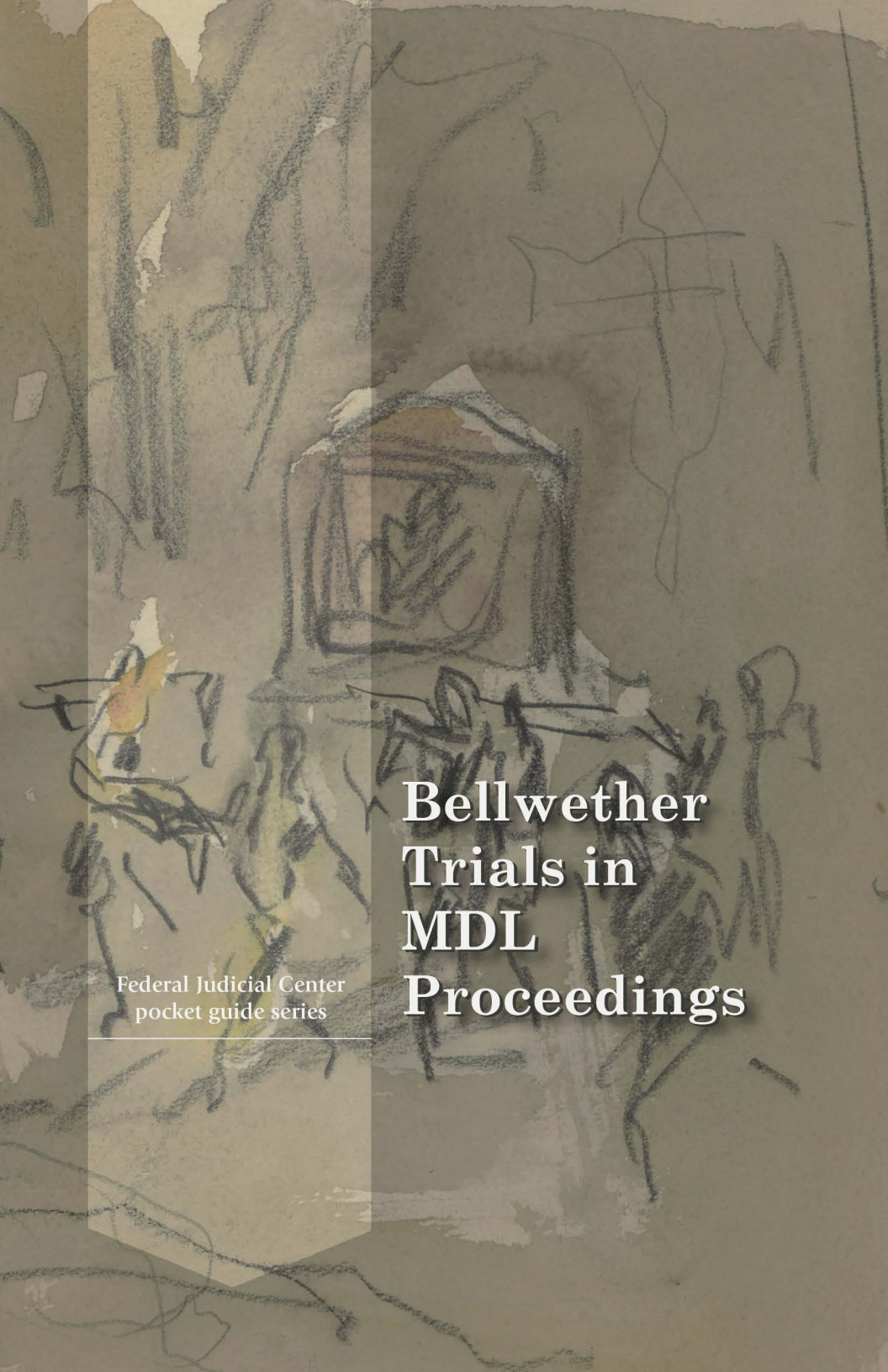

Bellwether Trials in MDL Proceedings

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Bellwether Trials in MDL Proceedings
A Guide for Transferee Judges

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Introduction

This pocket guide was created to provide transferee judges handling multidistrict litigation (MDL) with an overview of the bellwether trial process. Bellwether trials are one of many case-management tools available to MDL transferee judges. Although bellwether trials are not appropriate for every MDL proceeding, this guide outlines practical considerations for establishing and implementing bellwether protocols in proceedings where a court chooses to utilize them. Examples of past bellwether protocols are provided throughout the guide as potential models for future orders and to demonstrate the flexibility that courts have in designing bellwether trial strategies that are well-suited to the demands of particular MDL proceedings.

The Judicial Panel on Multidistrict Litigation (the MDL Panel or JPML) was created by 28 U.S.C. § 1407 to allow 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 order the transfer and assignment of cases to a transferee judge when doing so will be for the convenience of the parties and will promote the just and efficient conduct of the actions.[1] Transfer and MDL formation (often referred to as centralization) are designed to avoid duplication of discovery, prevent inconsistent rulings, and conserve the resources of the judiciary, the parties, and their counsel.[2] Centralization of cases provides an "opportunity for the 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."[3] Section 1407(b) empowers a transferee judge to exercise all powers of the transferor court with respect to pretrial proceedings. This includes holding pretrial conferences; setting discovery schedules; resolving pretrial disputes; deciding motions to dismiss, mo-

1. *See* 28 U.S.C. § 1407(a).

2. JMPL Overview Brochure, http://www.jpml.uscourts.gov/sites/jpml/files/JPML-Overview-Brochure-2-23-2016.pdf (last visited Apr. 4, 2019).

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

tions for summary judgment, and class certification; and facilitating settlement discussions.[4]

4. *See id*. at 2328.

What Is a Bellwether Trial?

The transferee court's authority over transferred cases generally extends only to pretrial matters. As discussed below, the transferee court does not retain jurisdiction over these cases for trial and may not transfer cases to itself for trial under § 1404(a).[5] However, while § 1407 does not empower the transferee court to self-assign and conduct trials of MDL cases, a transferee judge can conduct trials of cases originally filed in the transferee district where venue is proper or cases in which the parties have waived all objections to venue. A trial held in this setting is often referred to as a bellwether trial or test case.

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. *Bellwether* is derived from the practice of belling a male sheep (a wether) to lead a flock; in modern jurisprudence, the concept of bellwether trials developed from "[t]he notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims."[6] If bellwether

5. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).

6. *In re* Chevron U.S.A., 109 F.3d 1016, 1019 (5th Cir. 1997). The term *bellwether* appears in U.S. Supreme Court jurisprudence as early as 1972, in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 140 (1972) (selecting twelve plaintiffs as bellwether plaintiffs in claims involving tribal land allotments) and even earlier in state and federal courts. *See, e.g.*, Bouknight v. Lester, 119 S.C. 466, 473 (1921) (Supreme Court of South Carolina case referring to one of a series of cases regarding refusal of right to admission to a theater ticket as a "bellwether" in a particular line of jurisprudence); Int'l Carbonic Eng'g Co. v. Nat. Carbonic Prod., 57 F. Supp. 248, 251 (S.D. Cal. 1944), *aff'd, sub nom*. Int'l Carbonic Eng'g Co. v. Nat. Carbonic Prods., 158 F.2d 285 (9th Cir. 1946) (referring to a subsidiary's taking a license for a patent as a "bellwether" to indicate to others in the industry that they should do the same rather than question that patent's validity); Ranchers Expl. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 711 (D. Utah 1965) (regarding a large number of mining claims, "[d]uring pre-trial proceedings, in the hope of avoiding unmanageable processing for trial of numerous individual claims, six 'bellwethers' were selected by the parties (three claims by each side) as presenting the major issues of fact and law likely to be encountered

cases are representative of the broader range of cases in the MDL proceeding, they can provide the parties and court with information on the strengths and weaknesses of various claims and defenses and the settlement value of cases.[7]

Bellwether Process Overview

In general, the bellwether trial process begins with identifying key characteristics of the entire universe of cases in an MDL proceeding. Next, the court and parties create a pool of cases that is representative of these characteristics and advance those cases for discovery. This subset of cases may be referred to by a variety of names, such as a discovery pool, case selection pool, representative trial pool, or bellwether pool. Third, following core case-specific discovery, bellwether cases are selected from that pool and scheduled for trial.[8] A number of tools can assist with this process. This pocket guide provides an overview of the practical considerations for establishing and implementing bellwether trial protocols that are well suited to the demands of particular MDL proceedings. Examples of past bellwether trial protocols are provided throughout as potential models for future orders and to demonstrate the flexibility that courts have in establishing successful bellwether trial strategies.[9]

The Goals of Bellwether Trials

Promote Settlement. Bellwether trials can promote global settlement by giving the parties an early understanding of the strengths and weaknesses of each party's position and a sense of the value of in-

in deciding the validity of all of the claims in dispute.").

7. *See* Manual for Complex Litigation, Fourth §§ 22.314, 22.315 (2004) [hereinafter MCL 4th].

8. *See* Fallon et al., *supra* note 3, at 2325–36.

9. Many of the orders referenced in this pocket guide can be found in the sample order database maintained on the JPML website for use by transferee judges. *See* http://jpml.ao.dcn/transferee_Judge_Sample_Orders (last visited Apr. 4, 2019). Product liability in general and pharmaceutical and healthcare cases in particular have tended to represent a large number of the cases centralized in MDL proceedings and thus tend to dominate the examples provided here. However, many of these strategies can be adapted to other types of litigation where test cases may be helpful.

dividual cases.[10] They may also help the parties appreciate the costs and burdens of subsequent litigation.[11] For some cases, bellwether trial jury verdicts can provide the raw data around which to construct a global settlement in the form of a grid-based compensation system.[12] Finally, when parties do not agree to global settlement, carefully selected bellwether trials can expedite settlement of particular subsets of cases with similar fact patterns and applicable law.

Manage the MDL Proceeding Effectively. Discussing whether the case is suitable for a bellwether trial and setting a bellwether trial schedule soon after MDL centralization signals to the parties the court's intention to actively and efficiently manage the litigation. In particular, scheduling deadlines for the parties to prepare trial-worthy cases may avoid unnecessary delays by counsel and ensure cases move forward with discovery in a timely manner. Bellwether trials can be an efficient vehicle to decide common legal issues and rule on the admissibility of key evidence in the MDL proceeding. While particular rulings during individual trials do not generally bind other plaintiffs, they do signal to the parties how the court is likely to rule in future bellwether cases and may provide guidance to transferor judges upon remand of cases.

Assist the Parties and Transferor Courts upon Remand. Bellwether trials provide the parties with the opportunity to develop *trial packages* or litigation frameworks that can be used in subsequent bellwether trials or in cases remanded to the originating courts.[13] Preparing for bellwether trials forces the parties to organize and consolidate a large volume of materials from pretrial discovery into summary trial packages that can then be used by local counsel to try remanded cases. Materials include key documents, expert reports, deposition

10. *See* Barbara J. Rothstein & Catherine R. Borden, Fed. Judicial Ctr. & JPML, Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges 44 (2011) ("Conducting individual trials, sometimes referred to as bellwether trials or test cases, can help facilitate resolution of the MDL by testing essential elements of each side's litigation strategy and establishing representative settlement values.").

11. *See* MCL 4th § 22.315.

12. *See* Fallon et al., *supra* note 3, at 2342.

13. *See id.* at 2325, 2338–40.

testimony, and attorney work product summarizing such materials. The bellwether process allows parties to streamline case-specific pretrial discovery for future trials and helps transferor courts and local counsel prepare to try cases upon remand. For example, the court can encourage the parties to use videotaped expert testimony or prepare a standard set of exhibits when appropriate for use in multiple trials with similar legal and factual issues in play.[14]

The Limitations of Bellwether Trials

The appropriateness and utility of bellwether trials will depend on the unique facts and circumstances of the proceeding, but several common limitations should be noted. First, in general, bellwether trials do not have a preclusive effect on other cases in an MDL proceeding. In many proceedings, a focus on dispositive motions may be a more efficient use of the transferee court's resources in moving the litigation forward.[15] In addition, the parties may attempt to engage in unproductive gamesmanship in their bellwether trial strategies, including case selection, case ordering, and the scheduling of bellwether cases and related state court cases. For example, the parties may attempt to stall bellwether trials in favor of trying cases in the state courts perceived to be most favorable.

Alternatively, the parties' roles as advocates during bellwether case selection may skew the information produced from the bellwether process. If not managed effectively, the bellwether process could instead showcase extreme cases on both sides that do not reflect reasonable settlement values nor the merits more generally. For this reason, bellwether case selection demands careful consideration. Another limitation arising from the MDL transfer process is that venue objections by the parties may limit the number and variety of cases available for bellwether trials.

14. *See* MCL 4th §§ 12.13, 23.345.

15. However, a pattern of dismissals in several bellwether cases might still prove valuable and signal to the court that additional focus and effort should be expended on dispositive motion practice more generally. Other mechanisms, such as orders to show cause why similar claims or cases should not be dismissed, can also ensure that bellwether trials promote efficiency by streamlining future cases and weeding out invalid claims.

Finally, in some instances, efficiency may argue against an early bellwether process. For example, the court must also consider

- whether there may be more efficient means to resolve the litigation or certain subsets of cases (e.g., would it be helpful to hold a consolidated trial on a common claim or bifurcate discovery and decide general causation or another threshold issue first?)
- whether a focus on scientific evidence issues, including early *Daubert* motions, may be a more efficient means of promoting settlement than bellwether trials
- whether highly divergent, state-specific case-law issues are central to the claims or defenses in an MDL proceeding such that that the transferor court might be a better venue for trials
- whether, in balancing the competing demands of general fact and expert discovery, the legal and factual issues involved suggest that case-specific discovery should take a secondary role

Nonetheless, prior proceedings have demonstrated that bellwether trials can be an effective strategy in some instances, even while the court simultaneously juggles other aspects of the MDL proceeding, such as overseeing class-certification discovery and briefing or deciding dispositive motions. The MDL statute expressly directs transferee judges to remand cases for trial upon conclusion of pretrial coordination, but the vast majority of MDL cases are resolved before ever being remanded for trial.[16] Bellwether trials can facilitate such resolutions.

16. *See, e.g.*, Catherine R. Borden, Emery G. Lee III & Margaret S. Williams, *Centripetal Forces: Multidistrict Litigation and Its Parts*, 75 La. L. Rev. 425, 443 (2014).

Raising a Bellwether Process Early and Conferring with the Parties

Transferee judges can raise the possibility of a bellwether process proactively with the parties and seek their views on the utility of bellwether trials whenever it seems that bellwether trials might be beneficial. By introducing the court's interest in employing a bellwether trial process early on—perhaps at the first management conference—the court can set the tone for moving the litigation forward.

If the court decides to engage in a bellwether process, ensure that the parties are given sufficient time to confer and propose a joint bellwether selection protocol and trial schedule.[17] Having invested in the bellwether process and collaborated in negotiating and formalizing a bellwether trial protocol, the parties may be more likely to consent to having cases tried and issues decided in a binding manner before the transferee court, rather than requesting that the transferee court suggest to the JPML that cases be remanded to the transferor courts. Note, however, that when seeking the input of the parties on bellwether calendars and case selection protocols, the court will also need to be aware of perceived party advantages and the potential for gamesmanship.[18]

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17. MCL 4th § 22.93; *see also* Duke Law Center for Judicial Studies, MDL Standards and Best Practices [hereinafter Duke MDL Practices], Best Practice 1E, at 16 (Sept. 11, 2014). Note that the Duke MDL Practices provide guidance suggested by a number of legal practitioners; however, such guidance should be used only when the litigation-specific circumstances suggest they could serve the fundamental purposes for MDL proceedings and comport with the Federal Rules of Civil Procedure. The Duke MDL Practices are not a substitute for the Federal Rules or the lessons provided by prior judicial experience.

18. *See* Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 Emory L.J. 329, 346–47 (2014) (noting that early on, "it is exceedingly difficult for a transferee judge to know why parties are taking the strategic positions they do. Most commonly, judges have asked why parties are opposing measures that are intended to streamline litigation. For example, why do defendants in some cases oppose delaying inquiries into subgroups or individual claims until after the general questions are resolved? Why do plaintiffs at times oppose partial settlements?"); *see also*

Requiring that the parties submit detailed bellwether trial plans can also assist the court and parties in determining what issues, claims, and defenses may apply across groups, whether certain groups of claimants are particularly suitable for early trials, and the discovery necessary to prepare for individual bellwether trials.[19] Proposing a bellwether trial process also encourages the parties to organize, track, and continue to move individual cases forward early in the MDL process.

While bellwether trials can provide momentum in reaching a resolution, sufficient time should still be allowed for discovery prior to commencing bellwether trials in order for the parties to assess the composition and strength of the docket. The parties must have a reasonable grasp of key factual issues to ensure that they are comfortable with extrapolating case-specific findings and valuations from bellwether cases to other cases in the litigation. If a party is not receptive to extrapolating to the larger docket, the bellwether process could slow, rather than facilitate, a global resolution.

Friends for All Children, Inc. v. Lockheed Aircraft Corp., 87 F.R.D. 560, 564 (D.D.C. 1980) (establishing proposed interlocutory relief plan when parties engaged in burdensome settlement and trial-delaying tactics, and noting, "These cases are not games, yet they are being played by some as if they were. The Court is not required to stand by and referee these games when it can resolve the impasse and prevent unjust wind-falls, irreparable injury, and serious congestion of the docket of this busy federal court.")

19. MCL 4th § 22.93.

Addressing Venue and Jurisdiction Issues

Address *Lexecon* Venue Concerns

In *Lexecon Inc. v. Milberg Weiss*,[20] the Supreme Court held that a transferee judge cannot "self-transfer" an MDL action to his or her district for the purpose of conducting a trial.[21] Courts should anticipate and resolve, if possible, any *Lexecon*-related concerns at the outset of the litigation.[22]

Since *Lexecon*, transferee judges have developed a number of methods for working within the confines articulated by the Supreme Court. First, if the MDL contains actions that were properly filed in the transferee district in the first place, the transferee judge can conduct one or more bellwether trials from those cases.[23] Second, the Supreme Court's ruling in *Lexecon* does not prohibit parties from waiving venue objections when the transferee court has subject-matter jurisdiction. *Lexecon* waivers allow the parties to consent to trial in the transferee court, where venue would otherwise be improper. The court should discuss *Lexecon* waivers early in the process to ensure that cases are available for inclusion in the bellwether selection pool and for core, case-specific discovery.[24]

Courts can draw from the experience of a variety of past cases in crafting orders to facilitate *Lexecon* waivers. Examples include

- *In re* Chantix (Varenicline) Prods. Liab. Litig. (MDL No. 2039) (N.D. Ala.), Pretrial Order No. 9: Selection of Bellwether Plaintiffs for Discovery & Trial (Mar. 10, 2011):

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20. 523 U.S. 26 (1998).

21. *Id*. at 40 (1998) ("In sum, none of the arguments raised can unsettle the straightforward language imposing the Panel's responsibility to remand, which bars recognizing any self-assignment power in a transferee court[.]").

22. *See* Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges 8 (2d ed. 2014).

23. *See* MCL 4th §§ 20.132, 22.315, 22.93.

24. *See* Fed. Judicial Ctr. & JPML, Fallon et al., *supra* note 3, at 2359 (recommending that Lexecon waivers be obtained prior to case-specific discovery to avoid a situation where the side with the least favorable facts objects to venue later on during the bellwether trial selection process after significant discovery efforts have been made).

> Any Plaintiff in a case selected for the Discovery Pool who wishes to assert an objection under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), to his/her case being tried by this Court must do so in writing to Defendant's Lead Counsel by 5:00 p.m. CST on June 15, 2011. Plaintiffs who do not assert an objection by this time will be deemed to have waived any rights under *Lexecon* and to have agreed to have his/her case tried by this Court.

- *In re* GM LLC Ignition Switch Litig. (MDL No. 2543) (S.D.N.Y.), Order No. 25 Regarding the Selection of Personal Injury and Wrongful Death Bellwether Cases and Early Trial Scheduling (Nov. 19, 2014):

  > [F]or a claim to be eligible for inclusion in the Initial Discovery Pool, plaintiffs and defendants involved in the claim must waive any applicable venue and *forum non conveniens* challenges and agree that the claim can be tried in the United States District Court for the Southern District of New York without remanding the case to the transferor forum as required under *Lexecon*, 523 U.S. at 34.[25]

- *In re* Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litig. (MDL No. 2436) (E.D. Pa.), Case Management Order No. 15: Bellwether Case Selection Plan and Core Case-Specific Discovery (Oct. 4, 2013):

  > For the six cases consisting of the Eligible Trial Pool, it shall be deemed that: a. The parties have consented to personal jurisdiction and venue in the Eastern District of Pennsylvania; and b. The parties agree to a limited *Lexecon* waiver for this purpose only, such that a case may be tried before this court in the event the action is selected for trial as part of the Bellwether Trial Program.

- *In re* Bard IVC Filters Prods. Liab. Litig. (MDL No. 2641) (D. Ariz.), Case Management Order No. 11: Bellwether Selection Process (May 5, 2016):

  > It is important for the use of the bellwether process that is contemplated by this Order that both sides waive applicable

25. See generally the official GM Ignition Switch Litigation website, maintained by the parties at the request of MDL Transferee Judge Furman of the U.S. District Court for the Southern District of New York, http://gmignitionmdl.com/ (last visited Apr. 4, 2019).

> venue and forum non conveniens challenges … and stipulate that the initial scheduled trials can be conducted in the District of Arizona without remanding any case to the transferor forum under *Lexecon v. Milberg Weiss* ("Lexecon Waiver"). Accordingly, the selection of any case for inclusion … constitutes a Lexecon Waiver by the side/party selecting the case. Upon receipt of the list of cases from opposing counsel, each side will have five (5) business days to notify the other side if they do not agree to waive Lexecon with respect to any of the cases selected by the other side. Plaintiffs' Co-Lead Counsel and the Plaintiffs' Steering Committee shall use best efforts to secure a Lexecon Waiver for any case selected to be included … by Defendants. Defendants' counsel shall use best efforts to secure a Lexecon Waiver by Defendants for any case selected to be included … by Plaintiffs. If a plaintiff in a case selected for inclusion … by Defendants does not provide a Lexecon Waiver, the plaintiff or his/her counsel shall show cause why a Lexecon Waiver is not being made. If Defendants do not provide a Lexecon Waiver for any case selected for inclusion … by Plaintiffs, Defendants' counsel shall show cause why a Lexecon waiver is not being made in that particular case. Any party required to show cause must appear in person or by telephone before the Court to explain why a Lexecon Waiver may not be made in the particular case.

For cases filed after the JPML orders MDL centralization, the transferee court could issue a pretrial order that allows for direct filing of cases. Such orders would allow plaintiffs to either (1) waive all venue-related objections or (2) stipulate that direct filing into the MDL does not constitute a waiver of venue-related objections as to trial. Even when the parties expressly reserve the right to object to venue as to trial, the court can follow up at a later time to ask that the parties consider waiving venue-related objections if a case looks like it would be worthy of inclusion in a bellwether case pool. This type of direct filing process may provide speed and cost benefits in larger MDL proceedings compared to a process that utilizes standard case transfers and blanket *Lexecon* waivers. However, while parties in directly filed cases could theoretically waive venue-related objections as to trial at any point, such a waiver is unlikely when

there are strong strategic advantages to forum-shopping for a different trial venue.

As a later option following completion of MDL pretrial proceedings and following remand, the transferee court could suggest that a transferor court transfer the action back to the transferee judge for trial, pursuant to 28 U.S.C. § 1404 or 1406 (as long as the case might have been brought originally in the transferee district, all parties consent, or under §1406(b), the parties fail to interpose a timely and sufficient objection to the venue).[26] Under this scenario, the original transferor judge would have the option of transferring the case back to the transferee district and judge for trial.

Finally, to avoid *Lexecon* issues altogether, the MDL transferee judge could hold bellwether trials in the federal districts where the cases were originally filed. To do so, the transferee judge would need to obtain an intercircuit or intracircuit assignment to sit by designation under 28 U.S.C. § 292. The resources of the courts and convenience of the parties should be considered when taking this approach.[27]

Examples of proposed intercircuit or intracircuit assignments include:

- *In re* Fluoroquinolone Prods. Liab. Litig. (MDL No. 2642) (D. Minn.), Second Amended Pretrial Order No. 13 on Bellwether Discovery and Trials (Jun. 5, 2017):

  > The Bayer Defendants have indicated their intent to not waive *Lexecon* for any case in the MDL. Therefore, the above-trial schedule will also be subject to approval of the intracircuit and/or intercircuit assignment of this Court to conduct the trials in the judicial districts where the Cipro Only Bellwether Trial Cases were originally filed and courtroom availability.[28]

- *In re* Skechers Toning Shoe Prods. Liab. Litig. (MDL No. 2308) (W.D. Ky.), Order Regarding Early Mediation and Case

26. *See* MCL 4th § 20.132.

27. *See* MCL 4th § 20.132.

28. See generally the District of Minnesota's MDL website, http://www.mnd.uscourts.gov/MDL-Fluoroquinolone/ (last visited Apr. 4, 2019), where all pretrial orders and minutes are posted publicly.

Selection for Trial (Doc. No. 76) (May 3, 2012):

> The Court may try any cases originating in the Western District of Kentucky without raising the *Lexecon* issue, but absent agreement of the parties, the Court may not try any case arising outside of and transferred to this district …. When meeting and conferring about the case selection process, the parties shall also consider the possibility of intercircuit or intracircuit assignment pursuant to 28 U.S.C. §§ 292 or 294. This process would allow the MDL judge to try agreed upon cases in the districts where they originated.[29]

- *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig. (MDL No. 2592) (E.D. La.), Case Management Order No. 2 (Doc. No. 1305) (Sept. 18, 2015): The court announced its intent to hold four bellwether trials—two in the Eastern District of Louisiana (the transferee district) and one each in Mississippi and Texas (specific districts to be determined).

  > The Court's selection of the locations for the third and fourth trials is subject to change, in the discretion of the Court, if (a) the Court is not able to obtain a temporary assignment to try a case in another district pursuant to 28 USC 292, (b) the parties agree to waive *Lexecon* permitting the trial of a non-Louisiana plaintiff's case in the Eastern District of Louisiana, or (c) the Court determines after input from the parties that trial of a plaintiff's case in another venue is more appropriate.

- *In re* Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig. (MDL No. 2326) (S.D.W. Va.), Pretrial Order No. 91: Order Consolidating Above Cases For Trial on All Issues (Apr. 11, 2014): "At the conclusion of pretrial proceedings, it will be necessary to remand the cases to the Southern District of Florida, and I intend to try the consolidated cases there by intercircuit assignment with a planned trial date beginning on September 29, 2014, at 8:30 a.m."

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29. See generally the Western District of Kentucky's MDL website, http://www.kywd.uscourts.gov/multidistrict-litigation/mdl-2308 (last visited Apr. 4, 2019), providing the master docket, orders, associated cases, and other information on the proceedings.

Consider Other Jurisdictional Implications

A district court sitting in diversity typically must apply the substantive law, including choice-of-law rules, for the forum state in which it sits. However, when transfer results in a change of venue for purposes of MDL pretrial proceedings, the transferee judge "generally must apply the substantive law of the transferor forum, including that forum's choice-of-law rules and appropriate state law."[30] Thus for diversity-of-citizenship cases and in matters of state law, the transferee judge must apply the law that the transferor court would have applied, including its choice-of-law rules. For federal-question cases, the transferee judge generally applies the law of the judge's own circuit.[31]

This pocket guide assumes that all MDL cases were properly filed in the transferor district court (i.e., that personal jurisdiction lies with the original transferor court) and does not address such jurisdictional challenges. Transferee judges, however, should be aware of the implications that recent Supreme Court decisions may have for the filing practices of parties, particularly in cases removed from state to federal court and then subsequently centralized in an MDL proceeding.[32]

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30. Fed. Judicial Ctr. & JPML, *supra* note 21 at 8–9.

31. *See* MCL 4th § 20.132 ("Where the claim or defense arises under federal law, however, the transferee judge should consider whether to apply the law of the transferee circuit or that of the transferor court's circuit, keeping in mind that statutes of limitations may present unique problems." (citations omitted)); *see also In re* Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827 (N.D. Ill. 2010) (noting that in federal-question cases centralized under a multidistrict litigation, the law of transferor court warrants close consideration but does not bind the transferee court).

32. *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., 137 S. Ct. 1773 (2017) (holding that due process did not allow for exercise of specific personal jurisdiction in California state court over nonresident consumers' product liability claims); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017) (holding that the state of Montana could not exercise personal jurisdiction over a railroad under the Federal Employers' Liability Act where the railroad did business, had employees, and operated on tracks in Montana, but where injuries did not occur in the state and the railroad was neither incorporated in nor maintained its principal place of business in Montana).

The transferee judge should also consider how substantive law variations will impact the liability and potential value of bellwether cases and determine where applicable law differs substantially between originating districts on key liability issues. For example, the availability of certain claims, defenses, and punitive damages may all differ.

To improve the ability to extrapolate from bellwether trial results to the larger docket, where *Lexecon* waivers have been executed, the transferee judge should consider selecting cases from jurisdictions that follow a "majority rule" on key liability issues. When jurisdictions are fairly split on a key issue of liability, consider including cases from both types of jurisdictions. Finally, when there are no pronounced differences in the substantive law of the various jurisdictions and enough cases exist, consider selecting bellwether cases from those originally filed in the transferee court. This avoids venue objections altogether and may be especially efficient in situations where the substantive law to be applied follows the majority rule for pertinent liability and defense doctrines.

Developing a Bellwether Case-Selection Protocol and Case-Management Plan

Catalogue and Identify Key Characteristics of All MDL Cases

Consider requiring that plaintiffs collect data and provide the court with information on the composition of MDL cases. Alternatively, direct the parties jointly to collect and maintain information on the composition of MDL cases, perhaps with the assistance of electronic data-collection tools or third-party vendors, and to provide regular updates to the court. Requiring that the parties collect and routinely report information on the composition of the MDL docket will assist the court in identifying key variables that will allow for categorization of cases into major subsets or groups. Such variables may include plaintiff or defendant characteristics, the type of injury, the claims brought, the time when claims arose or a case was filed, or the availability of certain defenses.

To further assist with this process, the court can direct the parties, or appoint a special master, to identify relevant characteristics and specify the common issues that should be tested in a bellwether process.[33] Having the parties identify such characteristics will allow the court to recognize patterns, consider aggregation of similar cases, and gain an understanding of what "representativeness" of claims and injuries means in a particular MDL proceeding.

Determine the Size of the Pool of Potential Bellwether Cases

First, ensure that a large enough pool of potential bellwether cases is chosen to capture the variety of fact and legal patterns comprised by the total set of MDL cases. The court should anticipate that some cases will drop out or will be deemed unrepresentative after case-specific discovery is completed. The court can structure a bellwether case-management plan so that it provides for early identification of such cases and ensures that a large enough case pool remains after the exclusion of any outliers. The case pool's size will

33. *See* MCL 4th § 22.316.

depend on the variety of claims and injuries in the proceedings. For example, in a mass, acute event or an industrial accident, causation issues may be nearly identical for all cases and the damages fairly homogenous. In other instances, where the types of exposures vary, the injuries alleged are diverse, or there is the need to rule out a number of alternative causes for individual cases, the case pool size may need to be much larger.

The court should also keep in mind that the bellwether case pool size chosen may impact the parties' subsequent litigation strategies.[34] While the size of the bellwether case pool will depend on litigation-specific factors, past MDL proceedings and guidance offer some suggestions, including the following examples:

- Judge Fallon noted that past MDLs suggested that a pool of twenty cases "should be satisfactory for situations in which the transferee court intends to hold approximately six trials, with four to five major variable groupings, while giving each side of attorneys a few vetoes or strikes during the final trial-selection phase."[35]
- *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig. (MDL No. 2592) (E.D. La.), Case Management Order No. 3 (Nov. 20, 2015): Judge Fallon ordered that the bellwether discovery pool should consist of forty cases from which to select four individual bellwether trial cases. Of the forty, ten cases were chosen by plaintiffs, ten were chosen by defendants, and twenty were randomly selected from particular categories based on overall MDL case characteristics.[36]
- *In re* Fosamax Prods. Liab. Litig. (MDL No. 1789) (S.D.N.Y.),

34. *See* Loren H. Brown, Matthew A. Holian & Arindam Ghosh, *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 Akron L. Rev. 663, 671 (2014) ("Selecting a small number of bellwether cases increases the stakes for both sides, whereas selecting a larger number of cases distributes the risk, but may be less manageable.")

35. *See* Fallon et al., supra note 3, at 2347.

36. See generally the Eastern District of Louisiana's MDL website, http://www.laed.uscourts.gov/xarelto (last visited Apr. 5, 2019), posting information on developments, the litigation calendar, and pretrial, case management, and other orders.

> Case Management Order No. 9 (Early Trial Selection Process) (Jan. 31, 2007): The parties picked twenty-five trial cases to proceed through expert discovery and from which three cases were to be selected for trial.

Confirm Cases Will Be Ready for Trial

Cases chosen for the initial pool must be sufficiently "trial-ready." These selected cases must be suitable for fast-tracking case-specific discovery or already have had sufficient discovery completed to allow for trial within a reasonable time frame. The venue also must lie with the transferee court, or the parties must waive venue objections as to the selected case pool. Early individual case workups to ensure trial readiness also can help to ensure that any inaccuracies and misrepresentations in filings or plaintiff fact sheets are caught sufficiently early that they do not disrupt the bellwether case pool or trial sequencing process.[37]

Examples of past MDL orders addressing issues of trial readiness include the following:

- *In re* Actos (Pioglitazone) Prods. Liab. Litig. (MDL No. 2299) (W.D. La.), Scheduling Order: Pilot Bellwether Program (First Trial) (Feb. 19, 2013): Here, the court required that "Pilot Bellwether Discovery Pool Cases" include only non-class-action plaintiffs who had completed a fact sheet and medical record authorizations and where nominating counsel certified that the case could be ready for trial by a court-established cutoff date.
- *In re* Propecia (Finasteride) Prods. Liab. Litig. (MDL No. 2331) (E.D.N.Y.), Discovery & Trial Plan, Practice and Procedure Order No. 10 (2d Amended) (Mar. 16, 2016):

  > Neither party may select a case for the Case Pool unless the Plaintiffs supplied to Counsel for Merck both: (i) substan-

37. *See* Dodge, *supra* note 18, at 352 ("[I]t is not unusual for a case to settle as the parties discover that it bears little resemblance to its [fact] sheet. The late discovery of these inaccuracies can substantially disrupt not only that bellwether trial but the sequencing of other bellwethers, and perhaps even the coordination of timing between the MDL and parallel state court proceedings.").

> tially completed medical record authorizations (meaning authorizations for the prescribing physician, the primary care physician, and pharmacy records), and (ii) a Plaintiff's Profile Form by no later than January 1, 2015.

Ensure Representativeness of Case Pool

In order to provide reliable information about the strengths and limitations of claims or defenses or global settlement value, bellwether cases must be representative of the range of cases included in the MDL proceeding. In addition, to have a meaningful impact on reaching global settlement, both sides must consider the selected bellwether case pool a fair sample of the docket, likely to provide an unbiased valuation of claims and the likelihood of success of defenses.[38]

Representativeness is litigation- and fact-specific. Relevant factors to consider when creating a representative case pool may include

- plaintiff characteristics
- injuries
- type(s) of claims brought
- date when claims arose or case was filed (e.g., before or after regulatory action, label change, or other major event)
- applicable law
- circumstances of exposure (e.g., length of exposure, dose, particular product at issue, particular indication for use)
- type of defendant
- defendant's market share
- availability of affirmative defenses

Representativeness must also include the substantive law that will be applied. Generally, the transferee judge must use the transferor forum's choice-of-law rules to determine which substantive

38. "If the parties do not believe that their interests will be adequately represented in the bellwether trial process, they will not accept that the results are generalizable to other cases, making the process less likely to facilitate the resolution of many cases." Brown et al., *supra* note 34, at 670 (citing Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 637–38 (2008)).

laws should apply. Substantive law may differ in a number of ways, including the availability of certain doctrines of liability, certain defenses, and punitive damages.

The court should watch for unique issues of causation, damages, or theories of liability that would make a case an outlier or facilitate grouping of certain subsets of cases. Consider creating multiple pools for bellwether case selections if the types of cases presented are particularly diverse; the types of settlement likely to be reached differ by injury, plaintiff, or defendant; or trial verdicts are likely to differ based on key characteristics (e.g., based on jurisdiction, types of relief available, or different legal theories at play). Where categories of cases are based on different scientific theories or evidence, consider asking the parties to present a science tutorial prior to finalizing a bellwether selection process in order to better understand the science and select the correct variables or parameters for representativeness.

The court should also note the origin of bellwether pool cases, that is, whether a particular plaintiff is represented by a solo practitioner, a member of the plaintiff steering committee, or a firm with a large number of cases filed in the litigation. If leading players are involved in the bellwether trial process, results may be perceived as providing more valuable information to facilitate global settlement. However, the court must also balance issues of fairness in the division of plaintiffs' firms' labor and ensure that all individual plaintiffs' interests are addressed, not only those represented by the firm or firms with the largest number of cases in the MDL proceeding.

Finally, the transferee judge can reinforce the importance of representativeness through case management and bellwether trial selection orders. For example, in *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation* (MDL No. 2100) (S.D. Ill.), Amended Case Management Order No. 24 (Oct. 13, 2010), the MDL transferee judge emphasized,

> [T]he most critical element of this plan and the purpose it seeks to serve is for the most representative cases to be selected and for no one to lose sight of that objective. The Plaintiff's Steering Committee has a role to competently represent, at the very

> least administratively, all of the plaintiffs in this litigation. Defendant's leadership committee must competently represent the defendants. Together, however, they share a common interest in this phase of the litigation, which is to put together a list of cases that most accurately represent the typical case at issue in this litigation. Successful fact gathering during the bellwether process could well lead to an earlier conclusion to this litigation rather than a protracted litigation process, thereby conserving precious resources, redirecting resources, shaping expectations and serving the ends of justice for all concerned. Little credibility will be attached to this process, and it will be a waste of everyone's time and resources, if cases are selected which do not accurately reflect the run-of-the-mill case. If the very best case is selected, the defense will not base any settlement value on it as an outlier. If a case is picked that is dismissed on summary judgment, after the Plaintiff's evidence or a jury's verdict when it is obviously a weak case, the [plaintiffs'] side will look upon it as an outlier as well.[39]

Select Cases to Fill the Bellwether Case Pool

The MDL framework provides flexibility for the transferee judge to tailor the case-pool selection process to best facilitate resolution of a particular MDL proceeding. For example, "ideal" bellwether cases may differ based on whether the goal is to evaluate the viability of a range of claims, resolve particular contested issues, evaluate the strengths and weaknesses of "average" cases, or determine ranges of damages juries are likely to award.[40] While the "best" case pool in some instances may be one in which the parties and the court all agree on the included cases, if the parties are unable to select representative cases jointly, other strategies are available. Possible case-selection methods and their pertinent considerations include the following:

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39. Amended Case Management Order No. 24, at 4–5.

40. *See* Bolch Judicial Institute & Duke Law School, Standards and Best Practices for Large and Mass-Tort MDLs [hereinafter Duke Mass-Tort Practices], at 23 (Dec. 19, 2014) ("For example, does the judge want the parties to propose their strongest cases, or does the judge want to see cases that tee-up particular contested issues?").

1. *Allow one side to pick all cases.* This method may generally lead to bias in favor of the controlling party and may discourage the other party from participating in a bellwether trial process to the fullest extent possible, frustrating resolution of the MDL instead of providing a vehicle for global settlement. However, in some instances, it may be appropriate for one party to select a few test cases, particularly where a novel, unique theory of liability warrants separate testing.[41]
2. *Divide case selection between the two sides.* Simply permitting the plaintiffs and defendants to each choose some number of cases for the bellwether pool may similarly skew the information that is produced, leading to a pool that contains only extreme cases for each side. In theory these two extremes might average out to reasonable assessments of the value of a docket, or at least provide data on the outer boundaries of settlement values. However, in practice, the parties may be introducing additional bias to this process through advocacy. For example, one party may have an informational advantage in selecting favorable individual cases from the docket. Additionally, a party may choose to dismiss cases to skew the case pool in its favor after the case-pool selection process has been implemented.[42]
3. *Have the court select representative cases to include in the case pool.* In larger MDL proceedings, however, the transferee court may not have sufficient, requisite familiarity with individual cases to select cases for the pool without assistance from the parties.
4. *Randomly select cases from the entire MDL proceeding.* As a general statistical principle, random sampling is considered the standard method for helping ensure that a sample is representative of the population. Additionally, random selection prevents gamesmanship by the parties during case selection and may prevent certain attorneys from filing questionable

41. *See* King *ex rel.* King v. Sec'y of Health & Human Servs., No. 03-584V, 2010 WL 892296, at *8–9 (Fed. Cl. Mar. 12, 2010) (adopting an approach by which the petitioners' steering committee designated three "test cases" to be brought before special masters in order to test three unique causation theories regarding an alleged link between childhood vaccines and autism).

42. *See* Brown et al., *supra* note 34, at 676–77.

cases and remaining silent until a broad settlement comes within reach. Under a random selection process, such cases would be subject to scrutiny (and dismissal) early on, especially if they represented a large enough percentage of the docket that selection of such a case were likely.[43] This approach was endorsed previously in the *Manual for Complex Litigation* and has been used by transferee judges.[44] However, recent guidance suggests that random selection might not necessarily lead to representative cases and verdicts to assist in reaching global settlement. In theory, if 90% of litigants suffer one type of injury and 10% suffer another type, then a bellwether case pool chosen at random would also follow the same representative 90/10 pattern. However, for small case pools drawn from large MDL proceedings, this ideal scenario will very rarely, if ever, pan out due to random chance and variability.[45]

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43. *See* Dodge, *supra* note 18, at 350–51 (noting "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." This may in part be because "highly coveted leadership positions are appointed, in part, based upon the size of counsel's inventory." It may also be due to a lack of resources as the size of a firm's inventory increases, failure to work up each individual claim, and a strong incentive to rapidly develop large inventories of claimants. For nonleadership plaintiff attorneys, "the financial incentive is to invest as little as possible in the individual case, as any time invested will not impact their ultimate payout—as only time spent on developing generic assets, and not individual cases, is compensable as common-benefit work.").

44. *See* MCL 4th § 22.315 ("To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases."); *In re* Chevron U.S.A., 109 F.3d 1016, 1019 (5th Cir. 1997) ("A bellwether trial designed to achieve its value ascertainment function for settlement purposes or to answer troubling causation or liability issues common to the universe of claimants has as a core element representativeness—that is, the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained.").

45. *See* Fallon et al., *supra* note 3, at 2348 ("If cases are selected at random, there is no guarantee that the cases selected to fill the trial-selection pool will adequately represent the major variables."); Fed. Judicial Ctr., Nat'l Ctr. for State Courts & JPML, Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges 12 (2013), ("Selecting cases randomly … is unlikely

5. *Adopt a modified approach to randomization.* For example, establish multiple pools or subsets of cases based on key characteristics, such as plaintiff demographics, claims, available defenses, type of injury sustained, or governing law, and then randomly select cases from those subsets to help ensure the representativeness of cases selected. This type of stratified or cluster sampling based on key characteristics or demographics may help to ensure that the bellwether case pool reflects the frequency of these characteristics in the total set of MDL cases. Such sampling may preserve many of the benefits of random selection while ensuring that certain plaintiffs, claims, defenses, injuries, or other key litigation attributes are represented in the bellwether case pool.[46]
6. *Utilize a grid system to select cases with certain characteristics.* Where the ultimate goal is to extrapolate bellwether results to conduct a valuation of the docket as a whole and reach a global settlement, the bellwether case pool can be selected with a potential global settlement structure in mind. For example, the court may consider creating a grid or categorization of cases, similar to global settlement grids, to test potential settlement categories. The parties can then select a certain number of cases that fall within each grid category to develop further for trial, from which bellwether cases can then be selected.[47]

Any of these strategies may be combined or modified to produce a hybrid approach. For example, the court could allow both parties to select some cases and reserve others for the court to select or for random selection. Alternatively, the court could propose the global case-pool grid or case characteristics from which subsets of

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to produce a representative set of verdicts that will assist the parties in reaching a global settlement.").

46. *See, e.g.*, Meranus v. Gangel, No. 85 CIV. 9313 (WK), 1991 U.S. Dist. LEXIS 8731, at *4 (S.D.N.Y. June 26, 1991) ("Because clusters of plaintiffs may have different attributes, then, stratified random sampling rather than pure random selection may be necessary. This, in turn, requires identification of the pertinent characteristics and categorization of the plaintiffs according to those factors.").

47. *See* Duke Mass-Tort Practices, *supra* note 40, at 24; Dodge, supra note 18, at 378 ("[I]t may be more helpful to create a sample case grid, selecting cases that represent each of those imagined subgroups.").

cases could be chosen, and the parties could select cases to fill this grid. Other variations on the above strategies that have been used in past MDL proceedings include the following:

- Allow each side to recommend a set number of cases for the pool, but allow the other side strikes or vetoes over a certain number of selections to curb the parties' inclination to put forth their best—but potentially unrepresentative—cases.
- Require that each side provide a written report to the court on how its selections are statistically and qualitatively representative of the MDL.
- Allow one side to pick the cases that go into the initial discovery pool and the other side to select the bellwether cases from that pool.
- Allow each side to exercise alternating picks for the case pool and/or the cases selected from the pool to schedule for trial.
- Pick cases at random, but then allow each side a certain number of vetoes of cases where there are sufficient facts to support the parties' view that a selected case is not representative.
- Pick a larger set of cases at random, and then allow the parties to propose a subset of those that they deem most representative. Include in the final case pool the set of cases on which plaintiffs and defendants agree.[48]

Regardless of the case-pool or trial-selection measures used, the ultimate goal should be to obtain representative data to assist with global settlement or move the MDL proceeding forward efficiently. The judge must consider whether to override the parties' picks when it appears the parties have yielded to the pressures of advocacy by picking their best cases without regard to their representativeness.

Examples of the above bellwether pool selection strategies employed in past MDL proceedings include

- *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig. (MDL No. 1699) (N.D. Cal.), Pretrial Order No. 18: Initial Selection of Plaintiffs for Discovery and Trial Pool (Nov. 17, 2006): The transferee judge adopted a bellwether selection method that relied in part on a random-case-selection meth-

48. Adams v. Shell Oil Co., 136 F.R.D. 588, 597 (E.D. La. 1991).

od using randomization software. The parties each chose ten plaintiffs and twenty-five plaintiffs were randomly selected, for a bellwether case pool of forty-five plaintiffs in total.

- *In re* Chantix (Varenicline) Prods. Liab. Litig. (MDL No. 2092) (N.D. Ala.), Pretrial Order No. 9: Selection of Bellwether Plaintiffs for Discovery & Trial (Mar. 10, 2011): The discovery pool consisted of twenty-eight cases, fourteen chosen by the plaintiffs' counsel and the other fourteen by the defendant. Each set of fourteen cases was required to include four suicide cases, three attempted suicide cases, and seven neuropsychiatric injury cases.
- *In re* FEMA Trailer Formaldehyde Prods. Liab. Litig. (MDL No. 1873) (E.D. La.), Pretrial Order No. 28 (Feb. 10, 2009): The court required that the parties submit the names of at least fifty potential bellwether trial plaintiffs for four trials, with trailer manufacturer defendants for those four trials to be the four estimated to have the largest numbers of emergency housing units at issue in the proceedings.
- *In re* Fluoroquinolone Prods. Liab. Litig. (MDL No. 2642) (D. Minn.), Second Amended Pretrial Order No. 13 On Bellwether Discovery and Trials (Jun. 5, 2017): Two separate bellwether case pools were established based on product use, one for "Avelox Only Discovery Cases" and one for "Cipro Only Discovery Cases."
- *In re* Medtronic Implantable Defibrillator Prod. Liab. Litig. (MDL No. 1726), No. CIV 05MDI726, 2007 WL 846642, at *3 (D. Minn. Mar. 6, 2007): The selection protocol utilized a combination of joint party selection, random selection, and case preemptory strikes by each side to arrive at bellwether cases.
- *In re* Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig. (MDL No. 2385) (S.D. Ill.), Case Management Order No. 11: Unified Case Management Plan for Boehringer Ingelheim International GmbH (Oct. 19, 2012): The transferee judge required that the parties submit to the court a proposed order identifying the "process and parameters" for selecting bellwether plaintiffs, including "(i) categories from which bellwether plaintiffs shall be selected; (ii) characteristics which can be used to de-

lineate said categories; and (iii) numbers of plaintiffs."[49]

- *In re* Tylenol (Acetaminophen) Mktg., Sales Practices and Prods. Liab. Litig. (MDL No. 2436) (E.D. Pa.), Case Management Order No. 15: Bellwether Case Selection Plan and Core Case-Specific Discovery (Oct. 4, 2013): The court stated the goal of trying "cases that are both instructive and meaningful to the resolution of all cases in this MDL"; noted that the "vast majority" of cases involved over-the-counter (OTC) Tylenol products; and required that bellwether trials involve OTC Tylenol and the two most-frequently named defendants instead of less-frequently named co-defendants and less-frequently used prescription products.

Account for Dismissals and Settlements

Representativeness should be maintained throughout the selection and trial process, including the replacement of any cases that drop out of the pool. The transferee judge should consider mitigating the gamesmanship behavior of dismissing or settling unfavorable cases on the eve of trial and thereby distorting the case pool, by allowing plaintiffs to choose the replacement case where defendants settle and allowing defendants to choose the replacement case where plaintiffs voluntarily dismiss a bellwether case.[50] In addition, the court could require that the parties certify that the cases they propose for the bellwether case pool are intended for trial and are not likely candidates for early settlement.[51]

The court should familiarize itself with the bellwether pool generally, including those cases that leave the pool prior to trial. Set-

49. *See generally* Pradaxa MDL website, S.D. Illinois, available at http://www.ilsd.uscourts.gov/mdl/mdl2385.aspx (last visited Apr. 5, 2019).

50. *See* Duke Mass-Tort Practices, *supra* note 40, at 30 ("Although there may be good-faith reasons for settling or voluntarily dismissing a test case, there could be instances in which the parties do so to manipulate the takeaways from the bellwether process.").

51. *See, e.g.*, *In re* Actos (Pioglitazone) Prods. Liab. Litig. (MDL No. 2299) (W.D. La.), Scheduling Order: Pilot Bellwether Program (First Trial) (Feb. 19, 2013) (requiring that case-nominating counsel certify that the discovery pool nominee could be ready for trial by a set date, that counsel intends to try the case (not settle or dismiss), and that counsel has no reason to believe that the case will settle individually prior to trial).

tled or dismissed cases may suggest that there are certain clusters of cases that are particularly strong or weak for a given party compared to those that remain in the bellwether trial pool. Settlement or dismissal can inform the court's role as gatekeeper and provide a data point for global settlement. For example, repeated voluntary dismissals may signify that a type of case has significant weaknesses and may be a candidate for dispositive motion practice or a consolidated trial under Federal Rule of Civil Procedure 42(a).[52]

Utilize Data-Collection Tools for Case Selection and Monitoring

There are a number of data-collection tools and strategies that the transferee judge can utilize to ensure that the bellwether selection pool is appropriately selected and that chosen pool cases progress efficiently toward trial. As a general principle, the court should establish a system to obtain, on an ongoing basis, information jointly from the parties as to the status of cases centralized in the MDL proceeding, including information on dismissal, settlement, discovery, and injury type. For individual cases, the transferee judge should also ensure that any necessary medical or employment record authorizations are submitted in a timely manner to provide sufficient evidence about plaintiffs' claims and to determine whether they should be included in a bellwether pool.

In addition, the court can encourage the parties to adopt electronic data-collection tools to better track and understand the cases that have been filed and to help identify major variables on which individual case outcomes may turn. For example, several transferee

52. *See* Duke Mass-Tort Practices, *supra* note 40, at 21 ("Many bellwether cases resolve along the way, whether because of errors in the plaintiff fact sheet, special factors that strengthen or weaken the case during discovery that were not anticipated at the outset, or because of the court's early rulings. These cases should not be regarded as failures. Instead, they are important data points, helping the lawyers better understand the ground reality of the cases—which may vary considerably from the hypothetical plaintiff that has been the idealized subject of early negotiations. Indeed, the reasons these cases drop out—gamesmanship, good advocacy, plaintiffs disappearing, the outcome of preliminary motions—all provide insights into how the broader pool of cases may fare.").

judges have adopted the use of early, electronic plaintiff fact sheets to facilitate bellwether case-pool selection.[53] Some courts have requested that the parties utilize software that gathers and groups data from those electronic fact sheets and produces summary reports on them, to help guide bellwether case-pool selection. Sampling techniques, surveys, and questionnaires are other possible measures that can help facilitate test-case selection and identify subsets of cases that might require different considerations in the bellwether selection and trial process.[54]

Examples of the use of such data-collection strategies include

- *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig. (MDL No. 2592) (E.D. La.), Case Management Order No. 3 (Nov. 20, 2015):

  > All party selections and all random selections must come from representative categories utilizing data generated from MDL Centrality [a litigation management platform the parties previously agreed to use]. Pursuant to Case Management Order 2 the parties will advise the Court prior to the December 21, 2015 status conference whether they have agreed upon eligibility requirements and substantive categories for the 40 discovery pool plaintiffs.

- *In re* Gen. Motors LLC Ignition Switch Litig. (MDL No. 2543) (S.D.N.Y.), Order No. 25 Regarding the Selection of Personal Injury and Wrongful Death Bellwether Cases and Early Trial Scheduling (Nov. 19, 2014):

  > To facilitate efficient review of claim information, Lead Counsel shall place all Short-Form PFSs submitted by the deadline in an electronic and searchable database …. Immediately after the electronic and searchable fact sheet database is made available to counsel for the MDL Defendants, Lead Counsel and counsel for the MDL Defendants will meet and confer regarding (a) the type of alleged defects that should be encompassed within the scope of the bellwether trial plan and (b) the categorization of claims in the plan.

53. *See* Rothstein & Borden, *supra* note 10, at 41 ("In many MDL mass torts, courts have ordered claimants to complete plaintiff fact sheets, disclosing critical information such as the circumstances of their exposures and the severity of their injuries, to facilitate settlement negotiations or improve claim administration following settlement.").

54. *See id.* at 36.

Choose and Order Bellwether Cases for Any Additional Discovery and Trial from the Case Pool

After completing core case-specific discovery for the bellwether case pool, a subset of cases from the pool must be selected and ordered for any additional discovery and trial. Strategies similar to the ones outlined above for case-pool selection are also suitable for picking bellwether trial cases. Past guidance has recommended to the transferee judge,

> If possible, require counsel to agree on all bellwether cases. If the attorneys fail to agree, you may permit the plaintiffs and defendants to each choose some of the cases to try. This could skew the information that is produced, but by permitting each side a certain number of vetoes, you can minimize the chances of an unrepresentative case serving as a bellwether trial.[55]

By the time that plaintiffs are selected and ordered for the first bellwether trials, the transferee judge also has the benefit of additional factual information from discovery to more effectively exclude outliers that are not representative of the larger docket.

A sampling of past orders selecting plaintiffs for bellwether trials include

- *In re* Actos (Pioglitazone) Prods. Liab. Litig. (MDL No. 2299) (W.D. La.), Scheduling Order: Pilot Bellwether Program (First Trial) (Feb. 19, 2013): From among the ten cases in the case pool, plaintiffs identified the nominee for the first bellwether trial and defendants identified the nominee for the second bellwether trial.
- *In re* Chantix (Varenicline) Prods. Liab. Litig. (MDL No. 2092) (N.D. Ala.), Pretrial Order No. 9: Selection of Bellwether Plaintiffs for Discovery & Trial (Mar. 10, 2011):

  > After initial discovery, the parties shall provide the Court with (a) a summary of the Discovery Pool cases, including key medical records … and (b) briefs from each side setting forth the parties' respective positions on which cases are most representative of the then-existing docket. After consideration of those summaries and briefs . . . the Court will select [the bellwether cases to be tried].

55. *See id.* at 45–46.

- *In re* Fosamax Prods. Liab. Litig. (MDL No. 1789) (S.D.N.Y.), Case Management Order No. 9 (Early Trial Selection Process) (Jan. 31, 2007):

  > After fact discovery is completed, the three trial cases, to be tried separately before different juries in this Court, will be selected. The PSC shall select one case, Merck counsel shall select one case, and the Court shall select a third case. The Court will randomly select the order in which each of the three cases will be tried.… Once the three trial cases are selected, expert discovery will proceed in all three cases.

Selecting Bellwether Trial Structure

The structure, timing, and issues to be decided in bellwether trials are flexible and can be adapted to the circumstances or needs of a particular MDL. Federal Rule of Civil Procedure 42(b) allows multiple actions to be joined for trial for "any or all matters at issue" and for bifurcation or further division into separate trials on any issues or claims in actions "[f]or convenience, to avoid prejudice, or to expedite and economize[.]" For example, bellwether trials may be consolidated, bifurcated or multifurcated by issue or damages, handled in a class format, or conducted separately as single, individual trials. In some instances, a joint trial of common issues may be feasible, with separate trials following for remaining issues.[56] Based on the circumstances, the transferee judge's potential bellwether trial plans might include the following:

- Schedule a series of individual trials on all issues. While such trials will not have a preclusive effect on other MDL cases, they can inform parties about likely court rulings and the range of jury verdicts that may be expected in similar cases.
- Bifurcate trials on issues of liability and damages.[57]
- Conduct a consolidated or joint trial on a common issue,[58]

56. *See* MCL 4th § 22.93 ("In pursuing traditional or test case trials, the judge may conduct a unitary trial, bifurcate liability and damages, or create other helpful trial structures.").

57. Note, however, that if bifurcation will require the parties to present duplicative evidence, it could create inefficiencies that MDL proceedings in general and bellwether trials in particular were designed to prevent. *See* 4 William Rubenstein, Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:17 (5th ed. 2014).

58. *See, e.g.*, *In re* Welding Fume Prods. Liab. Litig. (MDL No. 1535) (N.D. Ohio), Case Administration Order, Document No. 1724 (March 31, 2006) ("The Court discussed with the parties the concept of holding a 'common issues trial,' pursuant to Fed. R. Civ. P. 23(c)(4)(A). The use of a common issues trial has been very effective at achieving resolution in certain litigations.… Accordingly, the Court directs the parties to submit an agreed briefing schedule for the filing of simultaneous briefs, followed by simultaneous response briefs, addressing all practical considerations relevant to the conduct of a common issues trial in this MDL.… The Court seeks help from the parties in answering the following questions, as well as identifying any other questions that are relevant. Assuming the Court chooses to pursue

then conduct separate trials later to resolve any individualized issues or unique fact patterns, claims, or injuries.

- Decide *Daubert* motions in the context of the first bellwether, or alternatively, hold *Daubert* hearings and decide summary judgment first on threshold issues for the entire MDL proceeding and then conduct bellwether trials to decide any remaining issues.[59]

Note, however, that the Seventh Amendment right to a jury trial limits the ability to extrapolate causation and damages findings by a jury in one personal injury trial to other cases in the MDL proceeding without clear consent by the parties that such outcomes will be binding.[60]

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the idea, what common issues should be addressed? Should it be a trial to a jury or the bench? What might jury instructions and interrogatories look like? What other practical, procedural, and substantive matters must be addressed? The parties need not address the question of whether the Court has the authority to conduct a common issues trial." (citations omitted)).

59. *See In re* Genetically Modified Rice Litig. (MDL No. 1811) (E.D. Mo.) (Judge Perry first denied class certification and then held bellwether trials. In the first trial, Judge Perry issued a detailed opinion on summary judgment and *Daubert* motions, which could also be applicable in large part to subsequent cases that went forward.).

60. *See* MCL 4th § 22.93.

Coordinating with State Judges on Related Cases

Whenever feasible, the transferee court should work actively with state courts that express interest in coordinating discovery activity and trial schedules. When there is active communication between state and federal judges with related cases, a bellwether process can inform multiple sets of litigations and help contain costs across other jurisdictions as well.[61] For example, early state trials may inform MDL bellwether case selection and strategy. In some instances, state-federal coordination may lead a transferee judge to postpone MDL bellwether trials and allow judges more familiar with particular governing state law to conduct early trials.[62]

To facilitate state-federal coordination, the transferee judge should require that the parties identify related proceedings in state courts in order to coordinate bellwether trial schedules and avoid scheduling scenarios that might inadvertently give one party or set of parties a strategic advantage. The court can also appoint state-federal liaison counsel. Finally, where other courts are amenable to coordination, the court could issue joint coordination orders with state courts on pretrial and discovery matters, including orders on

61. For a comprehensive general resource on state-federal coordination, see Fed. Judicial Ctr., Nat'l Ct. for State Courts & JPML, Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges (2013). Model orders relating to state-federal coordination can be found at https://multijurisdictionlitigation.wordpress.com/ (last visited Apr. 5, 2019). "Effective coordination between the federal and state courts in an MDL action promotes cooperation in scheduling hearings … [and] conducting and completing discovery, facilitates efficient distribution of an access to discovery work product, avoids inconsistent federal and state rulings on discovery and privilege issues, if possible, and fosters communication and cooperation among litigants and courts that may facilitate just and inexpensive determination." Duke MDL Practices, *supra* note 17, at 71.

62. *See* MCL 4th § 20.312; see also Duke MDL Practices, *supra* note 17, at 76 n.231 (citing silicone gel breast implant and diet drug litigations as "models for state-federal cooperation" in which "the transferee judge took the lead in implementing a comprehensive state-federal discovery plan while state judges presided over individual trials and settlements" in order to conduct efficient, consolidated discovery while still thoroughly developing individual cases to inform aggregate settlements (citations omitted)).

bellwether case-pool discovery, trial selection, and trial schedules.

The transferee judge can also use a number of informal strategies to keep state judges and parties informed about the MDL proceeding and avoid trial scheduling conflicts. For example, apprise state courts of MDL developments by maintaining an MDL website and updating it as soon as new orders are issued. The transferee judge could also contact state court judges with related cases directly. In addition, the transferee judge may consider conducting "periodic teleconferences in which all the parallel court judges participate to make sure that the cases are moving along at about the same pace and, if not, ensuring that the judges are aware of the divergence and the impact it may have on the parties' actions in their own cases."[63]

Examples of past federal-state joint coordination orders include

- *In re* Gen. Motors LLC Ignition Switch Litig. (MDL No. 2543) (S.D.N.Y.), Joint Coordination Order, Order No. 15 (Sept. 24, 2014):

  > [I]n order to achieve the full benefits of this MDL proceeding, the MDL Court has and will continue to encourage coordination with courts presiding over related cases, to the extent that those courts so desire, up to and including issuance of any joint orders that might allow full cooperation as between and among the courts and the parties.… As the MDL Court indicated at the initial case management conference, and has been reiterated thereafter, the MDL Court intends to work actively to reach out to any court that is interested in coordinating discovery activities. The MDL Court expects counsel for parties in the MDL proceeding to help ensure that such coordination is achieved wherever it is practicable and desired by a given court or courts.

- *In re* Zimmer NexGen Knee Implant Prods. Liab. Litig. (MDL No. 2272) (N.D. Ill.), Agreed Case Management Plan Regarding Coordination with Other Litigation: CMO 5 (Aug. 29, 2012):

  > In order to achieve the full benefits of this MDL proceeding, this Court may make efforts to coordinate with state courts presiding over related cases, to the extent such state courts so desire, such as through joint orders that will allow the parties in the state court actions to fully utilize any dis-

63. Duke Mass-Tort Practices, *supra* note 40, at 93.

> covery conducted in the MDL proceedings and vice versa, without prejudice to either the state or federal court actions. The Court expects counsel for parties in the MDL proceeding to take reasonable steps to assure such coordination is achieved wherever it is practicable. To that end, lead counsel for the parties shall jointly submit to the Court as needed a status report on the state court cases, along with contact information for all state court judges presiding over such cases.

- *In re* Testosterone Replacement Therapy Prods. Liab. Litig. (MDL No. 2545) (N.D. Ill.), Amended Case Management Order No. 17, Coordination with State Court Cases—Appointing Indiana and California Liaison Counsel, Document No. 542 (Jan. 7, 2015): "The State-Federal Liaison Counsel for plaintiffs and each defendant shall use their best efforts to coordinate discovery and case schedules in the MDL proceeding with discovery and case schedules in the state court cases, in order to enhance efficiency and avoid undue duplication of effort and unwarranted expense."
- *In re* Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig. (MDL No. 2385) (S.D. Ill.), Case Management Order No. 11 (Unified Case Management Plan for Boehringer Ingelheim International GmbH) (Oct. 19, 2012):

  > If any state court in California, Connecticut, Illinois or Nevada (if any cases are filed there) sets a trial (other than the Connecticut trial referenced above) to commence during the current schedule for bellwether trials in this MDL (August 11, 2014 through March 31, 2015), MDL lead counsel shall notify the MDL Court immediately. In such instance, the MDL Court intends to coordinate with such state court, and if necessary, delay the MDL bellwether trial set at the same time as such a state court trial, so that two Pradaxa trials are not simultaneously occurring until the end of the MDL bellwether trial schedule as set forth above concludes …. It is the intent of the parties that no other trial dates earlier than those set in this Order except as may be required pursuant to California Civil Practice Section 36 or in comparable, in extremis situations in other jurisdictions take place.

- *In re* Syngenta AG MIR162 Corn Litigation (MDL No. 2591)

(D. Kan.), Coordination Order (Document No. 1099) (Oct. 21, 2015):

> [T]oday the MDL Court is filing its Scheduling Order No. 2 which, highly summarized, establishes a protocol for a smaller pool of 'bellwether' cases for discovery purposes …. Thousands of state court actions related to the MDL Proceeding already are pending in Minnesota, while other actions are pending in Louisiana, and additional actions may be filed in the future (the 'Related Actions') …. To achieve the full benefits of this MDL proceeding, the MDL Court has and will continue to encourage coordination with courts presiding over Related Actions to coordinate discovery activities and other pretrial activities wherever it is practicable and desired by a given court or courts …. The coordination of pretrial proceedings in the MDL Proceeding and the Related Actions will likely minimize undue duplication of discovery and undue burden on courts, parties, and non-parties in responding to discovery requests, save substantial expense by the parties and non-parties, and produce substantial savings in judicial resources.

Mediation

Bellwether trials are just one of the many case-management practices available for MDL proceedings. One alternative to trial is to suggest that the parties resolve at least some claims or cases through mediation or another form of alternative dispute resolution. Mediations can be scheduled as an alternative to bellwether trials, or concurrently with them, and can be utilized even where global settlement seems unlikely.

Coordinating mediation and trial schedules in the MDL proceeding can offer several advantages. First, mediation values obtained through a more methodical, overseen third-party process may better inform global settlement than settlements reached in individual cases on the eve of a bellwether trial. Mediations also do not require *Lexecon* waivers. Plaintiffs can always opt out and preserve their right to a trial. Confidential mediation may also encourage greater cooperation and candor among the parties.

Note, however, that for mediation to succeed, the parties must be open to settlement of at least some subset of representative cases. For this reason, mediation may be more viable when enough discovery has been completed that the parties are prepared to engage in substantive discussions regarding case merit and value; when the parties do not contest questions of liability or causation and instead dispute the degree or value of damages; when the outcomes of other products in a class also subject to litigation have resulted in trials and settlements already; or when any contested issues regarding liability have already been decided or subjected to dispositive motions.[64] The court should keep such considerations in mind when developing bellwether trial schedules, encouraging settlement, appointing special masters, ordering mediation and settlement negotiations, or encouraging the parties to consider other forms of alternative dispute resolution.

The following are examples of bellwether trial and mediation coordination:

64. *See* Adam S. Zimmerman, *The Bellwether Settlement*, 85 Fordham L. Rev. 2275, 2286–87, 2298 (2017).

- In *In re Baycol Product Liability Litigation*, the court established a settlement and mediation program. A special master and five attorneys (two selected by plaintiffs, two by defendants, and one by the court) developed the settlement program and recommended mediators for appointment, subject to the court's approval. The program was overseen by the special master.[65] Soon after, the court also established a separate protocol for bellwether trials.[66]
- In *In re Skechers Toning Shoe Products Liability Litigation*, the Court ordered that the parties confer regarding mediation early in the MDL process, stating, "Early mediation can serve as a powerful tool for finding a global resolution of these proceedings, so much so, that the Court mandates the parties to meet and confer about the possibility of early mediation."[67]
- In *In re Zimmer NexGen Knee Implant Products Liability Litigation* (MDL No. 2272) (N.D. Ill.), Judge Pallmeyer required that the parties engage in mediation between two sets of bellwether trials.[68]

65. *See In re* Baycol Prod. Liab. Litig. (MDL No. 1431) (D. Minn.), Pretrial Order No. 59 (Settlement Mediation Order) (Jan. 2, 2003); *see also* Pretrial Order No. 64 (implementing and further clarifying the Court-Sponsored Baycol Settlement and Mediation Program).

66. *See id.*, Pretrial Order No. 89 (July 30, 2003) (establishing a case-selection protocol for trials in the transferee court).

67. *In re* Skechers Toning Shoe Prod. Liab. Litig. (MDL No. 2308) (W.D. Ky.), Order Regarding Early Mediation and Case Selection for Trial (Doc. No. 76) (May 3, 2012).

68. *See In re* Zimmer NexGen Knee Implant Prod. Liab. Litig. (MDL No. 2272) (N.D. Ill.), Case Management Order 10 (Jan. 22, 2016).

Other Bellwether Trial Considerations

Coordination and Sequencing of General and Case-Specific Discovery

The sequencing of general and bellwether case-specific discovery will depend on whether certain dispositive issues could eliminate certain groups of claims entirely and on the goals in mind if the court contemplates holding early trials. The court should communicate with the parties to determine the purposes—including motion practice and early trials—and proper ordering for discovery.

If the focus remains on holding early bellwether trials, the court will need to determine what information will be needed for those trials and schedule accordingly. Sequencing is very litigation-specific, and MDL proceedings have the flexibility to allow the court to schedule and coordinate discovery in a manner that serves the ends of efficiency and resolution.[69]

Settlement

The MDL transferee judge need not remand cases to the original court so long as "coordinated or consolidated pretrial proceedings" remain ongoing. Pretrial proceedings have been interpreted broadly to include facilitating settlement and oversight of individual non-global settlement or subgroup settlement discussions.[70] The court should remain informed about settlement discussions between the parties and suggest additional potential settlement opportunities where appropriate.

Bellwether trial preparation alone may help prepare the par-

69. *See* Dodge, *supra* note 18, at 377 ("If the defendant cannot establish that the generic evidence supports the dismissal of all claims, then the litigation will naturally proceed toward understanding the types of questions that may resolve the case as to particular groups of claims.… If early trials are to occur, the facilitative judge will again consider the parties' endgame and structure the trials to promote the generation of the requisite information").

70. *See* Fed R. Civ. P. 16(a)(5) (pretrial management includes ordering that the parties appear for such purposes as facilitating settlement); *see also In re* Patenaude, 210 F.3d 135, 145 (3d Cir. 2000) (holding that coordinated pretrial proceedings had not concluded in asbestos exposure cases where settlement negotiations were ongoing in plaintiffs' individual cases).

ties to discuss the strengths and limitations of the MDL cases and consider global settlement. If the MDL proceeding involves class actions, the court will also need to ensure that any proposed settlement is fair, reasonable, and adequate, and will need to assess whether the interests of the class or proposed class are better served by settlement than by further litigation, including trial.[71]

Staying Bellwether Trials for Settlement Discussions

When settlement discussions arise in the context of bellwether cases, the judge must consider whether to entertain requests to stay a trial or trial(s), how long of a stay to issue, the number of cases implicated by the settlement discussions (global settlement, settlement of a particular class of cases, or individual case settlement), and the likelihood of success of settlement discussions.

Advancing a litigation through fact and expert discovery may provide parties with the information necessary to inform settlement discussions. Keeping bellwether trials on track despite settlement discussions may also apply the pressure needed to move toward resolution of the MDL proceeding. On the other hand, should a bellwether jury verdict lie outside the range contemplated by the parties in settlement discussions, that verdict could derail settlement discussions and encourage the winning side to sideline negotiations and pursue trying additional cases.

Videotaping Bellwether Testimony

When conducting a bellwether trial, consider videotaping testimony, particularly of expert witnesses, for use at subsequent trials in transferor courts after remand as another means to expedite trials and avoid unnecessary duplicative effort.[72]

Strategic Use of Interlocutory Appeals

The Supreme Court has decided that, for purposes of appeal, a final decision in one of a collection of cases in an MDL proceeding is subject to immediate review in the court of appeals with authority

71. *See* Fed. R. Civ. P. 23.
72. MCL 4th § 20.132.

to review the decisions of the transferee district court, even if other cases in the MDL proceeding are still pending.[73] While the ability to appeal final decisions in individual bellwether cases is well-defined, circuits differ in their receptiveness to truly *interlocutory* appeals in the MDL setting. An interlocutory appeal generally should not be allowed if it will delay or halt other aspects of the MDL proceeding or compromise efficiency.

Late appeals may erase the efficiencies created by earlier bellwether trials. In some circumstances, however, an interlocutory appeal on issues critical to the litigation may be warranted—for example, when the relevant claim or issue is grounded in federal common law. Alternatively, if a key issue turns on an unresolved question of state law, the transferee court could consider certifying the issue to the relevant state court. The suitability or availability of interlocutory appeals for MDL pretrial orders is not yet settled and may be the subject of future rule revisions and clarifications. This pocket guide addresses interlocutory appeals only to note that the transferee judge should be aware that this issue may arise in the bellwether trial process.

Alternatives to Bellwether Trials

Other strategies, in addition to or in lieu of bellwether trials, may help advance the litigation and promote resolution. For example, in *In re General Motors LLC Ignition Switch Litigation*, Judge Furman observed that, "Notwithstanding the advantages and usefulness of bellwether trials in litigation of this sort, the Court is of the view that there may be other, less expensive means that the Court and parties could and should use—in addition to bellwether trials—to advance the litigation and promote resolution of cases individually or globally, including but not limited to early neutral evaluation and summary jury trials (either on select issues, such as gross negligence and punitive damages, or in select cases)." Judge Furman then directed the parties to continue conferring about such additional means and to be prepared at future status conferences to address

73. *See* Gelboim v. Bank of Am. Corp., 135 S. Ct. 897 (2015).

whether and when such means could or should be used.[74]

Timing for Recommending Remand

When it appears that there may be only limited benefit remaining from continued centralization and common issues no longer predominate, the transferee court must determine whether remand to the transferor courts for trial would be more efficient than continuing with a bellwether process in the MDL proceeding. At that point, the transferee judge should consider filing a suggestion of remand with the JPML.[75] As part of that procedure, transferee judges should include in the suggestion of remand, or elsewhere in the record, a brief description of the pertinent events that have taken place in the MDL proceeding, including key evidentiary and legal rulings, as well as recommendations regarding any additional steps that they believe are necessary to ensure that remaining cases are ready for trial.

74. *In re* Gen. Motors LLC Ignition Switch Litig. (MDL No. 2543) (S.D.N.Y.), Doc. No. 422 (Nov. 19, 2014). *See also In re* FEMA Trailer Formaldehyde Prods. Liab. Litig. (MDL No. 1873) (E.D. La.), Doc. No. 13872, Pretrial Order No. 64 (Apr. 28, 2010) (setting forth rules and procedures for conducting voluntary summary jury trials).

75. *See* J.P.M.L. R.P. 10.1.

For Further Reference

Sample orders for bellwether case selection for district judges' use are available at http://jpml.ao.dcn/transferee_Judge_Sample_Orders?field_judge_name_value=&field_order_sub_category_value=-Bellwether+Trials%2FTrial+Procedure&items_per_page=35&=Apply (last visited April 5, 2019).

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