

MDL No.: \_\_\_\_\_  
Plaintiff: \_\_\_\_\_

# Plaintiff Fact Sheets in Multidistrict Litigation Proceedings

*A Guide for Transferee Judges*

Federal Judicial Center  
pocket guide series

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PLAINTIFF'S FACT SHEET

to be completed by each plaintiff  
to the best of your knowledge. In  
providing information that is true and  
correct, please provide



**Plaintiff Fact Sheets**  
**in**  
**Multidistrict Litigation**  
**Proceedings**



*POCKET GUIDE SERIES*

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**A Guide for Transferee Judges**

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Federal Judicial Center  
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# Introduction

This pocket guide provides an overview of fact sheets, one of many case-management tools available to transferee judges. Fact sheets are party-negotiated and court-approved standardized questionnaires that seek information about parties' claims and defenses. Used during discovery, fact-sheet responses are generally treated as answers to interrogatories and requests for production,<sup>1</sup> and more broadly are used to manage a wide range of pretrial issues in large-scale multiparty litigation.<sup>2</sup> Fact sheets can be useful in organizing large groups of plaintiffs but can also be used to organize proceedings with multiple defendants. They are commonly ordered in multidistrict litigation (MDL) proceedings consisting of personal injury claims, such as those involving pharmaceuticals, medical devices, and mass disasters.

The pocket guide outlines practical considerations for using fact sheets, when appropriate, in MDL proceedings. Examples are provided throughout the guide as models for future orders and to demonstrate the flexibility that courts have in designing a fact-sheet process well suited to the demands of a particular MDL proceeding.

A brief point about terminology: In a recent study, Federal Judicial Center researchers found several related types of questionnaires in MDL proceedings.<sup>3</sup> Although *fact sheet* is a general term, some orders refer to questionnaires as *profile forms*, *preliminary disclosure forms*, or, more generally, *questionnaires*. Generally speaking, a profile form is a shortened version of the fact sheet and provides similar core information (plaintiff information, product identification information, description of use of drug or device, harm suffered, etc.). Some large MDL proceedings use only fact sheets, while some use both fact sheets and profile forms. This pocket guide provides information on the uses of fact sheets in MDL proceedings, using the more general term.

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1. Fed. R. Civ. P. 26 (duty to supplement); Fed. R. Civ. P. 33–34.

2. See Fed. R. Civ. P. 16(c)(2)(L) (“At any pretrial conference, the court may consider and take appropriate action on the following matters: adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.”).

3. Margaret S. Williams, Emery G. Lee III & Jason A. Cantone, Federal Judicial Center, Plaintiff Fact Sheets in Multidistrict Litigation: Products Liability Proceedings 2008–2018 (2019), <https://www.fjc.gov/content/337878/plaintiff-fact-sheets-multidistrict-litigation>.

## Fact-Sheet Process Overview

### Purposes Served by a Fact-Sheet Process

A fact-sheet process can serve many purposes in a large MDL proceeding. Fact sheets may be used to create a census of the claims and defenses in the proceeding, including, for example, plaintiffs' use of products, types of injuries, and the timing of use and injuries. Information obtained using fact sheets can be used to group cases for motions practice or into litigation tracks, to identify cases for targeted discovery, to select bellwether cases,<sup>4</sup> and to facilitate settlement negotiations. Fact sheets may also be used to screen cases in which plaintiffs lack information to support a claim against a defendant—an issue often raised by defendants in mass-tort MDL proceedings.<sup>5</sup> In ordering a fact-sheet process, the transferee judge should determine how the information collected will be used at various points in the proceeding and tailor the process accordingly.

### Practical Considerations: Cost and Scope

Information required to complete a fact sheet is typically within the control of the party or may be requested by the party from others (e.g., medical records) through authorization forms ordered at the same time as the fact sheets. In reviewing a proposed fact-sheet process, transferee judges should still consider the cost to the producing party, especially plaintiffs for whom the collection of information may not be automated. The monetary cost to

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4. Bellwether trials are “individual trials that are conducted by MDL transferee judges with the goal of producing reliable information about other cases centralized in that MDL proceeding.” Melissa J. Whitney, *Bellwether Trials in MDL Proceedings* 3 (Federal Judicial Center & Judicial Panel on Multidistrict Litigation 2019), <https://www.fjc.gov/content/338847/bellwether-trials-mdl-proceedings-guide-transferee-judges>.

5. Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 Emory L.J. 329, 350 (2014) (“While mass torts have notoriously generated false claims by individuals far removed from the tort, the structure of the modern MDL does not provide as strong a check upon these claims as exists in single-plaintiff litigation. Most plaintiffs’ counsel weed out these claims. But . . . there are a small group of counsel that do not exercise diligence on the front end to catch those individuals that are seeking to file false claims.” (footnotes omitted) (citing Duke Law Ctr. for Judicial Studies, *Standards and Best Practices for Large and Mass-Tort MDLs* 8–10 (2d rev. ed. 2014)); see also Dodge, *Facilitative Judging*, at 351 n.124 (noting defense counsel’s concern that many claims are generated by attorney advertising, sold to other counsel, and not developed by the filing counsel).

plaintiffs for completing fact sheets and profile forms may be low, especially relative to the cost of compliance with *Lone Pine* orders,<sup>6</sup> but completion of fact sheets may require a significant time commitment. Some plaintiff firms may find it difficult to produce a large number of completed fact sheets in a short period of time.

Even though parties usually negotiate the contents of a fact sheet, transferee judges should be mindful of the length of the questionnaire and the reporting period for which information is required when they set deadlines for compliance or outline procedures for curing deficiencies. Both the questionnaire length and the number of years the required information covers may pose obstacles to timely completion of fact sheets. Because many case-management orders provide for dismissal of cases for incomplete or deficient fact sheets (discussed below), disputes over fact sheets can result in more severe consequences for plaintiffs than may be true for other discovery matters.<sup>7</sup>

## Timing Considerations

Timing of the fact-sheet order is also an important consideration. Even before ordering a fact-sheet process, the transferee judge should consider whether there are generally applicable threshold defenses, such as preemption, that should be decided before engaging in individual-specific discovery. In some instances, the parties may agree that such threshold issues should be resolved before engaging in a fact-sheet process, but in others it may be beneficial to have the fact-sheet process take place alongside early dispositive motions. Additionally, the timing of the fact-sheet order can impact the parties' ability to obtain information that affects how the actions will be litigated. An

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6. *Lone Pine* orders are a separate, distinct case-management tool available to judges. These orders originated in a New Jersey state mass-tort case where plaintiffs sued a group of defendants for injuries allegedly suffered because of contamination from a landfill. An EPA study was submitted by the defense at a case-management conference as evidence counter to plaintiffs' claims. The study prompted the judge to enter an order (often cited) requiring plaintiffs to submit evidence of exposure to toxic substances, including reports from expert witnesses to support the claim of injury *and causation*. See *Lore v. Lone Pine Corp.*, Docket No. L 33606-85, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986). For a thorough discussion of *Lone Pine* orders, see Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 *Yale L.J.* 2 (2019).

7. For example, Case Management Order No. 18, *In re Invokana (Canagliflozin) Products Liability Litigation*, MDL No. 2750 (D.N.J. June 16, 2017), discusses the dismissal process for failure to comply with the order.

early census of claims in the MDL proceeding may be useful for organizing the proceeding and dismissing plaintiffs with unsupported claims.<sup>8</sup> As the proceeding develops, the parties should consider whether the fact sheet should be revised, and whether additional, individual-specific information may be needed.

There are no one-size-fits-all methods for using fact sheets or for their place in the overall discovery plan. Fact sheets do not replace regular discovery, so even if fact sheets are adopted, plaintiff-specific discovery will most likely still take place, especially in cases selected for an initial disposition or bellwether pool.<sup>9</sup> Additional information also may be needed for nonbellwether plaintiffs, which may take the form of supplemental fact sheets.<sup>10</sup> If the need for supplementation is likely, this should be taken into account when determining the length of the initial questionnaire.

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8. Some practitioners and academics have proposed further streamlining of fact sheets, beyond that typically done in profile forms, to focus the initial plaintiff questionnaire on proof of use and proof of injury, thus obtaining a faster initial census of plaintiffs and conducting early vetting of unsupported claims at the outset of the proceeding. As of this writing, no proceedings have adopted such a model, though some judges reportedly provided input on the proposal. See Jaime L. Dodge, Initial Census and Early Vetting: Emory Institute for Complex Litigation and Mass Claims MDL Roundtable Memorandum to Conference Participants (May 5, 2019), at 2–3 (on file with the Federal Judicial Center).

9. See Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2360 (2008) (“[E]ach of the cases within the [bellwether] pool must undergo case-specific discovery. This discovery process will typically be no different from that which occurs in an ordinary case.”).

10. Supplemental information from nonbellwether plaintiffs may be needed to provide counsel with improved data for evaluating the inventory of cases in the proceeding, which may occur in tandem with global settlement efforts. See, e.g., Order, *In re Abilify* (Aripiprazole) Prods. Liab. Litig., MDL No. 2734 (N.D. Fla. Aug. 31, 2018) (“The Court has determined that additional information is needed from all individual plaintiffs, beyond that provided on the initial Plaintiff Profile Forms, for use in evaluating the inventory of cases in this MDL. To that end, a Supplemental Plaintiff Profile Form (“Supplemental PPF”) must be completed in each case currently pending in the MDL and in all cases that become part of the MDL by virtue of being filed in, removed to, or transferred to this Court.”); see also Global Settlement Order No. 1, *In re Abilify*, MDL No. 2734 (May 2, 2018) (setting initial parameters for global mediation through September 1, 2018).

## Profile Forms

What types of fact sheets to use and when should also be considered. Some MDL proceedings require only fact sheets,<sup>11</sup> while others require both fact sheets and profile forms.<sup>12</sup> Proceedings also vary on which are required first and whether they are required of the plaintiffs, defendants, or both. When used, a profile form may be made to broadly apply to all plaintiffs at the outset of a proceeding, providing information to categorize the cases and select candidates for an initial discovery pool, from which actions for bellwether trials can be selected. A profile form may also be used *after* a fact sheet—for example, if after the litigation has matured, the parties realize that additional information is needed to facilitate resolution.

## Developing a Fact-Sheet Protocol

### Early Case-Management Conference

Though the fact-sheet process offers organizational benefits, not all MDL proceedings require fact sheets. To determine whether a fact sheet is an appropriate tool for the proceeding, the transferee judge and the parties should discuss the issue at an early case-management conference. While in older proceedings, fact sheets were used once the proceeding was more mature, it is now more common to discuss the use of fact sheets at an early conference, and orders requiring the submission of proposed fact sheets are

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11. In *In re Chantix (Varenicline) Products Liability Litigation*, MDL No. 2092 (N.D. Ala.), the court entered Case Management Order No. 4 (Feb. 24, 2010) requiring plaintiffs to complete a plaintiff fact sheet. While the information collected needed to be supplemented later in the proceeding (Pretrial Order No. 4E, *In re Chantix*, MDL No. 2092 (Mar. 4, 2013)), no profile form was used.

12. In *In re Wright Medical Technology, Inc., Conserve Hip Implant Products Liability Litigation*, MDL No. 2329 (N.D. Ga.), the court issued Case Management Order No. 1 requiring a one-page plaintiff preliminary disclosure (similar to a profile form) on May 23, 2012. Then the parties submitted plaintiff and defendant fact sheets to the court on May 30, 2012, which the court adopted in Case Management Order No. 2 (June 26, 2012).

usually entered early in a proceeding.<sup>13</sup> The time between centralization and an order requiring fact sheets has varied from forty-five days to several years into the proceeding, but on average is eight months from centralization.<sup>14</sup> The time typically varies depending on how long it takes to appoint leadership counsel (who play a key role in drafting fact sheets) and the process for negotiating the contents of fact sheets.

If after the discussion with the parties, a transferee judge determines that the proceeding would benefit from fact sheets, the judge should direct the parties to negotiate the contents of the fact sheets and the employment, medical, and financial releases necessary. In some proceedings, the parties negotiate the contents directly with each other,<sup>15</sup> while in others, the parties are ordered to submit proposed fact sheets, and the court chooses which one will be used.<sup>16</sup> Transferee judges should issue a case-management order that sets deadlines for submitting the proposed fact sheets for the court's review and approval, which should be issued after the initial case-management conference. If the parties are negotiating with each other, the proposal should include procedures to resolve any disagreements that arise.<sup>17</sup>

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13. Compare, for example, the use of fact sheets in *In re Silicone Gel Breast Implants Products Liability Litigation*, MDL No. 926 (N.D. Ala.), and *In re Ephedra Products Liability Litigation*, MDL No. 1598 (S.D.N.Y.). Case Management Order No. 30, *In re Silicone Gel Breast Implants*, MDL No. 1598 (March 26, 1996), required “[i]mplant-recipient plaintiffs and their spouses . . . to complete and serve on Defendants’ Liaison Counsel (within 60 days after their case was filed in, removed to, or transferred to this Court) the approved MDL Questionnaire, which is treated as the plaintiff’s answer to interrogatories and requests for production.” The order was entered almost four years after centralization. By 2004, in *In re Ephedra*, the transferee court entered an order within two months of centralization requiring fact sheets. Status Order, *In re Ephedra*, MDL No. 1598 (May 21, 2004).

14. Williams et al., *supra* note 3, at 3.

15. See, e.g., Case Mgmt. Order No. 4, *In re GAF Elk Cross Timbers Decking Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2577 (D.N.J. Mar. 26, 2015) (ordering the parties to negotiate the contents of the plaintiff fact sheet; the parties submitted a negotiated fact sheet to the court on May 1, 2015).

16. In *In re Biomet M2a Magnum Hip Implant Products Liability Litigation*, MDL No. 2391 (N.D. Ind.), the transferee judge entered an order on October 12, 2012, requiring the parties to submit fact sheets. On January 29, 2013, after reviewing the submission, the transferee judge entered an order (No. 199) selecting one of the two proposals. The fact sheet was modified through a negotiation process and a new order was entered on March 25, 2013, adopting the modified fact sheet.

17. Case Management Order No. 4 of *In re GAF Elk Cross Timbers* required the parties to submit proposed fact sheets to the court by April 27, 2015, along with an outline of the differences in the proposals, if they could not agree.

## Fact Sheet Contents

Although fact sheets may be completed by both plaintiffs and defendants, this pocket guide primarily addresses plaintiff fact sheets. This is because MDL litigants and transferee courts more regularly use these to organize and manage MDL proceedings, but the general discussion of information collection and procedure apply to both plaintiff and defendant fact sheets.

Parties typically negotiate which items to include in fact sheets, but judges may suggest what to include or delete and may resolve disputes over content. For plaintiffs, the following information is typically required:

- when and why the plaintiff used a product or device or service
- product identification records (brand used and model, if applicable)
- plaintiff's medical history
- what injury or injuries the plaintiff sustained
- requests for related documents and a witness list

Additional information may also be included. For example, the fact sheet may include questions about the plaintiff's background (e.g., educational and employment history, criminal history, social media use, and litigation history). Releases for medical, insurance, and financial information are also typically included. The fact sheet is a sworn statement completed under penalty of perjury, but plaintiff fact sheets do not require affidavits to be submitted by expert witnesses such as those typically required in *Lone Pine* orders (e.g., supporting a particular theory of causation).<sup>18</sup>

This core information is requested in both profile forms and fact sheets, and the need for additional questions varies by proceeding. But adding questions unrelated to the core issues in the litigation may cause inefficiencies or put an unreasonable burden on the plaintiffs. Judges must balance the demands of individual-specific discovery with the need to address common issues and facilitate efficient progress. While the use of fact sheets is part of a negotiation between the parties, the fact sheets in most proceedings are similar, with more recent proceedings including some new questions. This suggests that negotiation between parties does not always start with a blank slate and that fact sheets approved in earlier proceedings are often used as templates during this process. Judges should consider whether all the items on a party-negotiated fact sheet are necessary given

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18. *Lore v. Lone Pine Corp.*, Docket No. L 33606-85, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986).

the requirements to complete it and the needs of the proceeding, or if the questions can be narrowed down to core information. The specificity and amount of information required in some fact sheets may need to be revised as the proceeding moves along.<sup>19</sup>

Defendant fact sheets are sometimes required after plaintiff fact sheets have been submitted. Typically, defendant fact sheets gather information about the plaintiff from the defendant's records, including the defendant's contacts with the plaintiff's medical providers, information about product identification, the chain of custody for products and devices, and information the defendant possesses about adverse events.

## The Case-Management Order

Once the parties have agreed about the contents of the questionnaires, the court issues a case-management order to implement the process. The case-management order should set deadlines for submitting completed fact sheets both for cases that are currently part of the MDL proceeding and for later-filed cases (actions filed directly in the transferee court or tag-along actions transferred under § 1407). For example, in *In re Fluoroquinolone Products Liability Litigation*,<sup>20</sup> the court ordered that the fact sheet for pending cases be completed three months from the date of the order and, for future cases, sixty days after they become part of the proceeding.<sup>21</sup> The deadline for defendant fact sheets can be set for a number of days after each plaintiff fact sheet is received<sup>22</sup> or it can be set for a number of days from the date the order was issued,<sup>23</sup> or after cases for the discovery pool have been identified;<sup>24</sup> or the deadline can be based on a combination of these factors.<sup>25</sup>

19. See the discussion of *In re Xarelto (Rivaroxban) Products Liability Litigation*, MDL No. 2592 (E.D. La.), in the appendix.

20. MDL No. 2642 (D. Minn.).

21. See, e.g., Pretrial Order No. 7, *id.* (Apr. 26, 2016).

22. See, e.g., Case Mgmt. Order No. 18, *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100 (S.D. Ill. June 10, 2010).

23. See, e.g., Consent Order for Defendant's Fact Sheet, *In re Nuvaring Prods. Liab. Litig.*, MDL No. 1964 (E.D. Mo. Apr. 14, 2009).

24. See, e.g., Pretrial Order No. 32, *In re Boston Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326 (S.D. W. Va. Jan. 18, 2013); Pretrial Order No. 40, *In re Boston Sci.*, MDL No. 2326 (Mar. 14, 2013).

25. See, e.g., Case Mgmt. Order No. 6, *In re Fresenius Granuflo/Naturalyte Dialysate Prods. Liab. Litig.*, MDL No. 2428 (D. Mass. Nov. 27, 2013).



The case-management order for implementing fact sheets should also give directions for submitting them, either through a leadership structure,<sup>26</sup> directly to opposing counsel,<sup>27</sup> or through an online platform operated by a third-party vendor. If the parties agree to use a third-party vendor to submit and analyze the fact sheets, the process and deadlines for working with the vendor should be included in the case-management order, just as these details should be outlined when the parties are submitting the information to one another.<sup>28</sup> When a third-party vendor is used, the transferee judge may require the parties to discuss various relevant matters, such as who will bear the cost of the vendor, who can access the information housed with the vendor, and what security will be required.<sup>29</sup> Regardless of how fact sheets are submitted, they may contain sensitive or confidential medical or other information, and the parties may request a separate protective or confidentiality order. Even if the parties have already stipulated to a proposed protective or confidentiality order, judges should ensure that the order provides the reasons for granting the request.

The case-management order should also include procedures for how to enforce the fact-sheet requirement. Enforcement most often becomes an issue when plaintiff fact sheets are not submitted on time (or at all), or when defendants allege that a submitted fact sheet is substantively deficient. Like the contents of a fact sheet, the enforcement process is typically negotiated by the

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26. In *In re Heparin Products Liability Litigation*, MDL No. 1953 (N.D. Ohio), the court entered Pretrial Order No. 10 (Oct. 9, 2008), requiring defendants to submit completed defendant fact sheets to plaintiffs' liaison counsel.

27. In *In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Products Liability Litigation*, MDL No. 2100 (S.D. Ill.), the court entered Order No. 12 (Mar. 3, 2010) requiring plaintiffs to submit fact sheets to defendants.

28. The decision to use a third-party vendor is a matter generally left to the discretion of the parties, who pay for the vendor. Once the parties have made their selection, they typically document the logistics for submitting fact sheets in a proposed order for the court's approval. See, e.g., Stipulated Order, *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, MDL No. 2734 (M.D. Fla. Apr. 12, 2017).

29. For examples of MDL proceedings using third-party vendors, see *In re Valsartan Products Liability Litigation*, MDL No. 2875 (D.N.J.); *In re Proton Pump Inhibitor Products Liability Litigation* (No. II), MDL No. 2789 (D.N.J.); *In re Ethicon Physiomesb Flexible Composite Hernia Mesh Products Liability Litigation*, MDL No. 2782 (N.D. Ga.); *In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Liability Litigation*, MDL No. 2775 (D. Md.); *In re Abilify*, MDL No. 2734; *In re Roundup Products Liability Litigation*, MDL No. 2741 (N.D. Cal.); *In re Taxotere (Docetaxel) Products Liability Litigation*, MDL No. 2740 (E.D. La.); *In re Viagra Products Liability Litigation*, MDL No. 2691 (N.D. Cal.); *In re Zofran (Ondansetron) Products Liability Litigation*, MDL No. 2657 (D. Mass.); and the examples discussed below.

parties, and the parties bring any disagreements to the court for resolution. Different enforcement mechanisms have been incorporated into case-management orders over the years, as discussed in more detail in the next section.

## Managing Deficient Fact Sheets

In some large MDL proceedings, transferee judges have reported a recurring problem with substantially incomplete or missing fact sheets. The order requiring fact sheets to be completed may include a monitoring process to minimize these issues. The monitoring process can be conducted in a number of ways. Some courts require the opposing party to notify the judge directly of incomplete or deficient fact sheets,<sup>30</sup> usually by providing a list to the court at regular intervals.<sup>31</sup> But most proceedings require the opposing party to notify the noncompliant parties.<sup>32</sup> The list of actions with deficient or incomplete fact sheets can prompt parties to cure the deficiencies or to trigger the enforcement process.

The fact-sheet order may be enforced through motions to dismiss, show-cause orders, or alternative procedures established by court order. There is a process courts generally follow when notified that parties have submitted a deficient fact sheet or not submitted one at all: (1) the opposing counsel notifies the court of the deficiencies, and (2) the parties are given the opportunity to remedy the problem. This procedure is seen across many MDL proceedings, and the time required for notice varies. In some proceedings, parties were to give notice forty-five days after the fact sheet was overdue,<sup>33</sup>

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30. See, e.g., Pretrial Order No. 7, *In re Fluoroquinolone Prods. Liab. Litig.*, MDL No. 2642 (D. Minn. Apr. 26, 2016); Case Mgmt. Order No. 1, *In re Trasyol Prods. Liab. Litig.*, MDL No. 1928 (S.D. Fla. May 22, 2008).

31. See, e.g., Case Mgmt. Order No. 1, *In re Trasyol*, MDL No. 1928 (stating that deficiency list needed to be provided to the court monthly).

32. See, e.g., Case Mgmt. Order No. 5, *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, MDL No. 2502 (D.S.C. May 2, 2014).

33. See, e.g., Case Mgmt. Order: Plaintiff Fact Sheets, *In re Actos (Pioglitazone) Prods. Liab. Litig.*, MDL No. 2299 (W.D. La. July 9, 2012); Case Mgmt. Order No. 16 at 2, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (E.D.N.Y. June 2, 2006).

while in others, the parties were given less time.<sup>34</sup> After notice, parties have the opportunity to cure deficiencies within a deadline of two<sup>35</sup> to six weeks.<sup>36</sup>

Though parties are given the opportunity to amend a deficient fact sheet or file one that has not been submitted in time, this does not guarantee that all issues will be resolved. To resolve any remaining issues, judges may consider specific enforcement mechanisms. Those used in past proceedings are discussed below, but the specific mechanism used will benefit from the input of the parties. Past MDL proceedings have used one or more of the following enforcement mechanisms:

- **Motions to Dismiss.** In *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation (No. II)*,<sup>37</sup> the principal defendant filed a number of motions to dismiss the claims of some plaintiffs with prejudice for not complying with the case-management order that required them to complete fact sheets.<sup>38</sup> The case-management order that established the fact-sheet process cited the court's authority to dismiss actions for failure to comply with a court order<sup>39</sup> or for failure to comply with a discovery order.<sup>40</sup> The transferee court eventually dismissed some plaintiffs with prejudice. Motions to dismiss have been used in several other MDL proceedings.<sup>41</sup>

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34. See, e.g., Case Mgmt. Order 18c at 9, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. June 29, 2006).

35. See, e.g., Case Mgmt. Order No. 4-A, *In re E.I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, MDL No. 2433 (S.D. Ohio Oct. 31, 2018) (giving plaintiffs fourteen days to cure deficient fact sheets.)

36. In *In re Roundup Products Liability Litigation*, MDL No. 2741 (N.D. Cal.), the court issued Pretrial Order No. 50 on September 26, 2018, giving plaintiffs in one group (Group 3) forty-two days to cure deficient plaintiff fact sheets.

37. MDL No. 2502 (D.S.C.).

38. See, e.g., Case Mgmt. Order No. 5, *id.* (May 2, 2014), and Case Mgmt. Order No. 6, *id.* (May 16, 2014) (detailing the process for completing fact sheets); Case Mgmt. Order No. 17, *id.* (Sept. 10, 2014) (for dismissal of the cases for failure to comply with the court orders).

39. Fed. R. Civ. P. 41(b).

40. Fed. R. Civ. P. 37. See, e.g., Case Mgmt. Order No. 17, *In re Lipitor II*, MDL No. 2502 (Sept. 10, 2014).

41. Motions to dismiss were also used to deal with fact-sheet deficiencies in *In re Mirena IUD Products Liability Litigation*, MDL No. 2434 (S.D.N.Y.) (Order Granting Motion to Dismiss (Mar. 31, 2016)), and *In re Nuvaring Products Liability Litigation*, MDL No. 1964 (E.D. Mo.) (Order Granting Motion to Dismiss (June 13, 2013)).

- **Show-Cause Orders.** Show-cause orders can be used when a fact sheet is not served, is deficient, or is not adequately completed after a warning letter or deficiency notice. The court in *In re Benicar (Olmesartan) Products Liability Litigation*<sup>42</sup> established procedures to enforce compliance in a case-management order, which ordered that parties be notified of deficient fact sheets within twenty-one days of the deadline. Parties were then given two weeks to cure deficiencies, after which the case was put on the court’s agenda. If a case appeared on the agenda twice, a show-cause order would be entered requiring “the delinquent party to show cause why the party’s complaint or answer should not be dismissed or stricken with prejudice.”<sup>43</sup> Although the court did issue such orders when they were requested,<sup>44</sup> it did not issue them when defendants requested show-cause orders for cases that only appeared on the court agenda once.<sup>45</sup> Other transferee courts have established different procedures for show-cause orders, including issuing one if the plaintiffs on the dismissal list did not serve a signed fact sheet with authorizations within fifteen days of the order. In one such instance, the court also required parties to file a certification of compliance that the fact sheet was substantially complete (as required by an earlier pretrial order) or respond to the order to show cause.<sup>46</sup>
- **Call-Docket Approach.** The transferee court in *In re Taxotere (Docetaxel) Products Liability Litigation*<sup>47</sup> issued an order for a streamlined dismissal process by placing plaintiffs with deficient fact sheets on a monthly call docket, replacing a show-cause process that the parties found to be inefficient.<sup>48</sup> Defendants placed plaintiffs who did not comply after receiving a notice on the call docket. The list of cases was published fourteen days before the

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42. MDL No. 2606 (D.N.J.).

43. Case Mgmt. Order No. 20, *id.* (Jan. 29, 2016).

44. *See, e.g.*, Order to Show Cause, *id.* (Apr. 20, 2016).

45. *See, e.g.*, Transcript of Discovery & Status Conf., *id.* (Feb. 3, 2016), at 4–5 (explaining that “it was pointed out by plaintiffs’ counsel that many of these listed do not comply with the process that we have in place that requires timing and they are listed for inclusion on the agenda on today’s conference, when they should not have been, because the time period has not passed”).

46. *See* Order Denying Motion for Extension of Time, *In re Trasyol Prods. Liab. Litig.*, MDL No. 1928 (S.D. Fla. Feb. 2, 2012).

47. MDL No. 2740 (E.D. La.).

48. *See, e.g.*, Pretrial Order No. 22A, *id.* (July 24, 2018).

conference, and the docket was taken up after each status conference with no briefing by the parties. At the hearing, each party had the opportunity to address the court in person, by telephone, or through liaison counsel about the matter. Any plaintiff who failed to appear at the call docket and establish good cause for failing to comply with the discovery disclosure requirements would be dismissed with prejudice.<sup>49</sup> The court dismissed several hundred plaintiffs with prejudice through this process.

- **Motions to Compel.** When creating an enforcement process, the court and parties can rely on existing tools in the discovery rules, especially motions to compel. For example, in *In re Abilify (Aripiprazole) Products Liability Litigation*,<sup>50</sup> when plaintiffs in a number of cases either did not submit the requisite forms or submitted deficient ones,<sup>51</sup> the court established a formal deficiency process for fact sheets, records authorizations, profile forms, and supplemental forms, including authorizing defendants to file a motion to compel if health care provider authorizations were not filed by the deadline.<sup>52</sup>
- **Monetary Sanctions.** In *In re Ethicon, Inc., Pelvic Repair System Products Liability Litigation*,<sup>53</sup> the defendant filed hundreds of motions for monetary sanctions, seeking \$100 per day for each plaintiff who had not submitted a plaintiff profile form. The transferee judge granted many of the motions in part (e.g., imposing sanctions of \$500, subject to further enforcement proceedings if necessary).<sup>54</sup> The use of monetary sanctions in *Ethicon* is not the only instance of sanctioning attorneys for incomplete plaintiff fact sheets.<sup>55</sup>

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49. *Id.*

50. MDL No. 2734 (N.D. Fla.).

51. *See, e.g.*, Case Mgmt. Order No. 14, *id.* (June 13, 2018); Case Mgmt. Order No. 16, *id.* (Oct. 29, 2018).

52. *See, e.g.*, Order Re: Deficiency Process for Plaintiff Fact Sheets, Records Authorization, Plaintiff Profile Forms & Supp. Plaintiff Profile Forms, *id.* (Nov. 6, 2018).

53. MDL No. 2327 (S.D. W. Va.).

54. *See, e.g.*, Pretrial Order No. 196, *id.* (Oct. 9, 2015).

55. *See, e.g.*, Order No. 29, *In re Silica Prods Liab. Litig.*, MDL No. 1553 (S.D. Tex. June 30, 2005) (ordering sanctions under 28 U.S.C. § 1927 for submitting false or misleading fact sheet information); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1997 WL 704719 (E.D. Pa. July 24, 1997) (ordering fines of \$500 per plaintiff questionnaire containing false or misleading information).

Orders that address fact sheets often point to the court’s authority under the Federal Rules of Civil Procedure to order compliance and establish consequences for failure to comply, including case dismissal. In *In re Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation*,<sup>56</sup> the court ordered that parties may seek relief under Federal Rule of Civil Procedure 37 for overdue and materially deficient fact sheets after opposing counsel have provided a notice and the opportunity to cure the deficiencies.<sup>57</sup> In *In re Bair Hugger Forced Air Warming Devices Products Liability Litigation*,<sup>58</sup> the court considered the defendants’ motions to dismiss cases under Federal Rule of Civil Procedure 41 for deficient fact sheets that remained unresolved after an opportunity to cure had been provided and the deficiencies had been presented at a court conference.<sup>59</sup> Other courts have more generally referred to the ability of the parties to seek relief “under applicable federal rules for failure to timely file” fact sheets.<sup>60</sup>

The courts of appeals have consistently affirmed the authority of transferee courts to enforce case-management orders for the completion of fact sheets. In *In re Phenylpropanolamine (PPA) Products Liability Litigation*, the Ninth Circuit upheld the district court’s authority to dismiss actions for failure to comply with fact-sheet requirements under both Federal Rule of Civil Procedure 37 and the court’s authority to manage its docket.<sup>61</sup> Appellate courts have also affirmed the dismissal of cases under Federal Rule of Civil Procedure 41. In *In re Guidant Corporation Implantable Defibrillators Products Liability Litigation*,<sup>62</sup> the plaintiffs failed to complete fact sheets, and the district court dismissed the actions with prejudice under Federal Rule of Civil Procedure 41(b). The plaintiffs then sought relief from judgment under Federal Rule of Civil Procedure 60(b), which the court denied. In affirming, the Eighth Circuit cited with approval the Ninth Circuit’s *In re PPA* decision, and observed that an MDL court must be given “discretion to organize, coordinate and adjudicate its proceedings, including the dismissal of cases

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56. MDL No. 2428 (D. Mass.).

57. See, e.g., Case Mgmt. Order No. 6, *In re Fresenius Granuflo/Naturalyte Dialysate Prods. Liab. Litig.*, MDL No. 2428 (D. Mass. Nov. 27, 2013).

58. MDL No. 2666 (D. Minn.).

59. See, e.g., Order, *id.* (Feb. 15, 2018), at 2.

60. Pretrial Order No. 10, *In re Heparin Prods. Liab. Litig.*, MDL No. 1953 (N.D. Ohio Oct. 9, 2008).

61. 460 F.3d 1217, 1233–37 (9th Cir. 2006). The Ninth Circuit also affirmed other dismissals for fact-sheet deficiencies in a separate discussion. *Id.* at 1237.

62. 496 F.3d 863 (8th Cir. 2007).

for failure to comply with its orders,” noting the large numbers of plaintiffs involved.<sup>63</sup>

In general, transferee judges should actively monitor proceedings to promote the timely completion of the discovery process. As noted above, enforcing case-management orders that require fact sheets to be completed may sometimes tax court resources. Even with detailed procedures and clear consequences for deficient or missing fact sheets, it is unlikely that all parties will comply with the initial deadlines. Courts may need to adjust deadlines if the process proves more burdensome than anticipated. Transferee courts also may need to revisit the fact-sheet process several times over the course of the proceeding as the needs of the litigation change.

## Conclusion

In designing a fact-sheet process, the transferee judge should consider how much information is needed when. Judges should also consider using fact sheets as a tool for early identification and winnowing of unsupported claims. The goal of the overall case-management plan should be to resolve the proceeding through rulings on dispositive motions, a bellwether trial process, settlement, or remand of transferred actions for trial as efficiently and equitably as possible. The fact sheet proposed by the parties should be clear on the timing and volume of any proposed individual-specific discovery with an eye toward achieving these goals.

The court has a range of options, and sufficient legal authority, to enforce its orders to promote the just and efficient resolution of the proceeding. Case-management orders should set clear deadlines and establish procedures addressing issues as they arise, and transferee judges should ask themselves, “What information is necessary now to do the things proposed in the case-management plan?”

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63. *See id.* at 867.





## Appendix

# Case Studies of Fact-Sheet Approaches

Discussed below are three examples of how fact sheets are used in MDL proceedings to highlight different approaches to the fact-sheet process. Though the examples are not exhaustive, they illustrate how the processes have been used and why each approach was taken. *In re Xarelto (Rivaroxban) Products Liability Litigation* involves a widely used prescription drug for treating and preventing blood clots that allegedly causes severe bleeding injuries.<sup>64</sup> The surgically implanted mesh product in *In re Atrium Medical Corporation C-Qur Mesh Products Liability Litigation*, used for hernia repair, allegedly causes allergic or inflammatory responses.<sup>65</sup> The third example is *In re Testosterone Replacement Therapy Products Liability Litigation*, an “industry-wide” MDL involving testosterone replacement therapy drugs made by competing manufacturers, in which plaintiffs alleged that the drugs pose a risk of heart attack, stroke, and other cardiovascular and clotting-related injuries.<sup>66</sup>

### ***In re Xarelto (Rivaroxban) Products Liability Litigation, MDL No. 2592 (E.D. La.)***

In *In re Xarelto*, the transferee judge ordered a twenty-page plaintiff fact sheet (requesting ten years of information) in May 2015. The plaintiff fact sheets were due within sixty days of case filing or transfer, or within sixty days of the order, whichever was later.<sup>67</sup> Plaintiffs unable to comply with the order were given twenty days to cure deficiencies, along with a notice that failure to comply could result in the dismissal of the case. The use of fact sheets was supported by reference to the Federal Rules of Civil Procedure. Specifically, “[p]laintiffs’ responses to the PFS shall be treated as answers to interrogatories under Fed. R. Civ. P. 33 and responses to requests for production of documents under Fed. R. Civ. P. 34 and shall be supplemented in accordance with Fed. R. Civ. P. 26,” and defendants reserved the right to serve additional discovery.<sup>68</sup> In June 2015, the order requiring plaintiff fact sheets

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64. MDL No. 2592 (E.D. La.).

65. MDL No. 2753 (D.N.H.).

66. MDL No. 2545 (N.D. Ill.).

67. See, e.g., Pretrial Order No. 13, *In re Xarelto*, MDL No. 2592 (May 4, 2015).

68. *Id.*

was amended to require online submission through a third-party vendor (to be chosen by the parties) as well as submission to the defense liaison counsel, and allowed for extension of the deadlines if the parties agreed.<sup>69</sup>

Initially, all plaintiffs were required to complete the full fact sheet because part of its purpose was to give the transferee judge and leadership counsel a sense of the scope of the proceeding and to assist with the selection of cases for bellwether trial.<sup>70</sup> After the forty discovery-pool cases were selected in March 2016,<sup>71</sup> the court modified the plaintiff fact-sheet, requiring plaintiffs to fill out only the “Core Case Information” section, which requested plaintiff information, injury, and prescription information (approximately two pages of information), and to produce the medical and pharmacy records requested in section IX of the fact sheet (e.g., records of treatment for conditions linked to Xarelto and the plaintiff’s use of prescription drugs in the past twelve years).<sup>72</sup>

In March of 2019, after bellwether trials were completed, the court implemented a plaintiff profile form and short-form complaint process as part of a plan put in place the year before to prepare cases for possible remand under § 1407.<sup>73</sup> The nine-page profile form requested information mainly related to the use of Xarelto, the use of other drugs capable of causing the injury at issue, and the harm suffered. Most of the questions about the plaintiffs’ personal history in the original plaintiff fact sheet were excluded. The plaintiffs had sixty days from the date of the order to complete the profile-form process or face a show-cause order and possible dismissal as detailed in a previous pretrial order.<sup>74</sup> The profile-form process applied to 1,000 cases in the next wave of cases selected for remand workup, as well as any cases filed after the date of the pretrial order itself. Along with that, plaintiffs were required to submit a new eleven-page, short-form plaintiff fact sheet if their actions were selected for remand workup, due within thirty days of when their case was selected.

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69. See, e.g., Pretrial Order No. 13(A), *In re Xarelto*, MDL No. 2592 (June 23, 2015).

70. Pretrial Order No. 1, *id.* (Dec. 17, 2014) (“It is not yet known how many attorneys will eventually join this litigation, but we can assume it will be a large number.”).

71. See, e.g., Order, *id.* (Mar. 7, 2016).

72. See, e.g., Pretrial Order No. 27, *In re Xarelto* (Rivaroxban) Prods. Liab. Litig., MDL No. 2592 (E.D. La. Apr. 22, 2016).

73. See, e.g., Case Mgmt. Order No. 8, *id.* (March 7, 2019).

74. See, e.g., Pretrial Order No. 31, *id.* (Jan. 25, 2017).

The initial fact-sheet order in *In re Xarelto* also required defendants to complete fact sheets, and the requirements for defendant fact sheets changed over time alongside changes to the plaintiff fact sheets. For example, in April 2016, when the plaintiff fact-sheet requirements were reduced, so were those for the defendant fact sheets.<sup>75</sup> And in March 2019, the order that created a plaintiff profile form and a short-form plaintiff fact sheet also created a short-form fact sheet for defendants.

Over the life of the proceeding, plaintiff fact-sheet deficiencies were a recurring issue, and the transferee court devoted substantial judicial resources to enforcing the plaintiff fact-sheet requirement. Enforcement was mainly through defense motions to show cause, which sought the dismissal of deficient actions (e.g., where plaintiff fact sheets were missing or lacked core information), and through subsequent hearings on why the actions should not be dismissed. For example, in January 2017, the court issued a show-cause order. This resulted in an order that dismissed thirty-nine actions lacking plaintiff fact sheets and an order that allowed thirty-five other actions with resolved deficiencies to proceed.<sup>76</sup> Similar orders were issued throughout 2017 and 2018. On December 11, 2018, the court issued an order to streamline the process, following defendants' assertions that the show-cause process was slow and costly.<sup>77</sup> Under the revised process, overdue and deficient plaintiff fact sheets were generally listed on the court's monthly conference agendas and, after appearing on two agendas, were the subject of a show-cause order returnable at the next conference. The order provided that cases with uncured deficiencies would be dismissed with prejudice following the conference.

As the *In re Xarelto* example shows, the use of both plaintiff and defendant fact sheets can evolve over the life of the proceeding as the case-management needs of the proceeding change. If fact sheets are inefficient, their content and deadlines can be altered to better serve as a case-management tool, and modifications can be made alongside enforcement of the fact-sheet requirement.

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75. See, e.g., Pretrial Order No. 31(a), *id.* (Dec. 11, 2018).

76. See, e.g., Order, *id.* (Jan. 5, 2017).

77. See, e.g., Pretrial Order No. 31(a), *id.* (Dec. 11, 2018).

***In re* Atrium Medical Corporation C-Qur Mesh Products Liability Litigation, MDL No. 2753 (D.N.H.)**

In *In re C-Qur*, the transferee judge used fact sheets and profile forms a little differently. In an initial case-management order, the judge required all plaintiffs to complete a thirteen-page plaintiff profile form (plus authorizations).<sup>78</sup> Plaintiffs of existing cases were to complete the form within sixty days of the case-management order; plaintiffs in actions filed after the case-management order had to complete the form within sixty days of filing the short-form complaint or within sixty days of the date that the finalized transfer order was entered. The case-management order noted that a “completed PPF shall not be considered interrogatory answers under Fed. R. Civ. P. 33 or responses to requests for production under Fed. R. Civ. P. 34, however completeness and compliance will be governed by the standards applicable to written discovery under Federal Rules 26 through 37.”<sup>79</sup> For any late or substantially incomplete profile forms, defense counsel were instructed to send a deficiency letter; plaintiffs had seven days to cure, or the deficiency process could begin.

After cases were selected for bellwether trial, plaintiffs in those cases were required to complete a fact sheet.<sup>80</sup> The thirty-page fact sheet (plus authorizations) was due within ninety days of the order that selected the cases for potential bellwether trial. The plaintiff fact sheets had been provided to the plaintiffs in the initial case-management order in August 2017, but they were amended in the August 2018 order.<sup>81</sup> For cases selected for any later bellwether process, a plaintiff fact sheet was due within forty-five days of being selected. Unlike responses to profile forms, responses to plaintiff fact sheets were “considered interrogatory answers under Fed. R. Civ. P. 33 and responses to requests for production under Fed. R. Civ. P. 34, and will be governed by the standards applicable to written discovery under Fed. R. Civ. P. 26 through 37.”<sup>82</sup> For incomplete or deficient fact sheets, defendants were instructed to send a deficiency letter, and plaintiffs had twenty days to cure. If the fact sheets remained deficient, the defendants were to request a meet-

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78. See, e.g., Case Mgmt. Order No. 3G, *In re* Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig., MDL No. 2753 (D.N.H. Aug. 3, 2017).

79. *Id.*

80. *Id.*

81. See, e.g., Endorsed Order, *In re C-Qur*, MDL No. 2753 (Aug. 18, 2018) (creating Second Amended Case Mgmt. Order No. 3G).

82. See, e.g., Case Mgmt. Order No. 3G, *id.* (Aug. 3, 2017).

and-confer, then move for relief under Federal Rule of Civil Procedure 37 if deficiencies remained uncured.

Along with plaintiff profile forms and plaintiff fact sheets, the transferee judge's initial case-management order also required a defendant profile form and fact sheet. Defendant profile forms were due sixty days after the defense received the plaintiff profile form, and required information about the defendants' contact with the plaintiffs' implanting physicians, the defendants' contact with all treating or evaluating physicians for the plaintiffs, and product details such as lot numbers and failed devices. As with the plaintiff profile form, answers on the defendant profile form were not considered responses to interrogatories or requests for production but were governed by the standards for written discovery.<sup>83</sup> For incomplete or insufficient defendant profile forms, plaintiffs were instructed to send a deficiency letter, and the defendants had twenty days to cure. If they failed to do so, the plaintiffs were instructed to request a meet-and-confer, then move for relief under Federal Rule of Civil Procedure 37 if a profile form remained incomplete.<sup>84</sup>

Defendant fact sheets were due within ninety days of receipt of the plaintiff fact sheet (for those cases selected for a possible bellwether trial). An initial defendant fact sheet was submitted with the original case-management order, but the order noted that the parties were not yet in agreement on the items to be included, and the defendants retained the right to object to the items included. The defendant fact sheet required information in adverse events reports, as well as information on the sales contact with treating and implanting physicians. As with the plaintiff fact sheets, responses to defendant fact sheets were treated as answers to interrogatories or requests for production.<sup>85</sup> For missing or deficient defendant fact sheets, plaintiffs were instructed to send a deficiency letter, and the defendants had twenty days to cure. If the deficiencies were not cured in that time, the plaintiffs were instructed to request a meet-and-confer, and if the fact sheets still remained incomplete, the plaintiffs could move for relief under Federal Rule of Civil Procedure 37.

The transferee judge also issued a case-management order that appointed a third-party vendor to collect medical and other records from third parties.

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83. *Id.*

84. *Id.*

85. *Id.*

The court order stated that the records were to be made available to both parties equally and that the parties were to split the cost evenly.<sup>86</sup> The parties had ten days from the submission of their information to review materials for privilege or to withhold production before the other party was permitted to access it.<sup>87</sup>

As highlighted above, the *In re C-Qur* and *In re Xarelto* proceedings used fact sheets and profile forms differently. In *In re C-Qur*, initial information was collected on all cases through a profile form, and fact sheets were used to collect more comprehensive information on actions selected for possible bellwether trial. *In re Xarelto* started with a fact sheet for all cases, but then moved to a more streamlined questionnaire *after* the bellwether pool cases were selected. It then went through additional revisions after the bellwether trials.

### ***In re Testosterone Replacement Therapy Products Liability Litigation, MDL No. 2545 (N.D. Ill.)***

In *In re Testosterone Replacement Therapy*, the implementation of plaintiff fact sheets mirrored some aspects of *In re Xarelto* and *In re C-Qur* but differed in others. In October 2014, the court entered a case-management order requiring a plaintiff fact sheet for all pending cases and any future tag-along cases. The fact sheet, as amended in March and May of 2015, initially was a twenty-two-page document (plus authorizations). By May 2018, the fact sheet process had been amended a third time, to require a thirty-five-page fact sheet. The overall process remained the same. Fact sheets were to be completed and served on counsel for each defendant within sixty to eighty days, with all responsive, nonprivileged documents in their possession.<sup>88</sup> A courtesy copy was to be provided to leadership. The orders noted that the “responses in a PFS or amendment thereto are binding on the relevant plaintiff as if they were contained in answers to interrogatories under Fed. R. Civ. P. 33, and can be used for any purpose and in any manner that answers to

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86. *Id.*

87. A protective order covering information collected, including information from fact sheets, was entered in the proceeding. *See, e.g.*, Case Mgmt. Order No. 3E, *In re Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig.*, MDL No. 2753 (D.N.H. July 5, 2017).

88. *See, e.g.*, Case Mgmt. Order No. 9, *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, MDL No. 2545 (N.D. Ill. Oct. 6, 2014); Third Amended Case Mgmt. Order No. 9, *id.* (May 20, 2018).

interrogatories can be used pursuant to the Federal Rules of Civil Procedure, subject to the Confidentiality provisions of Section VI below. The Requests for Production of Documents in the PFS shall be treated as document requests under Fed. R. Civ. P. 34.”<sup>89</sup> Parties remained under their duty to supplement materials pursuant to Federal Rule of Civil Procedure 26(e).

Fact sheets for cases that were pending when the case-management order was amended in March 2015 were due two months later. For later-filed cases, plaintiffs had eighty days from the date their action was filed or transferred to complete the fact sheet. For any insufficient fact sheet, defense counsel was to notify the plaintiff in writing and the plaintiff had thirty days to cure. Parties had a meet-and-confer obligation within the thirty days. After that, defendants could file a motion to compel the required information, and plaintiffs had an opportunity to file a response. Unless there was a request for oral argument, the court would decide the motion without a hearing.

For overdue fact sheets, a warning letter was to be sent to the plaintiff’s counsel, and the parties were to meet and confer within forty-five days. If the plaintiff still failed to submit any portion of the fact sheet and authorizations after forty-five days, the defendants could move to dismiss the action with prejudice (no motion to compel was necessary). The court would decide the motion without a hearing unless either of the parties requested oral argument.

In December 2017, the transferee court issued another case-management order that required all plaintiffs, including those who had already completed the fact sheet, to complete supplemental plaintiff profile forms. The eight-page profile form was due within ninety days of the case-management order. The information collected in the form dealt with the specific products used and the harm suffered and was meant to inform the settlement negotiations. As with the fact sheets, a process for dealing with missing and deficient profile forms was included in the case-management order. Defendants were to notify the court of missing or deficient plaintiff profile forms, and the transferee court would enter a show-cause order asking why the case should not be dismissed or sanctions ordered. Plaintiffs had twenty-one days to respond, including any discussion of their ability to address the deficiency.

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89. See, e.g., Case Mgmt. Order No. 9, *In re Testosterone Replacement Therapy*, MDL No. 2545 (Oct. 6, 2014); Third Amended Case Mgmt. Order No. 9, *id.* (May 20, 2018).

Plaintiffs who failed to show cause could have their case dismissed with prejudice, or the court could impose another appropriate sanction.<sup>90</sup>

Defendant fact sheets were used for cases in defendant-specific bellwether selection pools,<sup>91</sup> and for cases in a “mixed-use” bellwether selection pool.<sup>92</sup> The defendant fact sheets required information about contacts and retainer agreements with, and payments to, the plaintiff’s prescribing healthcare provider(s), among other things.

*In re Testosterone Replacement Therapy* helps illustrate some different ways fact sheets can be used, particularly in comparison with *In re Xarelto* and *In re C-Qur*. As in those proceedings, the fact-sheet requirement was broadly applicable to all plaintiffs and responses were treated as discovery responses under the Federal Rules of Civil Procedure, and the court implemented a deficiency process for incomplete and missing fact sheets. But the proceeding took a different approach on some issues. While initial information was collected on all plaintiffs through the fact-sheet process, a separate profile form was used to provide supplemental information later in the proceeding during the settlement process, and defendant fact sheets were ordered only for cases in bellwether selection pools.

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90. See, e.g., Case Mgmt. Order No. 85, *In re Testosterone Replacement Therapy*, MDL No. 2545 (Dec. 8, 2017).

91. See, e.g., Case Mgmt. Order No. 31, *In re Testosterone Replacement Therapy*, MDL No. 2545 (Sept. 16, 2016).

92. See, e.g., Case Mgmt. Order No. 75, *In re Testosterone Replacement Therapy*, MDL No. 2545 (Oct. 13, 2017).





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## About the United States Judicial Panel on Multidistrict Litigation

The Judicial Panel on Multidistrict Litigation (the MDL panel or JPML) was created by 28 U.S.C. § 1407 to allow “civil actions involving one or more common questions of fact” that are pending in different districts to be transferred to a single district for coordinated or consolidated pretrial proceedings. The MDL panel may transfer and assign cases to a transferee judge when doing so will be convenient for the parties and will promote the just and efficient conduct of the actions.<sup>1</sup> The transfer of cases and creation of an MDL proceeding (often referred to as centralization) are designed to avoid duplication of discovery, prevent inconsistent rulings, and conserve the resources of the judiciary, parties, and counsel.<sup>2</sup> Centralization of cases provides an “opportunity for resolution of mass disputes by bringing similarly situated litigants from around the country, and their lawyers, before one judge in one place at one time.”<sup>3</sup> Section 1407(b) authorizes a transferee judge to exercise all powers of the transferor court for pretrial proceedings. This includes holding pretrial conferences; setting discovery schedules; resolving pretrial disputes; deciding motions to dismiss, motions for summary judgment, and class certification; and facilitating settlement discussions.<sup>4</sup>

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1. See 28 U.S.C. § 1407.

2. See Manual for Complex Litigation, Fourth § 22.33 (2004).

3. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2340–41 (2008).

4. Fallon et al., *supra* note 3, at 2328.

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This pocket guide was created to provide multidistrict transferee judges with an overview of the use of fact sheets. Fact sheets (either plaintiff or defendant) are one of many case-management tools available to transferee judges. Although using fact sheets is not appropriate for every multidistrict litigation (MDL) proceeding, this guide outlines practical considerations for establishing and implementing fact sheets in proceedings where a court chooses to utilize them. Examples are provided throughout the guide as potential models for future orders and to demonstrate courts' flexibility in using fact sheets in particular MDL proceedings, especially during discovery.