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May 6, 2025

Via CM/ECF and E-Mail

The Honorable Richard M. Gergel
U.S. District Court for the District of South Carolina
J. Waties Waring Judicial Center
83 Meeting Street
Charleston, South Carolina 29401

Re: *In re AFFF Products Liability Litigation*, MDL No. 2:18-mn-2873-RMG (D.S.C.) – Group A Personal Injury Bellwether Trial

Dear Judge Gergel:

Pursuant to Case Management Order ("CMO") 26G, Defense Co-Lead Counsel submit this letter-brief in support of their proposed Group A personal injury bellwether case(s) to move forward with motions practice and trial. Defendants respectfully submit that, consistent with longstanding practice in products liability MDLs, the first bellwether trial should be a single-plaintiff, single-cancer trial, and believe the *Voelker* kidney cancer case is the most appropriate to move forward.

Defendants heard the Court's comments at the April 4 status conference suggesting a preference for trying a kidney cancer case first. Status Conference Tr. (April 4, 2025), at 24:16–21. The Defense Co-Leads are following the Court's suggestion and proposing that a kidney cancer trial be scheduled first.[1] But the PEC's suggestion that the initial bellwether trial should include multiple plaintiffs should be rejected, for numerous reasons.

To start, a multi-plaintiff trial would not provide meaningful information to the Court or the parties as an aid for case management and potential resolution of the personal injury cases in this MDL. Indeed, Defendants have not found *any* products liability MDL court that conducted a multi-plaintiff trial under the circumstances present here: (1) the first bellwether trial in a mass tort litigation, (2) involving plaintiffs' personal injury claims from chemical exposure, and (3) against multiple defendants allegedly liable for different products. To the contrary, in all recent products liability MDLs, including several MDLs over which Judge Fallon and other leading MDL judges

[1] Although all Defendants do not necessarily agree that the initial trial pick should be a kidney cancer rather than a testicular cancer case, in light of the Court's comments, the Defense Co-Leads are proposing that a kidney cancer case be tried first.

presided, the courts have ruled that the first bellwether trial should involve only one plaintiff. Accordingly, only one of the three kidney cancer cases—*Donnelly*, *Speers*, or *Voelker*—should be set for trial first.[2]

The nature of Plaintiffs' claims (based on drinking water exposure and brought against multiple Defendants) makes them uniquely ill-suited for multi-plaintiff trials. Each of the three kidney cancer Plaintiffs alleges different facts regarding their exposure to PFAS from AFFF—including where they lived, when, and for how long—which affect their alleged exposure pathways, timing, and amounts of exposure. These different doses, pathways, and time periods of exposure affect, among other things, (1) general and specific causation,[3] (2) product identification, *i.e.*, which Defendants are even potentially implicated (because Defendants sold different products at different times), and (3) relevant Defendant knowledge of potential hazards. Furthermore, Plaintiffs necessarily have distinct medical histories, staging and prognoses of their diseases, damages, and fact witnesses (including treating physicians). These different facts make it a certainty that a multi-plaintiff trial would be materially longer than a single-plaintiff one and would present a significant risk of jury confusion. As many MDL courts have found, this is an undue (and unnecessary) burden on jurors.

The significant dangers of jury confusion and unfair prejudice to defendants have led judges to reject multi-plaintiff trials even in non-MDL personal injury cases: The cumulative effect of the testimony of multiple plaintiffs risks confusing jurors into believing that plaintiffs' injuries were caused by the alleged exposure without regard to the evidence on general and specific causation demonstrating otherwise. This results in unfair prejudice to Defendants that cannot be remedied through such things as jury instructions. A trial consolidation also would be contrary to Defendants' decisions to waive their *Lexecon* rights. CMO 26 (Dkt. No. 3080) at 6.[4]

As to which of the kidney cancer cases should be tried first, representativeness is a core element of a bellwether trial. "The more representative the test case[], the more reliable the information about similar cases will be." Manual for Complex Litigation (4th) § 22.315 (2004). Conversely, the less representative the test case, the less information will be gained about the overall pool. *See id.* As explained in Section III below, both Mr. Speers and Mr. Donnelly are unrepresentative outliers unsuitable to serve as the first test case in this MDL. By contrast and also as explained in detail below, a trial of Mr. Voelker's claims would give the jury a far more representative set of circumstances to evaluate, resulting in a fairer and more useful initial

[2] As the Court has indicated, under no circumstances would it make sense to try both a kidney cancer and a testicular cancer case together as that would be "very confusing" for the jury and massively increase the overall complexity of any trial. Status Conf. Tr. 23:6–8, 24:2–6, Apr. 4, 2025.

[3] As the Court knows from its *Lipitor* experience, for almost all diseases and substances, dose matters. Here, Plaintiffs claim to have had different amounts of PFAS in their blood at diagnosis and to have been exposed to different PFAS sources and concentrations in drinking water.

[4] Defendants' *Lexecon* waivers stated that their agreement to waive their rights under *Lexecon Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998), in the Group A cases did not apply in the event that a Plaintiff's case was "consolidated with any other action for trial." Dkt. No. 4211 at 11.

bellwether for both sides, which serves the very purpose for bellwether trials in a mass tort MDL setting. This is underscored by the fact that both sides chose Mr. Voelker for Tier 2 discovery, which is not the case for the other two.

The Court should reject the PEC's efforts to pack as many plaintiffs as possible into a single trial—the *first* trial in this massive MDL—in order to unfairly prejudice Defendants and confuse the jury, all in the name of achieving a plaintiff verdict leveraged on jury confusion rather than the merits. For six years, the parties and the Court have proceeded in an organized and deliberate fashion to ensure fair and defensible results for all—now is not the time to change course. The first trial in this MDL should not involve the claims of multiple Plaintiffs, regardless of disease type.

ARGUMENT

I. The first trial in this MDL should be a single plaintiff trial.

In circumstances such as this—the first trial in a massive MDL against multiple defendants and alleging highly fact-specific chemical exposure products liability claims—MDL judges, including some of the most experienced ones such as Judge Fallon, have repeatedly and consistently found that the only fair way to proceed is with a single-plaintiff trial. Only later in the proceedings, if no overall resolution is reached after a sufficient number of single-plaintiff trials, are multi-plaintiff trials considered appropriate.

Federal Rule of Civil Procedure 42(a) authorizes courts to consolidate separate actions for trial, but consolidation is not permitted if "the risks of prejudice and jury confusion" outweigh the procedure's "practical benefits to judicial economy." *Greene v. 4520 Corp., Inc.*, 2023 WL 3513306, at *1 (E.D.N.C. May 17, 2023) (citing *Arnold v. E. Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982)). Indeed, "regardless of efficiency concerns, consolidation is not appropriate if it would deny a party a fair trial." *Id.* "The benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993).

Plaintiffs, as the parties who would be moving for consolidation, bear the burden of proof as to why consolidation would be appropriate. *In re Injectafer Prods. Liab. Litig.*, 2021 WL 3145729, at *1 (E.D. Pa. Jul. 26, 2021). Although many complaints share a "common question of law or fact" such that Rule 42 "may" allow for consolidation, that does not mean they *should* be tried together. "Consolidation is not justified or required simply because the actions *include* a common question or fact." *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 460 (E.D. Mich. 1985) (emphasis in original). The operative question is whether trying two or more cases together would yield enough rewards in judicial economy to outweigh the risk of prejudice, confusion, or new delays. *In re Injectafer*, 2021 WL 3145729, at *1. Here, the answer is a resounding no.

Courts have repeatedly found that the claims of more than one plaintiff should not be tried together:

> (1) in personal injury products liability matters generally, where individual causation issues often predominate over common issues (compared to single accident or disaster cases like airplane crashes);[5]
> (2) in chemical exposure personal injury products liability matters in particular, where causation issues are even more plaintiff-specific, as "location and duration of exposure to toxic substances vary across plaintiffs";[6] and
> (3) for the first bellwether trial in mass tort litigation, because separate trials "help define 'the exact factual and legal contours' of the claims and defenses" and allow the parties "to better assess the value and strength of the remaining matters," thus better informing any potential resolution.[7]

The presence of just one of these circumstances would counsel against a multi-plaintiff trial. Here, all are present. In the circumstances of this massive and important MDL, consolidation would prevent a fair trial by confusing the jury and placing the Plaintiffs at a very unfair advantage, not least because they are certain to leverage potential jury confusion to their benefit. *See Malcolm*, 995 F.2d at 350 (citation omitted). The end result would be the opposite of what a bellwether program should accomplish: rather than provide the parties with datapoints on the case's merit, the preeminence of jury confusion and unfairness would be the parties' focus after any verdict, regardless of who prevails.

A. A multi-plaintiff trial would result in jury confusion and unfair prejudice, without promoting judicial economy.

Multi-plaintiff trials "tempt imputation of the life and circumstances of one [plaintiff] for the benefit of the other, regardless of the individual character of each claim." *Greene*, 2023 WL 3513306, at *2. These concerns are particularly acute in mass-tort cases, where proof of specific causation is critical to the issue of liability. When two cases are tried together, "one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case." *Rubio*, 181 F. Supp. 3d at 758. Jurors may "fill factual gaps on major issues" like causation because they may "unjustly believe that if each plaintiff is making similar accusations, they must be true." *See* Christopher E. Appel, *The Consolidation Prize: An Analysis of Multi-Plaintiff Product Injury Trials*, 47 Am. J. Trial Advoc. 225, 226 (2024) (Ex. A). Jury confusion inevitably leads to unfair prejudice to the defendants, as the jury resolves the confusion

[5] *E.g.*, *In re Injectafer*, 2021 WL 3145729, at *1–2; *Leeds v. Matrixx Initiatives, Inc.*, 2012 WL 1119220, at *2 (D. Utah Apr. 2, 2012).

[6] *E.g.*, *Vance v. Safety-Kleen Sys., Inc.*, 2022 WL 22352487, at *5 (N.D. Tex. Oct. 7, 2022) (collecting cases); *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 758–59 (C.D. Cal. 2016).

[7] *E.g.*, *Crabtree v. Livanova, PLC*, 2022 WL 19517407, at *4 (E.D. La. Mar. 30, 2022); *In re Injectafer*, 2021 WL 3145729, at *1.

by simply considering all the evidence to pertain to all the plaintiffs' claims, even when it is relevant to only one plaintiff's case. *See id.*; *Malcolm*, 995 F.2d at 352; *Hasman*, 106 F.R.D. at 461.

For these reasons, courts strongly disfavor consolidated trials in products liability personal injury actions. *E.g.*, *Crabtree*, 2022 WL 19517407 at *4; *Hasman*, 106 F.R.D. at 460–61; *Michael v. Wyeth, Inc.*, 2011 WL 1527581, at *3 (S.D.W. Va. Apr. 20, 2011); Appel, *supra*, at 242–43, 244 n.78 (collecting cases) (Ex. A). A fair trial can be lost to jury confusion and unfair prejudice with the mixing of highly specific facts, allegations, and defenses. *See Crabtree v. Livanova, PLC*, 2:18-cv-04588 (E.D. La.), Dkt. No. 28-1 (Declaration of Steven Penrod) (Ex. B).

Chemical exposure cases like the AFFF MDL, in particular, are filled with individualized questions and do not lend themselves to multi-plaintiff trials. *E.g.*, *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004). Proving liability in chemical exposure cases requires a "dizzying amount of evidence," *Malcolm*, 995 F.2d at 349, including evidence "regarding the timing, location, and therefore the *degree*" of exposure, *Ellis v. Evonik Corp.*, 604 F. Supp. 3d 356, 378 (E.D. La. 2022) (emphasis in original). In *Ellis*, for example, in granting defendants' motion to sever, the court recognized the "significant differences in the timing and length of each plaintiff's alleged exposure to" the chemical at issue, EtO:

> These distinct periods of exposure mean that each plaintiff's case will require and yield differing facts regarding, for instance, the actual emissions of EtO over various years, and the respective responsibilities, knowledge, and acts of [defendants] during these various periods of time. The distinct periods of exposure will also bear on each plaintiff's showing of fault and causation, thereby affecting the legal viability of each plaintiff's case.

Id. at 377. The plaintiffs in *Ellis* also lived varying distances from the exposure site, which weighed "heavily on the causation element" for each plaintiff. *Id.*

All of these differences exist here. Each kidney and testicular cancer Plaintiff has a different alleged exposure profile. Plaintiffs resided at different addresses, which Plaintiffs' experts claim were serviced by different primary wells in different water districts at different times. Based on the wells allegedly serving their residences and the realistic possible hydrogeologic pathways, certain Plaintiffs were impacted by AFFF use at entirely different military bases—with the alleged AFFF use at the two Bases at issue (Warminster Base and Willow Grove Base) implicating different AFFF products and time periods. And, of course, Plaintiffs all have widely varying medical histories, requiring different medical witnesses and disparate proof.

Consolidation risks brushing over these considerations, which are essential in proving causation, product identification, and knowledge. *Vance v. Safety-Kleen Sys., Inc.*, 2022 WL 22352487 (N.D. Tex. Oct. 7, 2022), illustrates the importance of keeping factually distinct cases separate. In granting defendants' motion to sever, the court recognized that, although all the plaintiffs claimed they were exposed to the same allegedly carcinogenic solvents while working

at the same plant, the alleged exposure happened in different locations within the plant, at different time frames, with numerous combinations of different products, and the plaintiffs had unique medical histories, risk factors, diagnoses, and prognoses. *Id.* at *6. The same is true here. Plaintiffs' expert reports intimate that Messrs. Donnelly, Speers, and Voelker were exposed to different combinations of AFFF products (with different chemical compositions, including different amounts of C8 fluorosurfactants) in varying degrees due to their different exposure locations and time periods.

Vance addressed other reasons why consolidation of cases could lead to jury confusion and introduction of irrelevant evidence: (1) the chemical composition of products changed over time,[8] and (2) what the defendant knew or reasonably should have known about the safety of its products varied among the plaintiffs due to the different time periods of alleged exposure.[9] 2022 WL 22352487, at *4. The same is true here, particularly given the different PFAS from AFFF alleged exposure periods (Mr. Donnelly alleges pre-diagnosis exposure 1979-2005; Mr. Voelker 1985-2015; and Mr. Speers 1995-2019). As Plaintiffs' own experts recognize, those differing exposure time periods and locations implicate different exposure patterns, different products, different product formulations, and different Defendants.

B. Initial bellwether trials in several recent MDLs and mass tort litigations have involved a single plaintiff.

Numerous MDL and mass tort judges have ruled that initial bellwether trials should be single-plaintiff trials:

1. In re Xarelto (Rivaroxaban) Prods. Liab. Litig., Case No. 2:14-md-02592-EEF (E.D. La.), is an instructive example. In this products liability MDL, over 30,000 plaintiffs alleged that the prescription medication Xarelto caused uncontrollable bleeding. Judge Fallon presided over the MDL and in 2017 conducted the first three trials as single-plaintiff trials. Dkt. No. 3856 at 1–2. A fourth single-plaintiff trial was set but settled.

As the Court knows, Judge Fallon also was the lead author on an important article aptly titled *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323 (2008) (Ex. C), which is viewed as the leading authority on conducting bellwether trials in MDLs. It described the purpose of bellwether trials, including their use in informing potential resolution of the cases. *Id.* at 2332, 2337. It discussed two pharmaceutical MDLs that effectively utilized bellwether trials "to provide meaningful information and experience to everyone involved," both of which involved single plaintiffs: *In re Vioxx Prods. Liab. Litig.* (2:05-md-01657) and *In re Propulsid Prods. Liab. Litig.* (2:00-md-01355), both in the Eastern District of Louisiana. *Id.*

[8] "Rayven Richards's claims require no information about the chemical makeup of [defendant's] solvents in 1971 because he did not begin working at Carrier until 2005." 2022 WL 22352487, at *4.

[9] "What [defendant] knew or should have known about its solvents' alleged health risks in 2007 is irrelevant to Plaintiff Stephnie Gee, who was employed . . . from 1973 to 1975." *Id.*

In *Vioxx*, Judge Fallon conducted six bellwether trials, each involving a single plaintiff, to test the core allegation that Vioxx caused their heart attacks. *Id.* at 2334–37; *see also In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 791 (E.D. La. 2007). After those six individual plaintiff trials, the parties reached a settlement of over 25,000 claims. Likewise, in *Propulsid*, another prescription drug MDL, Judge Fallon conducted one individual trial and had intended to conduct two additional, single-plaintiff bellwether trials, but ultimately granted summary judgment for the defendants. Fallon, 82 Tul. L. Rev. at 2332–34 (Ex. C). The parties then reached a global settlement. *Id.* at 2333.

2. In re Ranitidine Cases, Case No. 21-cv-002172 (Cal. Super. Ct. 2023), a recent coordinated proceeding in California state court (with a parallel MDL before Judge Rosenberg in the Southern District of Florida), is also instructive as it involved chemical exposure claims. Plaintiffs sued numerous manufacturers of Zantac (ranitidine), a heartburn medication, claiming that it degrades to a carcinogen known as NDMA and caused their cancers. *See* Dec. 5, 2023 Order on Mot. of Plaintiff Regarding Scheduling and Consolidation of 14 Bellwether Trials (Ex. D). In rejecting plaintiffs' request to consolidate the first bellwether cases for trial, the court recognized that "[r]egarding exposure, each plaintiff consumed ranitidine manufactured by different defendants at different times in different doses, and the ranitidine consumed by each plaintiff was exposed to different levels of heat and humidity that might have caused the degradation of the ranitidine into NDMA." *Id.* at 6. As has become apparent through expert discovery here, the Group A plaintiffs likewise claim to have been exposed to different amounts of different chemicals made by different Defendants at different times, and those chemicals do not degrade into PFOA in the same way or at the same rate.

Regarding specific causation, the *Ranitidine* court explained that "each plaintiff has their own personal history of potential alternate exposures, family medical history, and other issues," and regarding damages, "each plaintiff has suffered different symptoms, incurred different medical expenses, and suffered different other consequences from the cancer diagnosis." *Id.* So too here.

Moreover, the court commented that bellwethers are test cases, and "[i]f a case is a test case in the [MDL], then the management of the [MDL] suggests that it be tried with a single plaintiff so that the parties may brief legal issues that are focused on the single plaintiff." *Id.* "It is best that the bellwether cases are simple so that the legal issues are clearly presented without undue complication and the resulting orders can then be used as templates in other cases in the [MDL]." *Id.*

3. In re E.I. DuPont De Nemours and Company C-8 Personal Injury Litig., Case No. 2:13-md-2433 (S.D. Ohio), of course, is another relevant example. There, many single-plaintiff trials were held, and a global settlement reached, before any multi-plaintiff trials were permitted. In that MDL, as the Court knows, plaintiffs brought claims against DuPont alleging that exposure to PFOA from a DuPont manufacturing plant that entered their drinking water caused their injuries. The MDL court planned to conduct six single-plaintiff trials selected from the bellwether pool. *In re E.I. Du Pont De Nemours and Company C-8 Personal Injury Litig. ("DuPont C-8")*, 2019 WL 2088768, at *8 (S.D. Ohio May 13, 2019). Some settled before trial. Ultimately, the court

conducted four trials, three of which went to the jury; they were all single-plaintiff trials. *DuPont C-8*, 2019 WL 2088768, at *3, *9–10. The MDL court also planned to try 260 cancer cases, all as individual trials. *Id.* at *3, *9; *see also* Dkt. No. 4294. During this process, plaintiffs on "numerous occasions" moved the Court to hold multi-plaintiff trials, and the MDL court "each time denied [Plaintiffs'] request." *DuPont C-8*, 2019 WL 2088768, at *13.

During the fourth single-plaintiff trial, the parties reached a global resolution of the MDL, settling thousands of cases. *Id.* at *10. Following the global settlement, about 40-50 post-settlement cases were filed. *Id.* at *11. Only at this mature state of the trial proceedings did the MDL court permit five-plaintiff consolidated trials to take place, in order to move through these straggler post-settlement cases in a timely manner. *See id.* at 20. Obviously, allowing multi-plaintiff trials following several individual-plaintiff trials—and a global settlement—is quite different from the procedural posture currently before the Court in determining the parameters of the first bellwether trial in this MDL.

4. In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices, and Prods. Liab. Litig., Case No. 3:16-md-02738 (D.N.J.): This MDL includes over 58,000 plaintiffs who claim talc-based baby powder caused their ovarian cancer. In setting bellwether trials, the then-presiding MDL judge, Chief Judge Wolfson, was firm in stating, "I'm not trying multi-plaintiff cases. They are going to be single-plaintiff cases. So let's put aside that idea." Dkt. No. 16483 at 13:19–21. After Chief Judge Wolfson retired, the new MDL judge, Judge Shipp, likewise denied plaintiffs' request for consolidated bellwether trials. *See* Dkt. No. 33279 at 1–2.

5. In re Taxotere (Docetaxel) Prods. Liab. Litig., Case No. 2:16-md-02740 (E.D. La.): This MDL involved over 15,000 plaintiffs' claims that the chemotherapy drug, Taxotere, caused permanent hair loss. At least the first two bellwether trials were single-plaintiff trials. Dkt. No. 8253 at 1; Dkt. No. 13364 at 1.

These are just a few examples. Many other courts, MDL and otherwise, have similarly conducted single plaintiff trials for the first bellwether trial in complex litigation involving personal injury claims.[10] The rationale of all these cases is the same: as an initial matter at least, courts ought to avoid multi-plaintiff trials to avoid jury confusion and unnecessarily lengthy trials, and to get results that will promote resolution of the rest of the docket.

The PEC may cite examples where multi-plaintiff trials occurred in mass tort matters, but those cases are distinguishable, for the reasons discussed above. For example, cases in "mature"

[10] *See In re Roundup Prods. Liab. Litig.*, Case No. 3:16-md-02741 (N.D. Cal.), Dkt. No. 2194 at 1; *In re General Motors LLC Ignition Switch Litig.*, Case No. 1:14-md-2543 (S.D.N.Y.), 1:15-cv-08958 (S.D.N.Y.), Dkt. No. 8 at 1; *In re Davol Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Liab. Litig.*, Case No. 2:18-md-2846 (S.D. Ohio), Dkt. No. 515 at 1, 2:18-cv-01509 (S.D. Ohio), Dkt. No. 504 at 1; *In re American Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, Case No. 2:12-md-02325 (S.D.W.V.) Dkt. No. 1321 at 1; *In re C.R. Bard, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, Case No. 2:10-md-02187 (S.D.W.V.), Dkt. No. 524 at 2, Dkt. No. 2490 at 1, 2:11-cv-00195 (S.D.W.V.), Dkt. No. 336 at 1.

mass tort litigation where a number of trials have already been conducted are inapposite. *See DuPont C-8*, 2019 WL 2088768, at *16–18 (explaining differences in "immature" versus "mature" mass torts, and why multi-plaintiff trials should be avoided in "immature" litigation). Not a single AFFF case has been tried to date. Nor has any jury in any case determined that exposure to PFAS could be a general, or was a specific, cause of any disease. Consolidation in a first trial would be both inefficient and highly prejudicial. The "interests of efficiency" are served by letting cases proceed separately where a group of cases is being tried for the first time, as separate trials "help define the exact factual and legal contours of the claims and defenses" and "allow the parties to better assess the value and strength of the remaining matters." *In re Injectafer Prods. Liab. Litig.*, 2021 WL 3145729, at *1. Courts have warned that until enough trials have occurred so that the contours of various types of claims within the litigation are known, courts should "proceed with extreme caution when consolidating claims of immature torts." *See In re Van Waters & Rogers, Inc.*, 145 S.W.3d at 208.

Similarly, cases involving consolidation of a handful of matters that represent all (or nearly all) claims—as opposed to bellwether trials in massive MDLs—are also inapposite. While judicial economy might be served by trying two cases together where those are the only two cases with related facts to be tried, there are no meaningful efficiency gains to be had from trying one case versus two or three here, when this is the *first* bellwether trial in a litigation involving *tens of thousands* of claims. The goal here is not to make a meaningful dent in the number of pending cases, but to gain valuable information and guidance for the future of the MDL. As courts have explained, a main purpose of holding bellwether trials is "to provide meaningful information and experience to everyone involved in the litigations" to inform settlement discussions. *DuPont C-8*, 2019 WL 2088768, at *8 (quoting Fallon, 82 Tul. L. Rev. at 2332). That will not happen with a multi-plaintiff trial that would confuse the jury and prejudice Defendants. If the Court's first bellwether trial here were a multi-plaintiff trial, the findings from those proceedings would not be representative and would undermine the overall purpose of bellwether trials.

District courts can attempt to impose certain safeguards to mitigate risks of jury confusion or prejudice, like limiting jury instructions, but the threat of prejudice and jury confusion still looms large in environmental exposure cases like these. "Even with the aid of jury instructions, . . . there is a substantial risk that the jury will be unable to compartmentalize the evidence as it relates to each individual patient." *Crabtree*, 2022 WL 19517407, at *4; *Vance*, 2022 WL 22352487, at *6 ("the risk of jury confusion would be high if the claims were tried together, even if the Court gave a limiting instruction"). This is precisely why Judge Fallon and a parade of other MDL judges have insisted on single-plaintiff trials at the initial bellwether stage. The court should avoid these risks, particularly for the first bellwether trial in this MDL that already involves multiple *Defendants*, some of whom will need limiting instructions even in a single-plaintiff trial.

II. To the extent a kidney cancer case is tried first, it should be a single-plaintiff kidney cancer trial.

As discussed above and below, if the first trial is limited to kidney cancer, the relevant facts among the three kidney cancer cases—*Donnelly*, *Speers*, and *Voelker*—vary widely, making a two- or three-plaintiff trial from this pool unfair and impossible, for at least the following reasons:

- **Different PFOS/PFOA blood levels, both estimated and measured.** Dose matters, for both general and specific causation. *In re Lipitor*, 227 F. Supp. 3d 452, 462–64 (D.S.C. 2017). Plaintiffs had their blood tested for PFOS and PFOA in 2023, and Plaintiffs' expert Dr. MacIntosh also attempted to retroactively estimate their PFOS and PFOA blood levels at the time of diagnosis. Even under Plaintiffs' framework, their purported PFAS blood results are all different. Differences in PFAS blood levels could complicate, *inter alia*, pre-trial *Daubert* and summary-judgment motion practice, and presentations to the jury.

- **Different methods used to estimate historical PFOS/PFOA blood levels.** Plaintiffs' expert Dr. MacIntosh put forth three "hindcasting" methods of calculating Plaintiffs' estimated PFOS/PFOA blood levels at diagnosis: calculations based on (1) Plaintiffs' blood draws in 2023; (2) municipal water testing results; and (3) an individual plaintiff's estimated exposure dose from drinking water. He bases his opinions for Mr. Voelker's and Mr. Speers's blood levels on the personal serum method, but for Mr. Donnelly, he uses the municipal method. Like the blood levels themselves, differences in how those blood levels were estimated will complicate pre-trial motion practice and arguments to the jury.

- **Different Defendant knowledge.** Notice of the potential risks of PFOA and PFOS has changed over time. Plaintiffs' exposure end dates are different. Evidence that is admissible in one Plaintiff's case regarding Defendants' knowledge of the risks of PFOA/PFOS may be inadmissible or admissible for only a limited purpose in another Plaintiff's case.[11] Combining *Donnelly* with *Voelker* (or *Speers*), for example, would lead to the introduction of irrelevant evidence that likely would confuse the jury and ultimately bias the jury in Mr. Donnelly's favor, given Mr. Donnelly's earlier diagnosis date.

Putting aside the differing alleged amounts of PFOS or PFOA in Plaintiffs' blood, Plaintiffs must prove—on a Defendant-by-Defendant basis—that a legally and scientifically-relevant amount of that PFOS or PFOA came from Defendants' products, as opposed to another source.[12] The evidence Plaintiffs will use to establish that they were potentially exposed to PFOS or PFOA from particular Defendants' products varies by Plaintiff and Defendant, primarily as a factor of where the Plaintiff lived and when (and how much water he drank):

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[11] *See e.g.*, *Ellis*, 604 F. Supp. 3d at 377; *Vance*, 2022 WL 22352487, at *4.

[12] Defendants do not endeavor to articulate here the level of proof required, or the legal standard for substantial contributing factor, which will be part of Defendants' forthcoming summary judgment briefs.

- **Different exposure time periods.** Plaintiffs allege exposure to Defendants' products at different time periods, depending on when they moved to the area and when they were diagnosed with kidney cancer (*Voelker:* 1985-2015; *Speers*: 1995-2019; and *Donnelly*: 1979-2005). According to Plaintiffs' expert Dr. Higgins, different AFFF products (manufactured by different Defendants) were potentially used at the Warminster and Willow Grove Bases at different periods of time. These different time periods affect exposure source (and amount). For example, Mr. Donnelly's pre-diagnosis exposure ended in 2005. Products that were not potentially used at the Bases before 2005 (or earlier, as it takes time for PFAS to degrade and/or move) could not have impacted Mr. Donnelly.

- **Different addresses mean (1) different water systems, (2) different wells within the same water system, & (3) different sources of AFFF use at the Bases.** One Plaintiff (*Speers*) received his water from a different water system (Ambler), located in an entirely separate watershed than the other two Plaintiffs. Even for the two Plaintiffs who lived within the same water district (*Voelker* and *Donnelly*), Plaintiffs lived at different addresses. Those different addresses received water from different wells within the water system. Plaintiffs' own expert Dr. MacIntosh opined that each Plaintiff primarily received his water from different wells.[13] And Plaintiffs' expert Mr. Brown, opines that AFFF usage at different locations within the Bases would impact different wells at different times.[14]

  Likewise, Plaintiffs' expert Dr. Martin claims each well had a different amount and ratio of types of PFAS in it, affecting his opinions regarding exposure and source of the PFAS. And Plaintiffs' expert Dr. Higgins opines that different AFFF products—and different underlying formulations of those products—were used in different locations at different times at the Willow Grove and Warminster Bases.[15] In short, Plaintiffs' theories as to how they were exposed to PFAS from AFFF used at Willow Grove and Warminster—and *whose* AFFF they were exposed to—necessarily vary based upon where they lived and when and are highly plaintiff-specific factual questions.

- **Different potentially relevant Defendants.** Many Defendants will have summary judgment product identification and causation arguments that differ depending upon the Plaintiff selected for trial. Consolidation of more than one case for trial would cause jury

[13] For Mr. Voelker, Plaintiffs' expert asserts that his "primary contributing wells" to his residences were Warminster Wells 6, 10, 36, and 45. For Mr. Donnelly, he asserts Warminster Wells 4, 9, 15, and 45. So there is only one well of overlap between Mr. Voelker and Mr. Donnelly's residences.

[14] For example, Plaintiffs' expert opines that use of AFFF at certain areas within the Warminster Base may have impacted Mr. Voelker's primary contributing wells, but not Mr. Donnelly's. In fact, based on Defendants' expert's evaluation of the possible hydrogeologic pathways, Dr. MacIntosh's "primary contributing wells" for the residential addresses at issue for different plaintiffs were impacted by entirely separate military bases (Mr. Voelker: Warminster Base only; Mr. Donnelly: Willow Grove Base only).

[15] Plaintiffs' expert Dr. Higgins addresses different formulations and how they changed over time, including with respect to their fluorosurfactant components and C8 versus C6 content, in his report.

confusion and unfair prejudice to Defendants if they are dismissed from some cases but not others as the jury faces the "impossible task" of keeping straight which Defendants are still involved in which cases, and which evidence applies to which Defendants. *See Malcolm*, 995 F.2d at 350.

- **Different named Defendants.** Similarly, Defendants Arkema Inc. and AGC Chemicals Americas Inc. ("AGC") are not named Defendants in *Voelker* or *Donnelly*. Combining those cases with *Speers* would require Arkema and AGC to defend themselves in a trial much broader than their alleged liability which would be confusing to a jury, prejudicial to these two Defendants and cause logistical difficulties (and would bring subject matter jurisdiction issues into play, as discussed, *infra*).

- **Different case-specific legal defenses.** Defendants have individual case-specific defenses that are different for each Plaintiff. Defendants' alternative cause defenses and damages defenses too will vary between cases. For example, in declining to conduct multi-plaintiff trials, courts have recognized that evidence regarding "common risk factors for the development of cancer" and exposure to other carcinogens can vary among plaintiffs. *See Ellis*, 604 F. Supp. 3d at 377. The cases require "witnesses and documentary proof [that] vary widely across plaintiffs, as each plaintiff will need to submit their own medical records, as well as testimony from their treating physicians, family members, and other witnesses unique to them." *Id.* at 378. Here, Messrs. Donnelly, Speers, and Voelker have different medical histories, fact witnesses, and treating physicians, and Defendants have different specific causation experts for each.

Clearly, combining any two (or three) of these cases would undermine the purpose of the first bellwether trial by risking extreme jury confusion and prejudice to Defendants. Such a complicated, confusing trial would not aid in learning information about the overall MDL or how a jury might value an individual case. It would merely increase jury confusion and Plaintiffs' chances of winning. *See* Appel, 47 Am. J. Trial Advoc. at 225–26 (Ex. A).[16]

[16] These challenges would be even more pronounced were the Court to consolidate kidney and testicular cancer cases together. There are different bodies of scientific evidence of the association (if any) between PFAS exposure and kidney cancer versus testicular cancer, with different experts and issues to address. And the Plaintiffs with a medical history of testicular cancer—as compared to the Plaintiffs with a medical history of kidney cancer—lived in different water districts (Horsham) with different PFAS levels over time, received different diagnoses, underwent materially different treatment, and received different prognoses.

III. *Voelker* should move forward to motion practice/trial.

As between the three kidney cancer cases, Defendants submit that *Voelker* should move forward to summary judgment and *Daubert* motions and trial.

***Voelker* is the most appropriate case to advance.**

Mr. Voelker lived in Warminster, Pennsylvania since 1985, was diagnosed with renal cell carcinoma (RCC) in December 2015 at the age of 54, and was treated with a partial nephrectomy in early 2016. His age of diagnosis is the median age of the rest of the eligible pool and within the typical age range for a kidney-cancer diagnosis. Mr. Voelker was chosen by both the PEC and Defendants for Tier 2 discovery. This consensus reflects that neither side considered the case to too strongly favor the other. As Judge Fallon pointed out, "if the sides can agree on the cases" for the trial-selection pool, "the cases will likely be representative and fair to both sides." *See* Fallon, 82 Tul. L. Rev. at 2350 (Ex. C). *Voelker* is the only case both sides agreed to for Tier 2 discovery. And having risk factors for RCC such as age, hypertension, and being overweight—common conditions as people grow older—does not make a plaintiff a unicorn. In fact, they make the plaintiff run-of-the-mill: by definition, risk factors are factors that occur with some regularity in patients diagnosed with the disease.[17]

If the Court does not dispose of general causation on motions practice and its goal is for the jury to address general causation prior to reaching plaintiff-specific causation, *see* Status Conference Tr. (April 4, 2025), at 23:22–25, this can be achieved in a single-plaintiff case. One option may be to use special interrogatories that require the jury to address general causation (*e.g.*, "Do you find that PFOA can cause kidney cancer at the dose level Plaintiff had before his diagnosis? Do you find that PFOS can cause kidney cancer at the dose level Plaintiff had before his diagnosis?").

***Speers* is not representative.**

Although Defendants would certainly welcome having *Speers* proceed as the initial trial case given the unique strength of Defendants' summary judgment and *Daubert* arguments, there is a strong chance it would not reach trial and Plaintiffs undoubtedly would argue that such findings are not representative. And combining *Speers* with any other cases would cause significant juror confusion. Indeed, as compared to the other Group A plaintiffs, *Speers* is an extreme "outlier"—literally. He lives in Fort Washington, Pennsylvania, which lies outside the area arguably affected by the use of AFFF at Warminster and Willow Grove Bases. According to Plaintiff Fact Sheets,

[17] Additionally, the PEC *alone* picked *Voelker* for Tier 1. Any effort to disavow him as an appropriate trial pick now simply reflects a desire to choose the most plaintiff-favorable case for the first trial. The PEC may argue that Mr. Voelker's recent genetic testing results—that Plaintiffs chose to conduct in January 2025 and disclose as part of their expert reports—change his case, but Mr. Voelker's own expert excluded any familial genetic cause for his RCC, finding that his test was negative for any elevated risk for kidney cancer.

he was the only plaintiff in the entire bellwether eligibility pool to claim exposure from a residence in Fort Washington. His case should not be the first bellwether trial, and it should not be consolidated with any others for trial, for at least the following reasons:

Subject Matter Jurisdiction Issues. *Speers* is not an appropriate bellwether trial selection because on its face there is no subject matter jurisdiction. Direct-filed in the MDL, the *Speers* Complaint asserts that this Court has subject matter jurisdiction "pursuant to 28 U.S.C. § 1332(a) because complete diversity exists between Plaintiffs and Defendants . . . ." *See* 2:21-cv-03181-RMG, *Speers* Compl. (Dkt. No. 1) ¶ 2. This is wrong. There is no diversity jurisdiction because Plaintiffs Clinton and Gail Speers and Defendants Arkema Inc. and AGC are all residents of Pennsylvania. *Id.* ¶¶ 5, 10, 46, 49. Because there is no subject matter jurisdiction, *Speers* is not an appropriate bellwether trial selection. *See In re Lipitor*, 2:14-mn-02502-RMG, CMO 93 (Dkt. No. 1766) at 1-3 (D.S.C. Dec. 5, 2016) (dismissing multiple cases for lack of diversity jurisdiction).

Different Water System. Mr. Speers lives in Fort Washington, Pennsylvania, part of the Ambler Borough Water Department ("Ambler WD"). Fort Washington and Ambler WD are several miles away from the Warminster and Willow Grove Bases. So far away that when the United States Geological Survey (USGS) mapped the hydrogeology of the area, it found that water from the Warminster and Willow Grove Bases could not migrate to Ambler WD. And so far away that when the Pennsylvania Department of Health (PADOH) did its PFAS-cancer study of the area, it did not include Fort Washington or Ambler. Below is a graphic showing the bounds of the Ambler WD in the bottom left corner, separate from the boundaries of the Horsham and Warminster bases. The two military Bases at issue—Willow Grove and Warminster—are outlined in purple. Willow Grove is in the center, and Warminster is on the right side. Ambler WD is more than four miles away from the border of Willow Grove Base and even farther from Warminster Base.

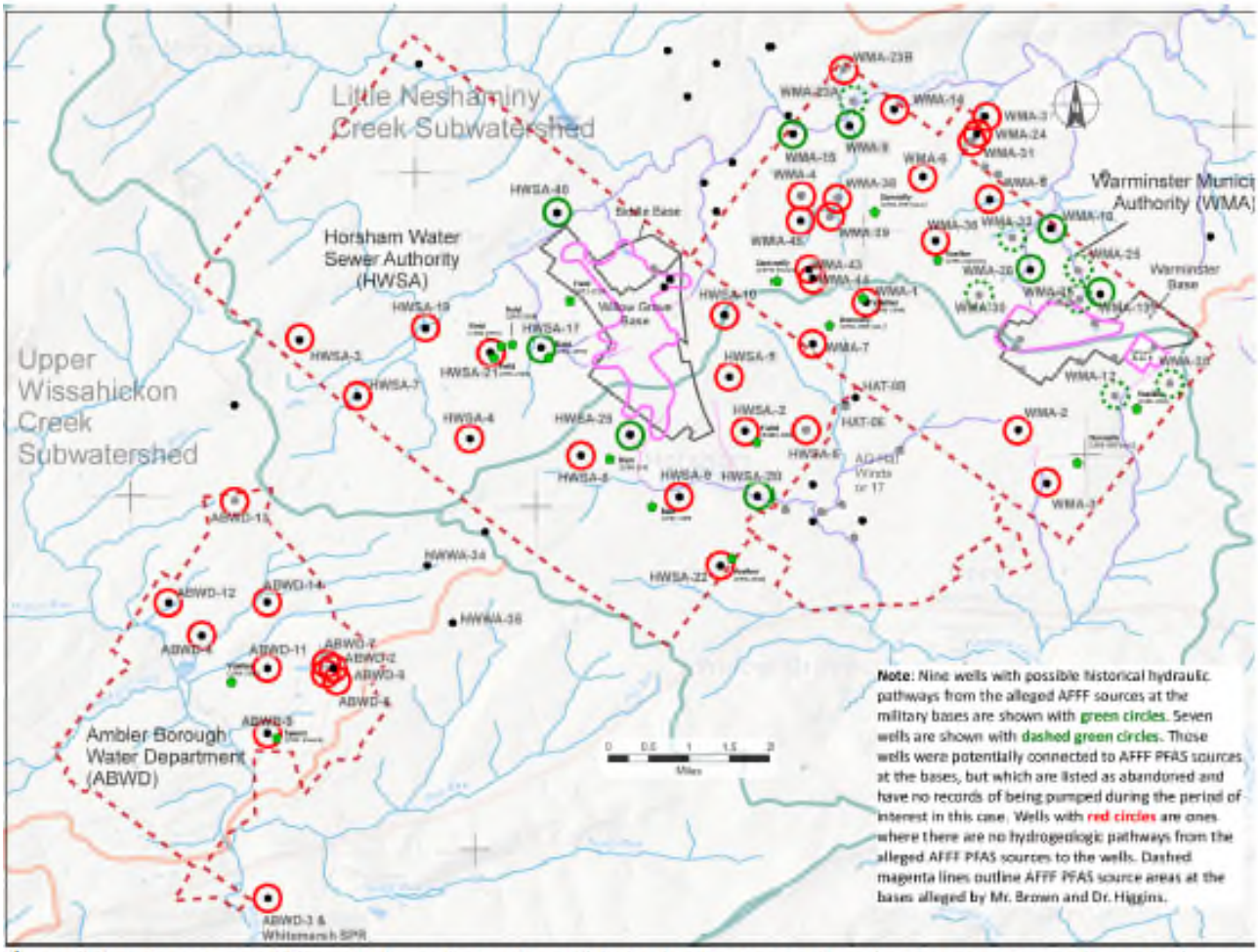

Figure 4.9.1. Summary of Einarson's analysis of possible hydraulic connections between water wells and alleged AFFF PFAS sources at Willow Grove and Warminster Bases

Although Plaintiffs' fate and transport expert stretches credibility to disregard the USGS and PADOH and argue that water from Willow Grove and Warminster Bases could have *jumped* over watersheds to reach Ambler WD, that opinion is not methodologically sound and will be challenged under Rule 702. While these arguments will be part of Defendants' pre-trial motion practice, selecting *Speers* as the trial case would complicate pre-trial workup and any bellwether trial.

Different Causes of Action. *Speers*'s complaint raises six causes of action not asserted in *Donnelly* or *Voelker*: (1) negligent failure to warn, *Speers* Compl. at ¶¶ 143-44, 146, 147(b), (d); (2) fraudulent concealment and misrepresentation, *id.* ¶¶ 157-74; (3) negligence per se, *id.* ¶¶ 175-78; (4) trespass and battery, *id.* ¶¶ 179-89; (5) negligent, intentional, and reckless infliction of emotional distress, *id.* ¶¶ 190-200; and (6) loss of consortium for his wife, *id.* ¶¶ 201-204 (Mr. Donnelly & Mr. Voelker are both unmarried). These additional claims will result in lengthier and more complicated motions for summary judgment and—to the extent any survive summary judgment—more complicated jury instructions. Proving the additional claims at trial would also

likely require Mr. Speers to present evidence that would otherwise not be necessary in Mr. Voelker's or Mr. Donnelly's trials.

In summary, *Speers* is not an appropriate or representative first bellwether trial case, either alone or with any other case.

***Donnelly* is not representative.**

Donnelly is also not representative, and therefore should not be the first bellwether trial.

Kidney cancer is one of the most common types of cancer, and the most common form is renal cell carcinoma (RCC), with clear cell RCC being the most common subtype. The risk of kidney cancer increases with age. The average age of diagnosis is 65 and kidney cancer is an uncommon diagnosis in people under age 45.[18] Indeed, less than 2.6% of kidney cancer cases occur in people under the age of 35.[19]

Mr. Donnelly was just 26 years old when he was diagnosed with kidney cancer. His age at diagnosis makes him an extreme outlier within both the general population and the pool of plaintiffs in this MDL. According to the Plaintiff Fact Sheets, only 3.7% of the bellwether eligibility pool was under age 30 when diagnosed with RCC; the average age at diagnosis for the pool was 52.9 years old, and the median was 54.

Mr. Donnelly's young age at diagnosis—and accompanying relative lack of other significant health issues, given his youth—has likely played into why he has long been a favorite PEC pick. But bellwether trials should help parties evaluate how jurors are likely to view individual cases remaining on the docket, and cases that most strongly favor one side do not achieve that goal. *Du Pont C-8*, 2019 WL 2088768, at *8; Fallon, 82 Tul. L. Rev. at 2349 (Ex. C). It is "critical" to a successful bellwether trial program that an "honest representative" sampling of cases be achieved. *See In re Yasmin & Yaz (Drospirenone) Mtkg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, 2010 U.S. Dist. LEXIS 108107, at *4 (S.D. Ill. Oct. 8, 2010). "Little credibility will be attached" to the bellwether trial process, and "it will be a waste of everyone's time and resources," if the case selected does "not accurately reflect the run-of-the-mill case." *See id.* at *6-7. Indeed, "[i]f the very best case is selected, the defense will not base any settlement value on it as an outlier." *Id.* at *7.

Donnelly is not an "honest representative" of the run-of-the-mill kidney cancer case in this MDL. "[U]nrepresentative cases, even if they are successful at trial, will do little to resolve the entire litigation and will have little predictive value." Fallon, 82 Tul L. Rev. at 2349 (Ex. C). Selection of *Donnelly* as the first bellwether trial, either alone or with another case, would

[18] American Cancer Society, Key Statistics About Kidney Cancer, available at: https://www.cancer.org/cancer/types/kidney-cancer/about/key-statistics.html

[19] National Cancer Institute: Surveillance, Epidemiology, and End Results Programs, available at: https://seer.cancer.gov/statfacts/html/kidrp.html

undermine "the bellwether trial concept [which] is designed specifically to help [the parties] predict how the litigation may unfold and ultimately resolve the litigation." *Id.* at 2350.

CONCLUSION

Defendants respectfully request that the first bellwether trial in this MDL be the trial of an individual plaintiff's claims. Anything else would confuse the jury, prejudice Defendants and prevent the parties from learning meaningful information about the MDL inventory writ large for the future of this MDL.

For the reasons discussed above, Defendants submit that it would make the most sense for *Voelker* to be the first case to go to trial.

Respectfully submitted,

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EXHIBIT A

The Consolidation Prize: An Analysis of Multi-Plaintiff Product Injury Trials

Christopher E. Appel[†]

Introduction

In mass tort product injury cases, judges are often asked to consolidate in a joint trial the claims of multiple plaintiffs who are strangers to one another but allege injury from the same product. For example, two or more unrelated plaintiffs that allege injury from a consumer product, prescription drug, or medical device may try to combine their individual lawsuits so that the same jury hears cumulative evidence in deciding issues of liability and damages. Over the past two decades, some courts have obliged these requests. This Article looks at those results. It finds that trial consolidation of unrelated plaintiffs' product injury cases appears to substantially skew trial outcomes. Multi-plaintiff joint trials tend to significantly increase the frequency and size of plaintiff verdicts unrelated to claims' merits, denying defendants fair trial rights.[1]

To this end, courts have found that "[u]nfair prejudice [to defendants] as a result of consolidation is a broadly recognized principle."[2] Specifi-

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[1] *See, e.g.*, Janssen Pharm., Inc. v. Bailey, 878 So. 2d 31, 48 (Miss. 2004) (finding "little doubt" that a consolidated trial "created unfair prejudice for the defendants by overwhelming the jury with this testimony, thus creating a confusion of the issues"); Grayson v. K-Mart Corp., 849 F. Supp. 785, 790 (N.D. Ga. 1994) ("There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against [the] defendant generally, thus, prejudicing [the] defendant with respect to the other plaintiffs' claims.").

[2] *See, e.g.*, Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co., 48 So. 3d 976, 988 (Fla. Dist. Ct. App. 2010) ("Unfair prejudice as a result of consolidation is a broadly recognized principle."); Hasman v. G.D. Searle & Co., 106 F.R.D. 459, 461 (E.D. Mich. 1985) ("If the unique circumstances of the cases are considered together in one trial, the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice.").

cally, courts have stated that consolidation can allow evidence used to prove one plaintiff's case to mask weaknesses in another plaintiff's case, blur important individual legal issues, or simply overwhelm jurors with information they cannot reasonably be expected to keep straight.[3] Also, by joining together multiple individuals' cases for trial, a jury may unjustly believe that if each plaintiff is making similar accusations, they must be true. This belief can lead jurors to fill factual gaps on major issues in product injury cases, including whether the defendant engaged in wrongdoing, the product was defective, and that scientific evidence proves causation. It can also trigger greater animosity against a defendant than had the same cases been tried individually, which may potentially subject that defendant to greater liability and damages for reasons unrelated to the individual claims.[4]

In looking at the "real world" effects of consolidation on trial outcomes in product injury cases, this Article builds upon previous studies. It incorporates data from studies that have focused on comparatively discrete contexts that include federal court multi-district litigation (MDL)[5] and the New York City Asbestos Litigation (NYCAL).[6] This

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[3] *See, e.g.*, Bower v. Wright Med. Tech. Inc., No. 2:17-cv-03178, 2019 WL 3947088, at *3 (C.D. Cal. Aug. 19, 2019) ("[T]he differences between the factual circumstances in both cases . . . pose a substantial risk of prejudicing defendants at trial and confusing the jury"); Rubio v. Monsanto Co., 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016) ("[B]y trying the two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case."); Malcolm v. Nat'l Gypsum Co., 995 F.2d 346, 348-49, 352, 354 (2d Cir. 1993) (reversing the trial court's decision to consolidate asbestos trials because "the jury was presented with a dizzying amount of evidence" that would not have been admissible had the cases been tried separately and recognizing that the "liability [award] amounted to the jury throwing up its hands in the face of a torrent of evidence").

[4] *See* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. APPLIED PSYCH. 909, 915-16 (2000) (finding that "[j]urors' ability to understand the evidence [is] significantly affected by the number of plaintiffs in the trial," with the result that juries in consolidated trials are significantly more likely to find for the plaintiff and render a larger damages award than if the cases were tried individually).

[5] John Beisner et al., *Trials and Tribulations: Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings* (U.S. Chamber Inst. for Legal Reform, Oct. 2019).

[6] Peggy L. Ableman et al., *The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency*, 30 MEALEY'S LITIG. REP.: ASBESTOS 1, 1 (2015).

analysis is more comprehensive in its coverage, examining as many multi-plaintiff consolidated product injury cases tried to verdict across the nation during the past two decades as the author could identify and reasonably verify with the help of research assistants.[7] (A more detailed discussion of how this analysis was developed is set forth in the Methodology section below). The patterns seen nationally in the outcomes of multi-plaintiff product injury trials can, in turn, lead to a fuller understanding of how joint trials impede courts' ability to administer justice.

I. Overview of Key Findings

This Article examines forty-two multi-plaintiff product injury cases tried to verdict over the past two decades. The trial outcomes, which are laid out in the Appendix below, add greater support to concerns that have long been raised about the potential of joint trials to distort the resolution of individual cases. These trial outcomes illustrate starkly why plaintiffs' lawyers often pursue a consolidated trial and why defendants vigorously oppose it as a fundamentally unjust and highly prejudicial litigation tactic.

Five takeaways stand out from the data:

(1) Multi-plaintiff trials resulted in high success rates for plaintiffs.

(2) Most multi-plaintiff trials resulted in large verdicts.

(3) Numerous juries awarded identical or similar amounts to dissimilar plaintiffs in the same case.

(4) Post-trial reversal or modification of plaintiffs' verdicts undercuts trial accuracy and efficiency claims.

(5) Consolidated multi-plaintiff product injury trials are rarely held.

These findings all point to the same conclusion: the risks of unfair prejudice from a multi-plaintiff trial are significant and do not outweigh any claimed efficiency. A consolidated trial appears to substantially change trial outcomes and tilt the scales of justice in a manner unrelated to the merits of individual plaintiff's claims. Courts should recognize these unsound effects on the fair and impartial administration of justice.

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[7] The author would especially like to thank Amina Sadural for her research assistance.

II. Methodology

The methodology for this analysis included several approaches to identify multi-plaintiff cases tried to verdict. We initially compiled case examples from existing studies of multi-plaintiff trials, similar to a meta-analysis. Specifically, we examined a 2019 study of all MDL product liability trials during a ten-year period[8] and a 2015 study of NYCAL trials between 2010 and 2014,[9] each of which identified seven multi-plaintiff trials.

In addition, we used legal search tools available on LexisNexis and Westlaw to research trial court orders and appellate court decisions discussing verdicts in multi-plaintiff trials. These efforts were complemented by researching articles reporting on multi-plaintiff trials in mainstream legal publications such as Law360 as well as more targeted publications such as Mealey's Litigation Reports.

We also surveyed the membership of various organizations, including the Product Liability Advisory Council (PLAC), Lawyers for Civil Justice (LCJ), Defense Research Institute (DRI), and International Association of Defense Counsel (IADC). The responses received helped facilitate additional research regarding specific cases.

The objective of each of these approaches was to identify as many examples of multi-plaintiff trials as possible over the past twenty years to build a data set for analysis. Once cases were identified, additional research was conducted to verify the trial outcome and to ascertain what occurred post-trial or as a result of appellate review. All of these cases are included in the table below; none were excluded.

The study period extends a few years beyond a strict twenty-year period to account for the COVID-19 pandemic, which effectively halted jury trials in America in 2020. Jurisdictions resumed trials at different times, sometimes only to start and stop again due to a rise in virus cases.[10]

Identifying product injury cases in which the claims of multiple, unrelated plaintiffs have been consolidated for a joint trial presents

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[8] *See* Beisner et al., *supra* note 5, at 2.

[9] *See* Ableman et al., *supra* note 6, at 1, 6.

[10] *See, e.g.*, *Court Operations During COVID-19: 50-State Legal Resources*, JUSTIA, https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources (last visited Sept. 4, 2024).

significant research challenges. The vast majority of jurisdictions do not have online searchable court dockets at the trial court level that can readily identify consolidated product injury cases. Even where comparatively advanced searches can be performed, there is generally no mechanism to distinguish claims of related plaintiffs, such as a husband and wife each asserting claims for one spouse's alleged injury, and unrelated plaintiffs (that is, plaintiffs who have no connection other than alleging injury from the same or similar product).[11]

Given these research challenges, there are undoubtedly examples of multi-plaintiff trials that were not captured. This analysis is the product of reasonable efforts to do something that does not appear to have been done before, which is to broadly survey the landscape of multi-plaintiff product injury trials and report on the data that could be captured through the various research approaches discussed.

III. Why Multi-Plaintiff Product Injury Trials Present Unique Challenges for the Judicial System

Those unfamiliar with multi-plaintiff trial consolidation may wonder why the procedure raises fairness and due process concerns. After all, courts adjudicate class actions involving multiple claimants when the requirements of Federal Rule of Civil Procedure 23 or its state equivalent are met, and courts in MDL and other situations regularly consolidate cases for pre-trial purposes. What makes a *joint trial* of unrelated plaintiffs alleging injury from the same product so different?

As many courts have recognized, there is a fundamental difference in having evidence required to prove two or more unrelated individuals' personal injury lawsuits heard together by the same jury.[12] Each plaintiff's personal injury lawsuit necessarily involves individualized factual

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[11] This analysis categorizes plaintiffs as related or unrelated. For simplicity, and to avoid confusion, multiple claims by related plaintiffs, such as a spouse or other relative asserting a claim arising out of the same product purchase, use or incident, are included in the accompanying table under a single plaintiff's name.

[12] *See, e.g.*, Bower v. Wright Med. Tech. Inc., No. 2:17-cv-03178, 2019 WL 3947088, at *3 (C.D. Cal. Aug. 19, 2019); Rubio v. Monsanto Co., 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016).

and legal questions that arise from their own unique circumstances, including alleged exposures to the product that "differ in intensity and duration," varied uses or misuses of the product, "different medical histories and preexisting risk factors," different doctors and treatment, and different alleged types or extent of injuries.[13] Combining these individual lawsuits in a joint trial creates significant risks of juror confusion, bias, and consideration of prejudicial "spill-over" evidence.

A. Juror Confusion

The differences among unrelated plaintiffs' personal injury claims can confuse jurors by conflating dissimilar claims and evidence and by overloading jurors with information. Jurors may improperly rely upon information relevant to one plaintiff's claims but not another's, which can bolster comparatively weaker claims merely by association with a stronger plaintiff's case. This confusion can result in unfair prejudice from the so-called "perfect plaintiff problem" where jurors "combin[e] the strongest aspects of unrelated claims" into a composite that does not reflect reality.[14]

B. Juror Bias

Juror bias can occur in several ways. When presented with multiple plaintiffs claiming injury from the same product, jurors may improperly *assume* that a defendant did something wrong, that the product is defective, or that the product can cause the harm alleged, even when overwhelming evidence contradicts this assumption.[15] Consequently,

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[13] *See* James M. Beck, *Little in Common: Opposing Trial Consolidation in Product Litigation*, 53 DRI FOR THE DEF. 28, 33 (Sept. 2011) ("No two mass tort plaintiffs are alike. Even if they suffer similar injuries, they will have exposures that differ in intensity and duration. They will have different medical histories and preexisting risk factors.").

[14] *See* Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829, 835, 837 (Miss. 2005) (citing Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 343-45 (4th Cir. 1998) (ordering severance of asbestos exposure claims because "there is a danger of defendants being prejudiced").

[15] *See* David B. Sudzus et al., *More Plaintiffs, More Problems: The Prejudice of Multi-Plaintiff Trials*, 15 IN-HOUSE DEF. Q. 20 (Winter 2020).

consolidation risks a jury finding against a defendant based on strength in numbers of plaintiffs alone or other improper considerations unrelated to the actual merits of each plaintiff's individual claims.[16] Further, hearing evidence of multiple plaintiffs' alleged wrongdoing in a single trial can generate greater juror animosity against defendants, leading to higher awards that may include the imposition of punitive damages, than if the cases were tried separately.

C. Prejudicial Spill-Over Evidence

A joint trial can further result in a jury considering evidence presented by one plaintiff that clearly would be inadmissible in another plaintiff's case.[17] For example, the very fact that other lawsuits exist is generally inadmissible, but a jury would necessarily hear allegations of multiple other lawsuits in a consolidated trial.[18] Other evidence, such as a defendant's subsequent remedial measures or state of knowledge of product risks at specific times, may be admitted for one plaintiff but not others, allowing the "wrong evidence considered for the wrong plaintiff."[19]

Courts have long recognized that these concerns regarding joint trials are well-founded, "mak[ing] it more likely that a defendant will be found liable and [that the trial] results in significantly higher damage awards."[20] These effects have been shown in previous studies of multi-plaintiff trial outcomes.[21]

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[16] *See In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 211 (Tex. 2004).

[17] *See, e.g.*, Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993) (finding in a joint trial involving two unrelated plaintiffs that "the potential for prejudice resulting from a possible spill-over effect of evidence . . . was obvious").

[18] *See, e.g.*, Davenport v. Goodyear Dunlop Tires N. Am., Ltd., No. 1:15-cv-03752-JMC, 2018 WL 833606, at *3 (D. S.C. Feb. 13, 2018) ("Evidence of other lawsuits . . . is inadmissible under [Federal Evidence] Rule 403. . . . Evidence of other lawsuits is likely to confuse and mislead the jury . . . and it is highly prejudicial." (quoting *In re* Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., No. 2:12-MD-02327, 2014 WL 505234, at *6 (S.D.W. Va. Feb. 5, 2014))).

[19] Sudzus et al., *supra* note 15, at 20.

[20] Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

[21] *See* Beisner et al., *supra* note 5, at 12-13 (finding that joinder may cause jurors to confuse the evidence, and that when four or more plaintiffs are joined, it is more

In the 1990s, when courts confronted mass tort claims related to industrial uses of products such as asbestos, several courts initially embraced consolidated trials as a potential means to more efficiently manage crowded dockets.[22] Over time, however, courts increasingly recognized problems with multi-plaintiff trials, both with respect to the fair and impartial administration of justice and with respect to any purported efficiency gain.[23]

As a result, the clear trend over the past several decades has been to bar or sharply limit multi-plaintiff trial consolidation. Several jurisdictions have adopted general restrictions on trial consolidation.[24] In addition, a number of states specifically ban the consolidation of cases alleging injury from exposure to asbestos unless the parties consent or the claims relate to members of the same household.[25]

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likely the jury will be confused by the evidence, find in favor of the plaintiffs, and give a higher award to each plaintiff); Ableman et al., *supra* note 6, at 8 (stating that "consolidation creates a pro-plaintiff bias in the jury's consideration of damages").

[22] *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Trial Judges of America: Help the True Victims of Silica Injuries and Avoid Another Litigation Crisis*, 28 AM. J. TRIAL ADVOC. 296, 326-27 (2004) ("[Consolidation] was initially appealing, and seemed logical . . . . Unfortunately, in lowering the barriers to litigation, courts unintentionally encouraged the filing of more claims.").

[23] *See* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 108 (2013) (recognizing that claims aggregation practices "raised concerns regarding due process issues"); Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455, 1477 (2015) ("For old-school aggregationists who have begun a process of rethinking (or re-education about) the virtues of aggregation, perhaps a good starting point is an appreciation of the fact that—contrary to received wisdom—it is not impossible to adjudicate large-scale dispersed litigation on an individualized basis.").

[24] *See* GA. CODE ANN. § 9-11-42(a) (requiring parties' consent to consolidation); LA. CODE CIV. PROC. ANN. art. 1561(B) (disallowing joinder if it will "[c]ause jury confusion, [p]revent a fair and impartial trial, [g]ive one party an undue advantage, [or] [p]rejudice the rights of any party"); MISS. R. CIV. P. 20 Advisory Committee Note (requiring "a distinct litigable event linking the parties"); Prohibition on "Bundling" Cases, Michigan Supreme Court Administrative Order No. 2006-6 (Aug. 9, 2006) ("The Court has determined that trial courts should be precluded from 'bundling' asbestos-related cases for settlement or trial."); MO. ANN. STAT. § 507.040(1) (West 2019).

[25] *See* Standing Order No. 1 at 67, *In re* Asbestos Litig., No. 77C-ASB-2 (Del. Super Ct. Oct. 13, 2006) ("Each asbestos action filed hereafter shall consist of one plaintiff . . . ."); GA. CODE ANN. § 51-14-11 (2007); IOWA CODE § 686B.7(4)(a) (2017); KAN. STAT. ANN. § 60-4902(j); N.D. CENT. CODE ANN. § 32-46.2-06(4) (2021); OHIO

Nevertheless, plaintiffs' lawyers have remained dogged in seeking consolidated trials. They likely recognize the potential for a multi-plaintiff trial to drive a more favorable litigation outcome in a manner untethered to individual claims' merits. The table in the Appendix below contains case examples where they were successful in persuading a court to hold a multi-plaintiff product injury trial.

IV. Analysis

The Appendix lists forty-two cases in which a court authorized a multi-plaintiff product injury trial and the case proceeded to a jury verdict. These cases included as few as two unrelated plaintiffs and as many as twenty-seven. They involved a range of products, including earplugs, dust masks, talcum powder, grout sealer, glyphosate, fungicide, PCBs, lead paint, tobacco, and various prescription drugs and medical devices. The trial outcomes ranged from defense verdicts on one end to two plaintiffs' verdicts exceeding $1 billion on the other, one of which far surpassed all other plaintiffs' verdicts at $4.69 billion.[26]

Despite differences in the number of plaintiffs, products at issue, and trial outcomes, the data reveal a number of remarkable similarities. Below are five key takeaways.

1. Multi-Plaintiff Trials Resulted in High Success Rates for Plaintiffs

Juries returned a plaintiffs' verdict in thirty-six of the forty-two cases contained in the data set, reflecting an 85.7% success rate. A defense verdict was reached in five of the cases and the jury deadlocked in another case, resulting in a mistrial.[27]

Some of the plaintiffs' verdicts were not total victories because the jury did not award damages to every plaintiff whose claims were

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REV. CODE ANN. § 42(A)(2); TENN. CODE ANN. § 29-34-306(b) (2012); TEX. CIV. PRAC. & REM. CODE ANN. § 90.009 (2005); W. VA. CODE ANN. § 55-7G-8(d)(1) (2015).

[26] *See infra* Appendix.

[27] *Id.*

consolidated. Nevertheless, in every instance, these partial victories resulted in multi-million dollar verdicts.[28]

This data suggests that multi-plaintiff trials overwhelmingly favor plaintiffs in terms of likelihood of success. One basis for comparison for this observational analysis of multi-plaintiff trials across the United States is to look at trial success rates across the United States. The U.S. Department of Justice (DOJ) has conducted several studies of civil trial success rates in tort cases, finding plaintiff win rates ranging from fifty-one to fifty-three percent.

Specifically, in 1995, the U.S. Department of Justice Bureau of Statistics published a study of tort cases from the nation's seventy-five largest counties, finding plaintiffs won 53% of trials.[29] A follow-up study published in 2004 found that plaintiffs won 51.6% of trials across all tort cases but had significantly lower success rates in product liability cases (44.2%).[30] Another study published in 2008 similarly found that plaintiffs won 51.6% of trials across all tort cases, except that plaintiffs had a slightly higher success rate in product liability cases alleging injury from exposure to asbestos (54.9%) and a substantially lower success rate (19.6%) for other product liability cases.[31]

None of these benchmarks approaches the plaintiffs' success rate seen in the multi-plaintiff trial data. Although these DOJ-reported trial success rates are imperfect benchmarks, it is unlikely the gap between the trial success rates for plaintiffs can be fully explained by chance alone. Rather, it appears trial consolidation augments litigation outcomes in plaintiffs' favor, even if other factors are at work.

This data also closely comports with earlier studies of multi-plaintiff trials. The previously referenced 2019 study of all MDL product liability trials during a ten-year period found that plaintiffs won more than 78% of the time in multi-plaintiff MDL trials, compared to less than 37% in

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[28] *Id.*

[29] Steven K. Smith et al., *Special Report: Tort Cases in Large Counties*, U.S. Dep't of Just., Bureau of Just. Stat., NCJ-153177 (Apr. 1995), at 1, 5.

[30] Thomas H. Cohen & Steven K. Smith, *Bulletin: Civil Trial Cases and Verdicts in Large Counties, 2001*, U.S. Dep't of Just., Bureau of Just. Stat., NCJ-202803 (Apr. 2004), at 4.

[31] Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, U.S. Dep't of Just., Bureau of Just. Stat., NCJ-223851 (Oct. 2008), at 4.

single-plaintiff MDL trials.[32] The referenced NYCAL study found that plaintiffs alleging injury from exposure to asbestos won 88% of the time in a consolidated trial compared to 50% in individual trials.[33]

As a practical matter, it may make sense that trial success rates for plaintiffs and defendants would hover around 50%. Only a small percentage of cases proceed to trial, with the inability of parties to reach a settlement providing a common reason. Failure to settle is often the product of each side having widely divergent positions and believing they have a strong case and will prevail in a trial. But, if plaintiffs can expect a far greater probability of success if the claims of multiple unrelated plaintiffs are heard together in a joint trial, it turns consolidation into a prize for plaintiffs to unbalance the playing field unrelated to claims' merits.

2. Most Multi-Plaintiff Trials Resulted in Large Verdicts

Equally as stark as plaintiffs' success rates in multi-plaintiff trials were the amounts of the verdicts. They included some of the largest tort awards in the nation over the past two decades. The data showed that 32 of the 36 cases in which plaintiffs prevailed (88.9%) resulted in a total verdict of $10 million or more, 25 (69.4%) resulted in a total verdict of $20 million or more, and 19 (52.8%) resulted in a total verdict of $50 million or more.[34]

There were also multiple nine-figure verdicts. Fifteen of the cases (41.7%) resulted in a total verdict of $100 million or more, seven (19.4%) resulted in verdict of $200 million or more, and five (13.9%) resulted in a verdict of $500 million or more. In addition, two cases (5.6%) resulted in a total verdict of $1 billion or more.[35]

These large total verdicts, in turn, produced large awards on a per plaintiff basis (calculated by dividing the total verdict by the number of non-settling unrelated plaintiffs). Twenty-seven of the 36 cases in which plaintiffs prevailed (75%) resulted in an average per plaintiff award of

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[32] *See* Beisner et al., *supra* note 5, at 2.

[33] Ableman et al., *supra* note 6, at 1-2.

[34] *See infra* Appendix.

[35] *Id.*

$5 million or more, 25 (69.4%) resulted in an average per plaintiff award of $10 million or more, and 19 (52.8%) resulted in an average per plaintiff award of $20 million or more.[36]

A significant portion of plaintiffs included in this group obtained even larger average awards. Thirteen of the cases (36.1%) resulted in average per plaintiff awards of $30 million or more, nine (25%) resulted in average per plaintiff awards of $50 million or more, and five (13.8%) resulted in average per plaintiff awards of $100 million or more.[37]

These awards appear significantly larger than in comparable single-plaintiff product injury trials. Although comparisons are challenging with respect to sprawling litigations such as asbestos or ongoing MDLs, a few litigations involving a mix of multi-plaintiff and single-plaintiff trials illustrate the stark disparity.

For example, in an MDL alleging defective combat earplugs, sixteen bellwether trials were held. Fourteen of these trials involved a single plaintiff. The plaintiff prevailed in eight of these trials, and the jury returned a defense verdict in six of them. Four of the eight successful plaintiffs recovered $8.2 million or less. One recovered approximately $13 million. Two other plaintiffs recovered substantial awards of $50 million and $77.5 million, respectively.[38] In other words, six of the plaintiffs in single-plaintiff trials recovered nothing, another six recovered up to around $13 million, and the remaining two recovered extraordinary awards.

By comparison, in the two multi-plaintiff trials listed in the Appendix, plaintiffs prevailed in both cases and recovered more than $117 million, resulting in an average per plaintiff award of $23.4 million.[39]

Another example is the Pinnacle® hip implant litigation, which—like the earplug litigation—has largely concluded via mass settlement.[40] Four of the MDL cases were tried to verdict before settlement: one in a single-

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[36] *Id.*

[37] *Id.*

[38] Jerin Jose Nesamony, *3M Earplugs Lawsuit Settlement Update 2024: What's New?*, LEZDO TECHMED (Sept. 4, 2024), https://www.lezdotechmed.com/blog/3m-earplug-lawsuit (providing summary chart of Bellwether verdicts).

[39] *See infra* Appendix.

[40] *See* Conor Hale, *J&J's Pinnacle Hip Settlements Total About $1B: Bloomberg*, FIERCE BIOTECH (May 8, 2019, 10:25 AM), https://www.fiercebiotech.com/medtech/j-j-s-pinnacle-hip-settlement-total-tops-1-billion-bloomberg.

plaintiff trial and the others in multi-plaintiff trials.[41] The single-plaintiff trial resulted in a defense verdict.[42] The three multi-plaintiff trials listed in the Appendix resulted in verdicts of $247 million, $502 million, and $1.04 billion, with an average per-plaintiff award of more than $105 million.[43]

Other bases of comparison show similarly sharp differences. The DOJ Bureau of Statistics studies discussed above produced comparisons across different types of product injury cases. The 2004 study reported a median award of $450,000 to a prevailing plaintiff in a product liability action, with a significantly higher median award of $1.65 million in cases alleging injury from exposure to asbestos.[44] The study also reported a median award of $2 million in successful product liability actions claiming wrongful death.[45] The 2008 study reported a median award of $567,000 to a prevailing plaintiff in a product liability action, with a higher median award of $682,000 in cases alleging injury from exposure to asbestos.[46]

Even adjusting for inflation, these amounts do not approach the verdicts seen in multi-plaintiff trials. More recent data reported by the Insurance Information Institute pegged the median award in a product liability action in 2020 at $3.9 million.[47] By way of comparison, the median award for prevailing plaintiffs in the Appendix is approximately $56.8 million. The median per plaintiff award is about $20.6 million.[48]

Another basis for comparison is the sheer number of multi-plaintiff trial verdicts totaling $100 million or more. A 2022 study of 1,376 jury verdicts of $10 million or more in personal injury and wrongful death

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[41] *See Johnson & Johnson Wins First DePuy Pinnacle Hip Implant Trial*, POPE MCGLAMRY ATTORNEYS AT LAW, https://www.pmkm.com/johnson-johnson-wins-first-depuy-pinnacle-hip-implant-trial (last visited Sept. 21, 2024) [hereinafter *Johnson & Johnson Wins*] (stating that Johnson & Johnson won against a single plaintiff); *see also* Appendix (detailing in part the results of multi-plaintiff hip implant trials).

[42] *Johnson & Johnson Wins*, *supra* note 41.

[43] *See infra* Appendix.

[44] *See* Cohen & Smith, *supra* note 30, at 5.

[45] *See id.* at 10.

[46] *See* Langton & Cohen, *supra* note 31, at 5.

[47] *Facts + Statistics: Product Liability*, INS. INFO. INST., https://www.iii.org/fact-statistic/facts-statistics-product-liability (last visited Sept. 19, 2024).

[48] *See infra* Appendix.

cases between 2010 and 2019 identified 101 verdicts nationally totaling more than $100 million.[49] The data set in the Appendix below includes fifteen cases in which a jury awarded $100 million or more.[50]

The data also included two cases with verdicts exceeding $1 billion. In 2016, a jury awarded $1.04 billion to six plaintiffs in one of the Pinnacle® hip implant trials referenced, and in 2018, a jury awarded $4.69 billion to twenty-two plaintiffs alleging injury from exposure to asbestos in talcum powder.[51] These awards also produced average awards of $173 million and $213 million per plaintiff. By comparison, the same 2022 study of large jury verdicts identified nine total verdicts exceeding $1 billion over a ten-year period across all personal injury and wrongful death cases.[52]

Based on these comparisons, it appears reasonably clear that the consolidation of unrelated plaintiffs' product injury claims for a joint trial plays a role in the large total and per-plaintiff verdicts seen in so many of the cases. The potential for consolidation—a procedural device that has nothing to do with claims' merits—to have *any* impact on a trial's outcome by inflating verdicts provides reason enough for courts to reject the practice.

3. Numerous Juries Awarded Identical or Similar Amounts to Dissimilar Plaintiffs in the Same Case

More than one-third of the verdicts in the thirty-six cases in which plaintiffs prevailed raise an eyebrow because the jury awarded unrelated plaintiffs identical, or nearly identical, damages. Such awards may evidence juror confusion or bias, or both, because the jury, after hearing different evidence pertaining to each plaintiff's unique claims, resolved to treat these dissimilar plaintiffs the same, or virtually the same, when determining liability and awarding damages.

The first two cases listed in the Appendix illustrate this concern. In the first case, the jury awarded $100 million to ten unrelated plaintiffs

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[49] Cary Silverman & Christopher E. Appel, *Nuclear Verdicts: Trends, Causes, and Solutions,* 6, 8-9 (U.S. Chamber of Com., Inst. for Legal Reform, Sept. 2022).

[50] *See infra* Appendix.

[51] *See infra* notes 103 & 105 and accompanying text.

[52] Silverman & Appel, *supra* note 49, at 8-9.

alleging injury from a pharmaceutical product, with each plaintiff being awarded an identical $10 million.[53] In the second case, the jury awarded $150 million to six unrelated plaintiffs, alleging that respirators failed to provide adequate protection, with each plaintiff being awarded an identical $25 million.[54]

In another case, *Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., Inc.*, the jury awarded $113,486,696 split equally among twenty-seven plaintiffs alleging injuries from a fungicide used to protect crops from pests and disease.[55] In the case involving the largest plaintiffs' verdict in the data set, *Ingham v. Johnson & Johnson*, the jury split a $4.69 billion award equally among twenty-two plaintiffs alleging injuries from exposure to asbestos in talcum powder.[56] The plaintiffs included individuals who passed away from ovarian cancer, individuals who were undergoing treatment, and those whose cancer was in remission, each of whom had vastly different family histories of cancer and were "exposed to different amounts of [talcum powder], from different sources, during different time periods."[57] Even so, each plaintiff was awarded $213.18 million, with the identical awards comprising $25 million in compensatory damages and $188.18 million in punitive damages.[58]

Other verdicts involving nearly identical damage awards appear similarly suspect. For example, in *Eghnayem v. Boston Scientific Corp.*, the jury awarded $26,788,887 to four unrelated plaintiffs alleging injuries from an implanted medical device—surgeries necessarily unique to each plaintiff—with two plaintiffs being awarded identical damages of $6,722,222 and the two other plaintiffs being awarded similar sums of $6,533,333 and $6,766,666.[59] In *Andrews v. DePuy Orthopaedics, Inc.*, the jury awarded $1.04 billion to six unrelated plaintiffs who alleged hip

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[53] *See infra* note 80 and accompanying text.

[54] *See infra* note 81 and accompanying text.

[55] 48 So. 3d 976, 980-81, 983 (Fla. Dist. Ct. App. 2010); *see infra* note 83 and accompanying text.

[56] *See infra* note 105 and accompanying text.

[57] *See* Brief of Appellants at *24-25, Ingham v. Johnson & Johnson, No. ED 107476, 2019 WL 4696636 (Mo. Ct. App. Sept. 6, 2019) (discussing differences among plaintiffs).

[58] *See infra* note 105 and accompanying text.

[59] *See infra* note 100 and accompanying text.

implant injuries, with each plaintiff's award falling within the narrow range of $172 million to $174 million.[60]

Similarly, in *Barden v. Brenntag North America, Inc.*, which resulted in one of the largest verdicts on a per plaintiff basis, the jury awarded $787.3 million to four unrelated plaintiffs, alleging injury from exposure to asbestos in talcum powder, with each award falling within a narrow range. The jury awarded plaintiffs amounts of $193.4 million, $194.75 million, $196.95 million, and $202.2 million.[61]

In several of the cases involving identical or nearly identical verdicts, the verdict was ultimately vacated because joinder or consolidation of the unrelated plaintiffs' claims for trial was found improper. With respect to the first two cases listed in the Appendix and discussed above, the Mississippi Supreme Court specifically held in reviewing each case that "the identical amounts of damages awarded to each plaintiff," given each plaintiff's unique circumstances, demonstrated improper joinder.[62] Similarly, in *Agrofollajes*, the Florida District Court of Appeals found consolidation improper because, "[d]espite the diverse experiences of the twenty-seven plaintiffs, all were awarded the same exact percentage of their claimed damages," which resulted in the jury awarding "identical damages."[63] These decisions underscore what many other courts have long appreciated, namely that "confusion and prejudice is manifest in the identical damages awarded."[64]

4. Post-Trial Reversal or Modification of Plaintiffs' Verdicts Undercuts Trial Accuracy and Efficiency Claims

Most of the plaintiffs' verdicts from a multi-plaintiff trial did not withstand post-trial and appellate court scrutiny. The very different final case outcomes appear to undercut claims that consolidated trials produce

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[60] *See infra* note 103 and accompanying text.

[61] *See infra* note 108 and accompanying text.

[62] 3M Co. v. Johnson, 895 So. 2d 151, 159 (Miss. 2005); Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31, 48 (Miss. 2004).

[63] Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co., 48 So. 3d 976, 988 (Fla. Dist. Ct. App. 2010).

[64] Cain v. Armstrong World Indus., 785 F. Supp. 1448, 1455 (S.D. Ala. 1992).

correct outcomes as well as the principal rationale of judicial economy that has been used to justify holding a joint trial.

In eleven of the thirty-six cases in which plaintiffs prevailed at trial (30.6%), the trial court reduced or reversed the verdict, most often by remittitur.[65] Although remittitur standards vary by jurisdiction, remittitur is generally reserved for "the unusual case in which the jury's award is so patently excessive, so pervaded by a sense of wrongness, that it shocks the judicial conscience."[66] In addition, the trial court was required in several cases (separate from the eleven noted above) to reduce the verdict pursuant to state statutes placing maximum limits on noneconomic or punitive damage awards.[67]

In ten of the cases in which plaintiffs prevailed at trial (27.8%), an appellate court vacated or otherwise reversed the judgments in their entirety. In several other cases, an appellate court partially reversed damage awards or reduced the awards. Sometimes, the appellate court further reduced awards that had already been reduced by the trial court.[68]

In total, only five verdicts (13.9%) appeared to survive post-trial and appellate court scrutiny unscathed where the data was available. That figure may also be inflated because in several of the cases, there was no appellate court scrutiny due to a post-trial settlement. In eight of the more recent cases, an appeal is pending, so the data is not available to know whether the verdict withstands appellate court scrutiny.[69]

The reality that so few multi-plaintiff verdicts remain unchanged raises questions about the claimed accuracy and efficiency of a multi-plaintiff trial, especially when compared to the countervailing fairness concerns discussed. To be sure, verdicts were reversed or reduced for a variety of reasons, including reasons unrelated to trial consolidation,[70] but the

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[65] *See infra* Appendix.

[66] Cuevas v. Wentworth Grp., 144 A.3d 890, 893 (N.J. 2016).

[67] *See infra* Appendix.

[68] *Id.*

[69] *Id.*

[70] *See, e.g.*, Barden v. Brenntag N. Am., Inc., Nos. A-0047-20, A-0048-20, A-0049-20, A-0050-20, 2023 WL 6430088, at *2 (N.J. Super. Ct. App. Div. Oct. 3, 2023) (reversing and remanding because the trial court erroneously admitted expert testimony).

overall takeaway from the data is that multi-plaintiff trials are prone to modification for excessive verdicts and reversible error.

When awards are reversed, it means judicial time and resources were exhausted in the pursuit of an improper trial. For multi-plaintiff trials, this may entail lost weeks or even months of time for the court, jurors, and parties. The greater inherent complexity of a joint trial also likely entails greater lost time and resources than a single-plaintiff trial, although the limited information available for many cases here did not permit an in-depth analysis of multi-plaintiff trial times. At the very least, however, the data shows no observable efficiency gain that might support a trial court's decision to hold a joint trial.

5. Consolidated Multi-Plaintiff Product Injury Trials Are Rarely Held

The fact that the data set consists of only forty-two multi-plaintiff cases tried to verdict over the course of two decades is noteworthy in itself. It suggests many courts are attune to the concerns discussed about unfair prejudice resulting from joint trials and exercise restraint or skepticism toward procedural mechanisms that risk distorting trial outcomes.

Courts across the nation have expressed various rationales when rejecting a multi-plaintiff product injury trial. For example:

- "It would be practically impossible for a jury to keep track of all of the facts and applicable law regarding each of the [numerous] Plaintiffs," and therefore, "the purpose behind [consolidation]—to enhance judicial economy—would not be furthered by allowing all of the Plaintiffs to join together in a single action and single trial."[71]
- "[C]onsolidation risks the jury finding against a defendant based on sheer numbers, on evidence regarding a different plaintiff, or out of reluctance to find against a defendant with regard to one plaintiff and not another."[72]

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[71] Adams v. Alliant Techsystems, Inc., No. 7:99CV00813, 2002 WL 220934, at *2 (W.D. Va. Feb. 13, 2002).

[72] *In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 211 (Tex. 2004).

> •"[L]itigation of . . . claims will involve extensive medical evidence that is sure to vary across plaintiffs . . . . Accordingly, the nature and extent of [the] defendants' liability will be unique to each plaintiff. The same is true for damages."[73]
>
> •"Joinder 'of several plaintiffs who have no connection to each other *in no way* promotes trial convenience or expedites the adjudication of asserted claims.'"[74]
>
> •"[T]he risks of prejudice and juror confusion substantially outweigh the benefits of consolidating . . . .[,] [a]lthough there are many overlapping witnesses and some common issues of law and fact . . . ."[75]

It is possible, of course, that the research challenges discussed of identifying more case examples proved too formidable, although several considerations suggest otherwise. First, the variety of research approaches used, including formal legal research and informal communications with practitioners, would appear likely to capture a greater swath of cases, or at least point in the direction of more examples, if multi-plaintiff trial consolidation was more commonplace in product injury cases. Instead, these efforts, which included surveying the memberships of major organizations (whose members are most likely involved in or aware of such cases), only reinforced how uncommon multi-plaintiff product injury trials appear to be throughout the United States.

Second, studies that have examined multi-plaintiff trial outcomes illustrate how rare these joint trials are. Two studies drawn upon to develop the data set here—one study examining all federal court MDL multi-plaintiff product liability trials over a ten-year period and another examining NYCAL multi-plaintiff trials over a five-year period—each identified only seven case examples.[76] The twenty-eight additional cases included in this analysis represents a sizable increase compared to these other studies, but the net was cast far wider to include the entire nation, and the duration extended beyond two decades.

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[73] Ellis v. Evonik Corp., 604 F. Supp. 3d 356, 378 (E.D. La. 2022).

[74] *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 146 (S.D.N.Y. 2001) (emphasis added) (quoting *In re* Diet Drugs, No. Civ. A. 98-20478, 1999 WL 554584, at *3 (E.D. Pa. July 16, 1999)).

[75] Bowles v. Novartis Pharms. Corp., Nos. 3:12-cv-145, 3:12-cv-238, 2013 WL 663040, at *2 (S.D. Ohio Feb. 25, 2013).

[76] Beisner et al., *supra* note 5, at 2; Ableman et al., *supra* note 6, at 6.

Third, the rarity of multi-plaintiff product injury trials is supported by the lack of legal scholarship discussing case examples. A number of articles have examined the fundamental fairness concerns regarding consolidated product injury trials, yet most cite only a few examples.[77]

The relative scarcity of multi-plaintiff product injury cases tried to verdict also did not appear to be from lack of effort by plaintiffs' lawyers. In researching cases to potentially include in the Appendix, it appeared clear that courts were often asked to consolidate product injury cases for trial and often rejected the request in light of concerns about jury confusion, bias, and unfair prejudice.[78]

Conclusion

This analysis of multi-plaintiff product injury trial outcomes indicates that joint trials are relatively rare, for good reasons. Plaintiffs overwhelmingly win, and win big, in multi-plaintiff trials because aggregation outcomes often are not reflective of the individual claims. For that reason, these verdicts often do not withstand post-trial and appellate court scrutiny. Some of the verdicts are so large, and so similar among multiple plaintiffs of dissimilar circumstances, that it is hard to see how juror confusion or bias did not play a role. Each of these observations lends additional support to concerns that have been voiced by courts, and in other analyses, regarding the risks that a multi-plaintiff product injury trial will substantially prejudice defendants and deny due process. As a federal appellate court explained forty years ago when rejecting a joint trial, "considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice."[79] That concern appears manifest in the multi-plaintiff trials conducted over the past two decades.

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[77] *See, e.g.*, Sudzus et al., *supra* note 15, at 20; Beck, *supra* note 13, at 31.

[78] *See, e.g.*, Rosewolf v. Merck & Co., Inc., Nos. 22-cv-02072-JSW, 22-cv-02263-JSW, 2022 WL 3214439, at *2-*4 (N.D. Cal. Aug. 9, 2022); Levi v. DePuy Synthes, No. 19L-10969 (Cir. Ct., Cook Cnty., Ill. Nov. 14, 2022); Bower v. Wright Med. Tech. Inc., No. 2:17-cv-03178-CAS, 2019 WL 3947088, at *3 (C.D. Cal. Aug. 19, 2019); Wanke v. Invasix, Inc., No. 2:19-cv-02978-RGK-KS, 2019 WL 7997250, at *3 (C.D. Cal. Aug. 7, 2019).

[79] Arnold v. E. Air Lines, Inc., 712 F.2d 899, 906 (4th Cir. 1983) (citing Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir. 1976)).

Appendix

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2001	Bailey v. Janssen Pharm. Inc.[80]	Pharma-ceutical (Propulsid)	10	**$100 million award** split among ten plain-tiffs ($10 million each).	Award reversed on appeal – improper joinder of claims.
2001	Johnson v. 3M Co.[81]	Dust Mask /Respirator	10 pre-trial (6 at time of verdict)	**$150 million award** split among six plain-tiffs remaining at time of verdict ($25 million each).	Award reversed on appeal – improper joinder of claims.
2004	*In re* New York Asbestos Litig. (Marshall & Mayer)[82]	Asbestos	2	**$22 million award** split between two plaintiffs – $14 million (Mayer) and $8 million (Marshall).	Trial court approved remittitur of award to $4.5 million (Mayer) & $3 mil-lion (Marshall).
2006	Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co.[83]	Fungicide	27	**$113,486,696 award** split equally among 27 plaintiffs.	Trial court entered defense verdict with respect to seven plaintiffs; awards of 20 other plaintiffs reversed on appeal.
2006	Goforth & Quinn v. Lin-coln Elec. Co.[84]	Manga-nese in welding fumes	2	**Defense verdict.**	

[80] No. 2000-20 (Miss. Cir. Ct.-Jeff. Cnty), *rev'd*, 878 So. 2d 31 (Miss. 2004).

[81] No. 2000-181 (Miss. Cir. Ct.-Holms Cnty.), *rev'd*, 3M Co. v. Johnson, 895 So. 2d 151 (Miss. 2005).

[82] Nos. 119369/02, 590192/02 (N.Y. Sup. Ct. N.Y. Cnty.), *modified*, 812 N.Y.S.2d 514 (N.Y. App. Div. 2006).

[83] Super Helechos, S.A. v. E.I. Du Pont De Nemours & Co., Nos. 01-06932, 01-23796 (Fla. Cir. Ct. 2006), *rev'd*, Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., 48 So. 3d 976 (Fla. Dist. Ct. App. 2010), *rev. denied*, 69 So. 3d 277 (Fla. 2011); *see also* Super Helechos S.A., 2006 WL 1889335 (Fla Cir. Ct. 2006) (verdict summary).

[84] Nos. 1:06-CV-17217, 1:06-CV-17218 (N.D. Ohio) (MDL 1535); Beisner et al., *supra* note 5, at 12 (reporting trial outcome).

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2007	Humeston & Hermans v. Merck & Co.[85]	Pharma-ceutical (Vioxx)	2	**$47.5 million award** to prevailing plaintiff (Humeston) following split verdict in joint trial on negligence.	Global settlement reached.
2007	McDarby v. Merck & Co., Inc.[86]	Pharma-ceutical (Vioxx)	2	**$17.97 million award** split between two plaintiffs – $15.7 million (McDarby) and $2.27 million (Cona).	Compensatory damages award of $4.5 million (McDarby) affirmed, and awards of punitive damages and attorney fees reversed on appeal.
2007	Casale v. A.O. Smith Water Prods. Co. / Rosenberg v. Alpha Wire Co.[87]	Asbestos	2	**$9 million award** split between two plaintiffs – $5 million (Casale) and $4 million (Rosenberg).	Unclear.
2008	Sager v. Hoffman-La Roche, Inc.[88]	Pharma-ceutical (Accutane)	3	**$12,895,500 award** split among three plaintiffs – $8,642,500 (Speisman), $2,625,000 (Sager), and $1,628,000 (Mace).	Trial court remitted $1,628,000 award (Mace) to $578,000. Plaintiffs' judgments reversed on appeal.
2010	Bell v. Roanoke Cos. Grp., Inc.[89]	Grout sealer	5	**Defense verdict.**	

[85] Nos. L-2271-03, L-5520-05 (N.J. Super. Ct.-Atl. Cnty.); *see also NJ Jury Splits Negligence Findings in Dual Vioxx Trial*, 10 No. 10 ANDREWS DRUG RECALL LITIG. REP. 2 (2007); 23 No. 2 Andrews Pharm. Litig. Rep. 2 (2007).

[86] Nos. L-3553-05-MT, L-1296-05-MT (N.J. Super. Ct.-Atl. Cnty.), *rev'd in part*, 949 A.2d 223 (N.J. Super. Ct. App. Div. 2008).

[87] Nos. 104299/06, 106697/06 (N.Y. Sup. Ct.); *see also* 2007 Jury Verdicts LEXIS 41538.

[88] Nos. L-197-05, L–196-05, L-199-05 (N.J. Super. Ct.-Atl. Cnty.), *remanded*, 2012 WL 967626 (N.J. Super. Ct. App. Div. Mar. 23, 2012), *opinion after remand*, 2012 WL 3166630 (N.J. Super. Ct. App. Div. Aug. 7, 2012), *cert. denied*, 65 A.3d 835 (N.J. 2013).

[89] No. 1:07-cv-00687 (N.D. Ga.) (MDL 1804); Beisner et al., *supra* note 5, at 12 (reporting trial outcome).

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2011	*In re* New York City Asbestos Litig. (Konstantin & Dummitt)[90]	Asbestos	7 pre-trial (2 at time of verdict)	**$51,550,157 award** split between two non-settling plaintiffs – $32 million (Dummitt) & $19,550,157 (Konstantin).	Parties stipulated to reduced damages award and judgment affirmed on appeal.
2011	*In re* New York City Asbestos Litig. (Koczur & McCarthy)[91]	Asbestos	2	**$21,150,000 award** split between two plaintiffs – $13.65 million (Koczur) and $8.5 million (McCarthy).	Trial court approved remittitur of $13.65 million award to $6.5 million (Koczur) and sustained $8.5 million award (McCarthy).
2011	Gaghan v. Hoffman-La Roche Inc.[92]	Pharmaceutical (Accutane)	3	**$2,125,617 award** to one plaintiff (Gaghan) and defense verdict for two others (Greenblatt & Andrews).	Judgment for prevailing plaintiff (Gaghan) reversed on appeal – claim time-barred.
2012	Rossitto v. Hoffman-La Roche Inc.[93]	Pharmaceutical (Accutane)	4	**$18 million award** split between two prevailing plaintiffs (Rossitto & Wilkinson - $9 million each), and defense verdict for two others (Reynolds & Young).	Judgments for prevailing plaintiffs (Rossitto & Wilkinson) vacated on appeal.

[90] Nos. 11498, 11499, 11500, 190134/10, 190196/10 (N.Y. Sup. Ct.-N.Y. Cnty.), *aff'd*, 990 N.Y.S.2d 174 (N.Y. App. Div. 2014), *appeal denied*, 28 N.E.3d 33 (N.Y. 2015); *see also In re* New York City Asbestos Litig. (Dummitt), 59 N.E.3d 458 (N.Y. 2016) (discussing post-trial outcome).

[91] Nos. 122340/99, 122304/99 (N.Y. Sup. Ct.-N.Y. Cnty.); *see also* Konstantin v. 630 Third Ave. Assocs., No. 190134/10, 2012 WL 4748316, at *15 (N.Y. Sup. Ct.-N.Y. Cnty. Sept. 20, 2012); *In re* New York City Asbestos Litig. (Peraica), No. 190339/2011, 2013 WL 6003218 (N.Y. Sup. Ct.-N.Y. Cnty. Nov. 6, 2013) (discussing *Koczur & McCarthy* trial outcome).

[92] Nos. A-2717-11, A-3211-11, A-3217-11 (N.J. Super. Ct.-Atl. Cnty.), *aff'd & rev'd in part*, 2014 WL 3798338 (N.J. Super. Ct. App. Div. Aug. 4, 2014).

[93] Nos. L-7481-10, L-1311-08 (N.J. Super. Ct. Law Div.-Atl. Cnty.), *vacated*, 2016 WL 3943335 (N.J. Super Ct. App. Div. July 22, 2016), *cert. denied*, 157 A.3d 839 (N.J. 2016) (Wilkinson) & 157 A.3d 841 (N.J. 2016) (Rossitto).

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2012	*In re* New York City Asbestos Litig. (Paolini)[94]	Asbestos	2	**Defense verdict**	
2013	*In re* New York City Asbestos Litig. (Assenzio)[95]	Asbestos	5	**$190 million award** split among five plaintiffs. $30 million (Assenzio), $60 million each to two others (Levy & Serna), and $20 million each to two others (Brunck & Vincent).	Trial court approved remittitur of award to $29.85 million: $6 million (Assenzio), $3.2 million (Brunck), $8.15 million (Levy), $7.5 million (Serna) & $5 million (Vincent).
2013	*In re* New York City Asbestos Litig. (Peraica)[96]	Asbestos	7 pretrial (1 at time of verdict)	**$35 million award** to remaining plaintiff at time of verdict (other plaintiffs settled).	Trial court approved remittitur of award to $18 million, and award reduced further on appeal.
2014	*In re* New York City Asbestos Litig. (Sweberg & Hackshaw)[97]	Asbestos	2	**$25 million award** split between two plaintiffs – $15 million (Sweberg) and $10 million (Hackshaw).	Trial court approved remittitur of award to $16 million: $10 million (Sweberg), $6 million (Hackshaw), and award reduced further on appeal.

[94] Ableman et al., *supra* note 6, at 14 (reporting trial outcome).

[95] *See id.*; Assenzio v. A.O. Smith Water Prods. Co., No. 190008/12, 2015 WL 667907 (N.Y. Sup. Ct.-N.Y. Cnty. Feb. 5, 2015).

[96] *See* Ableman et al., *supra* note 6, at 5, 14 (reporting trial outcome); Peraica v. A.O. Smith Water Prod. Co., 39 N.Y.S.3d 392 (N.Y. App. Div. 2016).

[97] Nos. 190022/13, 190017/13 (N.Y. Sup. Ct.-N.Y. Cnty.), *modified*, 2015 WL 246547 (N.Y. Sup. Ct.-N.Y. Cnty. Jan. 7, 2015), *modified further*, 143 A.D.3d 483 & 143 A.D.3d 485 (N.Y. App. Div. 1st Dept. 2016); *see also* Ableman et al., *supra* note 6, at 5, 14 (reporting trial outcome).

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2014	*In re* New York City Asbestos Litig. (Juni, Fersch & Middleton)[98]	Asbestos	3 pre-trial (1 at time of verdict)	**$11 million award** to remaining plaintiff (Juni) at time of verdict – one plaintiff (Fersch) settled and another (Middleton) discontinued case.	Trial court granted defense motion to set aside verdict, which appellate courts affirmed due to improper expert evidence.
2014	*In re* New York City Asbestos Litig. (McCloskey, Brown & Terry)[99]	Asbestos	3	**$12.5 million award** split among three plaintiffs – $6 million (McCloskey), $3.5 million (Brown), and $3 million (Terry).	Trial court approved remittitur of award.
2014	Eghnayem v. Boston Scientific Corp.[100]	Medical Device (Pelvic mesh)	4	**$26,744,443 award** split among four plaintiffs – $6,722,222 each to two plaintiffs (Eghnayem & Betancourt), $6,533,333 to another (Nunez), and $6,766,666 to another (Dotres).	Judgment affirmed on appeal.
2014	Tyree v. Boston Scientific Corp.[101]	Medical Device (Pelvic mesh)	4	**$18.5 million award** split among four plaintiffs – $4.75 million (Wilson), $4.25 million (Tyree & Campbell), and $5.25 million (Blankenship).	Post-verdict settlement with two plaintiffs. Judgments affirmed on appeal for remaining two plaintiffs.

[98] Nos. 190315/12, 190468/12, 190367/12, 11 N.Y.S.3d 416 (N.Y. Sup. Ct.-N.Y. Cnty.), *aff'd*, 148 A.D.3d 233 (1st Dept. 2017), *aff'd*, 116 N.E.3d 75 (N.Y. 2018); *see also* Ableman et al., *supra* note 6, at 5 (reporting trial outcome).

[99] Nos. 190441/12, 190415/12, 190403/12 (N.Y. Sup. Ct.-N.Y. Cnty.), *modified*, 2014 WL 4311725 (N.Y. Sup. Ct.-N.Y. Cnty. Aug. 29, 2014) (McCloskey), 2014 WL 8509004 (N.Y. Sup. Ct.-N.Y. Cnty. Aug. 29, 2014) (Brown), *aff'd*, 146 A.D.3d 461 (App. Div. 2017); *see also* Ableman et al., *supra* note 6, at 5, 14 (reporting trial outcome); Brief for Defendant-Appellant, *In re* New York City Asbestos Litig. (Konstantin), No. APL-2014-00317, 2015 WL 11120461, at *26 (N.Y. Apr. 24, 2015) (reporting trial outcome of Terry).

[100] Nos. 1:14-cv-024061, 1:14-cv-24064, 1:14-cv-24065, 1:14-cv-24066, 2016 WL 4051311 (S.D. Fla. Mar. 17, 2016), *aff'd*, 873 F.3d 1304 (11th Cir. 2017); *see also* 2014 WL 10356487 (S.D. Fla. Nov. 13, 2014) ("Reading of the Verdict").

[101] Nos. 2:12-cv-08633 (lead case), 2:13-cv-18786, 2:13-cv-22906, 2:14-cv-05475, 2014 WL 10356506 (verdict), 2016 WL 5796906 (S.D. W. Va.), *aff'd sub nom.* Campbell v. Boston Sci. Corp., 882 F.3d 70 (4th Cir. 2018).

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2016	Aoki v. DePuy Orthopaedics Inc.[102]	Medical Device (Hip implant)	5	**$502 million award** split among five plaintiffs – total award comprised of $536,514 in economic damages, $141.5 million in noneconomic damages, and $360 million in punitive damages: $74 million (Aoki), $90 million (Greer), $75 million (Christopher), $92 million (Peterson), and $170 million (Klusmann).	$360 million punitive damages award reduced to $9.6 million pursuant to statutory cap. Remaining judgments reversed and vacated on appeal.
2016	Andrews v. DePuy Orthopaedics, Inc.[103]	Medical Device (Hip implant)	6	**$1.04 billion award** split among six plaintiffs – total award of $28.3 million compensatory damages and $1.008 billion punitive damages: $173.36 million (Andrews), $173.33 million (Davis), $173.27 million (Metzler), $174 million (Rodriguez), $174 million (Standerfer), & $173.28 million (Weiser).	Punitive damage awards ($168 million per plaintiff) reduced by trial court to $36.225 million for each of four plaintiffs (Andrews, Davis, Metzler & Weiser), and to $54.552 million for each of two other plaintiffs (Rodriguez & Standerfer). Global settlement reached while appeal pending.

[102] Nos. 3:13-cv-1071-K, 3:14-cv-1994-K, 3:12-cv-1672-K, 3:11-cv-2800-K, 3:11-cv-1941-K, 2016 WL 4423417 (N.D. Tex.) (MDL 2244) (verdict), *rev'd*, 888 F.3d 753 (5th Cir. 2018).

[103] Nos. 3:11-md-2244-K; 3:15-cv-3484-K; 3:15-cv-1767-K; 3:12-cv-2066-K; 3:13-cv-3938-K; 3:14-cv-1730-K; 3:13-cv-3631-K (N.D. Tex.) (MDL 2244); *see also* Opening Brief of Appellants, *In re* DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig., 2017 WL 3421222, at *31 (5th Cir. July 31, 2017) (providing verdict breakdown).

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2016	Alicea v. DePuy Orthopaedics, Inc.[104]	Medical Device (Hip implant)	6	**$247.49 million award** split among six plaintiffs – total award $79.49 million compensatory damages and $168 million punitive damages: $40.05 million (Alicea), $39.44 million (Barzel), $48.63 million (Kirschner), $44.06 million (Miura), $37.46 million (E. Stevens), & $37.83 million (M. Stevens).	Global settlement reached while appeal pending.
2018	Ingham v. Johnson & Johnson[105]	Talcum powder	22	**$4.69 billion award** split among 22 plaintiffs – total award of $550 million compensatory damages and $4.14 billion punitive damages. Each plaintiff awarded $213.18 million ($25 million compensatory damages & $188.18 million punitive damages).	Damages award reduced on appeal to $1.4 billion against one defendant ($500 million compensatory damages & $900 million punitive damages) and to $840.9 million for co-defendant ($125 million jointly liable compensatory damages & $715.9 million punitive damages).
2018	Gerald & Brown v. R.J. Reynolds Tobacco Co.[106]	Tobacco	2	**$113.3 million award** split between two plaintiffs – $31 million (Gerald) & $82.3 million (Brown).	Punitive damages award of $30 million (Gerald) reduced to $14.4 million, and $70 million compensatory damages award (Brown) vacated on appeal.

[104] Nos. 3:15-cv-03489-K, 3:16-cv-01245-K, 3:16-cv-01526-K, 3:13-cv-04119-K, 3:14-cv-01776-K, 3:14-cv-02341-K (N.D. Tex.) (MDL 2244); *see also* Court's Charge to the Jury & Verdict, *In re* DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig., No. 3:15-cv-03489-K, Doc. 237 (N.D. Tex. Nov. 16, 2017); 2017 LexisNexis Jury Verdicts & Settlements 76.

[105] No. 1522-CC10417-01 (Mo. Cir. Ct.-St. Louis Cty.), *modified*, 608 S.W.3d 663 (Mo. Ct. App. 2020), *cert. denied*, 141 S. Ct. 2716 (2021).

[106] Nos. ST-10-CV-631, ST-10-CV-692 (V.I.), *modified and rev'd in part*, 2022 WL 2528307 (V.I. July 7, 2022).

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2019	Burton v. American Cyanamid Co.[107]	Lead paint	3	**$6 million award** split among three plaintiffs ($2 million each)	Judgments reversed on appeal.
2020	Barden v. Brenntag North Am., Inc.[108]	Talcum powder	4	**$787.3 million award** split among four plaintiffs – total award $37.3 million compensatory damages and $750 million punitive damages. $194.75 million (Barden), $196.95 million (Etheridge), $202.2 million (McNeill), & $193.4 million (Ronnig).	Punitive damages award of $750 million reduced by trial court to $187.5 million (5:1 ratio of punitive-to-compensatory damages for each plaintiff). Judgments reversed on appeal – improper expert evidence.
2021	*In re* 3M Combat Arms Earplug Prods. Liab. Litig. (Estes, Hacker, Keefer)[109]	Earplugs	3	**$7.1 million award** split among three plaintiffs – including $6.3 million in punitive damages split equally per plaintiff.	Appeal voluntarily dismissed.

[107] No. 2:07-cv-00303 (E.D. Wis. June 28, 2019 verdict), *rev'd sub nom.* Burton v. E.I. du Pont de Nemours & Co., Inc., 994 F.3d 791 (7th Cir. 2021); *see also* Cara Salvatore, *Sherwin-Williams, DuPont to Pay Millions in Lead Paint Cases*, LAW360 (June 6, 2019, 7:01 PM EDT), https://www.law360.com/real-estate-authority/articles/1165328/sherwin-williams-dupont-to-pay-millions-in-lead-paint-cases; Mike Curley, *Sherwin-Williams, DuPont Nab Win in Lead Paint Suits*, LAW360 (Mar. 4, 2022, 2:19 PM EST), https://www.law360.com/articles/1470506/sherwin-williams-dupont-nab-win-in-lead-paint-suits.

[108] Nos. L-1809-17, L-0932-17, L-7049-16, L-6040-17 (N.J. Super. Ct. Law Div.), *rev'd*, Nos. A-0047-20, A-0048-20, A-0049-20, A-0050-20, 2023 WL 6430088 (N.J. Super. Ct. App. Div. Oct. 3, 2023); 2020 LexisNexis Jury Verdicts & Settlements 9 (providing verdict breakdown); 2019 Jury Verdicts LEXIS 108655 (also providing verdict breakdown).

[109] No. 3:19-md-02885 (*Estes*, No. 7:20-cv-137, *Hacker*, No. 7:20-cv-131, *Keefer*, No. 7:20-cv-104) (N.D. Fla. Apr. 30, 2021 verdict), *appeal pending*, 3M Co. v. Estes, Nos. 21-13131, 21-13133, 21-13135 (11th Cir.) (oral argument held May 1, 2023); Cara Salvatore, *3M Hit with $7.1M Verdict in Earplug MDL Bellwether Trial*, LAW360 (Apr. 30, 2021, 9:39 PM EDT), https://www.law360.com/articles/1380107/3m-hit-with-7-1m-verdict-in-earplug-mdl-bellwether-trial.

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2021	Forrest v. Johnson & Johnson[110]	Talcum powder	3	**Defense verdict**	
2021	Erickson v. Monsanto[111]	Polychlorinated Biphenyls (PCBs)	3	**$185 million award** – total award comprised of $50 million compensatory damages and $135 million punitive damages. $60 million (Erickson), $63 million (Leahy), & $62 million (Marquardt).	Judgment reversed on appeal – claims barred by statute of repose. Further appeal pending.
2021	Long v. Pharm. LLC[112]	PCBs	3	**$62 million award** to seven plaintiffs, five of whom are related (parent and four children) – total award of $27 million compensatory damages and $35 million punitive damages ($5 million per plaintiff).	Appeal pending.

[110] No. 1522-CC00419-02 (Mo. Cir. Ct.-St. Louis City Sept. 27, 2021) (defense verdict); *see also* Magda Patitsas & Corey Schaecher, *Jury Returns Defense Verdict in Third Post-Pandemic Ovarian Cancer Talc Trial*, JD SUPRA (Oct. 8, 2021), https://www.jdsupra.com/legalnews/jury-returns-defense-verdict-in-third-9687311; David Siegel, *Johnson & Johnson Scores Cosmetic Talc Trial Victory in Missouri*, CVN (Sept. 27, 2021, 10:44 PM), https://blog.cvn.com/breaking-johnson-johnson-scores-cosmetic-talc-trial-victory-in-missouri.

[111] No. 18-2-11915-4 SEA (Wash. Super. Ct.-King Cnty. July 27, 2021 verdict), *rev'd* Erickson v. Pharmacia LLC, 548 P.3d 226 (Wash. Ct. App.), *review granted*, 2024 WL 4450637 (Wash. Oct. 9, 2024); *see also* Craig Clough, *Monsanto Hit with $185M Verdict over PCB Brain Damage*, LAW360 (July 27, 2021, 10:01 PM EDT), https://www.law360.com/articles/1407322/monsanto-hit-with-185m-verdict-over-pcb-brain-damage.

[112] No. 18-2-11915-4 SEA (Wash. Super. Ct.-King Cnty. July 27, 2021 verdict), *on appeal*, No. 84715-5-I (Wash. Ct. App.); *see also* Greg Lamm, *Monsanto Seeks to Undo 'Staggering' $62M PCBs Verdict*, LAW360 (Apr. 26, 2023, 7:55 PM EDT), https://www.law360.com/articles/1601089/monsanto-seeks-to-undo-staggering-62m-pcbs-verdict; David Siegel, *Bayer's Monsanto Hit with $62M Verdict over PCB Chemicals in WA State School*, CVN (Nov. 11, 2021, 10:41 PM), https://blog.cvn.com/bayers-monsanto-hit-with-62m-verdict-over-pcb-chemicals-in-wa-state-school.

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2022	Wayman v. 3M Co.[113]	Earplugs	2	**$110 million award** split equally between two plaintiffs – each awarded $15 million compensatory damages and $40 million punitive damages.	Trial court reduced the verdict of one plaintiff (Wayman) from $55 million to $21.7 million based on Colorado's caps on noneconomic and punitive damages.
2022	Beutler v. Pharmacia LLC[114]	PCBs	4	**$21.37 million award** to four plaintiffs, three of whom are related (siblings)	Appeal pending.
2022	Soley v. Monsanto Pharmacia LLC[115]	PCBs	3	**Mistrial** – jury deadlocked. Trial included ten plaintiffs comprised of three groups of parents and their children.	

[113] No. 7:20-cv-00149 & Sloan v. 3M Co., No. 7:20-cv-00001 (N.D. Fla. Jan. 27, 2022 verdict), 2022 WL 3703960 (N.D. Fla. May 24, 2022); Order, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-md-2885 (N.D. Fla. May 24, 2022) (reducing verdict); *see also* Grace Dixon, *3M Looks to Cut $55M Verdict in Veteran Bellwether Case*, LAW360 (Mar. 9, 2022, 7:21 PM EST), https://www.law360.com/articles/1472191/3m-looks-to-cut-55m-verdict-in-veteran-bellwether-case; Lauren Berg, *3M Hit with $110M Verdict in Fla. Military Earplug Bellwether*, LAW360 (Jan. 27, 2022, 10:41 PM EST), https://www.law360.com/articles/1459588/3m-hit-with-110m-verdict-in-fla-military-earplug-bellwether; Nate Raymond, *U.S. Judge Cuts $55 Million 3M Combat-Earplug Verdict by over Half*, REUTERS (May 25, 2022, 10:40 AM CDT), https://www.reuters.com/legal/litigation/us-judge-cuts-55-million-3m-combat-earplug-verdict-by-over-half-2022-05-25.

[114] No. 21-2-14302-1 SEA (Wash. Super. Ct.-King Cnty. June 2, 2022 verdict), *on appeal*, No. 84715-5 (Wash. Ct. App.); *see also* David Siegel, *Jury Returns $21.4M Verdict Against Monsanto in 3rd Trial over PCB Contamination at Wash. State School*, CVN (June 5, 2022, 9:32 PM), https://blog.cvn.com/jury-returns-21.4m-verdict-against-monsanto-in-4th-trial-over-pcb-contamination-in-wash.-state-school#:~:text=Seattle%2C%20WA%20%2D%20A%20Washington%20State,Bayer%2Downed%20agrochemical%20giant%20Monsanto; Cara Salvatore, *Monsanto Knew of PCBs' Dangers, Jury Hears in Latest Trial*, LAW360 (May 25, 2022, 11:14 PM EDT), https://www.law360.com/articles/1497130/monsanto-knew-of-pcbs-dangers-jury-hears-in-latest-trial.

[115] No. 18-2-23255-4 SEA (Wash. Super. Ct.-King Cnty., July 14, 2022) (deadlock/mistrial); *see also* Amanda Bronstad, *A 4th PCB Trial Against Monsanto Ended in a Mistrial. 'We Were a Little Chagrined*.', LAW.COM (July 20, 2022, 4:23 PM), https://www.law.com/2022/07/20/a-4th-pcb-trial-against-monsanto-ended-in-a-mistrial-we-were-a-little-chagrined/?slreturn=20240029142803.

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2022	Alesi v. Monsanto Co.[116]	Glyphos-ate (Roundup)	3	**Defense verdict**	
2022	Allison v. Monsanto Co.[117]	PCBs	13	**$275 million award** to thirteen plaintiffs comprised of three groups of parents and their children – total award of $55 million compensatory damages and $220 million punitive damages.	Appeal pending.

[116] No. 19SL-CC03617 (Mo. Cir. Ct. Sept. 2, 2022) (defense verdict); *see also* Brendan Pierson, *Bayer on Winning Streak in Roundup Litigation After Huge Initial Losses*, REUTERS (Sept. 2, 2022, 1:38 PM), https://www.reuters.com/legal/litigation/bayer-winning-streak-roundup-litigation-after-huge-initial-losses-2022-09-02/; David Siegel, *Monsanto Prevails at 1st Multi-Plaintiff Roundup Herbicide Trial in Missouri*, CVN (Sept. 1, 2022, 11:06 PM), https://blog.cvn.com/breaking-monsanto-prevails-at-1st-multi-plaintiff-roundup-herbicide-trial-in-missouri.

[117] No. 18-2-26074-4 (Wash. Super. Ct.-King Cnty. Oct. 13, 2022 verdict); *see also* David Siegel, *Jury Hits Monsanto with $275M Verdict in Latest Trial over PCB Exposure in Washington State School*, CVN (Oct. 17, 2022, 12:56 PM), https://blog.cvn.com/jury-hits-monsanto-with-275m-verdict-in-latest-trial-over-pcb-exposure-in-washington-state-school; Taylor Blatchford, *$275M Verdict for Toxic Exposures at Monroe School, Adding to Swelling Cost*, SEATTLE TIMES (updated Oct. 17, 2022, 8:49 PM), https://www.seattletimes.com/seattle-news/times-watchdog/275m-verdict-for-toxic-exposures-at-monroe-school-adding-to-swelling-cost/; Greg Lamm, *Wash. Jury Awards $275M in Latest Verdict Against Monsanto*, LAW360 (Oct. 13, 2022, 10:23 PM EDT), https://www.law360.com/articles/1539878/wash-jury-awards-275m-in-latest-verdict-against-monsanto.

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2022	Bard v. Monsanto Co.[118]	PCBs	4	**$82 million award** – total award of $20.5 million in compensatory damages and over $60 million punitive damages. However, the jury found Monsanto "not responsible for most of the plaintiffs [sic] injuries, with only one of the four plaintiffs awarded any damages."	Appeal pending.
2023	Clinger v. Pharmacia LLC[119]	PCBs	2	**$72 million award** to two plaintiffs (jury deadlocked with respect to claims of five related plaintiffs) – total award comprised of $12 million compensatory damages & $60 million punitive damages.	Appeal pending.

[118] No. 18-2-00007-SEA (Wash. Super. Ct.-King Cnty., Dec. 20, 2022 verdict), No. 849824 (Wash. Ct. App.); *see also* Jonathan Capriel, *Washington Jury Awards $82M in Latest School PCB Trial*, LAW360 (Dec. 22, 2022, 8:59 PM EST), https://www.law360.com/articles/1560953/wash-jury-awards-82m-in-latest-school-pcb-trial; Emily Field, *Monsanto Doubles Down in Push to Undo $82M PCB Verdict*, LAW360 (July 15, 2024, 9:15 PM EDT), https://www.law360.com/articles/1858292/monsanto-doubles-down-in-push-to-undo-82m-pcb-verdict.

[119] No. 18-2-54572-2 (Wash. Super. Ct.-King Cnty. July 14, 2023 verdict); *see also* Greg Lamm, *Seattle Jury Awards $72M in Latest Monsanto PCB Trial*, LAW360 (July 14, 2023, 9:25 PM EDT), https://www.law360.com/articles/1700107/seattle-jury-awards-72m-in-latest-monsanto-pcb-trial; Greg Lamm, *Monsanto Tells Jury It's Not at Fault in Latest PCB Trial*, LAW360 (July 10, 2023, 9:02 PM EDT), https://www.law360.com/articles/1697935/monsanto-tells-jury-it-s-not-at-fault-in-latest-pcb-trial; Greg Lamm, *Jury Urged to Award $100M in Latest Monsanto PCB Trial*, LAW360 (May 15, 2023, 10:11 PM EDT), https://www.law360.com/articles/1677852/jury-urged-to-award-100m-in-latest-monsanto-pcb-trial.

Trial Year	Case	Product	# of Unrelated Plaintiffs	Trial Outcome	Post-Trial and Appellate Review
2023	Heit v. Pharmacia LLC[120]	PCBs	8	**$165 million award** to eight plaintiffs – total award of $49.8 million compensatory damages & $115.3 million punitive damages. $20,976,500 (Heit), $29,571,500 (Johnson), $20,526,500 (Muller), $20,976,500 (Navone), $23,636,500 (Oestreich), $15,816,500 (Pierce), $14,251,500 (Rowe), & $19,326,500 (Toutonghi).	Appeal pending.
2023	Bard v. Pharmacia LLC[121]	PCBs	7	**$857 million award** to seven plaintiffs comprised of three groups of parents and children – total award of $73 million compensatory damages and $784 million punitive damages. $119 million to one parent (A. Bard), $127 million to daughter (J. L. Bard) & $124 million to son (J. D. Bard); $115 million to another parent (J. Savery) & $124 million to daughter (S. Savery) and $116 million to other daughter (M. Savery); and $132 million to another plaintiff (Califano).	Appeal pending.

[120] No. 18-2-55641-4 (Wash. Super. Ct.-King Cnty., Dec. 18, 2023 verdict); Greg Lamm & Rachel Riley, *Monsanto Hit with $165M Verdict In Latest School PCB Loss*, LAW360 (Nov. 20, 2023, 5:37 PM EST), https://www.law360.com/articles/1764591/monsanto-hit-with-165m-verdict-in-latest-school-pcb-loss.

[121] No. 21-2-14305-5 (Wash. Super. Ct.-King Cnty. Dec. 18, 2023 verdict); Greg Lamm & Rachel Riley, *Jury Awards $857M in Yet Another Wash. Monsanto PCB Loss*, LAW360 (Dec. 18, 2023, 6:48 PM EST), https://www.law360.com/articles/1777498/jury-awards-857m-in-yet-another-wash-monsanto-pcb-loss.

EXHIBIT B

LIVANOVA'S RESPONSE TO PLAINTIFFS' MOTION TO CONSOLIDATE FOR TRIAL

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TIMOTHY CRABTREE, CHRISTINE CRABTREE, individually and o/b/o their minor child, M.C. Plaintiffs, v. LIVANOVA, PLC, f/k/a Sorin Group U.S.A., Inc., and SORIN GROUP U.S.A., INC. Defendants.	CASE NO. 2:18-cv-04588-NJB-JVM JUDGE NANNETTE JOLIVETTE BROWN MAGISTRATE JUDGE JANIS VAN MEERVELD

The undersigned, Steven D. Penrod, declares the following:

1. My name is Steven D. Penrod. I am over 18 years of age and am competent in all respects to issue this Declaration. I have personal knowledge regarding the content of this Declaration, and if called to testify in this matter, my testimony would be consistent with the content of this Declaration. I am a Distinguished Professor of Psychology at the John Jay College of Criminal Justice of the City University of New York. I hold a J.D. degree from the Harvard Law School, and a Ph.D. degree in social psychology, also from Harvard University. I have testified as an expert on a variety of social science and law issues in over 150 cases in federal and state venues, including Wisconsin, Minnesota, Illinois, Ohio, Indiana, California, Texas, Oklahoma, New York, New Jersey, Maine, Connecticut, Massachusetts, New Hampshire, Maryland, the District of Columbia, Virginia, Delaware, and Pennsylvania. I am an author or co-author of approximately 160 publications. I have specialized in the study of the legal and psychological aspects of decision-making by juries for more than 40 years, am conversant with the literature on consolidation of claims and parties and have published research on the specific topics discussed in this declaration. My

professional qualifications, including publications, grants, awards, and memberships are set forth more fully in my *curriculum vitae,* attached to this declaration as Exhibit A.

2. I have reviewed the Complaint and Jury Trial Demands in the cases sought to be consolidated for trial in the above action--which include Civil Actions - 18-6112 Jackson, et al vs. LivaNova, PLC, et al; 18-6357 Menesses, et al, vs. LivaNova, PLC, et al; 18-6544 Southall, et al vs. LivaNova, PLC, et al; 18-6783 Hamer vs. LivaNova, PLC, et al; 18-6891 Stewart, et al vs. LivaNova, PLC, et al; 18-7218 Collins vs. LivaNova, PLC, et al; and 18-4588 Crabtree, et al. v. LivaNova, PLC, et al. I have been asked to render an opinion on: (1) the likely effect that a trial consolidating the claims of those plaintiffs for trial will have on the jury; and (2) the efficacy of limiting instructions designed to overcome the prejudice stemming from such consolidation.

3. In their Memorandum in Support of Motion to Consolidate for Trial, the plaintiffs note at page 6: among the "factors to consider in determining whether consolidation is appropriate" is the "risk of prejudice or confusion." In my opinion, if the claims of multiple plaintiffs are presented to the same jury, the result will be to induce jury confusion and unfair prejudice against the defendant resulting in a substantially greater likelihood that the jury will find defendant liable and will award greater damages to the plaintiffs. There is evidence, reviewed below, that the simple pairing of plaintiffs is sufficient to cause these problems and the magnitude of the prejudice and confusion tends to grow with each additional joined plaintiff. Plaintiffs further assert in their conclusion (p. 13): "Any potential confusion of issues among the jury can easily be cured with precautionary instructions by the Court." Based on research reviewed below, it is also my opinion that jury instructions will not mitigate the confusion and unfair prejudice engendered by joinder of plaintiffs.

4. In forming these opinions, I have reviewed the relevant scientific research literature summarized below and listed in Exhibit B hereto.

5. I base my opinions on scientific studies of jury decision-making in which jurors are confronted with multiple charges or claims, as well as studies in which jurors are confronted with evidence that is intended for use in either a limited manner or that jurors are instructed not to consider at all. In my opinion these studies clearly show that unfair prejudice results when jurors are exposed to information about other claims or charges against a defendant.

STUDIES ADDRESSING THE EFFECTS OF CONSOLIDATION

6. A number of researchers have studied the effect that consolidation of charges/claims against a defendant has on jury decision-making. The studies in this area clearly and fairly uniformly demonstrate that when evidence of consolidated claims is presented to a jury, the jury is substantially more likely to find against a defendant on a given claim than if it had not heard evidence of the other claims. Although some of this research has been conducted in the context of criminal cases, it is directly relevant to the issues raised in the present civil cases because the research underscores the difficulties jurors have in keeping trial evidence neatly compartmentalized. The research further demonstrates the ways in which inappropriate use of evidence can produce prejudicial effects. The research also underscores my opinions that jurors are likely to misuse evidence presented about multiple plaintiffs/claims, that the result will be prejudice against the defendant, and that efforts to constrain the jury's use of the evidence in order to avoid consolidation prejudice are extremely unlikely to succeed.

7. Among the studies supporting the conclusions above are: Bordens & Horowitz (1983); Goodman-Delahunty, Cossins & Martschuk (2016); Greene & Loftus (1985); Horowitz & Bordens (1988); Horowitz & Bordens (1990); Horowitz & Bordens (2000); Horowitz, Bordens & Feldman (1981); Leipold & Abbasi (2006); Tanford & Penrod (1982); Tanford & Penrod (1984); Tanford & Penrod (1986); Tanford, Penrod & Collins (1985);

Thomas (2010); White (2006) and Wilford, Van Horn, Penrod & Greathouse (2018). Nearly all of these and other consolidation studies cited below have been published in peer-reviewed scientific journals. Most of my research and many other studies have been supported by grants from sources such as the National Science Foundation and the National Institute of Justice and these studies were subjected to peer review even before they were funded and conducted. Complete references to the studies cited in this declaration are provided in Exhibit B.

8. These studies reveal the difficulties jurors confront when trying to sort out evidence that is relevant to particular issues or parties and not relevant to other issues or parties. The research shows that consolidated trials result in: (1) **inferences** by the jurors that a defendant has a bad character; (2) **cumulation** or spilling over of evidence against the defendant; (3) **confusion** of evidence; and (4) **changes in weight of evidence** (i.e. the tendency of jurors in such cases to give greater weight to plaintiff/prosecution evidence, relative to defense evidence). All of these factors have been shown to result in prejudice against defendants. A consolidated trial in this instance will therefore likely lead jurors to draw negative inferences against defendants and increase the likelihood of a pro-plaintiff verdict. It is also likely that jurors will cumulate "evidence" across claims, confuse the evidence presented by various plaintiffs and give greater weight to individual items of plaintiff evidence than would be the case if the claims were tried separately.

ARCHIVAL VS EXPERIMENTAL STUDIES: COMPLEMENTARY STRENGTHS

9. Research on consolidation effects has emerged from two types of studies (both of which have demonstrated prejudicial joinder effects). First, researchers have conducted *archival studies* of actual cases, in which they compare outcomes from trials in which multiple cases, charges or defendants have been consolidated to cases that have not been consolidated. In addition, there are *experimental studies,* in which researchers compare

outcomes in exemplar cases decided by mock jurors that are consolidated versus those that are tried separately. Australian researchers Goodman-Delahunty, Cossins & Martschuk (2016), published the most recent study of consolidation effects and have explained the advantages and disadvantages of archival studies:

> The advantage of such studies is that the observed relationships can be generalised across all jury trials with greater confidence than, for example, relationships between variables observed in a single trial or simulation. No two real trials will be exactly the same, so a finding that is robust across many trials is more likely to be broadly applicable to all relevant jury trials. One strength of archival studies is that they evaluate the verdicts of real-life juries, which have greater gravity due to their binding consequences. This is a feature that experimental trial simulations are less able to emulate. ... But these studies do not reveal the extent to which the observed increases in conviction rates in joint trials can be attributed to any of the three hypothesised sources of unfair prejudice. The core of the problem is that a comparison of verdicts in joint trials versus separate trials ... cannot reveal a causal relationship between joinder (and verdicts). Real-life trials involve unique and highly complex variables. No archival study can exclude the possibility that differences in verdicts were influenced by numerous other confounding variables... Many potentially confounding variables cannot be controlled, manipulated or eliminated in archival studies. (pp. 52-52) Footnotes omitted.

10. Goodman-Delahunty, Cossins & Martschuk (2016) note that experimental studies offer different benefits. For example:

> Crucially, causal conclusions can be more readily drawn from trial simulations because researchers control and construct the elements of a trial that they are interested in studying.... Inferences about the causal relationships between variables of interest – for example, the influence of joinder (on outcomes) ... can be determined with greater confidence than in archival studies because researchers are able to reduce the extraneous 'noise' present in real trials. Because the only differences across experimental conditions are manipulated by the researcher/s prior to observing the behaviour in interest, researchers can isolate whether these differences caused any observed differences in jury reasoning and case outcomes. Another advantage is that the identical research problem can be replicated multiple times in an experimental simulation, whereas beset by the possibility that the trials differed based on some confounding variable.... Trial simulations also have the methodological advantage of facilitating direct observations of the process of jury decision making, as well as the outcome of the trial. (pp. 54-55.) Footnotes omitted.

ARCHIVAL STUDIES DEMONSTRATE THAT CONSOLIDATION OF CLAIMS RESULTS IN PREJUDICE TO DEFENDANTS

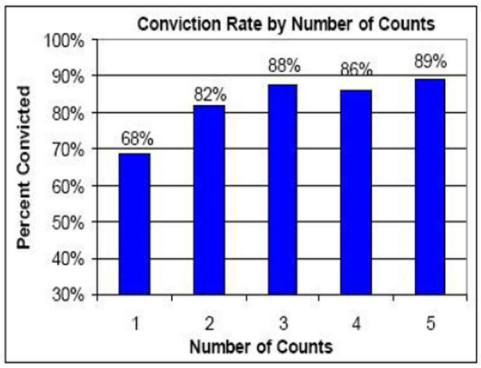
11. White (2006) examined outcomes in more than 4,600 asbestos cases, including bouquet trials (i.e. "a small group of ... claims... selected to be tried together from a larger group of ... consolidated claims" p. 375), and reported "that plaintiffs' probability of winning at trial increases by 15 percentage points when they have small consolidated trials rather than individual trials, and ... plaintiffs' probability of being awarded punitive damages increases by 6 percentage points." According to White, "the bouquet trial . . . is associated with a huge increase—85 percentage points—in plaintiffs' probability of winning punitive damages and with an increase of $1.5 million in punitive damage awards." (pp. 385 & 390.) In short, consolidation of cases was associated with a substantial increase in liability judgments against defendants, accompanied by substantial increases in damages.

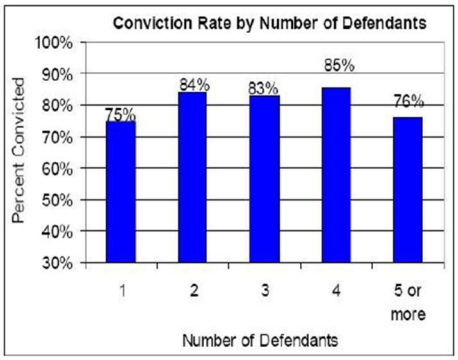
12. White (2006) also tested whether trying cases together—with just two plaintiffs--made it more likely that jurors would reach the same or similar liability and damage judgments with respect to those cases than if the cases were tried separately. According to White:

> For the actual two-plaintiff consolidations, the correlation coefficients for whether plaintiffs win and for expected total damages are .74 and .92, respectively. The correlation coefficients for larger consolidated trials are similarly high. However, the correlation coefficients for the random pairs and larger random groups are all close to zero... These results support the hypothesis that consolidating cases for trial increases the degree of correlation of the outcomes and therefore makes going to trial more risky. In fact, they suggest that the increase in risk due to consolidation is extremely large. (pp. 382-384.)

13. Leipold & Abbasi's (2006) study of 19,057 criminal trials in the United States produced similar findings. They reported that defendants in consolidated trials with two charges were 14% more likely to be convicted of the most serious count against them than were defendants tried on a single charge. As shown in the following Figure, the conviction

rate rose if a second charge was added and rose again if a third count was tried and peaked at that point. An increased rate of convictions was also observed for the consolidation of defendants (second figure)—with the consolidation effect evident with just two charges.



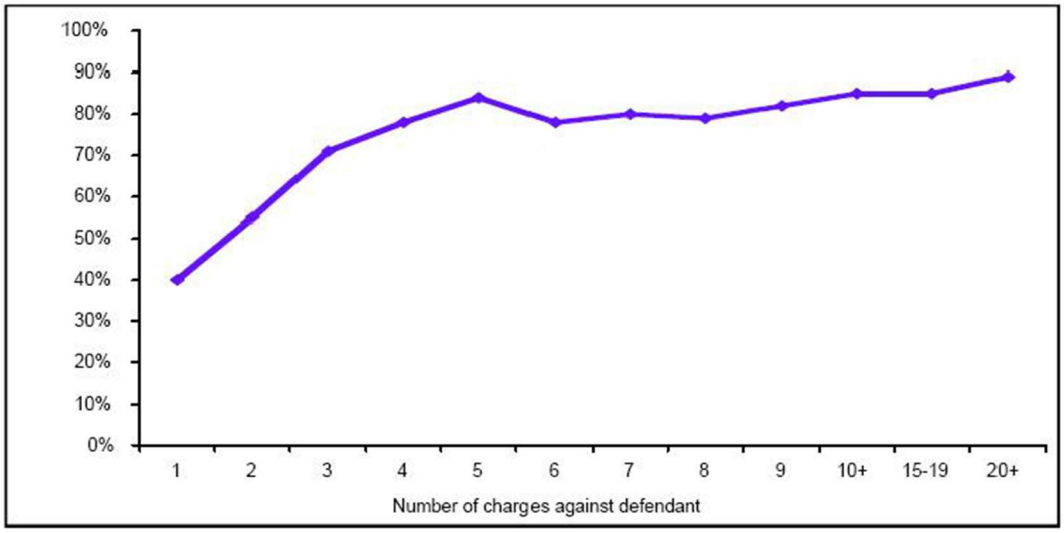


14. Based on the study, Leipold & Abbasi reached the following conclusions:

> Now we can say not only that joinder "prejudices" the defendant, but that joinder unfairly causes prejudice. Unlike many other harms about which defendants complain, the effects of spillover evidence, inference of a criminal disposition, and jury confusion do not themselves further any policy goals, do not avoid risks of defendant manipulation, and do not even plausibly make trials more accurate or more fair – quite the contrary. So to say a defendant is not entitled to a separate trial just because his chances of acquittal are better is to say that a defendant should not be granted a severance merely to avoid a significant (~10%) risk that his conviction will be influenced by improper factors. (p. 390.)

15. Leipold & Abbasi's finding was replicated in Thomas (2010), which included an analysis of nearly 23,000 United Kingdom (UK) criminal trials. Thomas found that the probability of conviction rose significantly as the number of charges increased. As the following figure shows, jury conviction rates were 40% when a defendant was charged with one offense but jumped to 55% when there were two charges and rose steadily with three and four charges--to 80% where there were five or more charges.

Figure 3.15: Jury conviction rate by number of charges (n=22,907)



EXPERIMENTAL STUDIES ALSO DEMONSTRATE THAT CONSOLIDATION CAUSES PREJUDICE TO DEFENDANTS

16. There is a somewhat larger body of experimental joinder research. These studies typically compare verdicts and judgments reached in an exemplar case when tried by itself versus when the case is consolidated with one or more additional cases. In contrast to archival studies, this method permits direct comparisons based on the same fact patterns and trial evidence. Experimental studies also permit collection of juror opinions about the evidence and the parties in the case (which allows researchers to gain insight into possible causes of consolidation bias). These studies also permit comparisons of large numbers of juror/jury decisions in both separate and consolidated trials.

17. The prejudicial effects of consolidation have been observed in a number of experimental studies involving civil cases. These studies demonstrate that consolidation increases the likelihood a jury will find a defendant liable and generally increases the amount of the damage award as decision making becomes more complex. For example, Horowitz & Bordens (2000) reported a study in which 135 jury-eligible adults were randomly assigned to one of five different aggregations of civil plaintiffs with 1, 2, 4, 6, or 10 claimants. Their

jurors were shown a 5- to 6-hour trial involving claims by railroad workers of varied repetitive stress injuries. As with the other civil case studies, both liability and damage judgments were affected by consolidation. As shown in the Table below, the defendant railroad was more likely to be found liable as the number of plaintiffs involved in the case increased (reflected in the drop in percentage of liability ascribed to the plaintiffs in the Table below—where plaintiff liability dropped from 60% to 51% with the addition of a second plaintiff and to 34% with six plaintiffs). Defendant liability steadily increased (reflected in *lower* numbers in the middle portion of the table) as the number of plaintiffs increased to four, six and ten. Similarly, damage awards rose fairly steadily as additional plaintiffs were added to the case—with the highest levels observed with four and six plaintiffs.

Means and Standard Deviations for the Damage Award, Liability, and Plaintiff Liability Measures

No. of plaintiffs	Damage award		Liability		Plaintiff liability	
	M	*SD*	*M*	*SD*	*M*	*SD*
1	0.96_{a}	0.96	1.39_{ab}	0.57	0.60_{a}	0.27
2	1.21_{a}	1.20	1.41_{a}	0.50	0.51_{a}	0.25
4	3.54_{b}	2.14	1.19_{bc}	0.40	0.36_{b}	0.17
6	3.00_{bc}	1.64	1.09_{c}	0.27	0.34_{b}	0.11
10	2.32_{c}	1.12	1.00_{c}	0.00	0.27_{b}	0.12

Note. For liability scores, higher numbers denote lower defendant liability. For damage awards, higher numbers indicate higher awards. Plaintiff liability scores denote proportion of liability assigned to the plaintiff. Means with different subscripts in the same column differ significantly by a Tukey test. Damage awards of 1 resulted in compensation of $10,000, awards of 2 resulted in compensation of $10,001–50,000, and awards of 3 resulted in compensation of $100,000–200,000.

18. Overall, Horowitz & Bordens (2000) found that sheer number of plaintiffs was systematically and substantially related to the liability and damage judgments (as reflected in the path coefficients in the figure below) -- whereas the effect of different plaintiffs and their somewhat different cases ("plaintiff number" in the figure) was much smaller in magnitude.

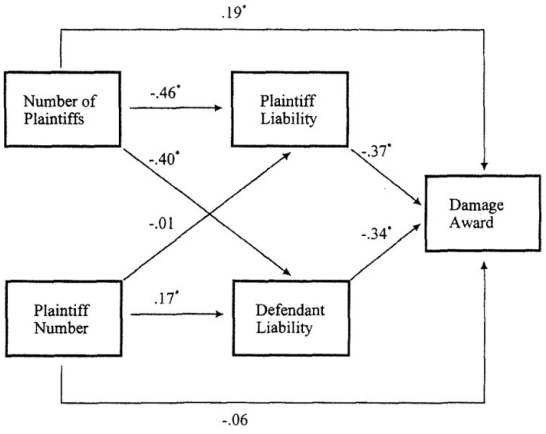


Figure 2. Path analysis for the award model. * $p < .05$.

19. One explanation for these effects is that offered by White (2006): when making a set of inter-related judgments about responsibility, one judgment may drive other judgments in a similar direction. Horowitz & Bordens (1990) found that only 25% of juries asked to decide only the causation issue in a toxic tort case involving multiple plaintiffs found for the plaintiffs, but, on average, 87.5% of juries asked to evaluate causation plus liability, and/or compensation and/or punitive damages found for the plaintiffs. Juries deciding liability alone voted for the plaintiffs 62.5% of the time versus 87.5% of the juries who were asked to decide liability plus one or more of the other outcomes.

20. Another explanation of joinder effects concerns the complexity of judgments., Horowitz, ForsterLee & Brolly (1996) found evidence of bias arising from information load and complexity of language. These researchers had jury-eligible adults watch videotapes of a complex toxic tort trial. The videos varied with respect to the amount of information communicated ("information load") and complexity of the language used by the witnesses. Information load and complexity influenced both liability and compensatory decisions. With respect to load: "Low-information load and less complex language served to allow jurors to make finer distinctions among the differentially worthy plaintiffs. Not unexpectedly, judgments of blameworthiness and differentiation among plaintiffs are performed most

efficaciously in the low-load less complex condition." {p. 763} As shown in the following table, jurors also made compensatory awards commensurate with plaintiffs' injuries only under conditions with less complex language—that is, awards varied across plaintiffs with different injuries when language was simple but not when it was complex.

Compensatory Awards as a Function of Plaintiffs and Simple or Complex Language

	Complex		Simple	
Plaintiff	*M*	*SD*	*M*	*SD*
Lawson	4.63_{b}	2.70	5.43_{a}	2.79
Beaumont	$4.92_{a,b}$	2.67	$4.89_{a,b}$	2.95
Gallagher	$4.93_{a,b}$	2.68	4.30_{b}	2.91
Stephens	4.31_{b}	3.12	3.33_{c}	2.99

21. Horowitz, ForsterLee & Brolly (1996) also found that information load significantly affected the type of information that jurors recalled about the cases they decided. Jurors in the high information load condition actually reported fewer case-related facts.

22. One of the more exhaustive experimental consolidation studies is one that I conducted with my student Sarah Tanford in 1984 as part of a series of studies supported by the National Science Foundation in the 1980s (Tanford & Penrod (1984)). These studies point to other factors that can influence judgments in joined cases. Tanford & Penrod (1984) studied the decision-making of 732 jury-qualified residents who participated in a realistic mock jury study. The jurors included 714 adults who had been summoned for jury service in Dane County, Wisconsin, 69% of whom had served on one or more juries. The eighteen remaining participants were jury-qualified students at the University of Wisconsin. Participating jurors viewed one of several different versions of a re-enacted trial lasting between 50 and 120 minutes. The trial was based upon actual trial transcripts and involved a criminal defendant charged with either one or three offenses. Jurors heard evidence from an average of three witnesses. The offenses included burglaries, assaults, and robberies. In

addition to manipulating the number of charges against the defendant, this study also manipulated the similarity of the charges and evidence considered by jurors. Thus, some jurors viewed a trial in which the defendant was charged with a single burglary, some jurors viewed a trial with three different burglaries, and other jurors viewed a trial with a burglary, an assault, and a robbery charge. In some trials, the evidence against the defendant was similar for all charges (e.g., all based upon circumstantial evidence) and in others the evidence was different for different charges (e.g., circumstantial, eyewitness, and fingerprint). After watching their trial, jurors privately indicated their personal verdicts and then began deliberating in groups of six. Deliberations were videotaped with a video camera placed in the corner of the deliberation room so that deliberations could be analyzed later. The evidence presented to the jurors in the Tanford & Penrod study (1984) was not complex and the trials were very brief, regardless of how many charges were at issue.

23. The individual juror verdicts in the Tanford & Penrod (1984) study were strongly affected by consolidation. When jurors decided a burglary case consolidated with evidence on two other charges, they were 62% more likely to convict than when they considered the same burglary evidence by itself. The study confirms that, when evidence of multiple claims/charges against a defendant is considered by a single jury in a single trial, the probability of a finding adverse to the defendant is significantly higher than when a single charge is at issue. In the Tanford & Penrod (1984) study, there were also more convictions when evidence presented on the various charges was dissimilar (43%) than when evidence on the charges was similar (35%).

24. The results of Tanford & Penrod (1984) are typical of the findings from other experimental studies, and parallel those of the archival studies, outlined above.

25. The relevant experimental studies, like archival studies, clearly show that the magnitude of the effect that consolidation has on verdicts increases as more claims/charges

are consolidated. For example, Tanford & Penrod (1982) found that conviction rates on a rape charge increased from 5% when tried alone (or with one other charge) to 27% when consolidated with two other charges (a 540% increase), and to 39% when consolidated with three other charges (a 780% increase). A similar pattern was observed for a trespass charge. In all these studies, the evidence on a given charge was always identical whether jurors evaluated the charge separately or consolidated with other charges.

26. The latest study of the effects of joining criminal allegations against a defendant is an Australian study by Goodman-Delahunty, Cossins & Martschuk (2016), who compared separate and joint trials with various forms of evidence in the context of a child sexual abuse scenario. The study involved 90 mock juries and more than 1,000 jury-eligible citizens. The researchers found that consolidated trials (as opposed to separate trials for the same offense) produced higher rates of errors in recall of trial evidence, stronger inferences about the defendant's sexual interest in boys, greater perceived intent, greater perceived poise and credibility for the complainant, greater defendant culpability, and, not surprisingly, greater defendant guilt (from about 80% not guilty to over 95% guilty).

CONSOLIDATION OF CLAIMS LEADS JURORS TO DRAW NEGATIVE CHARACTER INFERENCES ABOUT DEFENDANTS

27. Tanford & Penrod (1984) studied with particular care the reasons why the consolidation of multiple allegations against a defendant increases the probability of an adverse finding against the defendant. The strongest reason for the prejudicial effect of consolidation is that jurors in trials involving evidence of multiple allegations are substantially more likely to draw the inference that the defendant is "like a criminal" or has "criminal propensities." More broadly, Tanford & Penrod (1984) demonstrated that, when presented with evidence of multiple offenses, jurors find the defendant less sincere, less believable, less honest, more immoral, more likely to commit a future crime, less likeable, and more like a "typical criminal." This is the same pattern demonstrated in the study by

Goodman-Delahunty, Cossins & Martschuk (2016), discussed above, and similarly applies in civil cases.

28. Negative impressions of defendants directly influence verdicts. This is because negative inferences about a defendant's character appear to lower the standard of proof to which jurors hold the prosecution/plaintiff evidence. (See the discussion of Bordens & Horowitz (1986), below.) Jurors are also more willing to find against defendants who they view negatively because the consequences of an erroneous decision seem less severe when the defendant is disliked. (Bordens & Horowitz (1986).)

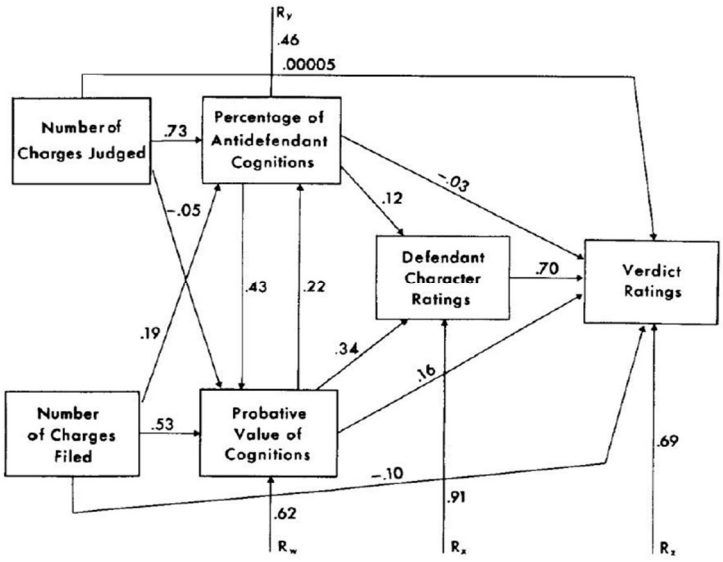
29. In my opinion, consolidation of multiple plaintiffs' claims for trial in the present case is likely to result in the jury drawing similar unsupported, negative inferences against the defendant and thereby make it more likely that the jury will find defendant liable without the appropriate evidence needed and inaccurately increase the amount of damages awarded.

CONSOLIDATION OF CLAIMS AFFECTS JURORS' CONSIDERATION OF THE EVIDENCE

30. Negative impressions of a defendant against whom claims are consolidated also strongly influence jurors' assessments of trial evidence, and these assessments in turn influence verdicts. Tanford & Penrod (1984) found that consolidated charges produced stronger negative inferences about the defendant's criminal character than severed charges, and that those inferences influenced verdicts directly through distorted perceptions of the trial evidence. When a defendant seems "more like a criminal" (an impression strongly fostered by evidence of multiple offenses arising from separate incidents), this makes it appear to jurors that evidence offered against a defendant with respect to a particular charge is more compelling and the defendant's evidence less compelling, even though there is no logical basis for concluding that the evidence is stronger. In short, an inference of criminality produced in consolidated trials makes identical items of evidence look) than the identical items of evidence in severed trials.

31. The same pattern of "criminal inferences" and changes in the weight of evidence has also been observed by Tanford, Penrod & Collins (1985), and similar patterns of negative inferences about defendants were reported by Greene & Loftus (1985). The pattern of changes in rationales for verdicts reported by Goodman-Delahunty, Cossins & Martschuk (2016), described above, are consistent with this cumulation effect. This research shows that jurors effectively cumulate evidence of multiple offenses. This makes jurors more likely to convict on any given charge in a consolidated trial than if they considered only the evidence of that particular charge. Furthermore, the more charges that are consolidated together, the greater the likelihood and strength of a criminal inference, the greater the apparent changes in the weight of evidence, and the greater the likelihood of conviction, even though the evidence on any particular charge remains unchanged.

32. Bordens & Horowitz (1986) tested, in some detail, the effect of consolidation on jurors' assessments of the defendant's character and levels of "anti-defendant" sentiment. Their model (below) shows that simple knowledge of the number of charges against a defendant increased anti-defendant feelings and negative perceptions of the defendant's character. Notably, those effects were in addition to the effect of the number of charges judged by jurors, which increased the percentage of anti-defendant cognitions and led directly and indirectly to negative inferences about the defendant's character and less favorable verdicts for the defendant.



33. Horowitz & Bordens (2000) similarly reported that as the number of plaintiffs in their civil case increased, jurors changed their mind about the case less often and there was a drop in the evaluation of defense evidence.

34. In my opinion, it is extremely probable that consolidation of the plaintiffs' cases in this litigation will similarly affect juror perceptions of the defendant's character and evaluations of the evidence. Because each plaintiff will offer allegations and evidence that defendant engaged in similar alleged wrongdoing, the jury will be more likely to draw negative inferences about the defendant's character and have distorted perceptions of the probative value of the plaintiffs' evidence.

CONSOLIDATION OF CLAIMS RESULTS IN JUROR CONFUSION

35. Consolidation of claims results in confusion about the evidence. Tanford & Penrod (1984), Bordens & Horowitz (1983) and Tanford, Penrod & Collins (1985) all documented consolidation-induced confusion of evidence, and this confusion is compounded where the consolidated charges are similar, as are the claims in the cases proposed for consolidation in the instant litigation. Studies have shown that confusion is related to

prejudicial judgments about the defendant (e.g., Bordens & Horowitz, 1983) and that jurors confused by multiple claims are more likely to find against the defendant.

36. In their study Horowitz & Bordens (2000) reported that as the number of plaintiffs increased, jurors had more difficulty keeping the plaintiffs separate and found it harder to understand the evidence and the experts. According to the study, "[w]ith respect to the impact of consolidation, the fate of the three 'focus' plaintiffs differed substantially when they were part of different configurations of plaintiffs. Clearly, jurors were not judging the evidence pertaining to these plaintiffs on merits alone." (p. 917.)

37. Plaintiffs assert in their Memorandum in Support of Motion to Consolidate for Trial (p. 11) that a consolidated trial of the plaintiffs' claims will last a month—presumably with many witnesses and a large number of documents presented to the jury.

38. The published literature supports a conclusion that a consolidated trial will result in significant juror confusion regarding the evidence, which makes it more likely that the jury will find against defendant.

LIMITING INSTRUCTIONS DO NOT MITIGATE THE PREJUDICE THAT RESULTS FROM THE CONSOLIDATION OF CLAIMS

39. In plaintiffs' Motion to Consolidate the argument is several times advanced that jury instructions can address some forms of the prejudice outlined above: "…cautionary instructions to the jury to consider the Plaintiffs' claims separately and prudent trial management would mitigate or eliminate any potential for prejudice or juror confusion that Defendant LivaNova may contend would result from a joint trial of these cases." (p. 12)

40. Despite this enthusiasm for jury instructions, empirical evidence demonstrates that efforts to mitigate the prejudicial effects of consolidation by giving the jurors limiting instructions are exceedingly unlikely to offset the prejudice of joining multiple claims together in a single trial, and there is a serious risk that such instructions will aggravate the prejudice to defendants. There are several reasons for this. First, a substantial body of

research shows poor juror comprehension of legal instructions. This research includes studies by Penrod & Tanford and Greene & Loftus, as well as that of Charrow & Charrow (1979), Cutler, Penrod & Schmolesky (1988), and Elwork, Sales & Alfini (1982). Researchers have evaluated juror comprehension of standard instructions from Arizona (Sigwirth & Henze (1973)); California (Charrow & Charrow (1979); Haney & Lynch (1994)); Florida (Buchanan, Pryor, Taylor & Strawn (1978); Elwork, Sales & Alfini (1982)); Illinois (Smith (1993)); Michigan (Elwork, Sales & Alfini (1977)); Nevada (Elwork, Sales & Alfini (1982)); Wisconsin (Heuer & Penrod (1988), Heuer & Penrod (1989), Heuer & Penrod (1994a), Heuer & Penrod (1994b)); and Washington (Severance & Loftus (1982)).

41. Severance and Loftus (1982) reported that jurors find limiting instructions one of the most difficult instructions to comprehend. One portion of the research on limiting instructions has focused on instructions intended to limit the impact of information about a defendant's bad acts. This research has been conducted in both criminal and civil settings. Although providing jurors with limiting instructions appears to slightly improve actual jurors' understanding of the appropriate use of evidence of prior convictions (Kramer & Koening (1990)), their overall comprehension is still low. Approximately half of the participants in that study did not adequately comprehend limiting instructions. Because limiting instructions are intended to protect litigants against biasing information, lack of comprehension severely threatens the fairness of the trial.

42. Civil jury studies illustrate the problem with limiting instructions. Broeder (1959) found that mock juries awarded higher damages to a plaintiff after being instructed to disregard a statement that the defendant had insurance as opposed to when they were given no instructions. When jurors were told the defendant had no insurance, the average damage award was $33,000. When jurors were informed that the defendant had insurance, damages rose to $37,000. And when jurors were instructed to disregard the insurance information, the

award rose to $46,000. *(See also* Cox & Tanford (1989) (Experiment 2) where jury eligible adults shown a videotape reenactment of a civil negligence trial recommended larger awards when given judicial admonitions to ignore certain evidence. Cox & Tanford (1989) (Experiment 2) characterized this as a "backfire effect." *(Id.)* Pickel (1995) similarly found that detailed legal explanations of limiting instructions did not help mock jurors ignore inadmissible prior conviction evidence and resulted in a backfire effect.

43. In a variant on limiting instructions research, Casper et al. (1989) showed participants (253 adults called for jury duty and 283 undergraduate students) a videotape of a hypothetical illegal search and seizure civil suit brought against two police officers. The case had three possible outcomes: police found evidence of illegal conduct (guilty outcome) or police found nothing and later arrested a different person (innocent outcome) or no outcome was provided (neutral outcome). Jurors were then presented with instructions that included an admonition to disregard outcome information when assessing damages. Participants who watched the videotape indicating that the search resulted in the discovery of illegal conduct were significantly less likely to award damages to the subject of the search. In other words, jurors did not follow the judge's instructions not to consider outcome evidence.

44. Doob & Kirshenbaum (1973) found that participants were significantly more likely to find a defendant in a hypothetical burglary case guilty when presented with information indicating that the defendant had a prior criminal record than when no prior record information was given. Judicial instructions to use the information to determine credibility, rather than as an indicator of guilt, did not significantly reduce ratings of guilt.

45. Similarly, Hans & Doob (1976), whose participants were given a written summary of a hypothetical burglary case, found that groups who received evidence of prior conviction, accompanied by limiting instructions, were more likely to convict (40%) than

groups who did not receive prior conviction evidence (0%). Furthermore, the content of jury deliberations was affected by the presence of inadmissible evidence. Groups exposed to prior conviction evidence made significantly more negative statements about the defendant and significantly more positive statements about the prosecution evidence. The authors concluded that jurors do not use evidence regarding convictions to determine the credibility of statements made by the defendant. Instead, they are used as an indicator of guilt, despite judicial instructions not to use the information in this manner.

46. Wissler & Saks (1985) reported similar results in a study using adults recruited from the Boston area. Some of these participants were told that the defendant had previously been convicted of either a similar crime, a dissimilar crime, or were given no information about a prior conviction. Participants who received information about a defendant's prior record were instructed to use it only to determine the credibility of the defendant's statements and as an indication that the defendant has a criminal disposition. The type of prior conviction did not influence the defendant's credibility. Jurors who read about a defendant convicted of perjury did not view the defendant as less credible than jurors who read about any other defendant, including a defendant with no prior convictions. However, participants returned significantly more guilty verdicts for defendants with similar convictions (75%) than for defendants with dissimilar convictions (52.5%), perjury convictions (60%), or no convictions (42.5%).

47. Steblay, et al. (2006) provide the most exhaustive overview of the effects of limiting instructions. Their study is a meta-analysis of the effect of judicial instructions to disregard inadmissible evidence (IE) on juror verdicts. Their data include 175 hypothesis tests from 48 studies with a combined sample of 8,474 participants. The results revealed that inadmissible evidence has a reliable effect on verdicts consistent with the content of that evidence (inadmissible evidence could and did operate against both sides, depending on the

study). Judicial instructions to ignore the inadmissible evidence did not effectively eliminate the negative impact of the evidence. Steblay noted two civil studies in which this pattern was observed: "Schaffer (1984) provided defense-slanted IE (of pretrial negotiation) in a product liability case and found support, *r*=-.24, for the hypothesis that judicial instruction does not eliminate the impact of IE on jurors' decisions. Also using a product liability case, Landsman & Rakos (1994) found a similar impact with pro-plaintiff IE (damaging information regarding a recall of the product) despite judicial instruction to disregard that evidence, *r=.33."* (p. 476.)

48. Contrary to the assertions made by plaintiffs, the results of both the civil and criminal studies all support the conclusion that jurors have difficulty comprehending and applying legal instructions not to consider certain evidence.

CONSOLIDATION INSTRUCTIONS, IN PARTICULAR, DO NOT MITIGATE THE PREJUDICE THAT RESULTS FROM CONSOLIDATION

49. Studies have shown that judicial instructions are not effective in mitigating the prejudicial effect of consolidating multiple claims/charges. In Tanford & Penrod (1984) and Tanford, Penrod & Collins (1985), half of study participants asked to evaluate a judicial case involving multiple charges were given a set of very strong instructions not to infer that the existence of multiple charges was evidence of guilt and that the evidence pertaining to each charge should be considered separately. The instructions were patterned after those actually employed in the federal courts, but were stronger and more extensive.

50. Of course, there have been many efforts to improve juror comprehension and application of instructions. A recent meta-analysis of these efforts was reported by Baguley, McKimmie & Masser (2017) who examined the effects of simplifying the language and/or conceptual complexity of instructions and/or providing decision aids such as flow charts in conjunction with 121 independent instructions from 63 articles, 75 studies, and 12,184 participants. The instructions included 48 substantive instructions (instructions about

offenses and defenses), 30 procedural instructions (e.g., joinder and the standard of proof), and 43 evidentiary instructions (e.g., eyewitness evidence). The instructions were used in both civil (n =23) and criminal (n =98) trials. The results of the study indicate that improving comprehension and application of instructions is very difficult. The authors note:

> Our results suggest that reducing the conceptual complexity, but not the linguistic complexity, and reducing the proportion of supplementary information, is associated with increased application of the instructions because mock jurors' verdicts were consistent with the dominant focus of the instruction content for lower levels of conceptual complexity and lower proportions of supplementary information…. The fact that mock jurors did not rely on the instructions to decide their verdict when the instructions were more complex is not surprising, as research shows that mock jurors will be persuaded by factors other than the content of a message, when the message is complex … Given jurors can only apply instructions to the extent they comprehend them … these findings suggest that reducing the conceptual complexity and proportion of supplementary information, is associated with improved comprehension, but reducing the linguistic complexity is not. ... Despite the difficulty of doing so, this study strongly suggests a need to find a way to effectively simplify legal concepts. (p. 296)

51. Tanford & Penrod (1984) found instructions to be totally ineffective in eliminating or even reducing the effects of consolidation. The conviction rate for jurors in consolidated trials who did not receive these instructions was 39% as compared with 38% for jurors who did. According to this study, instructions were also ineffective in influencing other measures of juror judgments. Other studies that have produced similarly discouraging results about the impact of consolidation instructions include Greene & Loftus (1985) and Horowitz & Bordens (1985). The results from the large-scale Australian study by Goodman-Delahunty, Cossins & Martschuk (2016) confirms these conclusions and is "in line with a large body of empirical studies demonstrating the ineffectiveness" of jury instructions to mitigate the prejudicial effects of consolidation.

52. On the basis of this research evidence, it is my opinion that it is extremely unlikely that a judicial instruction could effectively eliminate prejudicial inferences against the defendant that will result from joining the claims of multiple plaintiffs for trial.

DELIBERATION DOES NOT MITIGATE THE PREJUDICE THAT STEMS FROM CONSOLIDATION

53. The prejudice that would be caused by consolidation will not be cured by the process of jury deliberations. Tanford & Penrod (1986) showed that jury deliberations do not offset biases created by consolidation. In that study, jurors in consolidated trials, questioned before deliberation, recommended conviction at a higher rate than jurors in single trials. After deliberation, the difference was even greater. In short, deliberation aggravated consolidation-related biases.

54. Goodman-Delahunty, Cossins & Martschuk (2016) looked at the distribution of factual recall errors during deliberation and asked whether they were associated with varying numbers of trial witnesses. They found that simpler, non-consolidated cases were associated with fewer errors, as shown in the following figure.

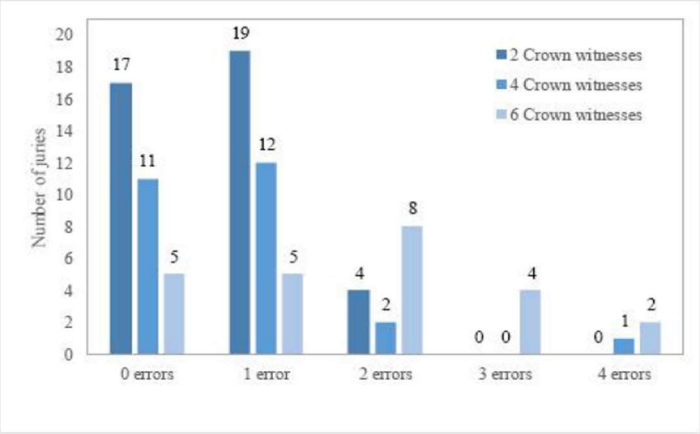


Figure 9. Number of factual recall errors in deliberation, by total number of prosecution witnesses

55. Based upon the foregoing, I conclude that it would be highly prejudicial to LivaNova if multiple claims against them were consolidated for trial. I anticipate and

research clearly indicates that consolidation would promote findings adverse to LivaNova, produce more homogenous verdicts across cases, promote bias as a result of jurors simply making more judgments and as a result of information overload, prompt jurors to draw unsupported, negative inferences about LivaNova, enhance the apparent probative value of evidence against LivaNova, prompt confusion and accumulation of evidence against LivaNova and prejudicially increase the risk of liability findings, damages and punitive damages awards against LivaNova.

56. As noted frequently above, these prejudicial effects generally appear when only two plaintiffs or claims or charges are consolidated and are intensified as the numbers increase. I further conclude that limiting instructions and deliberation by jurors are extremely unlikely to overcome these multiple sources of prejudice. By far the most effective method of avoiding the problems detailed above is to try each claim separately before separate juries.

I affirm under penalties for perjury that the foregoing representations are true.

December 3, 2021

Steven D. Penrod

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B.A. Yale College, 1969, Poli. Sci. Thesis Advisor: Robert Dahl

HONORS AND AWARDS

2015—European Assoc for Psychology and Law Award for Distinguished Career Contributions

2005--APA Fowler Award for Outstanding Contribution to the Professional Development of Graduate Students

2001--Distinguished Professorship, John Jay College, CUNY

1999--Award for Distinguished Contributions to Psychology and the Law—American Psychology-Law Society

1999-2000--Gallup Professorship—University of Nebraska

1994-1995--Davis Professorship in Law, Univ of Minnesota

1986--American Psychological Association Distinguished Scientific Award for an Early Career Contribution to Applied Psychology (Citation: *American Psychologist, 42*, 300-303).

1981--Second Prize American Psychological Association Division 13 Meltzer Research Award

1980--Cattell Dissertation Award, NY Academy of Sciences.

1980--Soc. for Experimental Social Psych Dissertation Award.

1980--Co-winner of Society for the Psychological Study of Social Issues Dissertation Award

Harvard University: National Science Foundation Dissertation Research Grant: Law and Social Sciences

Harvard Law School: Taft Scholarship.

Yale College: Political Science Honor Society; NSF Summer Research Grant; Griffin Scholarship, Alcoa Scholarship.

PROFESSIONAL EXPERIENCE

2001- Distinguished Professor of Psychology, John Jay--CUNY
1999-2000 Gallup Professorship—University of Nebraska
1995-2001 Dir of Law and Psychology Program-Univ of NE
1995-2001 Prof of Psychology & Prof of Law-Univ of Nebraska
1994-1995 Adjunct Prof: Humphrey Institute of Public Affairs-MN
1993-1995 Dir of Grad Studies in Conflict Management-U of MN
1992-1993 Grievance Officer, University of Minnesota
1991-1995 Director, Conflict and Change Center, Univ of Minn
1990-1995 Adjunct Professor of Psychology, Univ of Minnesota
1989-1996 Professor of Law, University of Minnesota
1988-1989 Visiting Prof, Law & Psychology, Univ of Minnesota
1988-Professor of Psychology, University of Wisconsin
1986 Research Consultant, Judicial Council of California
1985-1988 Associate Prof of Psychology, Univ of Wisconsin
1985 Visiting Professor of Law, Indiana University
1983 Visiting Professor of Law, University of Wisconsin
1979-1985 Asst Professor of Psychology, Univ of Wisconsin
1975-1979 Research/Teaching Asst--Psychology, Harvard Univ
1975 (summer) Staff-Hartford Inst for Criminal & Social Justice
1974 (summer) Asst Ombudsman for Connecticut Corrections
1971-1973 Naval Judge Advocate General Corps
1970 (summer) Research Assistant, Sociology Dept, Harvard Univ

PUBLICATIONS Google Scholar: goo.gl/W480EC

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Olczak, P. V., Kaplan, M. F., & Penrod, S.D. (1991). Attorney's lay psychology and its effectiveness in selecting jurors: Three empirical studies. *Journal of Social Behavior and Personality, 6,* 431-452.

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Cutler, B.L., & Penrod, S.D. (1990). Estimator Variables and

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Fulero, S.M., & Penrod, S.D. (1990). Attorney jury selection folklore: What do they think and how can psychologists help? *Forensic Reports, 3*, 233-259.

Cutler, B.L., Dexter, H.R., & Penrod, S.D. (1990). Juror sensitivity to eyewitness identification evidence. *Law and Human Behavior, 14*, 185-191.

Tanford, S. & Penrod, S. (1990). Las deliberaciones del jurado: Contenido de la discusion y procesos de influencia en la toma de decisiones de un jurado. /Jury deliberations: Discussion contents and processes influencing a jury's decision making. *Estudios de Psicologia, 42,* 75-98

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Shapiro, P. & Penrod, S. (1986). A meta-analysis of facial identification studies. *Psychological Bulletin*, *100*, 139-156. http://dx.doi.org/10.1037//0033-2909.100.2.139

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Penrod, S.D., Donnerstein, E., & Linz, D. (1982). Scientific research on pornography and violence: implications for American law. *Bulletin of the British Psychological Society*, *35*, 100 (abstract).

Penrod, S., Loftus, E. F., & Winkler, J. (1982). The reliability of eyewitness testimony: A psychological perspective. In N. Kerr & R. Bray (Eds.), *The psychology of the courtroom*. New York: Academic Press.

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Penrod, S., & Hastie, R. (1980). A computer simulation of jury decision making. *Psychological Review, 87*, 133-159.

Penrod, S., & Hastie, R. (1979). Models of jury decision-making: A critical review. *Psychological Bulletin*, *86*, 462-492.

RESEARCH AND PROGRAM GRANTS

National Science Foundation. Building Tools for Assessing the State of Eyewitness Science ($199,817, 5/1/18-6/30/21).

National Science Foundation. The responsibility of judges to assure due process: Tension among neutrality, rights protection, and role ($193,796, 07/15-06/17). With Larry Heuer.

National Science Foundation. Issue-Specific Jury Instructions. ($194,262, 09/12-08/15).

National Science Foundation. Factors influencing plea bargaining decisions by prosecutors and defense attorneys. ($93,200, 09/09-08/11).

National Science Foundation. Understanding the Impact on Juries of Defense Responses To Victim Impact Statements. ($245,813—8/08-6/11).

National Science Foundation, Field and Lab Studies of the Effects of Pretrial Publicity on Jurors' Trial Judgments. ($275,000, 8/1/06-7/31/09).

National Science Foundation, Eyewitness Guessing and Accuracy: Subjective Experience and Objective Determinants ($212,836, 9/1/2004-8/31/07) With Lisette Garcia.

National Science Foundation, Reducing Eyewitness Identification Errors: Procedural Strategies, ($298,398, 7/15/03-1/15/06).

National Science Foundation, Risk Management and Juries: How Jurors React to Cost-Benefit Analyses. ($260,000, 2/02-2/05).

With Kevin O'Neil.

National Science Foundation, Meta-Analysis of Facial Identification Research: A Reappraisal ($140,669, 5/01-4/03). With Brian Bornstein.

National Science Foundation, A Continuing Empirical Analysis of the Admissibility of Expert Testimony: Investigating the Effects of *Kumho Tire v. Carmichael*. ($102,307, 01/15/00 - 09/15/02).

CUNY Research Foundation, Sequential vs. Serial Lineup Identification Procedures. ($4800, 03/01/2002-06/30/2003)

National Science Foundation, How Expert Are Factfinders? Evaluating the Reliability of Interviews in Child Sexual Abuse Cases ($77,309, 09/01/99 - 05/31/01). With Nancy Walker.

National Institute of Mental Health, Training Grant in Mental Health Policy and Research ($620,000, 7/1/99-6/30/01).

National Science Foundation, The Death Equation: Decisionmaking in Death Penalty Cases ($172,021, Aug 1998-Feb 2001).

National Science Foundation, A Scientific Examination of the Admissibility of Scientific Expert Testimony Under *Daubert v. Merrell Dow Pharmaceuticals*. ($78,000, Sept 1997-March 1999).

Hewlett Foundation, *Center for Conflict and Change*, ($125,000, July 1994-June 1996).

National Science Foundation, *Meta-Analysis of Jury Decisionmaking Studies*, ($65,456, August 1993-March 1996).

Hewlett Foundation, *Center for Conflict and Change*, ($200,000, November 1991-October 1993).

National Science Foundation (with Eugene Borgida), *Cameras in the Courtroom: A Field Experiment* ($150,000, July 1990-June 1992).

State Justice Institute (with American Judicature Society and Larry Heuer), *Assessing the Impact of Juror Notetaking and Question-asking on Juror Performance: A National Experiment* ($111,201, November 1988-May 1990).

National Science Foundation (with Daniel Linz), *Pretrial Mass Media Exposure and Jury Decisionmaking* ($135,000, July 1988-March 1991).

National Institute of Mental Health (with Daniel Linz and Edward Donnerstein), *Sexual Violence in the Media: Mental Health Implications* ($350,824, July 1986-July 1989).

National Science Foundation, *Assessing and Calibrating Juror Sensitivity to Eyewitness Evidence* ($131,290, Sept 1984-Feb 1988)

National Institute of Justice, *Improving Eyewitness Performance* ($119,767, March 1984-September 1986).

National Science Foundation (with Edward Donnerstein). *Effects of Long-term Exposure to Sexually Violent Images*. ($202,503, June 1983-May 1986).

National Institute of Justice, *Guidelines for Joinder in Criminal Cases* ($117,000, September 1981-January 1984).

National Institute of Health, *Social Cognition and Patient-Physician Communication* ($98,003, January 1981-July 1983).

National Science Foundation (Joint Funding from Law & Social Sciences & Social and Developmental) *Empirically Based Models of Juror and Jury Decision Making*. ($76,549, January 1981-December 1983).

National Institute of Justice, 1981-1982, (with Dan Coates). *The Implications of Social Science Research for Criminal Trial Advocacy* ($203,045, January 1981-July 1983).

National Institute of Justice, *Validation of a Measure of Assaultive Risk*. Principal Investigator/Advisor on Dissertation Research by Marlowe Embree. ($10,500, 1981-1982).

National Science Foundation, *Evidence in Civil Commitment Cases*. Faculty Advisor on Student Originated Study with Terri Finesmith. ($5,828, Summer 1981).

University of Nebraska Visiting Scholar Grant (John Michon). 1996. $795.

University of Minnesota Graduate School, 1991-1992, *External Validity of Jury Research*, ($9,056).

University of Minnesota Graduate School, 1990-1991, *Juror Decisions in Joined Trials*, ($10,000).

University of Minnesota Graduate School, 1989-1990, *Legal Decisionmaking*, ($10,000).

University of Wisconsin Alumni Research Fund, 1986-1987, *Legal Decisionmaking* ($2,730).

University of Wisconsin Alumni Research Fund, 1984-1985, *Modeling Social Influence Processes*. ($7,959).

University of Wisconsin Bio-Medical Research Fund, 1984-1985, *Physiological Desensitization from Exposure to Media Violence*. ($5,000).

University of Wisconsin Alumni Research Fund, 1983-1984, *Effects of Exposure to Sexually Violent Images*. ($2,600).

University of Wisconsin Bio-Medical Research Fund, 1983-1984, *An Inoculation Procedure for Exposure to Violent Media Portrayals*. ($2,600).

University of Wisconsin Alumni Research Fund, 1982-1983, *Eyewitness Reliability: Closing the Generalization Gap*. ($5,922).

University of Wisconsin Alumni Research Fund, 1981-1982, *Script- Based Inferencing and Decision Making*. ($10,229).

University of Wisconsin Alumni Research Fund, 1980-1981, *Models of Jury Decision Making*. ($5,964).

University of Wisconsin Bio-Medical Research Fund, 1980-1981, *Social Cognition and Patient-Physician Communication*. ($7,300).

University of Wisconsin Bio-Medical Research Fund, 1979-1980, *Cognitive Models of Symptoms and Diseases*. ($5,000).

Wisconsin Graduate Research Committee, General Research Support, 1979-1980.

National Science Foundation (Law & Social Sciences) Dissertation Research Award 1979, *Evaluation of Traditional and 'Scientific' Jury Selection Methods*. ($5,790).

CONFERENCE PRESENTATIONS (2010-present)

Lee, J., Mansour, J. & Penrod, S. (March 2021). Validity of mock-witness measures for assessing lineup fairness. American Psychology-Law Society.

Penrod, S. D. (March 2020). From Hypotheticals to Plea Simulations: An Examination of Diverse Factors Influencing Plea Decision: Discussant American Psychology-Law Society, New Orleans.

Lee, J., Khogali, M., Despodova, N., & Penrod, S. D. (2019). A

third party's judgment in same-race and cross-race crimes. Fall Conference of the Korean Social and Personality Psychological Association, Seoul, Korea

Lee, J & Penrod, S. D. (June 2019). New signal-detection-theory-based framework for eyewitness performance in lineups. Society for Applied Research in Memory and Cognition, Brewster, MA.

Despodova, N., Lee, J., Khogali, M., Dysart, J., & Penrod, S. (March 2019). Are perceptions of alibi credibility affected by defendant and alibi witness race, and defendant alibi witness relationship? American Psychology-Law Society, Portland, OR.

Evelo, A., Lee, J., Modjadidi, K., & Penrod, S. (June 2018). The role of lineup bias in witness accuracy, the confidence-accuracy relationship and the courtroom value of witness confidence. European Assn of Psychology and Law, Turku.

Modjadidi, K., Khogali, M., & Penrod, S. D. (March 2017) Evaluating the effect of eyewitness aids on laypersons through a plea-bargain paradigm. American Psychology-Law Society, Seattle.

Rodriguez, D. Hanson, M., Berry, M., Rhead, L. Lawson, V.Z. & Penrod, S.D. (March 2017). Undisclosed and disclosed backloading in sequential, simultaneous, and modified simultaneous lineups. American Psychology-Law Society, Seattle.

Lee, J., Khogali, M., Band, S. & Penrod, S. D. (March 2017). The effect of own-race and interracial crimes on people's judgments in criminal cases. American Psychology-Law Society, Seattle.

Jones, A., Heuer, L. B. & Penrod, S.D. (March 2017). Does good (bad) behavior deserve good (bad) treatment? A test of the justice matching hypothesis. American Psychology-Law Society, Seattle.

Modjadidi, K., Khogali, M., & Penrod, S. D. (July 2016). Jury aids in plea-bargaining: Are attorneys sensitive to eyewitness evidence with aid when making plea-bargaining decisions? European Assn of Psychology and Law, Toulouse.

Jones, A., Heuer, L. & Penrod, S. D. (July 2016). The responsibility of judges to assure due process: Assessing antecedents of procedural and distributive justice in New York City Housing Court. European Assn of Psychology and Law, Toulouse.

Penrod, S. (July 2016). Wagenaar Symposium - Face recognition in forensic settings—chair. European Assn of Psychology and Law, Toulouse.

Bergold, A. & Penrod, S. D. (March 2016). Can closing arguments help jurors' evaluate eyewitness evidence? American Psychology-Law Society, Atlanta.

Penrod, S. & Smith, A. (August 2015). Memory quality, guessing and bias in lineups: Their intersecting influences on eyewitness performance. European Assn of Psychology and Law, Nuremberg.

Jones, A.M., & Penrod, S. (May 2015). Jurors' compliance and Henderson style judicial instructions influence evaluations of confession evidence. Association for Psychological Science, New York, New York.

Jones, A. Y., Bergold, A., Berman, M. & Penrod, S. (March 2015) Sensitizing jurors to factors influencing the accuracy of eyewitness identification: assessing the effectiveness of the Henderson instructions. American Psychology-Law Society, San Diego.

Berman, M. & Penrod, S. (March 2015) The roles of evidence evaluation and case-specific judicial instructions in eyewitness identification cases. American Psychology-Law Society, San Diego.

Sivasubramaniam, D., Heuer, L., Penrod, S. & Davies, L. (March 2015) "Acting Fairly": Do instructions to engage in procedural justice prompt distributive justice? American Psychology-Law Society, San Diego.

Yarbrough, A., & Penrod, S. (2014, March). Can expert testimony sensitize jurors to the coerciveness of interrogation tactics? American Psychology-Law Society, New Orleans.

Nicholson, A.S., Yarbrough, A., Berman, M., Hui, C., & Penrod, S. (2014, March). Helping jurors understand eyewitness identifications: Deliberations and judicial instructions. American Psychology-Law Society, New Orleans.

Berman, M., Yarbrough, A., Nicholson, A.S., Hui, C., & Penrod, S. (2014, March). Do issue-specific judicial instructions sensitize jurors to eyewitness identification accuracy? American Psychology-Law Society, New Orleans.

Hui, C., Yarbrough, A., Berman, M., Nicholson, A.S., & Penrod, S. (2014, March). Intuitive or informed decision makers? The impact of probative value of evidence on coherence-based reasoning in juror decision making. American Psychology-Law Society, New Orleans.

Penrod, S. (Dec 2013). National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Court.

Daftary-Kapur, T. & Penrod, S. (September 2013). Assessing the impact of research on the formation of a scientific consensus concerning eyewitness research findings: A longitudinal analysis. EAPL, Coventry.

Berman, M., Nicholson, A., Yarbrough, A., Hui, C., & Penrod, S. (June 2013). Issue-specific judicial instructions and expert testimony in eyewitness cases. Society for Applied Research in Memory and Cognition, Rotterdam, the Netherlands.

Hans, V., Ivkovich, S., Fukurai, H., Jaihyun, J., & Penrod, S. (Mar 2013). Global Perspectives on Lay Participation in Legal Decisions. APLS, Portland, OR.

Daftary-Kapur, T., Tallon, J. A. & Penrod, S. (Mar 2013). Influence of pre-trial publicity on verdicts in a trial simulation: Issues of generalizability and type. APLS, Portland, OR.

Berman, M. K. & Penrod, S. (Mar 2013). Mistaken eyewitness identification: A meta-analytic review of the efficacy of the judicial instruction safeguard. APLS, Portland, OR.

Tallon, J. A., Daftary-Kapur, T. & Penrod, S. (Mar 2013). Remorse and PTP in capital trials: Is seeing truly believing? APLS, Portland, OR.

Penrod, S. & Heuer, L. B. (December 2012). American Courts on Eyewitness Research. International Investigative Psychology. London.

Daftary-Kapur, T. & Penrod, S. (November 2012). An examination of the effects of post-venire publicity on juror decision-making. ASC, Chicago.

Yarbrough, A., Nicholson, A., & Penrod, S. (2012, June). Significant eyewitness cases and the shifting focus of the courts. Paper presentation at the Tenth Biennial International Conference, New York, NY.

Beaudry, J, Crocker, C. O. & Penrod, S. D. (March 2012). Prosecutor and Defense Attorneys' Perceptions of Video-Recorded Eyewitness Identifications. APLS, San Juan.

Penrod, S. (March 2012). Bringing Eyewitness Science to the

Courts. APLS, San Juan.

Penrod, S. (March 2012). Panel Chair: Lineup Administration: Challenges and Reforms. APLS, San Juan.

Tallon, J. A., Daftary-Kapur, T., Groscup, J., & Penrod, S. (March 2012). Examining Individual Differences in Jurors' Use of Affectively Laden Evidence. APLS, San Juan.

Vredeveldt, A. & Penrod, S. (March 2012). Eye-closure improves free recall of a live event: Context versus distraction. APLS, San Juan.

Tallon, J., Daftary-Kapur, T., Monier, A., Rhead, L., Loughlin, M., Yip, J., Groscup, J, & Penrod, S. (March 2011). Understanding potential defendant responses to victim impact statements. AP-LS, Miami.

Rhead, L. M., Daftary-Kapur, T. & Penrod, S. (March 2011). The effects of pretrial publicity on jurors' story construction in a civil case. AP-LS, Miami, FL.

Crocker, C. & Penrod, S. (March 2011). The influence of eyewitness identification factors and legal factors on attorneys' plea-bargaining decisions. AP-LS, Miami, FL.

Dumas, R., Dysart, J. Py J. & Penrod, S. (March 2011). Eyewitness identification strategies: Contribution of implicit personality theories and emotional expression. AP-LS, Miami, FL.

Wallace, B. & Penrod, S. (June 2010). Guessing, bias, and reliability in lineups. EAPL, Goteborg, Sweden.

Tallon, J.; Daftary-Kapur, T., Lindsey Rhead, L.; Jon Carbone, J.; Groscup, J.,; & Penrod, S. (March 2010). Underlying Affective Processes in Mock Jurors' Use of Victim Impact Statements. AP-LS, Vancouver.

Rhead, L.; D'Antuono, D., Daftary-Kapur, T., Tallon, J. A. & Penrod, S. (March 2010). The Death Penalty Attitudes Scale as a Moderator of Pre-trial Publicity. AP-LS, Vancouver.

MAJOR DEPARTMENTAL AND UNIVERSITY COMMITTEES

John Jay-CUNY:
Organizing CUNY Internal Grants for Psychology 2010-2013
CUNY Doctoral Faculty Policy Committee 2007-
CUNY Faculty Senate Legal Affairs Committee 2007-2010
Director of Forensic Psychology PhD program 2007-2008
CUNY Faculty Advisory Committee for Research Foundation—2003- (Chair 2003-2005)
RFCUNY Board of Directors 2002-2006 2015-
Department Personnel and Budget 2005-2006
Faculty/Staff Resource Comm for New John Jay Building 2003
MacNamara Award Committee 2002-2003
Presidential Research Award Committee 2002-2003
Justice Scholarship Committee 2002-2004
Law- Psychology Admissions Committee 2004-
Criminal Justice Graduate Admissions/Financial Aid/Graduate Council 2002-2015.

TEACHING

2001-21 (CUNY): Rotation of PhD courses: Jury Decisionmaking; Eyewitness Reliability; Experimental Psychology and Law; Graduate Research Methods; Media, Psychology and Law

1995-01 (Nebraska): Law and Behavioral Sciences, Jury Decisionmaking, Amicus Brief Writing; Juries, Alternative Dispute Resolution, Law and Psychology, Grantwriting, Meta-analysis

1988-95 (Minnesota): Social Science and Law, Alternative Dispute Resolution, Negotiation Skills, Conflict Management, Social Psychology Graduate Pro-Seminar, Social Psychology Graduate Pro-Seminar, Methods of Meta- Analysis, Moot Court Supervision, Graduate Research Methods (Political Science Department), Social Science and Law, Psychology and Law (Psychology Department).

1979-1988 (Wisconsin): Research Methods in Social Psychology, Psychology and Law, Graduate Research Methods in Social Psychology, Social Psychology, Social Science and Law, Expert Witness Seminar, Evidence (University of Wisconsin Law School), Social Cognition, Introductory Psychology.

Ph.D. STUDENTS

Jungwon Lee (2019)
Marlee Berman (2015)
Angela Yarbrough Jones (2015)
Min Kim (2009)
Tarika Daftary-Kapur (2009—with Maureen O'Connor) APA Division 41 Dissertation Prize and Cattell Dissertation award
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EXHIBIT C

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The Problem of Multidistrict Litigation
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BELLWETHER TRIALS IN MULTIDISTRICT LITIGATION

This Article first provides an overview of the multidistrict litigation process and the history of bellwether trials within it. The Article then recounts in detail specific uses and multiple techniques for implementing bellwether trials under the modern informational approach. After weighing the benefits and drawbacks of using bellwether trials, the Article concludes that procedures that involve considerable attention to the selection of bellwether cases, especially those that include significant attorney participation, are best suited to assist the parties in accurately valuating the thousands of other cases for which trial is often not practical or authorized in the transferee district. The Article sounds a hopeful note for judges and practitioners in multidistrict litigation today by highlighting and deconstructing one of the most innovative and useful techniques for the resolution of complex cases.

***2324** The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context. [1]

I. Introduction

In an age of increasing skepticism regarding the use of class actions in our legal regime, the modern multidistrict litigation (MDL) process embodied in 28 U.S.C. § 1407 is emerging as the primary vehicle for the resolution of complex civil cases. [2] The MDL process has traditionally been limited to establishing a centralized forum where related cases are consolidated so that coordinated pretrial discovery can proceed in an efficient and effective manner. [3] In theory, this centralized forum, or "transferee court," as it is known, is a sort of way-station at which the preliminary aspects of the litigation can be ***2325** more or less completed before individual cases are sent to their final destinations in courts across the country for ultimate resolution. In practice, however, the centralized forum can do more than function as a discovery crucible. Indeed, by establishing a mechanism for conducting "bellwether" or "representative" trials, the transferee court can enhance and accelerate both the MDL process itself and the global resolutions that often emerge from that process.

This Article begins with a brief overview of the traditional MDL process. It then traces the rise and development of bellwether trials, from early attempts to bind related claimants to the results of such trials, to the modern informational, or nonbinding, approach. A typical bellwether case often begins as no more than an individual lawsuit that proceeds through pretrial discovery and on to trial in the usual binary fashion: one plaintiff versus one defendant. Such a case may take on "bellwether" qualities, however, when it is selected for trial because it involves facts, claims, or defenses that are similar to the facts, claims, and defenses presented in a wider group of related cases. The primary argument presented here in support of the informational approach is that the results of bellwether trials need not be binding upon consolidated parties with related claims or defenses in order to be beneficial to the MDL process. Instead, by injecting juries and fact-finding into multidistrict litigation, bellwether trials assist in the maturation of disputes by providing an opportunity for coordinating counsel to organize the products of pretrial common discovery, evaluate the strengths and weaknesses of their arguments and evidence, and understand the risks and costs associated with the litigation. At a minimum, the bellwether process should lead to the creation of "trial packages" that can be utilized by local counsel upon the dissolution of MDLs, a valuable by-product in its own right that supplies at least a partial justification for the traditional delay associated with MDL practice. But perhaps more importantly, the knowledge and experience gained during the bellwether process can precipitate global settlement negotiations and ensure that such negotiations do not occur in a vacuum, but rather in light of real-world evaluations of the litigation by multiple juries.

The Article moves on to discuss the primary practical consideration for courts and counsel in employing bellwether trials, namely the method of selecting bellwether cases from a wider group of related lawsuits. Although there is no one trial selection paradigm, the process generally should proceed in three steps. First, the transferee court should catalogue the entire universe of cases that comprise the ***2326** MDL and attempt to divide the cases into several discrete categories based on prominent variables. Second, the transferee court should create a pool of representative cases, which includes cases from each category, and then place these cases on a fast-track for case-specific discovery. Third, the transferee court must devise the appropriate methodology for selecting a predetermined number of individual cases from the pool for trial. Throughout the entire process, the transferee court can greatly benefit from the assistance of the attorneys involved in the litigation. Indeed, the bellwether process works best when counsel are engaged and devoted to the endeavor from the start.

II. Overview of the Multidistrict Litigation Process

Congress amended the Judicial Code in 1968 "[t]o provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact." [4] In its current form, the MDL statute provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers

> for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, [t]hat the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded. [5]

Thus, the consolidation of related cases pending in federal courts across the country is achieved by the Judicial Panel on Multidistrict Litigation, known informally as the "MDL Panel." [6]

***2327** The MDL Panel "consist[s] of seven [sitting federal] circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit." [7] According to the MDL Panel itself, "[t]he job of the Panel is to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings." [8] The MDL Panel may carry out these functions either "upon its own initiative" or in response to a "motion filed with the panel by a party in any action in which transfer . . . may be appropriate." [9]

When the MDL Panel finds that centralization of related actions is appropriate, an MDL is formally created by the issuance of a "transfer order." [10] The Panel's transfer order will assign a title and number to the MDL and will identify the related actions currently pending in districts outside the selected transferee forum that are being ***2328** transferred pursuant to 28 U.S.C. § 1407. These cases, together with any related actions originally filed in the transferee forum, will constitute the MDL. As the MDL Panel subsequently learns of additional related cases, it will issue "conditional transfer orders" identifying tag-along actions that are to join the MDL. [11] A conditional transfer order does not become final, however, until it is filed by the MDL Panel in the transferee court and such filing is delayed fifteen days to allow any objections to the transfer of tag-along actions to be made. [12] Thus, transferor courts retain jurisdiction over cases subject to conditional transfer orders until such orders are filed in the transferee court. From time to time, the MDL Panel will vacate a conditional transfer order before it becomes final, typically based either on a well-founded objection to transfer or in light of the dismissal or remand of an action by the transferor court.

The MDL Panel transfers cases to the transferee court for "coordinated or consolidated pretrial proceedings." [13] And as the MDL Panel has explained, the word "pretrial, as an adjective, means before trial," thus "all judicial proceedings before trial are pretrial proceedings." [14] Indeed, the transferee court's authority has been described as "broad," and it necessarily encompasses issuing pretrial orders, resolving pretrial motions (including discovery motions, motions to amend, motions to dismiss, motions for summary judgment, and motions for class certification), and attempting to facilitate settlement. [15] In reality, there is only one true limit on a transferee court's authority over cases transferred to it by the MDL Panel, namely that a transferee court cannot "unilaterally transfer[] cases to [itself] for trial." [16] The United States Supreme Court defined this limitation in Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, noting that the MDL statute "not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court ***2329** when, at the latest, those pretrial proceedings have run their course." [17] Thus, Lexecon held that the language of § 1407 precludes a transferee court from utilizing 28 U.S.C. § 1404(a) to make "self-assignments" and thereby retain transferred cases beyond pretrial proceedings. [18] Accordingly, at the conclusion of pretrial proceedings, cases that have not been terminated in the transferee court as a result of summary judgment, judgment of dismissal, or judgment upon stipulation must be remanded by the MDL Panel to the transferor courts for trial. [19] However, in practice, "[f]ew cases are remanded for trial; most multidistrict litigation is settled in the transferee court." [20] But this process can take time.

***2330** Indeed, the strongest criticism of the traditional MDL process is that the centralized forum can resemble a "black hole," into which cases are transferred never to be heard from again. [21] The fact that MDL practice is relatively slow is to be expected, however, when one court is burdened with thousands of claims that would otherwise be spread throughout courts across the country. Despite criticisms of inefficiency, judicial economy is undoubtedly well-served by MDL consolidation when scores

of similar cases are pending in the courts. The relevant comparison is not between a massive MDL and an "average case," but rather between a massive MDL and the alternative of thousands of similar cases clogging the courts with duplicative discovery and the potential for unnecessary conflict. Nevertheless, the excessive delay and "marginalization of juror fact finding" (i.e., dearth of jury trials) sometimes associated with traditional MDL practice are developments that cannot be defended. [22] The use of bellwether trials can temper both of these negative tendencies.

III. The Rise of Bellwether Trials

While "consolidation improves the efficiency of the pre-trial process, courts still face the daunting possibility of adjudicating numerous similar claims." [23] Indeed, just like consolidation under Rule 42 of the Federal Rules of Civil Procedure, consolidation of individual cases in a transferee court by the MDL Panel pursuant to § 1407 "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." [24] It is in this setting that the use of bellwether, or representative, trials has developed and in which the practice can flourish.

*2331 A. Early Experimentation: The Binding Approach

Initially, courts attempted to use the results of bellwether trials to bind related claimants formally. [25] The early use of bellwether trials in this binding fashion was essentially an alternative to the adjudication of a class action. That is, notwithstanding the absence of class certification, it was nevertheless thought that the trial of representative claims could somehow have a binding effect on the consolidated cases of related claimants. [26] Appellate courts have been skeptical of this practice, and for good reason. [27]

*2332 B. The Modern Informational Approach

Two recent pharmaceutical MDLs that were centralized in the United States District Court for the Eastern District of Louisiana utilized bellwether jury trials for informational purposes: In re Propulsid Products Liability Litigation (MDL 1355) and In re Vioxx Products Liability Litigation (MDL 1657). [28] The ultimate purpose of holding bellwether trials in those settings was not to resolve the thousands of related cases pending in either MDL in one "representative" proceeding, but instead to provide meaningful information and experience to everyone involved in the litigations. [29] Because the remainder of this Article draws examples from both MDLs, a brief factual summary of the Propulsid and Vioxx MDLs and the bellwether trials that were conducted is appropriate.

1. In re Propulsid Products Liability Litigation (MDL 1355)

The federal Propulsid MDL was created by the MDL Panel on August 7, 2000. [30] Propulsid is the trade name for a family of prescription drugs that contain the active pharmaceutical ingredient cisapride. [31] Propulsid was manufactured by Janssen Pharmaceutica, Inc., which is a wholly owned subsidiary of Johnson & Johnson, and approved by the United States Food and Drug Administration (FDA) in 1993 for the treatment of nocturnal heartburn symptoms caused by gastroesophageal reflux disease. [32] Propulsid is a prokinetic agent that was designed to work by increasing the rate at which the esophagus, stomach, and intestines move food during digestion. [33] The plaintiffs in the Propulsid MDL asserted state law products liability claims, primarily alleging that Propulsid was defectively designed and that the ***2333** defendants failed to warn that dangerous heartbeat irregularities could develop when the drug was consumed by some individuals in certain circumstances. [34]

The transferee court conducted one bellwether trial in the Propulsid MDL before a jury in New Orleans. The bellwether trial, Diez v. Johnson & Johnson, involved the surviving spouse and children of a male plaintiff who suffered a fatal cardiac arrhythmia, allegedly as a result of his use of Propulsid. [35] The case was governed by Louisiana law and resulted in a verdict for the defendants.

In addition to the Diez case, the transferee court had intended to hold two additional bellwether trials in the Propulsid MDL. The second bellwether case, Reed v. Johnson & Johnson, involved a female plaintiff who allegedly suffered damage to her

intestinal track as a result of using Propulsid.[36] But prior to trial, the transferee court granted summary judgment in favor of the defendants under Louisiana law, finding that the plaintiff could not state a claim because her alleged gastric problems predated her use of Propulsid.[37] The third bellwether case, Brock v. Johnson & Johnson, involved a female plaintiff who alleged that her use of Propulsid caused her to have a sustained prolonged QT interval, placing her at risk for sudden death.[38] Prior to trial, however, the transferee court excluded the causation opinions proffered by two of the plaintiff's expert physicians and granted summary judgment in favor of the defendants under Louisiana law.[39]

A settlement of all Propulsid-related federal lawsuits was announced on February 4, 2004.[40] Pursuant to the terms of the settlement, the defendants agreed to pay eligible claimants at least $69.5 million, but no more than $90 million, with individual awards being determined by a medical review panel comprised of individuals ***2334** jointly selected by counsel.[41] A second settlement of all state lawsuits, and federal suits filed after the deadline for enrollment in the first settlement program, was announced on December 15, 2005.[42] Pursuant to the terms of the second settlement, the defendants agreed to pay eligible claimants at least $14.5 million, but no more than $15 million, with individual awards again being determined by a medical review panel.[43] Finally, on August 30, 2007, a supplemental agreement was announced, which provided that certain claimants originally determined to be ineligible under either of the previous settlement programs would be entitled to a re-review of their claims.[44]

2. In re Vioxx Products Liability Litigation (MDL 1657)

The federal Vioxx MDL was created by the MDL Panel on February 16, 2005.[45] Vioxx is a prescription drug that belongs to a general class of pain relievers known as nonsteroidal anti-inflammatory drugs (NSAIDs).[46] Vioxx was manufactured by Merck & Company, Inc. and approved by the FDA in 1999 for the treatment of pain and inflammation resulting from osteoarthritis, rheumatoid arthritis, menstrual pain, and migraine headaches.[47] Vioxx was designed to work by selectively inhibiting one form of the cyclooxygenase enzyme, namely COX-2, and to thereby provide pain relief with a reduced risk of gastrointestinal perforations, ulcers, and bleeds traditionally associated with NSAID use.[48] The plaintiffs in the Vioxx MDL assert state law products liability claims primarily ***2335** alleging that Merck failed to warn of an increased risk of heart attacks and strokes associated with the use of Vioxx.[49] The bulk of these claims are individual personal injury claims; however, the Vioxx MDL also includes claims for medical monitoring and third-party payor claims seeking reimbursement of amounts spent on the drug.[50]

The transferee court conducted six bellwether trials in the Vioxx MDL, only one of which resulted in a verdict for the plaintiffs.[51] The first federal trial was held before a jury in Houston, Texas, while the transferee court was temporarily displaced during Hurricane Katrina.[52] The remaining federal trials were held before juries in New Orleans, Louisiana.[53] During this time, approximately thirteen additional cases were tried before juries in state courts in New Jersey, California, Texas, Alabama, Illinois, and Florida.[54]

The first federal bellwether trial, Plunkett v. Merck, involved the surviving spouse of a male plaintiff who suffered a fatal heart attack in 2001 at the age of fifty-three, allegedly as a result of his use of Vioxx for several weeks.[55] The case was governed by Florida law and resulted in a hung jury.[56] The case was subsequently retried as the second bellwether trial and resulted in a verdict for the defendant.[57] Because of a misrepresentation by one of the defendant's expert witnesses during the retrial, the court vacated this verdict and reopened the case.[58]

***2336** The third bellwether trial, Barnett v. Merck, involved a male plaintiff who suffered a heart attack in 2002 at the age of fifty-eight, allegedly as a result of his use of Vioxx for several years.[59] The case was governed by South Carolina law and resulted in a $51 million verdict for the plaintiff, which consisted of $50 million in compensatory damages and $1 million in punitive damages.[60] The court initially ordered a new trial on the issue of damages,[61] but upon further consideration remitted the jury's award to $1.6 million.[62] After the plaintiff accepted the remitted award, the defendant appealed to the United States Court of Appeals for the Fifth Circuit, but the parties have since settled the case and the appeal has been dismissed.[63]

The fourth bellwether trial, Smith v. Merck, involved a male plaintiff who suffered a heart attack in 2003 at the age of fifty-two, allegedly as a result of his use of Vioxx for approximately four months. [64] The case was governed by Kentucky law and resulted in a verdict for the defendant. [65] The fifth bellwether trial, Mason v. Merck, involved a male plaintiff who suffered a heart attack in 2003 at the age of fifty-nine, allegedly as a result of his use of Vioxx for approximately ten months. [66] The case was governed by Utah law and resulted in a verdict for the defendant. [67] The sixth bellwether trial, Dedrick v. Merck, involved a male plaintiff who suffered a heart attack in 2003 at the age of fifty-four, allegedly as a result of his use of Vioxx for approximately six months. [68] The case was governed by Tennessee law and resulted in a verdict for the defendant. [69]

After these six bellwether trials in the MDL, as well as several trials in the state courts, the parties, with the encouragement of the various courts, began serious settlement discussions. Those discussions ultimately proved successful and a partial settlement of all ***2337** Vioxx-related personal injury lawsuits pending in both federal and state courts was announced on November 9, 2007. [70] Pursuant to the terms of the settlement, which was contingent upon a certain percentage of current claimants agreeing to participate, Merck agreed to pay $4.85 billion to eligible claimants, with individual settlement awards varying based on an objective analysis of individual circumstances by a claims administrator. [71]

C. Benefits of the Modern Approach

In the MDL setting, bellwether trials can be effectively employed for nonbinding informational purposes and for testing various theories and defenses in a trial setting. Although the results of such "nonbinding" bellwether trials are obviously binding upon the parties to the specific cases that are tried, the results need not be binding on consolidated claimants in order to be beneficial to the MDL process. The Fifth Circuit has recognized the potential value of employing bellwether trials in this manner:

> The 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 is a sound one that has achieved general acceptance by both bench and bar . . . . The reasons for acceptance by bench and bar are apparent. If a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts. [72]

Another significant benefit of bellwether trials is that they provide a vehicle for putting litigation theories into practice. As most experienced litigators know, trials rarely proceed exactly as planned. ***2338** In addition to the unexpected logistical problems that may arise, one can never be sure how certain arguments and evidence will "play" before a trier of fact. In multidistrict litigation, these uncertainties are often exacerbated by variations that exist among the circumstances of consolidated claimants and by the sheer volume of relevant material produced during discovery.

Bellwether trials thus assist in the maturation of any given dispute by providing an opportunity for coordinating counsel to organize the products of pretrial common discovery, evaluate the strengths and weaknesses of their arguments and evidence, and understand the risks and costs associated with the litigation. [73] Indeed, the utilization of bellwether jury trials can enhance and accelerate the MDL process in two key respects. First, bellwether trials allow coordinating counsel to hone their presentation for subsequent trials and can lead to the development of "trial packages" for use by local counsel upon the dissolution of MDLs. Second, and perhaps more importantly, bellwether trials can precipitate and inform settlement negotiations by indicating future trends, that is, by providing guidance on how similar claims may fare before subsequent juries.

1. Trial Packages

The bellwether process can benefit all consolidated litigants in an MDL by providing the impetus for coordinating attorneys to assemble "trial packages." [74] As noted above, bellwether trials force litigants to ***2339** organize and streamline the massive wealth of material that is often produced during pretrial discovery in multidistrict litigation. Trial packages are a valuable by-product of this forced organization, and can be distributed to litigants and local counsel when an MDL is dissolved and individual cases are remanded to transferor courts for trial.

Trial packages come in different shapes and sizes, but typically will include various databases of material such as the relevant docu-ments acquired in discovery, other valuable background information, expert reports, deposition and trial testimony (both transcripts and video, if available), biographies of potential witnesses, transferee court rulings and transcripts, and the coordinating attorneys' work product and strategies with respect to all of this material. Ideally, these materials will be well-organized, indexed, and electronically searchable.

To the extent that trial lawyers can be analogized to actors in a play, it is helpful to think of coordinating counsel as playwrights in this aspect of the bellwether process. A bellwether trial forces these playwrights to draft their manuscripts in a relatively short period of time--that is, to develop fully the presentation of their clients' cases within the MDL. Multiple bellwether trials allow counsel to hone their presentations, making minor adjustments based on previous performances and the realities of litigation--not unlike the practice of Shakespeare himself. [75] The trial package is the final product of this ***2340** interactive creative process, and its dissemination to local counsel upon the dissolution of an MDL is akin to "taking the show on the road."

Ultimately, the availability of a trial package ensures that the knowledge acquired by coordinating counsel is not lost if a global resolution cannot be achieved in the transferee court. Trial packages also ensure that the products of pretrial common discovery do not overwhelm local counsel in the event that cases are remanded for trial. In this way, the bellwether process guarantees that, at a minimum, the transferee court is effective at its intended goal of streamlining pretrial discovery and preparing cases for trial in their local districts. Indeed, the creation of a complete trial package is tangible evidence that the transferee court's statutory role in overseeing pretrial discovery is nearing an end and that the dissolution of the MDL is a real possibility. By ushering in these realities, the bellwether process can also precipitate global settlement negotiations.

2. Enhancing Global Settlements

"As in traditional tort litigation, the endgame for a mass tort dispute is not trial but settlement . . . . [and] the most ambitious settlements seek to make and enforce a grand, all-encompassing peace in the subject area of the litigation as a whole." [76] By virtue of the temporary national jurisdiction conferred upon it by the MDL Panel, the transferee court is uniquely situated to preside over global settlement negotiations. Indeed, the centralized forum created by the MDL Panel truly provides a "once-in-a-lifetime" 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. [77] Transferee courts can contribute to the fulfillment ***2341** of this important role through the initiation and management of the bellwether trial process.

In his recent treatment of mass tort settlements, Professor Richard Nagareda succinctly describes the way in which a typical mass dispute evolves: "[M]ass tort litigation frequently proceeds from an immature stage to a mature stage and, thereafter, to what one might call a peacemaking stage, where efforts focus on the crafting of a comprehensive settlement." [78] When the MDL Panel first centralizes related cases in a transferee court, chances are that the litigation is still in its "immature" stage, exhibiting the following characteristics:

> The immature stage marks the period for exploration of the legal and factual questions surrounding the merits of the litigation. The ultimate success of the litigation remains fraught with uncertainty . . . . Some individual lawsuits typically will proceed through full-scale trials to test the quality of proof gathered on the plaintiffs' side and to gauge the reactions of jurors to the allegations presented. Defendants, in particular, will be on the lookout for arguments with the potential to knock out the entire subject area of litigation--a lack of general causation as a factual matter or the absence of some other necessary element as a matter of law. [79]

Over time, as the litigation matures, both litigants and counsel begin to shift their focus to the potential for global resolution. [80] By bringing ***2342** fact-finding to the forefront of multidistrict litigation, bellwether trials can make a significant contribution to the maturation of disputes and, thus, can naturally precipitate settlement discussions. [81]

In addition to this valuable contribution, bellwether trials also allow MDL litigants and their lawyers to gain an understanding of the litigation that is exponentially more grounded in reality than that which has traditionally persisted in the absence of jury trials. [82] To grasp fully how bellwether trials can enhance the ultimate resolution of a given dispute, one must understand the

structure of modern mass tort settlements: "[I]n the period since the [Supreme] Court's decisions [in Amchem Products, Inc. v. Windsor [83] and Ortiz v. Fibreboard Corp. [84]], a rough consensus has emerged about the desirability of moving toward some manner of grid-based solution once mass tort litigation has matured." [85] These "grid-based solutions" are so-called because they "use grids to match medical conditions with compensation payouts in a systematic manner." [86] By allowing juries an initial opportunity to carry out such matching on an ad hoc, case-by-case basis, bellwether trials essentially supply counsel with "raw" data around which a more fair and equitable grid-based compensation system can ultimately be constructed.

IV. The Selection Process

After the threshold determination to utilize bellwether trials, the transferee court and coordinating counsel should focus on the ***2343** mechanics of the trial-selection process. If bellwether trials are to serve their twin goals as informative indicators of future trends and catalysts for an ultimate resolution, the transferee court and the attorneys must carefully construct the trial-selection process. Ideally, the trial-selection process should accurately reflect the individual categories of cases that comprise the MDL in toto, illustrate the likelihood of success and measure of damages within each respective category, and illuminate the forensic and practical challenges of presenting certain types of cases to a jury. Any trial-selection process that strays from this path will likely resolve only a few independent cases and have a limited global impact.

At the very outset, it must be noted that the sheer number and type of feasible trial-selection processes are limited only by the ingenuity of each transferee court and the coordinating attorneys. This Part will discuss possible alternatives and offer recommendations to consider in drawing up a trial-selection blueprint, taking into account the experiences learned through the Propulsid and Vioxx MDLs and the paths taken in other MDLs. Notwithstanding the views espoused here, it is important to note that no one process is a paragon for all MDLs. Instead, each transferee court that chooses to conduct its own bellwether trials must consider all the unique factual and legal aspects specific to its litigation and then fashion an appropriate, custom-made trial-selection formula.

There are three separate but equally important sequential steps that will streamline any trial-selection process and allow that process to achieve its full potential, regardless of the type of MDL. The first step requires the transferee court and the attorneys to catalogue the entire universe of cases that comprise the MDL and then to divide the cases into several distinct, easily ascertainable categories of cases. The second step necessitates that the transferee court and the attorneys select a manageable pool of cases, which reflects the various categories and contains cases that are both amenable to trial in the MDL and close to being trial-ready. Once the pool has been constructed, all the cases comprising the pool should be set on a fast track for case-specific discovery. Third, near the conclusion of the case-specific discovery, the transferee court and the attorneys should select a predetermined number of individual cases within the sample and set these cases for trial. Each of these steps will be discussed in turn.

***2344** A. Cataloguing the Entire Universe of Cases

Before the transferee court and the attorneys can determine which cases to set for trial, they should first ascertain the makeup of the MDL. The rationale behind cataloguing and dividing the entire universe of cases within the MDL is simple. A bellwether trial is most effective when it can accurately inform future trends and effectuate an ultimate culmination to the litigation; therefore, it is imperative to know what types of cases comprise the MDL. Otherwise, the transferee court and the attorneys risk trying an anomalous case, thereby wasting substantial amounts of both time and money. Thus, to ensure that the cases ultimately tried are emblematic of all the cases comprising the MDL, the transferee court and the attorneys must determine the composition of the MDL prior to engaging in any further trial-selection steps.

To discharge this task effectively, the transferee court and the attorneys should each conduct a census of the entire litigation and identify all the major variables. [87] This initial step in the bellwether process will require that the attorneys have some knowledge about the individual cases in the MDL. In the Vioxx MDL, this was achieved with limited case-specific discovery through the exchange of plaintiff and defendant profile forms. [88] Of course, each MDL is unique, and it would be nonsensical to suggest that the major variables in a products liability MDL would be the same as those in an antitrust, common disaster, or securities MDL. [89] Likewise, it would be equally unrealistic to suggest that even two MDLs within the same subject matter would share the same major variables. As it would be ill-conceived simply to cut and paste the major variables of one MDL to another, regardless of how similar the two MDLs may be, each transferee court and coordinating counsel must perform this task anew.

In any given MDL, there will be innumerable variables differentiating each case from the others. Rather than attempt to ***2345** delineate every identifiable variable, the transferee court and the attorneys should focus on those variables that can be easily identified, are substantively important, and provide clear lines of demarcation--i.e., the major variables. By identifying the major variables, the transferee court and the attorneys can create sensible and easily ascertainable groupings by which to categorize the entire MDL, providing manageability and order to what may otherwise appear to be a massive, chaotic conglomeration of loosely analogous cases. To put it summarily, these groupings will act as guideposts, focusing the attorneys on the most predominant and important issues in the litigation.

After the transferee court and the attorneys have each separately evaluated the composition of the MDL and considered all the major variables, the transferee court should hold a status conference at which time it and the attorneys should discuss all of the relevant variables in an attempt to reach a consensus on which variables are the most predominant and important. By the conclusion of this status conference, the court should determine how the MDL will be divided and, more importantly, the attorneys should know why the groupings have been chosen.

By way of illustration, the major variables ultimately decided upon in the Vioxx MDL were (1) type of injury (heart attack, stroke, or other), (2) period of ingestion (short-term versus long-term), (3) age group (older or younger than sixty-five), (4) prior health history (previous cardiovascular injuries or not), and (5) date of injury (before or after a certain label change). [90] Each of these variables could be easily identified, appeared to be substantively important, and provided a clear line of demarcation. In addition, these variables allowed the court to separate the entire litigation into meaningful divisions and focused the attorneys on the most predominant and important issues, ensuring that the cases ultimately tried were representative of the entire census.

At first glance, it may appear to be counterintuitive to focus only on a small group of variables, even if they are the most predominant ***2346** and important. If the rationale behind bellwether trials is for the attorneys to ascertain the range of value or forensic challenges of each case, then it would be ideal to understand the importance of all the variables. Indeed, only after accounting for every variable in an individual case can an attorney fully appreciate that case. Although that thought process is true in some respects, it must be tempered by the realities of modern mass tort litigation. Time simply will not allow a transferee court, tasked with its MDL pretrial duties as well as the duties attendant to its regular docket, to try enough cases so that the attorneys can fully appreciate how every factual nuance of a case will unfold at trial. If a transferee court intends to try only a small representative sampling of bellwether trials, as the Vioxx and Propulsid transferee courts did, it must limit the attorneys' focus to approximately four to five variables. [91] If a transferee court places more variables in play, it risks the chance that some of the variables at issue will not be accounted for during the bellwether trials and that the most predominant and important issues may be lost among the mass amalgamation of variables.

B. Creating a Pool of Potential Bellwether Cases

After determining the composition of the MDL and creating groupings by which to divide the MDL, the transferee court and coordinating counsel should begin the process of creating a pool of cases that accurately represents the different divisions within the MDL from which the bellwether cases will be selected. This step requires the transferee court and the attorneys to (1) determine the size of the pool, (2) determine who will select the cases to fill the pool and how they will do so, and (3) fill the pool with cases that are both amenable to trial within the MDL and close to being trial-ready.

1. Determining the Size of the Pool

The first phase in creating a proper pool of potential bellwether cases is determining the size of the ultimate pool to be formed. In calculating the size of the pool, the transferee court and the attorneys ***2347** must ensure that the pool is large enough to account for all of the major variables previously identified, but small enough to be manageable and time-efficient.

If the pool is too large, then an inordinate amount of time will be spent analyzing which cases should fill the pool, conducting case-specific discovery once the pool is filled, and selecting the actual cases to be tried once case-specific discovery has been completed. Not only will this result in an inefficient use of time, it may turn the trial-selection process into an unwieldy mess ripe with countless conflicts, rather than a finely tuned process.

If the pool is too small, then there is a risk that too few of the major variables will be properly represented. In addition, a small pool may inadvertently commingle aspects of the second step (selecting cases to fill the trial-selection pool) and third step (selecting cases from the trial-selection pool to be tried), by essentially forcing the attorneys to select which cases will be tried before completion of case-specific discovery. This is so because the smaller the pool of cases, the less choice the transferee court can afford to pick cases from the pool. For instance, if the transferee court intends to try five cases and the pool itself is only five to ten cases, then the ability to pick, veto, or strike cases within the pool is greatly diminished, and the second step essentially eliminated. This is problematic because, as can often happen, a case that appears to be favorable or representative early in the litigation process (when the pool is initially filled) may be eventually determined to be unrepresentative or grossly unfavorable once case-specific discovery is complete. Therefore, a small pool may force the attorneys to try unrepresentative or disparately unfavorable cases.

Unfortunately, there is no precise numerical size that will guarantee a manageable trial-selection pool while simultaneously accounting for the major variables. Thus, to determine the satisfactory number, each transferee court must consider several factors, such as the number of cases it intends to try, the number of major variables at issue, and how it intends to conduct the actual selection of cases for trial from the pool. Although it may be imprudent to recommend a set size for the pool, the Propulsid and Vioxx experiences reflect that a pool consisting 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. Nevertheless, common sense dictates that the greater the number of ***2348** trials to be held, the greater the number of variables at issue, and the greater the discretion afforded in selecting which cases will be tried, the larger the pool should be.

2. Filling the Pool

After determining the size of the pool from which cases will be selected for bellwether trials, it becomes necessary to determine who will fill the pool and how they will do so. There are essentially three ways to fill the pool: random selection, selection by the transferee court, and selection by the attorneys.

a. Random Selection

Under the random-selection option, the trial-selection pool is filled with a prearranged number of cases selected randomly from the total universe of cases in the MDL or from various logical subsets of that group. [92] This method is easy to perform, but it can be problematic. 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. Because the primary goal in filling the trial-selection pool is to narrow the field of potential bellwether cases to those that are representative, a selection method that may potentially frustrate this purpose by permitting unrepresentative cases to serve as bellwether trials should be rejected.

b. Selection by the Transferee Court

Alternatively, the transferee court can select which cases will fill the pool. Being an unbiased neutral, the transferee court's selections are likely to be more focused on cases that are truly representative of the litigation and not on cases that present the best opportunity for success at trial. [93]

***2349** Although the existence of a neutral arbiter is undoubtedly a great benefit, it is highly unlikely that the transferee court can properly conduct this task on its own. Given their inherent costs, bellwether trials will generally only be utilized in large-scale MDLs. Such MDLs typically consist of thousands of individual cases. Some cases will be filed directly in the transferee court. Some will be filed in, or removed to, other federal district courts and then transferred to the transferee court by the MDL Panel. Still others may be pending in state court awaiting trial. The transferee court simply does not have the resources available, or the familiarity with each individual case, to conduct this task adequately. [94] Therefore, this option should also be avoided.

c. Selection by the Attorneys

The last available option is to allow coordinating counsel to fill the trial-selection pool with cases. The attorneys are in the best position to know, or ascertain, the true census of the litigation. In addition, they have the most staff resources available. Although there may be some incentive for the attorneys to focus more on selecting cases that will be successful at trial than those that

are truly representative, the attorneys, with the transferee court's encourage-ment, must be mindful that unrepresentative cases, even if they are successful at trial, will do little to resolve the entire litigation and will have little predictive value. Additionally, the transferee court can take steps to curb this behavior by giving the attorneys veto or strike power during the subsequent trial-selection step. Accordingly, of the three possible alternatives, allowing the attorneys to fill the trial-selection pool will likely be the best, if not the only feasible, option.

Assuming the transferee court opts to allow the attorneys to fill the pool, there are three separate ways in which the court can allow the attorneys to accomplish their task: (1) allowing one side to pick all of the cases, (2) dividing the selections evenly between the two sides, or (3) requiring the attorneys to agree on all the cases jointly. These three alternatives will be discussed in turn.

First, the transferee court can give one side (plaintiffs or defendant(s)) the right to pick all of the cases that will fill the pool. Thus, if the transferee court determines that there should be fifteen ***2350** cases in the trial-selection pool, it would authorize the coordinating attorneys from one side to select all fifteen cases. The rationale behind this option is that, if the side that picks loses all or a majority of the bellwether trials, then there would likely be little or no merit to that side's position and the litigation could likely be resolved quickly and easily. The primary downside to this option is that, in permitting only one side to fill the entire trial-selection pool, the transferee court opens the door for the inequitable stacking of overtly unfavorable and possibly unrepresentative cases, as well as creating an atmosphere of antagonism.

Second, the transferee court can divide the selections evenly between the two sides.[95] For example, if the transferee court determines that there should be twenty cases in the pool, then each side would be allowed to select ten. The obvious rationale behind this option is equity and fairness between the sides. The primary problem with this option, however, is that it does not eliminate or minimize the chance that the attorneys will select favorable, rather than representa-tive, cases.

Third, the transferee court can require that the sides jointly agree on all of the cases selected to fill the trial-selection pool.[96] The reasoning being that, if the sides can agree on the cases, the cases will likely be representative and fair to both sides.[97] Of the three options, the last one is the best, but it is also the most difficult to effectuate. With so much at stake, it may be difficult for the attorneys to agree on which cases should fill the trial-selection pool. The transferee court can serve as a catalyst to assure fairness and remind the attorneys that the bellwether trial concept is designed specifically to help them predict how the litigation may unfold and ultimately resolve the litigation. Indeed, for the transferee court, it may often be less challenging and less time-consuming to perform only its MDL discovery duties, leaving the trial duties to the transferor courts on ***2351** remand. This, however, will make global resolution of the litigation next to impossible. Moreover, by being stubborn in their advocacy, as opposed to participating in meaningful, good-faith negotiations, the attorneys will lose an opportunity to resolve their clients' cases effectively and efficiently.

Thus, in having the attorneys fill the trial-selection pool, the transferee court should first have the sides attempt to utilize the third option. Only once it appears that the sides are unable to agree jointly on which cases should fill the pool, despite judicial encouragement, should the transferee court opt to implement one of the other two methods.

3. Limitations on Cases To Be Considered

After determining how to fill the trial-selection pool, the transferee court should focus on several additional issues concerning which cases should be considered for the pool. Indeed, not every case in an MDL should be considered for trial, nor will every case be susceptible to trial within the MDL. There are two specific limitations on which cases should and can be considered as potential bellwether cases. The first limitation is purely discretionary and cautions that only cases that are close to being trial-ready be considered as candidates to fill the pool. The second limitation is imposed by current law and requires that cases be amenable to trial before the transferee court.

a. Trial-Ready Cases

The discretionary limitation that bellwether trial candidates be trial-ready should be imposed as a means to streamline the trial-selection process. Once the trial-selection pool is filled, the attorneys must begin case-specific discovery in those cases. This process should not be any different than the discovery phase of any non-MDL case. Like the normal case, the discovery process can go smoothly and quickly or can be long and complicated. An important factor in how the discovery process proceeds is the

shape the case is in when it is filed and when discovery begins. Bellwether trial-candidate cases are no different from the typical non-MDL case--the less information that is known when a case is selected to fill the pool, the longer the discovery process will be. Therefore, to ensure that the case-specific discovery process progresses in an expeditious manner, it is vital that ***2352** only cases that are close to being trial-ready be considered to fill the trial-selection pool.

Of course, few, if any, cases will be trial-ready in the sense that all witnesses are lined up and all expert reports and testimony are prepared such that the case can proceed to trial in a matter of weeks. Instead, in this context, trial-ready means that the attorneys have adequate proof of the important, basic information.[98] For example, in the Propulsid and Vioxx MDLs, this meant that the attorneys had access to the plaintiffs' medical files and sufficient evidence tending to prove who had prescribed the drug, that the litigants had taken the drug, and what damages were allegedly suffered.[99] The importance of being trial-ready in this sense, other than the accelerated manner in which the case can be prepared, is that it prevents the unfortunate situation where a case is proposed and accepted to fill the pool, but the attorneys later discover that the existence of one of these preliminary matters is uncertain or even challenged.

b. Cases Amenable to Trial

Just as some cases may not be able to be adequately discovered prior to the selection of bellwether trials, some cases may not be amenable to trial by the transferee court. To understand which cases are amenable to trial and why, it is necessary to discuss how cases find their way into an MDL.

In the MDL context, there have been two traditional sources from which cases originate: (1) those cases filed in, or removed to, federal district courts across the country and transferred to the transferee court by the MDL Panel and (2) those cases for which venue is proper in the transferee court's judicial district and are therefore filed directly into ***2353** the MDL.[100] The distinctions between these two separate categories of cases, as well as a third recently conceived hybrid category, are vitally important to the determination of which cases are amenable for trial by the transferee court.

Absent extraordinary circumstances, the vast majority of cases within an MDL will come from the first category.[101] For instance, at just over the two-year mark into the Vioxx MDL, approximately 6000 cases had been transferred into the Eastern District of Louisiana by the MDL Panel, whereas only roughly 350 cases had been filed directly into the Eastern District of Louisiana by Louisiana citizens--a significant difference.[102]

Another key distinction between the two categories is the applicable substantive law. With respect to cases founded upon diversity jurisdiction and transferred by the MDL Panel, the transferee court is bound to apply the law of the transferor forum, that is, the law of the state in which the action was originally filed, including the transferor forum's choice-of-law rules.[103] In cases filed directly in the transferee court's district, the transferee court must apply the law of the state in which it sits.[104] Thus, for instance, if a case had been originally filed in the United States District Court for the Southern District of New York and then transferred by the MDL Panel to the Vioxx MDL in the Eastern District of Louisiana, the transferee court would apply New York's choice-of-law rules and perhaps New York substantive law; but for a similar case filed directly into the Vioxx MDL in the Eastern District of Louisiana, the court would apply Louisiana's choice-of-law rules and perhaps Louisiana substantive law.

At initial glance, it may appear that these two distinctions, especially the numerical disparity, have little bearing on the trial-selection process. For one, why would it matter if the mathematical ratio between the sources of cases is dramatically skewed? As long as the transferee court can try representative cases, regardless of their origin, it would seem that the purposes behind bellwether trials are achievable. Likewise, federal courts routinely handle cases that involve interstate and international parties that require the application of substantive laws of jurisdictions other than the forum state. Why ***2354** then would a microcosmic case that is essentially the functional equivalent of a typical binary trial present any abnormal difficulties?

Notwithstanding such logical observations, the interfusion of these two distinctions wreaks havoc on a transferee court's trial powers when considered in light of the Supreme Court's Lexecon decision.[105] As mentioned above, pursuant to Lexecon, a transferee court cannot try cases transferred to it by the MDL Panel, unless the litigants consent to trial before the transferee court.[106] The import of this holding can be quite debilitating to the effectiveness of bellwether trials. If litigants in cases transferred by the MDL Panel do not consent to trial, the universe of cases amenable to trial in an MDL is extremely limited in both number and applicable law. For example, had none of the non-Louisiana litigants consented to trial in the Vioxx MDL, the

total universe of triable cases would have been approxi-mately 350 and all would have been tried under Louisiana law, which does not allow recovery of punitive damages. In litigation like the Vioxx MDL (which involved different types of injuries to different types of people in different jurisdictions, each of whom had a different prescribing physician who conducted his or her own independent review of the drug's warning label and the relevant literature over the course of several years during which the label changed multiple times), as well as most modern MDLs which share a host of variables, a total universe of 350 cases, or a like number, all tried under a single state's substantive law would render the bellwether trials of limited value. Under such circumstances, the complete universe of triable cases, without any tactical assistance or creative approaches, will regularly be too limited to justify the time and expense common to the bellwether process. [107]

***2355** In recent years, thanks to scientific and technical advances, many aspects of our society have grown at increased rates and have inevitably become more complex. With these advances have come the increased development and production of products, as well as an increased ability to market and sell products nationally and internationally. Perhaps as an inevitable consequence of the mass-production and mass-marketing of an increased number of products, broad-based complex litigation has also increased at a high rate. In turn, with the recent statutory and judicial discouragement of class actions, [108] the federal court system has found itself turning to the MDL's broad remedial powers more frequently than ever before. [109] Attendant to this growth and despite the best efforts of all involved, inevitable delays associated with the transfer of cases from transferor courts to the transferee court have occurred. With greater sources of litigation subject to MDL consideration and larger numbers of individual cases subject to MDL transfer, it has become increasingly more time-consuming and expensive for an individual case to find its way into a transferee court.

In response to these realties, a third source from which cases in an MDL may originate has developed. Under this third category, the transferee court permits plaintiffs who do not reside in the judicial district encompassing the transferee court to file cases directly into the MDL. [110] This procedure obviates the expense and delay inherent with plaintiffs having to file their cases in local federal courts around the country after the creation of an MDL and then waiting for the MDL Panel to transfer the "tag-along" cases to the transferee court. [111] In ***2356** addition, it eliminates the judicial inefficiency that results from two separate clerk's offices having to docket and maintain the same case and three separate courts (the transferor court, the MDL Panel, and the transferee court) having to preside over the same matter. [112] In its Pretrial Order No. 11, the Vioxx transferee court recognized the beneficial aspects of this form of direct filing and thus permitted the use of the direct filing mechanism. [113] At just past the two-year anniversary of the Vioxx MDL, approximately 2000 cases had been filed directly into the Vioxx MDL by non-Louisiana citizens. [114]

Besides its efficiency aspects, direct filing can also play an important role in the trial-selection process. A case filed directly into the MDL, whether by a citizen of the state in which the MDL sits or by a citizen of another jurisdiction, vests the transferee court with complete authority over every aspect of that case. This is because the transferee court is no longer cognizable as the transferee court under 28 U.S.C. § 1407, but is technically the forum court. [115] Therefore, by ***2357** filing cases directly into the MDL, plaintiffs, in effect, waive their Lexecon objections, thereby subjecting their cases to trial within the MDL. [116]

c. Waiver Considerations

Of the three potential sources of cases, each of which is capable of producing hundreds of bellwether candidates, only cases deriving from one source--those filed directly into the MDL by residents of the state in which the transferee court sits--are amenable to trial without the consent of the parties. From a realistic standpoint, this typically will not suffice to warrant the cost and effort necessary to conduct fruitful bellwether trials. Thus, as a predicate for meaningful bellwether trials, the parties must be willing to waive their objections as to cases from the remaining two sources. Encouragement by the transferee court can be helpful in securing waivers. [117]

***2358** As illustrated above, the type of waiver required, and which parties must effectuate it for each case, depends on the origin of the case. For cases transferred to the transferee court by the MDL Panel pursuant to § 1407, the parties must each waive their Lexecon objections before that case can be set for trial. To effectuate Lexecon waivers, the parties should each consider the merits of all cases individually and, under circumstances with which each feels comfortable, waive their Lexecon objections on a case-by-case basis.

For cases filed directly into the MDL by nonresident plaintiffs, the defendant, and only the defendant, must waive its sustainable venue and venue-related objections. [118] To do so, the defendant can effectuate one of two venue waivers: (1) a full waiver or (2) a pretrial waiver. Under the full-waiver approach, the defendant waives all of its available venue objections as to all cases (those already within the MDL and those that will later become part of the MDL) through a stipulated pretrial order. Once such a stipulated pretrial order is entered, the transferee court is free to set any of these cases for trial. Under the pretrial-waiver approach, a defendant waives its available venue objections through a stipulated pretrial order, just as it would under a full-waiver approach, but expressly limits this waiver to pretrial proceedings only. That way, the defendant allows cases to become part of the MDL through an overarching waiver, but preserves its right to object to venue if the transferee court ever schedules these cases for trial. If the defendant later decides to waive its venue objections fully and permit a case to proceed to trial, the defendant can then execute a full waiver for that case alone. As part of Pretrial Order No. 11 in the Vioxx MDL, Merck effectuated a pretrial waiver, waiving any and all venue objections as to pretrial proceedings only. [119] Then, for the five bellwether cases that proceeded to trial in the Vioxx MDL, Merck subsequently waived its venue objections fully.

Much can be made of when and whether counsel and their respective clients should consent to trial within the transferee court. For instance, it is plausible to suggest that consent should only be given for each side's strongest cases. The thought being that, if the ***2359** bellwether trials will set the tone for global resolution, or be considered as a proximate indicator for future non-MDL trials, then it would be foolish to offer weaker cases voluntarily and risk negatively affecting the outcome for the remaining cases. Likewise, on a micro level, counsel and client in an individual, weaker case certainly would not want to serve as a sacrificial lamb for the benefit of the remaining consolidated parties.

Notwithstanding a litigator's natural instincts to put forward only his or her best cases and reserve weaker ones, it must be remembered that bellwether trials are not meant to be stand-alone victories or defeats. Instead, their true purpose is to serve as an archetype for how the litigation will proceed. If one side, therefore, can cast aside with conviction its defeats as being atypical, the bellwether trials will have failed in their ultimate purpose. Thus, although a favorable verdict is always of the utmost importance, counsel's initial concerns should not be whether an individual victory is probable, but whether resolution of a specific case will aid in resolution of the entire litigation. Similarly, the parties must temper their personal aversion to the risk of an adverse jury verdict with the realization that (1) for a plaintiff, a favorable verdict at trial may result in a greater recovery than would be received through settlement; and (2) for a defendant, favorable verdicts at trial may result in a more favorable settlement in the remaining cases.

From a practical standpoint, the attorneys and litigants must provide their consent to trial prior to nominating a case to fill a spot in the trial-selection pool. If consent is not obtained at this stage, a situation can develop where the attorneys or the litigants can back out of their commitment to try a given case. [120] To determine whether to ***2360** afford consent, counsel should begin examining all cases within the MDL as soon as possible to determine whether they would be good candidates for a bellwether trial and should continue to investigate tag-along cases as they are added to the MDL on a rolling basis. This inquiry should principally be the duty of the coordinating counsel which, unlike individual local counsel, have a broad perspective of the entire litigation and the means and authority to conduct this task most properly. In discharging their duties, coordinating counsel should examine cases not only to ascertain whether they are representative of the entire litigation, but also to discover whether the consent of the individual litigant and the litigant's local counsel to try the case can be obtained. [121] Importantly, coordinating counsel should focus on identifying the best cases (i.e., the most representative) to propose as bellwether trials, rather than culling out the weakest ones. At this stage, counsel should be focused on deciding which cases should be proposed as bellwether candidates, not on striking any cases from further consideration.

C. Case-Specific Discovery

Once the trial-selection pool has been assembled, each of the cases within the pool must undergo case-specific discovery. This discovery process will typically be no different from that which occurs in an ordinary case, and thus requires no additional explanation here.

D. Selecting Individual Cases from the Pool for Trial

Near the conclusion of case-specific discovery in the cases comprising the trial-selection pool, the transferee court and coordinating counsel can begin the final step of selecting the actual ***2361** cases to serve as bellwether trials. In anticipation

of the exercise of trial-selection picks, the transferee court, with the input of the attorneys, should have set forth the method by which the final selections will be made. As can be imagined, there are multiple methods, or any combination of methods, that can be used, such as (1) random selection, (2) selection by the transferee court, and (3) selection by the attorneys. Indeed, the alternative methods at this stage of the bellwether process in large part mirror the approaches that can be used earlier in the process to fill the trial selection pool. [122] In addition to these various selection methods, the transferee court can permit the attorneys to exercise a predetermined number of strikes or vetoes to eliminate cases in the pool from consideration prior to the actual selection. Again, the appropriate method is case-specific and may be different for each MDL.

1. Random Selection

The first trial-selection method is random selection. [123] Here, the bellwether trials are picked at random from the previously established trial-selection pool, whether picked out of a hat [124] or pursuant to a more sophisticated method. [125] Random selection appears to be a fair and sensible method of picking bellwether cases given that it is based purely on chance and neither side is given a tactical advantage over the other. [126] In addition, random selection is an efficient means of selecting cases because it does not require much time or any analysis by the transferee court or the attorneys. But despite its favorable appearance, random selection presents two problems that may weigh against its implementation.

***2362** First, if the selection is purely random, a distinct possibility exists that one or more of the major variables identified during the first phase of the trial-selection process will not be represented during the bellwether trials. For instance, if a trial-selection pool of fifteen cases has been created and there are five cases each representing short-term, mid-term, and long-term ingestion of a pharmaceutical product, there exists the possibility that one of the three categories will not be represented if the transferee court conducts five bellwether trials. The failure to represent a major variable at trial would be a major setback in the trial-selection process, compromising the value of the entire process. Of course, to combat this possibility, the transferee court could further segregate the trial-selection pool before selecting cases for trial. That is, the transferee court could divide the entire trial-selection pool into smaller pools representing the separate categories within each major variable and require that at least one case from each of the smaller subpools be selected randomly for trial.

The second, and chief, complaint against using random selection is that it detaches the attorneys from the process. Victories and defeats at trial are not the only information sought to be gained from bellwether trials. The attorneys should be interested in how best to present their cases at trial and in developing a familiarity with the strategic decisions that must be made prior to setting foot in the courtroom. By allowing the attorneys to have some hand in selecting which cases they will eventually have to try, the attorneys are provided an opportunity to make trial-selection choices that further their own agendas. For instance, different trial attorneys have different styles of preparing for and presenting a case at trial. If the coordinating attorneys are afforded an opportunity to pick which cases are eventually tried, they can control who gets to conduct the bellwether trials and learn first-hand how each style of preparation and presentation unfolds in front of an actual jury. [127] By imposing random selection, the transferee court precludes the coordinating attorneys from meeting these goals, which may inhibit the potential of a mass resolution of the litigation. [128]

***2363** 2. Selection by the Transferee Court

The next method of trial-selection is selection by the transferee court. Pursuant to this method, the attorneys prepare individual reports (either jointly or separately) for each case within the trial-selection pool, outlining (1) the facts of each case (those agreed-on and those in contention), (2) the major legal issues in each case, and (3) their positions on why each case should or should not be selected as a bellwether case by the transferee court. This method is advantageous because it permits the transferee court to ensure that each of the predetermined major variables is represented at trial and that the cases ultimately selected are fair to both sides.

The major problem with this method, like that of random selection, is that it minimizes attorney participation. Unlike random selection, the attorneys are permitted to argue for and against the selection of specific cases, addressing their own internal reasons for wanting to try a particular case. Permitting the attorneys to present their personal goals, however, will not ensure that the attorneys are allowed to effectuate them. Moreover, the attorneys may not want to share their internal motives with the transferee court or opposing counsel. This process will also be considerably more time-consuming for both the transferee court and the attorneys, requiring the attorneys to prepare reports for each case and the transferee court to analyze the merits of each case.

3. Selection by the Attorneys

The final trial-selection method is selection by the coordinating attorneys. This method may be employed in different ways by either allowing one side to select all of the bellwether cases or by allowing each side to make alternating selections. [129]

Under the first variety of this selection method, one side of coordinating attorneys selects all of the bellwether cases from the pool. The reasoning behind this approach is that if one side is allowed the opportunity to pick all of the bellwether cases and that side ultimately loses all or most of the trials, then it can reasonably be surmised that that side's theories are essentially without merit. This method was ***2364** utilized in the Propulsid MDL. [130] The advantages of this approach are that it is efficient, necessitating engagement by only one side in the trial-selection step (although both sides of coordinating attorneys should have been continuously analyzing the strengths and weaknesses of the cases from the outset anyway), and at least furnishes one side of coordinating attorneys the ability to participate. The disadvantage is that it gives the selecting side of coordinating attorneys a potentially unfair advantage. In addition, with the power to control which cases are set for trial, the selecting side of attorneys may disregard their responsibility to select cases that represent the major variables and instead choose cases that increase their ability to prevail at trial.

Under the second variety of this method, both sides of coordinating attorneys make selections by exercising alternating picks. For example, one side of coordinating attorneys would select the first case from the pool to be tried as a bellwether trial and then the other side of coordinating attorneys would select the second case. The process would continue in this alternating fashion until the full allotment of cases is reached. This approach is likely fairer than allowing one side to select all of the cases and it also ensures that both sides are involved in the process. Of course, this approach may be slightly less efficient than the previous alternatives because both sides of attorneys are involved. Moreover, although allowing the attorneys to select the bellwether cases will not absolutely guarantee that all of the major variables are represented, it must be remembered that the designation of major variables is a tool used to help focus the attorneys on the important aspects of the litigation. If both sides of coordinating attorneys, after the close of case-specific discovery, knowingly and intentionally choose to disregard the ostensible aid of the major variables in selecting bellwether cases, then such is their prerogative. Given that this approach institutes fairness and attorney participation, while maintaining efficiency and placing the burden of ensuring representative cases on those with the most at stake in the trial-selection process, this methodology is probably the most useful approach. Indeed, this method was utilized in the Vioxx MDL. There, the transferee court permitted each side of coordinating attorneys to select five cases. [131] From the collective group of ten cases, each side of coordinating attorneys was permitted to veto two cases from the other ***2365** side's list of five cases. [132] The remaining six cases were then set for trial on a rotating basis, starting with the plaintiffs' selection. [133]

4. Strikes or Vetoes

Regardless of which method is ultimately employed, a transferee court should consider allowing each side of coordinating attorneys to veto or strike from consideration a predetermined number of cases in the trial-selection pool. [134] No matter how diligently the attorneys or the transferee court fill the trial-selection pool, the possibility will always remain that, after the close of case-specific discovery, an unrepresentative case or a grossly unfavorable case will wind up in the trial-selection pool. By permitting the attorneys to strike or veto cases, the transferee court can minimize the chance that one of these outliers is selected as a bellwether trial, without having to disturb the preordained method of trial selection. In this way, if the abnormal case rears its head, the attorneys are equipped to deal with it on their own, without seeking court intervention.

V. Conclusion

Although the MDL process has traditionally been limited to establishing a centralized forum for coordinated pretrial discovery, transferee courts can play an important role in effectively and efficiently resolving multidistrict litigation by employing some version of the nonbinding bellwether process described in this Article. Once this process is completed and several cases are selected and given trial dates, transferee courts and counsel are free to prepare for the bellwether trials as they would any other case. Indeed, in the Vioxx and Propulsid MDLs, the transferee court essentially utilized its normal trial schedule, addressing various motions in limine and objections to both exhibits and deposition testimony in advance of each trial. Potential jurors filled out questionnaires prior to the first day of trial, and voir dire was often then able to be completed in several hours on day one. Most of the trials lasted between two to three weeks in accordance with time limits imposed by the court.

As discussed above, the injection of juries and fact-finding into multidistrict litigation through the use of bellwether trials can greatly ***2366** assist in the maturation of disputes. At a minimum, the bellwether process provides counsel an opportunity to develop their cases and gain practical litigation experience. This can lead to the development of trial packages by coordinating counsel which can be used by local counsel in the event that a global resolution cannot be reached. But the objective results obtained through bellwether trials often do precipitate settlement negotiations and also ensure that all of the parties to such negotiations are grounded by the real-world evaluations of the litigation by multiple juries. Indeed, these experiences, coupled with the alternative of dispersed litigation in courts across the country, supply a strong impetus for global resolution.

Despite the overwhelming benefits of nonbinding informational bellwether trials, there are some potential disadvantages associated with the practice. First, bellwether trials are often exponentially more expensive for the litigants and attorneys than a normal trial. This is to be expected to a degree, as coordinating counsel often pull out all the stops for bellwether trials given the raised stakes. For example, in the Vioxx MDL, both sides employed teams of lawyers and utilized jury selection consultants, shadow juries, and mock juries. Live trial testimony was streamed from the courtroom into separate "war rooms" in the courthouse and to remote locations around the country so that attorneys could follow along and, in some instances, draft various motions in real time. All of these bells and whistles add up; indeed, holding multiple trials on this stage can quickly swell the cost of multidistrict litigation. Second, tactical opportunities can arise for trial counsel to become familiar with the rulings, expectations, customs, and practices of one transferee judge. Astute trial lawyers will learn the tendencies or preferences of any judge with repeated exposure, and given the realities of representation, such opportunities may be subject to exploitation. Finally, because bellwether trials are typically held in the transferee court's judicial district, the informational output is generally limited to the views of one local jury pool. And in a country as diverse as ours, local communities are bound to exhibit divergent tendencies and beliefs. Of course, to the extent that this reality raises concerns, the transferee judge can travel to different districts to hold bellwether trials before different jury pools. [135] But even recognizing ***2367** these disadvantages, the use of bellwether trials proves on balance an effective tool in resolving complex multidistrict litigation.

Footnotes

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1 In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997).

2 See, e.g., In re Zyprexa Prods. Liab. Litig., 238 F.R.D. 539, 542 (E.D.N.Y. 2006) ("As use of the class action device to aggregate claims has become more difficult, MDL consolidation has increased in importance as a means of achieving final, global resolution of mass national disputes."); see also In re Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 396 & nn.7-8 (S.D.N.Y. 2008) (collecting recent authorities rejecting the use of class actions in the mass tort context).

3 See 28 U.S.C. §1407 (2000).

4 Pub. L. No. 90-296, 82 Stat. 109, 109 (1968) (codified as amended at 28 U.S.C. §1407 (2000)).

5 28 U.S.C. §1407(a).

6 See Manual for Complex Litigation (Fourth) §20.13 (2004); see also Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 148 (D. Mass. 2006) ("Since all 94 district courts follow identical rules concerning discovery and trial preparation, one excellent innovation in civil practice is the idea that a single judge might manage a number of 'related' cases, getting them all ready for trial in a uniform manner and returning the 'trial-ready' cases from whence they came (i.e., to the district courts with proper jurisdiction and venue) for trials before local juries."). Increasingly, the states are adopting similar legislation, which allows for intra-state consolidation of related cases pending in the courts of any given state. See, e.g., Mark Herrmann et al., Statewide Coordinated Proceedings: State Court Analogues to the Federal MDL Process (2d ed. 2004) (describing the consolidation procedures of each state); Jeremy T. Grabill, Comment, Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts, 80 Tul. L. Rev. 299, 321-23 (2005) (discussing the frameworks utilized by several states). The emerging multidistrict litigation model will often benefit, therefore, from coordination between the federal MDL and multiple state consolidations involving similar claims. See generally Francis E. McGovern, Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation, 148 U. Pa. L. Rev. 1867, 1867-96 (2000) (suggesting complimentary roles for state and federal courts in the national mass tort context); William W. Schwarzer et al., Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts, 78 Va. L. Rev. 1689, 1691 (1992) (arguing that "informal coordination can advance judicial economy, efficiency, and fairness").

7 28 U.S.C. §1407(d).

8 U.S. Judicial Panel on Multidistrict Litig., An Introduction to the Judicial Panel on Multidistrict Litigation (2006), available at http://www.jpml.uscourts.gov/General_Info/Overview/PanelBrochure-04-08.pdf.

9 28 U.S.C. §1407(c). Pursuant to its statutory authority under §1407(f), the Panel has promulgated rules for the conduct of its business. See Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425 (2001) [hereinafter J.P.M.L. R.P.]. Current amendments to the these rules are posted on the Panel's Web site. See Rules & Procedures, http://www.jpml.uscourts.gov/General_Info/general_info.html (last visited June 13, 2008). For further information concerning the functioning of the Panel, see generally David F. Herr, Multidistrict Litigation Manual (2006); Gregory Hansel, Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation, 19 Me. B.J. 16 (2004); Earle F. Kyle, IV, The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation, 175 F.R.D. 589 (1998); Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv. L. Rev. 1001 (1974); and Peter Geier, MDL Panel: 'Traffic Cop' Seeing Its Power Grow, Nat'l L.J., Mar. 26, 2007, at 1.

10 See 28 U.S.C. §1407(c).

11 J.P.M.L. R.P. 7.4, 199 F.R.D. at 435-36.

12 Id.

13 28 U.S.C. §1407(a).

14 In re Plumbing Fixture Cases, 298 F. Supp. 484, 494 (J.P.M.L. 1968).

15 See generally In re Patenaude, 210 F.3d 135, 142-46 (3d Cir. 2000) (discussing the transferee court's authority and the views expressed in the legislative history regarding that authority); Stanley A. Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575, 578-83 (1978) (discussing the authority of transferee courts).

16 Benjamin W. Larson, Comment, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach: Respecting the Plaintiff's Choice of Forum, 74 Notre Dame L. Rev. 1337, 1337 (1999).

17 523 U.S. 26, 34 (1998) (emphasis added). It should be noted, however, that the transferee court does have the authority to "enter pretrial orders that will govern the conduct of the trial." In re Factor VIII or IX Concentrate Blood Prods. Litig., 169 F.R.D. 632, 636 (N.D. Ill. 1996). Although transferor courts may depart from a transferee court's pretrial orders after cases have been remanded, "it is obvious that the objectives of §1407 can best be achieved when a departure from the transferee judge's pretrial orders is the exception rather than the rule, and it is this court's impression that such departures are in fact exceptional." Id. at 637.

18 Lexecon, 523 U.S. at 40-41. Section 1404 is the change-of-venue statute and allows a district court to "transfer any civil action to any other district or division where it might have been brought" if such a transfer will be "[f]or the convenience of parties and witnesses" or if it is "in the interest of justice." 28 U.S.C. §1404(a). There have been numerous unsuccessful attempts in Congress to overturn the holding of Lexecon. See, e.g., Multidistrict Litigation Restoration Act of 2005, S. 3734, 109th Cong. §3 (as introduced in the Senate on July 26, 2006); Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. §2 (as passed by the House on April 19, 2005); Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. §2 (as passed by the House on March 24, 2004); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. §2 (as passed by the House on March 14, 2001); Multidistrict Litigation Act of 2000, H.R. 5562, 106th Cong. §2 (as passed by the House on December 15, 2000); Multidistrict Jurisdiction Act of 1999, S. 1748, 106th Cong. §2 (as introduced in the Senate on October 19, 1999); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. §2 (as passed by the House on September 13, 1999); Multidistrict Trial Jurisdiction Act of 1999, H.R. 1852, 106th Cong. §2 (as introduced in the House on May 18, 1999).

19 See J.P.M.L. R.P. 7.5, 199 F.R.D. 425, 436-38 (2001). The MDL Panel may remand actions upon the motion of a party, the suggestion of the transferee court, or its own initiative. However, "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court." Id.

20 Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 151 (D. Mass. 2006). The MDL Panel maintains detailed statistical summaries of its activities. See U.S. Judicial Panel on Multidistrict Litig., Statistical Analysis of Multidistrict Litigation (2007), available at http://www.jpml.uscourts.gov/General_Info/Statistics/Statistical_Analysis_2007.pdf. According to the most recent numbers, which are current through September 30, 2007, there have been 265,269 actions subjected to MDL proceedings since the MDL Panel's inception in 1968. Id. This consists of 202,601 actions transferred by the MDL Panel and 62,668 actions filed directly in the transferee courts. Id. Of this total, 176,424 actions were terminated in the transferee courts, 393 actions were reassigned to transferor judges within the transferee courts, and 76,842 actions remain pending in the transferee courts. Id. Thus, only 11,610 cases have been remanded by the MDL Panel since 1968. Id.

21 See, e.g., Delaventura, 417 F. Supp. 2d at 147-57 (collecting criticisms and noting that "as compared to the processing time of an average case, MDL practice is slow, very slow"); In re "East of the Rockies" Concrete Pipe Antitrust Cases, 302 F. Supp. 244, 254 (J.P.M.L. 1969) (Weigel, J., concurring) ("There are a number of inherent inconveniences in transfers for coordinated or consolidated pretrial. Some plaintiffs are temporarily deprived of their choices of forum

and some defendants may be forced to litigate in districts where they could not have been sued. Considerable time and trouble are involved in the sheer mechanics of transferring and remanding.").

22 Delaventura, 417 F. Supp. 2d at 153.

23 R. Joseph Barton, Note, Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?, 8 Wm. & Mary Bill Rts. J. 199, 210 (1999).

24 Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496-97 (1933) (discussing consoli-dation under 28 U.S.C. §734, a precursor to Rule 42).

25 See, e.g., Cimino v. Raymark Indus., Inc., 151 F.3d 297, 318 (5th Cir. 1998).

26 See id.

27 The United States Court of Appeals for the Fifth Circuit has been particularly critical of using bellwether trials to bind related claimants. See, e.g., id. ("While the [In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997)] majority opinion ... contains language generally looking with favor on the [binding] use of bellwether verdicts when shown to be statistically representative, this language is plainly dicta, certainly insofar as it might suggest that representative bellwether verdicts could properly be used to determine individual causation and damages for other plaintiffs."). In his recent book, Professor Richard Nagareda discusses in significant detail Cimino and the trial plan that Judge Parker sought to implement in this asbestos litigation. See Richard A. Nagareda, Mass Torts in a World of Settlement 67-70 (2007). For an in-depth discussion of the In re Chevron case to which Cimino cites, see generally Richard O. Faulk, Robert E. Meadows & Kevin L. Colbert, Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases, 29 Tex. Tech L. Rev. 779, 779-810 (1998).

Other circuits have also recognized that the results of bellwether trials are not properly binding on related claimants unless those claimants expressly agree to be bound by the bellwether proceedings. See In re Hanford Nuclear Reservation Litig., 497 F.3d 1005, 1025 (9th Cir. 2007) ("We recognize that the results of the Hanford bellwether trial are not binding on the remaining plaintiffs."); Dodge v. Cotter Corp., 203 F.3d 1190, 1199 (10th Cir. 2000) ("[T]here is no indication in the record before us that the parties understood the first trial would decide specific issues to bind subsequent trials."); In re TMI Litig., 193 F.3d 613, 725 (3d Cir. 1999) ("[A]bsent a positive manifestation of agreement by Non-Trial Plaintiffs, we cannot conclude that their Seventh Amendment right is not compromised by extending a summary judgment against the Trial Plaintiffs to the non-participating, non-trial plaintiff."); see also Manual for Complex Litigation (Fourth), supra note 6, §20.132 ("[T]he transferee court could conduct a bellwether trial of a centralized action or actions originally filed in the transferee district, the results of which (1)may, upon the consent of parties to constituent actions not filed in the transferee district, be binding on those parties and actions, or (2)may otherwise promote settlement in the remaining actions." (footnote omitted)). For an example of a situation where consolidated parties agreed to be bound by at least some of the results of a bellwether trial, see Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 358-60 (2d Cir. 2003).

In a recent article, Professor Alexandra Lahav attempts to utilize the theory of deliberative democracy to defend the use of binding bellwether trials. See Alexandra D. Lahav, Bellwether Trials, 76 Geo. Wash. L. Rev. 576, 577 (2008). Although we believe bellwether trials to be more appropriately employed for nonbinding informational purposes, the bulk of Professor Lahav's policy arguments would appear to be no less forceful when marshaled in support of nonbinding bellwether trials.

28 In re Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005); In re Propulsid Prods. Liab. Litig., MDL No. 1355, 2000 WL 35621417 (J.P.M.L. Aug. 7, 2000).

29 See, e.g., Edward F. Sherman, Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process, 25 Rev. Litig. 691, 697 (2006) ("[E]ven without preclusive effect, [bellwether trials] offer an accurate picture of how different juries would view different cases across the spectrum of weak and strong cases that are aggregated.").

30 Propulsid, 2000 WL 35621417, at *1-2. For a more detailed factual background of the Propulsid MDL, see In re Propulsid Prods. Liab. Litig., 208 F.R.D. 133, 144-47 (E.D. La. 2002) (denying the plaintiffs' motion for certification of a nationwide personal injury class action). The transferee court has also catalogued various orders, transcripts, and other materials on a Web site dedicated to the Propulsid MDL. See MDL-1355 Propulsid Product Liability Litigation, http://propulsid.laed.uscourts.gov (last visited June 13, 2008).

31 Propulsid, 208 F.R.D. at 135.

32 Id.

33 Id. at 137.

34 Id. at 135.

35 Diez v. Janssen Pharmaceutica, Inc., No. 00-2577 (E.D. La. filed Aug. 30, 2000).

36 Zeno v. Johnson & Johnson Co., No. 00-282 (E.D. La. filed Jan. 28, 2000) (regarding Samantha Reed).

37 See In re Propulsid Prods. Liab. Litig., MDL No. 1355, 2003 WL 367739, at *1 (E.D. La. Feb. 18, 2003).

38 Black v. Johnson & Johnson Co., No. 00-2497 (E.D. La. filed Aug. 22, 2000) (regarding Ernestine J. Brock).

39 See In re Propulsid Prods. Liab. Litig., 261 F. Supp. 2d 603, 604-05 (E.D. La. 2003).

40 See In re Propulsid Prods. Liab. Litig., MDL No. 1355, 2004 WL 305816, at *1-3 (E.D. La. Feb. 5, 2004) (consent order expressing transferee court's agreement to exercise various powers under the settlement program).

41 See MDL-1355 Propulsid Product Liability Litigation, supra note 30 (providing a settlement update on February 4, 2004).

42 Press Release, Janssen, L.P., The Plaintiffs Steering Committee and the State Liaison Committee of the Propulsid Multi-District Litigation Announce Agreement To Resolve Remaining Federal and State Court Cases (Dec. 15, 2005), available at http://propulsid.laed.uscourts.gov/settlement.htm.

43 Id.

44 MDL-1355 Propulsid Product Liability Litigation, supra note 30 (providing a settlement agreement on August 30, 2007).

45 In re Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352, 1354-55 (J.P.M.L. 2005). For a more detailed factual background of the Vioxx MDL, see In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 776, 778-79 (E.D. La. 2007) (denying Merck's motion for summary judgment on federal preemption grounds); and In re Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 452-54 (E.D. La. 2006) (denying the plaintiffs' motion for certification of a nationwide personal injury class action). The transferee court has also catalogued various orders, transcripts, and other materials on a Web site dedicated to the Vioxx MDL. See MDL-1657 Vioxx Products Liability Litigation, http://vioxx.laed.uscourts.gov (last visited June 13, 2008).

46 Vioxx, 501 F. Supp. 2d at 778.

47 Id. at 778-79.

48 Id. at 778.

49 Id. at 779.

50 Vioxx, 239 F.R.D. at 453.

51 See id. at 452 n.4. As discussed below, the first bellwether trial resulted in a mistrial and was subsequently retried. Thus, although the transferee court held six bellwether trials, it did so in only five individual cases.

52 Id.

53 See id.

54 See, e.g., Heather Won Tesoriero, Sarah Rubenstein & Jamie Heller, Merck's Tactics Largely Vindicated as It Reaches Big Vioxx Settlement, Wall St. J., Nov. 10, 2007, at A1. Under current law and practice, any given mass tort will often manifest itself in both the federal and state courts. Parallel bellwether trials in the state courts serve essentially the same beneficial purposes as do bellwether trials in the federal MDL, and can also provide a wider geographic sampling of jury verdicts.

55 Plunkett v. Merck & Co., No. 05-4046 (E.D. La. filed Aug. 23, 2005). Prior to the first bellwether trial, the transferee court issued an omnibus order addressing various Daubert challenges to proffered expert witnesses. See In re Vioxx Prods. Liab. Litig., 401 F. Supp. 2d 565, 599-600 (E.D. La. 2005).

56 See, e.g., Alex Berenson, A Mistrial is Declared in 3rd Suit Over Vioxx, N.Y. Times, Dec. 13, 2005, at C1.

57 See, e.g., Heather Won Tesoriero, Merck Wins Vioxx Decision in Vital Second Court Victory, Wall St. J., Feb. 18, 2006, at A7.

58 See In re Vioxx Prods. Liab. Litig., 489 F. Supp. 2d 587, 591-95 (E.D. La. 2007).

59 See Barnett v. Merck & Co., No. 06-485 (E.D. La. filed Jan. 31, 2006).

60 See, e.g., Alex Berenson, Merck Suffers a Pair of Setbacks over Vioxx, N.Y. Times, Aug. 18, 2006, at C1.

61 In re Vioxx Prods. Liab. Litig., 448 F. Supp. 2d 737, 738 (E.D. La. 2006).

62 See In re Vioxx Prods. Liab. Litig., 523 F. Supp. 2d 471, 472 (E.D. La. 2007).

63 See Barnett v. Merck & Co., No. 07-30897 (5th Cir. Apr. 18, 2008) (entry of dismissal).

64 Smith v. Merck & Co., No. 05-4379 (E.D. La. filed Sept. 29, 2005).

65 See, e.g., Heather Won Tesoriero, Merck is Victorious in New Orleans Vioxx Trial, Wall St. J., Sept. 27, 2006, at A13.

66 Mason v. Merck & Co., No. 06-0810 (E.D. La. filed Feb. 16, 2006).

67 See, e.g., Janet McConnaughey, Jury Clears Merck in 11th Vioxx Trial, Wash. Post, Nov. 16, 2006, at D3.

68 Dedrick v. Merck & Co., No. 05-2524 (E.D. La. filed June 21, 2005).

69 See, e.g., Heather Won Tesoriero, Merck Prevails in 12th Trial Since Vioxx Was Pulled, Wall St. J., Dec. 14, 2006, at B10.

70 See, e.g., Tesoriero, Rubenstein & Heller, supra note 54.

71 See id.

72 In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997); see also In re Hanford Nuclear Reservation Litig., 497 F.3d 1005, 1014 (9th Cir. 2007) ("After almost two decades of litigation, ... the parties in 2005 agreed to a bellwether trial. The trial was designed to produce a verdict that would highlight the strengths and weaknesses of the parties' respective cases and thus focused on six plaintiffs ... who were representative of the larger group. The purpose of the trial was to promote settlement and bring long-overdue resolution to this litigation."); In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., MDL No. 1358, 2007 WL 1791258, at *2-3 (S.D.N.Y. June 15, 2007) ("A bellwether trial also allows a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action .... And every experienced litigator understands that there are often a handful of crucial issues on which the litigation primarily turns. A bellwether trial allows each party to present its best arguments on these issues for resolution by a trier of fact. Moreover, resolution of these issues often facilitates settlement of the remaining claims.").

73 The bellwether trial process is often only one phase in the effective management of multidistrict litigation. For an excellent discussion of techniques that may be employed in prior phases with respect to expert discovery and scientific evidence, see generally Barbara J. Rothstein, Francis E. McGovern & Sarah Jael Dion, A Model Mass Tort: The PPA

Experience, 54 Drake L. Rev. 621, 621-38 (2006). Indeed, almost every judicial action taken by an MDL transferee court could be described as having "bellwether" qualities:

> Due process requires that persons not parties to a particular litigation be afforded their own day in court unless the circumstances warrant a conclusion that they were in privity with the litigants against whom a ruling was made. Presenting similar claims or defenses, or raising the same legal issues as someone else, has never sufficed for such privity. Recognition of the due process rights of litigants need not cripple the courts in multidistrict litigation, however. Once a section 1407 or other participating judge has ruled on a matter, it will not take her long to dispose of subsequent motions based on the same legal arguments. New parties will figure out quickly which efforts to litigate issues already decided by the judge at the urging of others will be futile.
>
> Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595, 669 (1987) (footnote omitted).

74 In most MDLs, the transferee court will appoint two lawyers as "lead" or "liaison" counsel, one for plaintiffs and one for defendants. These lawyers essentially serve as the communication conduit between the transferee court and the thousands of lawyers that can often be involved in any given MDL. Lead or liaison counsel are usually "[c]harged with essentially administrative matters," but may also be expected to formulate and present "positions on substantive and procedural issues." Manual for Complex Litigation (Fourth), supra note 6, §10.221. In addition, the transferee court may also appoint various committees of lawyers for each side, often referred to as "steering committees." For example, in the Vioxx and Propulsid MDLs, the transferee court appointed a Plaintiffs' Steering Committee and Defendants' Steering Committee. See, e.g., In re Vioxx Prods. Liab. Litig., MDL No. 1657, 2005 WL 850962, at *1-2 (E.D. La. Apr. 8, 2005) (pretrial order no. 7) (delineating the duties and responsibilities of the Defendants' Steering Committee); In re Vioxx Prods. Liab. Litig., MDL No. 1657, 2005 WL 850963, at *1-6 (E.D. La. Apr. 8, 2005) (pretrial order no. 6) (delineating the duties and responsibilities of the Plaintiffs' Steering Committee); In re Propulsid Prods. Liab. Litig., MDL No. 1355 (E.D. La. Oct. 2, 2000) (pretrial order no. 2 at 5-10) (delineating the duties and responsibilities of the Plaintiffs' Steering Committee and designating lead counsel for the defendant), available at http://propulsid.laed.uscourts.gov/Orders/order2.pdf. Throughout this Article, we refer to all lawyers appointed by the transferee court as "coordinating counsel."

75 See, e.g., Gerald Eades Bentley, The Profession of Dramatist in Shakespeare's Time, 1590-1642, at 260-63 (1971). Indeed, the practical realities of modern mass tort litigation, revealed through the bellwether process, are not so different from those faced by the dramatist:

> In the world of the theatre, ... the impact of the author's creation is in good part determined by the playwright's cooperation with his colleagues in presentation. The tailoring of the literary product to the qualities of the actors, the design of the theatre, and the current conventions of production is of vital importance in achieving the effects which the author planned.
>
> Id. at 8.

76 Nagareda, supra note 27, at ix.

77 To be precise, we mean once in any given mass tort's lifetime. Indeed, when the structure provided by the transferee court breaks down upon the dissolution of an MDL, that is, when cases are remanded to the districts from which they originated, it becomes exceedingly difficult to organize and achieve a global settlement of related claims. The institutional value of the transferee forum in this respect is beyond dispute. See, e.g., id. at 260 ("As a practical matter, consolidated pretrial proceedings at the behest of the MDL Panel already form a setting ripe for plaintiffs' lawyers and defendants to begin discussions about a comprehensive peace.").

78 Id. at 12; see Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev. 659, 688-94 (1989) (recognizing that mass disputes can mature and ultimately be resolved through a hybrid process of consolidation, resolution of common issues, and acquisition of knowledge regarding the valuation of individual claims); see also Francis

E. McGovern, An Analysis of Mass Torts for Judges, 73 Tex. L. Rev. 1821, 1841-45 (1995) (expanding on this view and focusing on styles of judicial management).

79 Nagareda, supra note 27, at 14-15.

80 See id. at 54-57 ("When mass tort litigation reaches the mature stage, the game changes from the resolution of cases to the crafting of a comprehensive peace .... The basic thrust of the shift is from litigation of individual claims in the tort system to creation of private administrative systems for the compensation of claimants in the future."). Professor Nagareda goes on to describe the motivations underlying this inevitable shift:

> Savvy lawyers on opposing sides have not hit upon the ideal of comprehensive peace by happenstance; rather, observed behavior reveals an underlying truth. The prospect of mass liability extending over years or decades--especially, liability of such a scope as to threaten the viability of the defendant as a business firm--generates huge uncertainty. For plaintiffs, the main uncertainty concerns the availability of resources to compensate persons who happen to develop disease later rather than sooner. For defendants, uncertain and potentially firm-threatening liability can cripple their ability to draw upon the capital markets to support their continued business operations.
>
> Id. at x.

81 See, e.g., Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 Cornell L. Rev. 941, 959 (1995) ("Individual cases proceeding through trial, verdict, and appeal in a variety of jurisdictions gradually reveal the behavior of juries and judges, clarify the applicable rules of law, and render the expected value of individual claims more predictable.").

82 See, e.g., Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 155 (D. Mass. 2006) (extolling the "inevitable uncertainties of the direct democracy of the American jury"). Judge Young may be correct that "the 'settlement culture' for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice," and that when "[f]act finding is relegated to a subsidiary role[,] ... bargaining focuses instead on ability to pay [and] the economic consequences of the litigation." Id. at 150, 155 (footnotes omitted). The use of bellwether trials obviously recognizes the important institutional role of the jury system, but it can also broaden the focus of settlement negotiations in multidistrict litigation beyond these traditional considerations.

83 521 U.S. 591 (1997).

84 527 U.S. 815 (1999).

85 Nagareda, supra note 27, at 97. For an informative overview of the various structural components of modern mass tort settlement programs, see generally Francis E. McGovern, The What and Why of Claims Resolution Facilities, 57 Stan. L. Rev. 1361, 1362-75 (2005).

86 Nagareda, supra note 27, at 223.

87 See, e.g., In re Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig., MDL No. 05-1726, 2007 WL 846642, at *3-4 (D. Minn. Mar. 6, 2007). In an unpublished amended order, the Medtronic transferee court set forth six categories of cases based on the parties' recommendations. See In re Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig., MDL No. 05-1726 (D. Minn. Apr. 12, 2007) (amended order on bellwether actions).

88 See In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 790-91 (E.D. La. 2007).

89 The MDL Panel divides MDLs into ten separate subject-matter categories: (1)air disaster, (2)antitrust, (3)contract, (4)common disaster, (5)employment practices, (6)intellectual property, (7)miscellaneous, (8)products liability, (9)sales practices, and (10)securities. See U.S. Judicial Panel on Multidistrict Litig. Docket Information, http://www.jpml.uscourts.gov/Docket_Info/docket_info.html (last visited June 13, 2008).

90 Regarding the type of injury, although the plaintiffs alleged injuries in the Vioxx MDL other than heart attack or stroke, these two injuries so predominated that such cases promised to be the most informative. Similarly, the cases in the Propulsid MDL were divided into categories based on the type of injury alleged. See In re Propulsid Prods. Liab. Litig., MDL No. 1355, 2003 WL 22023398, at *1 (E.D. La. Mar. 11, 2003) ("The Court further noted that it wished to proceed to trial on three types of cases involving Propulsid: wrongful death cases, personal injury cases, and the sustained prolonged QT cases seeking medical monitoring.").

91 Of course, a transferee court may take a more ambitious approach and set a greater number of cases for bellwether trials. In such instances, a transferee court may find it prudent to place more variables in play, allowing for a greater number of divisions and groupings. A transferee court that takes this approach, however, must remain cognizant of the ultimate purpose of bellwether trials and be vigilant of the law of diminishing returns, understanding that at some point the costs inherent to trying additional bellwether trials will outweigh the benefits.

92 The transferee court in the Bextra & Celebrex MDL employed a hybrid method, allowing the attorneys to agree on a certain group of cases as pool-candidates and then permitting a subset of pool-candidates to be randomly selected to fill the pool. See In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., MDL No. 1699 (N.D. Cal. Nov. 17, 2006) (pretrial order no. 18 at 2-4) (describing the initial selection of plaintiffs for discovery and trial pool), available at http://ecf.cand.uscourts.gov/cand/bextra/content/files/pretrial_order_18.pdf.

93 See, e.g., In re Welding Fume Prods. Liab. Litig., MDL No. 1535, 2006 WL 2505891, at *2 (N.D. Ohio Aug. 28, 2006) (selecting fifteen cases for case-specific discovery); see also In re Baycol Prods. Liab. Litig., MDL No. 1431 (D. Minn. July 18, 2003) (pretrial order no. 89 at 2) (providing that the court will determine eligible cases to be tried if the parties are unable to agree), available at http://www.mnd.uscourts.gov/Mdl-Baycol/pretrial_ minutes/baycol89.ord.pdf.

94 Even if the attorneys prepare briefs outlining the potential cases, similar to a final pretrial order, it is still doubtful that the transferee court's selections will be as knowledgeable as the attorneys' picks.

95 See, e.g., In re Guidant Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2006 WL 905344, at *3 (D. Minn. Mar. 23, 2006) (pretrial order no. 8) (expressing the court's preference for party input in selecting representative trials); In re Guidant Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (pretrial order no. 9 at 2) (allowing each party to select twenty potential bellwether cases), available at http://www.mnd.uscourts.gov/Mdl-Guidant/Pretrial_Minutes/05md1708pto9050306.pdf.

96 E.g., In re Baycol Prods. Liab. Litig. (pretrial order no. 89 at 2).

97 In addition, a transferee court can implement a mix of these processes. See, e.g., In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig. (pretrial order no. 18 at 2) (allowing the plaintiffs and defendants to each select ten cases out of a pool of forty-five cases, and then selecting the remaining twenty-five cases randomly from a list agreed on by both sides).

98 See id. at 4 (limiting selections to those plaintiffs who had filled out the Plaintiff Fact Sheets and provided the authorizations and responsive documents pursuant to pretrial order no. 6).

99 The parties will usually be required to provide all of this information early on in the litigation pursuant to a global pretrial discovery order. See, e.g., In re Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. June 29, 2006) (pretrial order no. 18C) (governing the provision of Plaintiff Profile Forms, Merck Profile Forms, and medical authorizations); In re Propulsid Prods. Liab. Litig., MDL No. 1355 (E.D. La. Jan. 31, 2001) (pretrial order no. 9) (governing the provision of Plaintiff Profile Forms and medical authorizations). Notwithstanding such a requirement, the parties may occasionally fail to provide this information. Cases in which this basic level of disclosure is not complete should not be considered for bellwether trials, and may even be subject to dismissal if the parties fail to comply after additional prompting. See In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1232-34 (9th Cir. 2006); Acuna v. Brown & Root Inc., 200 F.3d 335, 340-41 (5th Cir. 2000).

100 See In re Vioxx Prods. Liab. Litig., 478 F. Supp. 2d 897, 903 (E.D. La. 2007).

101 See id.

102 See id.

103 See Ferens v. John Deere Co., 494 U.S. 516, 523-25 (1990).

104 See Vioxx, 478 F. Supp. 2d at 903.

105 See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998); supra notes 17-18 and accompanying text.

106 Lexecon, 523 U.S. at 40. A party's consent may be express or implied through conduct. See In re Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321, 1325-27 (11th Cir. 2000); Armstrong v. La Salle Bank, N.A., No. 01 C 2963, 2007 WL 704531, at *2-6 (N.D. Ill. Mar. 2, 2007); Solis v. Lincoln Elec. Co., No. 1:04-CV-17363, 2006 WL 266530, at *4-5 (N.D. Ohio Feb. 1, 2006).

107 Just because a case is currently pending in state court does not mean that it should not be considered for trial within the MDL or that a transferee court will not be able to obtain jurisdiction over it. The first case tried in the Vioxx MDL--the Plunkett case--had been pending in Florida state court for several years when the Vioxx transferee court and the attorneys agreed to set it as the first bellwether trial. See supra notes 45-58 and accompanying text. To effectuate this decision, the attorneys agreed that (1)the plaintiff would seek a voluntary dismissal without prejudice from the Florida state court (obviously informing the Florida state court of the purported bellwether plan and seeking the state court's permission), (2)the plaintiff would then file the case directly into the Vioxx MDL, and (3)the defendant would waive its venue and statute of limitations objections. Id. All three of these steps went smoothly and the Plunkett case was enveloped by the MDL, proceeding to trial approximately three months after the parties agreed to set it as the first bellwether trial.

Likewise, in other MDLs, the fact that a case is not presently within the transferee court's jurisdiction, or even within the federal court system, does not preclude its amenability to trial in the MDL. Creative thinking and attorney cooperation can provide the transferee court and the attorneys with the ability to try representative cases that would otherwise be untriable. Indeed, this sort of flexibility suggests that perhaps the primary perceived benefit of legislatively overruling

Lexecon, namely authorizing transferee courts to try cases transferred by the MDL Panel, may be outweighed by the unintended consequence of a diminished threat of remand.

108 See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); Castano v. Am. Tobacco Co., 84 F.3d 734, 746-51 (5th Cir. 1996); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299-1304 (7th Cir. 1995).

109 See discussion supra notes 2 and 20.

110 See In re Vioxx Prods. Liab. Litig., 478 F. Supp. 2d 897, 903-04 (E.D. La. 2007).

111 See id. at 904.

112 Direct filing also avoids any unfortunate situations that may arise when a transferor court acts on a motion after being divested of its jurisdiction by a transfer order from the MDL Panel becoming final. When the MDL Panel orders a case transferred from a transferor court to a transferee court, the transferor court is deprived of jurisdiction until such time, if at all, the case is returned to it. See, e.g., Astarte Shipping Co. v. Allied Steel & Export Serv., 767 F.2d 86, 87 (5th Cir. 1985); In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 664 F.2d 114, 118 (6th Cir. 1981); In re Prudential Ins. Co. of Am. Sales Practices Litig., 177 F.R.D. 216, 229-30 (D.N.J. 1997); In re Plumbing Fixture Cases, 298 F. Supp. 484, 495-96 (J.P.M.L. 1968). Thus, any orders issued by the transferor court after the final transfer are null and without effect, Plumbing Fixture, 298 F. Supp. at 496, and the transferee court is empowered to modify or rescind those orders. Astarte, 767 F.2d at 87; Upjohn, 664 F.2d at 118. In the Vioxx MDL, the transferee court vacated two remand orders from two different transferor courts, because those transferor courts ordered remand after the MDL Panel's transfer order became final. In re Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Sept. 5, 2007) (order relating to Coker v. Merck & Co., No. 07-3998); In re Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Mar. 13, 2006) (order relating to Hendershot v. Merck & Co., No. 05-6134). This is "unfortunate" because the transferee court, itself a district court, is essentially forced to abrogate another district court's order.

113 See Vioxx, 478 F. Supp. 2d at 904.

114 See id.

115 But see In re Vioxx Prods. Liab. Litig., 522 F. Supp. 2d 799, 812-13 (E.D. La. 2007) (noting the "fictional" quality of the transferee court's status as the forum state in cases filed directly into an MDL by nonforum citizens). Indeed, the practice of allowing cases to be filed directly into an MDL can create difficult choice-of-law issues for the transferee court, including whether the transferee forum's choice-of-law principles must be applied in such cases. See In re Express Scripts, Inc., PBM Litig., MDL No. 1672, 2007 WL 4333380, at *1-2 (E.D. Mo. Dec. 7, 2007) (applying the choice-of-law rules of the transferee forum); In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig., MDL No. 1785, 2007 WL 3046682, at *2-3 (D.S.C. Oct. 11, 2007) (avoiding this choice-of-law issue by finding that no conflict existed among the potentially applicable state laws); Vioxx, 478 F. Supp. 2d at 903-05 & n.2 (discussing the implications of direct filing, but ultimately applying the choice-of-law rules of the transferee forum). Ultimately, if a transferee court is going to employ direct filing in any given MDL, it should encourage the parties to think about the choice-of-law issues that may arise as a result and, ideally, the transferee court should include a choice-of-law provision in the pretrial order authorizing direct filing.

116 Conceivably, there are two ways in which nonresident plaintiffs can preserve their Lexecon objections while still taking advantage of the speed and cost benefits of direct filing. First, as part of a pretrial order allowing for direct filing, the transferee court, at the behest of the parties, could stipulate that direct filing into the MDL does not serve as a waiver of Lexecon objections. The transferee court, however, may be unwilling to do this because such an order places self-imposed conditions on the transferee court's jurisdiction. Second, an individual plaintiff could potentially preserve his Lexecon objection by making a notation of such in his complaint. While this alternative appears attractive, it may not be effective. Although there is no case law on the subject, it is doubtful that a litigant can unilaterally place conditions on a court order. Without an order allowing direct filing by a nonresident plaintiff, such plaintiffs have no right to file directly into the MDL. This right is the sole product of the transferee court's order, although it is conceivable that a plaintiff could file an action directly into the MDL, despite improper venue, and just hope that its filing is not challenged on venue grounds. Thus, if the transferee court does not acknowledge a plaintiff's right to preserve his Lexecon objection or affirmatively permit such preservation, a plaintiff may not have that right at all. On a related point, at least one court has held that a Lexecon waiver has no effect on the applicable choice-of-law principles. See In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 489 F. Supp. 2d 932, 934-35 (D. Minn. 2007) (applying the choice-of-law rules of the transferor forum in a case transferred by the MDL Panel and selected as the first bellwether trial).

117 There are two methods of encouragement: the carrot and the stick. The carrot method involves the transferee court explaining the benefits of the bellwether trial process and how those benefits cannot be fully achieved unless the parties are willing to consent to the most representative cases serving as bellwether trials. The stick method involves the transferee court, faced with obstinate attorneys refusing to provide consent, unilaterally setting cases filed directly into the MDL by citizens of the forum state for trial. Preparation of these "stick" cases for trial will likely be just as rigorous and expensive as preparation of a "carrot" case, but will be devoid of the institutional benefits and freedom of choice that are available when the attorneys are permitted to select their own bellwether trials. Thus, a transferee court, by signaling its willingness to use its "stick," can persuade the attorneys to choose the "carrot."

118 This is true unless a plaintiff reserves the right to object to venue if his case is set for trial or stipulates that direct filing is only for expediency and discovery purposes, and not for trial.

119 In re Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. May 18, 2005) (pretrial order no. 11 at 1-2), available at http://vioxx.laed.uscourts.gov/Orders/Orders.htm (follow "Pretrial Order No. 11" hyperlink).

120 An unfortunate incident developed in the Vioxx MDL that illustrates the importance of obtaining consent to trial within an MDL at the beginning of the trial-selection process. For various reasons, the Vioxx transferee court accorded the attorneys a vast amount of leeway in selecting cases for bellwether trials, prior to implementing a formal and rigid trial-selection process. See In re Vioxx Prods. Liab. Litig., MDL No. 1657, 2005 WL 3665985, at *1 (E.D. La. Dec. 16, 2005) (discussing the relatively informal process initially adopted). After the selection of the first case, the parties began negotiating which case would be picked as the second bellwether trial. At the conclusion of this drawn-out process, which was riddled with many letters to the court and status conferences, the parties agreed to set a second case for trial. As part of the agreement, lead counsel in the second case, who was also a member of the Plaintiffs' Steering Committee, stipulated that he and his client would only consent to trial if the case were tried in the state where the case had been originally filed. To move the trial-selection process along and to honor the agreement of the attorneys, the Vioxx transferee court proceeded to contact the proper officials and obtain the requisite permission to travel to the transferor forum and conduct the second trial. Before the trial was set to begin, however, plaintiff's counsel unexpectedly withdrew the case from consideration, reporting that his client refused to consent to trial. Although the attorneys had represented that all of the necessary consents had been obtained, the attorneys apparently never received the client's consent formally and, in light of Lexecon, the Vioxx transferee court was precluded from either forcing the selected case to trial or dismissing it for failure to prosecute. As a result, another case had to be selected.

121 It should not be difficult to determine whether the individual litigants or local counsel object to trial in the MDL. For a defendant, the Defendants' Steering Committee, which is generally handpicked by the defendant, usually consists of the defendants' personal attorneys, so it should be easy for them to answer such questions. For plaintiffs, the Plaintiffs' Steering Committee will most likely be comprised of attorneys who represent a large number of plaintiffs and are highly

knowledgeable of the subject matter. Given their number of cases, their knowledge, and their status, these attorneys will often be willing, if not excited, to offer one or more of their cases as bellwether candidates. For example, in the Vioxx MDL, four of the five bellwether cases were filed and tried by members of the Plaintiffs' Steering Committee. Even though one case was filed and tried by a nonmember, it was nevertheless overseen by a member of the Plaintiffs' Steering Committee.

122 See supra Part IV.B.2.

123 See, e.g., In re Norplant Contraceptive Prods. Liab. Litig., MDL No. 1038, 1996 WL 571536, at *1 (E.D. Tex. Aug. 13, 1996).

124 See In re Prempro Prods. Liab. Litig., MDL No. 1507 (E.D. Ark. June 20, 2005) (order regarding bellwether trial selection); In re Prempro Prods. Liab. Litig., MDL No. 1507 (E.D. Ark. July 14, 2005) (letter order). Information about these two orders can be found on a Web site dedicated to this multidistrict litigation. See Prempro Product Liability, http://www.are.uscourts.gov/mdl/index.cfm (last visited June 13, 2008).

125 In the Bextra & Celebrex MDL, the transferee court had attorneys use a third-party randomizer computer program as a random selection method. See In re Bextra & Celebrex Mktg. Sales Practice & Prod. Liab. Litig., MDL No. 1699 (N.D. Cal. Nov. 17, 2006) (pretrial order no. 18) (describing the initial selection of plaintiffs for discovery and trial pool), available at http://ecf.cand.uscourts.gov/cand/bextra/content/files/pretrial_order_18.pdf.

126 See Manual for Complex Litigation (Fourth), supra note 6, §22.315.

127 See supra Part III.C.

128 Moreover, although random selection may be a theoretically attractive method for selecting bellwether trials, and, indeed, although some courts and commentators have suggested that it may even be of constitutional significance when the results of bellwether trials are used to bind related claimants, random selection is of considerably less importance when bellwether trials are employed in practice for nonbinding informational purposes.

129 Of course, it would likely be best if the coordinating attorneys could mutually agree on which cases to set for bellwether trials. This option, however desirable, may not be realistically achievable because the stakes may be too great and the perceived values of the cases too divergent for the attorneys to reach an amicable agreement. In the Vioxx litigation, only one case--the first one--was selected by agreement. See discussion supra note 107.

130 See In re Propulsid Prods. Liab. Litig., MDL No. 1355, 2003 WL 22023398, at *1 (E.D. La. Mar. 11, 2003).

131 See In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 791 (E.D. La. 2007).

132 See id.

133 See id.

134 The number of vetoes or strikes should be proportionate to the number of cases in the trial-selection pool.

135 As mentioned above, the transferee court in the Vioxx MDL did just this by holding the first bellwether trial in Houston, Texas, albeit fortuitously as a result of evacuating New Orleans for Hurricane Katrina. In addition, the Vioxx transferee

court arranged to travel to another district for a subsequent bellwether trial, but ultimately these plans were not carried out. See discussion supra note 120.

82 TLNLR 2323

EXHIBIT D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

IN RE RANITIDINE CASES	No. JCCP 5150 No. 21CV002172 (Bautista v. GSK) ORDER ON MOTION OF PLAINTIFF REGARDING SCHEDULING AND CONSOLIDATION OF 14 BELLWETHER TRIALS. DATE 12/1/23 TIME 9:00 AM DEPT 21

The motion of Plaintiffs regarding scheduling and consolidation of 14 bellwether trials came on for hearing on 9/19/23 in Department 21, the Honorable Evelio Grillo presiding. GSK and Plaintiffs appeared at the hearing through counsel of record. The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows: IT IS HEREBY ORDERED: The motion of Plaintiffs regarding scheduling and consolidation of 14 bellwether trials is GRANTED IN PART.

BACKGROUND

There are approximately 4,750 plaintiffs in this JCCP asserting claims asserting personal injuries as the result of the use of ranitidine. (Order of 7/5/23 at p3.) The court set up a procedure where bellwether cases would be prepared for trial and then sent out to trial. The idea is that the bellwether trials will serve as templates for legal issues and evidence issues that should

then make the trial of the remaining cases simpler and shorter. The court set out the procedure in CMO 4 dated 7/7/21. CMO 4 anticipated that the first trial in October 2022, the second trial in February 2023, the third trial in May 2023, and the fourth trial in August 2023. To date there have been a few settlements but no trials.

The court set the Goetz case for trial for 2/13/23, which was later continued to permit briefing on Evid Codde 802/Sargon motions. The court issued an order on 3/23/23 that addressed various issues regarding the admission of expert testimony. (In re Ranitidine Cases (Cal Superior 2023) 2023 WL 2725766.) The Goetz case settled.

The court set the Cantlay/Harper case for trial for 11/13/23. The Cantlay/Harper case settled.

The court has tentatively set the Browne case for trial in February 2024 in Sacramento County. This case concerns bladder cancer. This case was a plaintiff pick. The order of 7/5/23 at 2:6-12 states: "The court TENTATIVELY ORDERS that *Browne v. GlaxoSmithKline, LLC, et al.*, Case No. 21CV002136, will be transferred to Sacramento County for trial. The court relies on CMC Stmt filed 6/28/23, Exh 1, which states that Browne resides in Citrus Heights, Sacramento County (which is adjacent to Placer County), used Zantac primarily in Sacramento County, and the primary healthcare providers are in adjacent Placer County. The court anticipates transferring the case in early February 2024 so that the trial can begin in February 2024."

The court has set the Boyd case for trial in March 2024 in Stanislaus County. This case concerns colorectal cancer. This case was a defense pick.

The court must now set a schedule for the remaining 14 bellwether cases. This raises the issue of whether the court should consolidate cases for trial.

OVERVIEW OF TRIAL SETTING ISSUES IN THE JCCP

The Order of 7/5/23 at 3:9-17 states: "The court has considered defendants arguments that the JCCP should move more deliberately. The court considered and addressed those concerns in the court order of 7/7/21 and again in the order of 5/24/23 at 6-8. (*In re Ranitidine Cases* (7/7/2021) 2021 WL 3908439 at *1-2.) In short, there are now approximately 4,750 plaintiffs in this JCCP, the court's goal is to resolve each case within 3 years (Std Jud Admin, Standard 2.2(f) and (g)), and the court must resolve each case within five years (CCP 583.310). Assuming 10% of the cases will need trial dates, that means 470 trial dates in the next four years (200 weeks), or 2.5 trial dates every week starting immediately. The calendar math compels the trial court to press forward." (See also In re Ranitidine Cases (Cal Superior, 5/24/23) 2023 WL 4552016 at *3-4.)

The briefing by the parties indicates that the parties might have some misconceptions about the setting of trial dates in a JCCP.

A JCCP is a procedure to coordinate the management of multiple cases. When a case is ready for trial, the Coordination Trial Judge will issue an order to transfer cases to appropriate counties for trial. (CRC 3.541(b)(1) and 3.543.) The court considers "the convenience of parties, witnesses, and counsel, the relative development of the actions and the work product of counsel, the efficient utilization of judicial facilities and manpower, the calendar of the courts,

and any other relevant matter." (CRC 3.341(b)(2); *Pesses v. Superior Court* (1980) 107 Cal.App.3d 11.7, 123.)

The cases must be "trial ready" when they are transferred, which means that all pretrial discovery and dispositive motions are complete. The Coordination Trial Judge may keep a case in the county where the JCCP is located so that the Coordination Trial Judge may preside over a bellwether trial.

The Coordination Trial Judge does not set a specific trial date in any given county. The Coordination Trial Judge simply transfers the case to an appropriate county for trial. Following the transfer, the court in the county where the trial will take place will determine the specific trial date depending on the availability of a trial department in that county.

The Coordination Trial Judge does not set a case in a specific trial department (except perhaps when the Coordination Trial Judge decides that they will preside over a trial). When the Coordination Trial Judge transfers a case to an appropriate county for trial, then the court in the county where of trial will take place will determine the specific trial department. That court might, but might not, assign the trial to a complex department. When a single plaintiff personal injury case is trial ready and is transferred out of a JCCP, then at trial it is single plaintiff personal injury case.

The Coordination Trial Judge might decide that cases should be consolidated for trial before they are transferred to a county for trial. If the Coordination Trial Judge decides to not consolidate cases, then the Coordination Trial Judge does not interfere with the ability of the court in the county where the trial will take place to later reconsider whether to consolidate cases for trial. (CCP 1048.)

The Coordination Trial Judge might decide that cases should be limited in length. The parties repeatedly state that the trials will be X weeks long or Y weeks long. The Coordination Trial Judge might decide that all cases that are transferred from the JCCP to a county for trial will be limited to certain number of hours for each side. If the Coordination Trial Judge decides to set time limits for trials, then the Coordination Trial Judge does not interfere with the ability of the court in the county where of trial will take place to later reconsider those time limits based on the particular facts of any given case.

The Coordination Trial Judge will not set a pre-trial schedule for the case in the transferee court. After a case is transferred to the transferee court for trial then the transferee court will manage the case and can adjust the trial schedule to consider courtroom availability and other factors. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967; *Walker v. Superior Court* (1991) 53 Cal.3d 257, 267.) The trial judge in the transferee county will manage matters directly related to trial such as setting the specific trial date, hearing motions in limine, setting a maximum trial length, and deciding on jury instructions. (*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22-23 [court can set time limits for trial].)

CONSOLIDATION OF CASES FOR TRIAL

The court has the discretion to consolidate cases for trial. The issue is not whether the court is permitted to consolidate cases for trial. (CCP 1048.) (*Pilliod v. Monsanto Company* (2021) 67 Cal.App.5th 591, 625-626; [trials of two plaintiffs in single trial]; *Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 Cal.App.4th 976, 979 [trials of three plaintiffs in single

trial].) The issue is whether consolidation of cases for trial would be a good idea on the facts of the 14 cases before the court.

The court finds that consolidation of any of the 14 bellwether cases for trial would not be a good idea. Regarding "general causation" and the possibility that ranitidine might degrade into NDMA and that NDMA might cause cancer, there is substantial common evidence among the 14 cases, but that is where the commonality ends. Regarding exposure, each plaintiff consumed ranitidine manufactured by different defendants at different times in different doses, and the ranitidine consumed by each plaintiff was exposed to different levels of heat and humidity that might have caused the degradation of the ranitidine into NDMA. Regarding causation, each plaintiff has their own personal history of potential alternate exposures, family medical history, and other issues. Regarding damages, each plaintiff has suffered different symptoms, incurred different medical expenses, and suffered different other consequences from the cancer diagnosis. (*In re Ranitidine Cases* (Cal Superior 8/17/2021) 2021 WL 9749384 at *8 [requiring use of single plaintiff complaints].)

Even if consolidation were appropriate generally, the cases are bellwether cases in the JCCP. A bellwether case is both the trial of the individual's case and a test case for the JCCP. If a case is a test case in the JCCP, then the management of the JCCP suggests that it be tried with a single plaintiff so that the parties may brief legal issues that are focused on the single plaintiff. It is best that the bellwether cases are simple so that the legal issues are clearly presented without undue complication and the resulting orders can then be used as templates in other cases in the JCCP. (Compare *GlaxoSmithKline LLC et al. v. The Superior Court of Alameda County* (A166778) Order of 10/23/23 [denying petition for writ of mandate and stating "the byzantine facts of this complex coordinated proceeding make it a particularly ill-suited

vehicle to address the underlying legal question."].) After the parties complete several trials of single plaintiffs, then it might be appropriate for the court to consider the consolidation of cases for trial if appropriate based on the specific facts of the cases.

TRIAL SCHEDULING

The court has considered its own order of 7/5/23 at 4:24 - 5:2, which states: "The parties should anticipate that 2-4 cases will proceed to trial in April 2024, 4-6 cases will proceed to trial in June 2024, and the balance of the cases will proceed to trial in August 2024.

The court has considered the case management needs of the JCCP, the equities of the parties regarding plaintiffs picked by plaintiff and plaintiffs picked by defendants, the facts of the 14 bellwether case to be set for trial, the most appropriate locations for the trials, and the interests of judicial efficiency.

The court will schedule the 14 bellwether cases using a procedure similar to the one proposed by defendants. Defendants stated: "Specifically, Defendants proposed that: in April 2024, the Court transfer one randomly selected plaintiff pick and one randomly selected defense pick; in June 2024, the Court transfer three randomly selected plaintiff picks and one defense pick; and in August 2024, the Court transfer the four remaining plaintiff picks and the four defense replacement picks. Ex. 9, Ex. 2 to 10/30/23 CMC Stmt. Random selection for the first two tranches would help address the imbalance between the number and status of the eight plaintiff picks and six defense picks (four of which are recent replacement picks), while ensuring that all of the cases move toward trial settings within a year." (Oppo at 6:6-13.)

The court will set the first of the cases for trial in Alameda so that the Coordination Trial Judge can develop the template for the trials in the JCCP. The remaining cases will be transferred to appropriate counties for trials. The court set the order of trials randomly, with minor adjustments so that plaintiff picks and defense picks proceed to trial on roughly similar schedules. As of the effective date of the transfer, the case must be "trial ready." This court cannot set a specific trial date or identify the trial judge or trial department.

The court ORDERS that schedule for the 16 bellwether cases will be as follows:

Plaintiff	**Case Number**	**Cancer Type**	**Plaintiff or Defense Pick**	**Transfer date/ County**
Browne	21CV002136	Bladder	Plaintiff	FEBRUARY 20, 2024. Trial date in Alameda (because first case) Otherwise would be Sacramento.
Boyd	21CV002165	Colorectal	Defendant	MARCH 26, 2024. Stanislaus County.
Peuse, Wanda	23CV041367	Colorectal	Defense	APRIL 22, 2024. Alameda (because first generic only case) Otherwise would be Solano.
Caratti, Michael	RG20061712	Bladder	Plaintiff	APRIL 21, 2024. Sacramento
Warren, Nancy	23CV041369	Breast	Defense	JUNE 23, 2024. Orange
Hughes, Annette	21CV002908	Colorectal	Defense	JUNE 23, 2024. San Joaquin
Apodaca, J.W.	22CV007136	Liver	Plaintiff	JUNE 23, 2024. Los Angeles.
Eiss, Sheldon	21CV002163	Bladder	Plaintiff	JUNE 23, 2024. Los Angeles.
Bautista, Jeffrey	21CV002172	Bladder	Plaintiff	AUGUST 25, 2024. Los Angeles.
Cook, Kenneth	22CV005318	Bladder	Plaintiff	AUGUST 25, 2024. San Francisco.
DeGase, Mary	23CV041325	Colorectal	Defense	AUGUST 25, 2024. Ventura

Plaintiff	Case Number	Cancer Type	Plaintiff or Defense Pick	Transfer date/ County
Pratt, Steve	22CV007137	Colorectal	Defense	AUGUST 25, 2024. Los Angeles.
Riggio, Joseph	21CV002171	Bladder	Plaintiff	AUGUST 25, 2024. Ventura.
Russell, John Wayne	RG20061561	Bladder	Plaintiff	AUGUST 25, 2024. Los Angeles.
Stewart, Anthony	21CV001687	Bladder	Plaintiff	AUGUST 25, 2024. San Diego.
Zavala, Maggie	23CV041328	Colorectal	Defense	AUGUST 25, 2024. Merced.

IT IS SO ORDERED.

Dated: December 5 2023

Hon. Judge Evelio Grillo

Superior Court of California, County of Alameda
Department 21, Administration Building

Case Number: JCCP005150
Case Name: Ranitidine Product Cases

ORDER ON MOTION OF PLAINTIFF REGARDING SCHEDULING AND CONSOLIDATION OF 14 BELLWERHER TRIALS

DECLARATION OF ELECTRONIC SERVICE

I certify that I am not a party to these cases and that a true and correct copy of the foregoing document was served electronically pursuant to Pre-Trial Order No. 8, entered in these coordinated proceedings on September 23, 2021 via the CASE ANYWHERE system. Execution of this certificate occurred at 1221 Oak Street, Oakland, California.

Executed on December 5, 2023

Executive Officer/Clerk of the Superior Court

By *Nicole Hall*
Deputy Clerk