Plaintiff Fact Sheets

Best Practice 1C(iv): Individual claimants should be required to produce information about their claims.

In non-MDL cases, plaintiffs are required to produce information about their claims from the outset, and that practice should not change simply because a claim has been transferred into an MDL proceeding. Such a balanced approach will ensure that both sides obtain information critical to claims or defenses. Moreover, development of plaintiffs' individual claims is vital to the establishment of a fair and informative bellwether trial process and is indispensable to any settlement discussions in which the parties may engage. In fact, settlement talks are often delayed precisely because the parties have not anticipated the need for assembling information necessary to assess the strengths and weaknesses of the global litigation and examine the potential value of individual claims. Finally, requiring plaintiffs to produce information verifying their basic factual allegations should allay concerns that MDL proceedings invite the filing of claims without adequate investigation.[1]

Of course, until determinations are made about which (if any) cases might be selected for bellwether trials in the MDL proceeding (as discussed below) or early remand to transferor courts for trials, there is no need to delve into full case development (e.g., plaintiff depositions, case-specific expert discovery). Rather, each claimant should be required to engage in streamlined, cost-effective paper discovery to the maximum extent possible.

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[1] *See* John H. Beisner & Jessica D. Miller, *Litigate the Tort, Not the Mass*, Washington Legal Foundation (2009) (expressing concern about the quality of mass-tort claims filed in MDL proceedings, noting that "[t]his problem is compounded by the fact that many of the claims are not developed by the filing counsel – they effectively were purchased from other attorneys who advertised to attract claimants in their home markets with no intention of ever litigating the claims themselves").

One of the most useful and efficient initial mechanisms for obtaining individual plaintiff discovery is the use of fact sheets. Fact sheets are court-approved, standardized forms that seek basic information about plaintiffs' claims – for example, *when* and *why* the plaintiff used the product at issue and *what* injury did the plaintiff sustain as a result of using the product.[2] Fact sheets spare defendants the expense of tailoring countless interrogatories to individual claimants, while allowing plaintiffs' attorneys to fulfill early discovery obligations with relative ease.[3] However, fact sheets will be meaningful only if plaintiffs and their counsel devote appropriate time and attention to this project. The fact sheets should be deemed a form of discovery governed by the relevant Federal Rules of Civil Procedure, requiring the same level of completeness and verification.[4]

Similarly, requiring the collection of plaintiffs' medical records (in personal injury cases) or employment histories (in employment cases) is another straightforward way that MDL courts can encourage a robust exchange of key information at a relatively early stage.[5] This information can help defendants verify the answers provided in the fact sheets and shed light on the potential causes of the plaintiffs' injuries.

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[2] *MCL* § 22.83; *see also* Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 Sedona Conf. J. 1, 8 n.40 (2011) ("The use of 'fact sheets' to streamline discovery by replacing formal interrogatories with supposedly less onerous, more fact-oriented formats is now a common practice in mass tort multidistrict litigation.").

[3] Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 Utah L. Rev. 863, 927-28 (2005); *see also* McGovern, *supra* note xxii, at 1888-89 (noting that in the Fen/Phen litigation, the parties "cooperated extensively with each other in the discovery process in order to reduce their transaction costs. Innovative processes, including the MDL-standardized fact sheets . . . provided models for discovery[.]").

[4] *See, e.g., In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, No. 3:09-md-02100-DRH-PMF, Order # 12, Case Management (PFS), ¶ A.2 (S.D. Ill. Mar. 3, 2010) ("A completed PFS, which requires that each Plaintiff sign the Declaration in Section XIII, shall be considered to be interrogatory answers and responses to requests for production under the Federal Rules of Civil Procedure, and will be governed by the standards applicable to written discovery under the Federal Rules of Civil Procedure.").

[5] "In the diet drugs MDL, for example, the court ordered 'first wave discovery' in which each plaintiff was required to submit a fact sheet and a list of medical providers and authorizations." 1-4 *ACTL Mass Tort Litigation Manual* § 4.05; *see also In re Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW, 2010 U.S. Dist. LEXIS 135152, at *20 (E.D. Ark. Dec. 6, 2010) (the fact sheets require plaintiffs to provide "the identity of each of plaintiff's prescribing physician(s), medical history, employment history, educational history, and the identity of potential fact witnesses.").

An alternative to fact sheets is standardized interrogatories or document requests, which are also less costly and onerous than individually tailored interrogatories and document requests. Especially as a proceeding matures, the transferee judge may consider the entry of *Lone Pine* orders requiring all plaintiffs to submit an affidavit from an independent physician to support their theories of injury or damages.[6] These orders are particularly important in an MDL proceeding involving disparate theories of causation – or where multiple alternative potential causes of the alleged injuries exist.

In some MDL proceedings, courts have required defendants to prepare fact sheets for each plaintiff, providing basic information they may have about the claimant or their claim.[7] Typically, this step is required only after a plaintiff has completed a fact sheet.[8]

The court should impose concrete time limitations for completing fact sheets. Unless such deadlines are rigorously enforced, counsel handling multiple claims may fall far behind in fulfilling that obligation. Missed deadlines may be excused if good cause is shown, but at some point, if fact sheets are not filed by a litigant, the claim should be dismissed for failure to prosecute.[9]

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[6] *See, e.g., In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2012 U.S. Dist. LEXIS 56309, at *5 (E.D. La. Apr. 23, 2012) ("*Lone Pine* orders [are] appropriate" because "it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury.") (internal quotation marks and citation omitted).

[7] *See, e.g., Bextra and Celebrex Marketing Sales Practices and Prod. Liab. Litig.*, MDL No. 1699, Case No. M:05-CV-01699-CRB, Pretrial Order No. 6: Plaintiff Fact Sheets and Defendant Fact Sheets, ¶ 12 (N.D. Cal. Feb. 13, 2006).

[8] *Id.* ¶ 13 ("[Defendants] shall provide a complete and verified Defendant Fact Sheet within sixty (60) days after receipt of a substantially complete and verified PFS and substantially complete authorizations.")

[9] *See, e.g., In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, No. 3:09-md-02100-DRH-PMF, Order # 12, Case Management (PFS), ¶ E.1 (S.D. Ill. Mar. 3, 2010) (establishing progressive consequences for ongoing non-compliance with PFS requirements, including dismissal with prejudice).