



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 41
Number 3 *Developments in the Law: Complex
Litigation in California and Beyond*

Article 3

3-1-2008

Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts

Scott Paetty

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Scott Paetty, *Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts*, 41 Loy. L.A. L. Rev. 845 (2008).

Available at: <https://digitalcommons.lmu.edu/llr/vol41/iss3/3>

This *Developments in the Law* is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

CLASSLESS NOT CLUELESS: A COMPARISON OF CASE MANAGEMENT MECHANISMS FOR NON-CLASS-BASED COMPLEX LITIGATION IN CALIFORNIA AND FEDERAL COURTS

*Scott Paetty**

I. INTRODUCTION

*Much complex litigation . . . will take the judge and counsel into sparsely charted terrain with little guidance on how to respond to pressing needs for effective management. Practices and principles that served in the past may not be adequate, their adaptation may be difficult and controversial, and novel and innovative ways may have to be found.*¹

Imagine the following scenario.² After toiling in Hollywood for over a decade, Joe Writer finally sells his pirate movie-musical to a big studio. Joe wants to use some of the money to remodel his classic craftsman into the swanky pad he has always wanted by adding a second story, a pool, and a guesthouse, reconfiguring the backyard to resemble the tropical gardens that formed the scene of his franchise epic. Total cost of the remodel: almost two million dollars.

* J.D. Candidate, May 2009, Loyola Law School, Los Angeles; B.A., Stanford University. I would like to thank all the judges and practitioners who generously shared their time and experiences with me. A very special thanks to the judges of the Los Angeles Superior Court at Central Civil West: Victoria Chaney, Carl J. West, Peter Lichtman, Anthony Mohr, and especially Carolyn B. Kuhl. This Article would not have been possible without their candor and guidance. Additional thanks to the editors and staff of the *Loyola of Los Angeles Law Review*, including Winston Stromberg, Janella Ragwen, and Alec Johnson. For Beth with all my love.

1. *Introduction* to MANUAL FOR COMPLEX LITIGATION (FOURTH) 1, 3 (2004).

2. This hypothetical is loosely based on the facts of two pending cases in California's complex court system: *Karsh v. Fort Hill Construction*, No. SC086901 (L. A. Super. Ct. filed Dec. 19, 2005), and *LPC Union Apartments v. R.D. Olson Construction*, No. BC364391 (L.A. Super. Ct. filed Jan. 5, 2007). The names of all parties and the occupation of the plaintiff have been changed.

Joe engages Build Your Dreams Affiliates (“BYDA”) to plan and execute the project. BYDA spins the job to Build Your Dreams, Inc. (“BYD”), a general contractor sub-entity of BYDA that hires all of the architects and related subcontractors to draw up the plans and complete the work. After two years of delays, cost overruns, and faulty construction, Joe severs his relationship with BYDA. He then files suit for breach of contract, fraud, misrepresentation, negligence, and other claims centering on BYDA’s alleged bad faith. BYDA in turn files cross-claims against Joe Writer and all of the subcontractors (including the architects, door manufacturers, marble importers, air conditioning and electric companies, pool and plumbing companies, landscapers, roofers, tile installers, and the bank that Joe used to co-finance the venture).

The third-party defendant subcontractors in turn file counterclaims against BYDA, asserting that BYD was inadequately capitalized and bonded for the work that it was supposed to do and that BYD was essentially a sham corporation designed to avoid liability. Thus, Joe’s celebratory home makeover has very quickly become a twisted legal mess more suited to one of his screenplays than an easy fix in court.

The notion of complex litigation conjures up images of mass tort claims with hundreds, if not thousands, of plaintiffs or cases hinging on the resolution of complicated issues involving legions of expert witnesses.³ However, the above hypothetical introduces the situation where a “simple” disagreement between two parties can quickly morph into a multi-headed hydra that demands more judicial resources than a conventional civil action.⁴ The number of difficult cases like the one described above has increased in both state and federal courts in recent times.⁵ Although state and federal judges around the country have actively managed complex litigation for

3. See, e.g., Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910, 910 (2001) (discussing the perceived large scale impact of mass tort actions on the judicial system).

4. Most CCCS cases are similar to mass tort claims because they involve numerous plaintiffs or defendants. However, the hypothetical shows that complex litigation can also result from an initial claim between one plaintiff and one defendant.

5. Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 388–89 (2007).

decades,⁶ commentators continue to write voluminously on the need for active case management and the difficulty of crafting rules and procedures specifically for “big” cases.⁷ Ultimately, creating viable procedures to deal with complex litigation is an evolving process that demands continuous reevaluation of complex litigation principles and their effective implementation.⁸

Accordingly, this Article traces the development of modern complex litigation, from its inception at the federal level in the 1960s through its reinterpretation by California’s complex court system (“CCCS”) at the dawn of the new millennium, showing how the California system represents an innovative step forward in this developing area of the law. Part II defines a “complex case” as well as other key terms in non-class-based complex actions. Further, it describes the genesis and structure of the CCCS. Part III then addresses the question—“Who deems a case complex in the CCCS and the federal courts?”—by looking at the similarities and differences between procedural mechanisms in the two systems. Part IV examines what litigants can expect after having a case designated as complex in either court system. Part V addresses different case management tools that California and federal judges employ in complex litigation. Finally, Part VI shows how the CCCS has taken the lead in creating innovative techniques for complex case management, improving procedural mechanisms involved in coordination, consolidation, and summary judgment. This Article concludes that courts around the country should use the CCCS as a model system for managing complex cases.

II. WHAT IS A COMPLEX CASE?

The differences in the development and structure of the federal Multidistrict Litigation (“MDL”) process and the CCCS mark their different approaches to defining complexity. The MDL process

6. ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., FINAL REPORT OF THE COMPLEX CIVIL LITIGATION TASK FORCE 4 (1999) [hereinafter TASK FORCE REPORT] (on file with author).

7. Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1688–89 (1992).

8. Cf. TASK FORCE REPORT, *supra* note 6, at i (describing the mission of the California Complex Civil Litigation Task Force).

developed first, beginning in 1968.⁹ Multidistrict litigation statutes created an institutional framework to improve the cooperation between federal courts, allowing for the successful coordination of a multitude of complicated antitrust cases in the early 1960s.¹⁰ Following its inception just before 2000,¹¹ the CCCS modeled itself on the judicial principles embodied in the MDL and then expanded on those principles to codify a more precise definition of a “complex case.”¹²

*A. Creation of the Federal Multidistrict-Litigation Process
and California’s Complex Court System*

The complex-case concept traces its roots back to a post-WWII judicial concern with many “similar” and “protracted” cases being filed in federal courts around the country.¹³ A committee appointed by Chief Justice Vinson of the U.S. Supreme Court expressed fear that these protracted cases would “threaten the judicial process itself” by using such a disproportionate amount of judicial resources that the federal court system would grind to a halt.¹⁴ After a wave of antitrust claims against electrical manufacturers in the early 1960s, Congress reacted to this fear by creating the federal MDL system in 1968.¹⁵ The MDL statute provides for the coordination of civil actions that share one or more questions of common fact and allows for their transfer into a single judicial district for pretrial proceedings.¹⁶ This congressional and judicial effort was a major step toward establishing concrete, reliable procedural mechanisms for aggregating similar cases, where only informal cooperation existed

9. See MARK HERRMANN ET AL., STATEWIDE COORDINATED PROCEEDINGS: STATE COURT ANALOGUES TO THE FEDERAL MDL PROCESS 3–5 (2d ed. 2004).

10. See generally DAVID F. HERR, MULTIDISTRICT LITIGATION 7–18 (1986) (providing a detailed history of the formation of the MDL Panel and the passage of 28 U.S.C. § 1407 (2000)).

11. Paul R. Kiesel, *Complex Courts: Making Courts That Work for Litigants*, 20 CAL. LITIG. 245, 248 (2007).

12. Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 69–70 (2007).

13. Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 30–31 (1991).

14. *Id.* (describing the strain on the federal courts that large cases would create without an increased measure of judicial control).

15. For a discussion of the history and chronology of the MDL courts, see HERRMANN ET AL., *supra* note 9, at 3–5, and Ostolaza & Hartmann, *supra* note 12, at 48–50.

16. See 28 U.S.C. § 1407 (2000).

before.¹⁷ In federal courts, the number of complex cases entering the MDL system has increased dramatically since its inception.¹⁸ Moreover, this trend is likely to continue as more class actions move from state to federal courts in the wake of the Class Action Fairness Act (“CAFA”), bolstering the potential number of MDL cases even further.¹⁹

California courts followed the federal lead in pressing for judicial reform to deal with the increasing presence of larger, more demanding cases. In 1996, Chief Justice George of the California Supreme Court appointed a task force to address concerns raised by business litigants about the time and expense needed to resolve

17. See Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 211–12 (1976); see also *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499 (J.P.M.L. 1968) (describing how the MDL statute reduces litigation costs and saves time and effort for the parties, the witnesses and the judiciary).

18. See JUDICIAL PANEL ON MULTIDISTRICT LITIG., ANNUAL STATISTICS OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION: JANUARY THROUGH DECEMBER 2006, 3 (2006), at http://www.jpml.uscourts.gov/General_InfoStatistics/CalendarYearStats-2006.pdf (showing seven percent of the total number of cases entering the MDL system since its inception occurred in the 2005–06 fiscal year).

19. See Georgene M. Vairo, *Foreword: Developments in the Law, The Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 979, 983 (2006). The present Article does not address class-based civil actions. For a detailed discussion of class actions, see Lauren D. Fredricks, *Developments, Removal, Remand, and Other Procedural Issues Under the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 995 (2006), Jennifer Gibson, *Developments, New Rules for Class Action Settlements: The Consumer Class Action Bill of Rights*, 39 LOY. L.A. L. REV. 1103 (2006), and Lonny Sheinkopf Hoffman, *Developments, In Retrospect: A First Year Review of the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1135 (2006). Nevertheless, an important point regarding the difference between class-based and non-class-based complex litigation must be made. Although class actions are subsets of complex litigation, a case need not be a class action in order to be considered complex. See, e.g., *Baker-Hoey v. Lockheed Martin Corp.*, 3 Cal. Rptr. 3d 593, 603 (Ct. App. 2003) (describing a case as complex in subsequent litigation even though the California Supreme Court upheld the trial court’s denial of class certification in *Lockheed Martin Corp. v. Superior Court*, 63 P.3d 913 (Cal. 2003)). In *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450 (E.D. La. 2006), the MDL Panel conferred MDL status on plaintiffs’ federal personal injury lawsuits against defendant drug company due to the filing of 7,000 individual actions, 22 million pages of documents, 168 witnesses, 35,000 pages of testimony and 270 motions. *Id.* at 452 n.4. Nevertheless, the court denied plaintiffs’ motion for class certification because the law of multiple states applied and because they did not satisfy the typicality, adequacy, predominance, and superiority requirements of Federal Rule of Civil Procedure 23. *Id.* at 459–63. Another pertinent example of the intersection of class and non-class-based complex litigation can be found in *Lockheed*. In *Lockheed*, residents in the City of Redlands brought suit against Lockheed Martin Corporation for allegedly dumping dangerous chemicals into the city’s drinking water. 63 P.3d at 916–17. While the trial court found that the proposed class had sufficient numbers and adequately represented the community interest, the California Supreme Court found that plaintiffs had not met their burden of proving that common issues of law and fact predominated, and therefore the class could not be certified. *Id.* at 922. Nevertheless, in subsequent litigation the court still referred to the case as “complex litigation.” *Baker-Hoey*, 3 Cal. Rptr. at 603.

complex cases.²⁰ The task force ultimately advised against creating a court available only to business litigants and instead recommended forming a new specialized court, concerned chiefly with development and oversight of a case management plan for complex actions.²¹ The result of this action was the creation of the CCCS. The CCCS now approaches the end of its first decade,²² and its success calls for a look at the evolution of California's approach and its conceptions of what makes a case complex.

*B. Definitions of Complexity
in the Federal Courts and the CCCS*

Federal courts and the CCCS have taken very different approaches in defining a complex case.²³ While codifying the idea that cases sharing common facts should be brought together for pretrial management,²⁴ the words "complex case" do not appear anywhere in the MDL statute. Conversely, the California legislature attempted to spell out a definition of "complex case." In California, "[a] complex case is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel."²⁵

The succinctness of the California statutory definition belies the difficulty surrounding any attempt to distill the theory of complex litigation to an easily digestible form. Commentators have termed the fruits of the California legislature's labors as a "cacophony of definitions"²⁶ that wind up "myopically describ[ing]" only part of the

20. TASK FORCE REPORT, *supra* note 6, at 2.

21. *See id.* at 1; *see also id.* at 2–3 (describing the initial studies done by the Business Court Study Task Force and its subsequent incarnation, the Complex Civil Litigation Task Force).

22. PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, CAL. ADMIN. OFFICE OF THE COURTS, EVALUATION OF THE CENTERS FOR COMPLEX CIVIL LITIGATION PILOT PROGRAM, at v (2003) [hereinafter EVALUATION].

23. For a detailed discussion and comparison of the CCCS and MDL approaches to complexity, see *infra* Parts II.B.1–2.

24. *See* 28 U.S.C. § 1407(a) (2000).

25. CAL. R. CT. 3.400(a). For a more detailed discussion of how courts interpret the principle of CAL. R. CT. Section 3.400, see *infra* Part III.A.1

26. Tidmarsh, *supra* note 7, at 1692–93 (citing use of term "complex" to describe cases that are costly, involve many issues or parties in numerous forums, give rise to voluminous evidence, or have national consequences).

issue.²⁷ Nevertheless, by taking the first step of actually laying out a definition of a complex case, California has charted a pioneering course through the maze of complex proceedings.²⁸

1. California Spells Out the Definition

Since the early 1970s, California has used an aggressive and systematic method for identifying and aggregating large cases.²⁹ Even before the concept of a specialized court system took hold, the California Code of Civil Procedure (“CCP”) granted judges the power to coordinate and consolidate related cases.³⁰ Presently, complex actions are expressly defined in the California Rules of Court (“CRC”).³¹ The rules then go further to enumerate a set of factors that aid the court in designating a case complex. In deciding whether an action is complex, a court must consider whether the action is likely to involve:

- (1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
- (2) Management of a large number of witnesses or a substantial amount of documentary evidence;
- (3) Management of a large number of separately represented parties;
- (4) Coordination with related court actions pending in other counties, states, or countries, or in a federal court; or
- (5) Substantial post-judgment judicial supervision.³²

27. *Id.* at 1754 (expressing dissatisfaction with definitions that focus on procedural and substantive elements of complexity without addressing philosophical underpinnings of complex litigation).

28. Rheingold, *supra* note 3, at 911–12.

29. *Id.* at 912.

30. CAL. CIV. PROC. CODE §§ 404–404.9 (West 2004); *see also* CAL. R. CT. 3.300(a) (defining related cases as falling into one of four categories: cases that “involve the same parties and are based on the same or similar claims;” cases that “arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact;” cases that “involve claims against, title to, possession of, or damages to the same property; or” cases that “are likely for other reasons to require substantial duplication of judicial resources if heard by different judges”). Related cases are defined substantively the same in the CCCS as in the federal courts. The differences between the CCCS and federal definitions of coordination and consolidation are addressed in Part V.B.

31. CAL. R. CT. 3.400(a) (defining a complex case as “an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel”).

32. *Id.* 3.400(b).

Further, California has tried to identify the types of cases likely to meet these criteria. The CRC provides the following categories under which a court should consider an action “provisionally complex”:

- (1) Antitrust or trade regulation claims;
- (2) Construction defect claims involving many parties or structures;
- (3) Securities claims or investment losses involving many parties;
- (4) Environmental or toxic tort claims involving many parties;
- (5) Claims involving mass torts;
- (6) Claims involving class actions; or
- (7) Insurance coverage claims arising out of any of the claims listed in (c)(1) through (c)(6).³³

If an action falls into one of these categories, then a presumption attaches that the initial court will transfer the case to the CCCS. Even if the case qualifies under provisional complexity, however, the judge must still officially determine whether it is truly complex.³⁴ In California, only a judge can ultimately evaluate and deem a pending case complex under the statutory definition and categories.³⁵

2. Defining Complexity in Federal Courts

Unlike California, Congress has not attempted to define complexity in federal statutes, and a bright-line definition does not appear to be practical in the federal system.³⁶ Complexity at the federal level is exhibited by a departure from the traditional role of the judge as a “passive” referee to a more hands-on “managerial” role.³⁷ For example, in *In re Phenylpropanolamine (PPA) Products Liability Litigation*,³⁸ the Ninth Circuit found that an MDL action is unique because of the large number of cases involved, the greater

33. *Id.* 3.400(c).

34. See TASK FORCE REPORT, *supra* note 6, at 25 (stating that the court will refer back to CAL. R. CT. 3.400(a) for final determination of complexity). For an additional discussion of provisional complexity in the CCCS, see *infra* Part III.A.

35. JUDICIAL COUNCIL OF CAL., DESKBOOK ON THE MANAGEMENT OF COMPLEX CIVIL LITIGATION § 1.02 (2006) [hereinafter DESKBOOK].

36. *Introduction* to MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, at 1. Complex designation does exist in the federal criminal context. However, I am focusing here on the civil justice system, and, therefore, any discussion of federal criminal complexity is beyond the scope of this Article.

37. See Barry R. Schaller, *Managerial Judging: A Principled Approach to Complex Cases in State Court*, 68 CONN. B.J. 77 (1994).

38. 460 F.3d 1217, 1222 (9th Cir. 2006)

complexity of these cases, and the statutory mandate for active judicial management of the litigation. While cases are not officially designated as complex in the federal court system, as they can be in the CCCS, the particularities of large-scale MDL cases mean that an MDL judge's decisions "may be somewhat different . . . from ordinary litigation on an ordinary docket."³⁹

The Federal Rules of Civil Procedure ("FRCP") begin by stating that civil cases must be "construed and administered to secure the just, speedy, and inexpensive determination of every action."⁴⁰ Consequently, federal judges hold the theoretical power to manage their dockets to ensure the principles of FRCP 1 through both pretrial and trial measures. Thus, judges can invoke this pre-trial management power to coordinate related actions.⁴¹ Further, FRCP 16 enables the court to direct the parties to appear in conference in order to facilitate communication among the parties and streamline the proceedings.⁴² As such, judges can rely on FRCP 16 to manage the case using pretrial conferences.

Another perspective on complexity appears in the *Manual for Complex Litigation* ("MCL"), the primary reference source for federal judges regarding complex cases.⁴³ Although the MCL is not binding authority,⁴⁴ it has become the "pre-eminent resource on many of the issues confronting judges and lawyers handling complex cases."⁴⁵ Previously, the MCL attempted to define a complex case by the somewhat self-evident truism: "[t]he greater the need for

39. *Id.*

40. FED. R. CIV. P. 1.

41. See *In re Vioxx Prod. Liab. Litig.*, 360 F. Supp. 2d 1352, 1353–54 (J.P.M.L. 2005) (referencing 28 U.S.C. § 1407 as the proper mechanism through which to aggregate related prescription drug claims). Further examples of the MDL statute to coordinate related actions will be discussed *infra* Part V.B.2.

42. For further examples of judicial use of the principles embodied in section 16 of the Federal Rule of Civil Procedure, see *infra* Part V.B.1. It is worth noting here that many volumes have been written about the ways in which federal judges wield the measures in Fed. R. Civ. P. 16, and the MDL statute, as well as Fed. R. Civ. P. 42, the federal rule governing consolidation and severance of civil actions. Although a comprehensive look at all of these case management practices is beyond the scope of this Article, Part V will focus on several formal and informal tools of complex case management and provide a comparative look at procedures in the federal courts and the CCCS.

43. *Introduction* to ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) 1, 3 (2007).

44. *Id.*

45. *Id.*

management, the more 'complex' is the litigation."⁴⁶ While this tack neatly avoided the semantic echo chamber that led to the CCCS's "cacophony of definitions," it did not provide much clarity for practitioners or judges seeking to actuate effective case management principles.⁴⁷ In fact, the MCL abandoned its prior tautological attempts at defining complexity in its most recent edition.⁴⁸

Indeed, neither the MCL nor federal case law provides any insight as to what might make litigation complex in certain circumstances and not complex in others. This lack of a definition is important because, even if a federal court's treatment of a case does not depend on formal complex designation, the expectations of counsel regarding the degree of judicial involvement in a case may rest on whether or not the case is seen as complex.⁴⁹ The Federal Judicial Center ("FJC") ultimately attempted to provide some clarification by informally identifying certain complex-litigation subject areas, such as antitrust, securities, mass torts, environmental, and civil rights.⁵⁰ In describing complex litigation in terms of these categories, the FJC was not attempting to definitively designate these types of cases as complex; it was merely attempting to point out that these are the types of cases in which active managerial judging will be most needed and most effective.⁵¹

In many ways, the subject matter breakdown presented by the FJC provided the template for the procedures governing complex case designation in the CCCS.⁵² California has gone even further in codifying the principles of case management and aggregation, however, by specifically defining categories for complex designation

46. *Id.*

47. See Tidmarsh, *supra* note 7, at 1692–93 (providing a detailed summary and evaluation of the myriad characteristics that commentators have cited as the basis for their definitions of complexity, including: number of issues, parties, fora, presence of many thorny legal issues, voluminous evidence and witnesses, or degree of nationwide consequence).

48. Cf. Scott A. Steiner, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 71, 74 (1999) (describing the attempt at complex case definition in the MANUAL FOR COMPLEX LITIGATION (THIRD)).

49. For a discussion of differing characteristics of judicial involvement in complex cases in the CCCS and federal court, see *infra* Part IV

50. *Introduction* to MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, at 1, 2–3.

51. Cf. *id.* (describing generally the challenging nature of certain cases to the judge's managerial acumen).

52. *Introduction* to ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 43, at 1, 5.

and expressly designating factors that qualify cases for more intensive judicial involvement.⁵³ In contrast to the somewhat vague and amorphous federal standards, California has taken an active lead in pioneering complex case management innovations by establishing court rules and legislation that facilitate early recognition of complex cases.⁵⁴

III. WHO MAKES A COMPLEX CASE? PROCEDURAL MECHANISMS FOR DEEMING A CASE COMPLEX IN THE CCCS AND THE FEDERAL COURTS

This section focuses on the procedural mechanisms used to officially designate cases as complex in the CCCS and federal courts. California procedural mechanisms are activated once a case meets the court rule and statutory requirements for complexity.⁵⁵ Federal courts, on the other hand, turn to the Judicial Panel for Multidistrict Litigation (“MDL Panel”) to invoke the coordination and consolidation procedures of the MDL statute.⁵⁶

A. Who Deems a Case Complex in the CCCS and the MDL?

California spells out the definition of complexity and then charges judges with ensuring that complex cases are guided to the proper court. The onus is then on the trial judge to guide the action to resolution. The MDL process, in contrast, does not provide a statutory definition of complexity but relies instead on the coordination procedures within the MDL statute to indicate a complex case.

1. California’s “Designer” Complexity

The CCCS places judges at the forefront of determining both whether a case is complex and where the case should be adjudicated. Judges are governed by the principle that they should “compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court

53. See CAL. R. CT. 3.400–.403.

54. Cf. Rheingold, *supra* note 3, at 911–12 (describing how California built on the MDL framework and distinguished itself as a pioneer in case aggregation procedures).

55. See *supra* Part II.B.1 (discussing Cal. R. Ct., 3.400–.403, and Cal. Civ. Proc. Code § 404-404.9 (West 2004)).

56. 28 U.S.C. §§ 1407(a), (d) (2000).

jurisdiction to final disposition of the action.”⁵⁷ In effect, California judges become “designers” of the litigation. The Los Angeles County Superior Court Rules (“LACSCR”) state that “the court, not the lawyers or litigants, should control the pace of litigation.”⁵⁸ Furthermore, CRC 3.400(b) and (d) place responsibility on judges to determine whether a case is complex by applying and evaluating the factors enumerated previously in Part II.B.1.⁵⁹ This ultimate determinative power rests with the judge, regardless of whether the initial question of complexity comes from the presiding judge *sua sponte* or from petition by the parties.⁶⁰

In the CCCS, a court will deem a case complex if it falls into one of the provisionally complex categories.⁶¹ If an action does not fall under one of the provisionally complex categories, a court can still deem a case complex upon a judge’s order or upon petition from either of the parties.⁶² To petition, any party can affix a cover sheet (Form CM-010) to their complaint or response, requesting a complex designation.⁶³ No later than the first appearance, a party may also file a non-complex counter-designation to a complaint that has a complex designation request.⁶⁴ This counter-designation challenges the adverse party’s complexity assertion and compels the judge to rule definitively on the challenge within thirty days.⁶⁵

Since early detection and management of potentially complex cases is the goal, a court clerk must immediately notify the presiding judge and court executive officer of any filings that request a complex designation.⁶⁶ Furthermore, a court must make a timely determination of whether a provisionally designated case⁶⁷ is actually complex.⁶⁸ Statistical studies indicate that the CCCS effectively employs the complex case factors in designating complex cases

57. L.A. SUPER. CT. R. 7.0(b).

58. *Id.*

59. CAL. R. CT. 3.400(b).

60. *Id.* 3.400(d).

61. *See supra* notes 33–35 and accompanying text.

62. DESKBOOK, *supra* note 35, § 2.02.

63. CAL. R. CT. 3.401, 3.402(b).

64. *Id.* 3.402(a).

65. *Id.* 3.402(b).

66. DESKBOOK, *supra* note 35, § 2.02.

67. This procedure is described *supra* notes 33–35 and accompanying text.

68. *See* CAL. R. CT. 3.403.

within a wide range of legal issues.⁶⁹ Furthermore, a study of 551 cases designated provisionally complex found that only four of these cases were subsequently deemed not complex.⁷⁰ This indicates that the various screening procedures mandated by the court rules and statutes are highly effective at identifying appropriate cases for the CCCS.⁷¹

A court also has the discretion to designate a provisionally complex case as not complex “if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine.”⁷² For example, some courts have handled so many asbestos claims over the past several decades that they no longer need to designate these claims as complex because the management techniques are commonplace.⁷³ While asbestos claims have many complex-case characteristics, such as multiple parties and complicated discovery, the resolution of these cases tends to follow a well-worn procedural path, and previously novel legal issues associated with them are now well settled.⁷⁴

2. MDL As the Genesis of Complexity in the Federal Courts

As noted previously, federal courts do not have an analogue to the CCCS rules defining complex cases. Thus, any attempt to draw procedural comparisons between the federal courts and the CCCS should not focus too rigidly on the term “complex.”⁷⁵ However,

69. EVALUATION, *supra* note 22, at 46–47 tbl.4.2. (Of the 1361 cases admitted to the CCCS since its inception, the number of provisionally complex and non provisionally complex cases was roughly equal (691 to 670, or 50.8 to 49.2%), and, of the non-provisionally complex cases, the distribution of case type across subject areas was relatively even: breach of warranty (10.8%), business tort (5.7%), insurance coverage (4.3%), eminent domain (4.0%), other non-PI/PD/WD (2.2%), product liability (1.8%), fraud (1.7%), other real property (1.6%), other PI/PD/WD (1.3%), professional negligence (1.1%) writ of mandamus (1.0%), medical malpractice (1.0%), all other civil (11.9%), and unknown (0.7%). *Id.*

70. *Id.* at 47 tbl.4.3.

71. *Id.*

72. CAL. R. CT. 3.400(d).

73. See DESKBOOK, *supra* note 35, § 2.02; see also TASK FORCE REPORT, *supra* note 6, at 25 (commenting on the proposed change to Cal. R. Ct. 1800(a)).

74. See TASK FORCE REPORT, *supra* note 6. For an interesting discussion on the definition of complexity, see *Complex Litigation: Key Findings from the California Pilot Program*, CIVIL ACTION (Nat'l Ctr. For State Courts, Williamsburg, Va.) Winter 2004, at 1, 3 (breaking complexity down into three distinct categories: legal, evidentiary and logistical).

75. “There are no complex cases, only complex attorneys.” Interview with R. Gary Klausner, Judge, U.S. Dist. Court for the Cent. Dist. of Cal., in L.A., Cal. (Sept. 13, 2007) (providing a humorous reference to the federal perceptions of complexity).

federal courts have coordination, consolidation, and related case concepts that allow federal courts to bring together similar actions into one court for intensive case management.⁷⁶ This case aggregation is the functional equivalent of complex case designation in the CCCS. Thus, the coordination procedures at the heart of the MDL statute provide the federal indicia for complexity.⁷⁷

While CCCS coordination procedures were originally based upon the MDL statute,⁷⁸ the MDL generally functions on a national, interstate basis, whereas the CCCS is by definition intrastate only.⁷⁹ The following section compares the coordination mechanisms in the two systems.⁸⁰

B. How Do Courts Bring Factually Similar Complex Cases Together? Differences Between the CCCS and Federal Courts Surrounding Activation of the Coordination Procedures

As in the CCCS, federal court coordination procedures allow courts to aggregate cases involving common factual questions.⁸¹ The principle difference between MDL and CCCS coordination procedures is the way the statutes initiate the proceedings. The MDL statute is worded more broadly than the CCCS statute.⁸² Initiating coordination via the MDL statute in federal court occurs in one of

76. See, e.g., 28 U.S.C. § 1407 (2000); FED. R. CIV. P. 42.

77. 28 U.S.C. § 1407.

78. See *supra* Part II.B.

79. Ostolaza & Hartmann, *supra* note 12, at 75–76.

80. For a closer look at the substantive differences between coordination as a case management tool in the CCCS and federal courts, see *infra* Part V.B.1

81. See 28 U.S.C. § 1407.

82. The MDL makes it easier procedurally to petition for coordination than the CCCS, and this difference illuminates a potential area for improvement of the mechanisms in the CCCS. Compare 28 U.S.C. § 1407(c)(ii) (stating that initiation of coordination can be made by any party in the proceeding), with CAL. CIV. PROC. CODE § 404 (West 2004) (stating that petition for coordination must be from all parties plaintiff or all parties defendant before any other procedural mechanism for coordination can be invoked). See generally Administrative Office of the Courts, Frequently Asked Questions, <http://courtinfo.ca.gov/courtadmin/aoc/cccfqa.htm> (last visited Feb. 23, 2008) (“What are the methods for initiating coordination of complex civil actions?”). Given that the factor most often cited by practitioners as the major impetus for cost savings in California complex litigation is the accessibility of the CCCS, see Paul Kiesel & Bryan Borys, *The Cost Savings of the Complex Civil Litigation Program*, CAL. CTS. REV., Summer 2007, at 16, 18 tbl.1, there is an inconsistency in the way coordination is activated in light of a primary goal of the CCCS to promote accessibility of the complex courts. Interview with Richard Aldrich, Assoc. Justice, California Court of Appeal, in L.A., Cal. (Oct. 16, 2007); see also TASK FORCE REPORT, *supra* note 6, at 2.

two ways: (1) *sua sponte* by the MDL Panel;⁸³ or (2) by a “motion filed with the [MDL] panel by *a party* in any [appropriate] action.”⁸⁴ The MDL panel then determines whether to coordinate based on three essential principles: (1) the proposed actions must involve “common questions of fact;” (2) the transfer must be for the “convenience of parties and witnesses;” and (3) any transfer must “promote the just and efficient conduct of such actions.”⁸⁵ The decision to transfer is a highly fact-specific inquiry that requires the MDL panel to weigh the above principles carefully in light of their interdependence.⁸⁶ The rationale behind MDL panel decisions to grant or deny coordination is the subject of much commentary and will be addressed in more depth later in this Article.⁸⁷ The relevant point here, however, is that if the judge does not coordinate on her own accord, either party to the action can initiate coordination proceedings.⁸⁸

In California courts, however, individual parties have less discretion to independently initiate coordination proceedings. In the CCCS, a petition for coordination may be submitted by any of the following: (1) a presiding judge of any court in which one of the included actions is pending; (2) *all parties* plaintiff or *all parties* defendant to one of the included actions; or finally, (3) any party after obtaining prior leave of the court under CRC 3.520(b).⁸⁹ The second method is referred to as “the all parties plaintiff and defendant rule.”⁹⁰ The rule allows all the parties on one side of a lawsuit to join a petition to deem a case complex directly to the Judicial Council without prior leave of the court.⁹¹ But if all the parties on one side of one action do not agree to join in the petition, an individual party must file a motion with the presiding judge of the

83. 28 U.S.C. § 1407(c)(i).

84. *Id.* § 1407(c)(ii) (emphasis added).

85. *Id.* § 1407(a).

86. Ostolaza & Hartmann, *supra* note 12, at 52.

87. *See infra* Part V.B.2; *see also* Ostolaza & Hartmann, *supra* note 12, at 52–61.

88. 28 U.S.C. § 1407(c)(ii).

89. *See* CAL. CIV. PROC. CODE § 404 (West 2004). For a gathering of the CCCS rules regarding complex case coordination, *see* Administrative Office of the Courts, *supra* note 82 (“Who can submit a petition for coordination to the chair of the Judicial Council?”).

90. *See* Administrative Office of the Courts, *supra* note 82 (“Who can submit a petition for coordination to the chair of the Judicial Council?”).

91. *Id.*

trial court requesting permission in order to submit a coordination petition.⁹² If the presiding judge grants permission, the moving party must submit the order along with the petition to coordinate to the chair of the Judicial Council.⁹³

An important and frequently misunderstood distinction of the third prong is that it does not present an alternative to “the all parties plaintiff or defendant rule.”⁹⁴ In other words, the petitioner cannot file her motion with the presiding judge of the trial court without first attempting to get all parties plaintiff or defendant to join in.⁹⁵ These procedures, while thorough, add an excessive procedural barrier to coordination in the CCCS. Case aggregation under the MDL statute is easier than under section 404 of the CCP because any party to the action may petition for coordination without unanimous party consent, making it easier to aggregate cases.

While the CCCS coordination statute is not currently as broad as the federal coordination statute, there seems to be a recent movement towards creating more flexible coordination procedures. In fact, this change has already been implemented for non-complex cases. In 1996, the California legislature amended the coordination procedures to add section 403, governing the coordination of non-complex actions.⁹⁶ This amendment stated that a judge can transfer a non-complex action, upon motion by either party, to that judge’s court when doing so promotes the ends of justice⁹⁷ and the moving party presents facts showing a good faith effort to obtain agreement to the transfer from all parties.⁹⁸ As yet, the statutes concerning complex actions do not allow transfers upon a showing of a “good faith effort,”⁹⁹ requiring parties to seek leave of the trial court if all parties do not agree. However, an amendment that expressly credits a party’s good faith attempt to secure agreement for coordination might present a more welcoming invitation to enter the CCCS.

92. CAL. R. CT. 3.520(b).

93. *Id.* 3520(b)(2).

94. Administrative Office of the Courts, *supra* note 82 (“What are the methods for initiating coordination of complex civil actions?”).

95. *Id.*

96. *See* 1996 Cal. Legis. Serv. 713 (West).

97. *See* CAL. CIV. PROC. CODE § 404.1 (West 2004).

98. *See* 1996 Cal. Legis. Serv. 713.

99. *See* CAL. CIV. PROC. CODE § 404 (adhering to the “all parties plaintiff or defendant” rule without mention of a good faith workaround).

IV. WHAT LITIGANTS IN COMPLEX CASES CAN EXPECT IN THE CCCS AND FEDERAL COURTS

Forum selection has long been an important element of parties' trial strategy.¹⁰⁰ In the arena of complex litigation, forum selection is no less important. In fact, given the intricate nature of complex case proceedings and the exclusive variables involved (such as numerous legal issues, witnesses, and discovery), forum selection is of paramount importance. The following section discusses some of the things plaintiffs and defendants in complex cases can expect from the procedures of the CCCS and federal courts.¹⁰¹

A. Timing and Efficiency

Because of their increased resources, federal courts are traditionally thought to be better equipped to handle the larger complex proceedings resulting from coordination or consolidation. Yet, the success of the CCCS model in effectuating timely and efficient resolution of complex cases is challenging this notion. For example, the Northridge Earthquake litigation¹⁰² highlighted the CCCS's successful resolution of thousands of insurance claims brought in the wake of the 1994 disaster. Over 4000 lawsuits were brought initially in the Los Angeles Superior Court ("LASC") when the California legislature changed the Civil Code to allow plaintiffs to bring bad faith claims against insurance carriers.¹⁰³ After noting the immense burden on the LASC system and the complexity of the cases, the Judicial Council transferred all 4000 cases to three judges in the CCCS.¹⁰⁴ Working together, and with the cooperation of

100. For an overview of forum selection issues, see Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction*, in CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 1097 (A.L.I.-A.B.A. ed., 2007).

101. Note that there are other areas that are ripe for comparison (for example, differences in attorney pay structures in complex cases in state courts as opposed to the federal MDL) that are outside the scope of this Article.

102. See, e.g., *Bialo v. W. Mut. Ins. Co.*, 115 Cal. Rptr. 2d 3 (Ct. App. 2002); *20th Century Ins. Co. v. Superior Court*, 109 Cal. Rptr. 2d 611 (Ct. App. 2001).

103. Kiesel, *supra* note 11, at 248.

104. *Id.*

counsel, the three judges facilitated settlement in the vast majority of these claims within twenty-four months.¹⁰⁵

A key operating principle of the CCCS is to be flexible in pursuing a timely resolution of complex matters.¹⁰⁶ This operating principle can be seen in the court rules governing the timeframe for resolution of cases in the CCCS. The California Rules of Court typically call for cases filed in the LASC to be resolved within two years of filing.¹⁰⁷ However, the CRC have been amended to allow case disposition goals to be tolled to a maximum of three years for extraordinary (i.e., complex) cases.¹⁰⁸ This amendment allows CCCS judges the flexibility necessary to manage complex cases without fear that case resolution guidelines will present too restrictive a framework for these difficult cases. The California Courts of Appeal support the primacy of CCCS case management statutes over the imposition of case disposition guidelines.¹⁰⁹

In the federal context, the MDL statute also provides litigants with ways to simplify pretrial proceedings to make them more timely and efficient. Coordination under the MDL statute has the potential to eliminate duplicative discovery by bringing discovery under the supervision of one judge.¹¹⁰ This judge can take measures to establish lead and/or liaison counsel¹¹¹ or create document depositories to provide means for shared interrogatories and depositions.¹¹²

Even though the creation of these mechanisms may speed communication and sharing among the parties, there is no guarantee that this will result in less discovery or a faster disposition of the case. In fact, one notable commentator suggests that when multiple

105. *Id.* at 249.

106. Interview with Carolyn B. Kuhl, Managing Judge, L.A. Superior Court, in L.A., Cal. (Sept. 6, 2007).

107. CAL. R. CT. 3.714(b).

108. *Id.* 3.714(c).

109. *See Polibrid Coatings, Inc. v. Superior Court*, 6 Cal. Rptr. 3d 7, 9 (Ct. App. 2003) (holding that the California fast track rules must give way to case management statutes).

110. *See* 28 U.S.C. § 1407(b) (2000); *see also* HERRMANN ET AL., *supra* note 9, at 9.

111. ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 43, § 10.22-.225 (discussing structure and roles of lead/liaison counsel and committees as strategies for document sharing among the parties). For an example of effective implementation of liaison counsel and criteria for selecting same, *see In re Delphi ERISA Litigation*, 230 F.R.D. 496 (E.D. Mich. 2005).

112. HERRMANN ET AL., *supra* note 9, at 9-10.

cases with multiple sets of plaintiffs' attorneys are in a single forum, there is an incentive to undertake discovery on even more issues surrounding the case because the efforts can be spread over more people.¹¹³ Moreover, given that an MDL case will often involve many parties in multiple jurisdictions¹¹⁴ and that state proceedings usually advance faster than federal ones,¹¹⁵ the process of aggregating these claims may push off resolution for an individual plaintiff for years.¹¹⁶ Individual plaintiffs might get swept up in expanded discovery proceedings, causing a case to be delayed in the federal system when it might have been "fast tracked"¹¹⁷ and placed on a trial calendar within a year in state court.¹¹⁸

Additionally, an MDL proceeding aggregates hundreds or even thousands of cases in one court. With an understanding of the difficulties surrounding docket management, plaintiffs' counsel can strategically file less meritorious cases in federal court and bide their time while pressing for settlement. By filing a complex case in the CCCS, counsel ensures that the cases will be actively managed by a CCCS judge. As such, plaintiffs' counsel may choose to file strong cases in state court.¹¹⁹

B. Appellate Procedures

The procedures for appeal in complex cases highlight another relevant distinction between federal courts and the CCCS. With limited exceptions, federal law dictates that appeals can be initiated

113. Mark Herrmann, *To MDL or Not to MDL?*, LITIG., Fall 1997, at 43, 45.

114. Albert Sheng & Paula Hannaford-Agor, *Mass Tort Management in State and Federal Courts: A Case Study of the Phenylpropanolamine (PPA) Litigation 1* (2006), http://www.nconline.org/WC/Publications/MassTorts/MaTprtsPPA_Final.pdf (unpublished manuscript).

115. *Id.* at 7.

116. *Id.* at 2.

117. *See* CAL. R. CT. 3.714 (a), (b). These rules are commonly known as the California Fast Track statutes. Interview with Carolyn B. Kuhl, *supra* note 106. The fast track statutes set goals to resolve all non-complex civil cases in two years and complex cases within three years. *Id.*

118. *See* Telephone Interview with Christine Spagnoli, Partner, Greene, Broillet & Wheeler (Aug. 29, 2007) (describing the difficulty of waiting for lengthy coordinated discovery in the Firestone tire case); *see also* Interview with Paul Kiesel, Partner, Kiesel, Boucher & Larson, in L.A., Cal. (Sept. 17, 2007) (describing a similar reluctance to file complex cases in federal court because of the potential delay).

119. *See id.*

only after final judgment.¹²⁰ In contrast, California statutes allow for interlocutory appeal.¹²¹ This major difference can have important effects on the disposition of complex cases.

In federal courts, interlocutory appeals are considered impediments to the efficient resolution of trial proceedings.¹²² Thus, interlocutory review is granted sparingly.¹²³ In MDL proceedings, a writ is the only option for appealing MDL Panel coordination orders, and there is no mechanism for appellate review when coordination is denied.¹²⁴ If the petition for a writ is filed prior to the MDL Panel's decision on transfer, then the petition must be filed in the appellate court with jurisdiction over the MDL Panel. If the petition is filed after transfer has been granted, however, then it can only be filed in the court with appellate jurisdiction over the transferee court.¹²⁵

The Ninth Circuit's opinion of writs is that they are an "extraordinary remedy" and undesirable because they interfere with the district court's ability to control the litigation before it.¹²⁶ The Ninth Circuit has issued guidelines for determining the appropriateness of a writ that can be charitably described as

120. 28 U.S.C. § 1291 (2000) ("[T]he courts of appeals other than the United States Court of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.").

121. CAL. CIV. PROC. CODE § 166.1 (West 2006) states:

Upon the written request of any party or his or her counsel, or at the judge's discretion, a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation.

122. *See* *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1948) ("The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.").

123. Interlocutory appeals are provided for by a provision of 28 U.S.C. § 1292. Interlocutory appeals are also provided for according to the *Cohen* collateral order rule. *Cohen*, 337 U.S. at 546. The *Cohen* collateral order rule is a three-prong test summarized most recently in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). In *Coopers*, the Court held that an appealable pretrial order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Id.* at 468. The statutory authority for interlocutory appeal by writs is found at 28 U.S.C. § 1651. This statute is commonly known as the All Writs Act and states that "all 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." *Id.*

124. 28 U.S.C. § 1407(e).

125. *See id.*

126. *See* *Star Editorial, Inc. v. U.S. Dist. Court*, 7 F.3d 856, 859 (9th Cir. 1993).

conservative.¹²⁷ These conservative guidelines have the primary effect of streamlining pretrial proceedings.

However, a corollary (not yet addressed in empirical studies) to this judicial philosophy might also be that federal appellate procedures stimulate settlement. If the movant loses an important pretrial motion, they might take the path of least resistance and settle rather than incur the expense and further uncertainty of trial. Settlement may be more attractive than continuing at trial with a judge who ruled against the movant, especially because an unsuccessful appeal would have been based on an assertion of the trial judge's abuse of discretion.

In the CCCS, appellate procedures are far less stringent and are therefore utilized much more regularly. The judge overseeing the coordination motion selects the court having appellate jurisdiction if the coordinated actions are in more than one jurisdiction.¹²⁸ While California statutes are similar to the MDL, they do not provide for appellate review of coordination motions;¹²⁹ however, orders denying coordination motions are usually reviewable by petition for writ unlike in the federal courts.¹³⁰ The rationale for allowing writ review of coordination orders is supported by statute,¹³¹ as well as by philosophical and practical concerns. In *McGhan Medical*

127. See *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977). The court describes the five requirements as:

- 1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
- 2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first).
- 3) The district court's order is clearly erroneous as a matter of law.
- 4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
- 5) The district court's order raises new and important problems, or issues of law of first impression.

Id. (internal citations omitted).

128. CAL. CIV. PROC. CODE § 404.2 (West 2004). The unstated (and somewhat obvious) corollary to this rule is that if aggregated cases arise within the same jurisdiction, the appellate court of that jurisdiction will hear all interlocutory appeals.

129. See *Lautrup, Inc. v. Trans-West Disc. Corp.*, 134 Cal. Rptr. 348, 349 (Ct. App. 1976) (holding that the legislature would have expressly permitted appeal of coordinated petition demands in Cal. Civ. Proc. Code § 904.1, if it had intended to do so).

130. See CAL. CIV. PROC. CODE § 404.6 (West 2004); see also *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 304 P.2d 13, 16 (Cal. 1956) (holding that an aggregation order is not appealable, but a petition for a writ of mandamus can be filed when justice so requires).

131. CAL. CIV. PROC. CODE § 404.6 (“[A]ny party may petition . . . for a writ of mandate to require the court to make such order as the reviewing court finds appropriate.”).

Corporation v. Superior Court,¹³² the California Court of Appeal noted that ultimate authority to approve decisions by the coordination motion judge that “foster the goals of coordination” is vested by statute in the Judicial Council.¹³³ Chief among these goals is that the coordination decision (either pro or con) “promote[s] the ends of justice.”¹³⁴

McGhan involved hundreds of cases involving personal injuries resulting from breast implants.¹³⁵ The cases were spread out over more than twenty different California counties.¹³⁶ The court emphasized that denying coordination would have a substantial impact on the appellate divisions throughout the state through the result of numerous trials.¹³⁷ Accordingly, the motion judge’s coordination decision warranted careful review.¹³⁸ Given the inherent complexity of cases in the CCCS, the need to “get it right” in the initial determination of coordination is of paramount importance. Therefore, it makes sense that CCCS grants writ review of both grants and denials of coordination motions.

Furthermore,¹³⁹ petitions for interlocutory appeal in the CCCS are liberally granted even after coordination.¹⁴⁰ This open attitude toward early appellate review squares with the goal to reduce costs for the litigants.¹⁴¹ If the parties agree that there are controlling and hotly contested points of law, then quick and early adjudication by appellate courts aids in effective resolution at trial.¹⁴² Thus, both the statutory language and common practice in the CCCS support interlocutory appeal as a desirable procedural mechanism in complex case management.

An interesting issue remains as to whether this approach is actually more efficient, specifically, whether the prevalence of

132. 14 Cal. Rptr. 2d 264 (Ct. App. 1992).

133. *Id.* at 269.

134. *Id.*

135. *Id.* at 266.

136. *Id.*

137. *Id.* at 268–69.

138. *Id.*

139. *See infra* Part V.B.1 (discussing how coordination in the CCCS takes place).

140. Interview with Carolyn B. Kuhl, *supra* note 106.

141. Interview with Carl J. West, Judge, L.A. Superior Court (CCCS), in L.A., Cal. (Oct. 29, 2007).

142. *Id.*

appeals in the CCCS has the unintended and undesirable consequence of adding extra time and expense to complex proceedings. For example, *Farmers Insurance Exchange v. Superior Court*,¹⁴³ provides an example of a case that contained several issues that bounced back and forth on appeal in the CCCS, delaying ultimate resolution of the case. In *Farmers*, insurance company defendants sought writ review on the trial court's decisions to grant a private right of action, to deny judgment on the pleadings, and to grant plaintiffs leave to add another claim.¹⁴⁴ While the litigation thus remained on the CCCS docket throughout these appeals, the time between filing of the plaintiff's initial complaint and resolution of the final procedural issue on appeal was almost five years.¹⁴⁵

This delay problem might not be as prevalent in federal courts because of the final disposition standards applied there. If a party loses a pretrial motion before the MDL judge, that party will have difficulty obtaining an appeal before final judgment. Since the standard for writ review is so high—abuse of discretion¹⁴⁶—the moving party is essentially arguing against the competence of the trial judge. If the movant loses, the prospect of returning to the same “incompetent” trial judge to resume the action will be, at best, unattractive. Depending on the importance of the issue to the cause of action, the losing party may be forced to think long and hard about whether her chances of overall success have diminished too greatly. If so, then settlement will become an increasingly attractive option. Under these circumstances, federal appellate procedures actually do a better job of facilitating a speedy disposition of cases¹⁴⁷ by increasing the motivation for certain parties to settle.

C. Use of Special Masters

While the use of special masters in pre-trial proceedings is commonly accepted in federal courts, they remain fairly controversial in California. Special masters are court appointed intermediaries who address the need for special expertise in a

143. 40 Cal. Rptr. 3d 653 (Ct. App. 2006).

144. *Id.* at 653, 655–57.

145. The first complaint was filed in April 2001, and the final procedure issue was resolved in March 2006. *Id.* at 655.

146. *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 304 P.2d 13, 15 (1956).

147. *See infra* Part V.A.

particular case.¹⁴⁸ They are known by many names, including auditors, assessors, appraisers, commissioners, examiners, monitors, referees, and trustees.¹⁴⁹ For the purposes of this Article, the term “special master” refers to court appointed adjuncts of all types. Special masters are a regular feature in the federal court system,¹⁵⁰ and their use is provided for in the FRCP.¹⁵¹ Yet this is not the case in the CCCS. Even before the creation of the CCCS, the use of special masters was a controversial part of adjudicating complex cases in California state courts.¹⁵² However, the use of special masters is called for in both the CCCS *Deskbook on the Management of Complex Civil Litigation* and in the CCP.¹⁵³ Special masters take on tasks in complex actions that include supervising discovery,¹⁵⁴ informally coordinating similar cases in federal and state proceedings,¹⁵⁵ and administering claimant trust accounts in mass tort cases.¹⁵⁶ Moreover, many commentators advance compelling arguments for extending their use even further into the field of complex case management.¹⁵⁷ So what is the controversy?

In its evaluation of the CCCS, the National Center for State Courts (“NCSC”) found an intense dissatisfaction among attorneys with the use of court appointed special masters prior to the

148. THOMAS WILLGING ET AL., FED. JUDICIAL CTR., SPECIAL MASTERS’ INCIDENCE AND ACTIVITY 1 (2000), available at [http://www.fjc.gov/public/pdf.nsf/lookup/specmast.pdf/\\$file/specmast.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/specmast.pdf/$file/specmast.pdf).

149. *Id.*

150. *Id.*

151. FED. R. CIV. P. 53(a)(1).

152. See TASK FORCE REPORT, *supra* note 6, at vii; see also Petition for Review, *Inland Roof Co. v. Superior Court*, No. G023846 (Cal. Ct. App. Aug. 18, 1998) (objecting to the trial court’s appointment of a discovery referee as antithetical to the principles of active and early judicial involvement in a complex case).

153. See DESKBOOK, *supra* note 35, § 2.05; see also CAL. CIV. PROC. CODE § 639 (West 2004 & Supp. 2008).

154. See *Lu v. Superior Court*, 64 Cal. Rptr. 2d 561, 563 (Ct. App. 1997).

155. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1455, 1457 (N.D. Ala. 1995).

156. See *Briggs v. Dalkon Shield Claimants Trust (In re A.H. Robins Co.)*, 211 B.R. 199 (E.D. Va. 1997).

157. See Georgene Vairo, *The Civil Trial: Adaptation and Alternatives: Symposium Article: Why Me? The Role of Private Trustees in Complex Claims Resolution*, 57 STAN. L. REV. 1391 (2005); see also Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299 (2005).

implementation of the CCCS.¹⁵⁸ Practitioners felt that reliance on special masters for pretrial management resulted in excessive costs for litigants with few efficiency benefits.¹⁵⁹ Before the CCCS pilot program, judges were often tempted to delegate too much management to special masters.¹⁶⁰ As a result, judges gave complex cases less attention and rarely enforced tight deadlines, resulting in frequent delay.¹⁶¹ Moreover, the report noted that attorneys and judges found the pay structure for special masters to be problematic.¹⁶² Special masters are generally compensated based on the amount of time they spend working on a case.¹⁶³ Thus, an incentive exists for them to drag out the proceedings.¹⁶⁴

The NCSC found that after the CCCS came into being, the overall attitude toward special masters changed as CCCS judges became more involved with supervision and management.¹⁶⁵ While the use of special masters has not disappeared,¹⁶⁶ CCCS judges tend to limit them to provisionally complex cases or construction defect actions where complicated discovery issues necessitate special care.¹⁶⁷ However, certain CCCS judges refuse to use special masters as a general rule.¹⁶⁸ For example, Judge Carolyn Kuhl of the Los Angeles complex courts feels that this policy works because it ensures that all of the management techniques are placed under exclusive supervision of the trial judge.¹⁶⁹ Nevertheless, in other CCCS jurisdictions, special masters are used more often.¹⁷⁰

158. See EVALUATION, *supra* note 22, at vi.

159. *Id.* at vii.

160. *Id.* at 32.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at viii.

166. See *id.* (describing the use of referees in twenty percent of complex cases in the CCCS. This is a “significant drop” in the use of referees when compared to pre-CCCS days).

167. *Id.* at 12.

168. Interview with Carolyn B. Kuhl, *supra* note 106 (stating the preference of Los Angeles judges in the CCCS to keep all facets of the litigation under their supervision. She cites consistency, time saving, and increased control of the proceedings as the primary reasons for this preference).

169. *Id.*

170. Interview with Richard A. Kramer, Judge, S.F. Superior Court (CCCS), in S.F., Cal. (Dec. 27, 2007) (affirming his general policy of granting a special master upon reasonable request of all the parties).

Ultimately, the use of special masters is a feature of local court culture.¹⁷¹

The hypo presented in Part I provides an illustration of an instance where appointment of a special master might be appropriate. Joe Builder and BYDA will likely have expert witnesses set for depositions on each of the claims involved. Moreover, each of the subcontractors, the architects, and even the bank will certainly add their experts to the mix as well. With the addition of motions to compel and suppress that will inevitably be filed by each of the parties, it becomes readily apparent that judicial resources will be stretched to their limit.

As this hypothetical action is only based on a single-family residential improvement, imagine if the construction defect claim involved a hundred unit condominium or a commercial development with even more parties involved. In such cases, judges are more likely to try to seek dependable help. Ultimately, the deciding factor regarding special master appointment in the CCCS may well hinge on the answer to a qualitative, as opposed to a quantitative inquiry: whether the judge and the special master can work as a team to move the case along more quickly.

V. CASE MANAGEMENT: METHODOLOGY IN THE CCCS AND FEDERAL COURTS

Complex case management affords state and federal judges an opportunity to effectuate the fundamental goal of the modern civil justice system: “the just, speedy and inexpensive determination of every [civil] action.”¹⁷² Although the classic model of the adversarial process generally allows litigants to drive the proceedings,¹⁷³ the transformation to an active managerial judiciary has taken hold in both federal and state courts.¹⁷⁴

In doing so, judges in both the CCCS and the federal MDL process rely on the MCL as a guide for case management theory.¹⁷⁵ The MCL lays out some underlying principles for complex case

171. See EVALUATION, *supra* note 22, at 60.

172. FED R. CIV. P. 1.

173. See Francis E. McGovern, *Toward a Functional Approach to Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 442 (1986).

174. Schaller, *supra* note 37, at 77.

175. See DESKBOOK, *supra* note 35, at xxi.

managers: “Judicial management needs to be active, substantive, timely, continuing, firm but fair, and carefully prepared.”¹⁷⁶ Because attorneys may become immersed in the details of a complex case, innovation and creativity in formulating a litigation plan frequently will depend on the judge.¹⁷⁷ The downside to more judicial involvement is an increased strain on judicial resources. However, the more traditional adversarial approach often ignored associated costs to the parties resulting from delays in resolution and the extension of the litigation.¹⁷⁸

While the principles underlying an effective case management approach may be the same in both state and federal court systems, the ways that courts implement these principles are as different as the judges that sit on the bench. This section focuses on the details of some of the formal and informal mechanisms for case management in the CCCS and the federal MDL courts.¹⁷⁹

A. Informal Tools for Managing Complex Cases

The principles set out in the MCL function as an excellent guide which CCCS and federal MDL judges can apply to their own style and preferred methods. Effective management calls for individual, creative thinking on the part of each judge, using the rules as a starting point.¹⁸⁰ Moreover, effective management also depends on

176. DESKBOOK, *supra* note 35, § 1.01; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 10.13.

177. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 10.13 (2004).

178. Judge Carl J. West, Los Angeles Superior Court, Management of Complex Toxic Tort and Environmental Litigation: A Judge’s Perspective, Presentation to the Environmental Law Section of the Los Angeles County Bar Association 3 (July 17, 2003) (transcript on file with author).

179. Each of the six California complex courts has its own local rules and judicial culture. For the purposes of this Article, however, I focus only on the case management tools of the judges in the Los Angeles branch of the CCCS. Of the sixteen judges in the CCCS, a plurality (seven) are located in the Los Angeles branch. Their anecdotal testimony is not intended to represent all of the case management philosophies presenting the CCCS, but they hopefully provide a cross section of some current attitudes toward effective handling of complex cases.

180. For an excellent examination of informal complex case management techniques, *see* William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992). *But see* Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 174–76 (2003) (providing a counterpoint to the idea of a creative, active judiciary); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

plaintiff and defense counsel committing to the goal of efficiency.¹⁸¹ This commitment entails the parties working together to move the proceedings forward while still zealously advocating for their clients. This forward movement involves the judge and counsel implementing the principles behind the rules of procedure. This effort is the essence of informal case management.

1. Active Case Management

An active judge anticipates problems before they arise rather than waiting passively for counsel to present them. Without active intervention, counsel in complex litigation often leave no stone unturned in their advocacy for their clients, sometimes to the point of miring the entire litigation in procedural quicksand.¹⁸² Management of complex litigation requires the coordination and management of substantial written discovery, electronically stored information, and expert designations—as well as a judge’s supervision of significant law and motion proceedings.¹⁸³ In actively managing a case, a judge should not take the case from the lawyers but rather provide guidance and direction, setting limits and applying controls as needed.¹⁸⁴ All of this requires a collaborative effort between the court and counsel.¹⁸⁵

For example, the AOL Time Warner litigation¹⁸⁶ had been on the docket for almost two years without any appreciable movement toward resolution at the time the coordinated actions were transferred to Judge Carl J. West’s CCCS courtroom.¹⁸⁷ Judge West’s first act was to set a status conference in which the parties agreed to work with the court to develop an approach to the eight pending jurisdictional motions and more than fifteen demurrers that had been

181. Interview with Anthony Mohr, Judge, L.A. Superior Court (CCCS), in Studio City, Cal. (Nov. 6, 2007) (emphasizing the importance of all parties “getting on board” and adopting a cooperative mindset).

182. Interview with Carl J. West, *supra* note 178 (describing shareholder suits that languished in California Superior Court before being transferred to the CCCS).

183. *Id.*

184. *Introduction* to MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, at 1, 3.

185. *Id.*

186. Interview with Carl J. West, *supra* note 178.

187. AOL Time Warner Coordinated Cases I & II, JCCP Nos. 4322 & 4325, Status Conference Agenda (Mar. 23, 2005) (on file with author) (detailing demurrer motions that were sitting on the docket with no action taken on them).

filed.¹⁸⁸ Engaging in “issue management” of this sort helps to avoid the delay problems associated with over-litigating a complex case by simplifying the proceedings.¹⁸⁹ This simplification has a streamlining effect throughout the litigation, especially during discovery. Fewer issues on the table translates into less discovery, which further translates into more efficient and less expensive proceedings.

In federal courts, a corollary to this practice of issue management requires counsel to prepare nonbinding statements (similar to those that might appear in a CCCS initial status conference) that identify the issues and factual background of the case.¹⁹⁰ Such statements encourage voluntary abandonment of tenuous claims or defenses by the parties, often as a result of the court’s probing into the likelihood of success and the potential disadvantages of pursuing them.¹⁹¹

2. Substantive Case Management

Substantive case management occurs when the judge becomes familiar with the substantive issues of a case at an early stage in order to make informed rulings on matters that shape the subsequent litigation, such as scheduling, bifurcation, consolidation, and discovery.¹⁹² CCCS judges view their primary objective as identifying the key legal issues in a given case and focusing pretrial activities on resolving those issues as efficiently as possible.¹⁹³

Again, the AOL Time Warner litigation is instructive because it shows how judges and attorneys working together to expose the essential parts of a complex case can be crucial to good case management. In that litigation, lead counsel created flowcharts identifying the legal issues presented by pending demurrers and motions to strike, associating each issue with the individual parties

188. *See id.*

189. Judge Carl J. West, *supra* note 178.

190. DESKBOOK, *supra* note 35, § 2.21; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 11.11 (2004).

191. For an example of this in California state court, *see infra* Part VI.B.1 (describing J. Kuhl’s stipulation workaround of the summary judgment problem).

192. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 10.13 (2004).

193. EVALUATION, *supra* note 22, at 63.

involved.¹⁹⁴ This permitted the court to schedule hearings on related legal issues in an orderly and timely fashion.¹⁹⁵

Another example of even broader substantive case management is Judge Victoria Chaney's handling of the Vioxx litigation that came to her court. In order to facilitate easier resolution of claims not filed under her jurisdiction, she compiled a "trial in a box."¹⁹⁶ Trial in a box is a package that contains rulings and materials on motions in limine, liability, general causation, jury instructions, and verdict forms.¹⁹⁷ The impetus behind the trial in a box approach is a desire to ease the strain on court resources in cases where multiple plaintiffs file claims that address the same issues and involve the same evidentiary rules.¹⁹⁸ For example, most of the plaintiffs in the Vioxx litigation suffered from myocardial infarction ("heart attack") and stroke.¹⁹⁹ Thus, the trial court findings on general causation and admissibility of medical evidence would be identical for each successive case. With an eye toward reducing the need for duplicative rulings on proposed depositions for the fifty expert witnesses involved, Judge Chaney and counsel for both sides assembled materials on these subjects to forward to other jurisdictions.²⁰⁰ The recipient trial court would then only have to review the appropriate findings from trial in a box, instead of holding hearings on each of the matters at issue.²⁰¹

A potential downside to such a packaged approach is that the objectivity of a trial court that accepted trial in a box could be questioned. Is it possible to take prior rulings from a different proceeding and graft them onto related litigation without somehow

194. AOL Time Warner Cases I & II Coordinated Actions, JCCP Nos. 4322 & 4325, Jointly Agreed-Upon Charts Re Threshold Issues on Demurrers (filed on Apr. 22, 2005); Telephone Interview with John Spiegel, Partner, Munger, Tolles & Olson (Nov. 14, 2007) (describing Judge West's management of the demurrer in the AOL Time Warner Litigation as "innovative" and a helpful way to push a very complex case past the pleading stage).

195. Interview with Carl J. West, *supra* note 178.

196. Interview with Victoria Chaney, Judge, L.A. Superior Court (CCCS), in L.A., Cal. (Nov. 30, 2007).

197. *Id.* (noting that "trial in a box" does not contain rulings on issues surrounding specific causation and damages, because of their individual nature, these elements are left for the trial court).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

compromising the integrity of the hearing? Judge Chaney responds that trial in a box does not impact objectivity because innovations like trial in a box are voluntary.²⁰² Trial judges are encouraged to accept some, all, or none of the rulings as they see fit. Moreover, trial judges are free to adapt the rulings to the proceeding at hand, if necessary.²⁰³ Essentially, the guiding principle for CCCS judges is to solicit cooperation among all sides in the litigation.²⁰⁴ That way, judge and counsel can formulate a plan together.²⁰⁵ CCCS Judge Richard Kramer invites counsel who do not approve of these case management techniques to “come up with a better way.”²⁰⁶ Any idea that furthers the just resolution of the case will be considered.²⁰⁷ This construct reflects a desire to counterbalance any perceived loss of objectivity with neutrality.

In an MDL proceeding, the federal judge can do a similar version of substantive issue management by using the court’s authority to eliminate insubstantial claims or defenses through motions to strike.²⁰⁸ For example, in the Consec Life Insurance litigation,²⁰⁹ Judge Howard Matz approved an order granting the plaintiff’s motion to strike the defendant’s affirmative defense of bankruptcy.²¹⁰ By removing the affirmative defense, the MDL judge eliminated complicated issues surrounding defendant’s recent bankruptcy from the trial, thus streamlining the proceedings.²¹¹

3. Timely Case Management

Timeliness means that the judge decides disputes promptly, particularly those that may substantially affect the course or scope of further proceedings. The CCCS judges as a group believe that being available to the litigants is the key to the timely resolution of the

202. *Id.*

203. *Id.*

204. Interview with Richard A. Kramer, *supra* note 170.

205. *Id.*

206. *Id.*

207. *Id.*

208. *See* FED. R. CIV. P. 16(c)(1).

209. *In re* Consec Life Ins. Co. Cost of Ins. Litig., MDL No. 04-1610 (C.D. Cal. 2005).

210. Order Granting Plaintiff’s Motion to Strike Discharge Defense, *In re* Consec Life Ins. Co. Cost of Ins. Litig., MDL No. 04-1610 (C.D. Cal. 2005) (on file with author).

211. Interview with A. Howard Matz, Judge, U.S. Dist. Court for the Cent. Dist. of Cal., in L.A., Cal. (Jan. 11, 2008).

litigation.²¹² The NCSC study shows that before institution of the CCCS pilot program, more than half of the attorneys interviewed responded that the judges were not accessible in complex cases.²¹³ This changed to an over ninety percent opinion that complex case judges were accessible after the CCCS pilot program began.²¹⁴

Early and frequent status conferences provide means by which complex case judges make themselves available and provide 'hands-on' case management.²¹⁵ After complex cases are assigned, initial status conferences allow the court and counsel the opportunity to discuss issues involved and to develop an approach to case management that suits the case.²¹⁶ Taking into consideration the convenience of the parties, witnesses, and counsel, the judge will then use her discretion to schedule and conduct further conferences as needed to facilitate the litigation.²¹⁷ Case management conferences provide the opportunity for the judge to address issues as they arise, establish case management directives, and generally supervise counsel to ensure that the proceedings are progressing toward resolution.²¹⁸ In the Vioxx litigation, Judge Chaney took accessibility to another level when she issued a case management order ("CMO") allowing any case arising out of the use of Vioxx in any district in California to be filed directly in her court.²¹⁹ This direct filing enabled her to ease the pathway into her court for all Vioxx related cases, bringing about faster and more cost effective resolution.²²⁰

CCCS and MDL judges have also focused on emerging technologies to increase accessibility. The internet is a primary tool for easing the burdens of service and facilitating communication between all parties. For example, in the *In Re Galvanized Steel Pipe*

212. See, e.g., Interview with Anthony Mohr, *supra* note 181.

213. EVALUATION, *supra* note 22, at 29.

214. *Id.*

215. Interview with Carl J. West, *supra* note 178.

216. CAL. R. CT. 3.541(a).

217. *Id.* 3.541(b); see also Interview with Carolyn B. Kuhl, *supra* note 106.

218. Cf. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 10.13 ("[D]elayed rulings may be costly and burdensome and will often delay other litigation events. The parties may prefer that a ruling be timely rather than perfect.").

219. *In re Vioxx Coordinated Cases*, JCCP No. 4247 (Cal. Sept. 9, 2005) (Case Management Order No. 6).

220. Interview with Victoria Chaney, *supra* note 196.

Litigation,²²¹ the lead plaintiff's counsel remarked that "one of the most valuable management tools employed by [the CCCS judge]—and one that has continued to prove workable and valuable in other complex litigation—was the establishment of a web site for the cases."²²² Although counsel was still required to file all documents with the court, service on all parties could be done electronically.²²³ This enabled the judge and all counsel to serve orders, pleadings, and discovery in a fast, secure, and guaranteed manner.²²⁴

In federal MDL proceedings, the internet has also become an important facilitator of settlement claims. For example, in the *Breast Implant Litigation*, the Alabama district court set up a website providing information for all members of the settlement class.²²⁵ The site contains contact information for the settlement administrator and a continuously updated posting of relevant information to the litigants.²²⁶ The Internet is still an evolving tool for case management. Nevertheless, it has already carved out a vital place as a service, discovery, and settlement tool. This supports the notion that the Internet will likely become even more widely used in informal case management of complex cases.²²⁷

Requiring parties to have a representative authorized to discuss settlement at every conference is a further example of a management decision aimed at creating timely options for case resolution.²²⁸ In *Official Airline Guides, Inc. v. Goss*,²²⁹ the Ninth Circuit upheld sanctions against the defendant for failing to obey a district court CMO requiring someone with settlement authority to be available at all settlement conferences.²³⁰

221. Case No. BC174649 (L.A. Super. Ct., settlement June 29, 2001).

222. Kiesel, *supra* note 11, at 248.

223. *Id.*

224. *Id.*

225. See MDL926 Breast Implant Litigation, <http://www.fjc.gov/BREIMLIT/mdl926.htm> (last visited Feb. 23, 2008).

226. *Id.*

227. See generally *Developments in the Law: Electronic Discovery*, 38 LOY. L.A. L. REV. 1529 (2005) (discussing the use of the internet in case management and the rules governing electronic discovery).

228. See FED. R. CIV. P. 16 advisory committee's note.

229. 6 F.3d 1385 (9th Cir. 1993).

230. *Id.* at 1396–97.

4. Continuing Judicial Involvement

The principle of continuing judicial involvement throughout the proceedings requires that the judge monitor the progress of the litigation to see that schedules are being followed and to consider necessary modifications to the litigation plan.²³¹ The NCSC found that judicial supervision of complex cases increased measurably after the institution of the CCCS.²³² CCCS judges again turn to the Internet as an innovative tool for continual complex case management. Through the use of electronic message boards, judges and counsel are able to post communications regarding hearings or conferences.²³³ These message boards serve as an open forum for counsel and the judge to ask questions, give answers, issue orders, and respond.²³⁴ Since the message boards are open to all parties, they provide a “real time” exchange of pertinent information and avoid any problems that might arise due to *ex parte* communications. Ultimately, they allow judges to be continuously involved in the day-to-day progress of the litigation.

5. Firm, but Fair

“Personality goes a long way.”²³⁵ Perhaps the most important element of any case management philosophy is creating an environment that encourages all parties to commit to a course of action moving the case toward resolution.²³⁶ Each judge invariably cultivates his own approach to getting the parties on the same page. However, all agree that a positive, congenial working environment is vital, and the foundation for effective management is laid at the beginning of the process.²³⁷ The methods used by CCCS judges to

231. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 10.13 (2004).

232. See EVALUATION, *supra* note 22, at 29 (providing statistics showing that all CCCS judges had at least one status conference at some point during the pendency of the case and half had conferences every three months. One third of attorneys participating in the NCSC study reported never having a status conference on their complex cases before the CCCS program).

233. Interview with Carl J. West, *supra* note 178.

234. *Id.*

235. PULP FICTION (Miramax Films 1994). Samuel L. Jackson’s character lays out the importance of a good disposition to John Travolta’s character. *Id.*

236. Interview with Anthony Mohr, Judge, L.A. Superior Court (CCCS), in Studio City, Cal. (Nov. 6, 2007).

237. *Id.*

foster this environment are often an outgrowth of their personalities.²³⁸

Nevertheless, a firm judicial hand should accompany all case management decisions in order to keep cases on track. Time limits and judicial deadlines are imposed after considering the views of counsel. Although such limitations are not written in stone, deadlines must be met once established or sanctions can follow.²³⁹ Time limits and other requirements are not imposed arbitrarily or without considering the views of counsel, and they are revised when warranted. For example, in *Smith v. Tosco Refinery, Inc.*,²⁴⁰ plaintiffs in a refinery explosion who did not file timely responses to a questionnaire regarding their proximity to the accident were deemed to have been located outside the primary exposure area.²⁴¹ Judge Kuhl issued this order after numerous delays by plaintiff's counsel in answering the questionnaires.²⁴²

Federal judges involved in the MDL process can be similarly challenged when faced with furthering a management plan in complex litigation. During the *In re Phenylpropanolamine (PPA) Products Liability Litigation*,²⁴³ the district court dismissed certain claims with prejudice when the parties failed to heed pretrial orders.²⁴⁴ The court also ordered the severance of all claims by plaintiffs who failed to meet certain pleading requirements.²⁴⁵ When various plaintiffs refused to file individual complaints, the district court dismissed the actions altogether, citing a waste of resources and prejudice to the defendants. Without the information contained

238. See, e.g., *id.* (placing emphasis on the importance of informal discussions between the parties to open the channels of communication); Interview with Carl J. West, *supra* note 178 (stating how important it is that the parties simplify their interactions as opposed to making them more complicated and contentious); Interview with Victoria Chaney, *supra* note 196 (describing herself as "Big Momma" doling out encouragement and reprimand while remaining objective in her efforts to enforce a civil and respectful environment conducive to just resolution).

239. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 10.13.

240. *Smith v. Tosco Refinery, Inc.*, No. TC014637 (L.A. Super. Ct. order filed Nov. 28, 2007).

241. See Defendant Tosco Corporation's Motion to Fix Responses to Questionnaire Question Number 57 as of April 2, 2007, *Smith v. Tosco Refinery, Inc.*, No. TC014637, (L.A. Super. Ct. May 1, 2007) (on file with author) (granted).

242. Interview with Carolyn B. Kuhl, *supra* note 106.

243. 460 F.3d 1217 (9th Cir. 2006).

244. See *id.* at 1244-47 (upholding the district court's decision to dismiss several causes of action because plaintiffs counsel failed to adhere to a case management order).

245. *Id.*

in the severed complaints, the court found the defendants' ability to defend those cases was seriously compromised.²⁴⁶

The FRCP grants judges authority to adopt special procedures to deal with complex cases.²⁴⁷ For example, in recent tobacco litigation in the Eastern District of New York, Judge Weinstein ordered the cases consolidated for the express purpose of facilitating settlement.²⁴⁸ The judge further ordered counsel on both sides to select representatives to attend pre-settlement conferences and required the parties to agree on a mediator or request that the court appoint one.²⁴⁹ The judge referred to the complexity of the proceedings and cited FRCP 16(c) as providing the authority to establish special procedures to facilitate the just, speedy, and inexpensive disposition of the case.²⁵⁰ These examples highlight the strength of informal tools to create innovative case management plans.

B. Formal Tools

The following methods represent more structured methods available to practitioners and judges for aggregating cases. These methods are based in statute and court rules.

1. Coordination

Part III of this Article focused on initiation procedures for coordination of complex cases.²⁵¹ This Part compares and contrasts how coordination functions in the CCCS and the federal courts after the procedure has been initiated. Both the CCCS and the federal courts involve gatekeepers to the coordination process.²⁵² These gatekeepers make threshold decisions regarding the appropriateness

246. *Id.* at 1245.

247. *See* FED. R. CIV. P. 16(c)(2)(L) (giving the court discretion in "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems"); *see also id.* advisory committee's notes (addressing the purposefully broad charter of judicial power in case management, "the Committee felt that flexibility and experience are the keys to efficient management of complex cases").

248. *See In re Tobacco Litig.*, 192 F.R.D. 90, 95 (E.D. N.Y. 2000).

249. *Id.*

250. FED. R. CIV. P. 16(c)(2)(P).

251. *See supra* Part II.B.

252. *See* 28 U.S.C. § 1407 (2000); CAL. CIV. PROC. CODE § 404 (West 2004).

of coordination.²⁵³ The CCCS relies on the decision of a single judicial official, whereas the MDL process relies on the decision of the MDL Panel to coordinate actions.²⁵⁴

Before discussing the mechanics of coordination, however, a slight refinement of the definition of related cases is warranted. As previously discussed,²⁵⁵ in order to be coordinated or consolidated, cases must be related.²⁵⁶ The exact definition of related cases varies between federal and state court, even among jurisdictions in both fora.²⁵⁷ However, the essential meaning is the same. Related cases arise from similar events, or have similar issues of law, or would require duplication of judicial resources if heard by different courts.²⁵⁸

In the CCCS, when two or more civil actions that share a common question of law or fact are pending in courts in different counties, they can be brought to one court for adjudication.²⁵⁹ After a motion to coordinate related cases is properly filed,²⁶⁰ the Chairperson of the Judicial Council²⁶¹ assigns a “coordination motion judge” to determine whether a case is “complex”²⁶² and whether coordination will promote the ends of justice.²⁶³ The coordination motion judge looks to the following factors: (1) whether a common

253. 28 U.S.C. § 1407.

254. CAL. CIV. PROC. CODE § 404.

255. *See supra* Part II.B.

256. *Compare* 28 U.S.C. § 1407 (stating the standard for relation in the federal court is “common question of fact”), *with* CAL. CIV. PROC. CODE § 404 (stating that the standard for relation in California is “common question of law or fact”).

257. *Compare* WILLIAM W. SCHWARZER ET. AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE TRIAL § 8:196.12 (2007), *with id.* § 8:196.13–14 (depicting slightly different words to describe what constitutes a related case in the California state court rules as opposed to federal court).

258. *Id.* at §8:196.12 (describing Central District of California Rule 4.3.1 requiring notice to be filed with the court when a related case is brought in federal court); *see also* United Nat’l Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1116–17 (9th Cir. 2001) (providing an example of very similar causes of action that are not “identical”).

259. CAL. CIV. PROC. CODE § 404. For methods through which coordination is initiated in California courts, *see supra* Part II.B.1

260. For a detailed discussion of the proper procedure for filing a coordination motion, *see supra* Part III.B.

261. *See* CAL R. CT. 10.1. The Judicial Council is an entity established by the California Constitution and chaired by the Chief Justice of the California Supreme Court. Its purpose is to set the direction and provide leadership for the court system as a whole.

262. The complexity analysis is discussed *supra* Parts II.B, II.B.1.

263. CAL. CIV. PROC. CODE § 404.

question of fact or law predominates; (2) whether the convenience of parties, witnesses and counsel would benefit by coordination; (3) whether judicial efficiency and streamlining of the court calendar would result; (4) whether there is potential for duplicative and inconsistent rulings; and (5) whether settlement is likely if coordination is denied.²⁶⁴ If coordination is appropriate, the Chairperson of the Judicial Council then either assigns a “coordination trial judge” or authorizes the presiding judge of a suitable court to assign the “coordination trial judge.”²⁶⁵ In practice, the Chairperson of the Judicial Council generally defers to the presiding judge of the court where the coordinated actions will be sent to handle appointment of the coordination trial judge.²⁶⁶ The trial judge is selected based on the following principles:

- (1) The number of included actions in particular locations;
- (2) Whether the litigation is at an advanced stage in a particular court;
- (3) The efficient use of court facilities and judicial resources;
- (4) The locations of witnesses and evidence;
- (5) The convenience of the parties and witnesses;
- (6) The parties’ principal places of business;
- (7) The office locations of counsel for the parties; and
- (8) The ease of travel to and availability of accommodations in particular locations.²⁶⁷

An interesting side note to the discussion of CCCS coordination procedures is how infrequently the formal procedures are initiated. At the time of the most recent CCCS evaluation, over one-fifth of the cases filed involved related actions.²⁶⁸ However, only 15 percent of these cases were formally coordinated under section 404.²⁶⁹ Since most of these related actions were filed in the same court, formal

264. *Id.* § 404.1. For examples of coordination motion rulings showing how judges have determined when the 404 factors are served, see HERRMANN ET AL., *supra* note 9, at 161 (quoting a coordination motion judge’s decision for coordination in *In re Bridgestone Tires*, J.C.C.P No. 4160 (April 6, 2001)). See also *McGhan Med. Corp. v. Superior Court*, 14 Cal. Rptr. 2d 264, 271 (Ct. App. 1992) (granting coordination after applying the 404 factors).

265. CAL. CIV. PROC. CODE § 404.3 (West 2004).

266. Interview with Carolyn B. Kuhl, *supra* note 106.

267. CAL. R. CT. 3.530.

268. EVALUATION, *supra* note 22, at 52 (placing the exact percentage of CCCS actions involving related cases at 21.4 percent).

269. *Id.*

coordination procedures were unnecessary.²⁷⁰ In these instances, the proper procedure for aggregation is consolidation.²⁷¹

Nevertheless, the question remains why formal coordination proceedings were not initiated for the cases that did qualify for them. The NCSC cites a judicial preference for informal coordination as the main reason.²⁷² CCCS judges place a premium on informal coordination measures because they are easier than initiating the formal procedures under section 404 of the CCP.²⁷³ Judges can effectively bypass the procedural requirements by coordinating with their colleagues. Using a number of techniques, such as joint hearings and joint rulings, these informal efforts aid in resolving disputes during discovery and other early stages of litigation.²⁷⁴

However, reliance on informal methods of coordination comes at a price. Informal coordination makes it virtually impossible to utilize the electronic case management measures discussed in Part IV. This difficulty arises from the lack of common file numbers that characterize coordinated actions.²⁷⁵ Moreover, when related cases have not gone through the formal channels of coordination, courts and practitioners are seriously disadvantaged as they try to identify similar cases and keep track of their progress.

At the federal level, coordination is appropriate when common issues of fact exist in two or more civil actions.²⁷⁶ These cases may

270. *Id.*

271. *See infra* V.B.2

272. EVALUATION, *supra* note 22, at 52.

273. Interview with Victoria Chaney, *supra* note 196 (describing the ease of making personal contact with a fellow judge upon learning of a related case filing in that judge's court as opposed to initiating the administrative hassle of an official coordinated proceeding).

274. *See* Schwarzer, Weiss, & Hirsch, *supra* note 180, at 1734–43 (describing informal coordination measures between state and federal courts). Note, however, that these same measures are applicable in intrastate actions as well). *See also* HERRMANN ET AL., *supra* note 9, at 42 (describing ways that attorneys can play a role in informal coordination through the use of liaison counsels and steering committees)

275. Interview with Richard Kramer, *supra* note 170. For further discussion of the consequences of informal coordination measures, *see supra* Part V.B.1

276. 28 U.S.C. 1407(a) (2000). For a discussion of the difference between the language of the CCCS and federal coordination statutes (i.e. common issue of law or fact (CCCS) as opposed to common issue of fact (federal)), *see* HERRMANN ET AL., *supra* note 9, at 127, 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 112.02[3] (3d ed. 2007); Ostolaza & Hartmann, *supra* note 12, at 52–53. Although the coordination statutes are worded differently in the CCCS and federal courts, in practice the standards are interpreted in a similarly broad manner. For example, *see* HERRMANN ET AL., *supra* note 9, at 164 (describing a broad reading of the common issue of law or fact standard in *McGhan Med. Corp. v. Superior Court*, 14 Cal. Rptr. 2d 264, 270–271 (1992), where the California Court of Appeal upheld coordination when most of the

then be transferred to any federal judicial district by the MDL Panel²⁷⁷ provided that this transfer will be for the “convenience of [the] parties and witnesses and will promote the just and efficient conduct of such actions.”²⁷⁸ The MDL Panel then designates a transferee court to handle the coordinated pretrial proceedings.²⁷⁹ The MDL Panel considers many factors in making this determination, including: (1) where the pending litigation has progressed furthest; (2) where the largest number of cases are pending; (3) where the documents, parties, and witness are located; and (4) where the greatest opportunity for state and/or federal coordination may exist.²⁸⁰

Recent examples of MDL Panel decisions involving coordination motions under 28 U.S.C. § 1407 include the *Vioxx*, *Pet Food*, and *American Honda* products liability actions.²⁸¹ Each case involved numerous related federal claims in multiple jurisdictions, and a look at the MDL Panel transfer orders in each case reveals an array of different considerations that the MDL Panel feels are important in selecting an appropriate transfer forum. The parties in the *Vioxx* and *Pet Food* actions could not agree on an appropriate transferee court; so the MDL Panel issued a transfer order based on an application of the factors listed above.²⁸² In the *Pet Food* litigation, the MDL Panel found that a number of district courts would be appropriate transferee venues and chose a geographically convenient district court with the most related cases pending.²⁸³ In the *Vioxx* action, however, where the related cases were so spread out that there was no geographic focal point, the MDL Panel chose

complaints were uniform even though the cases contained different defendants, products, and product warnings).

277. For a brief history of the MDL Panel’s formation, see Ostolaza & Hartmann, *supra* note 12, at 47.

278. 28 U.S.C. § 1407(a).

279. *Id.* § 1407(b).

280. HERRMANN ET AL., *supra* note 9, at 6.

281. *In re Vioxx Prod. Liab. Litig.*, No. 1657 (J.P.M.L. Feb. 16, 2005); *In re Pet Food Prods. Liab. Litig.*, No. 1850 (J.P.M.L. June 19, 2007); *In re American Honda Motor Co. Oil Prods. Liab. Litig.*, No. 1737 (J.P.M.L. Feb. 24, 2006). For excellent discussions of forum selection issues surrounding MDL transferee courts, see Georgene Vairo, *Legislation Update*, NAT’L L.J., Dec. 16, 2002, at B7 and John F. Nangle, *From the Horse’s Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 DEF. COUNS. J. 341 (1999).

282. See *In re Vioxx Prod. Liab. Litig.*, No. 1657, at 2; see also *In re Pet Food Prods. Liab. Litig.*, No. 1850, at 2.

283. *In re Pet Food Prods. Liab. Litig.*, No. 1850, at 2.

the transferee court based on the experience of the district judge in handling complex cases and the availability of space on the docket.²⁸⁴ The parties in *American Honda* made the decision much simpler for the MDL Panel by stipulating to a transferee court in the same location as the defendant's principle place of business.²⁸⁵

2. Consolidation

Consolidation is another formal tool available for judges and practitioners to manage complex cases. Nevertheless, disagreement exists as to what precisely constitutes consolidation for the purposes of complex litigation. This Part provides a brief overview of the different definitions of consolidation, describes the various rules that govern consolidation in the CCCS and the federal courts, and shows the ways that coordination and consolidation blend when discussing complex case management.

Consolidation is a malleable concept.²⁸⁶ The term has been used to describe the process by which several actions are stayed while a related action is adjudicated, and then the judgment in the trial that proceeds is applied to the stayed actions.²⁸⁷ More commonly, however, consolidation is used to describe either the combination of several actions into one, where the individual claims effectively becoming a single claim for which only one judgment is entered,²⁸⁸ or the aggregation of several actions into one court with each action remaining separate and requiring a separate judgment.²⁸⁹ The inevitable consequence of these different definitions and uses of the term "consolidation" is a wealth of legal literature on the topic.²⁹⁰

284. *In re Vioxx Litig.*, No. 1657, at 2.

285. *In re Am. Honda Litig.*, No. 1737, at 2.

286. Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 724 (1995).

287. *Id.*

288. *Id.* at 725–26 (describing these cases as "repetitive," representing "multiple suits on the same claim by the same plaintiff against the same defendant," or "reactive" where "a separate suit has been filed by a defendant to the first action . . . [claiming] he is not liable [for] the . . . first action or asserting an affirmative claim that arises out the same transaction or occurrence as the . . . first action").

289. *Id.*

290. *See, e.g.*, AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY (1994) (providing an in depth study of federal and state transfer and consolidation theory and detailed recommendations for

Consolidation procedures in the federal courts and the CCCS are governed by statute. In federal courts, FRCP 42 provides for consolidation of actions involving a common question of law or fact pending before the court.²⁹¹ The rule further states that the court may also, at its discretion, order separate trials of claims or even issues within claims.²⁹² The purpose of the rule is to enhance trial court efficiency (i.e., to avoid unnecessary duplication of evidence and procedures) and to avoid the substantial danger of inconsistent decisions.²⁹³ FRCP 42 gives the trial judge wide latitude in deciding to consolidate cases,²⁹⁴ and consolidation has become increasingly useful with the advent of complex litigation.²⁹⁵ For example, in *In re Asbestos Products Liability Litigation*,²⁹⁶ the MDL Panel revisited an earlier denial of consolidation and held that the increasing “magnitude” of the litigation warranted consolidation of the actions.²⁹⁷ Similarly, consolidation has become a particularly effective case management tool for aggregating claims in mass-accident cases.²⁹⁸

CCP section 1048 governs consolidation in the CCCS²⁹⁹ and is intended to conform in substance to FRCP 42.³⁰⁰ The only difference between the California and federal statutes is in the wording of CCP

revising procedures); Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. REV. 879, 901–05 (offering a critique of the A.L.I. study).

291. FED. R. CIV. P. 42(a) (stating that the court may order consolidation to avoid unnecessary costs or delay). An in depth discussion of the standards of consolidation is beyond the scope of this Article. For an excellent overview of the various interpretations of the standards for coordination in federal and state courts, see Marcus, *supra* note 290, at 901–05.

292. FED. R. CIV. P. 42(b) (giving the court the power to order bifurcated trials in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy).

293. See, e.g., *Todd-Stenberg v. Dalkon Shield Claimants Trust*, 56 Cal. Rptr. 2d 16, 17 (Ct. App. 1996) (upholding the trial court decision to consolidate actions while citing the appropriate use of discretion in finding that justice would be served by consolidation).

294. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2381 (3rd ed. 2008).

295. *Id.*

296. 771 F. Supp. 415 (J.P.M.L. 1991).

297. *Id.* at 418.

298. See Marcus, *supra* note 290, at 886; see also *Passa v. Derderian*, 308 F. Supp. 2d 43, 54 (D.R.I. 2004) (nightclub fire); *Case v. ANPAC La. Ins. Co.*, 466 F. Supp. 2d 781, 793 (E.D. La. 2006) (hurricane). For an examination of the Northridge earthquake litigation, see *infra* Part IV.A.

299. Section (a) of the California statute is identical to FED. R. CIV. P. 42(a).

300. See CAL. CIV. PROC. CODE § 1048 legislative committee comments (West 2007).

section 1048(b). CCP section 1048(b) differs in the description of the various related claims that may be considered for consolidation.³⁰¹ The practical effect of the consolidation statutes in the CCCS is that only two types of consolidation are possible: (1) consolidation for purposes of trial only, where the two actions remain otherwise separate; or (2) complete consolidation, where the consolidated actions effectively merge into a single proceeding under one case number and result in only one judgment.³⁰² As mentioned above, however, there is no statutory guidance regarding when either definition is appropriate.

Adding to the confusion surrounding these multiple definitions and various rules concerning consolidated actions is the occasional overlap in usage when referring to “coordination” and “consolidation.” Sometimes the two terms are even used in the same sentence and seem virtually interchangeable. For example, in the Asbestos Litigation discussed above, the MDL Panel (citing the language of 28 U.S.C. § 1407) described the centralized claims as “coordinated or consolidated” proceedings.³⁰³ Moreover, some states invoke consolidation when bringing all of the cases in various counties to a judge in one county.³⁰⁴

CCCS procedures offer a refinement of consolidation and coordination that provides some much needed clarity. The CCCS focuses on the locus of the related actions when determining whether coordination or consolidation is appropriate.³⁰⁵ Coordination brings together related civil actions pending in different counties.³⁰⁶ Consolidation unites multiple related cases that have been filed in the same county.³⁰⁷ Ultimately, the clear line drawn between coordination and consolidation in the CCCS is another example of

301. FED. R. CIV. P. 42(b), enumerates the list of the various claims over which the court retains authority to sever when justice or economy requires (cross-claim, counterclaim, third party claim), whereas CAL. CIV. PROC. CODE § 1048(b), lists only cross-complaints.

302. See *Hamilton v. Asbestos Corp., Ltd.*, 22 Cal. 4th 1127, 1147–48 (2000).

303. *In re Asbestos Prod. Liab. Litig.*, 771 F. Supp. 415, 421 (J.P.M.L. 1991).

304. Rheingold, *supra* note 3, at 912.

305. See ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., CIVIL CASE COORDINATION FACT SHEET 2 (2007), available at http://www.flcourts.org/gen_public/cmplx_lit/bin/California%20Complex%20Case%20Coordination.pdf; see also CAL. CIV. PROC. CODE § 404.

306. ADMIN. OFFICE OF THE COURTS, *supra* note 305, at 1.

307. *Id.* at 3; see also CAL. CIV. PROC. CODE §§ 403, 404, 1048(a).

the ways that the CCCS offers simple and functional procedural mechanisms for managing complex cases.

VI. GOING FORWARD: WHICH SYSTEM IS BETTER?

The remainder of this Article addresses some of the procedural successes and failures of complex case management in the CCCS and the federal courts. Through an exploration of the points of divergence in each system regarding transferee court jurisdiction, summary judgment, and late appearing parties, this Article sets forth the proposition that while neither system is perfect, the CCCS provides a better model of innovative and proactive measures for addressing complex cases.

A. California Dreaming: What the CCCS Does Better than MDL

1. Transferee Court Jurisdiction Problem

The most glaring difference between the CCCS and the MDL process is the power of CCCS judges to keep complex cases coordinated through trial.³⁰⁸ MDL judges, conversely, only have the power to handle coordinated actions through the pretrial phase.³⁰⁹ This ability to oversee complex cases from filing to disposition is perhaps the CCCS's biggest strength. CCCS judges can dispense with the actions by settlement, dismissal with prejudice, summary judgment, judgment after trial, or remand of individual cases to their original courts.³¹⁰ Having one judge in control of the proceedings provides continuity, consistency, and familiarity.³¹¹ In contrast, the specter of inconsistency and uncertainty hangs over coordinated actions in the MDL process. In many instances, cases under the

308. See CAL. CIV. PROC. CODE § 404.3 (granting the coordination trial judge the power to "hear and determine the actions").

309. 28 U.S.C. § 1407(a) (2000) (providing that coordinated actions must be remanded "at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated").

310. CAL. R. CT. 3.545(a); see also HERRMANN ET AL., *supra* note 9, at 126.

311. See, e.g., Interview with Victoria Chaney, *supra* note 196 (describing the importance of continuity in discovery rulings); see also Interview with Paul Kiesel, *supra* note 118 (discussing the convenience of having one judge who knows the issues and facts of the case). But see Telephone Interview with Jeff S. Westerman, Partner, Milberg Weiss (Sept. 17, 2007) (noting that if the trial judge is not seeing eye-to-eye with you regarding your case, being stuck with him throughout a protracted complex case can be difficult).

MDL are brought together from vastly different geographic regions,³¹² and the parties have had no previous dealings with either the judge or the forum court. While aggregation of the claims for the pretrial phase may ultimately serve an efficient resolution of the action, there is no guarantee that the parties themselves will enter this new forum with enthusiasm.³¹³ The effect of this lack of enthusiasm is an increased possibility of delay.

The MDL statute vests the transferee court with pretrial power over transferred cases identical to the district court where the action was originally filed,³¹⁴ and the transferee court overseeing the MDL proceeding can try cases that were originally filed before it.³¹⁵ After pretrial proceedings are concluded, however, the transferee judge sends the case back to the MDL Panel for remand to the court from which it was first transferred.³¹⁶ In the past, MDL transferee judges would invoke the transfer statute, 28 U.S.C. § 1404, to sidestep the pretrial limitation and hear the trial on the merits.³¹⁷ But in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,³¹⁸ the U.S. Supreme Court held that transferee courts could not try cases that originated in other districts.³¹⁹ *Lexecon* severely limited the transfer ability of MDL courts.³²⁰ Now, the transferee judge must remand cases that originated elsewhere back to their original courts after pretrial proceedings are complete.³²¹ This presents the potential for delay and inefficiency because different judges will have to be brought up to

312. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1355–59 (J.P.M.L. 2005) (listing coordinated actions from Vermont, Louisiana, California and Puerto Rico, among other places).

313. For a discussion of the trepidation that can accompany plaintiff's attorneys in federal court, see *infra* Part V.

314. See Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 578 n.21 (1978) (citing the legislative history of 28 U.S.C. § 1407 suggesting Congressional intent to provide the transferee judge complete power to rule on all pretrial matters and motions).

315. See generally *In re Brand-Name Prescription Drugs Antitrust Litig.*, 264 F. Supp. 2d 1372, 1378–79 (J.P.M.L. 2003) (discussing the defining characteristics of transferee and transferor courts).

316. R.P.J.P.M.L. 7.6(b).

317. Marcus, *supra* note 290, at 885.

318. 523 U.S. 26 (1998)

319. *Id.* at 40–41; see also HERRMANN ET AL., *supra* note 113, at 43; ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 43, § 20.14 author's comments.

320. For a detailed discussion of the *Lexecon* holding and its consequences for venue in MDL proceedings, see Vairo, *supra* note 100, at 495–99.

321. *Lexecon*, 523 U.S. at 34–35.

speed on the same facts, law, and parties. After *Lexecon*, Congress has taken steps toward passing legislation that would allow transferee courts to retain jurisdiction over MDL cases through trial, but none of these measures has become law as of yet.³²²

By contrast, the CCCS judge retains jurisdiction over coordinated cases from pretrial through resolution. This consistency fosters efficiency for several reasons. First, since the judge oversees the litigation from the beginning, she will have the opportunity to become well-versed in the key issues in the case. This enables the CCCS judges to more easily structure their case management decisions with an eye toward faster resolution.³²³ Second, retaining the same judge eliminates uncertainty surrounding the binding nature of pretrial decisions. Since the CCCS judge is the only supervisory authority on the case, her rulings are binding on the parties through trial. In the federal MDL courts where split authority is the rule, however, the extent to which a judge to whom a case has been remanded should be able to revisit or overturn rulings by the prior MDL transferee judge is an unsettled question.³²⁴ Confusion can arise because of separate rulings in the pretrial and trial jurisdictions.

Although the trial court is the ultimate arbiter of the proceedings before it, deference is normally accorded to the decisions of the MDL transferee court in practice.³²⁵ A longtime MDL Panel member, Judge Stanley Weigel, lends further support for such deference by stating that allowing transferor courts to overturn transferee courts would “undermin[e] the purpose and usefulness of . . . Section 1407” by undercutting finality at the trial level.³²⁶ In contrast, CCCS judges are free to initiate more creative case management actions without concern for impeding the authority of the ultimate trial judge.

322. See Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. § 2 (2005); Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. § 2 (2004); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. § 2 (2001).

323. Interview with Carolyn B. Kuhl, *supra* note 106. For an example, see the discussion of “trial in a box” in *supra* Part V.A.2.

324. See HERRMANN ET AL., *supra* note 9, at 14.

325. Interview with R. Gary Klausner, *supra* note 75.

326. See Weigel, *supra* note 314, at 577 (emphasizing the importance of finality to the convenience of witnesses and litigants and to efficient conduct of cases).

If our hypothetical case³²⁷ were filed in the CCCS, the judge could order counsel for Joe Writer and BYDA to propose jury instructions on an element of the cause of action two weeks into proceedings.³²⁸ The parties would then submit motions, and the judge would rule on them. This ruling would then guide discovery. By using preliminary jury instructions to shape discovery, the CCCS helps define the key issues at an early stage, eliminating uncertainty and improving efficiency.³²⁹

2. A Second Advantage of the CCCS

The second advantage of the CCCS can be described by the old sports adage: practice makes perfect. CCCS judges specialize in handling complex cases. Complex cases comprise a CCCS judge's entire docket, and as a result, the case management techniques employed in the CCCS are refined daily.³³⁰ Such continuous contact with difficult legal issues and causes of action breeds a degree of expertise in case management that makes the CCCS judges very efficient. The exclusive focus on complex cases allows CCCS judges to hone their case management skills by developing tools through regular, rigorous trial and error.³³¹ This continuous, active judicial management also lends a consistency to the proceedings that makes it easy for counsel to know what to expect from the judge.³³² Since CCCS judges often see the same plaintiff and defense counsel in successive litigation, establishing good communication and a commitment to moving the case toward resolution is an organic part of the proceedings.³³³ Familiarity with these innovative procedures allows the judge and counsel to focus on substantive issues, as opposed to rules of procedure.³³⁴ Moreover, CCCS judges do not

327. See *supra* Part I.

328. Interview with Carolyn B. Kuhl, *supra* note 106 (describing a common tool that she employs in complex case management).

329. *Id.*

330. *Id.*

331. Interview with Victoria Chaney, *supra* note 196 (describing the importance of learning from mistakes to a judge's development as a case manager). For specific examples of CCCS case management techniques in action, see *supra* Parts V.A.1-5.

332. Interview with Carolyn B. Kuhl, *supra* note 106.

333. *Id.* (describing the attitude in CCCS litigation that trial is a fallback, i.e., a last chance means to dispense with the case, and supporting the notion that communicative counsel is the best way to avoid, when possible, the cost and strain of trial).

334. *Id.*

have to keep reinventing the complex case management wheel after they work out the initial procedural kinks associated with new procedures. For example, the issue management techniques incorporated by Judge West in the AOL Time Warner Litigation,³³⁵ will enable him to focus on more substantive issues from the outset in subsequent shareholder derivative actions.

Certainly, federal judges have developed similar case management expertise in the MDL arena. Because of the diversity of federal dockets (including both civil and criminal actions), however, the opportunity to focus specifically on complex civil case management is not present to the same degree as in the CCCS. In a recent study of all prescription drug cases transferred by the MDL panel since the early 1970s, the most frequently cited factor supporting MDL transfer was the capacity of the transferee court to handle multi-district litigation.³³⁶ Court “capacity” refers to caseload considerations and availability of court resources—including electronic means—to handle the litigation.³³⁷ Although past experience with the MDL process or experience in the litigation subject area is important,³³⁸ it is only one factor that goes into deciding which judge gets an MDL case. The MDL panel considers other factors, such as location of the transferee court, travel for potential witnesses, judge neutrality, and pendency of any related state claims.³³⁹ Ultimately, both the federal MDL process and the CCCS strive for the same goal: “the just, speedy, and inexpensive determination of every case.”³⁴⁰ However, the specialized nature of the CCCS permits a more targeted approach to the unique demands of complex litigation.

B. The Empire Strikes Back: Advantages of the MDL

Despite the advantages of the CCCS, the federal MDL process promotes good case management practices more successfully in two

335. *See supra* Part V.A.1.

336. James M. Wood, Monique Hunt McWilliams & Delaney M. Anderson, *The Selection of a Transferee Court for MDL*, FOR THE DEFENSE, Nov. 2007, at 13.

337. *Id.* at 19.

338. *Id.* at 20–21 (citing experience of the transferee judge as operative in approximately one quarter of cases).

339. *See generally id.* (describing the various factors that influence MDL Panel decisions regarding transferee courts).

340. FED. R. CIV. P. 1; *see also*, DESKBOOK, *supra* note 35, § 1.01.

ways: the structure and functioning of summary judgment mechanisms and the ability of the MDL courts to block late appearing parties from filing motions to change judges.

1. Summary Judgment

One major difference between the CCCS and the federal MDL courts is the wording of the summary judgment statutes and the use of summary judgment as a case management tool. Ultimately, the flexibility of federal summary judgment procedures, which allow judges to dispense with individual issues in a cause of action, better serves the principles of effective case management than CCCS summary judgment procedures, which only permit summary judgment on entire causes of action.³⁴¹

In federal court, the procedural rule governing summary judgment states that if no triable issue of material fact exists in all or a portion of a party's claim, the moving party is entitled to judgment as a matter of law on all or part of the claim.³⁴² The upshot for complex cases is that the transferee court can resolve individual issues within a cause of action that have been coordinated under the MDL statute by granting an appropriate summary judgment motion.³⁴³ For example, *In re Air Crash at Taipei, Taiwan, on October 31, 2000*,³⁴⁴ was an MDL proceeding arising out of numerous individual claims resulting from an airplane crash in Taiwan.³⁴⁵ The Warsaw Convention³⁴⁶ applied in most of the cases brought against Singapore Airlines.³⁴⁷ The district court held that under the Warsaw Convention all punitive damages claims against

341. See CAL. CIV. PROC. CODE § 437c(f)(1) (West 2004 & Supp. 2008).

342. See FED R. CIV. P. 56(a)–(d).

343. See Interview with Gary A. Feess, Judge, U.S. Dist. Ct. for the Cent. Dist. of Cal., in L.A., Cal. (February 7, 2008).

344. C. D. Cal. No. MDL 1394 (2002).

345. Order Granting Singapore Airline's Motion for Partial Summary Adjudication of Punitive Damages Issue app. A, *In re Air Crash*, MDL 1394 (C.D. Cal. Sep. 3, 2002), available at <http://www.cacd.uscourts.gov/> (follow "Recent Opinions" hyperlink; then follow "All Opinions and Orders" hyperlink; then follow "2002" hyperlink; then follow "MDL 1394 GAF (RCx)" hyperlink).

346. The Warsaw Convention limits liability of an air carrier in international air transportation. See 8A AM. JUR. 2d *Aviation* § 82 (2007).

347. Order Granting Singapore Airline's Motion for Partial Summary Adjudication of Punitive Damages Issue, *supra* note 345, at 2.

Singapore Airlines could not stand.³⁴⁸ By eliminating this facet of the claim, the federal court effectively whittled down the complex action piece by piece into a more manageable form.

On the other hand, California's current summary judgment rule states that a judge can only dispose of an entire cause of action, affirmative defense, issue of duty, or category of damages.³⁴⁹ Interestingly, the language in the CCP mirrored the federal summary judgment statute closely until 1990. At that time, the California legislature expressly amended section 437(f) of the CCP to eliminate the ability to move for summary adjudication on some, but not all, of the issues in a claim.³⁵⁰ This wording reflects the legislature's intent to adopt an "all or nothing" mindset regarding summary judgment motions.³⁵¹ This procedural change came on the heels of significant efforts to make summary judgment easier to invoke on the federal level.³⁵² While these federal cases succeeded in making it easier on the moving party in summary judgment proceedings at the federal level,³⁵³ the backlash in California had a chilling effect on the ability of CCCS judges to use an important early disposition tool. CCCS judges are, in effect, attempting to whittle down large cases with a very dull knife.

To illustrate the effect of the federal summary judgment standard in the CCCS, examine again the introductory hypothetical. Imagine that BYDA in its dealings with the subcontractors implemented a series of change orders³⁵⁴ pertaining to the work on Joe Writer's house. For example, BYDA instructs the plumbing company to use PVC piping instead of copper to save money and instructs the tile company to use slate instead of marble for the same reason. Now imagine that Joe Writer's fraud claim against BYDA is

348. *Id.* at 6.

349. CAL. CIV. PROC. CODE § 437c(f)(1) (West 2004).

350. *See id.* § 437c(f) historical and statutory notes at 280–81.

351. *See id.* § 437c historical and statutory notes at 281 ("It is also the intent of this legislation to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense.").

352. *See* the trilogy of cases: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

353. *See* Thomas R. Freeman, *Put Up or Shut Up*, L.A. LAW., Nov. 1999 <http://www.lacba.org/showpage.cfm?pageid=1336>.

354. A change order is an order to deviate from a prior construction method.

based on thirty of these change orders. Under the current rule governing the CCCS, the court could not streamline the proceedings by dispensing with any meritless contentions regarding change orders made for valid reasons. If only one of these change orders turns out to be indisputably legitimate, then the court will be unable to excise that meritless contention from Joe's claim. In California, the summary adjudication of individual factual issues that dispose of only part of a cause of action is improper.³⁵⁵ Conversely, under the federal standard for partial summary judgment, the court could eliminate the baseless assertions regarding the change order from Joe's fraud claim.³⁵⁶ By streamlining causes of action in this manner, the federal statute is a more effective means of managing complex cases than current procedures in the CCCS.

2. Late Appearing Parties

The federal MDL process uses a more straightforward and sensible method than the CCCS when dealing with a late appearing party³⁵⁷ who objects to the MDL Panel's choice of a transferee court. If a party objects to the judge presiding over the transferee court in federal court, the party can make a challenge by filing an extraordinary writ motion to the appellate court with jurisdiction over the transferee court.³⁵⁸ Such writs are rarely granted.³⁵⁹ Conversely, a wrinkle in the CCCS procedures allows a party to file an affidavit to change judges in a complex case at any time before trial.³⁶⁰ Specifically, CCP section 170.6 states that a late appearing party can make a motion to disqualify the judge even if the judge has

355. See *Tutor-Saliba-Perini v. L.A. County Metro. Transp. Auth.*, No. B143430, 2005 WL240685, at *18 (Cal. Ct. App. Jan. 25, 2005).

356. CCCS judges have instituted some practical workarounds to mitigate summary judgment concerns. The parties can stipulate to eliminate certain aspects of the action (e.g., a plaintiff could agree to drop a baseless claim from the litigation if it is an obstacle to settlement). Additionally, judges can seek to isolate key issues through motions in limine to cull troublesome matters from consideration or early drafting of jury instructions to focus discovery from the outset of litigation. Interview with Carolyn B. Kuhl, *supra* note 106.

357. A late appearing party can enter the proceedings via a "tag along action." R.P.J.P.M.L. 1.1 defines a "tag along action" as a civil action "involving common questions of fact with actions previously transferred under Section 1407." For a further discussion of issues surrounding tag along actions, see Randall A. Spencer, *Multidistrict Litigation: Part II*, ASS'N BUS. TRIAL LAW. REP., Spring 2007, at 1.

358. See 28 U.S.C. § 1407(e) (2000).

359. For a discussion of the appellate procedures in the MDL process, see *supra* Part IV.B.

360. See CAL. CIV. PROC. CODE § 170.6(a) (West 2004).

presided over pre-trial aspects of the case.³⁶¹ Oddly, parties that are added later to formally coordinated complex cases do not have the same option to challenge the appointment of the trial judge.³⁶² For example, the court in *Industrial Indemnity Co. v. Superior Court of Santa Clara County*³⁶³ held that the CRC do not allow a late appearing party to peremptorily challenge the trial judge in a coordinated proceeding.³⁶⁴ As such, procedural inconsistencies in the CCCS make it easier to change judges when the actions have been designated complex but have not gone through the coordination procedures of CCP section 404. The practical application of this difference between the CCCS procedures for coordinated cases and complex cases is that a late-appearing party can throw an entire proceeding back to square one.

Again, the introductory hypothetical is instructive. Suppose that discovery reveals to BYDA that a lumber company sold substandard materials to the roofer that resulted in leaks. BYDA then adds the lumber company to the action. As it turns out, the roofer had been previously involved in a contentious prior litigation before the coordination trial judge and feels the trial judge would be prejudiced. The roofer can file a challenge under section 170.6 of the CCP and seek to have the judge removed, even if all the other parties agreed to the judge and participated in numerous pretrial case management conferences and hearings. It is no wonder that CCCS judges lament this potential for delay as a procedural shortcoming of the CCCS.³⁶⁵

In contrast, MDL proceedings do not invite this type of “judge shopping.” For example, in *In re Silicone Gel Breast Implants Products Liability Litigation*,³⁶⁶ the MDL Panel expressly stated its predisposition against allowing peremptory challenges: “[W]e have determined to *look beyond the preferences of the parties* in our search for a transferee judge with the ability and temperament to

361. *Id.* § 170.6(a)(2).

362. *See* Sch. Dist. of Okaloosa County v. Superior Court, 68 Cal. Rptr. 2d 612, 618 (Ct. App. 1997) (stating that judicial disqualification procedures in complex cases are not the same as in coordinated cases).

363. 262 Cal. Rptr. 544 (Ct. App. 1989).

364. *Id.* at 546.

365. Interview with Judge Carolyn B. Kuhl, *supra* note 106 (maintaining that protection against such late arriving challenges should extend to non coordinated complex cases in the CCCS).

366. 793 F. Supp. 1098, 1101 (J.P.M.L. 1992).

steer this complex litigation on a steady course that will be sensitive to the concerns of all parties."³⁶⁷ Moreover, Judge Stanley Weigel, a longtime member of the MDL Panel, states that the panel does not consider litigant preference in determining the transferee court, nor does the MDL Panel have the power to influence any decisions that the transferee judge makes.³⁶⁸

The California Courts of Appeal placed the ultimate responsibility for addressing this issue with the legislature.³⁶⁹ The court questioned the logic of the California legislature's failure to amend disqualification rules in light of the immense effort and resources expended in creating trial delay reduction programs like the CCCS.³⁷⁰ Perhaps it is time for the legislature to take up the challenge.

VII. CONCLUSION

Ultimately, the CCCS provides a solid model for future innovative techniques in managing complex litigation. By structuring a court system that is accessible to any litigant whose case meets the complex criteria, the CCCS stands as an important adaptation of judicial resources to better meet the needs of modern litigants. By expressly calling for early and active judicial involvement and creating practical mechanisms for case aggregation and management, the CCCS provides guidelines for moving complex cases along while maintaining enough flexibility to allow practitioners and judges room to maneuver in seeking to facilitate ever more efficient means of case resolution. Ultimately, the clarity of mission, precision of statutes, and creative management techniques that characterize California's approach may prove to be the most workable template for similar specialized courts around the country.

367. *Id.* (emphasis added).

368. Weigel, *supra* note 314, at 578 (referencing *In re Holiday Magic Securities Litigation*, 433 F.Supp. 1125, 1126 (J.P.M.L. 1977), *In re Molinaro/Catanzaro Patent Litigation*, 402 F.Supp. 1404, 1406 (J.P.M.L. 1975), and *In re Glenn W. Turner Enterprises Litigation*, 368 F.Supp. 805, 806 (J.P.M.L. 1973), as further support of the notion that MDL transfer does not consider the litigants' concerns about past or future rulings of the transferee judge).

369. *Sch. Dist. of Okaloosa County v. Superior Court*, 68 Cal. Rptr. 2d 612, 618 n.6. (Ct. App. 1997).

370. *Id.*

