

MASS TORT DEALS

Mass tort lawsuits over products like pelvic and hernia mesh, Roundup, opioids, talcum powder, and hip implants consume a substantial part of the federal civil caseload. But multidistrict litigation, which federal courts use to package these individual tort suits into one proceeding, has not been extensively analyzed. In *Mass Tort Deals*, Elizabeth Chamblee Burch marshals a wide array of empirical data to suggest that a systemic lack of checks and balances in our courts may benefit everyone but the plaintiffs – the very people who are often unable to stand up for themselves. Rather than faithfully representing them, plaintiffs’ lawyers may sell them out in backroom settlements that compensate lawyers handsomely, pay plaintiffs little, and deny them the justice they seek. From diagnosis to reforms, Burch’s goal isn’t to eliminate these suits, it’s to save them. This book is a must read for concerned citizens, policy makers, lawyers, and judges alike.

ELIZABETH CHAMBLEE BURCH is the Fuller E. Callaway Chair of Law at the University of Georgia School of Law and has been a visiting professor at Harvard Law School. In 2015, she won the American Law Institute’s Early Career Scholars Medal. She has published more than 30 articles and essays in journals such as the *New York University Law Review*, *Cornell Law Review*, *Virginia Law Review*, and *Vanderbilt Law Review*. She co-authored a casebook on *The Law of Class Actions and Other Aggregate Litigation* (2009) and is a frequent commentator in various national news media, such as *The New York Times*, *The Wall Street Journal*, *Forbes*, *USA Today*, and *The L.A. Times*. For more information and the book’s dataset, please visit www.elizabethchambleeburch.com.

Mass Tort Deals

BACKROOM BARGAINING IN MULTIDISTRICT
LITIGATION

ELIZABETH CHAMBLEE BURCH

University of Georgia School of Law



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-41697-9 — Mass Tort Deals
Elizabeth Chamblee Burch
Frontmatter
[More Information](#)

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.
It furthers the University's mission by disseminating knowledge in the pursuit of
education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108416979
DOI: 10.1017/9781108255929

© Elizabeth Chamblee Burch 2019

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2019

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Burch, Elizabeth Chamblee, author.

TITLE: Mass tort deals : backroom bargaining in multidistrict litigation /
Elizabeth Chamblee Burch, University of Georgia School of Law.

DESCRIPTION: Cambridge, United Kingdom ; New York, NY, USA :
Cambridge University Press, 2019. | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2018058436 | ISBN 9781108416979 (hardback) |
ISBN 9781108404211 (paperback)

SUBJECTS: LCSH: Complex litigation—United States. | Torts—United States. |
Negotiation in business—United States.

CLASSIFICATION: LCC KF8896 .B87 2019 | DDC 346.7303—dc23

LC record available at <https://lcn.loc.gov/2018058436>

ISBN 978-1-108-41697-9 Hardback

ISBN 978-1-108-40421-1 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy
of URLs for external or third-party internet websites referred to in this publication
and does not guarantee that any content on such websites is, or will remain,
accurate or appropriate.

Cambridge University Press
978-1-108-41697-9 — Mass Tort Deals
Elizabeth Chamblee Burch
Frontmatter
[More Information](#)

For my family

Contents

<i>List of Figures</i>	<i>page</i> ix
<i>List of Tables</i>	xi
<i>Acknowledgments</i>	xiii
Introduction	1
1 When Mass Torts Meet Multidistrict Litigation	8
The Shift Away from Mass Tort Class Actions	12
Judges’ Unenviable Task	17
The Clamor for Coordination	22
The Push for Settlement and Its Many Rewards	24
Why Litigation Matters	31
2 Quid Pro Quo Arrangements?	35
Dealmakers Gerrymander Settlements	40
Defendants Negotiate to End All Lawsuits	43
Lead Plaintiffs’ Attorneys Bargain for Their Fees	54
What Do Plaintiffs Receive?	63
3 The Rise of Repeat Players	72
Repeat Players	75
The Social Network	78
Social Networks, Group Decisions, and Amplified Error	81
Choosing Lead Lawyers	90
Do Leaders Owe Duties to Nonclients?	96
4 Judges as Bulwarks and Nudgers	99
Judges Nudge	104

	Judicial Signals about the Merits	107
	The Missing Merits	110
	The Settlement Shove	113
	Settlements’ Handmaidens	116
	Judicial Culture and Motivations	119
	Dissecting Judicial Paternalism	124
	Judicial Authority to Intervene?	128
5	When Multidistrict Litigation Settles into “Alternative Dispute Resolution”	134
	Settling with Blinders On	137
	Repeat Players, Part Deux	144
	Privacy versus Equal Treatment	156
	Self-Contained Appeals	158
	Community Disengagement	162
	Litigation as Contract Bargaining	166
6	Reforming Multidistrict Litigation	168
	Nudging Lawyers, Not Plaintiffs	172
	Incentivizing Attorney Loyalty	176
	Tying Common-Benefit Fees to Plaintiffs’ Outcomes	187
	Empowering the Masses	201
	Remanding Cases as Exit Opportunities	207
	Conclusion	215
	<i>Appendix</i>	223
	<i>Data Collection</i>	223
	<i>Data Analysis</i>	227
	<i>Index</i>	271

Figures

1.1 Leadership hierarchy within multidistrict proceedings	<i>page</i> 18
2.1 The evolution of settlement provisions stemming from <i>Propulsid</i>	41
2.2 Repeat players use settlements to promote finality and fees	42
3.1 Repeat players judicially appointed within the MDL dataset	77
3.2 Network of lead lawyers in products-liability and sales-practice multidistrict proceedings	79
3.3 Magnified view of one segment of the social network	80
4.1 Diffusion of Lone Pine orders post- <i>Vioxx</i>	121
A.1 Resolutions within the dataset of multidistrict products-liability and sales-practice proceedings	224

Tables

2.1 <i>Propulsid</i> by the numbers	page 39
2.2 Provisions benefiting defendants within the analyzed settlements	45
6.1 Comparing fee award methods	195
6.2 Tailoring the quantum-meruit approach to different scenarios	199
A.1 Dataset proceedings, dispositions, and repeat player percentages	228
A.2 High-level repeat player defense firms with five or more leadership appearances	233
A.3 Repeat plaintiffs’ attorneys participation in publicly available private nonclass settlements	235
A.4 Common-benefit fee practices, fee awards, and plaintiff recovery in private, aggregate settlements in the dataset	238
A.5 Transferee judges’ role in private, aggregate settlements within the dataset	246
A.6 Pre- and postsettlement judicial orders in dataset proceedings ending in private, aggregate settlements	258
A.7 Claims administration in publicly available, nonclass aggregate settlements within the dataset	266

Acknowledgments

Just as it takes a village to raise a child, this book has been incubating for many years and has been nurtured by many facets of the scholarly community along the way. Various chapters have benefited from the generous comments of Bob Bone, Brannon Denning, Alexandra Lahav, Richard Marcus, Jonathan Nash, Charlie Silver, and faculties at Connecticut School of Law, Elon University School of Law, Emory School of Law, Georgia School of Law, Harvard Law School, Houston Law School, Texas Law School, and UC Hastings College of the Law. A few kind, brave, and loving souls read and commented on the entire manuscript. I'm deeply indebted to them – Thomas Burch, Bearle Chamblee, Peggy Torrey, and Margaret Williams, who is my faithful sounding board.

Conversations and comments from colleagues at various institutions helped improve, shape, and influence the ideas in this book at each stage: Christina Boyd, Andrew Bradt, Howard Erichson, Myriam Gilles, Maria Glover, John Goldberg, Judge Clay Land, Emery Lee, Samuel Issacharoff, David Marcus, Arthur Miller, Judge David Proctor, Morris Ratner, Teddy Rave, Judith Resnik, Bill Rubenstein, Bo Rutledge, Jay Tidmarsh, Tom Tyler, Judge Jack B. Weinstein, Patrick Woolley, and Adam Zimmerman. And though he isn't around to hear it, my thinking on these topics and indeed my entire academic career have been enhanced, sharpened, and forever changed by Richard Nagareda. I will always be in his debt. In the opening chapter of his own book, *Mass Torts in a World of Settlement*, he notes that “innovation by lawyers and judges in the real world of mass tort litigation has driven the academic dialogue on the subject, not vice versa.” This book is a testament to those words, for it is a deep study of what happens in the litigation trenches. I wish I could tell him all about it.

Collecting and analyzing data over the course of six years has been possible only through the generosity of my dean, Bo Rutledge, and his predecessor, Dean Rebecca White. Even as schools have tightened their belts nationwide, continuous summer funding from the law school has made it possible for me to conduct my

research from a purely academic perspective – without having to rely on external grants or funding that could cast shadows on my conclusions. It's also allowed me to avoid consulting for litigants on either side. Although consulting can be a valuable source of insights, it may also affect one's views and loyalties. So, apart from serving as a class-action notice expert in 2009, I have declined consulting opportunities.

Six years' worth of data collection and analysis couldn't have happened without the help of many student research assistants from Georgia and Harvard: Peyton Bradford, Melissa Conrad-Alam, Ellen Clarke, Lorcan Connick, Lee Deneen, Hayes Dever, David Ehrlich, Ryan Giles, Marcol Harvey, Kyle Hollomon, Richard Liu, David McGee, Savanna Nolan, Michael Nunnally, Sarah Quattrocchi, Charlie Spaulding, and Justin Van Orsdol. I'm also thankful for daily assistance from Nikko Terry, who took pains to help me create the index and proofread the manuscript; T.J. Striepe for being a law librarian extraordinaire and overseeing some of the data collection; and Jim Henneberger and Leslie Grove for turning my private data collection public by designing and breathing life into a searchable website.

A number of attorneys and judges have spoken with me about their experiences in multidistrict proceedings. I promised them anonymity, so I haven't included their names here, but I am appreciative of their trust, our discussions, and their willingness to give me a glimpse into what takes place behind the scenes. In particular, I'm indebted to Lance Cooper, the one attorney who agreed to go on the record; his story enlivens the book tremendously. This book would not be possible without the patience and guidance of Christine Dunn and Matt Gallaway at Cambridge University Press. Most importantly, I'm am thankful each day for my family's love, patience, and support.

Parts of this book draw upon and revise ideas that I first published elsewhere. I'm grateful to those law reviews for their work on *Financiers as Monitors in Aggregate Litigation*, 87 New York University Law Review 1273 (2012); *Disaggregating*, 90 Washington University Law Review 667 (2013); *Remanding Multidistrict Litigation*, 75 Louisiana Law Review 399 (2014); *Judging Multidistrict Litigation*, 90 New York Law University Law Review 71 (2015); *Constructing Issue Classes*, 101 Virginia Law Review 1855 (2015); *Monopolies in Multidistrict Litigation*, 70 Vanderbilt Law Review 67 (2017); and *Repeat Players in Multidistrict Litigation: The Social Network*, 102 Cornell Law Review 1445 (2017) (with Margaret S. Williams).