

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2008

4 (Argued: March 12, 2009 Final Submission: June 17, 2009
5 Decided: February 3, 2010)

6 Docket No. 07-3815-cv

7 -----
8 IN RE: ZYPREXA PRODUCTS LIABILITY LITIGATION

9 *****

10 MULLIGAN LAW FIRM,

11 Appellant,

12 -v-

13 ZYPREXA MDL PLAINTIFFS' STEERING COMMITTEE II and
14 ELI LILLY AND COMPANY,

15 Appellees.*

16 -----
17 Before: McLAUGHLIN and SACK, Circuit Judges, and KAPLAN,
18 District Judge.**

19 Appeal from orders of the United States District Court
20 for the Eastern District of New York, No. 04-MD-01596 (Jack B.
21 Weinstein, Judge). This appeal concerns a set of orders by the
22 district court regarding attorney compensation in this ongoing

* The Clerk of Court is directed to amend the caption to appear as set forth in this opinion.

** The Honorable Lewis A. Kaplan, United States District Judge for the Southern District of New York, sitting by designation.

1 multidistrict litigation. We conclude that we do not have
2 jurisdiction to hear this interlocutory appeal and that it is not
3 appropriate for us to grant a writ of mandamus.

4 Appeal dismissed; application for a writ of mandamus
5 denied. Judge Kaplan concurs in a separate opinion.

6 ROBERT J. LACK, Friedman Kaplan Seiler &
7 Adelman LLP, New York, NY (Eric
8 Roberson, The Mulligan Law Firm, Dallas,
9 TX, and William David George and Earnest
10 W. Wotring, Connelly, Baker, Wotring
11 LLP, Houston, TX, on the brief) for
12 Appellant.

13 WILLIAM M. AUDET, Audet & Partners, LLP,
14 San Francisco, CA (James M. Shaughnessy,
15 Milberg LLP, New York, NY, on the brief)
16 for Appellee Zyprexa MDL Plaintiffs'
17 Steering Committee II.

18 ANTHONY VALE, Pepper Hamilton LLP,
19 Philadelphia, PA (Nina M. Gussack,
20 Philadelphia, PA, and Samuel J. Abate,
21 Jr., New York, NY, on the brief)
22 for Appellee Eli Lilly and Company.

23 PER CURIAM:

24 This interlocutory appeal concerns the attorney
25 compensation structure established by the district court in this
26 ongoing multidistrict litigation ("MDL"), and the applicability
27 of that compensation structure to the Mulligan Law Firm
28 ("Mulligan"). Mulligan represents more than two thousand
29 plaintiffs in upwards of seventy cases that have been transferred
30 by the Judicial Panel on Multidistrict Litigation to the United
31 States District Court for the Eastern District of New York (the
32 "MDL court" or the "district court"), where they are being

1 considered alongside many similar cases. Mulligan asserts that
2 the federal courts do not have jurisdiction over sixty-one of
3 these cases, all of which were originally filed in various state
4 courts, removed to federal courts, and then transferred to the
5 MDL court. It has therefore filed motions in the MDL court to
6 remand the cases to the state courts from which they came.

7 While the motions to remand were pending, the district
8 court instituted several attorney compensation protocols.
9 Included were a cap on attorneys' fees and the creation of a
10 common benefit fund -- generated by a three percent set-aside
11 from funds from all settlements and judgments -- to compensate
12 members of the appellee Zyprexa MDL Plaintiffs' Steering
13 Committee II (the "PSC II") for their work on behalf of all of
14 the MDL plaintiffs.

15 In a pair of orders dated August 17, 2007, the MDL
16 court (Jack B. Weinstein, Judge) ruled that all of Mulligan's
17 cases that were pending in that court were subject to these
18 attorney compensation strictures. The court also enjoined
19 Mulligan from making any disbursements from a fund that it
20 maintained (the "Qualified Settlement Fund") until a fund
21 administrator had certified that the protocols had been adhered
22 to.

23 Mulligan appeals from the August 17 orders. The firm
24 asserts: 1) that the district court lacks jurisdiction over the
25 sixty-one cases for which remand motions are pending, and that it
26 therefore also lacks jurisdiction to impose a fee cap and a set-

1 aside requirement with respect to those cases, and 2) that the
2 court abused its discretion in sua sponte placing a cap on
3 attorneys' fees in all of the Zyprexa cases pending in the MDL
4 court.

5 The PSC II and Eli Lilly and Company ("Eli Lilly"), the
6 manufacturer of the drug Zyprexa and the defendant in the
7 underlying litigation, have moved to dismiss this interlocutory
8 appeal. They assert, inter alia, that we lack jurisdiction to
9 hear it. Mulligan disagrees. Mulligan further argues that if we
10 conclude that we do not have such jurisdiction, we should grant
11 its petition for mandamus relief with respect to the sixty-one
12 cases over which, it asserts, the district court lacks
13 jurisdiction.

14 We conclude that we do not have jurisdiction to hear
15 this appeal, and that mandamus relief is unwarranted. We
16 therefore dismiss the appeal.

17 **BACKGROUND**

18 The multidistrict litigation underlying this appeal
19 consists of hundreds of lawsuits brought by thousands of
20 plaintiffs against Eli Lilly, which manufactures the drug
21 Zyprexa. Zyprexa is an antipsychotic medication that has been
22 approved by the Food and Drug Administration to treat
23 schizophrenia and bipolar disorder. Eli Lilly had been the
24 subject of many lawsuits based on allegations that Zyprexa causes
25 diabetes.

1 In April 2004, thousands of Zyprexa cases that were
2 pending against Eli Lilly were transferred to the United States
3 District Court for the Eastern District of New York -- the MDL
4 court -- pursuant to an order of the Judicial Panel on
5 Multidistrict Litigation. Transfer Order, In re Zyprexa Prods.
6 Liab. Litig., 314 F. Supp. 2d 1380 (J.P.M.L. 2004). A group of
7 lawyers was established as the Plaintiffs' Steering Committee to
8 help prosecute the cases in the MDL court. That litigation was
9 settled in late 2005. See In re Zyprexa Prods. Liab. Litig., No.
10 04-MD-1596, 2005 WL 3117302, 2005 U.S. Dist. LEXIS 29071
11 (E.D.N.Y. Nov. 22, 2005). A second Plaintiffs' Steering
12 Committee (the "PSC II") was then established to help prosecute
13 the many new Zyprexa cases that had been filed.

14 As part of this second wave of Zyprexa litigation,
15 Mulligan, a Dallas-based law firm, filed scores of cases
16 involving thousands of plaintiffs in state and federal courts
17 throughout the United States. Many of the state-court cases were
18 removed by Eli Lilly to federal court and then transferred to the
19 MDL court. Mulligan asserts that sixty-one of those cases --
20 brought by more than one thousand plaintiffs -- were improperly
21 removed, and that the federal courts do not in fact have
22 jurisdiction over them. In 2006, Mulligan filed motions to
23 remand these cases to state court. The motions were pending at
24 all times relevant to this appeal.

25 In an order dated March 28, 2006, the district court
26 established the following fee restrictions for the Zyprexa

1 litigation: 1) all attorneys' fees for claims of less than \$5,000
2 were capped at no more than twenty percent of the client's
3 recovery; 2) all other attorneys' fees were capped at thirty-five
4 percent of the client's recovery; and 3) four special settlement
5 masters, whom the court had appointed to oversee settlement
6 negotiations and administer settlement agreements, were given
7 discretionary authority to order reductions or increases of fees
8 down to thirty percent or up to thirty-seven and one-half percent
9 depending on the circumstances.

10 In an order dated December 5, 2006, the district court
11 granted in part a motion by PSC II to establish a common benefit
12 fund to compensate PSC II attorneys for their "significant
13 discovery work." The court ordered a set-aside equal to three
14 percent of judgments and settlements in favor of the plaintiffs
15 in any of the cases in the MDL court, including those for which
16 remand motions were pending, to be paid into the common benefit
17 fund. The court denied PSC II's motion, however, with respect to
18 cases that were at that time in state court.

19 At the end of 2006 or the beginning of 2007, Mulligan
20 reached a tentative settlement of all of the MDL cases against
21 Eli Lilly in which it represents the plaintiffs. The settlement
22 is contingent on certain conditions being fulfilled, including,
23 with respect to each case, the individual approval of the
24 plaintiff or plaintiffs that Mulligan represents.¹

¹ When this appeal was briefed, the relevant cases were all still pending before the district court, and the settlement

1 At a status conference on June 22, 2007, Mulligan
2 advised the district court of the tentative settlement and
3 inquired of the court as to the status of the fee cap and the
4 common benefit fund. The court responded with a pair of orders
5 dated August 17, 2007, and filed August 23, 2007. The first
6 noted that although Mulligan's contracts with its plaintiffs call
7 for a fee of forty percent of recovery, the firm was nonetheless
8 bound by the March 2006 order and the cap on attorneys' fees
9 there instituted. The second order rendered all of Mulligan's
10 cases pending before the MDL court, including the cases for which
11 motions to remand remained pending, subject to the March and
12 December 2006 orders. The second order therefore enjoined
13 Mulligan from making any disbursements from the Qualified
14 Settlement Fund until a fund administrator had certified that
15 there had been a segregation of funds representing both the
16 amount of fees sought by Mulligan in excess of the fee cap, and
17 the three percent set-aside for the common benefit fund.

18 Mulligan appeals from both of the August 17, 2007
19 orders.

agreement was tentative. Since oral argument, we have received a communication from Mulligan implying that at least some of the individual cases at issue are now in the Indiana state court system, where the distribution of settlement proceeds has begun. See Letter from Robert J. Lack to Clerk of Ct. (June 17, 2009). Neither party has explained the chain of events that led to this, nor have the parties offered any arguments regarding the possible impact of this development on the case at hand. Nor are we aware of the exact status of all (or, indeed, any) of the sixty-one individual cases, originating not just in Indiana but also in California and New Jersey, that underlie this appeal. We therefore address only the arguments that are before us and the facts as they are set forth in the record on appeal.

1 **DISCUSSION**

2 I. Jurisdiction

3 Mulligan argues that we have jurisdiction over this
4 appeal under 28 U.S.C. § 1292(a),² which confers on the federal
5 courts of appeals jurisdiction over, inter alia, "[i]nterlocutory
6 orders of the district courts of the United States . . .
7 granting, continuing, modifying, refusing or dissolving
8 injunctions, or refusing to dissolve or modify
9 injunctions" Id. § 1292(a)(1).

10 "As a general matter we have interpreted § 1292(a)(1)
11 to authorize an appeal only from an injunctive order that gives,
12 or aids in giving, substantive relief sought in the lawsuit in
13 order to preserve the status quo pending trial. We have held
14 nonappealable under § 1292(a)(1) orders that were unrelated to
15 the substantive issues of the litigation and that instead
16 regulated, or purported to regulate, such matters as pretrial
17 discovery and disclosure." Bridge C.A.T. Scan Assocs. v.
18 Technicare Corp., 710 F.2d 940, 943 (2d Cir. 1983) (citations
19 omitted); cf. Polymer Tech. Corp. v. Mimran, 975 F.2d 58, 64 (2d
20 Cir. 1992) ("An order awarding interim fees during the course of
21 litigation is not an injunctive order subject to interlocutory

² Mulligan explicitly waives any assertion of jurisdiction under 28 U.S.C. § 1291. See Appellant's Reply Br. at 14 ("The steering committee argues that this case is not appealable under 28 U.S.C. § 1291 because the MDL court has not entered a final judgment. The Mulligan Firm agrees. As the Mulligan Firm said in its opening brief, the only appellate jurisdiction is under 28 U.S.C. § 1292(a).") (footnotes omitted). We therefore do not consider whether we have jurisdiction to entertain this appeal under it.

1 appeal."). We have been instructed to "approach [section
2 1292(a)(1)] somewhat gingerly lest a floodgate be opened that
3 brings into the exception many pretrial orders." Switz. Cheese
4 Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23, 24 (1966).

5 We conclude that the injunction at issue here does not
6 give or aid in giving substantive relief sought in the lawsuit.
7 Indeed, it does not so much as relate to the substantive issues
8 in the litigation. The only argument Mulligan makes in this
9 regard is a conclusory one: Because the only task that remains
10 in these cases is distribution of the settlement proceeds,³ and
11 because the injunction prevents Mulligan from distributing those
12 proceeds in accordance with its contracts with its clients, the
13 injunction "goes directly to the cases' substantive issues" as
14 they currently stand. Appellant's Br. at 7. Those facts simply
15 do not render the issues substantive.

16 "To qualify as an 'injunction' under § 1292(a)(1), a
17 district court order must grant at least part of the ultimate,
18 coercive relief sought by the moving party." Henrietta D. v.
19 Giuliani, 246 F.3d 176, 182 (2d Cir. 2001). The district court
20 orders here at issue do not relate to the ultimate relief that is
21 sought in this litigation. Indeed, to the extent that there is a

³ It appears that this is not entirely true, insofar as the settlement remains tentative for at least some plaintiffs. While some of the settlement proceeds have already been distributed in part, see Letter from Robert J. Lack to Clerk of Ct. (June 17, 2009), the claims of other plaintiffs remain unresolved, see Certification of Settlement Administrator at 2, Cope v. Eli Lilly & Co., No. 79D01-0602-CT-14, at 2 (Tippecanoe Super. Ct., Ind., June 15, 2009) (referring to cases for which settlement funds had not yet been approved by Eli Lilly).

1 "moving party" -- PSC II filed a motion to create the set-aside
2 fund, compliance with which is one requirement of the injunction
3 before us -- it is not a party to the litigation itself and is
4 therefore not seeking "ultimate, coercive relief." In other
5 words, the injunction at issue does not "give[], or aid[] in
6 giving, substantive relief sought in the lawsuit." Bridge C.A.T.
7 Scan Assocs., 710 F.2d at 943. The orders are collateral to the
8 substance of the lawsuits.

9 We therefore conclude that we lack jurisdiction to hear
10 this appeal.

11 II. Mandamus

12 Anticipating that we might determine, as indeed we now
13 have, that we lack jurisdiction to hear this appeal, Mulligan
14 petitions for a writ of mandamus. 28 U.S.C. § 1651(a) codifies
15 this common law writ.⁴ Cheney v. U.S. Dist. Court for Dist. of
16 Columbia, 542 U.S. 367, 380 (2004). Mandamus "is a drastic and
17 extraordinary remedy reserved for really extraordinary
18 causes. . . . [O]nly exceptional circumstances amounting to a
19 judicial usurpation of power or a clear abuse of discretion will
20 justify the invocation of this extraordinary remedy." Id.
21 (citations and internal quotation marks omitted). Mulligan has
22 given us no basis in fact or in law on which we might conclude

⁴ "[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

1 that the district court usurped its power or clearly abused its
2 discretion. We will deny the petition.

3 Finally, while Judges McLaughlin and Sack are in
4 sympathy with the carefully reasoned concurring views of Judge
5 Kaplan, the issues he addresses need not be resolved by this
6 panel in order to render our judgment here. Judges McLaughlin
7 and Sack therefore decline to use the extraordinary means of an
8 advisory mandamus order for the purpose of resolving those
9 issues.

10 **CONCLUSION**

11 For the foregoing reasons, we dismiss the appeal for
12 lack of jurisdiction and deny the petition for mandamus.

1 removed most of the cases to federal district courts. Some
2 *Zyprexa* plaintiffs moved to remand in the districts to which the
3 cases were removed, arguing that the federal courts lacked
4 subject matter jurisdiction.

5 Beginning in 2004, the Judicial Panel on
6 Multidistrict Litigation ("JPML") transferred thousands of the
7 *Zyprexa* cases from federal district courts throughout the United
8 States to the Honorable Jack B. Weinstein in the Eastern District
9 of New York for coordinated or consolidated pretrial
10 proceedings.² Any pending motions, including remand motions
11 filed in the transferor districts, accompanied the transferred
12 cases.³

13 Soon thereafter, Judge Weinstein appointed a
14 Plaintiffs' Steering Committee ("PSC I") composed of attorneys
15 from thirteen law firms who represented various individual
16 plaintiffs. PSC I was responsible for, among other things,
17 coordinating and conducting pretrial discovery for all
18 plaintiffs, speaking for all plaintiffs in pretrial proceedings,
19 making and arguing any motions, and pursuing settlement.⁴

2

See *In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1382-83 (J.P.M.L. 2004).

3

See FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION FOURTH § 22.35, at 371 (2004) (hereinafter "MANUAL").

4

See *In re Zyprexa Prods. Liab. Litig.*, No. 04 MDL 1596, 2004 WL 3520245, at *2-3 (E.D.N.Y. Jun. 17, 2004).

1 In November 2005, virtually all of the cases
2 then pending in the MDL were settled.⁵ The settlement
3 contemplated the creation of a claims administration process
4 pursuant to which settling cases were divided into three tracks,
5 attorneys fees were capped for cases in each track, and special
6 masters were appointed to oversee and apply that process.⁶

7 In early 2006, the district court entered an
8 order which, as far as is relevant here, provided that "the
9 costs, disbursements and fees of the plaintiffs' steering
10 committee shall be paid out of the general settlement fund" to
11 the extent approved by the special masters.⁷ This was implemented
12 in part by setting aside one percent of the gross settlement
13 amount payable to each settling plaintiff in an escrow fund.⁸

14 The district court then appointed a second
15 Plaintiffs' Steering Committee ("PSC II") to coordinate pretrial
16 proceedings in the few non-settling early cases and in the
17 thousands of incoming and remaining cases, most of which had been
18 filed, removed to federal court, and subsequently transferred by

5

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

6

In re Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490
(E.D.N.Y. 2006).

7

Id. at 497.

8

In re Zyprexa Prods. Liab. Litig., 467 F. Supp. 2d at 263.

1 the JPML following the original settlement.⁹ Lilly and PSC II
2 moved for the establishment of a fund to compensate the attorneys
3 who had worked and would continue to work for the common benefit
4 of all *Zyprexa* plaintiffs after the original settlement. The
5 district court granted the motion and provided for the
6 establishment of a common benefit fund with certain details to be
7 worked out in subsequent proceedings.¹⁰

8 In due course, the district court ordered
9 that three percent of each remaining plaintiff's gross recovery,
10 if any, whether from a settlement or judgment, be placed in an
11 escrow account.¹¹ Half the money was to come from each
12 plaintiff's recovery and half from fees otherwise payable to his
13 or her attorney.¹² Any lawyer who worked for the common benefit
14 of all federal *Zyprexa* plaintiffs, including but not limited to
15 members of PSC II, were eligible to apply for compensation from
16 this account. Compensation would be granted only on a showing
17 that the attorney "provided significant assistance to all

9

See In re Zyprexa Prods. Liab. Litig., 467 F. Supp. 2d at 261.

10

Id. at 275.

11

In re Zyprexa Prod. Liab. Litig., No. 04 MD 1596, 2007 WL 2340790, at *1 (E.D.N.Y. Aug. 17, 2007). An earlier order imposed a set aside of a percentage of plaintiffs' attorney's fees, rather than of each plaintiff's gross recovery. Following hearings before a special master and Judge Weinstein, the nature of the set aside was modified. *Compare id. with In re Zyprexa Prod. Liab. Litig.*, 467 F. Supp. 2d at 266.

12

In re Zyprexa Prod. Liab. Litig., 2007 WL 2340790, at *1.

1 plaintiffs."¹³ If any money remained in the fund after all
2 claims on it settled, it would be distributed on a *pro rata* basis
3 to those who had paid portions of their recoveries into the
4 account.¹⁴

5 Petitioner-appellant the Mulligan Law Firm
6 ("Mulligan") represents over two thousand plaintiffs who
7 originally filed their actions in state and federal courts in
8 seven states and whose cases against Lilly are pending in the
9 MDL.¹⁵ Motions to remand sixty-one of these cases to state
10 courts remain pending in the district court.

11 In December 2006, Mulligan and Lilly agreed
12 in principle to settle all of Mulligan's *Zyprexa* cases, although
13 the settlement had not yet been implemented as of the date of
14 argument, because the settling plaintiffs had not fully satisfied
15 the preconditions to consummation.¹⁶ Hence, it was not then
16 certain that the settlement funds in fact will be distributed to
17 the Mulligan plaintiffs.¹⁷

18 Anticipating that the settlement would be
19 finalized, the district court enjoined Mulligan from distributing

13

In re Zyprexa Prod. Liab. Litig., 467 F. Supp. 2d at 266.

14

Id.

15

A-319, 349, 393, 589.

16

In re Zyprexa Prod. Liab. Litig., No. 04 MD 1596, 2007 WL 2340791, at *1 (E.D.N.Y. Aug. 17, 2007).

17

Oral Arg. 11:34-36.

1 settlement funds to itself or its clients until the fund
2 administrator certified that three percent of the funds
3 designated for each settling plaintiff had been set aside.¹⁸ It
4 specified that “[p]ayments may be made to individual plaintiffs
5 as soon as that can be done while ensuring that sufficient funds
6 have been held back to comply with the three percent common
7 benefit assessment.”¹⁹ As of the date of oral argument, however,
8 the court below had not awarded any fees or costs out of the
9 fund. Mulligan acknowledges that it will have the opportunity to
10 oppose any award of fees in the event fee applications are
11 filed.²⁰

12 Plaintiffs appeal the district court’s order
13 enjoining them from distributing any settlement funds without a
14 certification that the set-aside had been made.²¹ Alternatively,
15 they seek a writ of mandamus ordering the district court to
16 vacate the injunction.

18

Id.

19

Id.

20

Oral arg. 11:04-05; 11:24-27.

21

A-816.

1 Discussion

2 I. Mandamus

3 A. The Traditional Mandamus Standard

4 Mandamus and other prerogative writs "are
5 reserved for really extraordinary causes."²² Mandamus is "not to
6 be used as a substitute for appeal, even though hardship may
7 result from delay and [a] perhaps unnecessary trial."²³ Indeed,
8 it often has been said that mandamus is not available unless the
9 petitioner's right to relief is "clear and indisputable"²⁴ and a

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Ex parte Fahey, 332 U.S. 258, 260 (1947); see also *Aref v. United States*, 452 F.3d 202, 206 (2d Cir. 2006) ("Mandamus is an extraordinary remedy, available only in extraordinary circumstances." (citing *In re United States*, 10 F.3d 931, 933 (2d Cir. 1993))); *In re Nagy*, 89 F.3d 115, 117 (2d Cir. 1996) (requiring an "extraordinary showing" to get mandamus review in lieu of appeal from final judgment (citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir.1988))); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) ("The granting of a writ of mandamus is an extraordinary measure and should be done sparingly."); *United States v. Victoria-21*, 3 F.3d 571, 575 (2d Cir. 1993) ("Such writs may not be used as a mere substitute for an appeal, but rather the power should only be exercised in extraordinary situations.") (internal quotations omitted).

23

Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (citations omitted); accord *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943); *In re Ivy*, 901 F.2d 7, 10 (2d Cir. 1990) (quoting *Roche*); cf. *In re Traffic Executive Ass'n-E. R.R.s*, 627 F.2d 631, 634 (2d Cir. 1980) (denying writ where district court disapproved settlement agreement, noting that "[t]he likelihood that class members will find it tedious and time consuming to prove their losses does not make this an out-of-the-ordinary case").

24

E.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18 (1983); *Bankers Life*, 346 U.S. at 384; *In re Certain Underwriter*, 294 F.3d 297, 302 (2d Cir. 2002); *In re Aguinda*, 241 F.3d 194, 202 (2d Cir. 2001); *Drexel*, 861 F.2d at

1 direct appeal from a final judgment would not be an adequate
2 remedy.²⁵ Moreover, while traditional formulations of the
3 standard have spoken of using the writ to confine a lower court
4 to the exercise of its proper jurisdiction,²⁶ it long has been
5 clear that mandamus will not lie to review a claim of mere error
6 in a lower court's jurisdictional determination.²⁷ Indeed, any

1312.

25

E.g., United States v. Giffen, 473 F.3d 30, 38 n.7 (2d Cir. 2006); *United States v. Amante*, 418 F.3d 220, 222 (2d Cir. 2005); *In re SEC ex rel. Glotzer*, 374 F.3d 184, 187-88 (2d Cir. 2004); *United States v. Coppa*, 267 F.3d 132, 138-39 (2d Cir. 2001); *In re von Bulow*, 828 F.2d 94, 98-99 (2d Cir. 1987).

26

See, e.g., Parr v. United States, 351 U.S. 513, 520-21 (1956); *Bankers Life*, 346 U.S. at 382-83; *Roche*, 319 U.S. at 26; *Hong Mai Sa v. Doe*, 406 F.3d 155, 159 (2d Cir. 2005) (citing *Richardson Greenshields Secs., Inc. v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987)).

27

See, e.g., Ex parte Chicago, R.I. & Pac. Ry. Co., 255 U.S. 273, 275-76 (1921) (Brandeis, J.) (mandamus does not lie to review doubtful district court jurisdictional determination); *In re Ivy*, 901 F.2d at 10 ("[T]he writ will not issue to review an order overruling a plea to the jurisdiction" (quoting *Roche*, 319 U.S. at 31)); *Ward Baking Co. v. Holtzoff*, 164 F.2d 34, 36 (2d Cir. 1947) (denying writ where "[w]e are not satisfied that the district court 'clearly' lacks jurisdiction"); *see also United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972) (Friendly, J.) ("[M]ere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ."); *accord, e.g., Nat'l Right to Work Legal Def. v. Richey*, 510 F.2d 1239, 1242 (D.C. Cir. 1975) ("If the lower court is clearly without jurisdiction, the writ will ordinarily be granted. If, however, the jurisdiction of the lower court is doubtful . . . the writ will ordinarily be denied." (quoting *Ex parte Chicago*, 255 U.S. at 275)) (citations omitted); *Comfort Equip. Co. v. Steckler*, 212 F.2d 371, 373 (7th Cir. 1954) ("If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error." (quoting *Am. Airlines v. Forman*, 204 F.2d 230, 232 (3d Cir.

1 different view would conflict with the requirement that the
2 petitioner's right to relief be clear and indisputable.

3 Mulligan argues that this Court may grant its
4 petition under the traditional mandamus standard because the
5 district court lacked jurisdiction to issue the set aside order
6 in sixty-one of the cases Mulligan originally filed in state
7 court. At least until the district court actually awards fees
8 out of the common benefit fund, however, Mulligan cannot
9 demonstrate a need for traditional mandamus because it has not
10 yet suffered any injury. In any case, it lacks a "clear and
11 indisputable" right to relief²⁸ even assuming that the set aside
12 order were erroneous. But traditional mandamus is not the only
13 potentially relevant standard.

14 *B. Advisory Mandamus*

15 The stringencies of traditional mandamus
16 standards admit of a limited exception for what has been termed
17 "advisory mandamus" - the use of mandamus to provide guidance on

1953))).

28

Moses H. Cone Mem'l Hosp., 460 U.S. at 18; see also *In re Vazquez-Botet*, 464 F.3d 54, 57 (1st Cir. 2006) ("[E]ven where the merits clearly favor the petitioner, relief may be withheld for lack of irreparable injury[.]'" (citing *In re Martinez-Catala*, 129 F.3d 213, 217 (1st Cir. 1997))); *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003) (requiring showing of irreparable harm before granting mandamus relief); *United States v. Wexler*, 31 F.3d 117, 128 (3rd Cir. 1994) (same).

1 a novel question of general or exceptional importance to the
2 administration of justice that should not await review by appeal
3 from a final judgment.

4 In *Schlagenhauf v. Holder*,²⁹ the Supreme
5 Court "departed in some degree" from the traditional mandamus
6 standards to countenance the use of the writ for such advisory
7 purposes.³⁰ There, the Court indicated that mandamus may be used
8 to settle important questions of first impression where there is
9 a "substantial allegation of usurpation of power" by the district

29

379 U.S. 104.

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Kaufman v. Edelstein, 539 F.2d 811, 817 (2d Cir. 1976) (Friendly, J.). See generally Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973) (hereinafter "Harvard Note").

The Supreme Court has recognized a second limited exception to traditional mandamus standards for the exercise of "supervisory control of the District Courts by the Courts of Appeals." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). In *La Buy*, the district court, notwithstanding prior admonitions by the Seventh Circuit against excessive use of special masters, referred two antitrust cases to special masters on the ground that its docket was too congested. It did so in line with a prior practice of too frequent references to special masters that the Supreme Court characterized as "little less than an abdication of the judicial function." 352 U.S. at 256, 258. In those circumstances, the Court held that supervisory mandamus was appropriate. *Id.* at 259-60. The case therefore appears to authorize "supervisory" mandamus "when a plausible case could be made for the danger of frequent recurrence" of a "probably erroneous practice." See Harvard Note, 86 HARV. L. REV. at 609-10; see also, e.g., *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995) ("[A]n arbitrary practice of sentencing without proffered [sic] reasons would amount to an abdication of judicial responsibility subject to mandamus.") (dictum).

As demonstrated by the discussion below, because the practice challenged here was not "probably erroneous," much less an "abdication of the judicial function," supervisory mandamus has no proper role in this case.

1 court.³¹ Thus, courts of appeals have some scope for use of
2 mandamus to settle novel questions. On the other hand, as this
3 Court has written, "[n]o one could reasonably suppose that the
4 [Supreme] Court has now subscribed . . . to a doctrine that any
5 non-frivolous claim of error in a decision is a claim of
6 'usurpation of power' on the theory that courts are bound to
7 decide all issues correctly."³²

8 The Second Circuit's decisions subsequent to
9 *Schlagenhauf* do not resolve entirely the uncertainty as to the
10 criteria dividing appropriate from inappropriate uses of advisory
11 mandamus. The cases that bear most strongly on the facts at bar
12 are *In re International Business Machines Corp.*³³ and *United*
13 *States v. Amante.*³⁴ In *IBM*, the Circuit granted mandamus to halt

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379 U.S. at 110-11.

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Kaufman, 539 F.2d at 819 (citations omitted).

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687 F.2d 591 (2d Cir. 1982).

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418 F.3d 220.

Additionally, this Court has read *Schlagenhauf* as creating an "escape hatch" from the finality rule in the context of discovery, when the "question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment." *Am. Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 282 (2d Cir. 1967). Subsequent discovery cases also have invoked this standard. See, e.g., *In re Attorney Gen. of the United States*, 596 F.2d 58, 63 (2d Cir. 1979); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 181 (2d Cir. 1979); see also *Glotzer*, 374 F.3d at 187 (quoting *Coppa*, 267 F.3d at 137-38 (applying same standard, but without characterizing mandamus review as "advisory")).

These cases establish that mandamus sometimes may be granted to reverse an erroneous discovery ruling where the ruling

1 the district court's consideration of whether the Tunney Act
2 requirement of judicial approval of consent decrees in government
3 antitrust cases³⁵ applied to stipulations of dismissal under
4 Federal Rule of Civil Procedure 41(a)(1).³⁶ It did so, however,
5 not simply because it disagreed with the district court's
6 retention of jurisdiction to consider the issue, but for three
7 other reasons. First, both parties were united in their desire
8 that the case be dismissed outright.³⁷ Second, the case already
9 had gone on for thirteen years, tying up "one of the nation's
10 largest industrial concerns," during which time "many of the
11 underlying products [had become] commercially outmoded."³⁸
12 Finally, there was no serious basis for the assertion that the
13 Tunney Act applied to a Rule 41(a)(1) dismissal in light of the
14 plain language of the statute and "the clear and indisputable
15 legislative history."³⁹

orders discovery that could not be undone on appeal from a final judgment because the allegedly undiscoverable information will have been disclosed. But the discovery cases shed little light on the appropriate course in this case, in part because Mulligan would suffer no cognizable harm if review were denied unless and until there is a final order to disburse money it contributes to the set aside.

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15 U.S.C. § 16(e)(1).

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The district court had heard argument on the issue but had not yet issued a decision. 687 F.2d at 596.

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Id. at 600.

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Id. at 599-600.

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Id. at 600-02.

1 *Amante* concerned a different question, viz.
2 whether a district court had erred in bifurcating a simple felon-
3 in-possession firearm case to require first a trial on the issue
4 of possession and then a separate trial on the issue of the prior
5 felony conviction, the latter of which would take place only
6 after a jury finding of possession. In granting mandamus to
7 vacate the bifurcation order, the Circuit relied upon its
8 conclusions that (1) the issue was significant because “[i]ts
9 resolution will affect numerous defendants in similar trials and
10 will aid in the administration of criminal justice,” and (2) “no
11 remedy [wa]s available to the government other than mandamus.”⁴⁰

12 Both *IBM* and *Amante* demonstrate that this
13 Court has granted mandamus for advisory purposes when presented
14 with questions of significance and the district court had
15 committed a clear abuse of discretion and usurpation of power.⁴¹
16 In addition, both cases reached the merits of the issues
17 presented by the petitions as, of course, the Court was compelled
18 to explain the district court’s error. But they did not involve
19 the question whether this Court may reach the merits for advisory
20 purposes to deny a petition for mandamus where the issue and need
21 for review are sufficiently pressing.

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418 F.3d at 222.

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Id. at 222; see also *IBM*, 687 F.2d at 603.

1 This question was answered in the affirmative
2 in *Kaufman v. Edelstein*.⁴² There, two expert witnesses whom the
3 government had subpoenaed to testify in a civil antitrust case
4 petitioned for a writ of mandamus directing the district court to
5 quash the subpoenas. Observing that the district court's denial
6 of the motions to quash "clearly was no 'usurpation of power'"
7 nor a clear abuse of discretion, the Court, speaking through
8 Judge Friendly, stated that the only argument in favor of
9 granting the writ was that the case presented a "novel and
10 important" issue.⁴³ The Court then discussed the merits of the
11 case at some length, concluding that, although there existed no
12 privilege protecting expert witnesses from being called to
13 testify, courts in their discretion could protect expert
14 witnesses when good cause was shown.⁴⁴ Judge Friendly listed a
15 number of factors pertinent to deciding whether a particular
16 expert witness merited the protection of the court.⁴⁵

17 In sum, we have held that it is appropriate
18 for us to discuss the merits of a challenged district court
19 action to deny mandamus when the question is of sufficient
20 importance and there is a dearth of guidance on the issue.

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539 F.2d 811.

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Id. at 819.

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Id. at 819, 821.

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Id. at 822; see also *Stans v. Gagliardi*, 485 F.2d 1290, 1292
(2d Cir. 1973).

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C. Application To This Petition

The district court's set aside order, in my view, raises just such a question. The issue never has been addressed by this Circuit. Yet it arises frequently in MDLs,⁴⁶ many encompassing hundreds and sometimes thousands of cases and affecting hundreds or thousands of plaintiffs.⁴⁷ A resolution of the issue here would be "applicable to [this] entire class of cases."⁴⁸ A decision on the merits thus would offer guidance to both courts and litigants and aid the efficient administration of justice.

⁴⁶ The *Manual for Complex Litigation* instructs courts "[e]arly in the litigation" to "determine the method of compensation" for lead and liaison counsel "and establish arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions." MANUAL § 14.215, at 202.

⁴⁷ See, e.g., *In re Wilson*, 451 F.3d 161, 163 (3d Cir. 2006) (30,000 - 35,000 plaintiffs with suits pending before MDL court); *In re Diet Drugs*, 369 F.3d 293, 298 (3d Cir. 2004) (MDL involved 18,000 individual lawsuits and over 100 putative class actions); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 784 (3d Cir. 1999) ("thousands of plaintiffs" in MDL); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 222 (1st Cir. 1997) ("hundreds of claims" filed by "thousands of plaintiffs" consolidated in MDL); *In re Dow Corning Corp.*, 86 F.3d 482, 485 (6th Cir. 1996) (440,000 plaintiffs elected to become class members for purposes of settlement in MDL); *In re Food Lion, Inc. Fair Labor Standards Act "Effective Scheduling" Litig.*, 73 F.3d 528, 531 (4th Cir. 1996) (nearly 1,000 plaintiffs in MDL); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165-66 (2d Cir. 1987) (240,000 claimants in MDL).

⁴⁸ *SEC v. Stewart*, 476 F.2d 755, 758 (2d Cir. 1973) (discussing standard for supervisory mandamus).

1 II. *The District Court's Order*

2 A. *Subject Matter Jurisdiction*

3 The fundamental question here is whether a
4 district court has subject matter jurisdiction - power - to order
5 that settlement funds be set aside to fund possible fee awards to
6 counsel in MDL cases that have been removed to federal court and
7 in which motions to remand remain undecided in the district
8 court. In essence, Mulligan argues that it does not and that we
9 therefore either should (1) decide the jurisdictional issues that
10 were not passed upon below and exempt from the set aside order
11 any cases in which removal was improper or, alternatively, (2)
12 exempt all of these cases from the set aside order on the theory
13 that the entry of the set aside order in advance of determination
14 of the remand motions was erroneous. These contentions are
15 unpersuasive.

16 The starting point for this analysis is the
17 proposition that a federal court has jurisdiction to determine
18 its own jurisdiction.⁴⁹ While it must make this determination
19 before it reaches the merits of the case before it,⁵⁰ it is

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United States v. United Mine Workers of Am., 330 U.S. 258, 291
(1947); *Kuhali v. Reno*, 266 F.3d 93, 100-01 (2d Cir. 2001).

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Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp., 549
U.S. 422, 431 (2007) (citing *Ruhrigas AG v. Marathon Oil Co.*,
526 U.S. 574, 585 (1999) and *Steel Co. v. Citizens for a
Better Env't*, 523 U.S. 83, 100-01 & n.3 (1998)).

1 empowered to issue non-dispositive orders between the filing of
2 the action and its ultimate determination on the merits.⁵¹

3 Mulligan nevertheless argues that federal
4 courts are permitted, prior to a ruling disposing of any subject
5 matter jurisdiction challenge, to take only such actions as may
6 aid in determining their jurisdiction and that actions reaching
7 the merits are void.⁵² The district court's set aside order, in
8 its view, reached the merits and thus went beyond the limits of
9 the court's authority. Mulligan relies for this proposition on
10 *United States Catholic Conference v. Abortion Rights*
11 *Mobilization, Inc.*⁵³

12 *Catholic Conference* involved an appeal from
13 an order holding two non-party witnesses in civil contempt, over
14 their objection that the district court lacked subject matter
15 jurisdiction, for refusing to comply with a subpoena. The

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See *Sinochem*, 549 U.S. at 431 (recognizing that federal court "has leeway 'to choose among threshold grounds for denying audience to a case on the merits'" before determining jurisdiction and noting permissibility of dismissal of state law claims on discretionary grounds, dismissal based on *Younger* abstention, and dismissal under *Totten v. United States*, 92 U.S. 105 (1876), all before considering jurisdictional questions); *United Mine Workers*, 330 U.S. at 290 (district court "unquestionably had the power to issue a restraining order . . . pending a decision upon its own jurisdiction"); see also *id.* at 295 (noting Supreme Court would affirm district court's judgment of criminal contempt as validly punishing violations of order then outstanding, even if it was later determined that the district court lacked jurisdiction).

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Pet. Br. at 32-34.

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487 U.S. 72 (1988).

1 Supreme Court held that a non-party witness can challenge the
2 subject matter jurisdiction of a court in defense of a civil
3 contempt citation.⁵⁴ It stated further that the contempt orders
4 would be void if the district court lacked subject matter
5 jurisdiction. Mulligan argues that *Catholic Conference* therefore
6 stands for the proposition that federal courts are permitted only
7 to "take actions in aid of determining [their] jurisdiction."⁵⁵
8 But he overreads the decision.

9 In *Willy v. Coastal Corp.*,⁵⁶ the Supreme
10 Court upheld a district court's Rule 11 sanctions order
11 notwithstanding a subsequent determination that the district
12 court had lacked subject matter jurisdiction, and it rejected the
13 petitioner's contention that this result was precluded by
14 *Catholic Conference*. As the Court explained:

15 "[a] final determination of lack of subject-
16 matter jurisdiction of a case in federal
17 court, of course, precludes further
18 adjudication of it. But such a determination
19 does not automatically wipe out all
20 proceedings had in the district court at a
21 time when the district court operated under
22 the misapprehension that it had
23 jurisdiction."⁵⁷

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Id. at 76.

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Pet. Br. at 32.

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503 U.S. 131 (2001).

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Id. at 137.

1 Thus, a district court's order that is "collateral to
2 the merits" may be upheld despite a later conclusion that the
3 court lacked subject matter jurisdiction over the litigation.⁵⁸

4 In this case, the set aside order simply
5 imposed an assessment in order to create a fund that could be
6 used to compensate attorneys who demonstrate that their efforts
7 conferred a benefit on *Zyprexa* plaintiffs generally.⁵⁹ It is
8 even less related to the ultimate merits than orders awarding
9 attorney's fees, which are collateral matters over which a court
10 retains jurisdiction even if it ultimately is determined to lack
11 subject matter jurisdiction.⁶⁰ It does not preclude the Mulligan
12 plaintiffs from challenging any proposed distribution of funds on
13 the ground that they did not benefit from the efforts of counsel

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Id.

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In re Zyprexa Prod. Liab. Litig., 467 F. Supp. 2d at 266.

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See, e.g., Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395 (1990) ("It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction."); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 445 (9th Cir. 2003) ("It is clear that an award of attorney's fees is a collateral matter over which a court normally retains jurisdiction even after being divested of jurisdiction on the merits."); *see also In re Nineteen Appeals*, 982 F.2d at 609 ("[A]n order which definitively resolves claims for attorney's fees and expenses payable out of a common fund is severable from the decision on the merits.") (citing *Trustees v. Greenough*, 105 U.S. 527, 531 (1881)); *Overseas Dev. Disc Corp. v. Sangamo Constr. Co.*, 840 F.2d 1319, 1324 (7th Cir. 1988) (declaring it to be "settled that a decision awarding or denying attorney's fees and expenses from a common fund . . . is severable from the decision on the merits"); *Memphis Sheraton Corp. v. Kirkley*, 614 F.2d 131, 133 (6th Cir. 1980) (award of attorney's fees from common fund "is collateral" to the merits (citing *Sprague*, 307 U.S. at 780)).

1 to whom a distribution might be made. At least in these
2 circumstances, the set aside order was collateral to the merits
3 and well within the district court's power.

4 The district court's determination to defer
5 consideration of the jurisdictional challenges also was
6 comfortably within the bounds of its discretion. While it
7 usually is advisable for district courts to rule on any challenge
8 to subject matter jurisdiction early in a lawsuit, district
9 courts have broad scope to manage their own dockets in light of
10 considerations of "economy of time and effort for itself, for
11 counsel, and for litigants."⁶¹ The impact of such considerations
12 in this case, and in some other MDL and mass tort cases, often
13 may suggest a different course.

14 Alleged mass torts, as the term implies,
15 spawn masses of litigation. Plaintiffs understandably sue in
16 *fora* that they regard as convenient or likely to be favorable
17 including, in many instances, state courts. Indeed, some frame
18 their complaints in ways that raise issues concerning
19 removability. Defendants, moved by similar considerations,
20 frequently remove many of these cases to federal courts. These
21 tactical steps in turn often provoke large numbers of remand

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Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936).

1 motions, as occurred in this MDL.⁶² Indeed, Mulligan alone has
2 filed motions to remand in over 50 of its *Zyprexa* cases.⁶³

3 A district judge managing such a complex
4 situation reasonably may conclude that the court's time,
5 especially early in the litigation, is better spent on activities
6 other than deciding scores or hundreds of individual remand
7 motions. It often would be appropriate to conclude that many of
8 the cases in which such motions are filed are likely to settle
9 and that the expenditure of judicial resources on remand motions
10 likely would be wasted. Moreover, even if an MDL or comparable
11 court dealt immediately with remand motions pending at a given
12 moment, new cases and new remand motions are likely to be filed
13 throughout the pendency of the litigation.⁶⁴ Deciding each
14 motion prior to addressing other issues common to all or most
15 cases therefore could require a significant expenditure of
16 judicial time and resources, derailing the progress of the
17 litigation as a whole. Delays of this nature could well
18 frustrate the purpose of MDLs, which is "to promote just and

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See, e.g., Galati v. Eli Lilly & Co., No. 05-4338-CV-C-NKL, 2005 WL 3533387, at *1 (W.D. Mo. Dec. 22, 2005) (hundreds of remand motions pending in *Zyprexa* MDL).

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See, e.g., In re Zyprexa Prods. Liab. Litig., 467 F. Supp. 2d at 261-62.

1 efficient conduct" of actions involving common questions of
2 fact.⁶⁵

3 While every case turns on its own facts, I
4 cannot say that the district court's decision to give priority to
5 moving thousands of *Zyprexa* cases towards settlement or other
6 disposition over focusing promptly on the hundreds of pending
7 remand motions was an improvident exercise of the broad
8 discretion that inheres in its docket management function.

9 *B. The Common Fund Doctrine*

10 The district court's set aside order raises
11 also the question whether a district court in an MDL or other
12 litigation involving a large number of separately represented
13 individual claimants, in which any recovery will be unique to
14 each plaintiff, has the authority to create a fund out of those
15 recoveries for the purpose of financing an award of fees and
16 expenses to those counsel whose work benefits the entire group of
17 plaintiffs. The answer to this question lies in the common fund
18 or common benefit doctrine.

19 The so-called "American rule" is that the
20 prevailing litigant ordinarily must bear the litigant's own
21 attorney's fees.⁶⁶ Since the nineteenth century, however, the
22 Supreme Court has recognized an equitable exception to this

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28 U.S.C. § 1407.

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See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240, 247 (1975).

1 rule⁶⁷ - known as the common fund or common benefit doctrine -
2 that permits litigants or lawyers who recover a common fund for
3 the benefit of persons other than themselves to obtain reasonable
4 attorney's fees out of the fund, thus spreading the cost of the
5 litigation to its beneficiaries.⁶⁸ The doctrine "reflects the
6 traditional practice in courts of equity,"⁶⁹ which recognized
7 "that persons who obtain the benefit of a lawsuit without
8 contributing to its cost are unjustly enriched at the successful
9 litigant's expense."⁷⁰ A court acting in equity therefore may
10 assess attorney's fees proportionally among those benefitted by
11 the suit.⁷¹

12 In *Alyeska Pipeline*, the Supreme Court
13 identified several characteristics of cases in which the
14 application of the common benefit doctrine may be appropriate.
15 These include the ease in identifying the persons, or classes of
16 persons, benefitted by the recovery, ease in tracing the benefit
17 flow from the fund to those persons, and confidence that the

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Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (citing *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885) and *Trustees v. Greenough*, 105 U.S. 527 (1882)).

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Id.; *Alyeska*, 421 U.S. at 245; *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392-92 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-65 (1939); *Cent. R.R.*, 113 U.S. at 124-25; *Greenough*, 105 U.S. at 532.

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Boeing, 444 U.S. at 478 (citing *Greenough*, 105 U.S. at 532-37).

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Id. (citing *Mills*, 396 U.S. at 392).

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Id. (citing *Mills*, 396 U.S. at 394).

1 costs of litigation can be shifted with some exactitude to those
2 benefitted by the litigation.⁷² Courts routinely employ
3 the common benefit doctrine in awarding fees to counsel in class
4 actions⁷³ which, when successful, often result in lump sum
5 recoveries that benefit identifiable classes. Class actions
6 present also the free-rider problems the common fund doctrine was
7 designed to remedy, as class members who do not hire counsel
8 nonetheless benefit from any recovery. The doctrine thus
9 prevents the unjust enrichment of these class members at the
10 expense of class counsel by compensating counsel in proportion to
11 the benefit they have obtained for the entire class, rather than
12 just the named class representatives with whom they contracted.
13 Likewise, it prevents the unjust enrichment of class members at
14 the expense of the class representatives who contracted with
15 attorneys to prosecute the action.⁷⁴

16 Application of the doctrine to class actions
17 is straightforward. The class generally is represented by
18 counsel. Any proceeds from the litigation are awarded to the
19 class as a whole or by a formula that permits determination of
20 the amount of the aggregate benefit conferred on the class.

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Alyeska, 421 U.S. at 264 n.39; see *Boeing*, 444 U.S. at 478-79; *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 607 (1st Cir. 1992).

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See, e.g., *Boeing*, 444 U.S. 479-81; *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 237 (2d Cir. 1987).

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Boeing, 444 U.S. at 477; *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973); 4 NEWBERG ON CLASS ACTIONS § 14:6 (4th ed. 2002).

1 Courts may set some percentage of the lump sum recovery as the
2 fee or, using the "lodestar approach," ascertain the number of
3 hours reasonably billed to the class, multiply it by an
4 appropriate hourly rate, and deduct the product from any
5 recovery.⁷⁵

6 The situation is somewhat different with
7 respect to MDLs consisting of individual cases prosecuted by
8 individual plaintiffs, sometimes numbering in the thousands,⁷⁶
9 and other litigation involving large numbers of separately
10 represented claimants. Unlike most class actions, recoveries by
11 individual plaintiffs or groups of plaintiffs in such matters may
12 occur at different times, and individual plaintiffs or groups of
13 plaintiffs, unlike most individual class members, usually are
14 represented by individual counsel. Nevertheless, there are
15 substantial similarities to class actions as well. As an initial
16 matter, the efficient handling of such cases demands a similar
17 approach to case management. District courts typically appoint a
18 lead counsel or plaintiffs' steering committee to coordinate and

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Goldberger v. Integrated Res., Inc., 209 F.3d 43, 47 (2d Cir. 2000).

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For example, in many MDLs involving personal injury claims, courts have denied class certification pursuant to FED. R. CIV. P. 23(b)(3) based on findings that questions affecting individual members of the putative class regarding injury, causation and/or damages predominate over questions of fact or law common to the putative class. See, e.g., *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 66-68, 71 (S.D.N.Y. 2002); *In re Phenylpropanolamine Prods. Liab. Litig.*, 208 F.R.D. 625, 633 (W.D. Wash. 2002); see also *In re Prempro*, 230 F.R.D. 555, 566-67 (E.D. Ark. 2005) (consumer fraud claim).

1 conduct pretrial proceedings on behalf of all plaintiffs in order
2 to avoid what otherwise might well become chaotic.⁷⁷ Moreover,
3 while individual plaintiffs are separately represented, they
4 typically benefit also - often predominantly - from the work of
5 the lead counsel or committee.

6 The same equitable considerations that
7 warrant payment of class counsel out of common funds generated by
8 their efforts apply in these circumstances as well. The
9 desirability - indeed, the compelling need - to have pretrial
10 proceedings managed or at least coordinated by lead counsel or a
11 steering or executive committee demands the existence of a source
12 of compensation for their efforts on behalf of all. The logical,
13 and a most equitable, source of that compensation is recoveries
14 of individual plaintiffs who benefit from that work. Indeed,
15 foreclosing those recoveries as a source of funding for the
16 common benefit work would enrich the non-contributing individual
17 plaintiffs unjustly at the expense of either or both of the lead
18 counsel and any contributing individual plaintiffs.⁷⁸ The

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See, e.g., Smiley v. Sincoff, 958 F.2d 498, 499 (2d Cir. 1992) (district court did not abuse its discretion in requiring that attorney fee paid to plaintiffs' committee be distributed *pro rata* among committee members); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 774-75 (9th Cir. 1977) (district court had authority to direct appointment of committee of lead counsel); *MacAlister v. Guterma*, 263 F.2d 65, 68 (2d Cir. 1958) (approving appointment of "general counsel" and consolidation of actions for pretrial purposes to avoid unnecessary expenses, duplication and delay in three stockholders' derivative actions); MANUAL § 10.221 at 24-25.

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See In re Diet Drugs, 582 F.3d 524, 546 (3d Cir. 2009) (approving district court's apportionment of settlement funds among class counsel in MDL pursuant to common benefit

1 district court thus acted within the scope of its discretion when
2 it established an account to compensate counsel for common
3 benefit work funded by a set aside of future Zyprexa MDL
4 recoveries.⁷⁹

5 *Conclusion*

6 For the foregoing reasons, I conclude that
7 the district court did not err as a matter of law or abuse its
8 discretion in ordering a set aside of settlement monies in a
9 common benefit fund. I therefore concur in the denial of the
10 petition and dismissal of the appeal.

11

doctrine); *In re Air Crash Disaster*, 549 F.2d 1006, 1016, 1018-19 (5th Cir. 1977) (holding that district court properly exercised its authority to award fees to MDL lead counsel committee paid by other plaintiffs' counsel pursuant to common benefit doctrine); see also *Sprague*, 307 U.S. at 166 ("That the party . . . neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements."); *Smiley*, 958 F.2d at 499, 501 (holding that district court did not abuse its discretion in establishing fee structure whereby non-committee member attorneys placed percentage of their fees in escrow for *pro rata* distribution among committee members).

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Zyprexa, 467 F. Supp. 2d at 265-67.