

## **Important Considerations When Screening MDL Cases**

Case screening and selection is becoming increasingly important in the world of Mass Torts. Courts are beginning to hear cases from Plaintiffs that are unsupported by fact and science. Filing bad cases places undue strain on litigations. Case selection and screening based on the developed criteria of the MDL are critical.

### **Understanding Science**

In most MDLs, the epidemiology and science only supports a specific type of injury, or “signature injury.” For example, *In Re: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, the epidemiology supported venous clotting events. Another example, *In Re: Skechers Toning Shoe Products Liability Litigation* the science supported gait imbalance related falls but did not support gait induced chronic injuries. Science is paramount when screening cases. Filing cases that are based on significant injuries, damages, or a compelling story, but are not supported by the scientific literature is not a good practice. For the reasons discussed below, leadership will not spend time developing the case for injuries other than signature injuries. To become familiar with science in a pharmaceutical or device case, attorneys have several basic resources at their disposal. These include, but in no way are limited to, researching the product label on the FDA website, understanding how the 510k process works, and reading epidemiological and other studies all of which are available on the internet.

Filing cases that lack the fundamental link to the scientific evidence poses a multitude of problems. First, *Lone Pine* orders are increasing in popularity. *Lone Pine* orders, while beyond the scope of this article, generally require each individual plaintiff to produce an individual case specific expert report linking their injury to the product at issue.<sup>1</sup> *Lone Pine* is just one tool used to weed out illegitimate claims that should not have been filed.

### **Common Benefit and Case Prosecution**

In nearly every MDL, one of the first Orders entered by the Court is the Common Benefit Order. In short, Common Benefit is an Order requiring each case pay a percentage of the any eventual settlement to a fund that is used to reimburse both the attorney time and expenses of prosecuting the litigation. Generally, the Common Benefit percentage is between 4% and 9%. The nuances of Common Benefit workings and splits are beyond the scope of this article. It is important to understand what the assessment is for. The assessment is simply the price each individual case pays to have access to the work product of the MDL including the general causation and other experts, document review, depositions, and eventually a trial package. The MDL work product is produced over years of litigation.

The work done in each case by leadership for the common benefit of all cases in the litigation will focus on the signature injury and the link of that injury to the specific product at issue. Valuable time and resources will not be spent developing work product and trial packages for multiple or unique injury types.

### **Non-Qualifying Products**

When screening cases, attorneys should limit their case selection to the specific product at issue in the MDL. While this may seem like common sense, the issue becomes less obvious in many real life

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<sup>1</sup> *Lore v. Lone Pine Corp.*, No. L33606- 85 (N.J.Super.Ct. Law Div., Monmouth Co., Jan. 1, 1986).

situations. For example, a hip replacement system may be made up of multiple combinations of component products. Sometimes ten or more combinations of products could be used in a single hip replacement system only one of which is at issue in a litigation. A perfect illustration is *In Re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation*. In that litigation, metal liners are fillable cases. However, some, if not most, Pinnacle hip replacements have a polyurethane liner. The poly liner does not produce the metal-on-metal friction that produces the signature injury of metallosis leading to eventual revision surgery. More recently, the JPML heard arguments on *In Re: Stryker Orthopaedics LFIT V40 Femoral Head Products Liability Litigation* where the panel struggled with how to limit the scope of the MDL where multiple components were used, but only some of which are at issue.<sup>2</sup>

### **The Importance of Bellwethers**

Traditionally, Bellwether cases have been selected from pools of both Plaintiff and Defense picks. Unfortunately, in practice, this process rarely produces true bellwether cases. Rather, the adversarial system takes charge and Plaintiffs pick the best of the best cases in the inventory while Defendants pick the worst. A new trend in Bellwether selection is, for lack of a better term, the first in method. The Court will designate several cases, the first 100 cases filed for example, for case specific bellwether workup.<sup>3</sup> *In Re: Ethicon, Inc., Pelvic Repair System Products Liability Litigation*, for example, has had several waves of trial cases, based on filing date, selected for case specific depositions and workup. Consequently, filing cases that are scientifically sound early in the litigation has never been so important to the eventual success or failure of a MDL. Importantly, bellwether cases are also used to push parties to settlement discussions. Weak bellwether cases can lead to lower settlement values. Dismissing bellwether cases can draw the ire of the Court and the Defendants as well as weakening the Plaintiffs position. Filing bad cases and stringing a Plaintiff through a litigation can lead to client control and communication problems later in the litigation when you must explain why their case has gone poorly after years of litigation.

### **Conclusion**

Screening is important. Now more than ever, there is no escaping it. Attorneys must understand the scientific literature that supports each case and how that science applies to cases in their inventory. Failure to follow basic screening criteria on even a small number of cases can dramatically impact the entire litigation as a whole.

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<sup>2</sup>*In Re: Stryker Orthopaedics LFIT V40 Femoral Head Products Liability Litigation*, Transfer Order, [Doc. 2768], (April 5, 2017).

<sup>3</sup>See generally, *In Re: Abilify (Aripiprazole) Products Liability Litigation*, CMO 2, [Doc. 182], (February 2, 2017).