

## EXPERT ANALYSIS

### Trends in Selecting Bellwether Trials in Multidistrict Litigation

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Many mass tort litigations result in multidistrict litigation (“MDL”) proceedings and MDL proceedings are increasingly shaping the mass tort landscape. Since the JPML was created in 1968, 553,249 civil actions have been centralized for pretrial proceedings. See Statistical Analysis of Multidistrict Litigation: Fiscal Year 2015, U.S. Jud. Panel on Multidistrict Litig. 3, [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical\\_Analysis\\_of\\_Multidistrict\\_Litigation-FY-2015\\_0.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015_0.pdf) (last visited September 12, 2016).

As of Sept. 30, 2015, a total of 15,844 actions had been remanded for trial. *Id.* At the end of the twelve-month period ending Sept. 30, 2015, there were 132,788 actions pending in 57 transferee district courts. *Id.*

To manage the vast number of cases pending in MDLs, MDL courts utilize individual trials to “produce a sufficient number of representative verdicts and settlements 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.” Manual for Complex Litigation (Fourth) § 22.315 (2004).

The Manual for Complex Litigation (Fourth) recognizes that if these individual trials, often referred to as bellwether trials, are to produce reliable information, “the specific plaintiffs and their claims should be representative of the range of cases.” *Id.* However, the selection of representative bellwether cases is often a contentious process, and MDL courts have devised a number of methods for the selection of representative test cases.

#### BELLWETHER TRIAL SELECTION METHODS

MDL courts typically employ one of three methods for the selection of bellwether trials in MDL proceedings: Random selection; selection by the parties, or judicial selection. Each selection method has its benefits and drawbacks, and a number of hybrid selection models have also been used in an attempt to select representative cases that will provide valuable information to the courts and the parties.

#### *Randomly selecting bellwether plaintiffs*

One method of selecting representative cases is random selection in which the court randomly selects bellwether trials from a pool of cases. Notably, the Manual for Complex Litigation calls for random selection of cases. See Manual for Complex Litigation (Fourth) § 22.315 (2004) (“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.”).



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Recently, however, many courts have moved away from a pure random selection toward methods that allow for greater involvement of the parties and their counsel.

Throughout the last two decades, many courts have randomly selected bellwether trials. *See, e.g., In re Prempro Prods. Liab. Litig.*, MDL No. 4:03-CV-1507-WRW, at 2 (E.D. Ark. June 20, 2005) (order stating that court “will randomly draw from a hat (literally) fifteen cases”); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (noting that “the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained.”); *In re Norplant Contraceptive Prods. Liab. Litig.*, MDL No. 1038, 1996 WL 571536, at \*1 (E.D. Tex. Aug 13, 1996) (noting that the court utilized “random selection of the twenty-five bellwether trial plaintiffs”); *see also In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, MDL No. 1699, No. M:05-CV-01699, (Pretrial Order No. 18, at 2-3) (N.D. Cal. Nov. 17, 2006) (describing hybrid method of random selection in which Plaintiffs’ Steering Committee would select ten of the plaintiffs, Defendants would select ten of the plaintiffs, and 25 plaintiffs would be randomly selected by randomized software).

More recently, the court overseeing an MDL for olmesartan prescription drugs, which includes more than 1200 cases, employed a hybrid selection method in which the parties were to identify 20 bellwether cases from a pool of 30 randomly selected cases. *See In re: Benicar (Olmesartan) Prods. Liab. Litig.*, No. 15-2606 (RBK/JS), 2016 WL 1370998, at \*1 (D.N.J. Apr. 6, 2016).

Ultimately, while the random selection method is still utilized by some courts, others have questioned whether the random selection process results in a selection of sufficiently representative cases. *Compare Brown, et al., Bellwether Trial selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663, 681-82 (2014) (“A random sampling is most likely to yield a sample that is truly representative of the docket as a whole because it limits — if not eliminates — tactical manipulation by the parties ... Some commentators and courts are skeptical of a random selection process for the very reason that this selection method detaches the attorneys from the process.”) *with Fallon, et al., Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2348 (2008) (noting that the random selection method “is easy to perform, but it can be problematic” and should be “rejected” because “[i]f cases are selected at random, there is no guarantee that the cases selected to fill the trial-selection pool will adequately represent the major variables”).

The current trend is to place greater control in the hands of the parties and their representatives, either by allowing the parties to fully select bellwether cases or by employing a hybrid approach.

#### **Allowing parties to select bellwether plaintiffs**

As an alternative to random selection, MDL courts may allow parties to make bellwether selections themselves. The *General Motors LLC Ignition Switch Litig.* MDL Court recently allowed the parties to control the bellwether selection process in practice:

The Order laid out the eligibility criteria and selection process for choosing what would ultimately be six bellwether cases to be tried. The process involved an initial selection of eighteen cases as to which the parties would engage in case-specific fact discovery (*see id.* at 4-5, 9-14); the selection of five of those cases by each party to be potential “Early Trial Cases” (*see id.* at 14-15); and the exercise of two strikes by each party on the other’s list, resulting in six Early Trial Cases to proceed to expert discovery and, presumptively, trial (*see id.* at 15).

*In re: General Motors LLC Ignition Switch Litig.*, 14-MD-2543 (JMF), 14-MC-2543 (JMF), 2016 WL 1441804, at \*3 (S.D.N.Y. Apr. 12, 2016) (citing Order No. 25 (Docket No. 422), November 19, 2014).

Though there is a growing trend to allow the parties to participate in the bellwether selection process, many courts have adopted a hybrid approach in which the parties may select bellwether cases, but only from a pool of cases that is either randomly selected or selected by the Court.

The *Olmestartan* MDL discussed above, in which the Court allowed the parties to select 20 bellwether cases from a pool of 30 randomly selected cases, is a recent example of a hybrid approach involving a combination of random selection and party selection. See *In re: Benicar (Olmestartan) Prods. Liab. Litig.*, No. 15-2606 (RBK/JS), 2016 WL 1370998, at \*1 (D.N.J. Apr. 6, 2016) (citing CMO No. 15 (Docket No. 193)).

Other MDL courts have allowed the parties to make bellwether selections from a pool of cases designated by the court. See, e.g., *In re Levaquin Prods. Liab. Litig.*, MDL No. 1943, 2014 WL 11395078, at \*3 (D. Minn. Nov. 21, 2014) (dividing cases into three groups for selecting bellwether trials); *In re Stryker Rejuvenate and ABGII Hip Implant Prods. Liab. Litig.*, MDL No. 13-2441 (DWF/FLN), 2014 WL 2808919 at \*1 (D. Minn. June 20, 2014) (ordering parties to “identify three cases in each of the five ‘bellwether categories’ to be designated as lead cases in each category”).

### Judicial selection of bellwether plaintiffs

The MDL courts themselves can also make bellwether case selections, either on their own or in combination with another selection method. For example, the MDL court in *In re Ethicon, Inc., Pelvic Repair System Prods. Liab. Litig.*, MDL 2327, which included approximately 22,000 of the pending cases, selected two bellwether cases by court order. See *Bellew v. Ethicon*, No. 2:13-cv-22473, 2014 WL 6913836, at \*1 n.1 (S.D. W. Va. Nov. 24, 2014) (noting that court selected case as Prolift bellwether case in Ethicon MDL 2327) (citing Pretrial Order No. 98, at 1); MDL 2327, Pretrial Order No. 98 (Nov. 29, 2014).

Another pelvic mesh MDL court attempted to utilize a hybrid method, but ultimately played a larger role in the selection process. See *In re Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326 (S.D. W.Va.), Pretrial Order No. 22, at 1-2 (Nov. 2, 2012).

The court divided the pending cases into initial trial pools and then asked the parties to submit proposals for the trial pools from which the Court would make the bellwether selections. See *id.*

However, because the Court determined that “[b]oth parties offered selections that were not representative based on age and other factors or because they had conditions that made the cases outliers,” the Court ordered the parties to submit different bellwether selections “with more representative cases.” MDL No. 2326, Pretrial Order No. 51, at 1 (Aug. 7, 2013). Ultimately, the court made selections for the first and second bellwether trials. See MDL No. 2326, Pretrial Order No. 54, at 1 (Aug. 29, 2013).

The pelvic mesh MDL court, which oversaw seven separate pelvic mesh MDLs with more than 67,000 individual cases, utilized another hybrid approach. See *Bellew*, 2014 WL 6913836, at \*1. The MDL court ordered the parties to submit a list of eighty cases (forty per side) that would constitute the initial pool of cases. *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2327, Pretrial Order No. 33, at 1 (Jan. 18, 2013).

From those eighty cases, the parties were to identify thirty cases to move to the discovery pool, and from the discovery pool of thirty cases, the parties were asked to submit a list of sixteen cases (eight per side) to be included in the pool of trial cases. *Id.* at 1-2. The court then requested that the parties make presentations on all trial pool cases, from which the Court would select five cases to be bellwether trial cases. *Id.* at 2.

### EFFECTS OF VOLUNTARY DISMISSALS OF PLAINTIFFS ON THE BELLWETHER PROCESS

Courts are increasingly faced with an added complexity in the bellwether selection process: after selections are made for bellwether trials, selected plaintiffs may voluntarily dismiss their claims. This tactic has the potential to derail the bellwether process, and MDL courts have dealt with it in a variety of ways.

Many courts have moved away from a pure random selection of bellwether trials toward methods that allow for greater involvement of the parties and their counsel.

Some courts have adopted a hybrid approach in which the parties may select bellwether cases, but only from a pool of cases that is either randomly selected or selected by the court.

In *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 628 F.3d 157, 163-64 (5th Cir. 2010), the Fifth Circuit upheld the trial court's conversion of a bellwether plaintiff's voluntary dismissal without prejudice to a dismissal with prejudice.

The court noted that the plaintiff "wanted to have his cake and eat it by withdrawing from a bellwether trial and sitting back to await the outcome of another plaintiff's experience against the [defendants]." *Id.* at 163.

The court cautioned that "[c]ourts must be exceedingly wary of mass litigation in which plaintiffs are unwilling to move their cases to trial. Any individual case may be selected as a bellwether, and no plaintiff has the right to avoid the obligation to proceed with his own suit, if so selected." *Id.*

The Fifth Circuit concluded that "[i]f [the trial court] permitted [the plaintiff] to dismiss without prejudice, it would set a precedent that other plaintiffs could use to manipulate the integrity of the court's bellwether process," noting that it "would have subjected [the defendant] to the rigors and costs of trial preparation against [the plaintiff] without reaching a resolution of [the plaintiff's] claim." *Id.*

Ultimately, the court determined that the trial court "correctly saw this case as part of a much larger picture" and upheld the trial court's decision "for the sake of doing justice for thousands of plaintiffs and multiple defendants." *Id.* at 164. The Fifth Circuit added that the trial court's "action was not so much a sanction against [the plaintiff] as a necessary device to maintain an orderly resolution of the massed cases." *Id.*

In *In re Norplant Contraceptive Prods. Liab. Litig.*, MDL No. 1038, 1996 WL 571536, at \*1 (E.D. Tex. Aug 13, 1996), following the random selection of 25 bellwether trial plaintiffs, two selected plaintiffs sought to voluntarily dismiss their claims with prejudice.

In response, the defendants argued that they should have been allowed to cure "the bias caused by these dismissals in one of two possible ways": (1) allowing defendants to strike two potential trial plaintiffs from the pool following discovery or (2) giving defendants first choice in selecting trial plaintiffs. *Id.*

The court concluded that either one of those alternatives would cure the bias caused by the dismissals" and, therefore, in the "interest of fairness," allowed the plaintiffs to elect the remedy. *Id.*

In contrast, in *In re: Cook Medical, Inc. Pelvic Repair System Products Liability Litigation*, MDL No. 2440 (S.D. W.Va. May 19, 2015), following the identification of thirty discovery pool cases by the parties, the court selected four bellwether cases. MDL No. 2440, Pretrial Order No. 59, at 1.

However, "[w]ell before trial, all four cases were dismissed by the plaintiffs with prejudice" and "only six of the original thirty Discovery Pool cases remain[ed] pending [after] the other Discovery Pool cases were dismissed." *Id.*

As a result, the court concluded that "the bellwether process is not effective in these MDLs related to pelvic mesh." *Id.* at 2. "While [the court] had hoped that representative cases had been chosen in the bellwether process, without a trial of those cases because of their dismissal with prejudice by plaintiffs before trial, the parties have no opportunity to confirm that they were representative or determine potential values of these cases and the true cost of working them up for trial." *Id.*

The court concluded that "[t]he better approach, which [the court had] found effective in other MDLs, is to begin the work up of large numbers of cases in waves so that [the court could] remand or transfer those cases back to their home districts for trial." *Id.*

As a result, the court ordered that the 253 cases remaining in the Cook MDL in which the Cook defendants were the only named defendants "designat[e] for further work up." *Id.*

## CONCLUSION

In sum, MDL courts employ random selection, selection by the parties, or judicial selection, along with a number of hybrid selection models, in an effort to select representative cases for bellwether trials.

Going forward, the success of multidistrict litigation will likely depend on ensuring that representative cases are selected for bellwether trials and that once those cases are selected, they are not dismissed *en masse*.



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