

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: FRESINIUS)
GRANUFLO/NATURALYTE DIALYSATE)
PRODUCTS LIABILITY LITIGATION,)
)
This Document Relates To:)
) MDL No. 1:13-md-02428-DPW
ALL CASES)

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' EXECUTIVE COMMITTEE'S BELLWETHER PROPOSAL**

The parties have resolved a great number of their disputes regarding the selection and protocol for bellwether trial cases; only a handful of disputes remain. The Plaintiffs' Executive Committee ("PEC"), on behalf of the MDL plaintiffs, has proposed fair and efficient solutions to these disputes and submits this memorandum in support of Plaintiffs' revised bellwether concept for the Court's consideration.¹

Background

In late February 2014, the PEC and counsel for the Fresenius Medical Care North America Defendants ("FMCNA") submitted competing bellwether proposals to the Court.² Conceptually, the proposals differed significantly.³ On February 28, this Court granted the parties leave to continue to meet and confer and either reach a fully agreed-to bellwether proposal by March 14 or submit briefing as to the remaining contested issues.

¹ Once the Court resolves the remaining disputed matters (or if the parties reach full agreement prior to the March 28 status conference), the PEC will be prepared to confer with FMCNA to craft a proposed final Case Management Order.

² Document Nos. 539 and 541.

³ The PEC, FMCNA, and the European Fresenius Defendants have agreed that the European defendants will not be part of the bellwether process. Thus, by agreement, the European defendants have not participated in negotiations regarding these issues.

Counsel for PEC and FMCNA have met and conferred several times in earnest, making significant movement towards reaching an agreed upon concept for the bellwether process. Resolved issues include the relative number of bellwether cases to be selected to undergo core discovery, the number of cases to be selected for trial, when bellwether cases should be selected, and when discovery should commence.

Four issues remain contested.⁴ These are:

1. Production from FMCNA's Data Warehouse:
 - a. FMCNA has not agreed to produce any medical patient-specific information from its electronic Data Warehouse for any plaintiff in the litigation; whereas
 - b. The PEC proposes FMCNA produce limited laboratory data for 25 cases to help level the information imbalance and assist the PEC in selecting its ten representative bellwether cases.
2. Effect of Dismissals of Bellwether Selected Cases:
 - a. FMCNA proposes, in effect, a penalty should a plaintiff choose to dismiss his or her case after being selected for the bellwether process: the striking of a PEC-selected bellwether case, replacement of a PEC-selected bellwether case by a selection by FMCNA, or opting that the PEC could not replace the dismissed case; whereas
 - b. The PEC proposal recognizes that dismissals of bellwether selections prior to the commencement of depositions may occur for a variety of reasons, so the party who had selected the case for bellwether process should be permitted to select a

⁴ The PEC is prepared to continue to meet and confer with FMCNA counsel to attempt to resolve all remaining issues. If additional issues are resolved prior to the next Court status conference, the PEC plans to update the Court as to any such additional agreements.

replacement from the eligible pool of docketed cases. For dismissals occurring after the commencement of depositions in the case, the PEC proposes that, if the case was selected by FMCNA, the defendant should be permitted to select a replacement but, if the case was selected by the PEC, the only “penalty” should be that the PEC may not select a replacement.

3. Number of Case-Specific Depositions

- a. FMCNA proposes 14 depositions per each of the proposed total of 20 bellwether discovery pool cases, followed by additional case-specific discovery for those six cases selected for bellwether trial; whereas
- b. The PEC proposes five depositions per case for each of the 20 proposed bellwether discovery pool cases, with limited additional case-specific discovery for those six cases selected for bellwether trial.

4. Order of Trial Cases

- a. FMCNA has not proposed an ordering of cases, only that the parties meet and confer to reach agreement, or otherwise submit competing proposals for the Court’s consideration; whereas
- b. The PEC proposes that, since Plaintiffs have the burden of proof, this Court should first try a case selected by the PEC, with cases alternating between the parties thereafter.

The following table lays out the PEC’s proposed schedule and concept for the bellwether process, identifying those issues on which the parties agree and identifying Plaintiffs’ position where the matters remain in dispute.

Date	Agreed by the Parties	Plaintiffs' Position on Disputed Events
July 15, 2014		<p>Request by PEC to FMCNA for limited laboratory data as to 25 docketed cases, to assist PEC in selecting bellwether cases</p> <p>For 25 docketed cases in which plaintiff received his or her final pre-injury dialysis at an FMCNA clinic, the following laboratory results from the 6 months of dialysis leading up to date of injury shall be provided to the PEC within 30 days of receipt of a proper request⁵:</p> <ol style="list-style-type: none"> 1. Serum Bicarbonate (CO2) level; 2. Sodium level; and 3. Potassium level
Sept. 15, 2014	<p>PEC and FMCNA each select 10 eligible cases for Bellwether Core Case-Specific Discovery</p> <p>To be eligible for bellwether selection, a case must be representative of the litigation⁶ and have completed the sharing of a PFS, DFS and Product Identification, all per the applicable CMOs.</p>	

⁵ As to each plaintiff, the PEC would provide a completed HIPAA form and the following personal information: Patient's First Name, Last Name, Middle Initial, Appellation if any, FMCNA Medical Record Number ("MRN") if available, Social Security Number, Date of Birth, Date of Injury or Death, Date of Last Dialysis Treatment, PFS Named Clinic, Case Number, and Plaintiff's Counsel; along with any other information reasonably required by FMCNA to provide the requested data.

⁶ As the PEC initially proposed: (a) The identification of Granuflo as the dialysate used during the patient's last dialysis prior to the injury or death which gave rise to his or her lawsuit as set forth in Case Management Order No. 9 concerning Product Identification; (b) The types of injuries as alleged in the Master Complaint; (c) Dialysis patients from both Fresenius North America clinics and non-Fresenius clinics; (d) Dates of injury representative of the cases pending in the MDL; (e) Time elapsed from the patient's last dialysis to the alleged injury representative of the cases pending in the MDL; and (e) Any other issues deemed representative of the litigation by the parties.

Date	Agreed by the Parties	Plaintiffs' Position on Disputed Events
Oct. 1, 2014	<p>Written and Deposition Discovery commences</p> <p>Parties may exchange the following written discovery in each case:</p> <p>10 Requests for Documents</p> <p>10 Interrogatories</p> <p>10 Requests for Admissions</p>	<p>Depositions during this Core Case-Specific Discovery shall be limited to five per case, consisting of the following persons:</p> <ol style="list-style-type: none"> 1. Plaintiff Representative/Spouse 2. Plaintiff's Treating Nephrologist 3. Dialysis Clinic Medical Director 4. Dialysis Clinic Nurse 5. Dialysis Clinic Technician
		<p>If, prior to commencement of depositions in a case, the plaintiff files a dismissal, it shall be with prejudice but, the party who selected the case shall replace it from the pool of eligible cases.</p>
		<p>If, after the commencement of depositions in a case, the plaintiff files a dismissal in a case selected by the PEC, it shall be with prejudice and the PEC may <u>not</u> replace the case and shall proceed with less than 10 bellwether cases for the remainder of Core Case-Specific Fact Discovery.</p>
		<p>If after commencement of depositions, a plaintiff files a dismissal in a case selected by FMCNA, it shall be with prejudice and FMCNA may replace it from the pool of eligible cases.</p>
		<p>If FMCNA settles during Core Case-Specific Discovery with a plaintiff whose case was selected by the PEC for bellwether process, the PEC may replace the case from the pool of eligible cases.</p>

Date	Agreed by the Parties	Plaintiffs' Position on Disputed Events
Feb, 27, 2015	Completion of Core Case-Specific Discovery	
Mar. 6, 2015	Parties identify 5 cases each as potential bellwether trial cases	
Mar. 13, 2015	<p>Each party may “veto” up to 2 of the other’s bellwether trial cases, leaving 3 cases per side to proceed</p> <p>Cases selected for trial will be representative of agreed upon significant categories.⁷</p>	Parties may now conduct up to 5 additional case-specific fact depositions for the 6 cases selected for trial, deciding on witnesses by agreement or otherwise by Court order.
		Of the 6 selected trial cases, a case from the PEC list will be the first to proceed to trial. The trial order of the remaining cases shall alternate between FMCNA and PEC selections.
Next MDL status conference after Trial Case Selections	<p>Parties submit proposal(s) concerning next phase of litigation, including:</p> <ol style="list-style-type: none"> 1. Deadlines for expert reports and expert deposition discovery; 2. Deadlines for general dispositive motions (<i>Daubert</i> and/or Rule 56); 3. Deadlines for Trial Case-Specific Dispositive Motions 	

⁷ For example, cases where: (a) plaintiff received dialysis at an FMCNA clinic; (b) plaintiff received dialysis at a non-FMCNA clinic; (c) plaintiff’s alleged injury occurred after November 2011; and (d) plaintiff’s alleged injury occurred prior to November 2011.

Argument

1. The PEC's Request That FMCNA Laboratory Data Be Provided to the PEC as Part of the Bellwether Selection Process Simply Levels the Playing Field and Information Imbalance.

FMCNA maintains, in the regular course of business, a robust electronic database referred to as the "FMC Data Warehouse," wherein it stores a multitude of data points as to each FMCNA dialysis clinic patient – from demographics to billing information to laboratory and clinical data – updated contemporaneously or soon after each dialysis session. Much of this data is also contained within the paper copy traditional "patient chart" FMCNA possesses. Plaintiffs can obtain the paper patient chart under Case Management Order No. 3 but this still leaves an information imbalance, particularly for a patient who has been receiving dialysis at an FMCNA clinic for years, likely generating upwards of thousands of pages of a paper record. FMCNA balks at providing this Data Warehouse information for any patient, even though it has such data at its ready disposal.

In consideration of whether to select a case for the bellwether process, both parties will be interested in certain patient data, as it informs among other things, questions concerning the causal link between use of Granuflo in the administration of dialysis and the alleged cardiac-related injury. The ability to easily and efficiently view and analyze those select data points will enable both parties to make better informed decisions as to their respective bellwether case selections.

To point out the obvious, only FMCNA can review and access this patient data unless they agree or are ordered to share it with the PEC. The PEC has proposed a manner by which it can gain more equal access to the data we expect FMCNA would agree is, at a minimum, required to make an informed selection of bellwether cases, without overly burdening the time or

resources of the defendant. Two months prior to the deadline for bellwether case selection, the PEC seeks the right to request six months' worth of data as to 25 docketed cases in which the plaintiff was last dialyzed at an FMCNA clinic, for only the following three data points:

- Serum Bicarbonate (or CO₂) level;
- Sodium level; and
- Potassium level.⁸

With this information, the PEC can, more fairly informed in a manner similar to the defendant, include among its final 10 bellwether case selections those from the larger group of 25 docketed cases for which the data is obtained.

The burden to FMCNA is limited. Fairness dictates that the PEC have access to the same medical information, in a similar manner as FMCNA, which will inform the selection of cases that best serve the goals of the bellwether process.⁹

2. The PEC's Proposal for a Procedure Governing Dismissals of Cases is More Equitable.

Once selected as a bellwether discovery pool case, many reasons may counsel for the dismissal of an action by the PEC, including illness of the plaintiff or identification of unique weaknesses in the case that suggest the case is not representative of the litigation. Likewise, Defendants may opt to settle (and thus have dismissed) a particularly or uniquely strong case to remove it from bellwether contention.

⁸ To gather the information, the PEC would provide to FMCNA the same dialysis patient personal information required under Case Management Order No. 9, concerning product identification (this product identification data also comes from the FMC Data Warehouse).

⁹ Other potentially relevant, useful and discoverable data exists within the Data Warehouse as to each bellwether plaintiff who was dialyzed at an FMCNA clinic, to evaluate the cases for bellwether trial selection and moreover, to prepare the cases for bellwether trials; that data will be the subject of Core Case-Specific discovery requests.

If the bellwether process is intended to ensure that the parties identify which cases, in their respective assessments, represent the best and most representative cases for trial, then in fairness, one party should not decide the other's selection of either initial or replacement cases.

Following reflection and discussion with defense counsel since the filing of the initial competing bellwether protocols, the PEC proposes a replacement selection process that does not give either party a complete free pass for dismissals or settlement once depositions and intensive work begins, while also recognizing and respecting the goal of the bellwether process to try representative cases. The salient features are as follows:

- Where Plaintiffs dismiss or Defendants settle a case prior to the commencement of depositions, the parties suffer no prejudice from such an early dismissal and the party that selected the case also selects the replacement.
- Where Plaintiffs dismiss a PEC-selected case after depositions in that case begin, the dismissal is with prejudice and the PEC may not replace it. At the end of Core Case-Specific Discovery, the PEC may have to choose its top five cases from a pool of less than ten.
- Where Plaintiffs dismiss an FMCNA-selected case after depositions in that case begin, the dismissal is with prejudice and FMCNA may replace it from the pool of eligible cases.
- Where Defendants settle a PEC-selected case after depositions begin, the PEC may replace it from the pool of eligible cases.

FMCNA, however, seeks to penalize Plaintiffs for any dismissals and control the entire replacement process, reducing the likelihood of a representative pool of cases for trial. Under their plan, following a dismissal of a defense selection, FMCNA should have a right to strike in kind a PEC-selected case, replace a PEC-selected case itself, or opt for the PEC to not be able to replace a case. Allowing FMCNA's penalizing approach only serves to create a bellwether pool that tips the scales in favor of what the defendant considers its best cases for trial.

The PEC has prepared, at **Tab 1**, a table summarizing in relevant part bellwether case management orders from several recent Multi-District Litigations, comparing how this topic of

dismissals/replacements (and the remaining issues below) can be addressed. While no majority view dominates, the PEC's proposal fits neatly among these thoughtful hybrids and is a fair and efficient way to resolve problems raised by the dismissal of actions at various points in the process.

3. The PEC's Proposal to Limit but Also Phase Depositions is Fair and Efficient.

In their initial proposal, the PEC envisioned seven depositions taken in each of 14 bellwether discovery pool cases. These 98 depositions would have taken place only during Core Case-Specific Discovery and prior to the selection of the final bellwether trial cases, in a period of some 5-6 months, taking place around the country, with probably multiple depositions per day in order to complete the process timely for selection of bellwether trial cases. Based on experience, it's fair to assume the costs for the depositions could easily average thousands of dollars each.

FMCNA's initial proposal nearly tripled this undertaking and the costs: 20 bellwether discovery pool cases with 14 depositions per case, for 280 depositions in a similar time frame.

Acceding to FMCNA's wishes for 20 bellwether discovery pool cases, the PEC's revised proposal suggests an approach more likely to achieve the parallel goals of the bellwether process and also Fed. R. Civ. P. 1 to ensure the just, speedy and efficient resolution of this process: limiting the 20 cases to five depositions each but allowing up to five additional depositions once the six bellwether trial cases have been selected.

Only a handful of witnesses have real potential impact on decisions to select bellwether trial cases:

- The plaintiff representative or spouse
- The plaintiff's treating nephrologist

- The medical director of the dialysis clinic at issue
- The nurse at the dialysis clinic who last cared for plaintiff prior to his or her injury; and
- The technician at the dialysis clinic who oversaw the administration of Granuflo for the patient

Limiting depositions during Core Case-Specific Discovery to just five, for 20 cases, should permit the parties to make sufficiently informed decisions as to which cases to select for trial, while not unduly wasting time, money and resources.

Once the parties reduce the bellwether pool and exercise their vetoes to narrow each side's selections to three cases to proceed to trial, it makes sense to continue to develop those particular cases so as to be properly prepared for trial. Adding another five depositions per case should permit the parties to complete their case-specific fact-finding.

Under FMCNA's proposal, if seven or more depositions were conducted in these 20 cases prior to narrowing the field, the parties are unlikely to complete this work anytime near the contemplated end of discovery date of February 28, 2015. Further, the PEC and FMCNA would be spending time, money and resources inefficiently for the real purpose of these depositions, which is to inform the parties' choices for five bellwether trial cases (quickly narrowed down to three bellwether trial cases per side through vetoes by the opposing party).

As reflected in the PEC's table of other MDL bellwether orders, **Tab 1**, the phasing of deposition discovery as Plaintiffs suggest is a common, practical-minded, time and cost-efficient practice.

4. The PEC's Request to Select the First Bellwether Case to be Tried Simply Reflects the Greater Burden Plaintiffs Face.

Plaintiffs have the burden of proof in these cases. Plaintiffs go first at trial in their opening statement and in presentation of the evidence. Plaintiffs should decide likewise which of the selected cases should be first to proceed to trial. Even if FMCNA were to settle that first case, the PEC should choose again, so that no matter what occurs, a PEC-selected case goes to trial first.

The ordering of bellwether trial cases thereafter, in fairness, could simply alternate from defense-selected case to PEC-selected case until the parties run out of the six cases selected for trial. In the event the litigation would benefit from additional trials, the parties should continue the alternating trials from the pool of "vetoed" cases.

The PEC's table of other MDL bellwether orders at **Tab 1** does reflect that MDL courts may often decide themselves how best to prioritize the order of trials, rather than leaving it to the parties or following the PEC's above rationale. To the extent that would entail submissions by the parties as to the relative merits of each bellwether trial selection case and/or the extent to which it is fairly representative of the issues in the litigation, significantly more resources and time will be expended by the parties and this Court. Permitting the party with the ultimate burden of proof simply to go first, and then alternate, reasonably ensures that the goals of this process will be accomplished.

Conclusion

"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. If bellwether trials are to produce reliable information about the other cases in the MDL, the specific plaintiffs and their claims

should be representative of the range of cases.”¹⁰ The PEC’s bellwether proposal as revised and described herein not only satisfies the purposes and goals of an MDL bellwether process, but does so in a manner more befitting the parallel goals of Fed. R. Civ. P. 1, to ensure the just, speedy and efficient resolution of this litigation.

Dated: March 14, 2014

Respectfully submitted,

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MEET AND CONFER CERTIFICATION

I hereby certify that the undersigned met and conferred with counsel for the Fresenius Medical Care North America Defendants in an effort to narrow or resolve the issues herein.

/s/ Anthony Tarricone
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¹⁰ Rothstein, *Managing Multidistrict Litigation in Products Liability Cases*, Federal Judicial Center, p. 44 (2011).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via electronic mail to counsel of record for the FRESENIUS defendants as follows:

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Comparison of Bellwether Proposals in Other MDLs

MDL Case, Judge, and Order(s)	Case Specific Depositions and Phasing	Selection of Replacement Cases	Order of Trials
<p>MDL No. 2436: <i>In re. Tylenol (Acetaminophen) Marketing, Sales Practices and Products Liability Litigation</i></p> <p>E.D. Pa. Hon. Lawrence Stengel</p> <p>Formed Apr. 1, 2013</p>	<p>Parties select six cases total to constitute the Eligible Trial Pool and undergo Core Case-Specific Discovery.</p> <p>Core Case-Specific Discovery is limited to four depositions: “1) the plaintiff; 2) the plaintiff’s spouse, if any (or parent if the injured party is a child or representative of decedent); and 3) two (2) treating physicians and/or health care providers per side.”¹</p> <p>Following Core Case-Specific Discovery, the parties narrow the Eligible Trial Pool cases to two Bellwether Trial Program cases and “additional discovery may be taken after a case is selected for inclusion in the <i>Bellwether Trial Program</i>.”²</p>	<p>“Should the case that has been selected as the first bellwether trial be settled prior to the scheduled date for trial, or dismissed, the parties shall promptly notify the court of its dismissal. Within ten (10) business days thereafter, each party shall present to the court an alternate designated case from the Eligible Trial Pool for the bellwether trial.”³</p> <p>Case Management Order No. 15 does not specify a process for replacing a dismissed or settled case from the <i>Eligible Trial Pool</i> except where the case was designated as the first bellwether trial.</p>	<p>“The court will select the first bellwether trial case within fifteen (15) days of its receipt of the parties’ reasons as to which case should be the first case to be tried.”⁴</p> <p>The Court will confer with the parties after the first bellwether trial “including the identity of the case and the date of the trial”, with its selection to be “guided by the needs of this MDL, including the selection of a case, if any, which is both instructive and meaningful in resolving issues relevant to the remaining MDL cases.”</p>

¹ *Tylenol* Case Management Order No. 15: Bellwether Case Selection Plan and Core Case-Specific Discovery, dated Oct. 4, 2013, at 3. *Tylenol* Case Management Orders available at <https://www.paed.uscourts.gov/mdl2436o.asp>.

² *Tylenol* Case Management Order No. 15: Bellwether Case Selection Plan and Core Case-Specific Discovery, dated Oct. 4, 2013, at 4.

³ *Tylenol* Case Management Order No. 15: Bellwether Case Selection Plan and Core Case-Specific Discovery, dated Oct. 4, 2013, at 5.

MDL Case, Judge, and Order(s)	Case Specific Depositions and Phasing	Selection of Replacement Cases	Order of Trials
<p>MDL No. 2391: <i>In re. Biomet M2a Magnum Hip Implant Products Liability Litigation</i></p> <p>N.D. IN. Hon. Robert Miller, Jr.</p> <p>Formed: Oct. 2, 2012</p>	<p>Defendants may depose up to ten plaintiffs to allow informed bellwether nominations. At the conclusion of that time, the parties shall each select five cases for initial discovery.</p> <p>Depositions may include (a) the plaintiff(s); (b) implanting surgeon; (c) revising surgeon; (d) two sales representatives; and (f) one additional fact witness per side.</p> <p>The order is silent as to additional discovery.⁵</p>	<p>After narrowing to five bellwether trial selections, dismissals may only be with prejudice. Each side will submit one replacement candidate and the court will select from those.</p> <p>“I prefer not to have either side with full control over the selection of a case for bellwether trial purposes.”⁶</p>	<p>The court selects the order of trials.⁷</p>

⁴ *Tylenol* Case Management Order No. 15: Bellwether Case Selection Plan and Core Case-Specific Discovery, dated Oct. 4, 2013, at 4.

⁵ *Biomet* Scheduling Order, dated Dec. 10, 2013, at 4. *Biomet* Case Management Orders are available at <http://www.innd.uscourts.gov/millerm2391.asp>.

⁶ *Biomet* Scheduling Order, dated Dec. 10, 2013, at 5.

⁷ *Biomet* Scheduling Order, dated Dec. 10, 2013, at 4.

MDL Case, Judge, and Order(s)	Case Specific Depositions and Phasing	Selection of Replacement Cases	Order of Trials
<p>MDL No. 2385: <i>In re. Pradaxa (Dabigatran Etexilate) Products Liability Litigation</i></p> <p>S.D. IL. Hon. David Herndon</p> <p>Formed Aug. 8, 2012</p>	<p>Parties select sixteen cases as the Discovery Plaintiffs for initial discovery.</p> <p>Core case-specific fact discovery of the Discovery Plaintiffs may consist of no more than five depositions per side of the following: (a) plaintiff; (b) spouse of the plaintiff and/or a relative of the plaintiff; (c) prescribing physician(s); (d) two treating physicians; and (e) two sales representatives.</p> <p>Following selection of the first four bellwether trial cases, the parties may designate and depose additional fact witnesses.⁸</p>	<p>Cases dismissed by Plaintiffs or settled by Defendants within six weeks of selection of the sixteen cases for bellwether discovery shall be replaced by the opposing party with a selection from the Early Trial Eligible Cases (cases on file as of Apr. 5, 2013).⁹</p>	<p>“The Court will select four (4) bellwether trial cases and will designate the order of such bellwether trials.”¹⁰</p>

⁸ See *Pradaxa* Amended Case Management Order No. 28: Early Trial Scheduling, dated April 9, 2013, at 8-10. *Pradaxa* Case Management Orders available at <http://www.ilsd.uscourts.gov/mdl/mdl2385.aspx>.

⁹ See *Pradaxa* Amended Case Management Order No. 28: Early Trial Scheduling, dated April 9, 2013, at 6-7.

¹⁰ *Pradaxa* Amended Case Management Order No. 28: Early Trial Scheduling, dated April 9, 2013, at 10. See also *Pradaxa* Case Management Order No. 48: Selecting Cases for Consideration as Early Trial Cases, dated Nov. 4, 2013, at 1-2 (allowing short submissions regarding the representativeness or not of each proposed bellwether trial pick).

MDL Case, Judge, and Order(s)	Case Specific Depositions and Phasing	Selection of Replacement Cases	Order of Trials
<p>MDL No. 2342: <i>In re. Zolof (Sertraline Hydrochloride) Products Liability Litigation</i></p> <p>E.D. Pa. Hon. Cynthia Rufe</p> <p>Formed Apr. 17, 2012</p>	<p>Parties select twenty-five cases as the Initial Discovery Group.¹¹</p> <p>Depositions for the Initial Discovery Group are limited to (a) a minor plaintiff's mother/father/legal guardians or a decedent's estate representatives, (b) the prescribing healthcare provider(s), (c) no more than two healthcare providers who treated the plaintiff's mother for her pregnancy, (d) no more than two treating physicians of the plaintiff's, and (e) no more than two defense sales representatives.</p> <p>The Pretrial Orders do not specify a procedure for allowing additional discovery, but indicate that the first trial will commence "subject to the completion of all appropriate discovery"¹²</p>	<p>Cases dismissed within two months of selection of the Initial Discovery Group shall be replaced by the party that picked that case.</p> <p>If a defense selection is dismissed after that time, the defense may select the replacement.¹³</p> <p>The parties may each strike up to two cases chosen for the Initial Discovery Group by the other party. Dismissal of a case shall be considered one of the PSC's strikes. Dismissal of a case after the PSC's two strikes entitles the defense to identify and strike an equal number of cases selected by the PSC.¹⁴ Dismissal of a case after the strike deadline shall only be by order of the court and with prejudice in the absence of good cause.</p> <p>Parties will then each designate three cases for the Trial Pool.</p>	<p>The court selects the order in which the bellwether cases will be tried.¹⁵</p>

¹¹ *Zolof* Pretrial Order No. 24: Amendment to Pretrial Order Nos. 17 and 21: Selection of Initial Discovery Group, dated Apr. 1, 2013, at 1. *Zolof* Case Management Orders available at <http://www.paed.uscourts.gov/mdl2342o.asp>.

MDL Case, Judge, and Order(s)	Case Specific Depositions and Phasing	Selection of Replacement Cases	Order of Trials
<p>MDL No. 2299: <i>In re. Actos (Pioglitazone) Products Liability Litigation</i></p> <p>W.D. LA. Hon. Rebecca Doherty</p> <p>Formed: Dec. 11, 2011</p>	<p>Parties select twenty (later reduced to ten) cases for the Discovery Pool and complete core discovery.</p> <p>Depositions may include (a) the plaintiff; (b) the prescribing doctor(s) and treating doctor(s); and (c) two additional deponents per side.</p> <p>After selecting bellwether trial cases, the parties have two months to complete core-specific fact discovery for the first bellwether case.¹⁶</p>	<p>Not addressed.</p>	<p>Plaintiffs select the first trial and Defendants select the second.¹⁷</p>

¹² *Zoloft* Pretrial Order No. 15: Joint Discovery and Scheduling Plan, dated Nov. 15, 2012, at 5.

¹³ *See Zoloft* Pretrial Order No. 24: Amendment to Pretrial Order Nos. 17 and 21: Selection of Initial Discovery Group, dated Apr. 1, 2013, at 2 (and prior orders).

¹⁴ *Zoloft* Pretrial Order No. 44: Trial Pool Selection Protocol, dated Dec. 4, 2013, at 2.

¹⁵ *Zoloft* Pretrial Order No. 44: Trial Pool Selection Protocol, dated Dec. 4, 2013, at 2.

¹⁶ *Actos* Scheduling Order, dated July 13, 2012, at 2. *Actos* Case Management Orders are available at <http://www.lawd.uscourts.gov/mdl-orders-category>.

¹⁷ *Actos* Scheduling Order: Pilot Bellwether Program (First Trial), dated Feb. 19, 2013. *See Actos* Case Management Order: Bellwether Nominations, dated May 3, 2013.

MDL Case, Judge, and Order(s)	Case Specific Depositions and Phasing	Selection of Replacement Cases	Order of Trials
<p>MDL No. 2244: <i>In re. DePuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation</i></p> <p>N.D. TX. Hon. Ed Kinkeade</p> <p>Formed: May 24, 2011</p>	<p>Parties will select eight cases for the initial discovery pool.</p> <p>Depositions for the initial discovery pool shall include (a) the plaintiff; (b) treating physician; and (c) one sales representative.¹⁸</p> <p>After narrowing to four bellwether trial cases, expert and fact discovery continue for several months (approximately nine more months for the first bellwether trial case).¹⁹</p>	<p>Orders are silent on dismissal of cases in the initial discovery pool.</p> <p>Dismissal of cases selected for bellwether trial is with prejudice. Dismissal by plaintiffs results in replacement with a defense suggestion while settlement of a case by the defendants results in replacement with a plaintiffs' suggestion.²⁰</p>	<p>The court establishes the order of trials.²¹</p>

¹⁸ *DePuy Pinnacle Hip* Special Master's Report Relating to Bellwether Trial Selection Protocol, dated Jan. 16, 2013, at 2. *DePuy Pinnacle Hip* Case Management Orders are generally available at <http://www.txnd.uscourts.gov/judges/MDL/depu.html>.

¹⁹ *DePuy Pinnacle Hip* Case Management Order No. 8: Schedule of Pretrial Matters, dated Aug. 14, 2012, at 2.

²⁰ *DePuy Pinnacle Hip* Special Master's Report Relating to Bellwether Trial Selection Protocol, dated Jan. 16, 2013, at 3.

²¹ *DePuy Pinnacle Hip* Special Master's Report Relating to Bellwether Trial Selection Protocol, dated Jan. 16, 2013, at 2-3.

MDL Case, Judge, and Order(s)	Case Specific Depositions and Phasing	Selection of Replacement Cases	Order of Trials
MDL No. 2325: <i>In re. American Medical Systems, Inc. Pelvic Repair System Products Liability Litigation</i> ²² W.D. W.V. Hon. Joseph Goodwin Formed: Feb. 7, 2012			²³

²² *AMS Pelvic Mesh* Case Management Orders are available at <http://www.wvsc.uscourts.gov/MDL/amsinc/orders.html>.

²³ *AMS Pelvic Mesh* Pretrial Order No. 37: Docket Control Order, dated Jan. 18, 2013; *AMS Pelvic Mesh* Pretrial Order No. 69: First Amended Docket Control Order (PTO No. 37), dated June 10, 2013.

MDL Case, Judge, and Order(s)	Case Specific Depositions and Phasing	Selection of Replacement Cases	Order of Trials
<p>MDL No. 2197: <i>In re. DePuy Orthopaedics, Inc. ASR Hip Implant Products</i></p> <p>N.D. Ohio Hon. David Katz</p> <p>Formed: Dec. 7, 2010</p>	<p>Parties select eight cases total as bellwether trial candidates.</p> <p>Depositions in these cases may include (a) the plaintiff; (b) implanting surgeon; (c) explanting surgeon; and (d) one additional fact witness per side.</p> <p>Parties may engage in additional discovery for the two cases then selected as the primary and backup bellwether trial cases.²⁴</p>	<p>Once selected as a bellwether trial case, dismissal may only be with prejudice.²⁵</p> <p>The order is silent as to dismissal of the bellwether trial candidate cases and how replacements shall be selected.</p>	<p>If the parties cannot agree on which case shall be the primary and which shall be the backup bellwether trial, the court shall select.²⁶</p>

²⁴ *DePuy ASR* Case Management Order No. 14, dated July 26, 2012, at 2. *DePuy ASR* Case Management Orders available at <http://www.ohnd.uscourts.gov/home/clerk-s-office-and-court-records/multidistrict-litigation-cases/mdl-2197/>.

²⁵ *DePuy ASR* Case Management Order No. 14, dated July 26, 2012, at 2.

²⁶ *DePuy ASR* Case Management Order No. 14, dated July 26, 2012, at 2.

MDL Case, Judge, and Order(s)	Case Specific Depositions and Phasing	Selection of Replacement Cases	Order of Trials
MDL No. 2100: <i>In re. Yasmin and Yaz (Drospirenone) Marketing, Sales Practices, and Products Liability</i> ²⁷ S.D. IL. Hon. David Herndon Formed: Oct. 1, 2009			²⁸

²⁷ *Yaz* Case Management Orders available at <http://www.ilsd.uscourts.gov/mdl/mdl2100.aspx>.

²⁸ *Yaz* Amended Case Management Order No. 24: Bellwether Trial Selection Plan.