Bellwether Trials

Best Practice 1E: The transferee judge should confer with the parties to determine whether holding bellwether trials would advance the litigation.

"Bellwether" or test cases focused upon individual claims can be an important case-management tool in an MDL proceeding involving numerous individual claims. As one judge noted, a bellwether is the first sheep ─ and that is the role we should keep in mind in thinking through bellwether cases. How well or poorly would these facts work before a jury? How good are the experts? Is the key evidence admissible? These types of questions will drive the outcomes in motion practice and trial ─ and in the shadow of those expectations, the settlement values reached if settlement is to occur. It is important for the parties and court to know how the cases will fare.

But that also means obtaining a sufficient number of outcomes to provide guidance, given the variety of fact patterns, claims, and defenses anticipated. In asbestos, the first ten verdicts were for the defense; but that was not indicative of the overall trend of the litigation. The case-management plan should provide for a sufficient number of cases that early outliers (in either direction) can be identified as such, and the true path of litigation discerned to the maximum extent possible.

But, these cases need not go all the way to trial. Many bellwether cases resolve along the way, whether because of errors in the plaintiff-fact sheet, special factors that strengthen or weaken the case during discovery that were not anticipated at the outset, or because of the court's early rulings. These cases should not be regarded as failures. Instead, they are important data points, helping the lawyers better understand the ground reality of the cases ─ which may vary considerably from the hypothetical plaintiff that has been the idealized subject of early

negotiations. Indeed, the reasons these cases drop out ─ gamesmanship, good advocacy, plaintiffs disappearing, the outcome of preliminary motions ─ all provide insights into how the broader pool of cases may fare. Yet, recognizing this, it is important that the judge select a larger pool of cases, knowing that they will resolve at a variety of points in the bellwether litigation process ─ as they should.

Bellwether trials may provide useful information to the parties regarding the likely outcome of other cases at trial, such as: (a) how well or poorly the parties' fact and expert witnesses perform in a trial setting; and (b) decisions on key legal issues and the admissibility of key evidence. As recognized by the *Manual for Complex Litigation*, the purpose of bellwether trials is to "produce a sufficient number of representative verdicts" to "enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."[1] As such, the bellwether process will be valuable only if the cases selected for trial are truly representative of the whole (or of one or more distinct categories of cases that comprise the whole).[2]

Of course, recognizing this concurrently opens the door to strategic manipulation. The transferee judge must carefully consider how the bellwether selection process will work, and how

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[1] *MCL* § 22.315 (2004); *see also In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-md-2087 BTM(KSC), 2012 U.S. Dist. LEXIS 118980, at *56 (S.D. Cal. Aug. 21, 2012) ("The bellwether cases should be representative cases that will best produce information regarding value ascertainment for settlement purposes or to answer causation or liability issues common to the universe of plaintiffs.").

[2] Only when a "representative . . . range of cases" is selected may "individual trials . . . produce reliable information about other mass tort cases." *MCL* § 22.315; *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, 2010 U.S. Dist. LEXIS 108107, at *4, *6-7 (S.D. Ill. Oct. 8, 2010) (it is "critical to a successful bellwether plan that an honest representative sampling of cases be achieved" because "[l]ittle credibility will be attached to this process, and it will be a waste of everyone's time and resources, if cases are selected which do not accurately reflect the run-of-the-mill case"); Eldon E. Fallon, et al., *Bellwether Trials In Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2343 (2008). ("the trial selection process should . . . illustrate the likelihood of success and measure of damages" of all cases in the litigation and "[a]ny trial-selection process that strays from this path will likely resolve only a few independent cases and have a limited global impact").

to address cases that drop out of the pool, in order to minimize strategic behavior and enhance the value of the bellwether process. Later in the process, counsel may strategically settle cases as they are proved to be particularly strong or weak compared to the expected baseline. The judge will also need to consider whether to broaden the pool of potential bellwether cases; for example through *Lexecon* waivers or trying cases in their originating district (unless barred by the Ninth Circuit ruling, which prevents intercircuit assignment solely for these purposes). In addition, the judge should be aware of the origin of the bellwether cases ─ is the case one in which a solo practitioner not active in the MDL represents the plaintiff, or is it the case of one of the Plaintiff Executive Committee (PEC) or PSC members or another attorney active in the MDL? If the PSC is not able to control the litigation fully, the results may be perceived as less indicative. But, many cases are outliers with unique causation issues, damages, or defenses ─ particularly in pharmaceutical cases ─ and thus careful attention must be given to which cases will best help move the MDL forward. It may well be that some of the best cases are ones that were not filed by the MDL leadership. As discussed in this section, there are many ways of selecting the bellwether to balance the competing needs of the bellwether MDL process.

The selection process should be geared to the goals of the parties and court in beginning a bellwether process. For example, are counsel trying to determine the distribution and range of claims, or how particular types of claims will fare through the litigation process (and, the damages that will be awarded, if any)? Given these goals, the judge should create a selection process that will result in cases that are helpful to those aims and communicate that selection criteria to counsel. For example, does the judge want the parties to propose their strongest cases, or does the judge want to see cases that tee-up particular contested issues? Both of these approaches are appropriate, they simply serve different goals. If a bellwether process of some type will be used, plaintiffs'

counsel strongly urged the use of a case-selection committee on the plaintiffs' side. The committee members are able to learn a lot about the particular cases on file that they otherwise would not, in order to find the cases they believe are representative. This information in turn helps inform the settlement negotiations, which can otherwise be untethered from the on-the-ground reality of the case.

In creating a selection process, the judge should bear in mind the consequence of the process. For example, allowing the parties to nominate and then strike each other's picks, yields very different results from a judge saying "here are the types of claimants and categories I do or do not want to see; bring me your nominees and I'll make the final selection." Random selection results in yet another type of sample set, but parties caution that random does not necessarily mean representative cases. One judge solved this problem by randomly selecting ten cases to go first, then allowing the lawyers to argue that this was not a random sampling—obtaining the benefit of random selection while minimizing the risk of outliers.

One approach that garnered substantial support was creating a grid or categorization of the cases based upon the earlier litigation process. Then, have the parties select 20 cases that fall within each of those categories. That pool of cases can then be developed, such that one-off anomalies do not skew the results but the size of the pool is small enough to allow counsel to focus on those cases. As MDL settlements have moved toward global grid settlements or smaller settlements by claims type, the grid bellwether approach can help develop and test each potential settlement category.[3] If the MDL does not end in a settlement, the grid approach can help clarify the remand packet with materials specific to each claim type.

[3] Settlements are discussed in more detail in Chapter 5. As discussed there, most settlements are global grid settlements. However, increasingly defense counsel have pressed for smaller settlements, whether by-firm inventory settlements or by-claim settlements (effectively global settlements of a particular type of claim).

Counsel strongly supported judges taking a strong role in articulating the criteria by which cases would be selected, recognizing that counsel will otherwise strategically act in their nomination of cases and strike of cases. Judges likewise agreed that "parties sometimes don't want what they ask for" so a strong hand from the judge is often necessary to maximize the value of early cases.

Before developing a bellwether protocol for moving forward with an initial set of cases, transferee judges recommended resolving pending motions to remand, acting on outstanding motions, and allowing early science hearings to help clarify what types of cases and claims are at issue. The judge may also ask the parties to provide an early science tutorial for the judge, which some transferee judges reported finding more helpful than *Daubert* hearings. Judges suggested that this was very helpful to do prior to the creation of the bellwether-selection process, in order to help the judge know enough about the cases and science to stop the jockeying among attorneys and select the right process and parameters for the cases.

The transferee judge should also determine as a threshold matter whether bellwether proceedings would be beneficial in the proceeding at hand. In some MDL proceedings, for example, the individual cases may be too dissimilar for bellwether trials to provide any useful insight into the larger claims pool. It may well be that simply motion practice, mini-trials, or joint trials of multiple cases could better serve the parties' goals than a traditional bellwether trial.

Likewise, on the back end, the bellwether materials ─ such as deposition cuts and key rulings ─ will be helpful to the judge in preparing a trial package for remand, if the parties do not enter into a settlement in the shadow of the bellwethers.

> *Best Practice* 1E(i): The transferee court should adopt a strategy for facilitating the availability of the broadest possible pool of candidates from which to select bellwether cases.

If the decision is made to conduct bellwether trials, the transferee judge should take steps to ensure that an appropriate pool of cases is available for selection as bellwether trial candidates. Under the U.S. Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[4] a transferee judge may only oversee trials of cases originally filed in that court. Often, some subset of the cases pending in a MDL proceeding will qualify, but that subset may not be representative of the entire MDL case pool. Thus, trials of cases selected from that pool may be of limited value.

For that reason, the transferee court should consider adopting one of three commonly-used options for facilitating the broadest possible pool of candidates to select as bellwether cases:[5]

The first is to request that parties sign "*Lexecon* waivers" – that is, waivers of the right to object to venue before the MDL court. This option is attractive to many judges because it allows selection for bellwether trial of any case in which the parties have executed such a waiver.[6] Claimants are often willing to give such waivers because they (and their counsel) want the opportunity for an early trial. These waivers are sometimes resisted by parties – particularly by claimants who may wish to maintain their right to try their cases in the venue where originally filed. If this approach is selected, the request for waivers should be made early to ensure a clear definition of the cases that are available for trial in the MDL court's district.

A second option is for the MDL court to enter an order allowing for direct filing of cases in the MDL court with a later determination of venue issues.[7] Such orders allow the court to select any case for a potential bellwether trial and then at that point ask the parties to waive any venue

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[4] 523 U.S. 26 (1998).

[5] *MCL* § 20.132.

[6] *Id.*

[7] *Id.*

objections to conducting a trial in the MDL proceeding. This option has the benefit of not requiring the judge to urge all parties in all cases to execute a waiver, which can be a daunting undertaking. Once the bellwether trial process is complete, the transferee judge may either keep the non-bellwether cases in the judge's district or transfer them to another federal venue based on the parties' views.

The third option is for the MDL judge to conduct bellwether trials in the districts in which the selected cases were originally filed, thereby avoiding the *Lexecon* problem. This option may be the least convenient for the parties and the transferee court because it requires the judge to apply to sit by designation in another jurisdiction and requires the parties to shift the base of operations from the MDL proceeding venue. In addition, the U.S. Court of Appeals for the Ninth Circuit has held that an MDL judge can only use this procedure upon a showing of need for additional judges in the transferor district, which likely is not satisfied in the typical MDL setting.[8] To date, no other Circuit has adopted that view.

> *Best Practice* 1E(ii): The transferee judge and the parties should establish a process that requires collaborative selection of bellwether trial cases.[9]

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[8] *See In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d 1050 (9th Cir. 2013) ("Only severe or unexpected over-burdening, as happens when a judge dies or retires, when the district is experiencing a judicial emergency or when all judges are recused because of a conflict, will warrant bringing in a visiting judge.").

[9] *See, e.g.*, Joint Bellwether Plan, *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 3:09-md-2087-BTM-RBB (S.D. Cal. Mar. 19, 2012) (providing that each party will pick an equal number of trial candidates, subject to veto from the other side, that will then be tried alternately); Pretrial Order #10 at 2, *In re: Levaquin Prods. Liab. Litig.*, No. 08-1943 (JRT) (D. Minn. Mar. 8, 2011) (the "Court, upon recommendation by the parties, designated six individual plaintiffs . . . as possible bellwether" candidates and then allowed parties to take turns choosing cases to be tried); Case Management Order No. 9 at 2-3, *In re Fosamax Prods. Liab. Litig.*, No. 1:06-MD-1789(JFK) (S.D.N.Y Jan. 31, 2007) (providing that each party will pick 12 cases to fill the bellwether trial pool, with the Court picking an additional case; from that pool, plaintiffs, defendants and the court will each pick a trial case and the court "will randomly select the order in which each of the three cases will be tried"); Order Re: Bellwether Trial Selection at 2, *In re Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW (E.D. Ark. Jun. 20, 2005) (court to select 15 cases at random for the bellwether trial pool and then the "parties must 'meet and confer'" to "together select" five cases that involve representative plaintiffs for trial).

In designing a selection protocol, the transferee judge should be mindful that bellwether trials are most beneficial if they: (a) produce decisions on key issues that can then be applied to other cases in the proceeding (e.g., *Daubert* issues, cross-cutting summary-judgment arguments, the admissibility of key evidence); and (b) help the parties assess the strengths and weaknesses of various types of claims pending in the MDL proceeding. In the end, the key is to select cases that are representative of the entire claimant pool (or of specified categories in that pool). The most popular methods are: (1) random selection of cases from the entire case pool; and (2) selection of cases by the parties (usually with strikes).

The *Manual for Complex Litigation* endorses random selection as a means of identifying representative cases: "To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly from the entire pool or from a limited group of cases that the parties agree are typical of the entire mix."[10] Some MDL judges have embraced this approach and adopted random selection methods for identifying test-trial candidates. For example, in *In re Baycol Products Litigation*, the court's selection program included all cases filed in the District of Minnesota involving Minnesota residents plus a minimum of 200 additional cases selected at random from all MDL filed cases.[11] And in *In re Prempro Products Liability Litigation*, 15 cases were randomly drawn from a hat.[12] However, some commentators have expressed the view that random selection will rarely result in selection of representative cases.[13]

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[10] *MCL* § 22.315 (emphasis added).

[11] *See* Pretrial Order No. 89, *In re Baycol Prods. Litig.*, No. 01-md-01431 (D. Minn. July 18, 2003); *see also In re Norplant Contraceptive Prods. Liab. Litig.*, No. 4:03-cv-1507-WRW, 1996 WL 571536, at *1 (E.D. Tex. Aug 13, 1996) ("[f]ollowing random selection of the twenty-five bellwether trial plaintiffs").

[12] *See* Order re: Bellwether Trial Selection at 2, *In re Prempro Prods. Liab. Litig.*, MDL No. 1507 (E.D. Ark. June 20, 2005).

[13] Federal Judicial Center and National Center for State Courts, *Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges* 12 (2013) ("Selecting cases randomly . . . is unlikely to produce a representative set of verdicts that will assist the parties in reaching a global settlement.").

Another approach is to give the parties input into the bellwether trial selection process. For example, in *In re Vioxx Products Liability Litigation*,[14] the Plaintiffs' Steering Committee and Defendant's Steering Committee were each permitted to designate for trial five bellwether cases involving myocardial infarctions allegedly caused by Vioxx as bellwether trial candidates. Each side was given two veto strikes with the remaining cases set for trial on a rotating basis, starting with one of the plaintiffs' selections.[15] As Judge Eldon Fallon noted in an article published after the *Vioxx* settlement, the alternate-selection approach used in *In re Vioxx* is preferable to allowing "only one side" to select bellwether trial cases, which "opens the door for the inequitable stacking of overtly unfavorable and possibly unrepresentative cases, as well as creating an atmosphere of antagonism."[16] Further, allowing "both sides of coordinating attorneys [to] make selections by exercising alternating picks" is "the most useful approach" to bellwether trial selection because it "institutes fairness and attorney participation, while maintaining efficiency and placing the burden of ensuring representative cases on those with the most stake in the trial selection process."[17] Such collaborative approaches give the parties "better control over the representative characteristics of the cases selected" and are therefore more likely to result in bellwether cases that are typical of the litigation pool.[18] However, some judges have been critical of allowing the parties too much freedom to select cases because advocates may have a strong inclination to pick cases they are most likely to win, without regard to the representativeness of those cases.[19]

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[14] 501 F. Supp. 2d 789, 791 (E.D. La. 2007).

[15] *Id.*

[16] Fallon, et al., *Bellwether Trials In Multidistrict Litigation*, 82 Tul. L. Rev. at 2350.

[17] *Id*. at 2364.

[18] *In re Yasmin & Yaz*, 2010 U.S. Dist. LEXIS 108107, at *7.

[19] Federal Judicial Center and National Center for State Courts, *Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges* 12 (2013) ("Allowing attorneys complete freedom to choose bellwethers is unlikely to produce a representative set of verdicts that will assist the parties in reaching global settlement.").

A judge should view any proposal for consolidated bellwether trials with skepticism. At the bellwether stage, the goal should be to achieve valid tests (not strive to achieve verdicts as to large inventories of claims) and consolidation can tilt the playing field, undermining the goal of producing representative verdicts. As one transferee judge recognized in rejecting a proposal to hold a three-plaintiff bellwether trial, "[u]ntil enough trials have occurred so that the contours of various types of claims within the . . . litigation are known, courts should proceed with extreme caution in consolidating claims."[20]

As discussed previously, to enhance the selection process the transferee judge should require plaintiffs to: (1) provide fact sheets, which are court-approved, standardized forms that seek basic information about plaintiffs' claims (e.g., when they used the product, what injury they allege); and (2) submit medical and employment record authorizations to collect basic information about plaintiffs' claims.[21] The availability of such information should facilitate selection of more representative cases for trial. Indeed, sampling information from these sources may aid the court and the parties in defining what constitutes a representative case and in identifying distinct categories of cases within the pool pending in the proceeding. Irrespective of the bellwether selection method that is adopted, the parties should be given a reasonable amount of discovery in

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[20] *See In re Levaquin Prods. Liab. Litig.*, No. 08-1943, 2009 U.S. Dist. LEXIS 116344, at *9-11 (D. Minn. Dec. 14, 2009) (internal quotation marks and citation omitted); *see also* Pretrial Order # 71 at 2, *In re C.R. Bard Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2187 (S.D. W. Va. Mar. 7, 2013) (denying plaintiffs' motion to consolidate three plaintiffs' cases or, in the alternative, "seat three juries in a single trial but deliberate separately and render separate verdicts" as the first bellwether trial in product-liability litigation involving pelvic implant surgery); *In re Hydroxycut Mktg. & Sales Practices Litig*., No. 3:09-md-2087-BTM(KSC), 2012 U.S. Dist. LEXIS 93282, at *50-52 (S.D. Cal. June 28, 2012) ("[t]he selection of ***individual*** plaintiffs by the parties with oversight from the court is similar to approaches taken by other courts in designating representative bellwether cases for trial") (emphasis added); *In re Yasmin & Yaz*, 2010 U.S. Dist. LEXIS 108107, at *9 n.3 (plaintiffs for inclusion in the bellwether pool "must be selected . . . ***individually***") (emphasis added); *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 644 (E.D. La. 2010) (noting that six bellwether trials of individual plaintiffs were conducted during the course of litigation).

[21] *MCL* § 22.83.

a case before it is finally selected for a bellwether trial to ensure that no party is subjected to unfair surprise or otherwise disadvantaged.

> *Best Practice* 1E(iii): The transferee judge should adopt rules that will minimize the risk that parties will attempt to "game" the bellwether trial-selection process, resulting in test trials of cases that are not representative of the case pool as a whole.

Although there may be good-faith reasons for settling or voluntarily dismissing a test case, there could be instances in which the parties do so to manipulate the takeaways from the bellwether process.[22] For example, defendants could offer to settle what they view as a strong bellwether case for the plaintiffs. Likewise, plaintiffs could dismiss what they view as a weak bellwether case. If the transferee judge has elected random selection of cases, there is little that can be done about such tactics, unless the judge chooses to adopt a different procedure for selection of replacement cases. Such strategic behavior can be mitigated by, for example, allowing plaintiffs to choose the replacement for any bellwether case that defendants choose to settle rather than take to trial, or allowing defendants to select the replacement for any bellwether case that plaintiffs choose to dismiss.

A court can more effectively adopt rules and procedures to deal with attempts to game the system in an MDL proceeding in which the parties have participated in the selection of bellwether cases. For example, if the transferee judge allows each side to select a bellwether case from among four nominees by the other side (i.e., plaintiffs would pick the bellwether case from among four nominees by defendants, and vice versa), and plaintiffs choose to dismiss the case selected by defendants, the plaintiffs could either lose their right to pick their own case, or defendants could be allowed to choose the replacement case from among the entire case pool.

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[22] Federal Judicial Center and National Center for State Courts, *Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges* 12 (2013) ("Permitting plaintiffs to dismiss cases on the eve of trial also can distort the information provided by bellwether trials.").

Even if a bellwether case is voluntarily dismissed before trial, significant value may be derived from the court's pretrial rulings. With rulings in hand, the parties will be in a better position to gauge the direction of the litigation. While bellwether verdicts can be explained away and a negotiating spin placed on them by either side, a court's ruling (e.g., on a *Daubert* or summary-judgment issue) remains. Moreover, repeated voluntary dismissals may be an important signal that one side has no confidence in certain types of cases and that those types of cases may be candidates for dispositive motions. Thinning the docket in this manner may advance overall resolution of the controversy.

In planning case management, it is important to remember that every MDL proceeding is different – that what is a best practice in one MDL may be irrelevant to or counterproductive in another. In the end, collaboration among counsel and the court is the most essential ingredient in a successful MDL proceeding. Effective MDL-proceeding management depends on cooperation among counsel to a greater degree than in other civil litigation matters due to the magnitude and complexity of what is normally at stake. Proper case management is a shared responsibility among the court and counsel, and the court should hold counsel accountable for fulfilling their duties in that regard.[23]

[23] *See* Pretrial Order No. 1 at 1-2, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on Apr. 20, 2010,* MDL No. 2179, No. 2:10-md-02179-CJB-SS (E.D. La. Aug. 10, 2010) ("The Court expects, indeed insists, that professionalism and courteous cooperation permeate this proceeding from now until this litigation is concluded.").