Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Critical Legal Issues: WORKING PAPER SERIES

# EARLY ASSESSMENT OF CLAIMS CAN HELP REDUCE THE MDL TAX

**Christopher P. Gramling**, Eli Lilly and Company

**Matthew J. Hamilton**, **Mary Margaret Spence**, and **Jason A. Kurtyka**, Pepper Hamilton LLP

**Washington Legal Foundation**
Critical Legal Issues WORKING PAPER Series

Number 216
March 2020

# TABLE OF CONTENTS



 

# ABOUT OUR LEGAL STUDIES DIVISION

Since 1986, WLF's Legal Studies Division has served as the preeminent publisher of persuasive, expertly researched, and highly respected legal publications that explore cutting-edge and timely legal issues. These articles do more than inform the legal community and the public about issues vital to the fundamental rights of Americans—they are the very substance that tips the scales in favor of those rights. Legal Studies publications are marketed to an expansive audience, which includes judges, policymakers, government officials, the media, and other key legal audiences.

The Legal Studies Division focuses on matters related to the protection and advancement of economic liberty. Our publications tackle legal and policy questions implicating principles of free enterprise, individual and business civil liberties, limited government, and the rule of law.

WLF's publications target a select legal policy-making audience, with thousands of decision makers and top legal minds relying on our publications for analysis of timely issues. Our authors include the nation's most versed legal professionals, such as expert attorneys at major law firms, judges, law professors, business executives, and senior government officials who contribute on a strictly *pro bono* basis.

Our eight publication formats include the concise COUNSEL'S ADVISORY, succinct LEGAL OPINION LETTER, provocative LEGAL BACKGROUNDER, in-depth WORKING PAPER, topical CIRCULATING OPINION, informal CONVERSATIONS WITH, balanced ON THE MERITS, and comprehensive MONOGRAPH. Each format presents single-issue advocacy on discrete legal topics.

In addition to WLF's own distribution network, full texts of LEGAL OPINION LETTERS and LEGAL BACKGROUNDERS appear on the LEXIS/NEXIS® online information service under the filename "*WLF*," and every WLF publication since 2002 appears on our website at www.wlf.org. You can also subscribe to receive select publications at www.wlf.org/subscribe.asp.

To receive information about WLF publications, or to obtain permission to republish this publication, please contact Glenn Lammi, Chief Counsel, Legal Studies Division, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, DC 20036, (202) 588-0302, glammi@wlf.org.

 

# ABOUT THE AUTHORS

**Christopher P. Gramling** is Assistant General Counsel for Eli Lilly and Company, based in Indianapolis, IN.

**Matthew J. Hamilton** is a Partner, **Mary Margaret Spence** is a Senior Attorney, and **Jason A. Kurtyka** is an Associate, all resident in the Philadelphia, PA office of Pepper Hamilton LLP.

 

# EARLY ASSESSMENT OF CLAIMS CAN HELP REDUCE THE MDL TAX

Congress designed federal multidistrict litigation ("MDL") to "promote the just and efficient conduct" of civil actions pending in different districts.[1] By just about any measure, though, the litigation device has failed to serve its purpose, most notably in some pharmaceutical and medical device products liability litigation. Instead of achieving efficiency, MDLs have encouraged plaintiffs' lawyers to file a massive number of unmeritorious claims. Repeat-player plaintiffs' counsel have assembled organizations dedicated to the solicitation, funding, and prosecution of claims in products liability MDLs.[2] Television viewers are now familiar with the pitch—"you may be entitled to compensation." Filings have exploded—from October 2017 to October 2018, the MDL Panel transferred 4,671 actions, while 41,517 actions were filed directly in MDL courts.[3] As of September 30, 2018, nearly *52%* of all pending federal civil cases were in MDLs.[4]

---

[1] 28 U.S.C. §1407(a).

[2] S. Todd Brown, *Plaintiff Control & Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L.J. 391, 411 (2013).

[3] United States Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 (2018), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf; TRAC, *Multidistrict Litigation Creates Large Caseloads for Some Judges* (Feb. 28, 2019), https://trac.syr.edu/tracreports/judge/548.

[4] *Id.*

 

Section 1407 has unwittingly saddled defendants, especially those whose products are an essential part of America's healthcare system, with an "MDL tax." While plaintiffs file *en masse* with little upfront investigation or cost, defendants bear the bulk of discovery and other costs. In addition to MDLs' financial burdens, pharmaceutical and medical device defendants must report the existence of hundreds or thousands of claims to regulators at the Food and Drug Administration as well as to their shareholders. The pressure on MDL defendants to surrender is so overwhelming, plaintiffs' lawyers, and even some judges, *presume* settlement. Numerous incentives inherent to the MDL system, including lucrative common-benefit fees for members of each MDL's plaintiffs' steering committee ("PSC"), encourage plaintiffs' counsel to build massive inventories of claims.

Instead of the "just conduct" of civil actions, the MDL device can promote injustice by allowing plaintiffs to amass large numbers of claims and shielding those claims from scrutiny.[5] In the Vioxx MDL, for example, 31.6% of the 48,362 total claims ultimately failed, but not until the end of the process.[6] The MDL Subcommittee for the Advisory Committee on Civil Rules has estimated that on average, 20-30% of claims in an MDL are unsupportable, and in some MDLs, this percentage may be as

[5] Mary Nold Larimore & Matthew J. Hamilton, *Cost-Shifting Can Stimulate More Focused, Efficient Discovery in MDL Proceedings*, WLF LEGAL OPINION LETTER, June 1, 2018, https://www.wlf.org/2018/06/01/publishing/cost-shifting-can-stimulate-more-focused-efficient-discovery-in-mdl-proceedings/.

[6] Vioxx Claims Administrator Court Report No. 29, July 27, 2010.

 

high as 40% or 50%.[7] Such practices would never be tolerated in individual cases outside of the MDL context.

Procedures for meaningful early vetting of MDL claims could rebalance the equities. In the short term, defense counsel should educate the MDL courts about the problem and advocate the use of case management orders that require plaintiffs to establish the merits of *each* claim at an early stage. Longer term, reform of the Federal Rules of Civil Procedure to address MDL-specific issues, currently under consideration by the MDL Subcommittee to the Civil Rules Advisory Committee,[8] is needed for the MDL to achieve its purpose.

## I. MDLs NO LONGER DELIVER EFFICIENCY

Congress' intentions for the MDL device were noble enough—coordinated pre-trial proceedings would produce evenly distributed efficiency gains and lead to speedier resolutions. Centralized discovery, in theory, should lead to greater consistency in trial outcomes upon remand. Indeed, in the MDL statute's early years, defendants themselves moved to create products liability multidistrict litigation. In operation, however, MDLs have generally failed to deliver on their promise.

---

[7] Advisory Committee Rules of Civil Procedure, MDL Subcommittee Report, Nov. 1, 2018 at 142, https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[8] In November of 2017, the Advisory Committee on Civil Rules voted to form a Subcommittee to examine the need to amend the FRCP to ensure their application in MDL cases. *See* https://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf.

While the Federal Rules of Civil Procedure are designed to provide litigation with a predictable and balanced framework, many of the rules are simply incompatible with MDLs. Because many of the familiar processes for testing the merits of claims early have not proven practical at large scale, courts have developed ad hoc case management practices. Federal Rule of Civil Procedure 11(b) requires that an attorney conduct a reasonable inquiry into a claim prior to filing, but MDL judges rarely—if ever—entertain Rule 11 challenges due to the sheer number of claims brought. Moreover, Rule 11's safe harbor provision allows plaintiffs' counsel to file spurious claims without fear of sanction; should a defendant seek sanctions, plaintiffs' counsel can simply withdraw the complaint.[9]

Rule 12(b)(6) is similarly ineffective at weeding out meritless claims in MDLs. Use of master complaints essentially enables plaintiffs to file cost-free and allows them to sidestep the traditional considerations of jurisdiction, venue, and merit. While single-plaintiff actions are subject to pleading requirements, including the Rule 11 requirement that a pleading set forth non-frivolous claims that have evidentiary support, master complaints are not subject to that same scrutiny. Entrepreneurial plaintiffs' counsel have seized upon and exploited these favorable features.

[9] Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment ("These provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions ... unless, after receiving the motion, it refuses to withdraw that position or to acknowledge it does not currently have evidence to support a specified allegation.").

While plaintiffs' cost of entry is nil, defendants bear a heavy financial burden. While some defendants might have hoped that the 2015 amendments to the Federal Rules, in particular the requirement that discovery be proportional to the needs of the case, would shift the balance, defendants have seemingly not enjoyed a substantial reduction of discovery costs. Indeed, given the ease with which plaintiffs' counsel can solicit and file hundreds or thousands of untested claims, plaintiffs can distort the proportionality calculus.

A recent *Wall Street Journal* report exposed a sophisticated system of plaintiffs' firms, marketing companies, and financiers that solicit and recruit potential MDL claimants through nationwide advertising campaigns.[10] Claims brokers field calls from individuals who respond to advertisements, loosely vet their exposure to the product at issue, and pass the client along to a plaintiffs' law firm, for a fee. The plaintiffs' lawyers filed claims directly in the MDL, often with little to no scrutiny of their validity. Each additional claim drives up the possibility and cost of settlement, and plaintiffs know that. Plaintiffs' lawyers bring as many claims as possible—and expend as few resources as possible vetting the claims—in order to extract a substantial settlement. The Federal Trade Commission recently caught wind of this practice and sent letters to seven prescription-drug liability lawyers and lead generators warning them that

[10] Sara Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits*, WALL ST. J. (Nov. 25, 2019, 11:48 AM), https://www.wsj.com/articles/inside-the-mass-tort-machine-that-powers-thousands-of-roundup-lawsuits-11574700480.

 

their advertisements and solicitations may be deceptive or unfair.[11] Some states have recently passed legislation to regulate misleading practices in plaintiffs' lawyer mass tort advertising.[12]

Plaintiffs' lawyers' business model has converted the MDL from an efficient dispute-resolution mechanism into a brute-force settlement vehicle. Without an effective way to distinguish between authentic and spurious claims, defendants only see a mounting roster of complaints. A recent study of products liability MDLs showed that 47.9% of proceedings ended in aggregate settlement, while 27.4% concluded through class-action settlements.[13] As of 2018, MDL judges remanded only about three percent of individual claims back to their original districts.[14]

For their part, some MDL judges are beginning to recognize that meaningful early vetting is sorely needed. As Judge Clay Land of the Middle District of Georgia lamented, "the evolution of the MDL process toward providing an alternative dispute

---

[11] Press Release, Federal Trade Commission, FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits (Sept. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/ftc-flags-potentially-unlawful-tv-ads-prescription-drug-lawsuits.

[12] Tenn. Pub. Chap. 2019-116 (H.B. 352) (to be codified at Tenn. Code §§ 47-18-5601 *et seq.*), at https://legiscan.com/TN/text/SB0352/id/1998216/Tennessee-2019-SB0352-Chaptered.pdf (legal advertisement must disclose that it is a paid advertisement for legal services, and may not present as a "medical alert," "health alert," "consumer alert," "public service announcement" or similar language); Tex. Gov't Code §§ 81.151 *et seq.*), at https://legiscan.com/TX/text/SB1189/id/2024451/Texas-2019-SB1189-Enrolled.html (prohibiting lawyer advertising as a "medical alert," "health alert," "drug alert," "public service announcement," or similar misleading language).

[13] Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: From Fact Sheets to Lone Pine Orders*, 129 YALE L.J. 64, 72 (2019). Burch also explores the use of "walkaway clauses" in MDL settlement agreements. Many require between 85–100% of plaintiffs to enter the program, *id.* at 73, which ensures effective resolution for defendants, but also encourages plaintiffs' lawyers to avoid scrutinizing claims.

[14] *Id.*

resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action."[15] Judge Cynthia F. Rufe of the Eastern District of Pennsylvania encouraged plaintiffs' counsel at the first status conference in the Zoloft MDL to consider how they might certify early on that they are "bringing cases that are ready to be brought" in order to avoid "too many claims not established or vetted." [16] In the Zostavax MDL, Judge Harvey Bartle III, also of the Eastern District of Pennsylvania, dismissed 173 complaints, finding that the "one-size-fits-all approach of plaintiffs' counsel" who submitted complaints on a verbose form full of boilerplate unrelated to each individual "produced allegations that are absurd on their face as to every plaintiff."[17] Unless and until standardized, meaningful early vetting procedures are adopted, some MDLs will never attain efficiency.

## II. CURRENT TOOLS: PLAINTIFF FACT SHEETS AND *LONE PINE* ORDERS

Though some might claim that MDL courts already have some vetting tools at their disposal—namely, Plaintiff Fact Sheets and *Lone Pine* Orders—they are not up to the task and are inconsistently used and enforced. Fact Sheets, while requiring

[15] *In re Mentor Corp. Obtape Transobturator Sling Prods.*, MDL No. 2004, 2016 U.S. Dist. LEXIS 121608, *7-8 (M.D. Ga. Sept. 7, 2016).

[16] *In re Zoloft (Sertraline Hydrochloride Products Liability Litigation),* MDL No. 2342, Dkt. No. 216 at 59-62.

[17] *In re Zostavax (Zoster Vaccine Live) Products Liability Litigation*, MDL No. 2848, Dkt. No. 288 (E.D. Pa. May 2, 2019) ("Each of the 173 complaints is full of boilerplate language unrelated to the individual case and is the antitheses of how a proper federal complaint should be drafted.").

plaintiffs to divulge the basics of their claim, are often left incomplete and inaccurate. And *Lone Pine* Orders tend to be deployed to force settlement late in the litigation (after extensive, expensive discovery has already occurred), not to require disclosure of specific causation proofs early in the MDL lifecycle.

### A. Plaintiff Fact Sheets

Plaintiff Fact Sheets are court-ordered, standardized forms that seek basic information about plaintiffs' claims, including when and why the plaintiff used the product and what injury the plaintiff allegedly sustained.[18] Fact Sheets should save defendants from preparing hundreds of individual interrogatories while providing plaintiffs an easy way to meet their initial discovery obligations. In operation, however, Fact Sheets impose an unjust burden on defendants because they shift the cost of pre-filing vetting of claims, work that plaintiffs should have done before filing suit.

Fact Sheets force defendants to waste time and money as they chase down plaintiffs' counsel, send multiple waves of deficiency letters and engage in motion practice attempting to secure compliance. Even assuming plaintiffs' counsel provide Fact Sheets, they are typically full of omissions or outright misstatements, for which there are effectively no consequences. Defendants spend thousands of dollars per plaintiff collecting and reviewing medical records in order to obtain even basic

[18] Plaintiff Fact Sheets, Bolch Judicial Inst., https://law.duke.edu/sites/default/files/centers/judicialstudies/panel_4-plaintiff_fact_sheets.pdf.

information about plaintiffs' claims, tasks that plaintiffs' counsel should have completed before filing suit. When those records expose misstatements in Fact Sheets, plaintiffs' counsel suffer no financial consequences. While noncompliance might, after rounds of costly motion practice, ultimately provide a basis for the dismissal of unsupported claims, the cost to defendants is simply too high.

### B. *Lone Pine* Orders

*Lone Pine* Orders require plaintiffs to submit a physician affidavit attesting to their theory of injury and causation.[19] Such orders typically require three showings: the plaintiff was exposed to the product; the plaintiff suffered, or is suffering, the injury alleged; and an opinion connecting exposure and injury.[20] Like Fact Sheets, *Lone Pine* Orders should carry the threat of dismissal in the event of non-compliance.

Recent research suggests *Lone Pine* Orders tend to be settlement-inducing devices, not claim-vetting tools.[21] In a study of 34 products liability MDLs, Professor Elizabeth Chamblee Burch found that 16 proceedings entered *Lone Pine* Orders. However, 15 of the 16 MDLs deployed *Lone Pine* Orders after the parties had reached a settlement, indicating that the courts used *Lone Pine* Orders to coax resistant plaintiffs into settlement, rather than to screen meritless claims.[22]

---

[19] Nora Freeman Engstrom, *Missing the Forest for the Trees: The Lessons of* Lone Pine, 129 YALE L.J. 2, 20 (2019).

[20] *Id.*

[21] Burch, *supra* note 13, at 76.

[22] *Id.* at 76.

Courts have not used Fact Sheets or *Lone Pine* Orders to effectively root out meritless claims. On the contrary, anecdotal evidence indicates MDL judges see their true role as settlement facilitators.[23] Indeed, an MDL judge is more likely to receive subsequent MDL assignments if they demonstrate an aptitude for settling cases.[24] This incentive structure only encourages the filing of spurious claims. Furthermore, settlements that occur prior to the entry of a *Lone Pine* Order will likely encompass a number of un-vetted, meritless claims, such that the settlement amount may over-value the cases (and affect defendants' ability to settle remaining cases for fair amounts).

## III. SHORT-TERM SOLUTIONS: MEANINGFUL EARLY VETTING THROUGH CASE MANAGEMENT ORDERS

MDL defendants should educate courts on the challenges and inequities that meritless claims pose and advocate for meaningful early vetting. For example, a court can order plaintiffs to submit basic medical records documenting proof of use and injury.[25] Such records include basic information that plaintiffs' counsel should obtain before even filing suit in the first place, and plaintiffs' objections that such a

[23] Emily Field, *Opioid MDL Judge Says Litigation Track is a Settlement Aid*, Law360 (May 10, 2018), https://www.law360.com/articles/1038711/opioid-mdl-judge-says-litigation-track-is-a-settlement-aid; Jeff Overly, *Opioid MDL "Negotiation Class" Wins Approval*, Law360 (Sept. 11, 2019), https://www.law360.com/articles/1184460/opioid-mdl-negotiation-class-wins-approval.

[24] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understanding of Procedure*, 165 U. PA. L. REV. 1669, 1698–99 (2017).

[25] *See, e.g., Avandia Marketing, Sales Practices and Prods. Liab. Litig.*, MDL No. 1871, Dkt. No. 574-2 (E.D. Pa. Dec. 21, 2009).

requirement is overly burdensome and expensive are accordingly without merit. And, under Rule 26—which demands consideration of "the parties' relative access to relevant information"—plaintiffs can obtain their own medical records at minimal to no cost, whereas defendants must obtain subpoenas and go through an expensive medical-record collection process to obtain this information.

When it becomes clear that plaintiffs' counsel did not conduct the basic pre-claim investigation that Rule 11 demands, defendants should consider moving for sanctions. In addition to filing for dismissal of actions, defendants could seek costs and fees for preparing the motion to dismiss, as well as some portion of the case-specific discovery costs. For the most egregious of Rule 11 violations, monetary sanctions against plaintiffs' counsel may also be appropriate. For example, in a tobacco MDL, a special three-judge MDL court imposed $9.1 million in sanctions against two law firms after it determined that 1,250 of their cases were frivolous. Numerous plaintiffs never responded to the court's repeated attempts to contact them, fifteen plaintiffs had not authorized the attorneys to file suit on their behalf, twenty-eight plaintiffs had already previously resolved their claims, and eighteen plaintiffs did not even smoke.[26]

[26] Alison Frankel, *Ending Epic Debacle, Florida Tobacco Firms Agree to Pay $4.3 million Sanction*, Reuters (July 25, 2018, 4:29 PM), https://www.reuters.com/article/us-otc-engle/ending-epic-debacle-florida-tobacco-firms-agree-to-pay-4-3-million-sanction-idUSKBN1KF2VS. *See also* Glenn G. Lammi, *Court Order Imposing $9 Million Sanction Paints Sordid Tale of Ethically Challenged Lawyering*, WLF LEGAL PULSE, Nov. 2, 2017, https://www.wlf.org/2017/11/02/wlf-legal-pulse/court-order-imposing-9-million-sanction-paints-sordid-tale-of-ethically-challenged-lawyering/.

Courts may be hesitant to employ methods of meaningful early vetting over concern for the burden such an examination will place on the court. Use of magistrate judges and/or special masters, who can evaluate plaintiffs' submissions and recommend dismissal/cost shifting where appropriate, may help to ease the burden on the court. Special masters come with their own costs, however, and may add a layer of inefficiency as the court may have to hear the dispute anew if the recommendation of a special master is appealed. Utilizing magistrates and special masters in the first instance may also insulate the court from the various deficiencies in plaintiffs' cases and detract from the goal of having MDL judges fully attuned to the number of meritless cases clogging their dockets.

In some cases a court can test the viability of claims on a broader scale by employing case management orders that bifurcate case-dispositive issues for early treatment. By addressing key issues like general causation or preemption first, courts can assess whether there is any basis at all for the litigation, and defer costly general discovery in favor of targeted, specific discovery on case-dispositive issues that may render broader discovery unnecessary.

Courts have employed bifurcation in a number of recent MDLs for this purpose.[27] In the Onglyza and Roundup MDLs, for instance, the judge directed the

[27] *See, e.g.*, *In re Onglyza Products Liab. Litig.*, Dkt. No. 179, slip op. at 1 (CMO 1) (E.D. Ky. Oct. 24, 2018); *In re Roundup Prods. Liab. Litig.*, MDL No. 2741, slip op. at 1 (N.D. Cal. Nov. 14, 2016); *In re*

parties to complete general causation discovery before addressing plaintiff-specific issues.[28] Both judges recognized that if the plaintiffs could not prove the product was generally capable of causing the alleged effect, then timely dismissal would save significant resources.

## IV. LONG-TERM SOLUTION: RULES FOR MDLs

While case management orders can aid in the meaningful early vetting of claims, not all courts are receptive to defendants' requests for such orders. Amendments to the Federal Rules of Civil Procedure, however, would help ensure that MDLs actually fulfill their intended purpose of promoting efficiency. As noted above, the Civil Rules Advisory Committee recently created an MDL Subcommittee to consider these issues. Counsel and their clients can and should participate in the process.

Lawyers for Civil Justice ("LCJ"), a non-profit organization that advocates for excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases, has proposed six rule amendments to fill the gaps left by the ad hoc nature of MDL management. To enable meaningful early

---

*Incretin Mimetics Prods. Liab. Litig.*, MDL No. 2452, slip op. at 1 (S.D. Cal. Feb. 18, 2014); *In re Viagra Prods. Liab. Litig.*, MDL No. 1724, slip op. at 1 (D. Minn. June 30, 2006).

[28] *Onglyza*, slip op. at 1 ("General causation is a critical issue in this case, common to all actions. If the plaintiffs are unable to establish that Onglyza or Kombiglyze XR is capable of causing any person to develop heart failure or other conditions alleged by the plaintiffs, then the parties will not be required to undergo the time and expense of further discovery and litigation. Thus, addressing general causation before considering plaintiff-specific issues will best ensure the most efficient resolution of these actions and use of the parties' and the Court's resources."). *Roundup*, slip op. at 1.

vetting of MDL claims, LCJ proposes an amendment to Rule 26(a)(1) that would require disclosure of evidence showing the cause and nature of the injury alleged within sixty days of the filing of an action in, or the removal or transfer of, any civil action to a multidistrict proceeding.[29] Failure to submit this evidence would subject the plaintiff to sanctions, including dismissal.

Courts could even require plaintiffs to disclose basic evidentiary support at the time of filing. If "short form" complaints are permitted, court could require plaintiffs to attach medical records evidencing proof of use and proof of injury in lieu of complying with traditional Rule 12(b)(6) requirements. And, failure to provide this evidence would mandate dismissal under Rule 12(b)(6). Alternatively, the rules could require plaintiffs to attach of a certificate of merit signed by a physician to their complaint, "short form" or otherwise, similar to what is required in most states for medical malpractice actions. At a minimum, plaintiffs' counsel's up-front certification of exposure and injury, made under penalty of sanctions, would be an effective tool to limit filing of baseless claims.

Once an MDL is underway, judges could require plaintiffs to undertake further merits testing of their claims through plaintiff-focused discovery in tandem with, and in proportion to, any discovery permitted of defendants. Too often, MDLs are front-

[29] Lawyers for Civil Justice, MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules 4 (Sept. 14, 2018), https://docs.wixstatic.com/ugd/6c49d6_d26fb767e7a24be5943515fe0fde10e0.pdf.

loaded with defendants' discovery, with case-specific discovery coming much later (for example, when the court is working to select "bellwether" cases for trial). And often, when such discovery is finally ordered for a select group of cases, plaintiffs' counsel will suddenly start to dismiss cases in that group, after finally vetting a case and discovering it lacks merit. In the Fosamax MDL, for example, the court noted that there was "reason to believe that spurious or meritless cases are lurking in the some 1,000 cases on the MDL docket. ... More than 50% of the cases set for trial have been dismissed, and some 31% of cases that have been selected for discovery have been dismissed."[30] Similarly, in a pelvic implant MDL, the court noted that plaintiffs dismissed with prejudice all four of the cases initially selected for bellwether trials, only six of the original 30 cases in the initial discovery pool remained, and of those six, plaintiffs' counsel had moved to withdraw in four after summary judgment motions were filed.[31]

Mandatory case-specific discovery of plaintiffs early in the litigation of a random selection of filed cases would help educate judges about the merits (or lack thereof) of the inventory clogging their dockets, provide opportunities for defendants to rid themselves of meritless claims before entering into costly settlements, and help to incentivize plaintiffs to better vet their claims in the first place.

---

[30] *In re Fosamax Prods. Liab. Litig.*, No. 06 MD 1789 (JFK), 2012 U.S. Dist. LEXIS 166734 (S.D.N.Y. Nov. 20, 2012).

[31] Pretrial Order No. 59, *In re: Cook Medical, Inc. Pelvic Repair System Products Liability Litigation*, 2:13-md-02440, Dkt. No. 350 (May 19, 2015).

With these or similar rules in place, defendants would have tools to enforce meaningful early case vetting and could raise deficiencies through both motion practice and periodic status conferences to ensure that an MDL court is carrying out its mandate to direct the just and efficient resolution of matters.

## CONCLUSION

Congress created multidistrict litigation to promote efficiency, but the device no longer delivers on that promise. Nor is it likely, given the fees available, that entrepreneurial plaintiffs' counsel will abandon mass pharmaceutical and medical device litigation. Defense counsel, then, must work diligently to educate MDL courts on the undue burdens—the MDL tax—associated with the accumulation of meritless claims, and advocate meaningful early vetting through effective case management orders. At the same time, counsel and their clients must work tirelessly to advocate for the revision of the civil rules to ensure that all MDLs can deliver on their promise of "just and efficient" determination of litigation.

 