N.D. Cal. Apr. 14, 2017), ECF No. 6; Order Setting Initial Status Conference, *In re* FCA US LLC Monostable Elec. Gearshift Litig., No. 16-md-02744, (E.D. Mich. Oct. 18, 2016), ECF No. 14.

260. *See* Coleman, *supra* note 22, at 1035 (noting that transferee courts' familiarity with elite players engenders a repeat player system).

261. Burch, *Judging*, *supra* note 16, at 86.

consequences. In addition to continuing practices that are improving diversity, this Part concludes by proposing a practical and immediately implementable solution—a joint dual class counsel appointment structure.

A. *Evaluating Class Counsel Appointment Practices & Proposals*

Academics and practitioners in recent years have offered different proposals to narrow the gender and racial and ethnic gaps in class counsel appointments. Most of these focus on court practices, but a few involve external actors. Several of these proposals were summarized in the GW Report, a March 2021 updated collaborative report between practitioners and academics issued by the Complex Litigation Center at George Washington Law School, which aimed to create best practices for increasing the appointment of diverse class counsel in both class actions and MDLs.[262] This section discusses many of the recommendations made in the GW Report, in addition to proposals made by other scholars. These include urging courts to (1) adopt more transparent and competitive application procedures; (2) examine counsel's commitment to diversity; (3) stress the importance of diversity; (4) focus less on counsel's access to resources, history of cooperation, and experience; (5) monitor and police appointees during the litigation; and (6) focus diversity efforts on PEC appointments. In addition to efforts targeted at the judiciary, the GW Report also recommends that (7) the JPML transfer MDLs to more diverse judges and (8) the Judicial Conference adopt a new model rule that promotes diversity.

1. Adopting Transparent Competitive Application Procedures

Some scholars have advocated for ending slate appointments and private ordering,[263] and Part III's findings reflect that women and minorities benefited from transparent, competitive application processes. Greater transparency, at least in the application stage, and more involvement from the court seems to have afforded opportunities for non-traditional applicants to enter the playing field in CAAD MDLs. Transparency, however, is diminished when courts issue appointment orders (as Part III suggests they often do) without any explanation for their selection or justification for why certain diverse attorneys were

262. HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101.

263. Burch, *supra* note 23, at 136; Burch, *supra* note 38, at 849–50; Coleman, *supra* note 29, at 643, 648–50.

not selected. When there are hundreds of applications, this could of course be a time-consuming process, but perhaps a middle ground can be achieved, where courts can at least explain why a more diverse team was not selected or why a homogeneous team was better suited to serve the interests of the class in cases.

A competitive process, moreover, can be compromised and result in the appointment of the same white male repeat players. As the findings above demonstrate, even when courts institute a competitive individual application process, counsel can nevertheless come to agreements that result in slate appointments. In the *ZF-TRW Airbag Control Units Products Liability Litigation*, for example, the court instituted an individual competitive application process,[264] but counsel seem to have come to an agreement as to their organization and the attorneys who would serve.[265] While attorneys submitted individual applications, they almost invariably noted their support for other applicants. When courts inquire into and place stock in the level of support individual applicants receive, it thwarts the competitive process and encourages attorneys and firms to form coalitions that are based on the same considerations seen in slate appointments or private ordering.

Professor Chamblee Burch proposes that the competitive application process include an opportunity for attorneys to object to certain applicants' appointment. Two CAAD MDLs afforded a process for such objections,[266] but no objections were filed in either case, perhaps because objections would have been public. But keeping objections secret presents other transparency problems. If objections are not disclosed, the attorney against whom the objection is lodged would have no opportunity to respond. While objections can be legitimate, they can also be illegitimate and provide an avenue to bar women and minorities from serving as counsel. Moreover, repeat players could agree to jointly object to the appointment of new entrants. Professor Chamblee Burch also suggests that judges employ a scoring sheet to evaluate appli-

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264. Civil Minutes General at 4, *In re* ZF-TRW Airbag Control Units Prod. Liab. Litig., No. 19-ml-02905 (C.D. Cal. Sept. 6, 2019), ECF No. 5.

265. *See, e.g.*, Application For the Appointment of David Stellings As Co-Lead Counsel and a Proposed Leadership Group at 9–10, *In re* ZF-TRW Airbag Control Units Prod. Liab. Litig., No. 19-ml-02905 (C.D. Cal. Jan. 21, 2020), ECF No. 68 (filing individual application, but proposing leadership structure "which has the support of nearly all the plaintiffs' firms who have filed cases in this matter"); Application for Appointment of Roland Tellis As Plaintiffs' Co-Lead Counsel at 6, *In re* ZF-TRW Airbag Control Units Prod. Liab. Litig., No. 19-ml-02905 (C.D. Cal. Jan. 21, 2020) ECF No. 67 (C.D. Cal. Jan. 21, 2020) (same).

266. Pretrial Order No.1: Initial Conference at 3, *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs., & Prod. Liab. Litig., No. 17-md-02777 (N.D. Cal. Apr. 14, 2017), ECF No. 6; Pretrial Order No. 2: Applications for Appointment of Plaintiffs' Lead Counsel and Steering Committee Members at 2, *In re* Volkswagen Clean Diesel Mktg., Sales Pracs. & Prod. Liab. Litig., No. 15-md-02672 (N.D. Cal. Dec. 22, 2015), ECF No. 336.

cants.[267] If disclosed in advance, this would increase transparency, but unless the completed score sheets were subsequently disclosed, they might add little transparency to the ultimate appointment. Furthermore, if completed score sheets were published by courts, these might influence other courts to subsequently pass over the same candidates in future litigation further cementing the repeat player problem.

Courts should implement transparent, competitive application processes, but to be effective these cannot rubber-stamp coordinated applications or appoint counsel based on support applications receive from other applicants. Moreover, it serves little benefit to have a transparent application process if ultimately the selection process is not transparent. Courts must add transparency to the whole appointment process by providing justifications for their appointments.

2. Examining Commitments to Diversity

The GW Report advocates taking counsel's *commitments* to diversity into consideration, which some courts have implemented. No CAAD MDL inquired specifically into counsel's commitments to diversity (i.e., employing diverse attorneys and paralegals and staffing them on the instant case). And the practice of doing so is insufficiently tailored to achieve diverse appointments. For example, firms could meet their commitment to diversity by staffing a Black attorney to review thousands of documents, a female attorney to prepare deposition materials for lead counsel, or a Hispanic paralegal to copy and paste class members' discovery objections. However, these practices would not do much to benefit the class or improve the diversity of the class action plaintiffs' bar. Even if these diversity commitment requests provide some inclusion of diverse attorneys, the attorneys may not receive the type of experience CAAD MDL courts considered when making appointments.

The mere fact that a firm states a commitment to employing diverse counsel does not mean the firm provides them with the meaningful work, credit, mentorship, and opportunities necessary to afford them the experience required for appointment. The GW Report takes inquiring into counsel's commitments to diversity one step further by recommending courts specifically inquire into how substantive work will be assigned to diverse team members. This inquiry weeds out some of the problems discussed above and can further meaningful participation, but it has its own limitations. Inquiring into the division of labor prior to appointment may be premature, as assignments depend on the

267. Burch, *supra* note 23, at 164–65.

course of the litigation. And unless there is written record of these assignments and their completion, they fail to provide minority attorneys the experience courts require.

3. Stressing the Importance of Diversity

Only one CAAD MDL stressed the importance of diversity in either an application or appointment order. It is, therefore, difficult to assess the impact such a practice has on diversity based on the findings in Part III. That said, the one court that did discuss diversity ultimately appointed a woman to serve as lead counsel and three women and at least one non-white lawyer to serve on a PEC. There is little to be lost by courts stressing the importance of diversity and much to gain. If nothing else, such efforts may encourage more diverse candidates to apply or counsel to form coalitions that include women and minorities. The practice, however, can quickly devolve into token appointments for "diversity" or become lip service if courts continue to appoint only white, male candidates or accept joint slates that do not include minority candidates after stressing the importance of diversity. To have a meaningful impact, courts must make diverse appointments or be willing to send attorneys back to the drawing board if their proposals do not meet diversity expectations.

4. Diminishing the Importance of Resources, Cooperation, & Experience

Proposals have been made to diminish the importance of candidates' experience, access to resources to fund the litigation, and cooperation, as these criteria arguably result in the appointment of the same white male repeat players.[268] The findings above also seem to reflect that emphasis on experience and a candidates' access to resources often correlate with the appointment of a repeat player. However, Rule 23(g) *requires* courts to consider counsel's experience and resources to determine adequacy before appointment.[269] While these considerations may be eliminated in a non-class action MDL, they cannot be eliminated for a class action without amending Rule 23(g). Nor should they. Counsel needs both experience and resources to effectively prosecute these actions. Courts can and should, however, consider the experience and re-

268. Burch, *Judging*, *supra* note 16, at 95; HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 10–11, 14–15.

269. FED. R. CIV. PRO. 23(g)(1)(A)(i).

sources of appointed counsel collectively, as opposed to each counsel individually; this could provide greater opportunities for less experienced and financially funded candidates. The one CAAD MDL to discuss the importance of diversity in its appointment order appears to have followed this approach, noting that it balanced the desire to include newer players with experience when it appointed members to the PEC.[270]

Rule 23(g) does not, however, require courts to consider counsel's ability to work cooperatively because class counsel works more independently, while MDL counsel must work collectively.[271] While more than half of CAAD MDL courts stated this to be a criterion for appointment, only two courts stated in their appointment orders that they considered counsel's cooperative tendencies. And in those two cases, less than a third of appointments went to repeat players. It is thus unclear what value courts truly place on cooperative tendencies, or whether being a repeat player may negatively impact counsel's application. That said, to the extent courts weigh support from other applicants based on counsel's past cooperative behavior, it logically leads to the appointment of repeat players. Given that cooperation is not necessary for Rule 23(g), its potential to result in the appointment of repeat players is probably reason enough to eliminate its consideration.

5. Police Appointees Throughout the Litigation

Some recommend that courts take a more active role *after* appointing counsel and monitor counsel's work assignments and performance throughout litigation.[272] Specifically, they recommend that courts continue to ensure that work is being assigned to diverse candidates and keep tabs on which lawyers are performing meaningful work.[273] One CAAD MDL appears to have attempted to do this. The *Toyota Unintended Acceleration* court stated in its appointment order that it would discuss "a process for evaluating appointees' performance and commitment to

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270. Order Appointing Plaintiffs' Lead Counsel, et al. at 4, *Chrysler EcoDiesel*, No. 17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173.

271. Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 392 (2014).

272. *See* Samuel Issacharoff & R. David Proctor, Selection and Compensation of Counsel in Multi-District Litigation, Presentation to the 2012 Transferee Judges Conference 25 (Oct. 23, 2012) (on file with author); HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 22–24.

273. HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 23–24.

the tasks assigned" at a future hearing.[274] However, it is unclear from the docket what monitoring of counsel, if any, took place during the litigation. Actively monitoring counsel throughout the litigation requires a significant investment of time from the court and could prejudice the court against or in favor of plaintiffs' counsel because it has become more invested in the outcome of the litigation—both of which are harmful.

Moreover, it is difficult to envision how courts could effectively monitor counsel in practice. Appointed counsel is not likely to admit they are excluding diverse attorneys or giving significant work to diverse counsel but not giving them credit. The diverse attorney who is either part of the class counsel team or working for appointed counsel must then inform the court they are not receiving substantive work or are assigned work for which they are not receiving credit. The negative repercussions for the attorney making such a complaint could be substantial and the risk alone is likely to cause self-censorship.

However, courts in CAAD MDLs have frequently assigned a series of duties and responsibilities to appointed counsel. These assignments could include providing substantive experience to unappointed attorneys in the firm and providing the court or a special master with quarterly reports of the individual attorneys working on the action and the substantive work they are performing. While this does not afford an opportunity for remedial efforts in the instant action, it will presumably motivate appointed counsel to assign work to women and minority attorneys, even if for nothing other than publicity. Moreover, it provides a written record of substantive experiences these attorneys are obtaining that they can use in future applications.

6. Focus Efforts on PEC Appointments

Others have suggested that PEC appointments are the place for courts to focus diversity efforts.[275] The findings above, however, suggest that the experience courts value in lead counsel appointments are prior experiences serving as lead counsel. Moreover, PEC appointments, like lead counsel appointments, usually involve contributions to funding the litigation, which would exclude most junior attorneys from even apply-

274. Order No. 2: Adoption of Organization Plan and Appointment of Counsel at 5, *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig., No. 8:10-ml-02151 (C.D. Cal. May 14, 2010), ECF No. 169.

275. *See, e.g.*, HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 16–20; *In re* Deepwater Horizon Litig., 295 F.R.D 112, 137–38 (E.D. La. Jan. 11, 2013).

ing.[276] Unless courts create different tiers of PEC membership that do not require litigation funding or allow funding from third parties,[277] PECs are unlikely to provide opportunities for new entrants. Moreover, the experience attorneys gain from serving on a PEC varies from case to case because lead counsel is usually provided with significant discretion on how to employ PEC members. Finally, courts do not appoint a PEC when they deem one is unnecessary in the litigation.

7. Transfer MDLs to Diverse Judges

Transferring MDLs to female and minority judges, per the findings above, appears to be a mixed bag. Judges that belong to a racial or ethnic minority appointed more diverse attorneys in CAAD MDLs. Indeed, these judges appointed minority candidates nearly at a six times greater rate than white judges. But female judges appointed fewer female candidates than white men in CAAD MDLs. This could again be because only two female judges have presided over a CAAD MDL in the last ten years,[278] but this finding was also consistent with prior research.[279] And although the most significant impact on courts' appointment of minorities identified in Part III was the political party of the president who appointed the district court, transferring more MDLs to Democratic appointees is not a palpable solution or one advocated here. That said, transferring MDLs to women and other minority judges could also result in innovative procedures and more diverse counsel being appointed as a result. Moreover, diverse judges are more likely to be attuned to gender and racial or ethnic biases.[280]

8. A Model Rule Promoting Diversity

The GW Report recommends that the Judicial Conference issue a model rule promoting inclusivity in appointments.[281] The effects of such a rule are difficult to gauge, but based on the findings above that suggest courts often uniformly adopt language from the Manual's proposed orders, it seems that inclusion of language in the Manual that promotes

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276. *See* HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 14–15; Burch, *supra* note 23, at 76.

277. *See* HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 14–15.

278. The two cases women presided over are *In re* Navistar Maxxforce Engines Mktg., Sales Pracs. & Prods. Liab. Litig., No. 1:14-cv-10318 (N.D. Ill.) and *In re* Ford Motor Co. Spark Plug & 3-Valve Engine Prods. Liab. Litig., No. 1:12-md-02316 (N.D. Ohio).

279. ALVARÉ, *supra* note 1, at 7.

280. *See* Resnik, *supra* note 131, at 2206.

281. HUMPHREYS COMPLEX LITIG. CTR., *supra* note 101, at 25.

diversity would be highly beneficial. Indeed, updating various passages and instructions in the Manual (last updated in 2004), is advisable. Additionally, the Manual should be updated to remove language encouraging private ordering.

Several of the practices and proposals discussed above can and are having a positive impact on gender and racial and ethnic diversity in the appointment of counsel, and with some tweaks they could possibly have an even greater impact. However, progress has been slow and these less targeted approaches lead to mixed results. The following section proposes an innovative way to quickly increase the number of diverse attorneys qualified to serve as class counsel without sacrificing the experience and resources necessary to prosecute the action on behalf of the class.

B. *Driving Diverse Appointments: A Joint Dual Class Counsel Appointment Proposal*

Courts should implement joint dual class counsel appointment procedures for each class counsel position. A joint dual appointment process allows for the appointment of a new, more diverse entry class of counsel without sacrificing Rule 23(g) adequacy requirements.

1. Joint Dual Appointments in Concept

Undoubtedly, when appointing counsel courts most often consider experience, and for good reason. However, exclusively defining experience as prior service as lead counsel or as a member of a PEC for consideration in appointment as lead counsel or a member of a PEC respectively perpetuates the current white male repeat player system. The same 50-odd (or fewer) attorneys continue serving as lead counsel or members of a PEC. To avoid this, courts should consider experience more broadly. But it is difficult for courts to gauge the level of substantive, relevant experience attorneys that have not previously served in an appointed role have gained throughout their career without relying on self-serving statements in applications.

Unlike other litigation where clients are financially motivated to have their counsel distribute work to lower billing, less experienced attorneys, courts have no such motivations in class action MDLs. Courts must ultimately approve attorneys' fees and remain rightfully apprehensive about sacrificing experience for cost. Appointed attorneys trying to increase their lodestar may also avoid assigning certain tasks to more junior lawyers or (unethically) take credit for work performed by

them. But attorneys appointed to lead counsel, PEC, and liaison counsel roles rarely, if ever, perform their court-assigned duties alone. They are assisted by other more junior attorneys in their firm.

These assisting attorneys are usually just as, if not more so, involved in the day-to-day management of the case.[282] Many take primary roles in drafting motions, conducting depositions, coordinating discovery efforts, arguing hearings before a special master, and communicating with co-counsel and opposing counsel. These behind-the-scenes efforts, however, are rarely publicly recognized. Instead, appointed counsel is the one credited for the team's achievements. The joint dual class counsel appointment system proposed and described below can change that and provide ample opportunities for more diverse counsel.

Appointments should come jointly from the same law firm to avoid duplication and increased billings and costs. The second appointed attorneys already perform much of the same work, but do not receive the due experiential credit. Joint dual appointments would double the number of attorneys with sufficient experience to serve in leadership roles in class actions and MDLs, providing courts with a greater and continuously growing pool of attorneys to choose from with requisite experience.

Joint dual class counsel appointments also address courts' hesitancy to appoint repeat players' second in command because they are required under Rule 23(g) to appoint the best applicants.[283] The top billing attorney appointed would provide the required experience, knowledge of the law, and resources, but this is not to say that the secondary appointment would not have significant experience and knowledge. This Article does not propose that first, second, third, fourth, or even fifth-year attorneys with limited experience occupy the second appointment slot. Rather, seasoned attorneys (senior associates or junior partners) should be the primary candidates for these positions. Courts have understandably been hesitant to be the first to appoint these individuals without a safety net, but because the senior attorney will meet Rule 23(g)'s mandatory criteria, courts can more boldly emphasize other factors that impact the ability of counsel to "fairly and adequately represent the interests of [diverse] class" members, including diversity.

This Article recognizes, however, that while this proposal provides a solution for the repeat player problem, it does not on its own ensure that diverse attorneys will form part of the dual appointment team. Although the findings above, consistent with prior findings,[284] reflect that

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282. *See* Ratner, *supra* note 22, at 795 (noting that relatively few case managers are equity partners).

283. Dodge, *supra* note 70, at 370–71.

284. *See* ALVARÉ, *supra* note 1, at 9.

the percentage of diverse appointments increases with the number of appointments made, more needs to be done. In addition to employing a joint dual class counsel appointment organizational structure, courts must institute a process that encourages diverse applicant candidates to serve in the secondary role. This includes a competitive application process, wherein courts consistently stress the importance of diverse teams, including in early case management application orders and in oral communications during initial conferences. To add weight to their commitment to diversity, courts must make clear that they will not appoint agreed-upon interim counsel that fails to collectively meet all the adequacy considerations articulated.

Courts, however, should not require that all appointments include a woman or another minority attorney, as Judge Baer encouraged. This procedure should not be an attempt to establish quotas or tick boxes, but rather one to reflect the diversity of the profession and the class to be represented. Some cases may call for more diverse teams than others. The court should use its discretion. To the extent cognitive diversity, as Professor Chamblee Burch proposes, can be considered, it should, but it should not replace identity diversity, as Professor Coleman wisely notes.[285]

Courts' emphasis on diversity should in turn put the onus on repeat players to include diverse candidates on their roster. This will require plaintiffs' firms to reconsider not only their hiring practices but also their efforts to retain diverse hires. A firm's diverse entry class matters little if the firm is unable to retain diverse attorneys because dual appointment candidates are not eligible for appointment for several years. Time and time again, studies have revealed that while women are graduating from law school and being hired as entry-level associates at approximately the same (if not higher) rates as men, they are neither promoted nor retained at equal rates.[286] The same holds true for racial

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285. Coleman, *supra* note 29, at 638–39.

286. *See, e.g.*, ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE, at i (2019) (noting that "[w]hile entering associate classes have been compromised of approximately 45% women for several decades, in the typical large forim, women constitute only 30% of non-equity partners and 20% of equity partners"); NAT'L ASSOC. WOMEN LAWYERS, 2019 SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 2–3 (2019), https://www.nawl.org/page/2018survey [https://perma.cc/4DM5-L536] ("For over a decade, approximately 50% of law students nationwise have been women" and "about 47% of all law firm associates[,]" but they account for only about 20% of equity partners and 20% to 25% of governance and compensation committee members at law firms.); COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2018), https://www.pbi.org/docs/default-source/default-document-library/10569_a-current-glance-at-women-in-the-law-jan-2018-(1).pdf?sfvrsn=0 [https://perma.cc/Y4J9-XCEM] (finding that 48.7% of summer associates and 45% of associates were female but only 22.7% percent of partners and only 19% of equity partners were female).

and ethnic minority lawyers.[287] The primary reasons for attrition, a 2019 study found, are dissatisfaction with the recognition received, compensation, opportunities for advancement, and leadership diversity.[288] To remain competitive for appointments, plaintiffs' firms would thus focus their efforts on not only providing opportunities for diverse attorneys, but also ensuring they receive recognition for their efforts and are properly compensated, mentored, and promoted.

Even if diverse attorneys serve in the secondary role, they might become beholden to the senior attorney's decisions on their team and/or delegated to perform ministerial tasks while the senior attorney or other attorneys with whom the senior attorney has more affinity are assigned meaningful substantive work, providing little benefit to the junior attorney or the class in terms of diversity. Courts should, therefore, as they do now for lead counsel, clearly delineate the duties and responsibilities assigned to all appointees in their appointment order. Application orders should also require senior attorneys to describe their efforts in past years to train, involve, and mentor younger attorneys, including women and other minorities.

Courts must also make an effort to prevent the secondary role from evolving into a repeat player system. Ideally, attorneys would serve in this role only a few times before submitting an appointment application with another more junior attorney to continue increasing the pool of experienced, adequate applicants. At this point, an inter-firm conflict preventing junior partners' ascension if they replace the senior attorney in the individual appointment slate may arise. Presumably, this would free up the more senior attorney to pursue other leadership appointments and overall increase appointments for the firm,[289] but if few appointment opportunities arise an inter-firm conflict could occur. These conflicts may result, in one or more senior attorneys leaving the law firm. Which in turn could diversify the law firm repeat player system in the long term, although admittedly this proposal further cements the law firm repeat player system in the short term because more than one attorney from the same law firm would be appointed.

Ultimately this proposal would provide more attorneys with the experience and resources required to form their own law firms and thus

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287. Debra Cassens Weiss, *Diversity 'Bottleneck' and Minority Attrition Keep Firm Leadership Ranks White and Male, New ABA Survey Says*, ABA J. (Feb. 17, 2021, 12:51 PM), https://www.abajournal.com/news/article/diversity-bottleneck-and-minority-attrition-keep-law-firm-leadership-ranks-white-and-male-aba-survey-says [https://perma.cc/9PR8-SYQ4].

288. LIEBENBERG & SCHARF, *supra* note 286, at 9–11; *Report Examines Attrition of Senior Female Lawyers, Offers Best Practices to Retain Them*, ABA NEWS (Nov. 14, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/11/report-examines-attrition-of-senior-female-lawyers—offers-best-/ [https://perma.cc/U323-Y8A5]; *see also* Coleman, *supra* note 29, at 628–29.

289. Dodge, *supra* note 70, at 371.

increase the number of firms with attorneys applying for leadership positions. If this new wave of attorneys is also more diverse, this would likely provide greater opportunities for more diverse attorneys in the future to continue the trend, as affinity mentorship is common and currently an obstacle for diverse entrants.[290] Dual appointments are not completely without drawbacks, but they stand to provide much-needed immediate change to the plaintiffs' class action bar, change that is required to better serve the interests of diverse class members.

2. Joint Dual Appointments in Practice

In practice, dual appointments are not revolutionary. Courts appointing counsel in a class action would enter, much as they do now, an order indicating their intention to appoint counsel. A sample order is included in Appendix B. Along with providing notice, the courts' order would outline in detail, as several do now,[291] the process the court will employ in collecting applications and the criteria it will consider in selecting counsel. In addition to Rule 23(g)(1)(A)'s four adequacy considerations, these criteria should explicitly include diversity, which the court would recognize as pertinent to counsel's ability to represent the interests of all class members adequately and fairly, pursuant to Rule 23(g)(1)(B).[292] The court would indicate that each intended position would be jointly filled by two-member attorney teams and that their qualifications would be reviewed collectively under Rule 23(g).

Applications should include joint applicants' relevant experience, history of working cooperatively, proposed division of labor, access to resources, and work performed by each applicant on the litigation to date. The senior attorneys' application should also include their efforts in mentoring other attorneys, providing opportunities to more junior and diverse attorneys, and references from counsel that previously worked under them attesting to their leadership and mentorship skills.

Upon receiving all applications, the court should conduct a hearing prior to appointing counsel. At the hearing, applicants should be prepared to discuss their experience and commitment to a fair division of labor that provides all team members substantive experience. The court should actively inquire into any reservations it has regarding an appli-

290. *See* Coleman, *supra* note 29, at 648.

291. *See, e.g.*, *In re* General Motors Corp. Air Conditioning Mktg. & Sales Pracs., No. 2:18-md-02818 (E.D. Mich. Apr. 11, 2018), ECF No. 13; *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs., & Prod. Liab. Litig., No. 3:17-md-02777 (N.D. Cal. June 19, 2017), ECF No. 173.

292. *See* FED. R. CIV. P. 23(g)(1)(B).

cant and allow the applicant to respond to those concerns, thereby avoiding making decisions clouded by assumptions or implicit biases.

After conducting a hearing, the court should enter an appointment order explaining its appointments. A sample model order is included in Appendix C. If appointed counsel is not diverse, the court should explain why more diverse counsel would not have better served the interests of the class. The appointment orders should specifically assign duties and responsibilities to each appointed counsel. While these duties should apply to all counsel in the same appointed position and be general enough to provide some degree of flexibility to matters that may arise during the litigation, the duties should also be sufficiently specific to ensure that junior counsel is substantively participating in the litigation. For senior appointees, duties could include involving junior appointees in settlement discussions, litigation strategy, and other substantive decisions, as well as soliciting and considering input from junior appointees.

Courts should specifically assign junior lead attorneys duties that involve assuming an active role in hearings, discovery, and settlement negotiations, taking lead in conducting defensive discovery of class representatives, and managing class member communications. Duties assigned to PEC junior members will largely depend on the duties assigned to the committee generally, but they should also include active participation in all committee meetings, coordinating any discovery with which the committee is charged, and assisting in drafting any pleadings or motions assigned to the committee. They should also participate in any settlement discussions in which the committee is involved. In addition to creating a written record of these attorneys' substantive experience, this assignment of duties also provides the junior lead attorneys with direct access to the class whose interests they are meant to represent—access that to date is missing with other appointments.

V. CONCLUSION

Exclusively white male teams are not invariably the best attorneys to represent the interests of a class, much less a diverse class. Despite the attention that class counsel's lack of diversity has received in recent years and courts' efforts in the last decade to improve diversity, this Article's findings suggest that improvement has been and continues to be incremental. What little progress has been achieved appears largely attributable to the repeat appointments of a small group of diverse attorneys. While some courts may be more willing than others to appoint di-

verse legal teams and certain appointment processes provide diverse attorneys greater opportunities, the biggest hurdle women and racial and ethnic minority attorneys face is a lack of qualifying experience. Experience is the most cited and often single reason given by courts when appointing repeat players. Courts cannot ignore Rule 23(g)'s other requirements in exchange for diversity, but diverse attorneys must be provided access to the experience and resources Rule 23(g) requires for appointment. Joint dual appointments, along with courts' and the profession's continued commitment to diversity, are necessary to provide class members with appointed counsel that can serve the interests of their entire class.

DRIVING DIVERSE REPRESENTATION OF DIVERSE CLASSES APPENDICES

Alissa del Riego

APPENDIX A
LIST OF CAAD MDLS ANALYZED IN PART III[293]

In re ZF-TRW Airbag Control Units Products Liability Litigation, MDL-2905 (C.D. Cal.) (ongoing).

In re Ford Motor Company F-150 & Ranger Truck Fuel Economy Marketing and Sales Practices Litigation, MDL-2901 (E.D. Mich.) (ongoing).

In re General Motors Corp. Air Conditioning Marketing and Sales Practices Litigation, MDL 2818 (E.D. Mich.) (ongoing).

In re Chrysler-Dodge Jeep Ecodiesel Marketing, Sales Practices, and Products Liability Litigation, MDL 2777 (N.D. Cal.) (ongoing).

In re FCA US LLC Monostable Electronic Gearshift Litigation, MDL-2744 (E.D. Mich.) (ongoing).

In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, MDL-2672 (N.D. Cal.) (terminated Nov. 13, 2020).

In re American Honda Motor Company CR-V Vibration Marketing and Sales Practices Litigation, MDL-2661 (S.D. Ohio) (terminated Jan. 1, 2019).

In re Takata Airbag Products Liability Litigation, MDL-2599 (S.D. Fla.) (ongoing).

In re Navistar MaxxForce Engines Marketing, Sales Practices and Products Liability Litigation, MDL-2590 (N.D. Ill.) (terminated June 22, 2022).

In re General Motors LLC Ignition Switch Litigation, MDL-2543 (S.D.N.Y.) (ongoing; economic loss claims settled Dec. 2020).

In re Ford Fusion and C-Max Fuel Economy Litigation, MDL-2450 (S.D.N.Y.) (terminated Apr. 26, 2018).

In re Hyundai and Kia Fuel Economy Litigation, MDL-2424 (C.D. Cal.) (terminated Nov. 6, 2015).

In re Ford Motor Company Defective Spark Plug and 3-Valve Engine Products Liability Litigation, MDL-2315 (N.D. Ohio) (terminated Jan. 26, 2016).

In re Porsche Cars North America Incorporated Plastic Coolant Tubes Products Liability Litigation, MDL-2233 (S.D. Ohio) (terminated Mar. 19, 2014).

In re Navistar Diesel Engine Products Liability Litigation, MDL-2223 (N.D. Ill.) (terminated July 2, 2013).

In re Toyota Motor Corporation Hybrid Brake Marketing, Sales Practices, and Products Liability Litigation, MDL-2172 (C.D. Cal.) (terminated July 30, 2013).

In re Toyota Motor Corporation Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation, MDL-2151 (C.D. Cal.) (ongoing but economic loss claims settled on July 24, 2013).

In re Land Rover LR3 Tire Wear Products Liability Litigation, MDL-2008 (C.D. Cal.) (terminated July 23, 2013).

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293. Listed in reverse chronological order of date of transfer to the district court.

In re Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Products Liability Litigation, MDL-2006 (D.N.J.) (terminated May 26, 2009).

In re Nissan North America Incorporated Odometer Litigation, MDL-1921 (M.D. Tenn.) (terminated Jan. 19, 2012).

In re Mercedes-Benz Tele Aid Contract Litigation, MDL-1914 (D.N.J.) (terminated on Sept. 9, 2011).

In re Saturn L-Series Timing Chain Products Liability Litigation, MDL-1920 (D. Neb.) (terminated June 10, 2009).

In re General Motors Corporation Speedometer Products Liability Litigation, MDL-1896 (W.D. Wash.) (terminated Jan. 23, 2009).

In re American Honda Motor Company Oil Filter Products Liability Litigation, MDL-1737 (C.D. Cal.) (terminated Oct. 26, 2009).

In re Ford Motor Company Speed Control Deactivation Switch Products Liability Litigation, MDL-1718 (E.D. Mich.) (terminated Oct. 9, 2012).

In re Ford Motor Company E-350 Van Products Liability Litigation, MDL-1687 (D.N.J.) (terminated June 16, 2005).

In re General Motors Corporation "Piston Slap" Products Liability Litigation, MDL-1600 (W.D. Okl.) (terminated Oct. 20, 2006).

In re General Motors Corporation Dex-Cool Products Liability Litigation, MDL-1562 (S.D. Ill.) (terminated Mar. 4, 2009).

In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation, MDL-1373 (S.D. Ind.) (terminated Dec. 8, 2009).

In re Ford Motor Company Crown Victoria Police Interceptor Products Liability Litigation, MDL-1488 (N.D. Ohio) (terminated Apr. 28, 2008).

In re General Motors Corporation Vehicle Paint Litigation, MDL-1392 (N.D. Ill.) (terminated Sept. 12, 2011).

In re General Motors Corporation Type III Door Latch Products Liability Litigation, MDL-1266 (N.D. Ill.) (terminated June 21, 2001).

In re Airbag Products Liability Litigation, MDL-1181 (E.D. La.) (terminated May 21, 1998).

In re Ford Motor Company Anti-Lock Brake System (ABS) Products Liability Litigation, MDL-1171 (C.D. Ill.) (terminated Aug. 20, 1997).

In re Ford Motor Company Thick Film Ignition (TFI) Module Products Liability Litigation, MDL-1133 (N.D. Cal.) (terminated July 30, 1997).

In re General Motors Corporation Anti-Lock Brake Products Liability Litigation, MDL-1129 (E.D. Mo.) (terminated Sept. 18, 2000).

In re Ford Motor Company Ignition Switch Products Liability Litigation, MDL-1112 (D.N.J.) (terminated Aug. 31, 1996).

In re Ford Motor Company Head Rest Products Liability Litigation, MDL-1103 (N.D. Ala.) (terminated Jan. 22, 1999).

In re Ford Motor Company Vehicle Paint Litigation, MDL-1063 (E.D. La.) (terminated Feb. 16, 2000).

In re Ford Motor Co. Bronco II Product Liability Litigation, MDL-991 (E.D. La.) (terminated Sept. 18, 1998).

In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, MDL-961 (E.D. Pa.) (terminated Dec. 16, 1994).

In re Suzuki Samurai Products Liability Litigation, MDL-784 (E.D. Pa.) (terminated Mar. 27, 1990).

In re General Motors 1980 X-Body Car Braking Systems Warranty Litigation, MDL-613 (D.D.C.) (terminated July 27, 1995).

In re General Motors Corporation Engine Interchange Litigation, MDL-308 (N.D. Ill.) (terminated June 27, 1981).

APPENDIX B

UNITED STATES DISTRICT COURT
[INSERT] DISTRICT OF [STATE]
CASE NO. [INSERT]

IN RE:
[CASE NAME]
_____ /

CASE MANAGEMENT ORDER SOLICITING APPLICATIONS FOR INTERIM CLASS COUNSEL

The Court intends to appoint plaintiffs' [interim lead counsel, a plaintiffs' executive committee, and/or liaison counsel] in this matter. Specifically, the Court anticipates appointing at least [[number] of joint two-member interim lead counsel teams, [number] of joint two-member plaintiffs' executive committee members, and a joint two-member liaison counsel team]. Joint member teams will consist of two attorneys from the same firm, with at least one attorney that has either never served as or been appointed class counsel or has been appointed to the position they are applying for in no more than two substantively litigated cases. Applications for these positions must be filed on CM/ECF on or before [date].

Appointed counsel must be able to fairly and adequately represent the interests of class members. Pursuant to Rule 23(g)(2), the Court will appoint the joint applicants collectively best able to represent the interests of the class. The Court will consider counsel's experience handling similar cases; knowledge of the applicable law; commitment to the litigation to date, including any work done and time spent identifying or investigating the claims; ability to commit resources to representing the class; collective diversity; and [any other matters the Court deems to be pertinent to counsel's ability to adequately and fairly represent the interests of the class].

The Court is committed to upholding the integrity and independence of the judiciary. Applicants will not be excluded on the basis of gender, race, ethnicity, color, sex, sexual orientation, age, or disability. Moreover, the Court recognizes and strongly believes that diverse legal teams best represent the interests of all class members for a myriad of reasons. It, therefore, expects applicants will consider the diversity of their proposed legal team prior to applying. The Court reserves the

right to deny applications if proposed counsel does not take into account its ability to best represent the interests of the class.

Each two-member team must file a joint application, but slate applications proposing the appointment of more than the individual two-member team applying are not permitted. Each application must not exceed [#]-pages and include: (1) the joint position for which counsel is applying; (2) a list of similar cases each attorney previously worked on, including their appointed or unappointed role in the litigation, the work they performed in the litigation, and the outcome of the litigation; (3) counsel's firm's prior experience in similar litigation, the firm's or its attorney(s)' role in the litigation, and the outcome of the litigation; (4) counsel's prior experience working together; (5) the resources counsel intends to dedicate to the litigation; (6) a statement affirming counsel's ability to dedicate time and effort to the litigation; (7) efforts counsel has made in the past to mentor more junior attorneys and provide them with substantive experience; (8) work each counsel has performed in the litigation to date and proposed division of labor between counsel throughout the rest of the litigation; (9) counsel's plan to decipher and represent the interests of diverse class members; [(10) any other matter the Court believes would impact counsel's ability to fairly and adequately represent class members;] and (11) any other matter counsel believes makes them the best counsel to fairly and adequately represent class members as [interim lead counsel, PEC member, or liaison counsel]. Applications may not include a list of other counsel that support their appointment or statements regarding applicants' support of other counsel's applications.

On [date and time approximately one to two weeks after all applications have been submitted], the Court will conduct a hearing wherein all applicants may appear and present a no more than [time] minute presentation on their ability to fairly and adequately represent the interests of the class. At this time, the Court may also ask any questions it has of counsel and their ability to serve the interests of the class.

DONE AND ORDERED in Chambers, this _____ day of [month], [year].

_____

UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
[INSERT] DISTRICT OF [STATE]
CASE NO. [INSERT]

IN RE:
[CASE NAME]
_____ /

ORDER APPOINTING INTERIM CLASS COUNSEL

The Court, upon reviewing all applications for appointment of interim class counsel and hearing argument from all counsel wishing to address the Court on the same, appoints the following attorneys to serve as interim class counsel.

I. INTERIM LEAD COUNSEL

A. *Appointees*

The Court appoints [number] joint counsel teams to serve as interim co-lead counsel. Given the demands of this litigation, the Court believes such a structure for interim lead counsel is appropriate because [_____].

The Court appoints [name] and [name] of [firm] to serve as interim co-lead counsel[, along with [name] and [name] of [firm] and [name] and [name] of [firm]] (collectively "Interim Co-Lead Counsel"). The Court received [number] of joint applications for lead counsel. It has appointed Interim Co-Lead Counsel based on counsel's collective experience, knowledge, resources, and ability to best represent the interests of class members in this litigation.

Specifically, the Court is appointing [name] and [name] because of their individual and collective [_____]. [[Similarly, Additionally, Furthermore,] the Court appoints [name] and [name] because of their individual and collective [_____].] [Finally, the Court appoints [name] and [name] because of their individual and collective [_____].]

The Court notes that various other qualified candidates applied to serve as lead counsel. These individuals and teams were not appointed because of a lack in ability to fairly and adequately represent the inter-

est of the class, but rather the Court concluded that appointed Interim Co-Lead Counsel were best able to represent the interests of class members because [_____].

B. *Duties*

Despite [name(s) of Junior Interim Counsel's] significant experience working on [type of litigation] putative actions, the Court notes that [name(s) of Senior Interim Counsel] have more experience [and have been previously appointed to serve as [list roles in litigations]]. While the Court will not micromanage the division of labor amongst Interim Co-Lead Counsel, it expects each attorney will actively participate in managing the litigation. In addition to the duties outlined in Section 40.22 of the Manual for Complex Litigation, the Court, based in part on Interim Co-Lead Counsel's representations to the Court regarding its planned division of labor, orders that:

1. [Names of Senior Interim Co-Lead Counsel members]: (a) involve [names of Junior Interim Co-Lead Counsel members] in all significant strategic decisions, including settlement discussions; (b) assign [names of Junior Interim Co-Lead Counsel members] motions or portions of motions to argue before the Court, magistrate judge, or special master; (c) assign to the extent possible [names of Junior Interim Co-Lead Counsel members] depositions to take and/or defend and assist in those depositions; (d) provide mentorship and opportunities for [names of Junior Interim Co-Lead Counsel members] to gain substantive experience and improve their litigation skills; and (e) continuously solicit input from [names of Junior Interim Co-Lead Counsel members].

2. [Names of Junior Interim Co-Lead Counsel members]: (a) actively participate in strategic litigation decisions, including settlement discussions; (b) research, draft, and argue motions or portions of motions before the Court, magistrate judge, or special master; (c) participate in taking and defending depositions; and (d) coordinate discovery of class members.

II. PLAINTIFFS' EXECUTIVE COMMITTEE

A. *Appointees*

The Court appoints a [number] joint member Plaintiffs' Executive Committee ("PEC"). Given the nature of the litigation, the Court be-

lieves a PEC with [number] joint members is appropriate because [_____]. The Court appoints [name] and [name] of [firm] to serve as members of the PEC[, along with [name] and [name] of [firm] and [name] and [name] of [firm]]. The Court received [number] of joint applications to participate in the PEC. It has appointed the aforementioned counsel to the PEC based on their collective experience, knowledge, resources, and ability to best represent the interests of class members in this litigation.

Specifically, the Court is appointing [name] and [name] because of their individual and collective [_____]. [The Court appoints [name] and [name] because of their individual and collective [_____].] [The Court appoints [name] and [name] because of their individual and collective [_____].]

[The Court notes that various other qualified candidates applied to serve on the PEC. These individuals and teams were not appointed because of their lack of ability to fairly and adequately represent the interest of the class, but rather the Court concluded that appointed PEC members were best able to represent the interests of class members because [_____].]

B. *Duties*

Despite [names of Junior PEC members'] significant experience working on [type of litigation] putative actions, the Court notes that [names of Senior PEC members] have more experience and have been previously appointed to serve as [list roles in litigations]. While the Court will not micromanage the division of labor amongst PEC members, it expects each attorney will actively participate in managing the litigation. In addition to the duties outlined in Section 40.22 of the Manual for Complex Litigation and the duties Interim Co-Lead Counsel assigns the PEC, the Court, based in part on PEC members' representations to the Court regarding their planned division of labor, orders that:

1. [Names of Senior Interim Co-Lead Counsel members]: (a) involve [names of Junior PEC members] in all significant strategic decisions, including settlement discussions in which the PEC participates; (b) involve [names of Junior PEC members] in drafting and/or arguing before the Court, magistrate judge, or special master any motions assigned to the PEC; (c) involve [names of Junior PEC members] in depositions assigned to the PEC; (c) provide mentorship and available opportunities for [names of Junior PEC members] to gain substantive experience and

improve their litigation skills; and (d) continuously solicit input from [names of Junior PEC members].

2. [Names of Junior PEC members]: (a) actively participate in strategic litigation decisions, including settlement discussions, in which the PEC is involved; (b) work on motions or portions of motions assigned to the PEC; (c) participate in taking and defending depositions assigned to the PEC; and (d) coordinate discovery of class members assigned to the PEC.

III. LIAISON COUNSEL

A. *Appointees*

The Court appoints [name] and [name] of [firm] to serve as liaison counsel ("Liaison Counsel"). The Court received [number] of joint applications for liaison counsel. It has appointed Liaison Counsel based on counsel's collective experience, knowledge, and ability to best represent the interests of class members in this litigation.

Specifically, the Court is appointing [name] and [name] because of their individual and collective [_____]. [The Court notes that various other qualified candidates applied to serve as liaison counsel. These individuals and teams were not appointed because of their lack of ability to fairly and adequately represent the interest of the class, but rather the Court concluded that appointed Liaison Counsel were best able to represent the interests of class members because [_____].]

B. *Duties*

Despite [Junior Liaison Counsel's] experience working on [type of litigation] putative actions, the Court notes that [Senior Liaison Counsel] has more experience [and has been previously appointed to serve as [list roles in litigations]]. While the Court will not micromanage the division of labor amongst Liaison Counsel, it expects each attorney will actively participate in the duties assigned to Liaison. In addition to the duties outlined in Section 40.22 of the Manual for Complex Litigation, the Court, based in part on Liaison Counsel's representations to the Court regarding its planned division of labor, orders that:

1. [Senior Liaison Counsel]: (a) involve [Junior Liaison Counsel] in assignments, filings, and communications with counsel and the Court

and (b) provide mentorship and available opportunities for [name of Junior Liaison Counsel] to gain substantive experience.

2. [Junior Liaison Counsel] actively participate in tasks assigned to Liaison Counsel.

DONE AND ORDERED in Chambers, this _____ day of [month], [year].

_____

UNITED STATES DISTRICT COURT JUDGE