



U.S. CHAMBER
Institute for Legal Reform



Trials and Tribulations

*Contending with Bellwether and
Multi-Plaintiff Trials in MDL Proceedings*

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U.S. CHAMBER
Institute for Legal Reform

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Prepared for the U.S. Chamber Institute for Legal Reform by

John Beisner, Jessica Miller, Nina Rose, and Jordan Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP

Executive Summary

The explicit statutory purpose of multidistrict litigation (MDL) proceedings is to coordinate discovery and other pretrial matters when multiple cases involving overlapping factual issues are pending in different federal courts. The MDL statute is also clear that centralization is for pretrial purposes only and that cases must be returned to their home districts for trial once pretrial matters are resolved.

Over the last several years, however, as the volume of mass tort litigation has multiplied, many MDL courts have expanded their role beyond “pretrial” matters. In particular, a growing number of judges tasked with overseeing MDL proceedings have begun conducting so-called “bellwether” trials as part of MDL proceedings, including consolidated multi-plaintiff trials (i.e., trials in which one jury simultaneously resolves the claims of more than one plaintiff), often as part of a strategy to encourage global MDL settlements. Indeed, there appears to be a growing sense that an MDL judge has “failed” if he or she does not broker a

litigation-wide settlement because the alternative is to flood federal courts around the country with hundreds or thousands of remanded cases. As a result, it has become increasingly common for MDL courts to employ bellwether trials as a tool to encourage (or even pressure) the parties to come to the settlement table.

There are two fundamental problems with this approach. As an initial matter, it remains an open question whether trials are ever a proper function of an MDL court. The MDL statute authorizes “coordinated or consolidated *pretrial* proceedings,”¹ but

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does not provide any role for the MDL court beyond the pretrial stage. Further, the United States Supreme Court’s 1998 decision in *Lexecon*² instructs that cases pending in an MDL proceeding must be remanded to the districts in which they originated at the conclusion of pretrial matters, absent consent of the parties to further proceedings. Yet, a review of the dockets of the 135 mass tort MDL proceedings that are currently pending or were formally concluded in the last 10 years shows that 29 (or roughly 21 percent) of those proceedings involved at least one trial, with a total of 73 MDL trials having been conducted, either before the MDL court or with the MDL judge sitting by designation in the transferor district as a means to continue the MDL court’s involvement in the case.³

As set forth below, this raises concerns about whether MDL judges are improperly straying from their designated role by pressuring parties to forgo their rights under *Lexecon* and submit to MDL trials, all in an effort to keep hold of the litigation and force a global settlement. And while MDL trials may seem efficient, commentators have noted that there are many benefits of remanding MDL cases back to their home districts for trial, including increased objectivity from new judges with “fresh

eyes” on a case and allowing more juries from a wider variety of jury pools to determine the value of various claims.

This is especially true given the second—more troubling—trend reflected in the MDL data: the use of multi-plaintiff trials by MDL courts. As set forth below, MDL judges have conducted seven multi-plaintiff trials in product liability cases in the last 10 years, collectively addressing the claims of 32 different plaintiffs.⁴ Notably, the jury found in favor of the plaintiffs more than 78 percent of the time in these multi-plaintiff MDL trials (whereas less than 37 percent of single-plaintiff MDL trials resulted in verdicts for plaintiffs). This is not surprising given the well-documented evidence that multi-plaintiff trials are highly prejudicial to defendants for a host of reasons, including the tendency of juries to conflate the facts of the plaintiffs’ cases to defendants’ detriment, and to view defendants facing multiple claims negatively. Indeed, academic research on the topic has made clear that multi-plaintiff trials have a significantly higher likelihood of resulting in a verdict for the plaintiff and generally involve much higher damage awards. This raises concerns that courts could use the multi-plaintiff trial mechanism to increase settlement pressure on the defendants.

Are MDL Trials Ever Appropriate?

As commentators have noted, there has been a recent trend among MDL judges to “refuse to remand” cases back to their transferor districts after pretrial proceedings are complete and instead conduct trials in the MDL proceeding.⁵

There is a significant question, however, as to whether MDL courts should be conducting MDL trials at all. As set forth above, the MDL statute itself does not contemplate coordinated MDL proceedings continuing past the pretrial stage. Accordingly, the United States Supreme Court unanimously held in *Lexecon* that an MDL court cannot unilaterally retain for trial cases that are transferred to it for pretrial proceedings.⁶ Instead, an MDL court must remand any action sent to it “at or before the conclusion of ... pretrial proceedings to

the district from which it was transferred.”⁷ In sum, *Lexecon* confirms that “[a]n MDL court can conduct pretrial proceedings but cannot try a case that it would not be able to try without its MDL status.”⁸ The only way that such a court can try transferred cases is with the parties’ consent, which is known as a “*Lexecon* waiver[.]”⁹

The problem with *Lexecon* waivers, however, is that they are not always freely given. MDL courts have significant power over a litigation in its early stages. Tasked with making important and far-reaching decisions regarding the scope of discovery, dispositive motions and, in some cases, class certification, the MDL court essentially charts the trajectory of the litigation, with its actions affecting hundreds or even thousands of cases across the country. Accordingly, MDL courts wield considerable influence and, as a result, can exert substantial pressure on the parties to waive their rights to remand under *Lexecon* and consent to a trial in the MDL court. In addition, as noted below, certain MDL courts have interpreted *Lexecon* waivers broadly, taking a party’s consent to an initial or particular MDL trial as an admission that

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any case (or combination of cases) transferred to the MDL court may be tried there, or by the MDL judge in another forum. As a result, parties to an MDL proceeding can find themselves coerced or forced into an MDL trial—or a series of trials—to which they would not otherwise have consented.

Settlement Pressure and MDL Trials

As numerous sources have noted, a primary reason why MDL courts seek to try cases is to encourage global settlement before the proceeding concludes and individual cases are transferred back to their transferor districts.¹⁰ Specifically, MDL courts often propose holding “bellwether” trials of a variety of different, purportedly representative cases that supposedly reflect the general inventory of pending claims, the thought being that the verdicts reached as a result of those trials will provide an objective assessment of the value of various types of claims in the litigation. “Bellwether cases ... are representatives selected from the ‘flock’ of cases consolidated in front of the transferee court and tried front-to-back” there.¹¹

As recognized by the Manual for Complex Litigation, the purpose of bellwether trials is to “produce a sufficient number of representative verdicts” to “enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis.”¹²

“ *It is well understood that the MDL process ‘creates incentives for judges to treat settlement as the ultimate goal.’* ”

While there are certainly benefits to the bellwether trial process in certain scenarios, there are significant policy concerns associated with conducting MDL trials in order to facilitate settlement of a litigation, especially where the parties may be pushed to consent to MDL trials despite a preference for having cases tried in home districts. For one thing, federal case law makes clear that it is improper for any court to take actions intended primarily to coerce settlements.¹³ It is well understood that the MDL process “creates incentives for judges to treat settlement as the ultimate goal,”¹⁴ especially because many MDL courts “struggle to deal effectively with caseloads expanding at a precipitous rate,”¹⁵ making global resolution seem like the best, and sometimes only, option.¹⁶ But however substantial these struggles may be, appellate courts have made it clear that district courts cannot cross the line between facilitating settlement and coercing it, and that requiring “particular lawyers or litigants to participate in additional and unconventional settlement procedures” crosses that line.¹⁷

Prodding defendants to waive their rights under *Lexecon* constitutes precisely that

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kind of judicial coercion, particularly when combined with the already existing pressures to settle that are the inevitable product of certain MDL courts’ “cowboy-on-the-frontier mentality” and ad hoc approach to procedure.¹⁸ And because any interlocutory rulings regarding such procedures are not immediately appealable, a defendant facing pressure from an MDL court to waive its *Lexecon* rights generally lacks any immediate means of protection and must endure a protracted and expensive MDL trial, post-trial and appellate process to obtain review by an appellate court. As Judge Edith Jones of the Fifth Circuit plainly put it, “[s]uch an outcome belies the goals of efficiency, economy, fairness, and predictability for which the MDL system supposedly exists.”¹⁹

Representation Problems With MDL Bellwethers

There is also a significant concern that MDL trials are not actually “representative” of the larger body of cases—and therefore cannot provide a fair estimate of the legitimacy or value of the plaintiffs’ claims generally. It is true that, where each party freely consents to an MDL trial of a case with which both sides are comfortable, these proceedings can sometimes be a useful exercise in assessing the strengths and weaknesses of the overall claims pool and informing the

direction of the MDL proceeding. But that is not always the case, especially where an MDL court pushes litigants for broad *Lexecon* waivers that allow the MDL court to try virtually whatever cases it wants in whatever fashion it thinks best without the express consent of the parties.²⁰

Judge Jones accurately noted that “[t]he undeniable pressure on defendants to settle is a reality in ... alleged mass tort cases,” and this dynamic is being fueled in part by MDL judges erroneously and broadly construing supposed *Lexecon* waivers and trying cases in an “unauthorized forum.”²¹ Indeed, as set forth below, the trend toward MDL trials has led to the practice of conducting inherently unfair multi-plaintiff MDL trials pursuant to such purported waivers, directly threatening the due process rights of MDL defendants and providing a distorted assessment of the value of claims in a litigation.

MDL Trials Are Problematic Even With Consent

Even if *Lexecon* waivers were not being obtained through coercion, there is a more fundamental question that must be addressed: whether MDL courts should be conducting trials at all. As commentators have observed, “the source of an MDL judge’s authority to try *anything* is quite

questionable” given the text of the MDL statute, which expressly limits the power of an MDL court to pretrial proceedings only.²² In addition, the legislative history of the MDL statute explains the reason for limiting an MDL court’s role in this way, acknowledging that “trial in the originating district is generally preferable” to one before an MDL court because it is more convenient for the parties and witnesses.²³ Further, as commentators have noted, remanding MDL cases for trial preserves the “litigant[s]’ traditional privileges of selecting where, when and how to enforce [their] substantive rights or assert [their] defenses.”²⁴

Indeed, once the MDL court has resolved generally applicable issues, there is no reason for specific trials to take place in a forum that lacks any connection with the case, rather than in the transferor court, which the plaintiff has chosen and in which the defendant is presumably subject to personal jurisdiction.²⁵ In addition, sending cases back to their original districts for trial avoids saddling the transferee judge with the task of applying the choice-of-law rules, and the substantive laws, of many different states.

As courts have recognized, an MDL court may not simply impose its own choice-of-law framework on the hundreds or thousands of cases transferred to it. Instead, cases transferred to an MDL proceeding are governed by the choice-of-law rules of the jurisdiction where they originated—and cases filed directly in an MDL proceeding pursuant to a direct file agreement/order are subject to the choice-of-law rules of the jurisdiction in which the events giving rise to the cause of action occurred.²⁶ Thus, conducting MDL trials of

cases originating in other jurisdictions often requires an MDL court to interpret and apply the choice-of-law rules and substantive laws of other states. Because MDL trials often involve complex and novel questions that have not yet been clearly resolved by courts in the applicable states, this can result in MDL courts essentially creating new law in states with which they have little prior experience and no real connection.

It has also been noted that, if the parties wish to meaningfully assess the strength of the claims in a litigation, they are better served by conducting bellwether trials in front of various different judges using different jury pools in different states, as opposed to allowing the same judge to try a

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whole series of cases before juries drawn from the same small corner of the country, which may not be representative of the nation as a whole.²⁷ Importantly, this problem exists even where an MDL judge remands cases back to their home districts and then seeks to sit by designation to conduct trials there. This is because a single MDL judge is likely to impose the same or similar evidentiary and other rulings in each trial he or she conducts, setting the stage for similar outcomes and verdicts in cases that may have ended very differently if tried by different jurists with different views on

the litigation. Commentators have also noted that remanding cases for trial by different courts “minimiz[es] possible undue complexity from multi-party trials,” which—as set forth below—may be encouraged in an MDL proceeding where a single MDL judge feels singularly responsible for resolving hundreds or thousands of suits.²⁸

In short, while MDL courts have been trying cases with increased regularity in recent years, it remains unclear whether such a practice is appropriate or promotes the just outcome of the litigation.

Multi-Plaintiff MDL Trials Violate Defendants' Due Process Rights

The most egregious example of the dangers presented by the trend toward MDL courts conducting trials as a means to encourage settlements is the increasing occurrence of multi-plaintiff MDL trials, which raise significant fairness and due process concerns for defendants.

As set forth below, both the MDL data and relevant academic literature demonstrate that the use of consolidated trials works to the significant and unfair disadvantage of mass tort defendants—substantially increasing the likelihood and size of each plaintiff's verdict and, as a result, artificially skewing the perceived "trend" of the litigation in the plaintiffs' favor.²⁹ Thus, the use of multi-plaintiff trials as a means of assessing the overall value of a litigation in the MDL context is inherently unreliable and inappropriate.

Multi-Plaintiff Trials in the MDL Context

As noted above, 29 MDL proceedings pending in the last decade have involved at least one trial, with 73 trials in total having been conducted by MDL judges during that period. Of those, 66 were single-plaintiff trials, 42 of which (63.6 percent) resulted in a defense verdict and 24 (36.4 percent) of which ended in a verdict for the plaintiffs. In addition, MDL judges presided over seven multi-plaintiff trials (involving a combined

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total of 32 different plaintiffs) that were tried to a verdict.³⁰ In contrast to the results of the single-plaintiff MDL trials, 78.1 percent of the plaintiffs' cases in multi-plaintiff trials resulted in a plaintiffs' verdict, and only 21.9 percent ended in a verdict for the defense. Notably, none of the multi-plaintiff trials ended in split verdicts (i.e., the jury finding in favor of some plaintiffs but not others). A brief summary of each of these multi-plaintiff trials is included below.

CAMPBELL v. BOSTON SCIENTIFIC CORP., NO. 2:12-CV-08633 (S.D. W. VA.) (MDL 2326)

Campbell was a trial of four plaintiffs' claims alleging negligence and strict liability under West Virginia law against the manufacturer of the Obtryx Transobturator Mid-Urethral Sling System, a treatment for stress urinary incontinence. The district court had *sua sponte* consolidated 11 cases for trial, but three were dismissed during discovery and one was later removed from the consolidated action. Defendant Boston Scientific Corp. moved to sever the remaining cases for individual trials and, while that motion was pending, the plaintiffs dismissed three additional cases. The court then denied the motion to sever.³¹

The four-plaintiff trial took place in November 2014 and lasted 11 days, resulting in a combined plaintiffs' verdict of \$18.5 million, which included \$14.5 million in past and future compensatory damages and \$4 million in punitive damages. The plaintiffs were awarded \$4.25 million (plaintiff Blankenship); \$3.25 million (plaintiff Tyree); \$3.25 million (plaintiff Campbell); and \$3.75 million (plaintiff Wilson). Post-trial, Boston Scientific Corp. reached settlement with two of the plaintiffs and appealed the judgment in favor of the

remaining two plaintiffs. The primary argument on appeal was that the trial was rendered unfair by the consolidation of four independent cases, but the United States Court of Appeals for the Fourth Circuit affirmed the verdicts, holding that consolidation was appropriate because all plaintiffs alleged that they experienced similar complications from the same device, and each received her medical device in West Virginia and asserted the same claims under West Virginia law.³²

EGHNAYEM v. BOSTON SCIENTIFIC CORP., NO. 1:14-CV-24061-JRG (S.D. FLA.) (MDL 2326)

Eghnayem, also a part of the MDL proceeding addressing product liability claims related to the Obtryx Transobturator Mid-Urethral Sling System, involved the trial of four plaintiffs' claims before the MDL judge sitting by designation in the plaintiffs' home district. The MDL court had previously consolidated the cases for trial over the defendant's objection³³ and transferred them to the United States District Court for the Southern District of Florida for trial to avoid jurisdictional issues.³⁴ The MDL court then requested permission to sit by designation in that district to oversee the trial,³⁵ which began in November 2014 and lasted eight days.³⁶ Ultimately, the jury reached a \$27 million combined verdict for the plaintiffs.³⁷ Compensatory damages were divided almost equally among the plaintiffs: \$6,722,222 (plaintiff Eghnayem); \$6,722,222 (plaintiff Betancourt); \$6,533,333 (plaintiff Nunez); and \$6,766,666 (plaintiff Dotres).³⁸ The verdicts were ultimately affirmed on appeal by the United States Court of Appeals for the Eleventh Circuit.³⁹

**AOKI v. DEPUY ORTHOPAEDICS, INC.,
NO. 3:13-CV-01071-K (N.D. TEX.) (MDL 2244)**

Aoki involved a trial of five plaintiffs who alleged that they were injured by defects in the Pinnacle artificial hip, a metal-on-metal hip replacement device. During the course of selecting proposed bellwether candidates for an initial trial, a disagreement emerged between the Plaintiffs' Executive Committee and defendants over whether multiple cases should be consolidated for trial. After the Plaintiffs' Executive Committee filed its proposal for selecting bellwether trials, which included a request for consolidation, the defendants responded that they did "not agree to waive their *Lexecon* objections for a prejudicial, multi-plaintiff trial."⁴⁰

The MDL court proceeded to conduct an MDL trial of the claims of a single plaintiff, selected by plaintiffs' counsel from a pool of eight cases, and the jury returned a verdict for the defendants.⁴¹ Seemingly frustrated by the defense verdict, and concerned that it would discourage the defendants from pursuing settlement, the court selected five cases *sua sponte* to be tried together in the next trial.⁴² The defendants had previously agreed to a *Lexecon* waiver for a second trial⁴³ and the five plaintiffs at issue were all residents of Texas, obviating any jurisdictional issues.⁴⁴ That agreement, however, was rooted in defendants' expectation that—consistent with their prior narrow waiver—a second trial would not involve multiple plaintiffs, a position reiterated by defendants in the form of a motion to deny consolidation.⁴⁵ The trial began in January 2016 and lasted nine weeks, with the jury ultimately reaching a verdict in favor of all plaintiffs.⁴⁶ The

combined verdict was \$502 million, including \$500,000 in economic compensatory damages, \$141.5 million in non-economic compensatory damages, and exemplary damages in the amounts of \$120 million and \$240 million against defendants DePuy Orthopaedics, Inc. and Johnson & Johnson, respectively.⁴⁷

The MDL court later applied Texas' statutory cap on exemplary damages to reduce the \$360 million in exemplary damages to \$9.6 million.⁴⁸ The compensatory damages were divided as follows: \$16.8 million to plaintiff *Aoki*; \$16 million to plaintiff Christopher (plus \$746,980 to Christopher's wife for loss of household services and loss of consortium); \$31.7 million to plaintiff Greer; \$50.2 million to plaintiff Klusmann (plus \$2.5 million to Klusmann's wife for loss of household services and loss of consortium); and \$32.2 million to plaintiff Peterson (plus \$1.6 million to Peterson's wife for loss of household services and loss of consortium).⁴⁹ The judgments were later reversed on appeal by the United States Court of Appeals for the Fifth Circuit due to "egregious, multiple, and prejudicial" errors, although consolidation was not one of the specific errors identified by the appellate court.⁵⁰

**ANDREWS v. DEPUY ORTHOPAEDICS, INC.,
NO. 3:15-CV-03484-K (N.D. TEX.) (MDL 2244)**

Andrews also arose from the Pinnacle hip implant MDL proceeding. This time, the MDL court consolidated—over the defendants' objections—the claims of six California plaintiffs for a single trial that began in September 2016 and lasted two months.⁵¹ Prior to trial, the defendants had explained to the court that, "[a]lthough [they] previously waived *Lexecon* for

purposes of selecting prior bellwether cases, they have never agreed to a blanket *Lexecon* waiver and do not waive their venue objections with respect to forthcoming trials.”⁵²

The MDL court proceeded with the trial rejecting these arguments, and it resulted in a plaintiffs’ verdict totaling an astronomical \$1.04 billion.⁵³ This included \$28.3 million in compensatory damages and \$1.008 billion in punitive damages. Punitive damages were later reduced by close to half, such that combined damages totaled roughly \$543 million.⁵⁴ The compensatory awards to each plaintiff were, for the most part, very similar: \$78.2 million to plaintiff Andrews (plus \$1.25 million to Andrews’ wife); \$77.5 million to plaintiff Davis (plus \$1.25 million to Davis’ husband); \$76.5 million to plaintiff Metzler (plus \$1.25 million to Metzler’s husband); \$115.2 million to plaintiff Rodriguez; \$114.8 million to plaintiff Standerfer; and \$76.6 million to plaintiff Weiser (plus \$1.25 million to Weiser’s wife).⁵⁵ An appeal of the verdict was pending before the United States Court of Appeals for the Fifth Circuit when a global settlement was reached in the litigation, mooting the appeal.

ALICEA v. DEPUY ORTHOPAEDICS, INC., NO. 3:15-CV-03489-K (N.D. TEX.) (MDL 2244)

Alicea, the final MDL trial conducted in the Pinnacle hip implant MDL proceeding, once again over the defendants’ *Lexecon* objections, began in November 2017. When the MDL court signaled its intention to once again proceed with a multi-plaintiff trial (this time involving the claims of six plaintiffs from New York), the defendants sought a writ of mandamus from the United States

Court of Appeals for the Fifth Circuit to prohibit the MDL judge from so proceeding (a writ of mandamus is an extraordinary procedure, and is only allowed in the rarest of circumstances). A majority of judges on the Fifth Circuit panel concluded that the defendants had waived their objections only as to the first two bellwether trials.⁵⁶ The appellate court reasoned that although it would not force the MDL court to stop the fourth MDL trial based on the existence of later appellate review, it deemed the district court’s finding of waiver a “serious error” and cautioned that it would be a “clear[] abuse[]” of discretion for the district court to proceed.⁵⁷

Disregarding the circuit court’s opinion, and defying one appellate judge’s rhetorical question asking “what district court is going to go forward with the trial” after being told that it had reached a “patently erroneous” result,⁵⁸ the MDL judge nonetheless required the defendants to participate in a six-plaintiff, two-month-long trial.⁵⁹ The result was a \$246 million verdict for the plaintiffs, including \$78 million in compensatory damages and \$168 million in punitive damages.⁶⁰ Compensatory damages were divided similarly among the plaintiffs: \$39.3 million to plaintiff Alicea (plus \$500,000 to Alicea’s wife); \$38.8 million to plaintiff Barzel (plus \$600,000 to Barzel’s wife); \$48.6 million to plaintiff Kirschner; \$43.7 million to plaintiff Miura; \$37.3 million to plaintiff Michael Stevens (plus \$500,000 to Michael Stevens’ wife); and \$36.7 million to plaintiff Eugene Stevens (plus \$100,000 to Eugene Stevens’ wife).⁶¹ The verdict was appealed to the United States Court of Appeals for the Fifth Circuit but, as in *Andrews*, the appeal was mooted by the global settlement reached in the litigation.

**GOFORTH v. LINCOLN ELECTRIC CO.,
NO. 1:06-CV-17217-KMO (N.D. OHIO) (MDL 1535)
AND QUINN v. LINCOLN ELECTRIC CO.,
NO. 1:06-CV-17218-KMO (N.D. OHIO) (MDL 1535)**

Goforth and *Quinn* were one of the two multi-plaintiff MDL trials that resulted in a defense verdict. There, the cases of two welders alleging neurological injuries as a result of exposure to manganese in welding fumes were consolidated for trial.⁶² After the MDL court directed the parties to propose a case for the first scheduled bellwether trial, the plaintiffs proposed consolidation of seven newly-filed cases (which they served on the defendants only after making the motion to consolidate), but later dropped two of the seven actions from the consolidation proposal.⁶³ The court ultimately agreed to consolidate for trial the claims of two South Carolina plaintiffs.⁶⁴ The trial of their claims began in November 2006 and lasted 18 days. After the verdict in favor of defendants, no appeal was taken and the litigation ultimately settled.

**BELL v. ROANOKE COS. GROUP,
NO. 1:07-CV-00687-TWT (N.D. GA.) (MDL 1804)**

Bell involved a trial of the claims of five plaintiffs from Minnesota, Utah, and Missouri.⁶⁵ The five were originally part of a single multi-plaintiff suit filed on behalf of 39 plaintiffs from 21 different states, all of whom alleged personal injuries as a result of their use of and/or exposure to Stand 'N Seal, a spray-on grout sealer.⁶⁶ The defendants filed a motion to sever the claims of all 39 plaintiffs, or, in the alternative, order separate trials,⁶⁷ which the court granted in part and denied in part, stating its intention to try the cases in groups of five.⁶⁸ The first of these trials began in April 2010 and lasted six days,

resulting in a verdict in favor of the defendants. That verdict was not appealed and the parties ultimately settled, obviating the need for additional trials.⁶⁹

Academic Literature Helps Explain Why the Consolidation of Claims Results in Prejudice to Defendants

The significant statistical difference in the outcomes of single-plaintiff versus multiple-plaintiff trials conducted by MDL judges is consistent with academic literature demonstrating that, when multiple claims against the same defendant are presented to a single jury, that jury is substantially more likely to find against the defendant on a given claim—and award higher damages—than if the claim had been presented in the absence of the others.⁷⁰ The relevant research indicates that this is so for a variety of reasons.

JUROR CONFUSION REGARDING EVIDENCE

First, it is well-documented that the consolidation of multiple plaintiffs' claims for trial is associated with juror confusion regarding which evidence pertains to which case.⁷¹ Indeed, courts have recognized that juries are often unable to "compartmentaliz[e] certain evidence that applies to one case but not the other."⁷² As a result, there is a substantial risk in such trials that the jury will quickly lose track of the differences among the plaintiffs and render verdicts that conflate different plaintiffs' claims and evidence.⁷³ Academic research confirms this.

According to one scholarly article, for example, the joinder of multiple parties and claims poses a serious risk that jurors "may get evidence confused."⁷⁴ Another study

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generated even more troubling conclusions, finding that consolidation of four or more plaintiffs not only made it harder for jurors to understand the evidence, but also more likely that the jury would find the defendant liable, and more likely that the jury would set higher per-plaintiff compensatory damages awards.⁷⁵ That study’s author opined that even when jurors say they can distinguish among a multi-plaintiff group, a “blending effect” occurs, often resulting in similar awards for all members of the group.⁷⁶ In short, while the issues being litigated in mass tort cases are already complex, the addition of multiple plaintiffs and/or defendants compounds that complexity, resulting in an “enormous” cognitive task for jurors that “raise[s] questions about the competence of jurors to decide these cases fairly and rationally.”⁷⁷

This type of prejudicial juror confusion is evident in the multi-plaintiff trials conducted by MDL judges discussed above. For example, the trial conducted by the MDL

judge in *Eghnayem v. Boston Scientific Corp.* involved the personal injury claims of four plaintiffs allegedly injured by a medical device, each of whom experienced different complications from the device, manifested at different times in connection to their surgery, had different medical histories and lodged different allegations about their current conditions.⁷⁸ Yet, the jury ignored all of these differences among the plaintiffs’ cases and awarded them nearly identical damages in the amounts of \$6,766,666; \$6,722,222; \$6,722,222; and \$6,533,333.⁷⁹

Further, as Boston Scientific noted in its post-trial briefing in the *Eghnayem* case, the MDL judge there specifically remarked during the trial that the jury was likely missing things due to the jumbled manner in which evidence about different plaintiffs was presented—and plaintiffs’ own counsel admitted during his questioning of a trial witness that he sometimes was confused regarding which facts applied to each plaintiff.⁸⁰ If the lawyers who had dedicated countless hours and resources preparing these four cases for trial could not keep track of the details of each plaintiff’s particular claims, it is all but impossible that the jurors were able to do so.

A similar outcome occurred in the *Andrews* trial conducted in the Pinnacle hip implant MDL proceeding. After a two-month-long trial, the jury deliberated for less than a day and then wrote virtually identical amounts on every line of the 82-page verdict form, which itself covered 27 causes of action.⁸¹ Specifically, the jury awarded the four plaintiffs who had been implanted with only one hip replacement device exactly \$500,000 each for past physical pain, exactly \$500,000 each for future physical

pain, exactly \$500,000 each for past disfigurement, exactly \$500,000 for future disfigurement, and so on down the line for past physical impairment, future physical impairment, past mental suffering and future mental suffering.⁸² The jury then awarded the plaintiffs' respective spouses the same amount (\$500,000) for past and future loss of consortium.⁸³

The only distinction the jury was able to draw was between those four plaintiffs who received a unilateral hip implant and the two who received bilateral implants, awarding the latter two exactly \$750,000 in every damages category.⁸⁴ The jury's awards ignored the numerous factual differences among the plaintiffs' cases with respect to how their devices were implanted, the problems they allegedly experienced with the devices, the severity of their injuries and their medical histories.⁸⁵ For example, while one of the plaintiffs testified that his hip "doesn't hurt anymore," another plaintiff testified that "sometimes I can't sleep on my left side."⁸⁶ The identical damages awards confirm the rampant jury confusion addressed in the academic literature, which culminated in the jury "throwing up its hands in the face of" a "torrent of evidence" about different plaintiffs, different theories, different doctors and different circumstances.⁸⁷

OUTLIER PLAINTIFF PROBLEM

Second, courts and commentators have also acknowledged that multiple-plaintiff trials raise a significant concern that the jury may be swayed by sympathy for a particular plaintiff, or particular aspects of individual plaintiffs' cases, and hold defendants liable to all plaintiffs based on factors that do not

apply to all of them.⁸⁸ Again, this conclusion is bolstered by experimental research. For example, one study found that the presence of an "outlier" plaintiff with more severe injuries than other plaintiffs resulted in an increase in punitive damages awards.⁸⁹ The study's authors opined that juries may justify such a result because they "assume that the less severely injured will, in time, suffer the same fate as did the outlier."⁹⁰ As one author noted, although defendants in individual trials are usually successful in excluding evidence of other cases and complaints in the absence of substantial similarity, "[w]ith multi-plaintiff 'bundled' trials, that protection disappears."⁹¹

Relatedly, multi-plaintiff trials have the effect of allowing plaintiffs to cover significant deficiencies in the claims of certain plaintiffs by pointing to evidence relevant only to the other plaintiffs' claims. For instance, in the *Eghnayem* trial, the plaintiffs expressly relied on the testimony of a physician who had examined only one of the four plaintiffs' devices as evidence that all of the plaintiffs' devices were defective.⁹² Thus, the mere fact of consolidation allowed the plaintiffs to bolster three of the claimants' cases with evidence that would not have been relevant if their claims had been tried individually. Similarly, in the *Aoki* trial, each of the plaintiffs prevailed on their warning-based claims at trial even though only three of them adduced any evidence of whether a different warning would have impacted their surgeons' implanting decisions.⁹³ In other words, as in *Eghnayem*, consolidation enabled plaintiffs' counsel to paper over serious plaintiff-specific weaknesses by relying on evidence not generally applicable to all plaintiffs' claims.

And in the *Andrews* trial (also in the Pinnacle MDL proceeding), plaintiffs' counsel was able to parade before the jury a vulgar email exchange between employees of the manufacturer discussing a Pinnacle component that only one plaintiff received.⁹⁴ That email, which should have been excluded in any event, would undoubtedly have been excluded in individual trials for the five plaintiffs who did not receive the component that was addressed in the email. However, because the cases were consolidated, the jury was exposed to the inflammatory email during trial, was reminded of it during closing argument, and the jury even requested the exhibit during its very brief deliberations.⁹⁵ The ensuing astronomical verdict—which treated all of the plaintiffs the same—highlights the danger of inflammatory evidence that only applies to a single plaintiff being used against the defendants as to all of the plaintiffs whose claims are being tried.

“*[M]ulti-plaintiff trials have the effect of allowing plaintiffs to cover significant deficiencies in the claims of certain plaintiffs by pointing to evidence relevant only to the other plaintiffs' claims.*”

CUMULATIVE IMPACT OF MULTIPLE CASES

Third, both courts and researchers have noted the “cumulative impact” of having multiple plaintiffs present their cases to one jury and “the inferences a jury might draw with respect to the defendant because of the sheer number of plaintiffs” weighs against consolidation.⁹⁶ The authors of one study noted that research has shown that “when persons are presented to observers as a ‘group’ there is a strong tendency to attribute similarity to all the group members” and to perceive those similarities as the result of “situational factors” common to them.⁹⁷ In addition, studies have shown that jurors in criminal trials involving multiple claims are substantially more likely to draw the inference that the defendant is of bad character and to find the defendant to be less believable.⁹⁸

This propensity to punish defendants based on the multiplicity of claims has also been borne out in civil trials—as perhaps best illustrated by the trajectory of the Pinnacle hip proceeding. After all, the first bellwether trial presented the claims of a single plaintiff, and the jury determined that the product in question was not defective. The next three trials—involving the exact same device, but with consolidated groups of five and six plaintiffs—resulted in plaintiffs' verdicts approaching \$2 billion. Needless to say, the exorbitant jury awards in those latter cases reflect the “cumulative” impact of having multiple plaintiffs present their cases to a single jury in a single proceeding. Plaintiffs' counsel in that very litigation effectively recognized as much in an article underscoring the prejudice of multi-plaintiff trials.⁹⁹ In short, the consolidation of claims for trial has the effect of making juries more skeptical of defendants' arguments and

“ This propensity to punish defendants based on the multiplicity of claims has also been borne out in civil trials—as perhaps best illustrated by the trajectory of the Pinnacle hip proceeding.”

evidence while conversely encouraging jurors to overlook potential weaknesses in the individual plaintiffs’ cases.

THE “BACKFIRE EFFECT”

Finally, efforts to mitigate the prejudicial effects of consolidation by giving jurors limiting instructions are exceedingly unlikely to offset the prejudice of joining multiple

claims together in a single trial.¹⁰⁰ Indeed, jury studies have found that mock juries are more likely to rule against defendants—or to award higher damages to plaintiffs—after being instructed not to consider certain evidence detrimental to the defendant’s case, a phenomenon that is referred to in the literature as the “backfire effect.”¹⁰¹

Conclusion

As the legislative history and text of the MDL statute demonstrate, MDL proceedings are intended to allow for the efficient resolution of pretrial proceedings in related cases involving overlapping factual and legal issues. The MDL data, however, reveal that in the last decade MDL courts have been conducting trials with some frequency as part of an effort to assess the purported “value” of the litigation and to encourage global settlement.

Although the Supreme Court made clear in *Lexecon* that MDL trials are prohibited absent the consent of all parties, the significant power wielded by MDL courts can be inherently coercive, leaving defendants no real choice but to agree to bellwether trials before the MDL court. Such MDL trials raise a variety of policy concerns, especially where defendants are compelled to provide broad *Lexecon* waivers allowing MDL courts to conduct highly prejudicial multi-plaintiff trials. While multi-plaintiff trials have thus far comprised a minority of MDL trial proceedings, there is significant concern that these precedents will, going forward, be used as a model for MDL courts seeking to encourage resolution of MDL litigation. As the data and relevant literature bear out, these multi-plaintiff trials have the effect of stacking the deck in favor of the plaintiffs and therefore provide little, if anything, in the way of an objective assessment of the value of the plaintiffs’ claims overall.

Further, multi-plaintiff MDL trials raise significant fairness and due process concerns, with MDL defendants forced to defend themselves in an inherently one-sided proceeding in which multiple plaintiffs’ claims are evaluated in their totality, rather than each individual plaintiff having to prove each of the required elements of his or her claims.

The most effective way to prevent such an improper use of the MDL process would be to enact federal legislation codifying *Lexecon* and prohibiting MDL courts from conducting trials without the express consent of all parties to the particular case proposed to be tried. Notably, the United States House of Representatives attempted to do just that in early 2017, when it passed H.R. 985, the Fairness in Class Action Litigation Act, which included such a provision. The legislation, however, was not taken up by the Senate that term.

An alternative approach proposed by some commentators would involve revision of 28 U.S.C. § 1407 itself to expressly prohibit MDL courts from trying cases without the express and continuing consent of the parties, and to bar consolidation of multiple plaintiffs' claims for trial, either in the MDL proceeding or prior to remanding cases to

their transferor districts.¹⁰² Such legislative changes would promote the continued utility of the MDL process as a means to move mass tort litigation forward, while protecting the basic principles of fairness and due process on which our judicial system is built.

“ The most effective way to prevent such an improper use of the MDL process would be to enact federal legislation expressly codifying Lexecon and prohibiting MDL courts from conducting trials without the express consent of all parties to the particular case proposed to be tried. ”

Endnotes

- 1 28 U.S.C. § 1407(a) (emphasis added).
- 2 *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).
- 3 The authors of this article reviewed the full PACER dockets of all 62 mass tort MDL proceedings pending as of mid-March 2019 and the 73 dockets of the mass tort MDL proceedings that were formally closed (according to postings on the JPML website) during calendar years 2008 through 2019. (The 2019 review was limited to proceedings closed between January and March.) For purposes of this exercise, “mass tort MDL proceeding” was defined as any MDL proceeding in which the JPML’s initial transfer order noted that personal injury claims would be a substantial component. To identify instances in which trials were conducted, each MDL proceeding’s PACER docket was searched for the terms: “trial,” “bellwether,” “Case Management,” and “CMO.” Results of this PACER docket analysis were verified using searches of court websites dedicated to the MDL (if available), Google and Law360 for any coverage of trials associated with that MDL proceeding.
- 4 As explained below, one of these trials was conducted by the MDL judge who had consolidated the cases for trial in the MDL proceeding and then transferred the cases back to their home district with the proviso that the MDL judge would sit by designation in that district to conduct the trial.
- 5 Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 La. L. Rev. 399, 404 (2014).
- 6 *Lexecon*, 523 U.S. at 28, 34 (“[Section 1407] obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course.”).
- 7 *Id.* at 35 (quoting 28 U.S.C. § 1407(a)).
- 8 *In re DePuy Orthopaedics, Inc.*, 870 F.3d 345, 348 (5th Cir. 2017).
- 9 *Id.*
- 10 See Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 Rev. Litig. 185, 185-86 (2018) (“A subset of cases from the pool of suits in the multidistrict litigation are selected for trial. Lawyers on both sides use the outcomes of these cases, both judicial determinations associated with trial such as motions *in limine* and the verdicts themselves, to inform negotiations in a global settlement for all or most of the cases in the MDL.”); Burch, *supra* note 5, at 408 (“Conducting bellwether trials before settlement helps to establish claim values”); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 989, 995 (9th Cir. 2008) (“[bellwether] trial was designed to produce a verdict that would highlight the strengths and weaknesses of the parties’ respective cases” and to “promote settlement”); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (noting the “value ascertainment function for settlement purposes” of bellwether trials).
- 11 Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys’ Fees in Multidistrict Litigation*, 67 N.Y.U. Ann. Surv. Am. L. 589, 626 (2012).
- 12 Manual for Complex Litigation (Fourth) § 22.315 (2004).
- 13 *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993) (explaining that, while courts may “encourage and aid early settlement,” “they should not attempt to coerce that settlement”) (citing *Strandell v. Jackson Cty.*, 838 F.2d 884, 887 (7th Cir. 1987)).
- 14 Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1669 (2011) (citation omitted).
- 15 *In re NLO*, 5 F.3d at 157.
- 16 See *In re Chevron*, 109 F.3d at 1021 (“We are sympathetic to the efforts of the district court to control its docket and to move this case along.”). A recent example of the willingness

- of MDL courts to embrace novel procedures to facilitate settlement can be found in the “first-of-its-kind ‘negotiating class’” recently approved by the MDL court overseeing claims brought by various local governmental entities against the manufacturers of prescription opiates. Frankel, Alison, “Opioid MDL judge OKs novel negotiating class as ‘likely to promote global settlement,’” Reuters (September 12, 2019), <https://www.reuters.com/article/us-otc-opioids/opioid-mdl-judges-oks-novel-negotiating-class-as-likely-to-promote-global-settlement-idUSKCN1VX2RE>. In its order approving the use of a novel “negotiation class” device—which would allow selected plaintiffs’ counsel to negotiate a binding settlement on behalf of all class members who do not opt out of the process up front—the MDL court made clear that its primary intent was to “promote global settlement” of as many claims as possible. Mem. Op. Certifying Negotiation Class at 3, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804 (N.D. Ohio Sept. 11, 2019).
- 17 See *In re NLO*, 5 F.3d at 158 (quoting Jennifer O’Hearne, Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 Nw. U. L. Rev. 290, 320 (1989)); see also, e.g., *Chevron*, 109 F.3d at 1022 (Jones, J., specially concurring) (recognizing that a flawed bellwether process could have the potential effect of “forc[ing] defendants to settle even when they might have meritorious defenses”); *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) (“We view with disfavor all pressure tactics whether *directly or obliquely*, to coerce settlement by litigants and their counsel.”) (citation omitted).
- 18 Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669, 1675, 1689 (2017) (noting that the tendency of MDL courts to operate free from defined procedures and without meaningful appellate review “erodes traditional due process protections, eschews appellate review, threatens impartiality, and undermines public trials”).
- 19 *In re DePuy Orthopaedics*, 870 F.3d at 358-59 (Jones, J., concurring in part and dissenting in part) (citing 28 U.S.C. § 1407(a)).
- 20 See *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09md2087 BTM(KSC), 2012 U.S. Dist. LEXIS 118980, at *56-57 (S.D. Cal. Aug. 21, 2012) (where “the ‘representativeness’ of the case is questionable ... its value as a bellwether case is diminished”).
- 21 *In re DePuy Orthopaedics*, 870 F.3d at 358 (Jones, J., concurring in part and dissenting in part) (“impact” of trying cases in “unauthorized forum” on “parties’ settlement approaches cannot be denied”); see also *id.* (warning that “a court’s patent errors” in erroneously finding waiver of *Lexecon* objection “can compound into unjust settlements”).
- 22 Bexis, *The Multi-District Litigation Statute Needs Rewriting*, Drug & Device Law Blog (Dec. 19, 2016), <https://www.druganddevicelawblog.com/2016/12/the-multi-district-litigation-statute-needs-rewriting.html#> (some emphasis added); see also *Lexecon*, 523 U.S. at 35 (“[Section 1407] comes in terms of the mandatory ‘shall,’ which normally creates an obligation impervious to judicial discretion.”).
- 23 Burch, *supra* note 5, at 401 (quoting S. Rep. No. 90-454, at 5 (1967)).
- 24 *Id.* (quoting *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499 (J.P.M.L. 1968)).
- 25 See Lahav, *supra* note 10, at 201 (noting the value of deciding an individual case “as it would have been if it had never been transferred”).
- 26 See *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 732 (7th Cir. 2010); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2011 WL 1375011, at *5-6 (S.D. Ill. Apr. 12, 2011).
- 27 See Lahav, *supra* note 10, at 201-02 (noting the advantage of judges with “fresh eyes” and that “a result that accurately reflects the plaintiff’s and defendant’s entitlement may be more likely if the jury pool is that of the transferor court”); Burch, *supra* note 5, at 408-09.
- 28 Burch, *supra* note 5, at 401 (citation omitted).
- 29 The authors would like to thank Steven D. Penrod for his research on these issues, which

- aided in the preparation of this article.
- 30 As noted below, one of these trials, *Eghnayem v. Boston Scientific Corp.*, No. 1:14-cv-24061-JRG (S.D. Fla.) (MDL 2326), involved cases that were sent back to the transferor district after consolidation and then tried by the MDL judge sitting by designation there.
- 31 Appellant's Corrected Opening Br., *Blankenship v. Bos. Sci. Corp.*, No. 16-2279 (4th Cir. Mar. 1, 2017).
- 32 *Campbell v. Bos. Sci. Corp.*, 882 F.3d 70, 74 (4th Cir. 2018).
- 33 See Appellant's Corrected Opening Br., *Eghnayem v. Bos. Sci. Corp.*, No. 16-11818-H (11th Cir. Oct. 12, 2016).
- 34 See Pretrial Order # 91, Dkt. 10, *Eghnayem v. Bos. Sci. Corp.*, No. 2:13-cv-07965 (S.D. W. Va. Apr. 11, 2014) (consolidating cases for discovery and trial on all issues); Order ("Eghnayem Order"), Dkt. 255, *Eghnayem v. Bos. Sci. Corp.*, No. 2:13-cv-07965 (S.D. W. Va. Oct. 30, 2014).
- 35 See *Eghnayem* Order at 2 n.2.
- 36 See *Eghnayem v. Bos. Sci. Corp.*, 873 F.3d 1304, 1311 (11th Cir. 2017).
- 37 *Id.* at 1312.
- 38 *Id.*
- 39 See *id.* at 1324.
- 40 Defs.' Resp. to Pls.' Proposal for Bellwether Trial Selection Process at 1, Dkt. 341, *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:11-md-02244-K (N.D. Tex. Sept. 6, 2013).
- 41 Am. Compl., Dkt. 14, *Paoli v. DePuy Orthopaedics, Inc.*, No. 3:12-cv-04975-K (N.D. Tex. Mar. 14, 2014); Electronic Minute Entry Noting Jury Verdict Rendered, Dkt. 214, *Paoli v. DePuy Orthopaedics, Inc.*, No. 3:12-cv-04975-K (N.D. Tex. Oct. 23, 2014).
- 42 Order Consolidating Bellwether Cases for Trial ("Pinnacle Order"), Dkt. 606, *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:11-md-02244-K (N.D. Tex. Jan. 8, 2016).
- 43 *In re DePuy Orthopaedics*, 870 F.3d at 349.
- 44 *Pinnacle* Order at 2.
- 45 See Reply in Supp. of Pet. for a Writ of Mandamus at 11-12, *In re DePuy Orthopaedics, Inc.*, No. 17-10812 (5th Cir. Aug. 16, 2017).
- 46 *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 763-64 (5th Cir. 2018).
- 47 *Id.* at 764.
- 48 *Id.*
- 49 See Final J., Dkt. 287, *Aoki v. DePuy Orthopaedics, Inc.*, No. 3:13-cv-0171-K (N.D. Tex. July 5, 2016); Final J., Dkt. 269, *Christopher v. DePuy Orthopaedics, Inc.*, No. 3:14-cv-1994-K (N.D. Tex. July 5, 2016); Final J., Dkt. 278, *Greer v. DePuy Orthopaedics, Inc.*, No. 3:12-cv-1672-K (N.D. Tex. July 5, 2016); Final J., Dkt. 311, *Klusmann v. DePuy Orthopaedics, Inc.*, No. 3:11-cv-2800-K (N.D. Tex. July 5, 2016); Final J., Dkt. 299, *Peterson v. DePuy Orthopaedics, Inc.*, No. 3:11-cv-1941-K (N.D. Tex. July 5, 2016).
- 50 *In re DePuy Orthopaedics*, 888 F.3d at 784.
- 51 *In re DePuy Orthopaedics*, 870 F.3d at 349-50.
- 52 Defs.' Mem. of Law in Supp. of Mot. to Stay Additional Trials Pending Resolution of Appeal of Second Bellwether Trial Cases at 1 n.1, Dkt. 657-1, *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:11-md-02244 (N.D. Tex. May 24, 2016).
- 53 *In re DePuy Orthopaedics*, 870 F.3d at 350.
- 54 See Final J., Dkt. 294, *Andrews v. DePuy Orthopaedics, Inc.*, No. 3:15-cv-03484-K (N.D. Tex. Jan. 3, 2017); Final J., Dkt. 289, *Davis v. DePuy Orthopaedics, Inc.*, No. 3:15-cv-01767-K (N.D. Tex. Jan. 3, 2017); Final J., Dkt. 285, *Metzler v. DePuy Orthopaedics, Inc.*, No. 3:12-cv-02066-K (N.D. Tex. Jan. 3, 2017); Final J., Dkt. 284, *Rodriguez v. DePuy Orthopaedics, Inc.*, No. 3:13-cv-03938-K (N.D. Tex. Jan. 3, 2017); Final J., Dkt. 281, *Standerfer v. DePuy Orthopaedics, Inc.*, No. 3:14-cv-01730-K (N.D. Tex. Jan. 3, 2017); Final J., Dkt. 283, *Weiser v. DePuy Orthopaedics, Inc.*, No. 3:13-cv-03631-K (N.D. Tex. Jan. 3, 2017).

- 55 *See id.*
- 56 *In re DePuy Orthopaedics*, 870 F.3d at 351-52.
- 57 *Id.* at 347, 352.
- 58 *Id.* at 354 (Costa, J., concurring in the judgment) (citation omitted).
- 59 *See* Electronic Minute Entry for First Day of Jury Trial, Dkt. 95, *Alicea v. DePuy Orthopaedics Inc.*, No. 3:15-cv-03489-K (N.D. Tex. Sept. 19, 2017) and Electronic Minute Entry Noting Jury Verdict Rendered, Dkt. 235, *Alicea v. DePuy Orthopaedics, Inc.*, No. 3:15-cv-03489-K (N.D. Tex. Nov. 16, 2017).
- 60 *See* Final J., Dkt. 244, *Alicea v. DePuy Orthopaedics, Inc.*, No. 15-cv-03489 (N.D. Tex. Aug. 29, 2018); Final J., Dkt. 237, *Barzel v. DePuy Orthopaedics, Inc.*, No. 16-cv-01245 (N.D. Tex. Aug. 29, 2018); Final J., Dkt. 230, *Kirschner v. DePuy Orthopaedics, Inc.*, No. 16-cv-01526 (N.D. Tex. Aug. 29, 2018); Final J., Dkt. 243, *Miura v. DePuy Orthopaedics, Inc.*, No. 13-cv-04119 (N.D. Tex. Aug. 29, 2018); Final J., Dkt. 234, *Stevens v. DePuy Orthopaedics, Inc.*, No. 14-cv-01776 (N.D. Tex. Aug. 29, 2018); Final J., Dkt. 234, *Stevens v. DePuy Orthopaedics, Inc.*, No. 14-cv-02341 (N.D. Tex. Aug. 29, 2018).
- 61 *Id.*
- 62 *See* Mem. & Order (“*Welding Fume Order*”) at 9-12, Dkt. 1921, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-cv-17000-KMO (N.D. Ohio Oct. 5, 2006).
- 63 *See* Pls.’ Mot. to Consolidate & Mem. in Supp. at 2, Dkt. 1748, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-cv-17000-KMO (N.D. Ohio Apr. 17, 2006); Defs.’ Opp’n to Pls.’ Mot. to Consolidate, Dkt. 1774, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-cv-17000-KMO (N.D. Ohio May 8, 2006).
- 64 *See Welding Fume Order* at 9-12.
- 65 Pls.’ Third Am. Compl. at 3, Dkt. 42, *Bell v. Roanoke Cos. Grp.*, No. 1:07-cv-00687-TWT (N.D. Ga. Sept. 20, 2007) (noting citizenship of plaintiffs Shawn Mork, Amy Paddock, Jodi Leatham, Craig Housekeeper and Troy Marshall, respectively).
- 66 *See generally id.*
- 67 *See* Defs.’ Mem. of Law in Supp. of Mot. to Sever Pls.’ Claims or, in the Alternative, Mot. for Separate Trials, Dkt. 153-1, *Bell v. Roanoke Cos. Grp.*, No. 1:07-cv-00687-TWT (N.D. Ga. Nov. 10, 2008).
- 68 *See* Order, *Bell v. Roanoke Cos. Grp.*, No. 1:07-cv-00687-TWT (N.D. Ga. Sept. 15, 2009).
- 69 *See* Order, Dkt. 758, *Bell v. Roanoke Cos. Grp.*, No. 1:07-cv-00687-TWT (N.D. Ga. Sept. 29, 2010).
- 70 *See* Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decision*, 12 L. & Hum. Behav. 209 (1988) (finding punitive awards were higher for all plaintiffs in multi-plaintiff trials that included an outlier plaintiff with injuries that were significantly more severe than the other plaintiffs); Chilton Davis Varner, *The Beginning of MDL Consolidation: Should Cases be Aggregated and Where?*, 37 Rev. Litig. 227, 239 (2018) (noting the “breath-taking verdicts awarded thus far in multiple-plaintiff [MDL] ‘bundled’ trials”); Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors’ Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. Applied Psychol. 909 (2000) (study finding defendants more likely to be judged as liable, and that damages were more likely to be higher, when claims were consolidated for trial).
- 71 *See* Matthew A. Reiber & Jill D. Weinberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 U. Cin. L. Rev. 929, 929 (2010) (concluding that juror “comprehension declines as complexity increases, particularly when the complexity arises from the presence of multiple parties or claims”).
- 72 *Minter v. Wells Fargo Bank, N.A.*, Nos. WMN-07-3442, WMN-08-1642, 2012 WL 1963347, at *1 (D. Md. May 30, 2012) (declining to consolidate cases on prejudice grounds); *see also Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (noting that “the potential for prejudice resulting from a possible spill-over effect of evidence” in a joint trial is

- "obvious"); *In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 447 (D.N.J. 1998) ("A consolidated trial ... would compress critical evidence of specific causation and marketing to a level which would deprive [the defendant] of a fair opportunity to defend itself.").
- 73 *Leeds v. Matrixx Initiatives, Inc.*, No. 2:10cv199DAK, 2012 U.S. Dist. LEXIS 47279, at *7-8 (D. Utah Apr. 2, 2012) ("[I]f the unique details of each case were consolidated during a single trial, 'the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice.'" (citation omitted); *In re Consol. Parlodel Litig.*, 182 F.R.D. at 447 (noting that the plaintiffs had diverse medical histories and that consolidating cases for trial "would compress critical evidence of specific causation and marketing to a level which would deprive [the defendant] of a fair opportunity to defend itself").
- 74 Krystia Reed & Bryan H. Bornstein, *Juries, Joinder, and Justice*, 27 *Jury Expert* 34, 35-36 (2015).
- 75 See generally Horowitz & Bordens, *The Consolidation of Plaintiffs*, *supra* note 70.
- 76 See *id.* at 916-17.
- 77 See Ryan J. Winter & Edith Greene, "Juror Decision-Making," *Handbook of Applied Cognition: Second Edition* 756 (Francis Durso ed., 2007); see also Varner, *supra* note 70, at 238-39 ("The risk of jury confusion in trying a multi-plaintiff case is manifest: different complaints, at different times with (possibly) different manufacturer's warnings, with different learned intermediaries, and different advice and information imparted to the plaintiff").
- 78 See Def. Boston Scientific Corp.'s Mot. for New Trials ("Boston Scientific Mot.") at 4-7, Dkt. 323, *Eghnayem v. Bos. Sci. Corp.*, No. 1:14-cv-024061-JRG, 2016 WL 4051311 (S.D. Fla. May 11, 2015).
- 79 See *Eghnayem*, 873 F.3d at 1314.
- 80 See Boston Scientific Mot. at 3.
- 81 Principal & Resp. Br. for Defs.-Appellees-Cross-Appellants ("Andrews Appeal Br.") at 34, *In re DePuy Orthopaedics, Inc.*, No. 17-10017 (5th Cir. Sept. 29, 2017).
- 82 See Court's Charge to the Jury & Jury Verdict at 76-78, 81, Dkt. 287, *Andrews v. DePuy Orthopaedics, Inc.*, No. 3:15-cv-03484-K (N.D. Tex. Dec. 1, 2016).
- 83 *Id.* at 83.
- 84 *Id.* at 79-80. The jury awarded different amounts for past medical expenses, but these amounts were stipulated by the parties. See Defs.' Mot. & Mem. of Law in Supp. of Mot. for New Trials on All Issues ("Andrews New Trial Mot.") at 7 n.2, Dkt. 297, *Andrews v. DePuy Orthopaedics, Inc.*, No. 3:15-cv-03484-K (N.D. Tex. Jan. 31, 2017).
- 85 See *Andrews New Trial Mot.* at 7-12.
- 86 *Andrews Appeal Br.* at 35 (citations omitted).
- 87 *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (reversing and remanding for a new trial because "there is an unacceptably strong chance that the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence").
- 88 See *Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) ("There is a tremendous danger that one or two plaintiff[s]' unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims."); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) (noting the unfairness created when plaintiffs are able to present a "'perfect plaintiff' pieced together for litigation" based on "the most dramatic" features from individual constituent cases); *Gwathmey v. United States*, 215 F.2d 148, 156 (5th Cir. 1954) (due process was not "possible in the circumstances under which these consolidated cases were tried," where there was "so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times").
- 89 See Horowitz & Bordens, *The Effects of Outlier Presence*, *supra* note 70, at 225.

- 90 See *id.* at 226; see also Reed & Bornstein, *supra* note 74, at 35-36 (explaining that psychological research indicates that “people may use the most extreme group member as representative of the rest of the group members”).
- 91 See Varner, *supra* note 70, at 239.
- 92 See Boston Scientific Mot. at 10.
- 93 See *In re DePuy Orthopaedics*, 888 F.3d at 774-76. Given the lack of any evidence pertaining to the other two plaintiffs’ implanting surgeons, the Fifth Circuit held that the defendants were entitled to judgment as a matter of law. *Id.* at 775 (“The jury was left to guess, and plaintiffs’ claims fail as a result.”).
- 94 See *Andrews* Appeal Br. at 37.
- 95 See *id.* at 37-38.
- 96 *Grayson*, 849 F. Supp. at 791; see also *Sidari v. Orleans Cty.*, 174 F.R.D. 275, 282 (W.D.N.Y. 1996) (consolidation denied where the “lumping together of such claims, which amounts to guilt by association, would unfairly prejudice the defendant”).
- 97 See Horowitz & Bordens, *The Effects of Outlier Presence*, *supra* note 70, at 212; see also Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. of Legal Stud. 365, 373 (2006) (explaining that jurors in consolidated trials base their decisions on more information than juries in individual trials, and that if additional information makes a defendant appear “callous,” jurors can become more sympathetic to plaintiffs).
- 98 See Kenneth S. Bordens & Irwin A. Horowitz, *Information Processing in Joined and Severed Trials*, J. of Applied Soc. Psychol. 351 (1983) (experimental study concluding that when joined trials are composed of similar categories of offenses, guilty verdicts increase and jurors tend to confuse evidence, and that more anti-defendant cognitions were found when cases were similar); Edith Greene & Elizabeth F. Loftus, *When Crimes Are Joined at Trial*, 9 L. & Hum. Behav. 193 (1985) (experimental study concluding that a defendant was more likely to be convicted of a crime if two charges were joined in one trial and that the defendant was perceived in a more negative way when standing trial on two offenses).
- 99 See Amanda Bronstad, *Consolidated Trials Drawing Fire From Defense as Unfair*, Nat’l L.J. (July 25, 2017) (counsel stating that “One of the arguments the defendants like to make in these cases is that this is the one rare exception. But when you’ve got five or 10, and you have to find some bizarre reason for each one, it belies credibility with the jury”).
- 100 See Sarah Tanford & Steven Penrod, *Social Inference Processes in Juror Judgments of Multiple-Offense Trials*, 47 J. of Personality & Soc. Psychol. 749, 761 (1984) (experimental study finding that “joining multiple charges increases the proportion of individual guilty verdicts” and that “[a] very strong set of judges’ instructions designed to eliminate joinder effects had no influence on verdict judgments”); Greene & Loftus, *supra* note 98 (finding defendants were more likely to be convicted of either crime if two charges were joined in one trial and that instructions to subjects to judge the cases against the defendant separately had no effect).
- 101 See Dale W. Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744, 753-54 (1959) (concluding from experimental study that objections and instruction to disregard something can have the unintended effect of “sensitiz[ing]” jurors to the very fact that they were instructed to disregard); Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 L. & Hum. Behav. 477 (1989); Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 L. & Hum. Behav. 407 (1995) (experimental study concluding that if jurors subjectively decide that it is not necessarily unfair to consider evidence they have been instructed by the court to disregard, they will actually place more emphasis on it, thus producing a backfire effect).
- 102 See *Bexis*, *supra* note 22.

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U.S. CHAMBER

Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com