Mass Torts Litigation: Looking Back but Heading Forward

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I. MULTIDISTRICT LITIGATION

The Judicial Panel on Multidistrict Litigation (JPML) created ten Mass Tort MDLs in 2007

1. MDL-1804: In re Stand 'n Seal Products Liability Litigation

   - Judge Thomas W. Thrash, Jr.
   - Northern District of Georgia
   - Transfer Date: January 5, 2007
   - Overview: The 11 consolidated actions each raised allegations that plaintiffs had suffered injuries resulting from their use of the Tile Perfect Stand 'n Seal "Spray-On" Grout Sealer. The litigation's five corporate defendants moved for consolidation in the Northern District of Georgia or, in the alternative, in the Northern District of Iowa. Plaintiffs requested transfer to the Western District of Texas. With no single forum standing out as a transferee district choice, the Panel centralized in the Northern District of Georgia for the following reason: 1. one of the eleven actions was already pending in that district; 2. the district was an easily accessible location; and 3. two of the five corporate defendants had their principal places of business in the district, and thus witnesses and documents relevant to plaintiffs' claims were likely to be located there.

2. MDL-1811: In re Genetically Modified Rice Litigation

   - Judge Catherine D. Perry
   - Eastern District of Missouri
   - Transfer Date: December 19, 2006
   - Overview: The seven consolidated actions involved various putative classes of rice farmers alleging that Bayer CropScience contaminated the farmers' commercial rice stocks with LLRice 601, a variety of genetically modified rice. All responding parties supported centralization, although disagreed on location. Various groups of plaintiffs proposed the actions be consolidated in the Eastern District of Arkansas, Northern District of Mississippi, Eastern District of Texas, Western District of Louisiana, Eastern District of Missouri, or Northern District of Illinois, respectively. Defendant Riceland Foods, Inc. supported the Eastern District of Arkansas. Common defendant Bayer CropScience supported consolidation in the Eastern District of Missouri, which the Panel ultimately selected as an appropriate transferee district. The Panel's rationale for selecting the Eastern District of Missouri was that the venue was supported by the common defendant, Bayer CropScience, as well as several plaintiff groups, and Judge Catherine D. Perry was "a seasoned juris in a readily accessible district with the capacity to handle this litigation."

3. MDL-1817: In re CertainTeed Corp. Roofing Shingle Products Liability Litigation

   - Judge Louis H. Pollak
   - Eastern District of Pennsylvania
   - Transfer Date: February 15, 2007
   - Overview: The eight consolidated actions involved allegations regarding defective roofing shingles manufactured, warranted, and distributed by Certain Teed Corp. The plaintiff moving for consolidation proposed the

Eastern District of Pennsylvania, to which the common corporate defendant, Certain Teed Corp., consented. In light of the agreement of all moving and responding parties and the fact that the headquarters of the common defendant, including the business unit that manufactured the shingles in question, was located in the Eastern District of Pennsylvania, the Panel selected it as the transferee venue.

4. MDL-1822: In re Bluetooth Headset Products Liability Litigation

- Judge Dale S. Fischer
- Central District of California
- Transfer Date: February 20, 2007
- Overview: The 13 consolidated actions alleged that defendants designed, manufactured, marketed and distributed Bluetooth headsets, which when used for certain periods of time could cause noise-induced hearing loss. The actions were brought as nationwide or statewide class actions, and plaintiffs sought relief under various theories of liability, including unjust enrichment, breach of express and/or implied warranties, and strict products liability, as well consumer protection claims. The moving plaintiffs requested centralization in the Central District of California. Defendants and all responding plaintiffs supported the motion and the Panel consolidated the actions in that district.

5. MDL-1836: In re Mirapex Products Liability Litigation

- Judge James M. Rosenbaum
- District of Minnesota
- Transfer Date: June 22, 2007
- Overview: The 54 consolidated actions all involved allegations concerning the alleged adverse side effects of the drug Mirapex, which is prescribed for Parkinson's disease, and the timeliness and adequacy of the defendants' warnings regarding those side effects. The common defendants moved for consolidation in the Southern District of New York or the District of Connecticut. The responding plaintiffs opposed transfer. The Panel selected the District of Minnesota for the following reasons: 1. the district had the most procedurally advanced actions; 2. the judge had already become familiar with the litigation; and 3. Minnesota was an easily accessible location. The District of Minnesota is also home to the Medtronic, Guidant and St. Jude medical device MDLs.

6. MDL-1842: In re Kugel Mesh Hernia Patch Products Liability Litigation

- Judge Mary H. Lisi
- District of Rhode Island
- Transfer Date: June 22, 2007
- Overview: The 13 consolidated actions involved allegations that various models of hernia patches manufactured and sold by C.R. Bard Inc., Davol, Inc. and/or Surgical Sense, Inc. were defective. Moving plaintiffs requested centralization in the District of Rhode Island, where defendant Davol, Inc. was headquartered. Other Plaintiffs requested consolidation in the Northern District of Alabama. Common defendants C.R. Bard and Davol, Inc. opposed consolidation, but, in the alternative, suggested selection of either the Eastern District of Missouri or the Western District of Arkansas for

centralization. Defendant Surgical Sense, along with at least one additional group of plaintiffs, opposed the motion. The Panel's only identified reason for consolidation in the District of Rhode Island was that Davol, Inc.'s headquarters were located there and it was thus where witnesses and relevant documents were likely to be found.

7. MDL-1844: In re Air Crash Near Peixoto de Azeveda, Brazil, on September 29, 2006

- Judge Brian M. Cogan
- Eastern District of New York
- Transfer Date: June 22, 2007
- Overview: The six consolidated actions concerned the cause or causes of a mid-air collision of an aircraft operated by Gol Linhas Aereas Inteligentes, S.A. with a business jet and the subsequent crash of the Gol aircraft near Peixoto de Azeveda, Brazil, on September 29, 2006. All responding parties supported centralization. Plaintiffs suggested the Southern District of Florida and Eastern District of New York, respectively. The Panel selected the Eastern District of New York because the first two filed actions were pending in that district and were more procedurally advanced than actions pending elsewhere.

8. MDL-1845: In re ConAgra Peanut Butter Products Liability Litigation

- Judge Thomas W. Thrash, Jr.
- Northern District of Georgia
- Transfer Date: July 17, 2007
- Overview: The 20 consolidated actions alleged physical and economic injury from consuming and/or purchasing contaminated peanut butter that was manufactured and packaged at ConAgra's Sylvester, Georgia plant. Three sets of plaintiffs moved for consolidation in the Northern District of Georgia, the District of South Carolina and/or the Western District of Washington, respectively. Common defendant ConAgra Foods, Inc. supported centralization in the Western District of Missouri, or, alternatively, the Northern District of Georgia or the Western District of Washington. The Panel selected the Northern District of Georgia because that was where the contaminated peanut butter was manufactured and, thus, it was likely relevant documents and witnesses could be found there.

9. MDL-1850: In re Pet Food Products Liability Litigation

- Judge Noel L. Hillman
- District of New Jersey
- Transfer Date: June 19, 2007
- Overview: The 13 consolidated actions stemmed from the recall of pet food products allegedly tainted by melamine found in wheat gluten imported from China and used in these products. All responding parties agreed that centralization was appropriate, but differed on location. Plaintiffs moved for centralization in District of New Jersey, Western District of Washington, Eastern District of Tennessee, Western District of Arkansas, and Northern District of Ohio, respectively. All related defendants, including Menu Foods, suggested the Northern District of Illinois. The Panel selected the District of New Jersey because one-third of all pending actions were already in the district and were more procedurally advanced.

10. MDL-1871: In re Avandia Marketing, Sales Practices and Products Liability Litigation

    - Judge Cynthia M. Rufe
    - Eastern District of Pennsylvania
    - Transfer Date: October 16, 2007
    - Overview: The 35 consolidated actions alleged adverse side effects and increased risk of heart attack associated with the use of the diabetes drug, Avandia. Plaintiffs proposed transfer to the Eastern District of Louisiana, District of Puerto Rico, Southern District of Florida, District of New Jersey and Southern District of New York, respectively. Defendant GlaxoSmithKline initially opposed centralization, but later suggested the MDL be located in the Eastern District of Pennsylvania. The Panel said that the choice of the Eastern District of Pennsylvania was appropriate because GlaxoSmithKline's principal place of business was in Philadelphia and witnesses and documents were likely to be found there. Of note, the Eastern District has most recently been home to the pedicle screw, diet drug and latex glove MDLs.

In 2007, the Panel denied centralization of the following requested mass tort MDLs:

- MDL-1821: In re Lycoming Crankshaft Products Liability Litigation
- MDL-1834: In re Helicopter Crash Near Zachary, Louisiana, on December 9, 2004
- MDL-1830: In re Air Crash at Lexington, Kentucky, on August 27, 2006
- MDL-1856: In re Depo-Provera Products Liability Litigation
- MDL-1883: In re Microsoft XBox 360 Console Defective DVD-ROM Drive Products Liability Litigation (Motion Withdrawn)

II. REMOVAL

Jurisdiction is often the first battleground in an emerging mass tort. Where – and in how many forums – a mass tort action will be litigated has potentially long-term ramifications for all involved. The following section details recent developments in mass tort removal case law in 2006 and 2007:

A. Removal under the Class Action Fairness Act (CAFA)

Many of the decisions involving CAFA have addressed whether a case was properly removed in light of CAFA applying only to cases commenced on or after February 18, 2005.

In the first significant court of appeals decision on this issue, the Tenth Circuit held in *Pritchett v. Office Depot, Inc.*, that "commenced" under CAFA meant the date the case was filed in state court, not when the case was removed to federal court. 420 F.3d 1090 (10th Cir. 2005). In *Pritchett*, Office Depot removed the case four days before the trial was scheduled to begin, arguing that the case commenced for purposes of CAFA when it was removed to federal court. The Tenth Circuit concluded that the plain words of the statute meant that a case "commenced" only once—when it was initially filed in state court. The court would not countenance a reading that would permit cases "to be plucked from state court on the eve of trial" and "would effectively apply new rules to a game in the final minutes of the last quarter." *Pritchett*, 420 F.3d at 1097.

The Seventh Circuit held that CAFA was not triggered if the amended complaint "relates back" to the original complaint. *Phillips*, 2006 U.S. App. LEXIS 2233 at *7. If the amendment "relates back" to the original complaint, there is no new suit, *i.e.*, the statute of limitations would not run. *Id.* Because Illinois law "allows named plaintiffs to be substituted with relation back," the amended complaint did not commence a new suit. *Id.* at *9. *See also Plubell v. Merck & Co., Inc.*, 434 F.3d 1070 (8th Cir.

2006) (substitution of a new class representative did not result in a new case commenced after CAFA's effective date because the claims alleged in the original complaint and the amended complaint were the same, and the new class member was a member of the putative class in the original complaint).

1. CAFA: The Burden of Establishing Federal Jurisdiction

In *Brill v. Countrywide Home Loans, Inc.*, the plaintiffs alleged that Countryside violated the Telephone Consumer Protection Act by sending fax advertisements. 427 F. 3d 446 (7th Cir. 2005). Countryside removed the case, and the issue for the court was whether the jurisdictional minimum of $5 million was met. Countryside argued that CAFA reassigned the burden of establishing remand to the plaintiffs, relying not on the language of the statute, but on language in the report of the Senate Judiciary Committee that stated that if a case is removed, the burden should be on the named plaintiff(s) to establish that removal was improvident.

The Seventh Circuit rejected Countryside's argument, finding that "naked legislative history has no legal effect." *Brill*, 427 F.3d at 448. It noted that the Act itself contained no provision that was arguably relevant, and therefore, "when the legislative history stands by itself . . . it has no more force than an opinion poll of legislators—less really, as it speaks for fewer. . . . The rule that the proponent of federal jurisdiction bears the risk on non-persuasion has been around for a long time. To change such a rule, Congress must enact a statute with the President's signature (or by two-thirds majority to override a veto). A declaration by 13 Senators will not serve." *Id.*

The Ninth, Eleventh, and Second Circuits have followed the Seventh Circuit's lead and upheld the *Brill* decision. In doing so these circuits rejected arguments relying on CAFA's Senate Judiciary Committee Report and agreed that the burden of proving the jurisdictional minimum lies with the removing party. *See generally Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 686 (9th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328-29 (11th Cir. 2006); and *Blockbuster v. Galeno*, 472 F.3d 53 (2d Cir. 2006) (stating that Congress has to explicitly overrule precedent and committee reports cannot serve as an independent statutory source); *but see Harvey v. Blockbuster, Inc.*, 384 F.Supp.2d 749, 752 (D.N.J. 2005) (stating it appears "the party opposing removal under Section 1332(d) bears the initial burden of demonstrating that an action should be remanded. *See* S.Rep. 109-14, at 42-44. *See also* 151 Cong.Rec. H723-01, at H727 & H732 (2005) (statements of Reps. Sensenbrenner and Goodlatte).").

2. CAFA: The Amount in Controversy

The issue of who has the burden of establishing federal court jurisdiction may be dispositive in determining whether CAFA's jurisdictional minimum of $5 million is met in a particular case.

In *Ongstad v. Piper Jaffray & Co.*, the plaintiffs sued for alleged unauthorized trading in brokerage accounts maintained by Piper Jaffray in various North Dakota offices. 2006 U.S. Dist. LEXIS 140 (D.N.D. Jan. 4, 2006). Piper Jaffray removed, and the plaintiffs moved to remand. Following *Brill*, the court concluded that Piper Jaffray had the burden of establishing federal court jurisdiction. Diversity existed, and the issue for the court was whether there was at least $5 million in controversy. While CAFA permits the aggregation of plaintiffs' claims, in *Ongstad* the complaint did not pray for a specific dollar amount of damages. In trying to establish the jurisdictional minimum, Piper Jaffray submitted an affidavit establishing that its North Dakota offices had approximately 16,200 open accounts, held by 11,300 clients, managing in excess of $1 billion in assets. Piper Jaffray argued that even if the alleged unauthorized trading occurred in only a small percentage of these accounts and involved only a small percentage of the assets, its liability could easily exceed CAFA's amount in controversy minimum of $5 million.

The court held that this evidence failed to establish that the amount in controversy exceeded $5 million. It concluded that there was no inherent correlation between the total value of the assets held in the accounts and the amount of damages sustained. *Ongstad*, 2006 U.S. Dist. LEXIS 140 at *16. According to the court, the proper measure of damages would be "the difference between the value of the unauthorized investment at the time it was sold or purchased and its current value." *Id.*

Because neither party provided the court with a reliable method to estimate that amount, there was substantial uncertainty regarding the amount in controversy in the case, and the court decided the motion to remand by applying the general rule that any doubt regarding whether federal jurisdiction exists should be resolved in favor of remand. *Id.* at 18.

3. CAFA: The Deadline to Appeal

CAFA contains what many have concluded is a drafting error. It provides that an application to appeal must be "made to the court of appeals not less than 7 days after entry of the order." 28 U.S.C. § 1453(c)(1). In *Pritchett*, the Tenth Circuit concluded that this was a "typographical error" and that the word "less" should be read as "more" to avoid "a result demonstrably at odds with the intentions of the drafters." *Pritchett*, 420 F.3d. at 1093 n.2. *See also Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 2006 U.S. App. LEXIS 1858 at *16 (9th Cir. Jan. 26, 2006) ("there is no apparent logical reason for the choice of the word 'less' in the statute, use of the word 'less' is, in fact, illogical and contrary to the stated purpose of the provision, and the statute should therefore be read to require that an application to appeal under § 1453(c)(1) must be filed—in accordance with the requirements of FRAP 5—not *more* than 7 days after the district court's order") (emphasis in original).

4. CAFA: Limits on Appeal

CAFA's appellate review provisions are limited to only those class actions brought under CAFA. In *Saab v. Home Depot U.S.A.*, defendant removed a class action to federal district court arguing that the parties were diverse and the amount in controversy exceeded $75,000.00. 469 F.3d 758 (8th Cir. 2006). The district court denied the plaintiff's motion to remand and plaintiff appealed to the Eighth Circuit pursuant to 28 U.S.C. § 1453(c)(1), enacted under CAFA. *Saab*, 469 F.3d at 759. The Eighth Circuit determined, however, that CAFA's appeal provision does not permit an appeal from the denial of a motion to remand when the class action has been removed to federal court on the basis of traditional, complete diversity jurisdiction under Section 1332(a). *Id.* at 759-60. The Eighth Circuit stated that it must limit § 1453(c)'s appellate review provisions solely to class actions brought under CAFA. In reaching this holding the Eighth Circuit joined with two prior rulings from the Fifth Circuit. *See Patterson v. Morris*, 448 F. 3d 736, 742 (5th Cir. 2006); *Wallace v. Louisiana Citizens Prop. Ins. Corp.*, 444 F.3d 697, 700 (5th Cir. 2006) (holding that the review provisions of Section 1453 are limited to class actions brought under CAFA).

5. CAFA: The Local Controversy and Home State Exceptions

In *Kitson v. Bank of Edwardsville*, the plaintiffs brought a class action alleging defendants improperly calculated interest on their loans. 2006 WL 3392752 (S.D. Ill. Nov. 22, 2006). One defendant removed the case pursuant to CAFA. The removing defendant satisfied the juridical requirements but the court remanded the case based on the statute's local controversy and home state exceptions. *Id.* at *17.

The removing defendant first argued that abstention was improper under the local controversy exception because it was not evident that two-thirds of the class members were Illinois citizens. *Id.* at 5-6. However, the court concluded that two-thirds or more of the proposed plaintiff class and the primary defendants were from Illinois. *Id.* at 7. The court also determined that the removing defendant was not the primary defendant because its liability was "predicated solely on aiding and abetting" the

in-state defendants' alleged wrongdoing. *Id.* at 14. The removing defendant disputed whether the local controversy was implicated because the "principal injuries" did not transpire in Illinois. In making this argument, the defendant relied on CAFA's legislative history. The Court was unmoved by the legislative history and found that the local controversy exception applied, reasoning that "[T]he purpose of this criterion is to ensure that this exception is used only where the impact of the misconduct alleged by the purported class is localized." *Id.* at 9.

In *Preston v. Tenet Healthsystem Memorial Medical Center*, the United States District Court for the Eastern District of Louisiana examined a Hurricane Katrina case surrounding stranded hospital patients. The case was removed to federal court pursuant to CAFA and remanded as a result of the local controversy and the home state exceptions. 2006 WL 3396171 (E.D. La. November 21, 2006).

Plaintiffs brought their class action in Louisiana state court and the defendants removed pursuant to CAFA. Plaintiffs then moved to remand and the court granted their motion. The court's decision to remand the case focused on Sections 1332 (d)(3) and (4), the local controversy and home state controversy exceptions. The court determined that more than two thirds of the proposed class members were citizens of Louisiana, the defendants were Louisiana citizens, and the injuries took place in Louisiana. The court also found that the discretionary exception under 1332 (d)(3) applied. *Id.* at *9. The court held there was a distinct nexus between the forum of Louisiana, the defendants, and the proposed class. All of the defendants' actions and all of the alleged injuries to patients took place at Memorial Hospital in New Orleans. The court therefore concluded that the case was a local controversy and had to be remanded to state court.

B. Fraudulent Misjoinder

Just more than ten years after the concept of "fraudulent misjoinder" was first articulated, the doctrine continues to be a relevant, and much disputed, basis for removal in mass tort litigation. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (holding that two groups of defendants had been "egregiously" misjoined because none of the claims against the defendants arose from the same transaction or occurrence), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 2004 F.3d 1069-1072 (11th Cir. 2000). Since *Tapscott*, removal based on fraudulent misjoinder has generally arisen in one of two fact patterns:

1. Complaints involving multiple "misjoined" diverse and non-diverse plaintiffs (who are often asserting claims against multiple diverse and non-diverse defendants); or
2. Complaints involving claims against non-diverse defendants that have been "misjoined" with claims against a diverse defendant. [1]

[1] This scenario is often coupled with the more traditional allegation that the non-diverse defendant has been fraudulently joined because there is not a reasonable basis for imposing liability under state law. By contrast, misjoinder is premised on the concept that the claims asserted against the non-diverse defendant do not arise out of the same series of transactions or occurrences as the claims against the diverse defendant and their joinder is procedurally improper.

In general, the first scenario has proven far more amenable to successful removal on the basis of fraudulent misjoinder. Federal district courts – particularly MDL courts – have shown a disinclination to allow the unwieldy joinder of individual plaintiffs in a single complaint to serve as a tool for preventing removal. This trend continued in 2006-2007.

In *Accardo v. Lafayette Ins. Co., et al.,* for example, the Eastern District of Louisiana refused to allow eighteen individual Louisiana property owners to proceed with claims against a group of insurer defendants, all but one of whom was diverse. 2007 WL 325368, at *5 (E.D. La. Jan. 30, 2007). Applying Louisiana's joinder statute, the court held that there was "insufficient factual overlap among these claims to make it a matter of common sense for the eighteen plaintiffs to litigate their individual actions together." *Id.* Likewise, in *In re Prempro Prods. Liab. Litig.*, the court denied remand in a multi-plaintiff, multi-defendant case, pointing out that "[p]laintiffs are residents of different states and were prescribed different HRT drugs from different doctors, for different lengths of time, in different amounts, and suffered different injuries." 417 F. Supp. 2d 1058, 1060-61 (E.D. Ark. 2006). The court went on to state that it would look at similar such complaints "with a jaundiced eye." *Id.; see also In re Seroquel Prods. Liab. Litig.*, 2006 WL 3929707 (M.D. Fla. Dec. 22, 2006).[2]

By contrast, removals premised on the basis that one or more non-diverse defendants have been misjoined have proven far less reliable for the removing party. Over the course of the past year and half, the majority of federal courts presented with removals premised, at least in part, on the alleged misjoinder of defendants declined to accept jurisdiction. *See, e.g., Lief's Auto Collision Ctrs. v. Progressive Halcyon Ins. Co.,* 2006 WL 2054552 (D. Or. July 21, 2006) (finding joinder of claims appropriate under Oregon law); *A. Kraus & Son v. Benjamin Moore & Co.*, 2006 WL 1582193 (E.D.N.Y. June 7, 2006) (holding that claims against non-diverse defendant were "inextricably intertwined" with those asserted against diverse defendant); *Wenski v. Janssen Pharmaceutica, L.P., et al.*, 2006 WL 1153816 (E.D. Mo. May 1, 2006) (declining to hold non-diverse healthcare defendants had been fraudulently misjoined).

At least one court – the Southern District of Illinois – rebuked the doctrine outright. In three separate rulings, the Southern District declined to adopt misjoinder as a basis for removal regardless of whether the scenario involved: 1. misjoined defendants; 2. misjoined plaintiffs; or 3. as an exception to the voluntary-involuntary rule following a state-court severance of claims. *See Rutherford v. Merck & Co., Inc.*, 428 F. Supp. 2d 842 (S.D. Ill. 2006); *Bavone, et al. v. Eli Lilly & Co.,* 2006 WL 1096280 (S.D. Ill. April 25, 2006); *Vogel v. Merck & Co., Inc., et al.*, 2007 WL 709002 (S.D. Ill. Mar. 6, 2007); *see also Sabo v. Dennis Technologies, LLC, 2007* WL 1958591 (S.D. Ill. July 2, 2007).

In *Rutherford*, and later *Bavone*, the Southern District savaged the doctrine as an "improper expansion of the scope of federal diversity jurisdiction by the federal courts" and the source of "enormous judicial confusion." *Rutherford*, 428 F. Supp. 2d, at 852. At least two other district courts have since followed *Rutherford's* lead. *See Alegre v. Aguayo, M.D., et al.*, 2007 WL 141891 (N.D. Ill. Jan. 17, 2007) (declining to adopt the fraudulent misjoinder doctrine); *Bird v. Carteret Mortgage Corp., et al.,* 2007 WL 43551 (S.D. Ohio Jan. 5, 2007) (finding the "cases declining to adopt the fraudulent misjoinder rule are the better reasoned and are more consistent with the oft-repeated maxim that removal jurisdiction is to be strictly construed"). Interestingly, the court's refusal in *Vogel* (discussed

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[2] *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 651-54 (S.D. Tex. 2005); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 679 (E.D. Pa. 2003); *In re Baycol Prods. Litig.*, 2003 WL 22341303, at *3 (D. Minn. 2003); *In re Baycol Prods. Litig.*, 2002 WL 32155269, at *2 (D. Minn. July 5, 2002); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 145-47 (S.D.N.Y. 2001); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 1999 WL 554584, at *4 (E.D. Pa. July 16, 1999).

in more detail below) to acknowledge misjoinder as exception to the voluntary-involuntary rule followed just more than year after the Fifth Circuit, in *Crockett v. R.J. Reynolds Tobacco Co., et al.* had held that improper joinder, like fraudulent joinder, *could serve* as exception to the rule. 436 F.3d 529, 533 (5th Cir. 2006).

While district courts in the Sixth and Seventh Circuits rejected fraudulent misjoinder outright, at least one district court in the Eighth Circuit trended the other direction. In *In re Guidant Corp. Implantable Defibrillator Prods. Liab. Litig.*, the plaintiff had made claims against both the non-diverse doctor who had implanted and explanted the plaintiff's internal defibrillator and the defibrillator's diverse manufacturer. 2007 WL 2572048, *1-3 (D. Minn. Aug. 30, 2007). After the diverse manufacturer removed, the non-diverse doctor moved for remand, requesting that the claims against him be severed from the claims made against the diverse manufacturer defendant. The doctor asserted that the medical negligence claims asserted against him were legally distinct from the product liability claims made against the manufacturer and, thus, had been inappropriately joined. The MDL court agreed, severing and remanding the claims against the non-diverse defendant while retaining jurisdiction over the diverse manufacturer defendant. In so doing, the court declined to adopt the "egregious" standard set forth originally in *Tapscott*. Rather, the District of Minnesota reasoned that "where a non-diverse party . . . cannot be properly joined under the Federal Rules of Civil Procedure, other interests, such as the Defendants' statutory right of removal, prevail over that of permitting a plaintiff's choice of forum." *Id.* at *3.

The fraudulent misjoinder doctrine was also employed with limited success in the scores of insurance-related lawsuits filed in the aftermath of Hurricane Katrina and Rita. *See Accardo*, 2007 WL 325368; *but see, e.g.*, *Sisson, et al. v. American Family Home Ins. Co*., 2007 U.S. Dist. LEXIS 50055 (E.D. La. July 9, 2007); *Oster v. Allstate Ins. Co*., 2007 U.S. Dist. LEXIS 47820 (E.D. La. July 2, 2007); *Haas v. Liberty Mutual Fire Ins. Co*., 2007 WL 1029462 (E.D. La. March 30, 2007); *Murphy Constr. Co., et al. v. St. Bernard Parish, et al.*, 2007 WL 442231 (E.D. La. Feb. 6, 2007); *Southern Athletic Club LLC v. Hanover Ins. Co*., et al., 2006 WL 2583406 (E.D. La. Sept. 6, 2006); *Radlauer v. Great Northern Ins. Co., et a*l., 2006 WL 1560791 (E.D. La. May 16, 2006). In *Sisson*, the Eastern District of Louisiana clarified its approach to fraudulent misjoinder.

Sisson involved two separate, albeit related, homeowners who had brought suit against several insurers. The lone non-diverse insurer defendant removed, arguing that plaintiffs' claims against the various insurance companies – both diverse and non-diverse – had been misjoined. The Eastern District agreed, stating that "two unrelated insurers who issued unrelated and distinct policies on two separate properties" lacked the requisite community of interest and that none of the relief sought by plaintiffs could be applied to the defendants jointly, severally, or in the alternative. Still, the Eastern District granted remand. Echoing *Tapscott*, the *Sisson* court held that: "*mere misjoinder* of claims does not necessarily imply improper joinder of claims unless the misjoinder is *particularly egregious*. This case does not involve wholly unrelated plaintiffs but instead only involves wholly unrelated defendants so the misjoinder in this case is not as egregious as the one in *Tapscott* . . . under the facts presented in this case the Court does not find the misjoinder is so egregious so as to allow the Court to ignore the [non-diverse defendant's] citizenship." *Sisson*, at *4-7. (emphasis added)

C. The Voluntary-Involuntary Rule

As discussed above, district courts in different jurisdictions recently reached opposite conclusions as to whether the doctrine of fraudulent misjoinder could serve as an additional exception to the voluntary-involuntary rule, the federal common-law principle that only a voluntary action by a plaintiff (such as the voluntary dismissal of a non-diverse defendant) can make a case removable in diversity jurisdiction.

In 2006, the Fifth Circuit held in *Crockett v. R.J. Reynolds Tobacco Co., et. al*., that procedurally improper joinder, or misjoinder, could serve as an additional exception to the traditional bar to removal imposed by the voluntary-involuntary rule. 436 F.3d 529, 533 (5th Cir. 2006). The Fifth Circuit found no reason to allow an exception where a non-diverse defendant had been fraudulently joined, but not allow the same exception where a non-diverse defendant had been improperly joined procedurally. *Id.* The court noted that both exceptions to the voluntary-involuntary rule served the same "salutary purpose" of preventing plaintiffs from "blocking removal by joining non-diverse and/or in-state defendants who should not be parties." *Id.*

The Eastern District of Louisiana has since interpreted *Crockett* to be a endorsement by the Fifth Circuit of the fraudulent misjoinder doctrine generally. *Murphy Const. Co. v. St. Bernard Parish*, 2007 WL 442231 (E.D. La. Feb. 6, 2007); *Accardo v. Lafayette Ins. Co*., 2007 WL 325368 (E.D. La. Jan. 30, 2007). The Western District of Louisiana, however, arrived at a different conclusion as to the import of the Fifth Circuit's holding in *Crockett*. In *Griffith v. Louisiana Citizens Coastal Plan*, *et al.*, a diverse insurance company removed on the grounds that it had been fraudulently misjoined with an in-state insurance company. 2007 WL 933510, *3-4 (W.D. La. Feb. 16, 2007). The Western District rejected the argument, holding that is was "unnecessary to adopt fraudulent misjoinder" since the Fifth Circuit's ruling in *Crockett* meant that the issue of joinder must first be litigated at the state court level – rendering removal on misjoinder grounds "wholly unnecessary." *Id.* Whether this was the Fifth Circuit's intention in *Crockett* remains unclear.

Most recently, the Southern District of Illinois held that it would not recognize fraudulent misjoinder as an exception to the voluntary-involuntary rule. *Vogel v. Merck & Co*., 2007 WL 709002, at *9 (S.D. Ill March 6, 2007). The court held that because it did not recognize fraudulent misjoinder directly for purposes of removal, "the Court will not recognize the doctrine indirectly, by acknowledging it as an exception to the voluntary-involuntary rule." *Id*.

Interestingly, a number of courts faced with the issue of fraudulent misjoinder have noted, *in dicta*, that defendants should address perceived misjoinder at the state court level before seeking to remove. *See, e.g*., *Bird v. Carteret Mortgage Corp*., *et al*., 2007 WL 43551, at *6 (S.D. Ohio Jan. 5, 2007) (stating that allowing state courts to determine misjoinder prior to removal would preserve the "concept that state procedural irregularities cannot have an effect of the existence or nonexistence of federal court jurisdiction"); *In re Prempro Prods. Liab. Litig.*, 417 F. Supp. 2d 1058, 1060-61 (E.D. Ark. 2006) (noting that it would be a "more efficient approach if the removing party would address misjoinder in the original court, before removal); *see also S. Bayview Apts., et al. v. Continental Western Insurance Co*., 2007 U.S. Dist. LEXIS 50160 (W.D. Wash. July 11, 2007) (holding that misjoinder must be resolved at the state court level). In light of the conflicting case law, it is unclear whether this judicially recommended approach would ultimately allow for successful removal to federal court – even if a state court should hold the non-diverse plaintiff/defendant had been misjoined under applicable state joinder rules.

D. Federal Officer Removal

In 2005, the Eighth Circuit affirmed an Arkansas district court's ruling that the Federal Trade Commission's ongoing regulation of the tobacco industry rose to a sufficient level to allow for removal under 28 U.S.C. § 1442(a), the statute permitting removal in situations where a person is sued for actions take under the direction of a federal officer. *See Watson v. Philip Morris Cos., Inc*., 420 F.2d 852 (8th Cir. 2005). Two years later, the United States Supreme Court reversed and remanded the Eighth Circuit's decision in *Watson*, effectively foreclosing the use of federal officer removal as a means for obtaining federal jurisdiction by federally-regulated defendants. *See Watson, et al. v. Philip Morris Cos., Inc*., 127 S. Ct. 2301 (2007).

The Supreme Court's decision rested primarily on the belief that tasks performed by regulated defendants – even highly regulated ones – did not meet the threshold for "acting under" a federal officer as required by Section 1442(a). The Court stated that "the help or assistance necessary to bring a private person within the scope of the statute does not include simply complying with the law." *Id.* at ***18. If that were the case, the Court stated, federal officer removal would theoretically be open to such defendants as taxpayers who fill out complex federal tax forms, airline passengers who obey federal regulations prohibiting smoking, or well-behaved federal prisoners – all of whom the Court reasoned help or assist, in some sense, the federal government. The Court also pointed out that the defendants' actions were not covered by the statute's traditional purpose – protecting federal officers from local prejudices. "When a company subject to a regulatory order (even a highly complex order) complies with the order, it does no ordinarily create a significant risk of state-court 'prejudice,'" the Court stated. "Nor is a state-court lawsuit brought against such company likely to disable federal officials from taking necessary action designed to enforce federal law." *Id.* at ***18-19.

What remains to be seen is how the Supreme Court's decision in *Watson* will impact the ability of private-party government contractor defendants to remove under Section 1442(a) – a situation that has most often come up in the context of asbestos litigation (and will likely become increasingly relevant post-Iraq). Although the Court expressly declined to analyze in what situations a private contractor could invoke the statue, the Court, *in dicta*, seemed to confirm that federal officer removal remained very much a viable option for contractor defendants. In distinguishing the relationship of regulated defendants and private contractor defendants with the federal government, the Court made clear that "the assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." These defendants, the Court reasoned, perform a job that, "in the absence of a contract with a private firm, the Government itself would have performed." *Watson*, at ***21.

III. MASS TORT CASE MANAGEMENT

There have been a number of decisions in the past 24 months addressing the management of mass torts through the use of bellwethers, *LonePine* orders, and other procedural mechanisms. Summaries of the decisions that may be helpful to practioners are set forth below.

In re: Medtronic Implantable Defibrillator Product Liability Litigation
2007 WL 846642 (March 6, 2007 D. Minn.)
The case management order for the Medtronic Defibrillator MDL includes a provision requiring the use of bellwether plaintiffs. In an order last month the court ordered the parties to select bellwethers pursuant to a fairly limited time schedule:

(1) counsel for plaintiffs and defendants must submit a joint report identifying no more than six categories for bellwether cases;
(2) on or before April 1, plaintiffs counsel must submit a report assigning each plaintiff who has completed a fact sheet to one of the jointly selected case categories (assignment must be based upon information contained in fact sheet);
(3) on or about April 15, the court will randomly select plaintiffs in each category to be the potential bellwether trial cases – the court will choose an odd number of randomly selected plaintiffs in each category (with at least 5 but no more than 10 plaintiffs per category);
(4) on or about April 25, three potential bellwether plaintiffs in each category will be identified through the use of alternating preemptory strikes (plaintiffs have first preemptory strike, defendants have second strike, and so on);
(5) following the selection of the bellwethers, the case management order provides the procedure for conducting discovery applicable to the trial bellwethers.

(6) By November 1, 2007, the parties shall meet and confer and then submit a report providing a joint recommendation as to which of the three bellwether pool cases in each category should proceed to bellwether trial. Absent agreement of the parties, the court will select the bellwether trial cases and the order in which the trials will proceed.

In re: Guidant Corp. Implantable Defibrillators Products Liability Litigation
2006 WL 409200, *1 (Jan. 31, 2006 D. Minn.)
In this MDL the Court outlined the use of bellwether plaintiffs and provided some background to its intent regarding the use of bellwethers:

> The Court believes that the parties and the Court have a meeting of the minds on what is meant by the phrase "representative or so-called bellwether" cases. Generally, the term refers to individual cases that can illustrate and inform the parties and the Court of important issues in the litigation, which necessarily means they are of value to individual Plaintiffs and the case as a whole for a variety of reasons. It does not mean that, absent a stipulation of the parties, the trials would have any claim-preclusive effect on any other case. Whether a group of cases could be consolidated as one of the representative cases is a matter to be decided by the Court and counsel. Whether the best interests of individual Plaintiffs and the Defendants and this litigation in general will be found in locating a test case that will consolidate a number of individual cases to be tried together, or whether the Court tries three to five cases that are of value to this litigation, is a decision that can be made consistent with the schedule set forth in this Order.

In re: Guidant Corp. Implantable Defibrillators Products Liability Litigation
2006 WL 905344 (March 23, 2006 D. Minn.)
After its preliminary order on the use of bellwethers, the MDL court issued a pretrial order entitled "Establishing an Instructive Bellwether Case Selection Plan." In this order the district court noted the two general ways for selecting bellwether plaintiffs: (1) obtaining the input of counsel to establish truly representative trial categories that are proportionately representative of the case in the MDL; or (2) enacting a random selection process (as a third alternative the court can simply order the parties to identify a specified number of bellwethers). The court recognized a strong preference for obtaining the input of counsel and selecting truly representative bellwethers, as this process would most likely lead to the identification of verdict ranges that are representative of the various categories of plaintiffs in the MDL. With this goal in mind, the court ordered the parties to (1) consult and agree on trial categories that proportionately represent the variety of cases in the MDL; and (2) identify a process by which individual cases can be selected from these categories for trial. The court emphasized the burden on the parties by stating that, "[w]ith or without the agreement of the parties, it is the intent of the Court to proceed with an established trial selection plan" within approximately one month of the date of its order.

In re: Neurontin Marketing, Sales Practices and Products Liability Litigation
MDL Docket No. 1629, D. Mass.
In this MDL the defendant Pfizer Inc. asked the United States District Court for the District of Massachusetts to randomly select the first ten cases from an MDL pool of 140 product liability cases. Plaintiffs requested that the court either allow the plaintiffs to select the first ten cases or for each side to be permitted to pick five each. In recognizing that a core issue in the MDL was whether Neurontin can cause the harms that the plaintiffs claim, the Magistrate Judge ordered cases to be selected from a pool of 80 plaintiffs (all filed by the same law firm) for the first track of cases from the MDL, and that the plaintiff and defendant will each select their two best cases. Notably, allowing the respective sides to choose the cases does not result in the selection of bellwether plaintiffs – it simply allows the plaintiffs to select the best cases and the defendants to select the worst. Nonetheless, where the issue

to be tested is causation (as in the Neurontin MDL), the selection of "best" and "worst" cases probably provides as good a sample as any for testing theories of general causation.

Burns et al. v. Universal Crop Protection Alliance
2007 WL 2811533 (E.D. Ark. Sept. 25 2007)
In *Burns* eighty five cotton farmers filed suit against five herbicide manufacturers alleging the plaintiffs' cotton crops suffered damage after exposure to the defendants' herbicides. Plaintiffs alleged that "tens of thousands of pounds" of the defendants' herbicides were applied to rice crops in northeast Arkansas, and that some of these herbicides drifted across a ridge and damaged the plaintiffs' cotton crops. On the basis that numerous factors (such as wind speed, aircraft speed, field location, and the use of drift control products) would have to be analyzed to determine causation, the defendants argued that discovery would be inordinately expensive and burdensome, and that the plaintiffs should be required to make a *prima facie* showing of which of the defendants' products came into contact with each of the plaintiffs' crops. The defendants requested a *LonePine* order that would require the plaintiffs to show, by affidavit: (1) for each defendant's product at issue, the date, location and amount of each product application at issue; (2) for each plaintiff, the location and acreage of each cotton field claimed to have been damaged; (3) for each cotton field, the manufacturer, distributor and name brand of each product allegedly transported to the field and the location from which the product was transported; (4) the facts supporting the plaintiffs' claim that each defendant's product was transported to the plaintiffs' cotton fields; and (5) the preliminary facts and data relied on by any experts to support the plaintiffs' claims of causation. Relying on Arkansas law requiring that, where several defendants' products must have caused an injury, the plaintiff must introduce sufficient evidence that exposure to a particular defendant's product was a substantial factor in producing the injury, the court agreed that a *LonePine* order "identical or similar" to that proposed by the defendants was appropriate.

Morgan v. Ford Motor Company
2007 WL 1456154 (D.N.J. May 17, 2007)
In this case over 700 plaintiffs alleged personal injury and property damage from exposure to materials released from the Ringwood Mines Landfill site in New Jersey. Defendants moved for a *LonePine* order on the grounds that the plaintiffs' complaint did not include information about the individual plaintiffs' injuries. Specifically, the defendants sought expert affidavit evidence from the plaintiffs showing: (1) that the plaintiffs were in fact injured from exposure to chemicals; (2) that there is a basis to conclude that the injury-causing chemicals came from the landfill; and (3) that the exposure is attributable to the conduct of the defendants. Plaintiffs countered by arguing that the *LonePine* order requested by defendants would deny them any discovery while requiring them to "fund and exchange literally hundreds of expert reports." Instead, the plaintiffs proposed that the case could be better managed by means of phased proceedings and bellwether trials. After a fairly detailed analysis of bellwether plaintiffs and *LonePine* orders, the court distinguished this case from *LonePine* and declined to enter a true *LonePine* order. Because there were only 20 defendants in this case (as opposed to 464 in *LonePine*), the EPA had listed the landfill on the National Priorities List (as opposed to indicating that there was no contamination at the landfill involved in *LonePine*), and the plaintiffs' properties were close to the subject landfill (as opposed to being up to 20 miles away in *LonePine*), the court held that the plaintiffs would not required to prove a *prima facie* case without any discovery. However, the court struck a balance and required the plaintiffs to provide the defendants a "simple statement" from each plaintiff identifying the nature and extent of their injuries. The court also found that a phased, bellwether proceeding would be appropriate, and implemented the following case management order:

> [M]indful of Rule 1 and pursuant to the Court's discretion in managing its caseload, the Court will fashion a Rule 16 Case Management Order tailored to the specific circumstances of this case. The Court will require Plaintiffs' counsel to initiate a

> Rule 26(f) conference within 30 days. During this conference the parties will discuss the following phases delineated by the Court. Phase I will include (1) completion of a Rule 26(a)(1) simple statement from all plaintiffs regarding the "nature and extent of injuries suffered," their treating physicians, and medical authorizations, to be followed by (2) designation of five bellwether plaintiffs, (3) discovery regarding causation as to the five bellwether plaintiffs, (4) expert discovery as to the five bellwether plaintiffs, and (5) dispositive motion practice as to the five bellwether plaintiffs. If the bellwether plaintiffs' claims survive summary judgment motions, plenary discovery regarding property damage, personal injury, and causation for the remaining plaintiffs will be conducted in Phase II. Fact discovery regarding on-site contamination may commence immediately and may continue throughout Phases I and II.

Simeone v. Girard City Board of Education
872 N.E.2d 344 (Ohio App. 2007)
In this case students, parents, and their teachers brought suit alleging various health problems caused by building defects. The defendants moved for and obtained a *LonePine* order, and the plaintiffs complaint was ultimately dismissed by the trial court for failure to satisfy the requirements of the *LonePine* order. On appeal the Ohio Court of Appeals reversed, holding that the trial court prematurely and inappropriately entered the *LonePine* order. The *LonePine* order in this case required each plaintiff to identify specifically the toxins they alleged caused their injuries and to provide expert affidavits supporting causation. Finding no "established precedent" in Ohio for a *LonePine* order, the court found that the trial court's order had the effect of "effectively and inappropriately supplant[ing] the summary judgment procedure." The appeals court reversed the trial court's dismissal and reinstated the plaintiffs' case. This case leaves serious doubt about the viability of any *LonePine*-type case management order in Ohio state courts.

Schwan v. CNH America LLC
2007 WL 1345193 (D.Neb. April 11, 2007)
In *Schwan* the district court granted summary judgment against 135 plaintiffs in a mass tort case who failed to provide disclosures required by a previously issued *LonePine* case management order. The decision includes very little analysis, but the court's decision was that, because the plaintiffs did not satisfy the case management disclosure requirements, they would not be able to prove their cases against defendants and summary judgment was therefore appropriate.

In re: Methyl Tertiary Butyl Ether (MTBE) Products
2007 WL 1791258 (S.D.N.Y. June 15, 2007)
This MDL proceeding involves two municipalities in New York suing various defendants for the use and handling of MTBE and the alleged contamination of numerous municipal water wells. In March, 2007 the plaintiffs moved to set a trial of ten bellwether water wells, in which the contamination and liability associated with ten of the water wells would be decided. The plaintiffs premised their argument on the grounds that a trial involving ten wells would take approximately three months, while a trial of all 182 wells might take two years or more. In opposing the use of bellwether trials, the defendants relied heavily on the right to trial issues and the preclusive implications of bellwether trials raised in *In re Chevron*, 109 F.3d 1016 (5th Cir. 1997). The district court found the defendants' concerns invalid on the grounds that the two plaintiffs involved in this action would be parties to the trial, so no plaintiff would gain any preclusive advantages while not being present at trial; there would be no extrapolation of liability from the bellwether trial; and the only preclusive affects of any trial would be with respect to common issues of tort liability. With respect to the preclusive effects of the bellwether trial, the court envisioned that the bellwether trial jury would be asked to answer interrogatories addressing common liability issues, such as whether the defendants could have provided feasible alternatives to MTBE, whether the defendants knew of the dangers of MTBE,

whether the defendants provided adequate warnings about the dangers of MTBE, and whether water contamination was a foreseeable result of the use of MTBE-containing gasoline. The court stated that these findings could have preclusive effects in future trials.

In re: Welding Fume Products Liability Litigation
2007 WL 1702953 (N.D. Ohio June 26, 2007)
This decision in the Welding Rod MDL addressed the defendants' concerns that the bellwether plaintiffs selected for trials had been almost entirely of the plaintiffs' choosing. Defendants urged that the bellwether plaintiffs for trials in November 2007, January 2008 and July 2008 should be selected randomly by the court. While the court recognized the defendants concerns, it concluded that the bellwethers selected by plaintiffs for trial in November 2007 and January 2008 were sufficiently representative to be valid choices for bellwethers (the court noted that the purpose of bellwether trials was to produce a sufficient number of representative verdicts to enable the parties and the court to facilitate a resolution of the entire body of cases). However, the court indicated that it would select the July 2008 bellwether from a previously and randomly selected pool of 100 plaintiffs.

In re: Medtronic, Inc. Implantable Defibrillator Product Liability Litigation
2007 WL 846642 (D. Minn. March 6, 2007)
In this MDL the trial court issued a case management order setting time lines for disclosures of fact sheets by both sides, parameters for fact discovery, and the use of bellwether trial plaintiffs. The portion of the court's order addressing bellwether plaintiffs required: (1) the parties to identify no more than six categories of cases into which bellwethers could be designated; (2) the process for plaintiffs to assign each plaintiffs to one of the specific categories; (3) a random selection process by which the court would select bellwethers from the categories, followed by the use of preemptory challenges by each side to whittle the number of bellwethers down to three; and (4) plaintiff specific discovery and pre-trial procedures for the three bellwether plaintiffs.

In re: Allied Chemical Corporation
227 S.W.3d 652 (Tex. 2007)
This case involves claims by over 1900 plaintiffs against 30 defendants alleging exposure to chemical fumes and leaks from pesticide mixing and storage areas. Five years after plaintiffs filed suit in Hidalgo County, Texas, they had not answered interrogatory responses identifying any expert basis for their proof of causation, but the trial court set the case for trial. The Texas Court of Appeals denied the defendants mandamus relief, but the Texas Supreme Court granted mandamus and vacated the trial court's trial setting. The Texas Supreme Court premised its holding on the grounds that: (1) the case involved toxic soup allegations that were immature, and the Texas Supreme Court had previously issued admonitions that trial courts should exercise "extreme caution" in setting consolidated trials in immature mass torts; and (2) because the plaintiffs had not produced any scientific or medical evidence to support their claims of causation, the defendants did not have "to spend the few remaining weeks [before trial] begging for better answers."

Irrer v. Milacron Inc.
484 F.Supp.2d 677 (E.D. Mich. 2007)
This case involved allegations by roughly 270 plaintiffs of injuries claimed to be caused by exposure to industrial chemicals. The trial court ordered plaintiff specific discovery to proceed with respect to 30 bellwether plaintiffs and for general fact and expert discovery to take place concurrently with the plaintiff specific discovery. After the close of discovery the defendant moved for summary judgment on its failure to warn claims. Although plaintiff specific discovery had been conducted only for the thirty bellwethers, the court found the factual record sufficient to grant the defendant's motion and dismiss the case in its entirety.

IV. MEDICAL MONITORING CLAIMS

Prosecuting and defending medical monitoring claims has become a staple of mass tort practice. Once the realm of chemical/substance exposure cases only, medical monitoring has expanded – albeit with mixed results – into nearly every kind of mass tort-type action. The following cases represent a number of the more significant medical monitoring decisions in 2007.

A. Medical Monitoring: Present Injury Not Required

In a matter of first impression, the Supreme Court of Missouri reversed the denial of certification of a medical monitoring class, holding that, under "well-accepted" legal principles of Missouri law, recovery for the prospective consequences of a defendant's conduct was permissible so long as the alleged injury was reasonably certain to occur. *See Meyer v. Flour Corp*., 220 S.W. 3d 712 (Mo. 2007).

In *Meyer*, a proposed class of more than 200 children had brought suit against various lead smelting operators in Herculaneum, Missouri alleging harmful exposure to lead emissions. The class sought the recovery of compensatory damages for the expense of prospective medical monitoring that was allegedly necessitated by the "large quantities of lead" emitted from the smelter and that had resulted in "higher levels of lead and other toxins" in the town. *Id.* at 714. The Missouri circuit court, which had held that individual issues would predominate, denied certification of the class. Plaintiffs appealed, asserting that the circuit court, in its class action analysis, had assumed incorrectly that a present physical injury was a necessary element of a medical monitoring claim. *Id.* at 715. The Missouri Supreme Court agreed.

In granting certification, the *Meyer* court held that medical monitoring – as a compensable item of damage once liability is established[3] – was consistent with the touchstone of Missouri law that a plaintiff is entitled to full recovery for past and present injuries caused by the defendant. *Id.* at 717. In this case, the injury for which plaintiffs sought compensation was not a present physical injury, but rather the "quantifiable costs of periodic medical examinations reasonably necessary for the early detection and treatment of latent injuries." *Id.* at 718. The court stated that "[j]ust as an individual has a legally protected interest in avoiding physical injury, so too does an individual have an interest in avoiding expensive medical evaluations caused by the tortuous conduct of others." *Id.* at 717. As such, the court held that it was not necessary for plaintiffs to demonstrate a present physical injury to recover for such damages.

The Missouri Supreme Court rejected the circuit court's reliance on nine "individual issues" the circuit court had believed would predominate over common issues. The *Meyer* court held that such factors were not relevant in a medical monitoring claim where the need to prove a present physical injury was absent. Instead, the Missouri Supreme Court focused on the significance and extent of plaintiffs' toxic exposure, which the court stated was primarily an issue of common proof. *Id.* at 719. Accordingly, the *Meyer* court held that the circuit court had misapplied Missouri law by "applying personal injury concepts to Plaintiff's medical monitoring claim and in holding that these individual personal injury issues were predominate over common issues." *Id.* at 720.

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[3] The court clarified that its holding did not create a new "medical monitoring" tort, but rather recognized medical monitoring as a compensable item of damages only.

B. Medical Monitoring: Present Injury Required

Despite the Missouri Supreme Court's decision in *Meyer*, many courts across the country continued to hold that, without proof of a present physical injury, medical monitoring claims were not otherwise maintainable. *See, e.g., Avila v. CNH America LLC, et al.*, 2007 WL 2688613, * 1 (D. Neb. Sept. 10, 2007) ("Nebraska law does not recognize a claim for medical monitoring when no present physical injury is alleged"); *Houston County Health Care Auth. v. Williams*, 961 So.2d 795, 810-811 (Ala. 2007) ("[u]nder current Alabama case law, mere exposure to a hazardous substance resulting in no present manifestation of physical injury is not actionable . . . where exposure has increased only minimally the expose person's chance of developing a serious physical disease and that person has suffered only mental anguish").

In *Paz v. Brush Engineered Materials, Inc*., for example, the Fifth Circuit certified the following question of unresolved state law to the Mississippi Supreme Court: "[w]hether the laws of Mississippi allow for a medical monitoring cause of action, whereby a plaintiff can recover medical monitoring costs for exposure to a harmful substance without proving current physical injuries from that exposure?" 483 F.3d 383, 384 (5th Cir. 2007). The Mississippi Supreme Court responded in the negative and stated that a cause of action that involved solely the potential for future injury would not be recognized under the law of Mississippi. *Id*.

The Eleventh Circuit reached a similar conclusion in *Parker v. Wellman*, 230 Fed.Appx. 787 (11th Cir. 2007). In *Parker*, plaintiffs, current and former employees of Lockheed Martin, sought to recover damages, including medical monitoring, for personal injuries allegedly sustained due to defendants' manufacture, use and discharge of beryllium. Plaintiffs alleged that they had been exposed to respirable forms of the Category 1 carcinogen at the company's Marietta, Georgia facility. *Id.* at 880. After the Northern District of Georgia dismissed their medical monitoring claims, plaintiffs appealed. The Eleventh Circuit affirmed the Northern District's ruling, holding that allegations of "subclinical" or "cellular" injury did not meet the threshold for an "identifiable physical disease, illness, or impairing symptoms." *Id.* at 882. In the absence of recognizable present physical injury, the Eleventh Circuit held that plaintiffs were not entitled to the recovery of medical monitoring costs under Georgia law. *Id.* at 883.

C. Medical Monitoring: Debating the Present Injury Requirement

In *Sinclair v. Merck & Co., Inc*., a New Jersey appeals court reversed the dismissal of a proposed medical monitoring class action involving users of the prescription pain-reliever, Vioxx. 913 A.2d 832 (N.J. Super Ct. App. Div. 2007). The *Sinclair* plaintiffs had claimed that their direct and prolonged use of Vioxx had increased their chance of sustaining serious, undiagnosed and unrecognized myocardial infarctions. Although plaintiffs had alleged no present physical injury, they did request that the defendant manufacturer fund a court-administered medical screening program. *Id.* at 833-34. The trial court dismissed plaintiffs claim holding that, if faced with the situation, the New Jersey Supreme Court would not extend medical monitoring relief to plaintiffs "pure" product liability action (as opposed to the more traditional toxic tort action). *Id.* at 834. Under New Jersey's product liability regime, plaintiffs were required to prove they had incurred "harm," which was defined by New Jersey law as "personal physical illness, injury or death."

On appeal, the New Jersey Appellate court held the dismissal prematurely terminated plaintiffs' opportunity to establish the existence of a legally cognizable claim. In so holding, the court refused to adopt a bright-line test that would make available medical monitoring only in situations where there was the existence of a manifested disease or condition. *Id.* at 840. The court stated that there was not a sufficient legal distinction between a toxic tort claim and a product liability claim that would require proof of present injury in the product liability claim as a threshold for medical monitoring, but not the toxic tort claim. *Id.* at 841. Moreover, the court noted, it was "far less clear" whether the state's

supreme court would require evidence of present physical injury in a situation involving demonstrated direct exposure to the alleged harmful substance, as was the case in *Sinclair*. *Id.* at 839. The *Sinclair* court conceded that without such a bright-line test, it was premature to dismiss plaintiffs' claim as legally insufficient on the bare pleadings and not-yet-developed factual record alone.

In *Jensen v. Bayer AG*, plaintiff appealed an Illinois trial court's denial of certification of a medical monitoring class. 371 N.E.2d 1091, 1100-1101 (Ill. App. Ct 2007). Plaintiff had alleged that members of the class had suffered and increased risk of developing certain harmful side effects related to Baycol exposure. *Id.* The Illinois Appellate Court affirmed the trial court's decision. The court, however, declined to reach a conclusion on whether a present physical injury was required. Rather, the court held that even assuming, *arguendo*, the Illinois Supreme Court accepted the premise that a medical monitoring claim could be maintained without a present physical injury, plaintiff still had failed to offer any evidence that such monitoring was necessary to a reasonable degree of medical certainty. *Id.* Further, plaintiff had relied on case law that supported medical monitoring to detect a present physical injury rather than the potential for future harm as plaintiff had alleged in *Jensen*. *Id.*

While *Jensen* avoided the issue of whether Illinois law required a present physical, the Eastern District of Pennsylvania confronted the issue in *Gates v. Rohm & Haas Co., et al*., 2007 WL 2155665 (E.D.Pa. July 26, 2007). *Gates* involved a class of 1000 residents and property owners who sought a medical monitoring fund paid for by defendants. Plaintiffs claimed that defendants had generated and released certain solvents and other toxic substances that had contaminated the drinking water and air in their town. *Id.* at *1. Defendants argued that because the Illinois Supreme Court had never recognized medical monitoring damages in a case without a present physical injury, the Eastern District could not do so in *Gates*. *Id.* at *2. The *Gates* court disagreed. The Eastern District found that the majority of Illinois state and federal courts had "either assumed that such a cause of action exists, or recognized that the cost of diagnostic testing is a compensable injury." *Id.* at *3. As such, the Eastern District held that it was likely the Illinois Supreme Court, under the principle of single recovery, would also find that the cost of diagnostic testing, even if periodic or ongoing, to be a compensable injury under Illinois law.

D. Medical Monitoring: Issues of Certification

In *In re Welding Fume Prods. Liab. Litig.*, the Northern District of Ohio denied certification of a proposed class of plaintiff welders, who presented claims that, as a result of exposure to welding fumes, the class members had suffered and would continue to suffer a significantly increased risk of serious neurological injury. -- F. Supp. 2d --, 2007 WL 2701925, at *2 (N.D. Ohio Sept. 14, 2007). Rather than seeking pure monetary damages, Plaintiffs requested creation of a medical monitoring fund to account for the allegedly increased risk of brain damage. Plaintiffs sought monitoring in only eight states – all of which recognized medical monitoring and did not require present physical injury.[4] *Id.* at *7.

In denying certification, the Northern District focused on Rule 23(a)(3)'s typicality requirement. Following what it called an "exhaustive review" of case law addressing class certification of medical monitoring, the court held that "the large size of the class, the difference in defendants' conduct, and the variable working environments in which all of the welder plaintiffs performed, each class member's claims involves so many distinct factual questions that class certification becomes inappropriate." *Id.* at *15. The *In re Welding Fume* court stated that even if it ignored individual-specific issues (such as age, medical history, lifestyle, susceptibility, etc., etc.), the more than two dozen welding rod defendants' conduct could not be examined consistently across the class. *Id*. at

[5] The states selected by Plaintiffs were: Arizona, California, Florida, New Jersey, Ohio, Pennsylvania, Utah and West Virginia.

*19. As illustration, the court stated that it was conceivable that a jury could find a certain defendant acted reasonably when it supplied certain warnings to a certain sophisticated employer for whom a certain plaintiff worked. But the court noted that the same jury could find the same defendant acted unreasonably in supplying "only certain warnings to the employer of another plaintiff, whose training and work conditions were poor." *Id.* *20. In the end, the court concluded that there was not one single course of conduct by all defendants that would satisfy typicality. *Id.*

V. DAMAGES

A. Philip Morris USA v. Williams

The seminal holding this year is *Philip Morris USA v. Williams*, in which the United States Supreme Court held that awards of punitive damages based in part on a jury's desire to punish a defendant for harming non-parties to litigation amounts to a taking of property without due process. 127 S. Ct. 1057 (2007). In so holding the Court remanded the case to the Oregon Supreme Court to reconsider whether there were sufficient constitutional protections in place to ensure that a jury award of $79.5 million in punitive damages was not based on the jury's desire to punish Philip Morris for harm caused to non-parties.

The majority opinion, authored by Justice Breyer and joined by Chief Justice Roberts and Justices Kennedy, Souter and Alito, was premised on the view that "the Constitution's Due Process Clause Forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063. The tension in the majority's opinion—and the basis for a stern dissent—arises from the majority's recognition that the reprehensibility of a defendant's conduct can be based on "evidence of actual harm to nonparties." *Id.* at 1064. While the evidence of harm to others may be considered in the analysis of reprehensibility, the majority cautioned that "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it alleged to have visited on nonparties." *Id.*

At trial plaintiff's counsel told the jury "to think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed]." *Id.* at 1061 (alterations in original). In response to these arguments Philip Morris requested an instruction telling the jury that "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is between any punitive award and the harm caused by Jesse Williams . . . [but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims." *Id.* The judge rejected Philip Morris' request and instead instructed the jury: "punitive damages are awarded against a defendant to punish misconduct and to deter misconduct and are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." *Id.*

Although the majority did not indicate whether Philip Morris' proposed instruction would provide sufficient due process safeguards, the majority provided the following guidance: "How can we know whether a jury, in taking account of harm caused by others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused harm to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Id.* at 1065.

Three Justices authored dissenting opinions. Justice Stevens stated that he "saw no reason why an interest in punishing a wrongdoer for harming persons who are not before the court should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct." *Id.* at 1066. Further, he opined that the Court's existing jurisprudence provided sufficient substantive and procedural protections on the imposition of punitive damages as punishment. *Id.*, *citing State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of North America, Inc., v. Gore*, 517 U.S. 599 (1996); *Honda Motor Co. v. Obert*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

Justice Thomas authored a short dissent noting that the Court's opinion "proves once again that this Court's punitive damages jurisprudence is 'insusceptible of principled application.'" *Id.* at 1068 (*quoting BMW of North America*, 517 U.S. at 599).

Justice Ginsburg, joined by Justices Scalia and Thomas, found that the Oregon Supreme Court's holding was entirely consistent with the majority's opinion. Additionally, Justice Ginsburg analyzed Philip Morris' proposed instruction in more detail than the majority. Justice Ginsburg criticized the proposed charge because, in her view, it would have only confused the jury on how to consider reprehensibility without meting out punishment for harm caused to non parties. *Id.* at 1069 ("Under that charge, just what use could the jury properly make of the 'extent of harm suffered by others?' The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.").

The Court remanded the case to the Oregon Supreme Court for reconsideration in light of its decision, and one can only wonder what the Oregon Supreme Court will do with this instruction. It is possible the Oregon court could conclude that the trial court implemented sufficient procedural safeguards to protect against an award of punitive damages for harm caused to non parties, but, given Justice Breyer's majority opinion, it seems unlikely that such a result would be upheld. If the Oregon Supreme Court reverses and orders a new trial, what procedural safeguards can be put in place to ensure that a jury may not award punitive damages intended to punish non-parties but, at the same time, permitting the jury to consider the harm caused to non-parties as a factor in determining the degree of reprehensibility? Regardless of its decision, the Oregon Supreme Court's decision should be interesting and informative as it struggles with the difficult direction set forth by Justice Breyer in *Philip Morris*.

Since the decision in *Philip Morris*, several courts have applied the Supreme Court's holding. Those decisions are summarized below.

In re MTBE Products
2007 WL 1791258 (S.D.N.Y. June 15, 2007)
Discussed above in the context of bellwether trials, this case also is also interesting with respect to its application of *Philip Morris* to the use of bellwether trials. As discussed above, the court ordered a bellwether trial where the bellwethers consisted of ten water wells. In addressing the complexities of using bellwethers in the case, the court recognized that, unless the bellwether trial jury considered and decided on punitive damages, the judgment would not be final and subject to appeal under Rule 54(b). The defendants, however, argued that if each successive bellwether jury was allowed to award punitive damages, then (1) successive awards could unduly increase the total award of punitive damages, (2) the awards of punitive damages would not bear a reasonable relationship to the total harm because all of the wells would not have been considered, and (3) because the jury would be dealing with the bellwether wells (constituting a five-percent subset of all of the water wells), the jury might be inclined to award a higher multiple of compensatory damages for punitives. For example, if a jury believed the total harm was $20 million, it might award a punitive damages multiplier of 8:1, but if the total harm was much greater (i.e. related to all the wells, or $400 million), the jury might

award a much smaller multiplier for punitive damages. Although the court deemed the defendants' arguments "compelling," it concluded that it would allow the bellwether trial jury to consider punitive damages. The court reasoned that the jury would be specifically instructed to consider damages only relating to the bellwether wells before it, and that the jury could not consider any other wells in the case. As a result the court concluded that an award of punitive damages would not run afoul of *Philip Morris*. Also, the court noted that such jury instructions are not unusual and analogized the use of such instructions in a bellwether case to any other mass tort in which trials were conducted with single plaintiffs.

Although the following cases were not decided in the mass torts context, they offer insight into how lower courts have applied the holding in *Philip Morris*.

Merrick v. Paul Revere Life Insurance Co.
2007 WL 2458503 (9th Cir. August 31, 2007)
Facts: Mr. Merrick filed suit against Paul Revere claiming breach of contract and the duty of good faith and fair dealing when Paul Revere denied Merrick's claim on a disability policy.
Procedural History: Paul Revere and Unum Provident appealed the district court's jury verdict which included punitive damages in the amount of $10 million to Plaintiff for breach of contract and duty of good faith and fair dealing.
Holding: The Court found that the punitive damages instruction addressed liability but did not "prevent the jury from setting an *amount* of damages that includes direct punishment for harm to others. This Court sought guidance from the *Williams* case and held that the jury instruction which "allows (or does not preclude) direct punishment for nonparty harm runs afoul of this prohibition and invites precisely the improper jury speculation-as to, for example, the number of nonparty victims or the extent of their injury-that *Williams* sought to avoid."

Kauffman v. Maxim Healthcare Services, Inc.
2007 WL 2506026 (E.D. N.Y. September 5, 2007)
Facts: Plaintiff filed suit against Maxim Healthcare asserting violations of §1981 and the New York State Human Rights Law.
Procedural History: The jury awarded Plaintiff punitive damages in the amount of $1,500,000.00. Defendant Maxim Healthcare moved for a new trial or in the alternative for remittitur as to punitive damages. Defendant argued that Plaintiff's punitive damage claim was partially based on testimony regarding the discrimination of others. Defendant further argued that the Court's jury instructions were unclear and the jury could "not punish a defendant for harm done to those nonparties" as discussed in the *Phillip Morris* case.
Holding: The Court held that Defendant failed to object to the Court's jury instruction and did not request a jury instruction based on the *Phillip Morris case*. Therefore, the claim was unpreserved.

White v. Ford Motor Company
2007 WL 2445952 (9th Cir. August 30, 2007)
Facts: Plaintiffs brought suit against Ford Motor Company after their son was killed when Ford pickup truck rolled over him.
Procedural History: The jury awarded punitive damages to the Plaintiffs and Ford Motor Company appealed the district court's decision that the award of $52 million did not violate Due Process. During the trial, Ford objected to the district court's proposed jury instructions and requested a limiting instruction. The district court refused Ford's proposed instruction.
Holding: The Court reversed the district court's decision and remanded for new trial on punitive damages.

B. Dukes v. Wal-Mart, Inc., 474 F. 3d 1214 (9th Cir. 2007).

In *Dukes* the Ninth Circuit affirmed the trial court's certification of a class of approximately 1.5 million current and former female employees of Wal-Mart stores. It is the largest class action ever certified and—although the class certification issues focus largely on employment law under Title VII—it will likely have implications beyond employment law because of the size of the class. Additionally, two issues from *Dukes* are relevant to the discussion above on bellwether plaintiffs and punitive damages.

1. Punitive Damages

On appeal from the order granting class certification, Wal-Mart argued that its due process rights would be violated if it was not provided an opportunity for individualized hearings. 474 F.3d at 1241. With respect to potential punitive damages awards, Wal-Mart argued that any award of punitive damages in the absence of individualized hearings "would violate its due process rights because it might punish legal conduct and award damages to non-victims." *Id.* at 1242. Rejecting Wal-Mart's contentions, the Ninth Circuit held that the district court imposed due process protections that adequately protected Wal-Mart:

> First, the [district court's] order specifies that any punitive damages award will be based solely on evidence of conduct that was directed toward the class. This ensures that the punitive damage award will be calibrated to the specific harm suffered by the plaintiff class. In addition, the order states that recovery of punitive damages will be limited to those class members who actually recover an award of lost pay, and thus can demonstrate that they were in fact personally harmed by the defendant's conduct. Finally, the order requires that allocations of punitive damages to individual class members must be in reasonable proportion to the individual lost pay awards. Thus, in the event that Wal-Mart faces a punitive damages award, the district court took—and presumably will continue to take—sufficient steps to ensure that any award will comply with due process.

Id. at 1242. Although decided before *Philip Morris*, *Dukes* begs the question of how any jury could ever make a reasonable determination about conduct directed towards over one million different people. Further, in the event a jury elects to punish Wal-Mart for actions purportedly directed at over one million people, will any award of punitive damages—which would at least in part be based on the sheer number of plaintiffs in the class—comply with due process after *Philip Morris*?

2. Statistical Analysis of Bellwether-Type Plaintiffs

In a footnote to its discussion in response to Wal-Mart's contentions about the need for individualized damages hearings, the Ninth Circuit recognized the district court's speculation that a special master might assist by developing and employing a formula to compute damages at the remedy stage. *Id.*, n.19. Wal-Mart contended that the use of a special master would result in a violation of its Seventh Amendment right to a jury trial, but the Ninth Circuit tersely rejected this issue on the bases that: (1) there was no suggestion that a special master would be substituted for the jury as a fact-finder; and (2) that any formula, whether prepared by a special master or experts, can be subjected to a jury's review. *Id.*, *citing Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996). The Ninth Circuit's reference to *Hilao* is interesting, as *Hilao* is one of the few reported cases where damages assessed to bellwether plaintiffs were used to assess damages against non-bellwethers.

In *Hilao*, the district court certified a class consisting of 9,541 claims alleging torture and other human rights abuses against the Estate of Ferdinand Marcos. The court implemented a trifurcated trial scheme, conducting a general liability trial followed by bifurcated trials on exemplary and compensatory damages. In the compensatory damages trial, the jury considered 137 randomly selected

claims and used these claims to award damages to the individual claimants and to establish liability to *all remaining class members*.

The plaintiffs in *Hilao* retained a statistical expert who offered an opinion that a random sample of 137 claims would result in "a 95 percent statistical probability that the same percentage determined to be valid among the examined claims would be applicable to the totality of claims filed." The district court appointed a special master who oversaw the selection of 137 random claimants and depositions. The special master examined the depositions and claim forms and issued a report recommending specific amounts for compensatory damages to each of the 137 plaintiffs. The special master went further and calculated an average amount awarded to each of the three categories of claimants (divided into categories of torture, execution, and disappearance), and then recommended that this average amount be awarded to each remaining claimant in the respective category. The special master's total recommendation for compensatory damages was $767,491,493.

At the jury trial the special master testified, and the jury received a copy of his report. Although the jury's verdict varied somewhat from the special master's recommendations, the jury largely adopted his awards and specifically followed his procedure in awarding average amounts to the claimants who were not part of the 137 member random sample. The defendant in *Hilao* appealed arguing that the procedure recommended by the special master and adopted by the district court and jury violated its due process rights. While the Ninth Circuit noted that the defendant's due process claim raised "serious questions," it held that the district court's methodology was justified because of the unique nature of the claims. Essentially, the court opined that although a trial of individual damage claims may have resulted in greater or lesser amounts for particular plaintiffs, the fact that the random sample yielded a statistically valid result mitigated any due process claims by defendant, as the total compensatory damages awarded would have been roughly the same. Since the court identified defendant's key due process right as its *total* potential liability—as opposed to its specific liability to any single plaintiff—the use of the statistically valid sample mitigated any due process violations.

As *Hilao* involved less than 10,000 plaintiffs, it is at least arguable that the trial court's and special master's methodologies were statistically valid. In light of the sheer size of the *Dukes* class, it seems much less likely that a special master could fairly or adequately allocate damage awards to non-bellwethers. Moreover, given the likely juror confusion involved in a class of over one million, it seems possible that the jury would grant enough deference to a special master's report or recommendations that a defendant's Seventh Amendment rights to a jury trial would be violated.

VI. SIGNIFICANT DECISIONS

In addition to the decisions summarized and discussed elsewhere in these materials, the following decisions are also worthy of note in the mass torts context.

City of St. Louis v. Benjamin Moore & Company
226 S.W.3d 110 (Mo. 2007)
In this case the City of St. Louis filed suit against paint manufacturers to recover the costs of lead abatement programs. The City was not able to identify specific manufacturers of paint in properties that were subject to lead paint abatement. Based on the City's inability to satisfy product identification requirements, the Supreme Court of Missouri held that, absent appropriate product identification, the City was not able to prove causation. In response to the City's argument that its status as a governmental entity should lower the standard for causation, the Missouri Supreme Court held that the tort requirement of causation "applies with equal force to public nuisance cases brought by governmental entities for monetary damages accrued as an alleged result of the public nuisance" and dismissed the City's lawsuit.

In re: Lead Paint Litigation
924 A.2d 484 (N.J. 2007)
In this action various municipalities in New Jersey asserted a claim of public nuisance in an effort to recover lead paint abatement costs, the costs of lead-paint educational programs, and the costs of providing treatment to residents with lead poisoning. In responding to the various claims, the Supreme Court of New Jersey held that the claims asserted by the municipalities "would stretch the concept of public nuisance law far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."

Bell Atlantic v. Twombly
127 S.Ct. 1955 (2007)
Although decided in the context of an antitrust class action, *Twombly* arguably has implications far beyond antitrust and well into the field of mass torts. In dismissing the plaintiffs' complaint for failure to satisfy the liberal pleading requirements under the Federal Rules of Civil Procedure, the Court noted that the plaintiffs had not "nudged their claims across the line from conceivable to plausible." Specifically, the Court held that a plaintiff's compliant must describe the claims in enough detail to give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." Although the effect of *Twombly* remains to be seen, the general consensus is that it changed the standard for pleadings in civil lawsuits. In the mass torts context, one federal circuit court has allowed a plaintiff to amend in the face of a motion to dismiss where the defendant relied on the heightened pleading standards under *Twombly*. *See Fastrip, Inc. v. CSX Corp.*, 2007 WL 2254357 (W.D.Ky. Aug. 2, 2007) (in case alleging property damage from emanation of toxic plume, defendant moved to amend motion to dismiss after *Twombly* decision; in granting defendant's motion to supplement its brief, the court also allowed the plaintiffs fourteen days to amend their complaint). Outside of the mass torts context, one circuit court interpreted *Twombly* to require dismissal where the complaint failed to give the defendant "fair notice" of the specific allegations in an employment discrimination lawsuit, *see EEOC v. Concentra*, No. 06-3436 (7th Cir. 2007), and another has relied on *Twombly* to require a plaintiff to plead more specific facts in response to a defendant's motion for a more definitive statement. *See Iqbal v. Hasty*, 490 F.3d 143 (2nd Cir. 2007); *see also Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 2007 WL 2406859, *4 (7th Cir. Aug. 4, 2007) (noting that, under *Twombly*, the Supreme Court is instructing "that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8").

VII. E-DISCOVERY

Now that the e-discovery amendments to the Federal Rules have been in effect, there are a growing number of decisions applying the rules to the realities of e-discovery. Although not strictly applicable to mass torts, the following decisions offer guidance on how the federal courts are applying the amended rules on a number of fronts.

A. Admissibility

Lorraine v. Markel Am. Ins. Co.
241 F.R.D. 534, 585 (D. Md. May 4, 2007)
This memorandum opinion dismisses without prejudice cross motions for summary judgment because of the parties' failure to establish the authenticity of their exhibits, resolve potential hearsay issues, comply with the original writing rule, and demonstrate the absence of unfair prejudice. The Magistrate Judge offers a thorough discussion on the admissibility of electronic evidence for reference for the parties.

B. Costs

Quinby v. WestLB AG
2007 WL 38230 (S.D.N.Y. Jan. 4, 2007)
The Magistrate Judge modified an earlier order shifting 30% of the cost of restoring backup tapes to the plaintiff who requested one person's emails on those tapes. The plaintiff objected, pointing out that the tapes had to be restored in any event because they also contained emails of other people which had been ordered produced. The Court agreed and limited the plaintiff's costs to 30% of the expense of restoring specifically the plaintiff's requested emails.

AAB Joint Venture v. United States
75 Fed.Cl. 432, 443-44 (Fed. Cl. Feb. 28, 2007)
In this case the Court determined the defendant offered inadequate emails from key people in the lawsuit but the defendant objected to the costly production of more emails by restoring backup tapes. Instead of granting plaintiff's motion to require the defendant to restore all the backup tapes at its own cost of $85,000 to $100,000, the Court ordered phased restoration to allow the Court a "meaningful benefit-burden analysis" and the parties the opportunity to determine if they contain relevant evidence such that restoration of further backup tapes was warranted.

Guy Chemical Co., Inc. v. Romaco AG
243 F.R.D. 310, 312, 2007 WL 1521468, **1 (N.D. Ind. May 22, 2007)
Although the Court found the $7,000 cost to search for and produce requested discovery from a non-party rendered the information not reasonably accessible, it found the defendant showed good cause as there was no other location for the information crucial to the case. The Court noted that "non-party status is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue" and ordered the defendant to pay the costs of production.

Pipefitters Local No. 636 Pension Fund v. Mercer Human Resource Consulting, Inc.
2007 WL 2080365, *2 (E.D. Mich. July 19, 2007)
Even though no motion to shift costs was pending, the District Court granted Plaintiffs' motion to strike the Magistrate's order for plaintiffs to bear the costs of restoring electronic data if defendants did bring such a motion. The District Court noted that Fed.R.Civ.P. 26(b)(2)(B) guided the analysis of cost-shifting and the Magistrate Judge should have applied those factors. Under the electronically stored information amendment to Fed.R.Civ.P. 26(b)(2)(B), the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.

C. Format

3M Co. v. Kanbar
2007 WL 1725448, *1 (N.D.Cal. Jun. 14, 2007)
Defendant Kanbar made broad document requests to which 3M responded with at least 170 boxes of documents. As the discovery cutoff date approached, Kanbar moved to compel 3M to "organize" or "itemize" the documents pursuant to Fed. R. Civ. P. 34. The Court denied Kanbar's request because the situation was largely the result of Kanbar's own actions, namely, the broad document requests, the lack of a demand for electronic production, and insufficient staff to digest the document production. The Court found 3M did not purposefully produce documents in a disorganized manner but did order 3M to produce all previously produced responsive electronically stored information ("ESI") to Defendant in an electronic and reasonably usable format because Plaintiff had delayed production and electronic production was not onerous.

MGP Ingredients, Inc. v. Mars, Inc.
2007 WL 3010343, *2 (D. Kan. Oct. 15, 2007)
Magistrate David J. Waxse denied a plaintiff's motion to compel the defendant to identify by Bates Numbers the documents produced and which documents respond to each particular request for production. The Court found the parties had no prior agreement about the manner of production of the

electronic documents and therefore defendants "had the right to choose the option of producing their documents and ESI as kept in the usual course of business." The Court refused to impose a greater duty on defendants under Fed. R. Civ. P. 34(b).

D. Metadata

In re Payment Card Interchange Fee and Merchant Discount
2007 WL 121426, *5 (E.D.N.Y. 2007)
In a dispute over the format of produced documents, defendants argued the plaintiff's production of ESI without metadata violated amended Rule 34. Noting the plaintiffs had already produced a substantial amount of information and heard no objection for several months, the Court found it would be an undue burden on the plaintiff to produce the same information in a different format. The Court did warn plaintiffs that it would be more likely to compel prospective production of documents in a format agreeable to defendants and limited its protective order to those documents the plaintiffs had already produced.

E. Motions to Compel

Butler v. Kmart Corp.
2007 WL 2406982, *3 (N.D. Miss. Aug. 20, 2007)
The Court refused plaintiff's request for unfettered access to Kmart databases unless the plaintiff could prove Kmart acted improperly. The Court did compel Kmart to diligently search its computer systems and produce the electronically stored information to respond to plaintiff's requests or to provide responses and affidavits detailing its diligent searches for the information.

Peskoff v. Faber
240 F.R.D. 26 (D.D.C. Feb. 21, 2007)
Peskoff v. Faber
2007 WL 2416119 (D. D.C. Aug. 27, 2007)
Two opinions were filed this year in this case involving an ongoing discovery dispute regarding two years of emails the defendant failed to produce. In the first opinion, the Court reviewed defendant Faber's court-ordered affidavit "specifying the nature of the search" he conducted to find the emails. The Court found the search was inadequate as Faber had searched only two of the five locations the Court had prescribed with insufficient detail. The Court ordered another search, a sworn statement from a qualified person detailing the search for the emails, and an evidentiary hearing where the person who conducted the search must testify about the search.

In the second opinion, the Court reviewed Faber's statement that he had searched his personal computer but noted that Faber did not appear for the evidentiary hearing and did not specify how he had searched his computer or any criteria he used to determine whether emails were responsive to discovery requests. The Court ordered the parties to collaborate to solicit bids from qualified forensic computer technicians to search for the subject emails. The Court will then would allow the parties to brief whether to accept any proposal and who would bear the cost.

F. Non-Party

Auto Club Family Ins. Co. v. Ahner
2007 WL 2480322, *1 (E.D. La. Aug. 29, 2007)
The Court denied a non-party's motion to quash a subpoena duces tecum and for a protective order. The non-party, Rimkus, investigated Hurricane Katrina-related damages to the plaintiffs' home and produced a hard copy of its file but argued it should not have been required to produce electronically stored information in the file. Rimkus argued that, under Rule 45(d)(1)(C), it need not produce information in both paper and electronic forms. Rimkus failed to make an evidentiary showing that the data sought was not reasonably accessible because of undue burden or cost. The Court found the fact

that Rimkus produced the hard copies of the documents did not excuse it from producing the requested information in electronic form.

G. Personal Computers

Hedenburg v. Aramark Am. Food Serv.
2007 WL 162716, *1 (W.D. Wash. Jan. 17, 2007)
In this employment discrimination case defendant sought a "mirror image" of the Plaintiff's home computer hard drive in order to discover personal correspondence with unnamed third parties (in the form of emails or internet postings) that might reveal discrepancies in her testimony. The Court considered other cases where courts have allowed mirror imaging of a personal computer hard drive through appointment of a special master. "The common thread of these cases is that a thorough search of an adversary's computer is sometimes permitted where the contents of the computer go to the heart of the case. This court has in other cases permitted mirror image searches of computers where, for example, one party demonstrates the likelihood that trade secrets were forwarded to or sent by it." In this case, the central claims were "wholly unrelated to the contents of plaintiff's computer" and the court denied the motion.

Benton v. Dlorah, Inc.
2007 WL 2225946, *3 (D. Kan. Aug. 1, 2007)
The Court denied without prejudice a motion to compel production of the hard drive of plaintiff's personal home computer to facilitate recovery of deleted emails in an employment discrimination case. The defendants argued the plaintiff must have deleted relevant emails because she only produced a few in response to discovery requests. The Court found defendants' reasoning was speculation and did not meet the burden for the motion because there was no proof plaintiff failed to produce documents responsive to the requests for production or that plaintiff spoliated relevant evidence. The court noted if further discovery showed that plaintiff did either, the court would consider another motion to compel.

H. Privileged Information

Amersham Biosciences Corp. v. PerkinElmer, Inc.
2007 WL 329290, *1 (D. N.J. 2007)
A plaintiff inadvertently produced five hundred privileged e-mails that had been deleted from a single Lotus Notes DVD but appeared when a vendor processed the DVD as well as 37 files that were unreadable to the attorneys. The District Court found the Magistrate had based the decision on a factual mistake and reversed and remanded the Magistrate's decision in part. It affirmed the Magistrate's decision that "turning over unintelligible or unreadable documents to an adversary evidences a lack of reasonable precaution," and refused to compel their return.

Kingsway Financial Services, Inc. v. Pricewaterhouse-Coopers LLP
2007 WL 1837133, *1 (S.D.N.Y. 2007)
In this discovery dispute, the parties had an agreement that the inadvertent production of purportedly privileged documents would not operate as a waiver of any applicable privilege. Plaintiffs inadvertently produced a privileged email along with other electronic documents. Plaintiffs also attached the email in a filing of a motion for reconsideration in a related action in the Illinois state courts. Plaintiffs then filed a letter under seal requesting the return of the email as inadvertently produced and attached the email as an exhibit. The Court held the deliberate distribution of the email to the defendants with its service copies of the letter constituted waiver of the attorney-client privilege.

In re: Vioxx Products Liability Litigation
501 F.Supp.2d 789 (E.D. La. Aug. 14, 2007)
This decision from Judge Fallon addresses a discovery dispute regarding approximately 500,000 pages of e-mails to which Merck claimed privilege. Judge Fallon initially reviewed each of these documents

and decided which documents were privileged and which were not, but Merck then appealed the issue to the United States Court of Appeals for the Fifth Circuit, and the Fifth Circuit recommended a representative re-review of the documents. *See In re Vioxx Prods. Liab. Litig.*, 2006 WL 1726675 (5th Cir. May 26, 2006). In implementing the fifth circuit's recommendation, Judge Fallon appointed a special master and a special counsel to review approximately 2,000 pages of documents that Merck deemed representative of the privilege issues. The above referenced decision sets forth the opinion of the special master and renders rulings on the privilege issue. Although the opinion is not directly addressed to electronic discovery, because it deals with e-mails and the high volume of paper documents that result from e-mail traffic, it is instructive. Indeed, Judge Fallon noted in his conclusion that this decision may be of some benefit in future cases where disputes arise about the application of the attorney client privilege to large numbers of documents:

> The emergence of the internet and electronic methods of communication present significant challenges for traditional discovery practices. These challenges are exacerbated in MDL proceedings and otherwise complex cases where, because of their vastness, no one counsel can be expected to keep up with everything that transpires. Discovery is often handled by a discovery committee in such cases, and trial preparation by a separate committee. This presents opportunities for disconnects. . . . .

[T]he sample resolution process suggested by the Fifth Circuit and ultimately employed in this case, along with the appropriate "packaging" of withheld documents, may be able to streamline such discovery disputes in future cases. It may be desirable to issue a pretrial order setting forth an appropriate method of organizing documents to be submitted for *in camera* review and establishing mandatory guidelines for the creation of a detailed privilege log that identifies the individuals that author and receive each document and explains their relationship to the document and to the party asserting the privilege.

I. Scope of Discoverable Information

Gibson v. Ford Motor Co.
2007 WL 41954, *6 (N.D. Ga. Jan. 4, 2007)
Plaintiffs sought through discovery the instructions given to material employees regarding the documents they were not to destroy while the litigation was pending. The Court held this type of document is not reasonably calculated to lead to the discovery of admissible evidence; further, it was work product, overly broad, and related exclusively to litigation. The Court noted that such instructions in litigation should be encouraged and compelling production would only discourage companies from issuing such instructions to preserve evidence for litigation.

Columbia Pictures, Inc. v. Bunnell
2007 WL 2702062, *2 (C.D. Cal. Aug. 24, 2007)
The district court agreed with the Magistrate Judge that data held in the RAM of computers under Defendants' control is within the scope of discoverable information, even if it was only stored temporarily. The Court relied in part on the Ninth Circuit's holding that even temporary RAM memory was held with a degree of permanence and sufficient duration for liability under the Copyright Act. *See Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). The Court rejected concerns about the impact of the decision on businesses' record-keeping by declaring parties need only preserve and produce "specific information requested in light of its relevance and the lack of other available means to obtain it," after the issuance of a court order, and following a careful evaluation of the burden to defendants. The Court further determined the Magistrate's Order to produce the RAM information did not violate the First Amendment, Fifth Amendment, Stored Communications Act (SCA), the Wiretap Act, or the Pen Register Statute.

J. Spoliation of Evidence

World Courier v. Barone
2007 WL 1119196, *1 (N.D. Cal. Apr. 16, 2007)
The District Court granted defendant's motion for an adverse instruction as a sanction for spoliation of a computer hard drive containing relevant data. The Court found it did not matter that the person who destroyed it (plaintiff's husband) was not a party because preservation of relevant evidence is an affirmative duty of the parties evidence both prior to and during trial.

In re NTL, Inc. Securities Litigation
2007 WL 241344, *19 (S.D.N.Y., Jan. 30, 2007)
The Court granted an adverse inference spoliation sanction, plus attorneys' fees where defendant was at least "grossly negligent" by utterly failing to preserve relevant documents and ESI after the duty to preserve attached because it was aware of potential litigation. The Court rejected the party's argument that it no longer had control over the documents plaintiff sought because the defendant corporation had split during bankruptcy proceedings. The Court found the defendant had control over the information because it had the right, authority, and practical ability to obtain the records.

Greyhound Lines, Inc. v. Wade
485 F.3d 1032, 1035 (8th Cir. 2007) (Nebraska)
The Eighth Circuit affirmed the district court's refusal to grant defendant sanctions for spoliation of evidence against plaintiff Greyhound for destroying electronic data before the suit was filed even though litigation was likely. The Court found spoliation had not occurred where Greyhound retrieved the information before erasing the data and identified the mechanical defect that led to the bus collision.

K. Separate Lawsuits Based on Firms' E-Discovery Conduct

Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey
497 F. Supp. 2d 627, 2007 WL 2085358 (E.D. Pa. July 20, 2007)
The District Court for the Eastern District of Pennsylvania granted summary judgment for a law firm that had represented a party in previous intellectual property litigation against Healthcare Advocates, the plaintiff in this case. The plaintiff brought several charges against the law firm including copyright infringement and circumventing an electronic protective measure based on their conduct during discovery in the previous litigation. The firm obtained copies of old versions of the plaintiff's website prior to the date the complaint was filed despite protective measures the plaintiffs had implemented with regard to their website. The Court found no evidence the firm intentionally tried to exceed its authorized access.

VIII. FEDERAL-STATE AND INTERSTATE COORDINATION[5]

A. Federal-State

It is readily apparent, especially to the judiciary, law professors, and defendants, that there is merit in coordinating litigation involving the same product or conduct which is pending both in the federal and state courts. This covers just about all of the interests in mass tort litigation, but for one party–the plaintiffs. Recent examples of mass torts pending in federal and state cases, often in close to even numbers, are:

- Vioxx: MDL in E.D.La., and heavy concentration of suits in states of New Jersey and

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[6] Sections VIII, IX, and X were contributed by Paul D. Rheingold, author of the book, *Litigating Mass Tort Cases* (Thomson/West 2006). The following sections include partial summaries from Mr. Rheingold's book.

California.
- Betxra/Celebrex: MDL in N.D.Cal., and in New York State
- ReNu with MoistureLoc contact lens solution: MDL in D.S.Car. and New York State
- HRT: MDL in D.Ark. and Philadelphia.
- Ortho Evra: MDL in W.D. Ohio, and in New Jersey State

Inevitably, the federal cases in this mix are in MDLs. The state court cases are almost always in jurisdictions which (1) have the defendant residing there; and (2) which have a well organized method of handling mass tort litigation, assigned to one judge.

The reasons that some plaintiffs' state-court attorneys are not fully cooperative with some sort of lock-step coordination of discovery, motions and resolution are complex and not entirely noble. Among the reasons are:

(1) A perceived advantage in litigation in state court. For example, the state may have a *Frye* test compared to a *Daubert* standard. Or the rules of disclosure and absence of privilege may be stronger under state procedure. Or, cases may be expected to come to trial more quickly than those some enmeshed in MDL (and remand) proceedings. Or state court juries are more likely to make awards than federal jurors (in the same state on remand). Or the judges are less remote.

(2) Fighting a war on two fronts. This tactic keeps added pressure on the defendant and engenders more time and expense on its part. Every experienced lawyer knows that the more times you depose the same corporate employee, the more confusions and contradictions are likely to occur.

(3) Ego and greed. Many lawyers who are not in a leadership position in an MDL (they were squeezed out or came along too late) favor going into a state system, where they can exercise their own power. And the state court lawyer is also seeking to avoid paying into the common fund set aside in MDLs (although there are sometimes similar fees paid in state proceedings). Of course, the next time around that fervant advocate of the states will take the opposite position if he or she is nominated to help operate the MDL.

As for these latter motives, they often come masked in "states rights" language. The plaintiffs' bar tell the state judge that there is no reason to bow to federal authority. The abilities of local counsel and the judiciary are every bit as good as the federal players. When the cases are almost all in one system, there is of course not generally the type of clash pictured here.

The federal judges in MDLs like those listed above attempt to exercise strong control over the state cases. They hold meetings with the state court judges; they ask them to sit on the bench with them. In the instances of current litigation listed above, there has been continued rancor between federal and state lawyers. State plaintiffs' lawyers try to stiffen the backbone of the state judge to go its own way, and to use local practices. In some areas, this may be, for example, the *Daubert* proceeding in Bextra/Celebrex in the MDL, *Frye* in New York. Or the MDL and state court judge sitting together in the ReNu litigation, both in South Carolina and New York. The NY law on coordination in the state is sec. 202.69, Uniform Court Rules of the Supreme and County Courts. *See* Chapter 4 of Rheingold, Litigating Mass Tort Cases (Thomson/West 2006).

B. Interstate coordination

A recent trend in national products liability litigation has been for judicial cooperation between the states in handling pretrial matters. This per force must proceed voluntarily, but it has worked satisfactorily in some instances, as far as the parties go. A dynamic judge or two is also required. Such cooperation has been the norm when there is a single-situs disaster, such as a plane crash or

building collapse. Examples of wide-spread torts being worked on cooperatively are:

- Cooper tire: *Talali v. Cooper Tire & Rubber Co*., No. MID-L-8839=00 (N.J.Super. 7/17/01).
- Fen Phen: coordination of efforts of plaintiffs' bar in Pennsylvania, New Jersey and New York state courts. *See* Rheingold et al, State Courts Provide New Forums for Mass Torts, Nat'l L. J. 2/22/99, p. C28.

IX. TRANSNATIONAL LITIGATION; CROSS-BORDER COOPERATION

If the state and federal courts can cooperate to save costs and time in litigation involving the same mass tort, how far behind is cross border coordination?

Before we turn to recent developments in US-Canada cooperation, one can mention many examples of transnational litigation that have dealt with the same mass tort. A simple example is the attempts by foreign citizens to litigate in the US along side US residents. Here for the most part, however, the doctrine of forum non conveniens has stood in the way of success. *See* Rheingold, sec. 13:8. Nonetheless, the discovery and know-how developed in US litigation will often work to the benefit of lawyers in other countries representing persons injured there by the same product. The recent uptick in litigation involving the same tort in both the US and Canada has been fueled in large part by the availability in Canada of class actions, both within a province and countrywide. *See* Rheingold, sec. 13:19. These laws are much more liberal than those in the US where litigation class actions are banned for mass torts (*see Amchem* case discussed in chapter 3 of Rheingold).

Indeed, the possibility exists that someday a class action brought in Canada will subsume US litigation and resolve the rights of injured US users of a product. *See* Rheingold, supp. to section 13:19.

X. RESOLUTION OF MASS TORTS

Mass torts can come to a conclusion by verdict, settlement or dismissal on a dispositive motion. Trial to a single verdict as a resolution of mass torts is unprecedented. One reason is that it would take a class action format to dispose of all cases with one jury verdict. Another reason is that defendants are not in a "bet your company" mood very often.

Nonetheless, trials play a significant role in the resolution of mass torts. Many mass tort cases move along by means of individual trials. A pattern may emerge which leads the parties to mass settlement. A few big losses in the fen phen cases brought on the settlement in 1999, for example. A mixed pattern of wins and losses, as in Vioxx, do not necessary advance the cases to resolution. Resolution through dismissal of a block of mass tort cases, while it sounds unlikely, has now occurred several times. This is when the litigation is so weak and poorly analyzed at the start of the filing of cases that the defendant can eventually find enough systemic weakness to convince courts to dismiss the litigation. This has happened two times in recent years. In the Norplant litigation, the evidence was that the doctors had been warned about the risks of the birth control rods. *See* the Meridia and Norplant litigation, covered in Rheingold, c. 3.

Thus, settlement is the dominant means of the resolution of mass torts. Settlement takes many forms, however. The main forms are:

- a proposal for settlement by converting an MDL into a class action under Rule 23. This involves a right to opt out, and generally some sort of matrix or scheme to pay pursuant to factors involved in the condition of the injured plaintiffs. The multi billion settlement in the fen phen cases is a good example of this procedure.
- a practice by the defendant to recognize certain types of injuries as ones to be settled and then establishing a voluntary plan of settlement. Again a matrix is usually involved, and a case may decide not to participate in the plan on an equivalency to opting out. The Baycol

settlements for the rhabdomyolysis cases is an example. An earlier example, still going through it final stages, was the Dow Corning breast implant cases.

- a variant of the above is individual case settlements, or even an inventory settlement plan with a firm, where there is no schedule. Each case is negotiated individually (supposedly), and often on a confidential basis. The cases which opted out of the fen phen class settlement is a good example here. Generally on settlement of mass torts, *see* Rheingold, c. 9.

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