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Institute for Legal Reform

MDL Proceedings

Eliminating the Chaff

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Executive Summary

Multidistrict proceedings are supposed to enhance the fair and efficient litigation and resolution of large controversies.¹ In theory, they concentrate multiple lawsuits involving the same subject before one court, and the court helps the parties streamline the litigation by, for example, entering pretrial orders that apply in every case, rather than having many different courts address the same issues over and over again.

Through the use of bellwether trials, these courts can help the parties obtain the information they need about the strength of the claims pool and thereby facilitate a more efficient resolution of all claims.

Unfortunately, multidistrict litigation (MDL) practice is not living up to the theory: MDL proceedings are morphing from a procedural device that is intended to create efficiencies in civil litigation (particularly pretrial discovery) into lawsuit magnets.² This is, in large part, because plaintiffs' counsel have increasingly been able to turn the chief virtue of MDL—the efficiencies

gained from resolving pretrial matters in the aggregate—into a significant vice. Through aggressive advertising and highly sophisticated client recruitment strategies, plaintiffs' counsel have been able to use the existence of multidistrict proceedings to attract claims of dubious merit. And because multidistrict proceedings by design have tended to prioritize global issues over individual ones, plaintiffs' counsel have successfully warehoused meritless claims and shielded them from judicial scrutiny in a way they never could if all the cases were being tried individually.

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This cynical strategy has produced one windfall after another for plaintiffs' counsel. The filing of bogus claims inflates the size of multidistrict proceedings, which in turn lends baseless credence to allegations that, in reality, might pertain to only a small minority of all the claims filed. Plaintiffs' counsel then tout the mass of claims as evidence that the presiding court could never hope to resolve them all, in an effort to spur the court into browbeating defendants to settle. Too often, these efforts succeed, producing settlements that include no robust mechanisms to ensure that baseless claims are disqualified from compensation. In the name of "efficiency," defendants end up writing a bigger check than they would have if multidistrict proceedings had never been established, paying people to whom they would never have been found liable otherwise.

This result is not inevitable. Courts overseeing MDL proceedings can curb the incentives to amass bogus claims by adopting commonsense case management procedures and other measures that would streamline MDL and weed out frivolous claims in the early stages. Such measures include the expanded use of plaintiff fact sheets and *Lone Pine* orders that would require plaintiffs at the outset of litigation to satisfy a minimum evidentiary threshold before the parties proceed to expensive and burdensome discovery. In addition, MDL judges should require a percentage of randomly selected cases to undergo advanced discovery and dispositive *Daubert* and summary judgment motions. Those cases that do not survive the dispositive motions could give rise to orders to show

cause as to why similar cases brought by the same plaintiffs' counsel should not be dismissed. And those cases that withstand the dispositive pretrial motions would proceed to trial as bellwether cases, the outcome of which would have significant consequences for the broader MDL proceeding by educating the parties on the strengths and weaknesses of the claims at issue and informing settlement discussions. These requirements would keep the courthouse door open to mass tort claims that have some footing in fact, while at the same time restoring the efficiency that MDL proceedings are designed to promote and filtering out frivolous claims.

Part I of this paper addresses the aggressive and sometimes unscrupulous solicitation of clients by lawyers and outside groups—a practice that has increased the number of dubious lawsuit filings in MDL proceedings. Part II focuses on the frivolous (and sometimes fraudulent) nature of many lawsuits filed in MDL proceedings—a phenomenon caused, in large part, by the failure of plaintiffs' counsel to adequately vet the cases they bring and the reluctance of some MDL judges to examine individual claims. Part III centers on the settlement pressure inherent in MDL proceedings, which has forced defendants to enter into settlements that do not account for the merits of individual claims. And Part IV lays out various case management and other meaningful proposals under which plaintiffs' counsel would be barred from parking meritless lawsuits in MDL proceedings that waste the parties' and the courts' time and resources.

Aggressive Client Recruitment Fuels Meritless Lawsuits

The problem of meritless and even frivolous claims in multidistrict litigation begins with the tactics used to recruit those individuals asserting the claims. Over the years, plaintiffs' attorneys have fashioned a variety of means to attract potential clients, none of which include significant filtering mechanisms to remove or deter meritless claims.

The most notorious of these tools have been the massive screening programs undertaken in silica and welding fume litigations, both of which resulted in the mass filing of meritless and even fraudulent claims, and forced defendants to spend enormous sums of money defending themselves against groundless allegations. In addition, lawyers are spending nearly \$850 million per year advertising for clients in large-scale mass tort litigation.³ These efforts likewise contribute to the large numbers of meritless lawsuits that balloon MDL proceedings.⁴

Mass medical screenings are generally organized by a consortium of plaintiffs' lawyers at hotels and union halls, and have been used to generate massive numbers of plaintiffs in the context of silicosis, asbestos, fen-phen, and welding fume litigation.⁵ Working off a list of supposed diagnostic criteria, well-compensated doctors often diagnose hundreds of

individuals a day with diseases they never knew they had, often in a matter of minutes. In the silica litigation, for example, 99% of the more than 9,000 plaintiffs involved in the litigation were diagnosed by the same nine doctors,⁶ and one of those doctors performed 1,239 diagnostic evaluations in 72 hours—an average of less than four minutes per evaluation.⁷ Needless to say, such medical screenings differ in several significant respects from the traditional medical model. Screenings “have no intended health benefit; they are conducted solely to obtain mass numbers of litigants and to generate mostly bogus medical records to support the claims.”⁸ In other circumstances in which someone believes him- or herself to have been injured by a product, the normal course of action would be to visit a doctor, determine what's wrong, and then, if something is indeed wrong, retain a lawyer. Medical screenings, by contrast, “discover” injuries in people who never saw any reason to

visit a doctor until they were encouraged to do so by a billboard or advertisement. Critically, with the prospect of a potential payout down the road, a would-be plaintiff who participates in screenings has a strong incentive to invent or imagine the symptoms that the doctors are looking for. And the physicians hired by the lawyers also have strong incentives to find that many people have been injured.

The reason some lawyers favor screenings over the traditional medical process is clear: they drive up the number of claimants in the MDL pool—without real regard to whether the claims have any merit.⁹ Indeed, one academic has “estimate[d] that approximately 1.5 million potential litigants have participated in these litigation screenings; that a comparative handful of litigation doctors have found that approximately 1 million of those screened had the requisite condition to confer a right of compensation; [and] that approximately 900,000 of these claims were based on medical reports that were ... ‘manufactured for money[.]’”¹⁰

At the extremes, screenings can give rise to entire litigations that simply have no basis in reality. The silica litigation is one such example: That MDL proceeding encompassed thousands of lawsuits alleging that plaintiffs had been harmed by breathing in crystalline silica, a substance

similar to sand, but smaller. “Because of silica’s widespread use, some plaintiffs’ lawyers viewed it as the source of the next big mass tort” after asbestos.¹¹ But in the end, Judge Janis Graham Jack, who presided over the silica MDL proceeding, recommended that all but one of the 10,000 claims on the MDL docket should be dismissed on remand, because the diagnoses were fraudulently prepared.¹²

In a harshly written ruling finding litigation screening fraud, Judge Jack resolved that the “‘epidemic’ of some 10,000 cases of silicosis ‘is largely the result of misdiagnosis’” and that “the failure of the challenged doctors to observe the same standards for a ‘legal diagnosis’ as they do for a ‘medical diagnosis’ renders their diagnoses ... inadmissible[.]”¹³ Judge Jack further declared that “it is apparent that truth and justice had very little to do with these diagnoses—otherwise more effort would have been devoted to ensuring they were accurate. Instead, these diagnoses were . . . manufactured for money.”¹⁴ As the court recognized, “the use of litigation screenings as an ‘entrepreneurial’ means of claim generation is a strategy that seeks ‘to inflate the number of Plaintiffs and claims in order to overwhelm the Defendants and the judicial system. This is apparently done in hopes of extracting mass nuisance-value settlements because [they] are financially incapable of examining the

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merits of each individual claim in the usual manner.”¹⁵ Judge Jack’s ruling prompted a congressional investigation into the dubious methods employed by lawyers and doctors to screen plaintiffs for silicosis.¹⁶ Unfortunately, the type of scrutiny placed on claims in the silica litigation is the exception—not the norm. “The abuses in MDL 1553 were brought to light as a result of a perfect storm of events. If not for the strategy adopted by defense counsel and Judge Jack’s leadership, ‘litigation based on abusive diagnostic practices might have continued.’”¹⁷

The welding fume litigation further demonstrates how questionable recruitment practices have led to the filing of fraudulent claims in mass tort litigation. A group of plaintiffs’ lawyers got together in the early 2000s to sponsor medico-legal screenings of welders around the country. These attorneys ran ads on billboards, the Internet, and late-night TV, telling welders that they could be eligible for

money if they had ever experienced any of a list of generic symptoms, including headaches, insomnia, erectile dysfunction, and tremors.¹⁸ The attorneys teamed up with a few neurologists, whom they paid up to \$10,000 a day, to set up shop near welding worksites around the country to diagnose welders with an extraordinarily rare disease called manganism. By the time this screening process had wound its way through the country (focusing on the South), the attorneys had managed to drum up about 10,000 welders to file lawsuits in courts around the United States.¹⁹ According to responses on forms that all federal court plaintiffs were required to complete, approximately 90% of all the plaintiffs claiming a diagnosis of manganism were diagnosed by a single neurologist after examinations that took as little as five minutes.²⁰ And the overwhelming majority of those diagnosed with manganism never sought follow-up medical attention for their supposed illness.²¹

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As the litigation progressed, plaintiffs selected for trial several cases that came out of the screening process in which the individuals turned out to have lied in discovery or faked their symptoms.²² In one instance, surveillance revealed that a man who claimed to be completely disabled could in fact carry groceries, walk unassisted, and rake leaves.²³ In August 2006, after several such cases were dismissed, the federal court overseeing the MDL proceeding issued a case management order establishing a “trial certification” process to be used in identifying MDL trial candidates going forward.²⁴ The order required plaintiffs’ counsel to conduct a thorough review of their clients’ medical records in certain select cases. Following that review, plaintiffs’ counsel in each selected case were obligated to “(again) interview [their] client[s] carefully to obtain information bearing on whether pursuit of the case to trial might be unwarranted[.]”²⁵ The court further instructed that each interview “must include an explanation to the client that making false statements under oath can carry substantial personal penalties[.]”²⁶ Once that review and interview process was complete, plaintiffs had to either “certify” that they intended to proceed to trial in each case, dismiss the case, or move to withdraw as counsel.²⁷

The August 2006 order made clear that this trial-certification process was intended to remedy the problem of plaintiffs dismissing cases “after all parties spent substantial amounts of time and money preparing to litigate” them.²⁸ These requirements led to the dismissal of thousands of claims, but this success came at a tremendous cost. The mass dismissals did not occur until years into the litigation, after defendants had spent vast sums of money defending

litigation that, from the outset, consisted almost entirely of frivolous claims.

Another reason MDL proceedings are ballooning out of control is that a “new crop of companies called lead generators, which refer clients to plaintiffs['] law firms, are fueling an increase in spending on advertising.”²⁹ These companies engage in aggressive marketing and sell the names of potential claimants to plaintiffs’ counsel.³⁰ “They provide the pipeline that connects claimants to lawyers—or vice versa.”³¹ Lead generator companies are large businesses, selling client referrals to lawyers for between \$500 and \$10,000 apiece.³² “Unlike attorneys, lead generation firms don’t have the same ethical constraints in targeting potential clients,” which is perhaps why their tactics have recently attracted closer scrutiny.³³ The aggressive advertisements by these companies “are commonplace on television, often using trumped-up news headlines and listing a host of alarming side effects from using a product.”³⁴ Indeed, one 2014 article noted that there have been approximately 67,000 personal injury or mass tort television spots broadcast every year.³⁵ In addition to television marketing, lead generation companies also market through emails, text messages, and websites.³⁶ And they don’t stop there. Lead generators go so far as to gather the names and personal data that consumers provide to websites and then directly contact them in the hopes that they will agree to commence litigation, even if they do not feel that they were aggrieved by the defendant in any way.³⁷

To take one example from 2011, Missouri resident Linda Burke received a phone call from a woman named “Sarah.”³⁸ “Burke didn’t know Sarah, but that didn’t stop the caller from asking some exceptionally

personal questions,” including whether “anyone in the Burke household died after taking a diabetes drug called Avandia.”³⁹ At the time of the call, GlaxoSmithKline was facing an avalanche of lawsuits alleging that the drug caused an increased risk of heart attack.⁴⁰ “Burke and scores of other Missouri residents wanted no part of the Avandia litigation, court records show,” but that didn’t stop these lead-generation companies from aggressively promoting litigation.⁴¹

In sum, plaintiffs’ lawyers and lead generation companies have joined forces in recent years to capitalize on the establishment of MDL proceedings. From fraudulent medical screening to unscrupulous solicitation of potential claimants, these tactics have led to an increased number of lawsuits filed in MDL proceedings—the overwhelming majority of which often lack any merit.

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MDL Proceedings Are Riddled With Inadequately Vetted Theories Or Cases

Medical screenings and lead generation are particularly problematic because plaintiffs' attorneys have very little incentive to examine the merits of the claims they generate, at least not at the outset of litigation. After all, the more cases an attorney files, the more likely he or she is to get a significant payout in the event of settlement.⁴² Further, "[b]ecause highly coveted leadership positions are appointed, in part, based upon the size of counsel's inventory, plaintiffs' counsel seeking these positions have an incentive to build as large an inventory as possible, which may lead a handful of bad actors to willfully fail to investigate."⁴³ Moreover, there is essentially no "gatekeeping" hurdle that a case must pass in order to join a mass of cases pending in multidistrict proceedings.

Plaintiffs' lawyers do little work on the vast majority of their cases and are rarely called upon to demonstrate that such cases have any merit. As a result, defendants are forced to "spend gargantuan sums to defend and, in some cases, settle" litigation that includes a significant number of meritless lawsuits.⁴⁴ Indeed, as the silica litigation makes clear, entire litigations can get off the ground even though no substantial evidence exists to support the plaintiffs' central scientific theory.

Despite "the uncovering of fraudulent diagnostic procedures in [the silica MDL]," "there are no guarantees that similar practices would be uncovered in the future."⁴⁵ As a RAND Corporation report explains, "[p]laintiffs can attempt to overwhelm defendants with claims to force defendants to settle with little attention paid to the merits of the claims. It can be extremely costly for defendants to investigate the merits of a substantial proportion of the claims, and some may conclude that it is cheaper, at least in the

short run, to settle.”⁴⁶ Indeed, in addition to the silica and welding fume MDLs already detailed above, there are many other examples of MDL proceedings in which entire litigations had no basis in science or many—if not all—of the lawsuits were not properly investigated before filing and ultimately turned out to be illegitimate.

Litigations involving the drug Bendectin, silicone gel breast implants, and the drug Digitek are prime examples of MDL proceedings in which the entire litigation was severely flawed. The dubious scientific theories underpinning these litigations were ultimately uncovered, but not until after years of expensive litigation, burdensome discovery, and, in one case, bankruptcy. Had plaintiffs’ attorneys more carefully scrutinized the claims at issue in these MDL proceedings at the outset, such litigations might never have gotten off the ground.

Bendectin Litigation

In 1983, Bendectin, a drug used to treat morning sickness in pregnant women, was taken off the market by its manufacturer, Merrell Dow, after several suits were filed alleging that the drug caused birth defects

in babies whose mothers had used the drug. Plaintiffs’ lawyers brought suit despite a finding by a Federal Drug Administration (FDA) panel of experts that there was no evidence that Bendectin caused birth defects. “With a few animal studies, some adverse event reports, and aggressive marketing [the lawyers] were able to generate approximately 1,700 clients. They were not, however, able to recover damages for any of their ‘inventory.’”⁴⁷ Although Merrell Dow ultimately “‘won pretty much everything,’ it ‘probably spent upward of \$100 million for its vindication’” in debunking the junk science advanced in the Bendectin litigation.⁴⁸

Silicone Gel Breast Implant Litigation

Lawsuits “filed against breast implant manufacturers are one of the most well-known examples of frivolous litigation. Despite the fact that there was no scientific evidence in support of the claim that silicone breast implants increased an individual’s risk for developing cancer, suits based on these claims ended up driving Dow Corning, a Fortune 500 business, into bankruptcy.”⁴⁹ The genesis of the breast

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implant MDL was the FDA's decision to ban silicone gel implants for cosmetic purposes, which generated a media frenzy and prompted a slew of lawsuits against Dow Corning and other manufacturers.⁵⁰ The Judicial Panel on Multidistrict Litigation established an MDL proceeding, resulting in the consolidation of over 21,000 cases in the Northern District of Alabama.⁵¹ The manufacturers ultimately settled all the cases for more than \$4 billion, but the settlement collapsed when an unexpectedly large number of women participated in the settlement.⁵²

"At the time of these events, plaintiffs lacked credible scientific support for their medical theories," but "Dow Corning sought the settlement to avoid the potentially crippling liability of class and individual litigation."⁵³ Notably, the parties produced 10 million pages of documents, and there were approximately 225 depositions in the litigation, representing significant costs for the parties.⁵⁴ "[T]he [breast implant multidistrict litigation] provides a good illustration of how frivolous lawsuits...can lead to large settlements and of the need to have a review of the merits at an early enough stage to detect cases that lack sufficient foundation to go forward."⁵⁵

Digitek Products Liability Litigation

In this litigation, plaintiffs alleged personal injuries and death after using allegedly oversized heart drug pills that contained twice the appropriate amount of digoxin, the drug's active ingredient.⁵⁶ The parties proceeded to engage in "expensive discovery and [the defendants entered into] nuisance-value settlements with most of the plaintiffs," even though there was no evidence that even a single oversized digoxin tablet had reached the market.⁵⁷ After plaintiffs in two cases opted out of the global settlement, defendants moved for summary judgment.⁵⁸ The MDL judge found that testimony from experts in the broader MDL did not support the individual plaintiffs' claims and also agreed to exclude all experts in the two remaining individual cases, finding that they lacked relevant experience.⁵⁹ The court concluded that there was a "missing link" pervading all of the lawsuits in the MDL—namely, the lack of evidence regarding defect and causation.⁶⁰ In so doing, the court emphasized the "very perplexing fact" that some plaintiffs had large supplies of unused Digitek tablets that they refused to test, as well as the fact that an investigation of pills at Digitek's manufacturing plant uncovered only 20 total defective pills out of millions of tablets—about 0.0004% of a batch.⁶¹

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The cases summarized above are examples of MDL proceedings in which the overall litigation was based on questionable science but in which that fact was not uncovered until years of needless and expensive litigation. There is also clear evidence that many individual claims in MDL proceedings are not properly investigated before filing—even when the issues of junk science are not at play. These are claims “that, when investigated, reveal that the individual has no cause of action—for example, the plaintiff never took the drug that is the subject of the MDL, which she is alleging caused her injury.”⁶² The presence of these meritless lawsuits in MDL proceedings is attributable to plaintiffs’ counsel, who “do not exercise diligence on the front end to catch those individuals [who] are seeking to file false claims.”⁶³ This lack of diligence should come as no surprise. As one professor succinctly explained, plaintiffs’ lawyers have an incentive to file claims without investigating their merit because “[t]he lawyer knows that it is costly to determine whether any given victim is fraudulent. He knows that it would not be rational, given the cost of checking, to examine every victim in the class to determine validity.”⁶⁴

False claims comprised a large segment of lawsuits in the multidistrict litigation involving the prescription painkiller Vioxx, which plaintiffs alleged caused heart attacks and strokes. After losing a verdict in the first case to go to trial, Merck, the manufacturer, won most of the remaining jury trials, prompting the parties to negotiate a global resolution of the personal-injury claims.⁶⁵ The parties reached an unprecedented \$4.85 billion settlement that required each individual or estate seeking payment to satisfy three basic “gate” requirements: (1) that he or she had a qualifying injury—i.e., a heart attack, an ischemic stroke, or sudden cardiac death; (2) that he or she used a minimum amount of Vioxx; and (3) that he or she took Vioxx within a proximate time of the alleged medical event.⁶⁶ However, 9,888, or 32.4%, of the heart attack claimants were unable to satisfy these rudimentary requirements, while 5,399, or 31.2%, of the ischemic stroke claimants failed to provide documentation of these requirements.⁶⁷ All told, 15,287 plaintiffs could not demonstrate the basic facts necessary to recover: that they had an injury; that they took at least 30 Vioxx pills; and/or that they took the drug within close proximity to the date of injury.⁶⁸

The fact that nearly one-third of claimants failed to satisfy these most basic requirements strongly suggests that there were many unfounded claims in the Vioxx MDL proceeding. These claims were most likely not properly vetted before they were filed. And because there were no procedures in place requiring plaintiffs to come forward with basic medical evidence

of injury and causation until years into the litigation, these groundless claims were able to languish in the MDL proceeding for years, while the parties produced over 54 million pages in discovery and conducted over 1,800 depositions.⁶⁹ Moreover, the presence of these “spurious” claims likely inflated the value of the global settlement.⁷⁰

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Excessive Focus on Settlement Prospects Often Distorts the Value of Plaintiffs' Claims

Some commentators have expressed concern that plaintiffs have succeeded in deflecting early attention from the merits of pending claims in MDL proceedings by emphasizing settlement and procedural matters, particularly defense discovery.⁷¹

As one commentator has noted, plaintiffs' attorneys have successfully leveraged the large mass of claims pending in MDL proceedings to persuade some presiding courts that the claims must have merit and therefore that the courts' role is to "get ... the parties to a claims process—a settlement—as quickly as possible."⁷² This settlement pressure "exists independently of the value of the claims at issue."⁷³ Because the mere mass of thousands of cases pending on a court's docket may itself seem imposing, plaintiffs' counsel have had success in persuading some MDL

courts that sorting out the meritless claims would prove to be an impossible task.⁷⁴

The press to settle is enhanced by institutional pressures. Settlement in the MDL context usually offers the transferee judge an opportunity to resolve multiple cases at the same time.⁷⁵ Any cases that are not settled or resolved through pretrial motion practice will have to be remanded to their transferor courts for trial. "The potential remand creates a further incentive to be perceived as the hero who resolved the disputes rather than the ineffectual colleague whose inability to achieve a

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settlement left her fellow trial judges with the task of trying each case individually.”⁷⁶ In addition, transferee judges often “campaign” for MDL assignments because they involve interesting facts, media scrutiny, and highly talented attorneys.⁷⁷ The Judicial Panel on Multidistrict Litigation generally views quick settlements of complex cases very favorably and tends to reward judges who shepherd such agreements to fruition with new “plum” MDL assignments.⁷⁸

As a result of these pressures, it is hardly surprising that settlement has taken the front seat in a number of MDL litigations.⁷⁹ Paradoxically, however, pressuring defendants to settle without digging into the merits of a case is at odds with the goal of obtaining final resolution of mass tort litigation, because many defendants will not seriously consider settlement until meritless claims are weeded out.⁸⁰ Thus, it is critical for MDL courts to find efficient and effective ways to dig into the merits of the litigation as a whole and also to scrutinize individual cases and determine their legitimacy.

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MDL Courts Should Employ Best Practices to Streamline Multidistrict Litigation and Weed Out Frivolous Lawsuits

“An MDL proceeding should not be viewed as a place to ‘warehouse’ cases indefinitely.”⁸¹ Instead, MDL courts can promote fairer and faster resolutions of mass tort proceedings by adopting commonsense best practices that streamline the litigation and weed out unfounded claims. These measures include notices of diagnosis, plaintiff fact sheets, medical authorizations, and *Lone Pine* orders, all of which should be implemented at the beginning of an MDL proceeding and strictly enforced by the MDL judge. Such tools would impose a minimal but meaningful price of admission for plaintiffs’ lawyers seeking to reap the ultimate benefit of participating in an MDL proceeding.

In addition to fact sheets, medical authorizations, and *Lone Pine* orders, MDL courts should consider phased or sequenced discovery, as well as random selection of cases for dispositive pretrial briefing, including *Daubert* motions and motions for summary judgment. These measures would ensure that the individual claims at issue in an MDL proceeding are carefully considered before the parties rush to settlement or spend large sums of money trying cases.

Notices of Diagnosis

The most logical starting point for sensible MDL case management is an “up front” requirement of notices of diagnosis—i.e., documentation by a physician that he or she has seen the plaintiff and has determined that the alleged injury appears to be related to the cause alleged in the complaint. In the welding fume MDL proceeding, for example, Judge Kathleen O’Malley implemented a simple

mechanism for identifying and excluding weak cases by requiring plaintiffs to submit notices of diagnosis. Judge O'Malley entered a case management order requiring each plaintiff to provide a Notice of Diagnosis certifying that a licensed medical doctor had examined the plaintiff and diagnosed a manganese-induced neurological disorder. This requirement led to the dismissal of about 25% of the pending claims.⁸² Imposing such a requirement at the start of an MDL proceeding would provide a much better understanding to the court and the parties of the actual merit and size of the litigation.

More often than not, “plaintiffs’ attorneys do not provide a physician’s diagnosis until discovery, and, if the case settles, a diagnosis may never be provided.”⁸³ Further, “[d]efense efforts to obtain diagnostic information can be time consuming and costly.”⁸⁴ Requiring plaintiffs to disclose their diagnosis “up front,” along with the identity of the diagnosing physician and relevant medical records, would “help ensure adherence to defensible diagnostic practices and allow defendants to more rapidly evaluate [individual] claims.”⁸⁵ Disclosure of the diagnosing physician’s identity at the outset of litigation is also important because it “would make that person subject to

deposition and prevent plaintiffs from broadly shielding all of their experts from deposition ‘by arguing that [a particular] expert is a consulting expert and would not testify in a particular case.’”⁸⁶ Notably, the requirement to submit a notice of diagnosis would not be burdensome for plaintiffs, who presumably have some kind of medical diagnosis before bringing suit. Indeed, obtaining some type of medical diagnosis before commencing litigation is arguably already required by Rule 11, which requires litigants to certify that their claims are not frivolous.⁸⁷ Further, plaintiffs should expect to produce this information by putting their health at issue (as they clearly would have to do in an individual lawsuit outside the MDL context).

Plaintiff Fact Sheets and Medical and Employment Records

In addition to notices of diagnosis, MDL judges should require plaintiff fact sheets and (in the case of personal injury or employment cases) the collection of medical and employment records. Fact sheets are “court-approved standardized forms that seek basic information about plaintiffs’ claims—for example, *when* and *why* the plaintiff used the product at issue and *what* injury did the plaintiff sustain as a result of using the product.”⁸⁸

“Notably, the requirement to submit a notice of diagnosis would not be burdensome for plaintiffs, who presumably have some kind of medical diagnosis before bringing suit. Indeed, obtaining some type of medical diagnosis before commencing litigation is arguably already required by Rule 11, which requires litigants to certify that their claims are not frivolous.”

Standardized fact sheets should not be a controversial matter; they spare defendants the cost of adapting hundreds—or perhaps thousands—of interrogatories to individual plaintiffs while affording plaintiffs’ counsel an easy and inexpensive opportunity to satisfy initial discovery obligations.⁸⁹ These sheets “can have a deterrent impact that counterbalances the structural incentives toward the inclusion of weaker claims by some [plaintiffs’] counsel.”⁹⁰

Plaintiff fact sheets have become standard in multidistrict litigation,⁹¹ but fact sheets are useful only if they are completed accurately, honestly, and on time. To that end, MDL courts should enforce time limitations for submitting fact sheets and mandate that they be completed accurately.⁹² “[T]he transferee judge [should] clearly specify the sanctions that will be imposed should counsel submit erroneous or incomplete sheets.”⁹³ After all, “[a]bsent the imposition of specific and substantial sanctions from the court, the structure of the MDL does not itself impose a significant check upon the veracity of fact sheets.”⁹⁴

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In addition to requiring fact sheets, MDL courts should also grant defendants access to plaintiffs’ medical and employment histories. Authorizations for collection of medical and employment records can shed light on individual mass tort claims early in

the litigation. Defendants can then use this information to verify plaintiffs’ fact sheet responses and investigate causation issues and contributory negligence defenses.⁹⁵

In the diet drugs MDL, for example, the court not only required the completion of plaintiff fact sheets but also required plaintiffs to provide a “list of medical providers and authorizations.”⁹⁶ The list required the disclosure of the plaintiff’s current family physician; his or her primary care physicians for the past 20 years; each cardiologist, pulmonary physician, and/or heart, lung or chest surgeon who had ever treated the plaintiff; and, *inter alia*, each hospital where he or she received inpatient treatment during the past 10 years.⁹⁷ Each plaintiff had to sign an authorization allowing his or her doctors “to furnish copies of all medical records, reports, radiographic films, prescription records, echocardiographic recordings, written statements, employment records, wage records, disability records, medical bills, and other documents in [their] possession concerning” the plaintiff.⁹⁸ While these types of authorizations are becoming increasingly common in MDL proceedings, MDL judges should be more aggressive in sanctioning plaintiffs for failure to comply with these most basic disclosure requirements, including dismissing cases where plaintiffs drag their feet.⁹⁹

Lone Pine Orders

Transferee judges should also consider the entry of *Lone Pine* orders requiring all plaintiffs to submit an affidavit from an independent physician to support their theory of injury and causation.¹⁰⁰ “The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims and streamline litigation in complex cases

involving numerous claimants[.]”¹⁰¹ Such an order “can drastically alter the landscape of the litigation by forcing dismissal of numerous fraudulent or unsupported claims.”¹⁰² *Lone Pine* orders are increasingly being employed in MDL proceedings to ensure a good-faith basis for plaintiffs’ claims before requiring the parties to engage in more complex, cumbersome discovery.¹⁰³

While these orders undoubtedly have the potential to weed out baseless claims, MDL courts should consider using them earlier in litigation to maximize their value.¹⁰⁴ For example, the MDL court in the Vioxx litigation entered a *Lone Pine* order after there had been six federal bellwether trials and while the parties were negotiating the global settlement.¹⁰⁵ The *Lone Pine* order applied to nonsettling plaintiffs and succeeded in trimming down the remaining mass of cases after the settlement was complete.¹⁰⁶ Nevertheless, the fact that nearly a third of claimants enrolled in the master settlement agreement could not satisfy the basic “gate” requirements demonstrates that spurious claims permeated the Vioxx MDL proceeding at the time of settlement.¹⁰⁷ These meritless cases probably could have been culled out prior to settlement by earlier use of *Lone Pine* orders.

“ Lone Pine orders are increasingly being employed in MDL proceedings to ensure a good-faith basis for plaintiffs’ claims before requiring the parties to engage in more complex, cumbersome discovery. ”

“ Lone Pine requirements might have culled out meritless cases sooner and potentially eliminated the waste resulting from working cases up for trial only to have plaintiffs’ counsel dismiss them. ”

Similarly, in the Fosamax MDL proceeding in the Southern District of New York, the court issued a *Lone Pine* order two and a half years after Merck first moved for such an order. The court concluded that experience had shown that the time for the order had come, noting that “more than 50% of the cases set for trial ha[d] been dismissed, and some 31% of cases that ha[d] been selected for discovery ha[d] been dismissed.”¹⁰⁸ According to the court, “[p]laintiffs’ habit of dismissing cases after both parties have expended time and money on case-specific discovery demonstrates that this MDL is ripe for a *Lone Pine* order.”¹⁰⁹ “In short, [the court] had become skeptical about the bona fides of plaintiffs’ claims and the candor of the plaintiff’s steering committee.”¹¹⁰ Based on counsel’s pattern of behavior, the MDL court had “reason to believe that spurious or meritless cases [were] lurking in the some 1,000 cases on the MDL docket.”¹¹¹ Here, too, earlier implementation of *Lone Pine* requirements might have culled out meritless cases sooner and potentially

eliminated the waste resulting from working cases up for trial only to have plaintiffs' counsel dismiss them.

The lesson to be gleaned from prior MDL proceedings is that *Lone Pine* orders should not be viewed as a sort of sanction for bad or wasteful litigation conduct. The issue is not necessarily counsel misconduct or candor, but rather the lack of incentive on the part of plaintiffs' lawyers in mass tort litigation to investigate each one of the cases in their inventories on the front end. MDL courts should recognize this disincentive as inherent in the structure of multidistrict litigation and embrace *Lone Pine* orders early as one means of mitigating the problems caused by a systemic issue.

“ MDL judges possess the authority to issue precovery *Lone Pine* orders and should exercise that authority at the outset of litigation to weed out meritless claims before the parties proceed to expensive and time-consuming discovery.”

Although some courts have concluded that *Lone Pine* and other similar case management orders constitute a “premature” summary-judgment type requirement prior to the close of discovery,¹¹² the Fifth Circuit has recognized that these orders are an effective tool for dealing with litigation that typically accompanies a mass tort.¹¹³ Indeed, that

court explained that a *Lone Pine* order is merely an extension of the requirements of Rule 11—i.e., that the basic allegations underlying any claim must be investigated and verified before the suit is ever filed.¹¹⁴ In short, MDL judges possess the authority to issue precovery *Lone Pine* orders and should exercise that authority at the outset of litigation to weed out meritless claims before the parties proceed to expensive and time-consuming discovery.

In sum, expanding the use of notices of diagnosis, fact sheets, and *Lone Pine* orders at the outset of litigation—and imposing stringent sanctions for the failure to comply with such disclosure requirements—would go a long way toward weeding out baseless claims and conserving the parties' and the courts' time and money.

Advanced Discovery, Show-Cause Orders, and Bellwether Trials

ADVANCED DISCOVERY

Another tool for streamlining multidistrict litigation is requiring a full case work-up for trial with respect to a representative sample of randomly selected cases. A certain percentage—e.g., 2% or 3%—of all cases in the MDL proceeding should be randomly selected for intensive discovery, the results of which would be used for dispositive pretrial *Daubert* and summary judgment motions. MDL judges have the authority to rule on dispositive pretrial motions, and as a Federal Judicial Center paper makes clear, such rulings can serve as a “yardstick” for rulings in other cases on remand.¹¹⁵ Indeed, MDL courts can use show-cause orders to help clear their dockets of frivolous claims even before remand, as a number of courts have done to great effect in multidistrict litigation.

“ Indeed, MDL courts can use show-cause orders to help clear their dockets of frivolous claims even before remand, as a number of courts have done to great effect in multidistrict litigation. ”

Daubert rulings offer one means of shutting down large numbers of cases—or even an entire litigation—where the science is tentative or lacking.¹¹⁶ As previously discussed, in the silica MDL, which encompassed over 10,000 plaintiffs, Judge Jack determined that the substantial number of diagnoses in the sprawling litigation “def[ie]d medical knowledge and logic,”¹¹⁷ and found the diagnoses of the diagnosing physicians to be “fatally unreliable.”¹¹⁸ While the court ultimately concluded that it had subject matter jurisdiction over only one of the cases, the court issued extensive findings regarding the admissibility of the challenged physicians’ testimony in the broader litigation.¹¹⁹ “Had the court found that it had subject-matter jurisdiction with respect to the other cases before it, exclusion of the plaintiffs’ doctors—as would have been likely, given the court’s view of the case—would have sounded the death knell for the lawsuits.”¹²⁰ Indeed, Judge Jack’s scathing findings regarding the dubious nature of the diagnoses in the MDL proceeding clearly “affected the viability of the plaintiffs’ actions,” as, in a matter of months, more than half of the lawsuits remanded were voluntarily dismissed by the plaintiffs’ firms that had filed them.¹²¹

Like *Daubert* rulings, summary judgment decisions are another important tool for effective case management in an MDL proceeding. In addition to weeding out unmeritorious cases and entire causes of action, summary judgment decisions can excise certain issues from the broader MDL proceeding. Specifically, the rule governing summary judgment states that “[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.”¹²² “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.”¹²³ For example, in the MDL proceeding stemming from an airplane crash in Taiwan, the MDL court determined that the Warsaw Convention applied to most of the cases asserted against Singapore Airlines.¹²⁴ The MDL judge held that all punitive damages claims against Singapore Airlines failed as a matter of law under the Warsaw Convention.¹²⁵ “By eliminating this facet of the claim, the federal court effectively whittled down the complex action piece by piece into a more manageable form.”¹²⁶

SHOW-CAUSE ORDERS

In the event the defendant prevails on an early *Daubert* or dispositive motion, the MDL judge should consider issuing an order to show cause why other cases presenting similar issues should not be dismissed. The order would afford the plaintiffs an opportunity to come forward with evidence that their cases differ in some material respect from the dismissed case, while simultaneously paving the way to expeditious resolution of their cases. The usefulness of dispositive show-cause orders in MDL proceedings was

recently on full display in the Fosamax MDL proceeding. The plaintiffs in that litigation asserted a variety of warning-based claims arising out of allegations that Fosamax causes atypical femur fractures.¹²⁷ After a jury verdict in favor of Merck was returned in a bellwether trial, Judge Pisano nonetheless addressed the issue of preemption and ruled as a matter of law that the claims of the bellwether plaintiffs were preempted “because [d]efendant submitted to the FDA all of the information relevant to a label change and tried to change the Precautions section of the label to include low-energy femoral fractures, but the FDA rejected this change.”¹²⁸ Because “the parties ha[d] been aware of the potential global effects preemption could have on the entire MDL for at least two ... years,” Judge Pisano issued an order to show cause why other plaintiffs’ cases presenting similar facts with respect to the preemption issue should not be dismissed under the reasoning of the court’s ruling in the bellwether case.¹²⁹ Finding that those plaintiffs failed to come forward with any evidence that the FDA would not have rejected a stronger warning by Merck prior to September 2010, the court dismissed the claims of all plaintiffs with injuries that occurred prior to September 2010.¹³⁰ While the court’s decision has been appealed to the Third Circuit, it can serve as a useful judicial template for using show-cause orders to dispose of meritless cases.

BELLWETHER TRIALS

After addressing summary judgment and *Daubert* motions, and any related show-cause rulings, the MDL court would then conduct a bellwether trial, the outcome of which would help inform the direction of the broader MDL.¹³¹ “Bellwether cases ... are representatives selected from the ‘flock’ of cases consolidated in front of the transferee court and tried front-to-back.”¹³² Bellwether trials play a critical role in resolving mass torts by showing the strengths and weaknesses of the various kinds of claims in the broader pool and by informing settlement negotiations.¹³³ “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 value the cases may have if resolution is attempted on a group basis.’”¹³⁴ Accordingly, it is critical that bellwether trial plaintiffs be as representative as possible of the entire claimant pool.¹³⁵

The selection process for bellwether trials varies, with some courts choosing a random sample of cases and others leaving the case selection to counsel.¹³⁶ However, random selection from the entire case pool is the fairest and most efficient method

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for ensuring that representative cases are chosen.¹³⁷ After all, if the selection process were left to the lawyers, plaintiffs’ counsel would undoubtedly choose their strongest cases, which are hardly representative of the overall claimant pool. As such, random selection should govern the choice of those cases that undergo advanced discovery, dispositive pretrial briefing, and, ultimately (if necessary), bellwether trials. In addition to yielding the most representative cases of the overall MDL claim pool, random selection also helps to separate potentially meritorious cases from meritless or fraudulent ones early on in the MDL proceeding. If plaintiffs’ counsel discover that a bellwether selection lacks merit, counsel should promptly dismiss the case, but early and aggressive use of fact sheets, *Lone Pine*

orders, and other case management tools should minimize the need for such dismissals. Courts should recognize that routine dismissals of bellwether selections signal that not enough has been done to weed out frivolous cases, and give strong consideration to the adoption of additional measures to clean up the claims pool.

Attorneys’ Fees

“Over the long history of MDLs, judges have awarded lead attorneys billions of dollars in fees and cost reimbursements.”¹³⁸ The supposed hallmark of multidistrict litigation is the efficiency gained from coordinating overlapping cases before a single judge for pretrial matters.¹³⁹ Nonetheless, when it comes time to settle, plaintiffs’ counsel often seek contingency payments in the same 33%–40% range that they would typically obtain in an individual action outside the MDL context.¹⁴⁰ Such substantial awards make no sense. If litigating a matter in an MDL proceeding is truly more efficient, the cost for doing so on a per-case basis (and therefore the amount of the contingency fee to be paid) should be considerably less than 33%, perhaps 10% or some other percentage that reflects the supposed efficiencies of mass torts. Adopting this more modest approach to attorneys’ fees would maximize the benefits realized by the settling plaintiffs and ensure that plaintiffs’ counsel do not receive a windfall.

Conclusion

More and more mass torts are being litigated in MDL proceedings. MDLs are designed to maximize efficiency and judicial economy by centralizing overlapping cases before a single court for pretrial proceedings. But while MDL proceedings play important roles in attempting to foster fair resolutions of mass tort claims, these proceedings are increasingly being exploited by plaintiffs' counsel who park meritless, poorly investigated lawsuits into these proceedings in the hopes that defendants will enter into a global settlement without assessing the viability of the individual claims at issue.

This conduct takes advantage of the structure of MDLs and the general approach to their administration, and as a result, plaintiffs are able to avoid the exchange of information required of plaintiffs at the early stages in non-MDL cases.

To close this loophole, MDL courts should consider employing a broad array of tools to require plaintiffs to make earlier and more substantive contributions in MDL proceedings. Plaintiffs in MDL proceedings should be required to complete fact sheets, provide some sort of *Lone Pine*

proof of injury and causation, and submit copies of medical records as the price of admission in the MDL proceeding. In addition, MDL courts should randomly select a representative sample of cases for advanced discovery, dispositive pretrial motion practice, and, ultimately (if necessary), bellwether trials. These requirements would shift the focus of multidistrict litigation to the merits of the individual claims at issue, ensuring that MDL proceedings are no longer havens for meritless claims and promoting the fair and efficient resolution of the broader litigation.

Endnotes

- 1 Multidistrict litigation (MDL) proceedings are established pursuant to 28 U.S.C. § 1407 in circumstances where multiple cases involve “one or more common questions of fact.” In an MDL proceeding, these related cases are centralized before a single court for coordinated pretrial proceedings.
- 2 More than one-third of the civil cases pending in the nation’s federal courts are now consolidated in multidistrict litigations, up from just 15% a decade ago. See Table C, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2012 and 2013, 2009 and 2010, 2007 and 2008, 2005-2006, 2003 and 2004, 2001 and 2002, and 1998 and 1999, Judicial Business of the United States Courts, Annual Reports of the Director, Administrative Office of the United States Courts; Cumulative Summary of Multidistrict Litigation: United States Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation Fiscal Year 2013, 2011, 2009, 2007, 2006, 2004, and 2001.
- 3 *Smoke Screens: Decades of Dubious Mass Tort Claims*, Latitude Litigation, Oct. 31, 2014, <http://latitudelitigation.com/smoke-screens-decades-of-dubious-mass-tort-claims/>.
- 4 *Id.*
- 5 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 632 (S.D. Tex. 2005); Lester Brickman, *Anatomy of an Aggregate Settlement: The Triumph of Temptation Over Ethics*, 79 Geo. Wash. L. Rev. 700, 705 (2011) [hereinafter Brickman, *Aggregate Settlement*] (recounting “the hiring of screening companies by plaintiffs’ lawyers to generate hundreds of thousands of claimants in the asbestos, silica, fen-phen, silicone breast implant, and welding fume mass tort litigations”); Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833, 836 (2005) (stating that in the asbestos context “nonmalignant asbestos litigation today mostly consists of . . . a massive client recruitment effort accounting for 90% of all claims currently being generated and resulting in the screening of over 750,000 and perhaps as many as 1,000,000 ‘litigants’ in the past fifteen years”).
- 6 *In re Silica*, 398 F. Supp. 2d at 580.
- 7 *The Silicosis Sheriff*, Wall St. J., July 14, 2005, at A10.
- 8 Brickman, *Aggregate Settlement*, *supra* note 5, at 705.
- 9 See Mark A. Behrens & Corey Schaecher, *Rand Institute for Civil Justice Report on the Abuse of Medical Diagnostic Practices in Mass Tort Litigation: Lessons Learned from the “Phantom” Silica Epidemic That May Deter Litigation Screening Abuse*, 73 Alb. L. Rev. 521, 533 (2010) (“[T]he prospect of large financial gain provides a powerful incentive to utilize inappropriate diagnostic procedures in order to manufacture large numbers of claims.’ . . . This strategy prevents cases from being addressed on an individual basis as economies of scale frequently compel settlement of screened cases.”) (citation omitted).
- 10 Brickman, *Aggregate Settlement*, *supra* note 5, at 705 (footnotes and citation omitted); see also Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 121 (2013) (noting that “[t]he rate of “positive” findings by these [litigation] doctors can be startlingly high, often upwards of 50% and in some studies as high as 90%,’ suggesting that the readings may not be neutral or legitimate”) (quoting ABA Comm. on Asbestos Litig., Report to the House of Delegates 8 [2003], http://www.abanet.org/leadership/full_report.pdf).
- 11 Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. Times, Mar. 8, 2006, <http://www.nytimes.com/2006/03/08/business/08silica.html?pagewanted=print&r=0>.

- 12 Victor E. Schwartz et al., *Getting the Sand out of the Eyes of the Law: The Need for a Clear Rule for Sand Suppliers in Texas after Humble Sand & Gravel, Inc. v. Gomez*, 37 St. Mary's L.J. 283, 291 (2006).
- 13 *In re Silica*, 398 F. Supp. 2d at 632, 634 (citation omitted).
- 14 *Id.* at 635.
- 15 Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. Rev. 1221, 1316 n.512 (2008) (quoting *In re Silica*, 398 F. Supp. 2d at 676); *see also* Behrens & Schaecher, *supra* note 9, at 528 (Judge Jack "found that the plaintiffs' law firm multiplied the proceedings unreasonably and vexatiously, describing the firm's behavior as part of a larger process to 'overwhelm ... the system to prevent examination of each individual claim and to extract mass settlements.'" (quoting *In re Silica*, 398 F. Supp. 2d at 676).
- 16 Creswell, *supra* note 11.
- 17 Behrens & Schaecher, *supra* note 9, at 534-35 (citation omitted).
- 18 *See, e.g.*, Mary Ellen Egan, *Twitch & Shout*, *Forbes*, Jan. 9, 2006, <http://www.forbes.com/forbes/2006/0109/046.html>.
- 19 *See generally* *Ruth v. A.O. Smith Corp.*, No. 1:04-CV-18912, 2006 U.S. Dist. LEXIS 7361, at *11-12 (N.D. Ohio Feb. 27, 2006) (noting that "the spark leading to the great number of recently-filed lawsuits is the combination of the advertising and screening processes used by plaintiffs' counsel to identify potential claimants").
- 20 *See In re Welding Fume Prods. Liab. Litig.*, No. 1:03-cv-17000, 2006 U.S. Dist. LEXIS 16407, at *32 (N.D. Ohio Apr. 5, 2006).
- 21 *See* Defs.' Surreply in Opp'n to Pls.' Mot. for Class Certification of Medical Monitoring Claims at 1, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-cv-17000-KMO, MDL No. 1535 (N.D. Ohio filed Apr. 17, 2007).
- 22 *See Plaintiffs in Welding Fume Litigation Forced to Dismiss Fifth Trial-Ready Case Due to Fraud*, *BusinessWire*, Mar. 28, 2008, http://www.businesswire.com/news/home/20080328005545/en/Plaintiffs-Welding-Fume-Litigation-Forced-Dismiss-Trial-Ready#Vfxe_NLD-ow; *see also* Egan, *supra* note 17 ("In December [2005] the first two welding cases in a mass tort with 5,300 claimants imploded amid charges of faked injuries.").
- 23 *See In re Welding Fume*, 2006 U.S. Dist. LEXIS 16407, at *18.
- 24 *See* Order, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-cv-17000-KMO, MDL No. 1535 (N.D. Ohio Aug. 28, 2006).
- 25 *Id.* at 3.
- 26 *Id.*
- 27 *Id.*
- 28 *Id.* at 2.
- 29 Amanda Bronstad, *Ad Spending Up, Defense Bar Irked*, *Nat'l L.J.*, Apr. 27, 2015.
- 30 Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, *BloombergBusiness*, Dec. 12, 2013, <http://www.bloomberg.com/bw/articles/2013-12-12/mass-tort-lawsuit-lead-generator-jesse-levine-has-victims-for-sale>.
- 31 *Id.*
- 32 Bronstad, *supra* note 29.
- 33 *Id.*
- 34 *Id.*
- 35 Larry Bodine, *How Lead Generation Companies Connect Consumers to Lawyers*, *National Trial Lawyers*, Apr. 17, 2014, <http://www.thenationaltriallawyers.org/2014/04/how-direct-marketing-companies-connect-consumers-to-lawyers/>.
- 36 Bronstad, *supra* note 29.
- 37 Barrett, *supra* note 30.
- 38 *Id.*
- 39 *Id.*
- 40 *Id.*

- 41 *Id.*
- 42 *Smoke Screens*, *supra* note 3 (“Their ability to amass thousands, even tens of thousands, of cases through panic-inducing advertisements enables plaintiffs to take advantage of economies of scale, federal MDL procedures and the smoke/fire aphorism.”).
- 43 Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 *Emory L.J.* 329, 350 (2014).
- 44 *But Judge . . . This Is How We’ve Always Done It*, *Latitude Litigation*, Dec. 3, 2014, <http://latitudelitigation.com/but-judge-this-is-how-weve-always-done-it/>; *see also* Dodge, *supra* note 42, at 349 (explaining that defendants often agree to settle claims that are “not legally cognizable” because “the settlement agreement provides closure”).
- 45 Behrens & Schaecher, *supra* note 9, at 534.
- 46 *Id.* (quoting Stephen J. Carroll et al., RAND Inst. for Civil Justice, *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica* (2009), at 26, http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf).
- 47 *TRT Litigation: Jumping the Gun?*, *Latitude Litigation*, Oct 22, 2014, <http://latitudelitigation.com/trt-litigation-jumping-the-gun/>.
- 48 Edward K. Cheng, *Changing Scientific Evidence*, 88 *Minn. L. Rev.* 315, 318 n.21 (2003) (quoting Peter W. Huber, *Galileo’s Revenge: Junk Science in the Courtroom* 127 (1991)).
- 49 Max Helveston, *Promoting Justice through Public Interest Advocacy in Class Actions*, 60 *Buff. L. Rev.* 749, 780 n.115 (2012).
- 50 Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 *Duke L.J.* 1251, 1302-03 (2002).
- 51 *Id.* at 1303.
- 52 *Id.*
- 53 *Id.*
- 54 Andrew K. Solow et al., *Sequenced Discovery in Mass Tort Litigation*, *Kaye Scholer LLP*, Jan. 15, 2015, <http://www.lexology.com/library/detail.aspx?g=88462489-d102-44b8-9464-e22aebe75067>.
- 55 Bone & Evans, *supra* note 50, at 1303.
- 56 Kaitlin Ugolik, *Judge Nixes Last 2 Wrongful Death Suits in Digitek MDL*, *Law360*, Nov. 3, 2011, <http://www.law360.com/articles/283288/judge-nixes-last-2-wrongful-death-suits-in-digitek-mdl>.
- 57 *But Judge . . . This Is How We’ve Always Done It*, *supra* note 44.
- 58 *In re Digitek Prods. Liab. Litig.*, 821 F. Supp. 2d 822, 830 (S.D. W. Va. 2011).
- 59 *Id.* at 833.
- 60 *Id.* (“I will address the missing link common to all of the MDL cases. It is the absence of proof on defect and causation.”).
- 61 *Id.* at 834, 836; *see also* Ugolik, *supra* note 55.
- 62 Dodge, *supra* note 43, at 350.
- 63 *Id.*
- 64 Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 *Sw. U. L. Rev.* 575, 586 (2008).
- 65 Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, *N.Y. Times*, Nov. 9, 2007, http://www.nytimes.com/2007/11/09/business/09merck.html?_r=0.
- 66 *In re Vioxx Prods. Liab. Litig.*, MDL 1657, 2008 U.S. Dist. LEXIS 60269, *10-11 (E.D. La. Aug. 7, 2008).
- 67 Vioxx Claims Administrator Court Report No. 29, July 27, 2010.
- 68 *Id.*
- 69 Solow et al., *supra* note 54.
- 70 *Cf. In re Fosamax Prods. Liab. Litig.*, No. 06 MD 1789 (JFK), 2012 U.S. Dist. LEXIS 166734, at *7 (S.D.N.Y. Nov. 20, 2012) (“In the event the parties reach a settlement, the elimination of spurious claims will ensure that only plaintiffs with meritorious cases are compensated.”).

- 71 3 Antitrust Counseling and Litigation Techniques § 23A-5, *To MDL or Not to MDL: A Defense Perspective* by Mark Hermann (1998) (explaining that some courts have come to view multidistrict litigation “as a mechanism to settle an unmanageable body of cases, rather than as a mechanism for weeding out frivolous cases and resolving the rest”); see also Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *Fordham L. Rev.* 1643, 1669 (2011) (“There is every reason to believe that multidistrict centralization increases pressure on transferee judges to promote an early settlement (since the MDL process creates incentives for judges to treat settlement as the ultimate goal of consolidation).”) (quoting Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 *Harv. J.L. & Pub. Pol’y* 855, 883 (2005)).
- 72 Hermann, *supra* note 71; see also Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 *B.U. L. Rev.* 109, 128-29 (2015) (“Parties to MDL cases and the transferee judges who preside over them face tremendous pressure to settle.”).
- 73 Moller, *supra* note 71, at 878.
- 74 See *id.* at 879 (noting the “psychological” and “institutional” factors that weigh on a court’s consideration of how to handle mass litigation).
- 75 Pollis, *supra* note 71, at 1669; see also Manual for Complex Litigation (Fourth) § 20.132 (2004) (MDLs “afford a unique opportunity for the negotiation of a global settlement”).
- 76 Pollis, *supra* note 71, at 1670; see also Redish & Karaba, *supra* note 72, at 128-29 (“Because a primary objective of consolidation into MDL is to avoid multiple federal judges having to deal with the same issues, some judges perceive failure to achieve a global settlement as a failure.”).
- 77 Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 *La. L. Rev.* 399, 417 (2014).
- 78 *Id.*
- 79 *Id.* at 416-17 (“[T]he ‘settlement culture’ for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice.”) (quoting *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006)).
- 80 MDL Standards and Best Practices at 11, Duke Law Center for Judicial Studies (2014) (“In fact, settlement talks are often delayed precisely because the parties have not anticipated the need for assembling information necessary to assess the strengths and weaknesses of the global litigation and examine the potential value of individual claims.”).
- 81 *Id.* at 3.
- 82 Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 *Vand. L. Rev.* 107, 163-64 (2010).
- 83 Carroll et al., *supra* note 46, at xi-xii.
- 84 *Id.* at 23.
- 85 *Id.* at 28.
- 86 Behrens & Schaecher, *supra* note 9, at 535 (quoting Carroll et al., *supra* note 46, at 29).
- 87 Fed. R. Civ. P. 11(b).
- 88 *Id.* at 11-12; Manual for Complex Litigation §22.83 (similar); see also Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 *Sedona Conf. J.* 1, 8 n.40 (2011) (“The use of ‘fact sheets’ to streamline discovery by replacing formal interrogatories with supposedly less onerous, more fact-oriented formats is now a common practice in mass tort multidistrict litigation.”).
- 89 Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 *Utah L. Rev.* 863, 927-28 (2005).
- 90 Dodge, *supra* note 43, at 352-53.
- 91 George M. Fleming & Jessica Kasischke, *MDL Practice: Avoiding the Black Hole*, 56 *S. Tex. L. Rev.* 71, 81 (2014) (“Transferee courts routinely engage in plaintiff and defendant fact sheets, a uniform set of questions asked of all MDL plaintiffs and defendants that generally serve as interrogatories.”).

- 92 See MDL Standards and Best Practices, *supra* note 80, at 13 (“The court should impose concrete time limitations for completing fact sheets.”).
- 93 Dodge, *supra* note 43, at 354.
- 94 *Id.*; see also MDL Standards and Best Practices, *supra* note 80, at 13 (“Unless such deadlines are rigorously enforced, counsel handling multiple claims may fall far behind in fulfilling that obligation.”).
- 95 See MDL Standards and Best Practices, *supra* note 80, at 12 (authorizations “can help defendants verify the answers provided in the fact sheets and shed light on the potential causes of the plaintiffs’ injuries”).
- 96 1-4 ACTL Mass Tort Litigation Manual § 4.05; see also *In re Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW, 2010 U.S. Dist. LEXIS 135152, at *20 (E.D. Ark. Dec. 6, 2010) (the fact sheets require plaintiffs to provide “the identity of each of plaintiff’s prescribing physician(s), medical history, employment history, educational history, and the identity of potential fact witnesses”).
- 97 Pretrial Order No. 22, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, No. 2:11-md-01203-HB, MDL No. 1203 (E.D. Pa. Mar. 23, 1998).
- 98 *Id.*
- 99 Hon. Eldon E. Fallon et al., *The Problem of Multidistrict Litigation: Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2352 n.99 (2008) (noting frequency of plaintiff fact sheets and medical authorization, but noting that “parties may occasionally fail to provide this information,” which may subject their cases to dismissal).
- 100 *Lone Pine* orders are named after a New Jersey case that adopted this procedure. See *Lore v. Lone Pine Corp.*, No. L 33606-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Ct. Law Div. Nov. 18, 1986).
- 101 *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at *2 (S.D. Ohio Jan. 30, 2007); see also Hon. Brian R. Martinotti, *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 Loy. U. Chi. L.J. 561, 572-73 (2013) (these orders “seek to ensure that completely unsupported claims will not consume the judge’s or litigants’ resources”).
- 102 Rodney K. Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 Okla. L. Rev. 269, 317 n.192 (2012).
- 103 *In re Fosamax*, 2012 U.S. Dist. LEXIS 166734, at *4-5 (granting motion for issuance of *Lone Pine* order; “With increasing frequency, courts overseeing complex pharmaceutical MDLs are using *Lone Pine* orders to streamline the docket.”); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2012 U.S. Dist. LEXIS 56309, at *5 (E.D. La. Apr. 23, 2012) (“*Lone Pine* orders [are] appropriate” because “it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury.”) (internal quotation marks and citation omitted). In the Vioxx litigation, the Fifth Circuit affirmed the dismissal of cases where plaintiffs failed to comply with Judge Fallon’s *Lone Pine* order, resolving that “it is within a [district] court’s ‘discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require.’” *Dier v. Merck & Co.*, 388 F. App’x 391, 398 (5th Cir. 2010) (per curiam) (quoting *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000)).
- 104 See MDL Standards and Best Practices, *supra* note 80, at 89 (“[C]ourts often implement *Lone Pine* proceedings at or near the end of the MDL[.]”).
- 105 *Smoke Screens*, *supra* note 3.
- 106 *Dier*, 388 F. App’x at 393-94.
- 107 Indeed, plaintiffs’ resistance to the pretrial order—which merely required a “minimal showing . . . that there is some kind of scientific basis that Vioxx could cause the alleged injury,” *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. May 30, 2008)—confirms that at least some counsel had filed cases without conducting an adequate investigation of the basis for the allegations in the suits.
- 108 *In re Fosamax*, 2012 U.S. Dist. LEXIS 166734, at *7.
- 109 *Id.*

- 110 William A. Ruskin, *Lone Pine's Impact on Pharma Products Litigation*, Law360, Jan. 22, 2013.
- 111 *In re Fosamax*, 2012 U.S. Dist. LEXIS 166734, at *6-7.
- 112 *See, e.g., In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249, 257 (S.D. W. Va. 2010) (“[W]hen the *Lone Pine* order cuts off or severely limits the litigant’s right to discovery, the order closely resembles summary judgment, albeit without the safeguards that the Civil Rules of Procedure supply.”) (quoting *Simeone v. Girard City Bd. of Educ.*, 872 N.E.2d 344, 350 (Ohio Ct. App. 2007)); *Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293, 299 (M.D. Pa. 2012) (denying motion for entry of *Lone Pine* order because it “seeks entry of an order that places an exclusive burden on [p]laintiff to comply with a set of discovery benchmarks at the outset of the litigation”); *Antero Res. Corp. v. Strudley*, 347 P.3d 149, 158 (Colo. 2015) (“Whether presumptive or modified, case management orders . . . are instruments courts employ to streamline litigation and ensure the just progression of a case—not to eliminate claims or dismiss a case independent of mechanisms for eliminating claims and dismissing cases under the rules.”).
- 113 *See Dier*, 388 F. App’x at 398 (upholding entry of *Lone Pine* order; MDL court had “discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require”) (internal quotation marks and citation omitted); *Acuna*, 200 F.3d at 340 (affirming dismissal for failure to comply with pre-discovery *Lone Pine* orders, reasoning that “[e]ach plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries”); *see also* 17 *Moore’s Federal Practice*, § 112.07 (Matthew Bender 3d Ed.) (“A transferee’s court inherent case management authority includes discretion to enter a *Lone Pine* order requiring plaintiffs to produce a measure of evidence to support their claims at the outset of litigation.”).
- 114 *See Acuna*, 200 F.3d at 340 (“The scheduling orders issued below essentially required that information which plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3).”).
- 115 Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 Akron L. Rev. 1197, 1241 (2010) (“Interpretation and application of the *Twombly* pleading standard, the Court’s summary judgment trilogy, and the *Daubert* admissibility standard understandably are not identical across the federal system. MDL treatment for pretrial proceedings . . . effectively operates to lend a unitary yardstick for the making of such rulings.”) (quoting Emery G. Lee et al., *The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation* 26 (Draft paper, Federal Judicial Center 2009)).
- 116 *See, e.g.,* Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys’ Fees in Multidistrict Litigation*, 67 N.Y.U. Ann. Surv. Am. L. 589, 624 (2012) (“In some cases, a *Daubert* ruling may be dispositive for all intents and purposes.”).
- 117 *In re Silica*, 398 F. Supp. 2d at 620.
- 118 *Id.* at 675.
- 119 *Id.* at 676-77, 680.
- 120 Hays, *supra* note 116, at 625.
- 121 *Id.* at 625-26.
- 122 Fed. R. Civ. P. 56(a).
- 123 Scott Paetty, *Complex Litigation in California and Beyond: 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, 893 (2008).
- 124 *Id.* (citing 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. Sept. 3, 2002)).
- 125 *Id.* at 893-94.
- 126 *Id.* at 894.
- 127 *In re Fosamax (Alendronate Sodium): Prods. Liab. Litig.*, MDL No. 2243, 2014 WL 1266994, at *1 (D.N.J. Mar. 26, 2014).
- 128 *Id.* at *5.
- 129 *Id.*
- 130 *Id.* at *17.

- 131 *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (“The term bellwether is derived from the ancient practice of bellring a wether (a male sheep) selected to lead his flock.”).
- 132 Hays, *supra* note 116, at 626.
- 133 See MDL Standards and Best Practices, *supra* note 80, at 16 (“Bellwether trials may provide useful information to the parties regarding the likely outcome of other cases at trial, such as: (a) how well or poorly the parties’ fact and expert witnesses perform in a trial setting; and (b) decisions on key legal issues and the admissibility of key evidence.”).
- 134 *Id.* (quoting Manual for Complex Litigation §22.315).
- 135 See, e.g., *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”); *Morgan v. Ford Motor Co.*, No. 06-1080 (JAP), 2007 U.S. Dist. LEXIS 36515, at *34 (D.N.J. May 17, 2007) (“[T]o ensure the usefulness of bellwether plaintiffs to the process and the parties’ due process rights, representative plaintiffs must be chosen.”).
- 136 Martinotti, *supra* note 101, at 574.
- 137 See, e.g., *In re Chevron*, 109 F.3d at 1019 (“A bellwether trial designed to achieve its value ascertainment function . . . has as a core element representativeness—that is, the sample must be a randomly selected one[.]”); see also Manual for Complex Litigation § 22.315 (“To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases.”).
- 138 Silver & Miller, *supra* note 82, at 109.
- 139 *In re Elec. Books Antitrust Litig.*, No. 11 MD 2293 (DLC), 2014 U.S. Dist. LEXIS 42549, at *67 (S.D.N.Y. Mar. 28, 2014) (“[T]he essential purpose of section 1407 [is] to promote the just and efficient conduct of complex multidistrict litigation.”) (quoting *Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 92 (2d Cir. 1998)).
- 140 Brickman, *Aggregate Settlement*, *supra* note 5, at 706 (“[F]orty percent appears to have become the standard contingency fee in nonclass mass tort litigation.”).



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