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Note

Different Bells for Different Wethers: Random Sampling and Other Bellwether Selection Trends in Products Liability MDLs

FELIPE VILLALÓN

When the Judicial Panel on Multidistrict Litigation (JPML) transfers pools of thousands of similar cases pending in different districts to a single district court pursuant to 28 U.S.C. § 1407, the transferee judge needs a speedy and effective means of resolving these multidistrict litigations, or MDLs. Some MDLs, especially those involving products liability claims, are enormous, consisting of tens of thousands or even hundreds of thousands of claims. The MDL statute, however, limits the transferee court's power to pretrial proceedings. Judges managing MDLs will promote settlement by fast-tracking several cases for trial, either in their own district (if they have jurisdiction) or by transferring these cases back to their district of origin. These fast-tracked cases are known as bellwether trials.

MDL procedures are governed by the MDL statute, the Federal Rules of Civil Procedure, and case law. Judges also have a great deal of discretion in structuring the bellwether trial procedure, and their approaches vary. Successful bellwether trial procedures are often copied by other MDL judges and become a form of "soft" precedent.

There are two dominant methods for selecting bellwether cases. The first method is selection by counsel, in which lawyers for the plaintiffs' management committee and the defendant each pick the cases the judge will try. The second method is random sampling, in which cases are randomly selected for trial.

This Note presents an empirical review of judicial practices and finds that when judges have smaller case pools, they tend to allow counsel to select bellwether cases. When the case pool exceeds 10,000, judges will use modified random sampling to select bellwether cases. Evaluating the two methods, this Note argues that random sampling is the superior method and should be applied uniformly.

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Different Bells for Different Wethers: Random Sampling and Other Bellwether Selection Trends in Products Liability MDLs

FELIPE VILLALÓN [*]

INTRODUCTION

Multidistrict litigation (MDL) is a fast-growing part of the federal docket. Just a few years ago, one in five newly filed federal civil cases were MDL proceedings.[1] The Judicial Panel on Multidistrict Litigation (JPML) aggregates these cases, which share common facts and sometimes number in the thousands, and then transfers those cases to a district court for pretrial proceedings. That transferee court completes the preliminary aspects of litigation before remanding to the transferor court for trial.[2] One way to resolve these cases is to try a sample of them and use that sample as a starting point for negotiating a settlement. This is a "bellwether trial" process.[3]

This Note documents the methods five district courts have used to select bellwether trials in large-scale products liability MDLs over the last twelve years. This examination reveals a correlation between the size of the MDL and the bellwether selection method employed.

The organization of these cases proceeds chronologically, grouped by the type of selection method. Even though there is no consensus among courts on which method is best, courts have preferred parties to select bellwether plaintiffs in MDLs numbering roughly 10,000 cases or fewer, whereas with MDLs aggregating tens of thousands or hundreds of thousands of cases, courts have adopted a modified random sampling selection process.

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[*] J.D. Candidate, University of Connecticut School of Law, May 2023. Thank you to Professor Alexandra Lahav, who is on the forefront of her field and provided her invaluable time and guidance in developing this Note; to my peers of the *Connecticut Law Review* for your contributions and maintaining the highest editorial standards; and to my mother, sisters, and close friends for unconditional love and support. Additionally, thank you to Dr. Andrew Rieser, whose passion inspires sparks to fires, and to Dr. Rebecca Martin for challenging our intellectual capacities. Finally, thank you to Anely, Daniel, Mark, and Matthew for being reliable eyes, ears, and voices in these endeavors.

[1] Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 3 (2021). "MDLs do make up a substantial percentage of pending cases, at one point comprising almost forty percent of the federal civil caseload." *Id.* at 3 n.2.

[2] *See* Eldon E. Fallon, *Bellwether Trials*, 89 UMKC L. REV. 951, 951 (2021) (describing the transferee court's purpose).

[3] *Id.* at 951–52 (defining the bellwether process).

MDLs can involve cases numbering anywhere from several hundred to over one hundred thousand.[4] Judges use bellwether trials to facilitate a settlement without the need to try every single case. The idea is that by working up the factual predicate and trying a sample of individual suits, parties will obtain the information they need to settle the bulk of the lawsuits within the MDL. With or without the assistance of party counsel, the judge develops a bellwether process for how to select a "sample" from which to base their actions and decisions for the other cases. These processes are detailed in court management orders.

There are three overall approaches judges employ in selecting bellwether trials: (1) selection by counsel, (2) selection by transferee court, and (3) random sampling.[5] The first and third are relevant here. In selection by counsel, the judge gives the parties discretion on which cases to select for trial. In random sampling, cases are randomly selected to proceed to discovery. The judge and counsel then refine this pool to a smaller group from which to select cases for trial. At this point, there are several routes the court can take: parties can select the cases, the court can select them, a smaller random sampling can be selected, or the court can use a combination of all methods. This Note provides case studies of two MDLs that employ the random selection method—one with nearly 40,000 combined actions and another with nearly 300,000 combined actions—to demonstrate why this emerging method is more efficient and fairer than pure party selection of sample cases. The two methods outlined above and a review of their inner workings demonstrates that random sampling is ideal.[6]

Bellwether cases are supposed to be *representative* of the whole. Yet, if given the opportunity, counsel can, and will, select favorably *extreme* cases, and this runs contrary to the purpose of a bellwether trial procedure to try representative cases. Since no rules or regulations currently guide how judges determine case selection protocols, this Note provides a study of existing methods to determine what judges are doing and to evaluate what

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[4] *MDL Statistics Report – Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Dec. 15, 2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-December-15-2022.pdf [hereinafter *MDL Statistics Report*] (identifying active pending cases). As of December 15, 2022, for example, *In re Takata Airbag Products Liability Litigation* (MDL No. 2599) has 179 actions pending and 350 total actions historically. *Id. In re Roundup Products Liability Litigation* (MDL No. 2741) has just over 4,000 actions both pending and total historically. *Id.*

[5] *See* Fallon, *supra* note 2, at 953 (outlining the three main approaches in selecting cases).

[6] Edward B. Ruff III and James G. Gillingham have "concerns" about both of these methods, and their description of random sampling as "ignor[ing] the best and worst cases" needs unpacking. *See* Edward B. Ruff III & James G. Gillingham, *The Ins and Outs of Trying the Bellwether Case in Multidistrict Litigation*, 61 FED'N DEF. & CORP. COUNS. Q. 453, 468 (2011) (describing and opining on plaintiff selection methods). In random sampling, attorneys can still select "plaintiffs strongest for their side" from a pool of randomly selected plaintiffs, resulting in one side's best and the other side's worst. *Id.* at 467. Ruff and Gillingham might mean to say that random sampling precludes parties from selecting the best and worst at the outset of litigation.

they ought to do. This study provides a foundational understanding for a more refined discussion of *In re 3M Products Liability Litigation* ("*3M*")—showing how Judge Rodgers uses a bellwether process to tackle nearly 300,000 total actions in the largest MDL in history.[7] This study ultimately concludes that random sampling should be incorporated at some point in the selection process to bring fairness and impartiality to a litigation technique designed to generate results from cases representative of the majority.

This Note will proceed in three parts. Part I describes bellwether trials generally. Part II describes how judges structured bellwether procedures in five different MDLs. Part III assesses these methods and advocates for the hybrid random sampling case selection model as used in *3M*.

I. WHAT ARE BELLWETHER TRIALS?

Bellwether trials are born out of multidistrict litigation (MDL), which is a group of "civil actions involving one or more common questions of fact . . . pending in different districts."[8] MDLs can be viewed as a relative of and, sometimes, an alternative to the Rule 23 class action.[9] When several federal cases involve common questions of fact, the JPML transfers these cases to a district court for pretrial proceedings.[10] The JPML and its procedures are governed by 28 U.S.C. § 1407, which gives litigants and courts the opportunity to consolidate cases[11] and conduct pretrial proceedings effectively[12] in what is called a transferee court. This transferee court has the power to do more than conduct these pretrial proceedings, however—it also can try, by consent,[13] individual cases that would have been properly filed in that venue prior to being aggregated under the JPML. For other cases,

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[7] *MDL Statistics Report*, *supra* note 4; *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-02885, 2022 WL 3345969, at *1, *3 (N.D. Fla. Aug. 14, 2022).

[8] 28 U.S.C. § 1407(a).

[9] *See generally* FED. R. CIV. P. 23; Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017) (comparing procedural standards of Rule 23 Class Actions with MDLs).

[10] 28 U.S.C. § 1407(c); *see also id.* § 1407(d) ("The judicial panel on multidistrict litigation shall consist of seven 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. The concurrence of four members shall be necessary to any action by the panel.").

[11] *Id.* § 1407(c) ("Proceedings for the transfer of an action under this section may be initiated by—(i) the judicial panel on multidistrict litigation upon its own initiative, or (ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate.").

[12] *Id.* § 1407(a) ("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.").

[13] Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2354 (2008). Here, trying by consent means that out-of-forum parties have given a transferee court permission to try their case.

once the pretrial proceedings are complete, the transferee court must remand to the original transferor court for trial.[14] Few cases are actually remanded to the transferor court, however, because the litigation . . . [usually] settle[s] in the transferee court."[15]

How is a transferee court to assess the specifics of several hundreds to thousands of pending cases with common questions of fact? The *Manual for Complex Litigation* has a few recommendations:

> A variety of case-management techniques are available when there is insufficient information as to the nature, strength, or value of the claims. Before making aggregation decisions, the judge should order the parties to identify other, pending, related cases and their status. The judge also might consider setting several individual cases on a schedule for pretrial motions, discovery, and trial as test cases, while holding other cases or claims in abeyance.[16]

These test cases mentioned above are also known as bellwether trials,[17] and they are frequently used in large personal injury cases (including products liability, pharmaceutical and medical device, and environmental mass tort litigation) for their ability to lead to global settlement.[18] The purpose of bellwether trials is "not to resolve the thousands of related cases pending in an MDL . . . but instead to provide meaningful information, experience, and data to allow the parties to make an intelligent and informed

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[14] § 1407(a) ("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*, That 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.").

[15] Fallon et al., *supra* note 13, at 2329 (quoting Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 151 (D. Mass. 2006)). Fallon et al. also noted that between 1968 and 2007, "only 11,610 cases" out of "265,269 actions subjected to MDL proceedings . . . have been remanded by the MDL Panel . . . ." *Id.* at 2329 n.20. This illustrates that consolidating the cases for bellwether proceedings can be effective.

[16] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.314 (2004).

[17] *Id.* at § 22.315 ("If individual trials, sometimes referred to as bellwether trials or test cases, are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases. Some judges permit the plaintiffs and defendants to choose which cases to try initially, but this technique may skew the information that is produced. To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases. Test cases should produce a sufficient number of representative verdicts and settlements 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. The more representative the test cases, the more reliable the information about similar cases will be.").

[18] *See* Loren H. Brown et al., *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663, 668–69 (2014) (describing some of the popular legal areas implementing bellwether trials).

decision as to the future course of the litigation."[19] If the process is done well, the judge and the parties can, by carefully culling and trying a selection of cases, analyze how the remaining cases should be resolved. Although the MDL process is slow, bellwether trials help conserve judicial resources by eliminating duplicative litigation in similar cases that would otherwise be spread across various federal courts. Additionally, bellwether trials give transferor courts the opportunity to focus on other cases.

The term "bellwether" is derived from the ancient practice of placing a bell on a male sheep, also known as a wether, that leads the rest of the flock.[20] Like their namesake, bellwether trials lead similar cases to a resolution.[21] A sample of cases are selected for trial to exemplify the price of litigation and a potential settlement amount for the remaining cases.[22] Sometimes, the advent of bellwether procedures causes defendants to settle with plaintiffs' committees before the judge issues orders.[23] It is important to note that unlike its relative in aggregate litigation, the class action, bellwether procedures are nonbinding in most MDLs, allowing selected plaintiffs to opt out of being tried.[24] Exercising this option frustrates the purpose of selecting a case as a representative of others in the MDL.[25]

Originally, courts tried to use the bellwether trials to bind participants and claimants in judgment values much like the way a judgment in a class action binds class members.[26] In this sense, a bellwether trial was close to an alternative to a class action resolution.[27] However, this approach has been criticized for a variety of reasons,[28] and a nonbinding approach is preferred

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[19] Fallon, *supra* note 2, at 951–52; *see also* Jeffrey R. Johnson & Tami Becker Gómez, *Federal Multidistrict Litigation: Background, Basics, Global Settlements, and Bellwether Trials*, 79 DEF. COUNSEL J. 21, 30 (2012) (describing bellwether trials as a "testing ground" for "testing various theories and defenses in a trial setting").

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

[21] *Id.*; *see also* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577 (2008) [hereinafter Lahav, *Bellwether Trials*].

[22] *See* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185, 186 (2018) [hereinafter Lahav, *Primer on Bellwether Trials*].

[23] *See infra* notes 75–77, 80, 116–19 and accompanying text (discussing that parties settled before the start of bellwether trials).

[24] "Although bellwether trials are not binding on other related cases, they are, of course, binding on the parties in the specific case that is tried and can also still be beneficial to the MDL process." Fallon, *supra* note 2, at 951; *see also* Lahav, *Primer on Bellwether Trials*, *supra* note 22, at 186 (discussing how the nonbinding nature of bellwether trials on other related cases "do not raise due process issues for the parties").

[25] *See* Fallon et al., *supra* note 13, at 2348 ("This method is easy to perform, but it can be problematic. [T]here is no guarantee that the cases . . . will adequately represent the major variables. [A] selection method that may potentially frustrate this purpose by permitting unrepresentative cases to serve as bellwether trials should be rejected.").

[26] Johnson & Gómez, *supra* note 19, at 30 (citing Cimino v. Raymark Indus., Inc., 151 F.3d 297, 318 (5th Cir. 1998)).

[27] Fallon et al., *supra* note 13, at 2331.

[28] *Id.* at 2331 n.27 (quoting *Cimino*, 151 F.3d at 318 ("While the [*In re* Chevron USA., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997)] majority opinion . . . contains language generally looking with favor on

instead. Dubbed the "Modern Informational Approach," this nonbinding form is the approach MDLs have adopted more frequently.[29] It is also the approach most like the one advanced by the *Manual for Complex Litigation*, which recommends "[a] series of consolidated trials on all issues, if they are sufficiently common."[30]

Three canonical cases established important bellwether principles. First, decided in 1997, *In re Chevron* established that cases selected for bellwether trials should be representative of the rest.[31] Second, decided in 1998, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* held that the JPML must remand cases before or at the conclusion of pretrial cases, and that a transferee court's self-assignment of cases for trial without parties' consent is improper.[32] The result of that case now enables litigants to waive venue so that they can be tried in a transferee court, thereby enriching and diversifying the case pool for bellwether selection. Third, decided in 2007, *In re Vioxx* was a products liability MDL that contained several thousand cases against pharmaceutical company Merck for manufacturing a drug with serious side effects.[33] *Vioxx* is important because it is a good example of a large case where selection by counsel was effective in achieving a resolution, and it seems to have served as a model for future MDL judges.

A. *In re Chevron U.S.A., Inc.*

Chevron is seminal in aggregate litigation because it established the philosophy behind bellwether trials: that bellwethers, a term derived from herding livestock, should be representative of the "flock" they are leading.[34]

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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."); *see also* Brown et al., *supra* note 18, at 667–68. The concurrence in *Chevron* criticized this approach a year earlier:

> That all the plaintiffs are here represented by a single set of attorneys does not, in my view, alleviate Seventh Amendment concerns; to the contrary, it compounds them with potential ethical problems. . . . We are not authorized by the Constitution or statutes to legislate solutions to cases in pursuit of efficiency and expeditiousness. Essential to due process for litigants, including both the plaintiffs and Chevron in this non-class action context, is their right to the opportunity for an individual assessment of liability and damages in each case.

Chevron, 109 F.3d at 1023 (Jones, J. concurring). For an additional discussion of Seventh Amendment issues in this context, see Lahav, *Bellwether Trials*, *supra* note 21, at 615–17.

[29] Fallon et al., *supra* note 13, at 2332; Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 697 (2006).

[30] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.93 (2004) (emphasis removed); *see also* Ruff & Gillingham, *supra* note 6, at 461.

[31] *Chevron*, 109 F.3d at 1019.

[32] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

[33] *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 776, 778 (E.D. La. 2007).

[34] *See Chevron*, 109 F.3d at 1019.

A mass torts case, *Chevron* concerned a class of plaintiffs in Texas who alleged that Chevron, an energy corporation, contaminated their soil in the 1920s.[35] After removal to and consolidation of claims in the District Court for the Southern District of Texas, the court approved a trial plan in which plaintiffs and defendants would each choose fifteen cases among the 3,000 claims for trial on the issues of causation and damages, and "to establish bellwether verdicts to which the remaining claims could be matched for settlement purposes."[36] Chevron argued against this plan, asserting that it would "not result in a representative group of bellwether plaintiffs."[37] The district court ultimately denied Chevron's interlocutory appeal on that concern.[38]

On appeal, the Fifth Circuit asserted that the function of bellwether trials should have a "core element [of] representativeness—that is, the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained."[39] The court held that "before a trial court may utilize results from a bellwether trial for a purpose that extends beyond the individual cases tried, it must, prior to any extrapolation, find that the cases tried are representative of the larger group of cases or claims from which they are selected."[40] Here, the district court used the bellwether trial selection protocol technique of having the plaintiffs and defendants pick their cases; but the Fifth Circuit held that the results of trials selected in this manner, because they lacked the random sampling requisite in creating a representative pool, were not to be used in binding the other litigants in the pool.[41]

Chevron is important because it set the standard for the way bellwether cases ought to be selected. Directly rebuking the selection-by-counsel method, the *Chevron* court highlighted the importance of using random

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[35] *Id.* at 1017.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1018.

[39] *Id.* at 1019.

> Such samples are selected by the application of the science of inferential statistics. The essence of the science of inferential statistics is that one may confidently draw inferences about the whole from a representative sample of the whole. The applicability of inferential statistics have long been recognized by the courts.

Id. at 1019–20.

[40] *Id.* at 1020.

> Typically, such a finding must be based on competent, scientific, statistical evidence that identifies the variables involved and that provides a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from trials of the whole.

Id.

[41] *Id.* at 1021.

sampling, thereby undercutting parties' chances to cull their favorite cases and conducting a trial of the "best" and "worst" cases.[42]

B. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*

In *Lexecon*, the Supreme Court held that transferee courts may not assign themselves cases transferred to them for pretrial proceedings.[43] The Court found that this practice was the result of district courts' misinterpretations of 28 U.S.C. § 1404 in relation to the MDL statute, § 1407.[44]

Lexecon, a consulting firm, was a defendant in a class action arising out of allegations of disinformation about a bank it represented. Two law firms, Milberg and Cotchett, represented that class against Lexecon.[45] The cases against Lexecon were transferred to a district court under § 1407 for pretrial proceedings, but before these proceedings concluded, Lexecon and the plaintiffs agreed to have the claims dismissed.[46] Shortly afterward, Lexecon sued the two law firms in the District Court for the Northern District of Illinois, which then asked the JPML to consolidate the suit, along with the cases involving the bank Lexecon represented, back to Arizona.[47] After resolving pretrial issues, and after Lexecon twice asked the case to be remanded back to Illinois and the defendants twice asked the district court to self-assign, the court granted the latter request.[48] Lexecon then appealed this decision.[49] The Supreme Court ultimately held that the JPML must remand cases before or at the conclusion of pretrial and that courts have no authority to self-assign cases without the consent of the parties.[50]

Lexecon is influential because litigants who file from jurisdictions outside of transferee courts can "waive *Lexecon*," thereby giving those litigants the opportunity to be tried in the transferee courts if they choose.[51] This is beneficial to an effective MDL because it can enrich a transferee court's pool of cases for trial. Without having the opportunity to try cases outside of the transferee's district, the data obtained from the transferee

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[42] *Id.* at 1019.

[43] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

[44] *Id.* at 31–32. The confusion came from § 1407(a) mandating remand and § 1404(a) granting courts the authority to transfer cases. *See In re* Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1532–35 (9th Cir. 1996) (discussing that self-assigning cases has been an accepted practice).

[45] *Lexecon*, 523 U.S. at 28.

[46] *Id.* at 29.

[47] *Id.* at 29–30.

[48] *Id.* at 30–31.

[49] *Id.* at 31.

[50] *Id.* at 40. In 2011, three years after *Lexecon* was decided, Congress amended 28 U.S.C. § 1404(a) to allow district courts to transfer any civil action "to any district or division to which all parties have consented." Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 204, 125 Stat. 758, 764.

[51] In *In re DePuy*, discussed *infra* Subsection II.A.1, a related appellate decision held that a "party cannot waive its removal rights through a forum-selection clause unless the waiver is 'clear and unambiguous.'" *In re* DePuy Orthopaedics, Inc., 870 F.3d 345, 351 (5th Cir. 2017).

district's trials would be limited to claims and plaintiffs within that district. Since that pool would be biased with a narrow set of data, that data would be less applicable and less representative of claimants at large.

C. *In re Vioxx Products Liability Litigation*

In 2005, the JPML transferred the *Vioxx* case to Judge Fallon of the Eastern District Court of Louisiana. Vioxx (rofecoxib), a pharmaceutical drug manufactured by Merck & Co., "belongs to a general class of pain relievers known as non-steroidal anti-inflammatory drugs ('NSAIDs')," more commonly known as "Advil (ibuprofen), Aleve (naproxen), and Voltaren (diclofenac)."[52] These drugs are well known for providing relief from pain and inflammation arising out of "osteoarthritis, rheumatoid arthritis, and other musculoskeletal conditions."[53] However, these drugs are not without side effects, which have historically included "greatly increas[ing] the risk of gastrointestinal perforations, ulcers, and bleeds ("PUBs")."[54] The higher the dosage, the higher the risk of these problems occurring.[55]

In the early 1990s, scientists discovered what they believed were the enzymes responsible for producing pain and inflammation.[56] In 1998, Merck filed a patent for Vioxx, a drug that would inhibit the production of one of these enzymes with the potential for reduced side effects that were typical in other NSAIDs, and in 1999, the FDA approved "Vioxx as safe and effective for treatment" of various pains.[57] The drug "gained widespread acceptance among physicians."[58]

Merck tested and studied Vioxx before and after its approval.[59] In one such study in 2000, the Vioxx GI Outcomes Research (VIGOR) study, Merck learned "that patients taking Vioxx suffered fewer serious gastrointestinal PUBs than patients taking [Aleve]," but "it also showed that patients on Vioxx suffered a statistically significant increase of serious cardiovascular thrombotic events compared to patients taking naproxen."[60] Merck negotiated with the FDA for approximately two years in approving a new label for the drug.[61] In a separate 2004 study, Merck learned that patients taking Vioxx "showed a significantly increased rate of

[52] *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 776, 778 (E.D. La. 2007).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 779.
[59] *Id.*
[60] *Id.*
[61] *Id.*

cardiovascular events."[62] Merck withdrew the product a week later,[63] and Judge Fallon oversaw more than 6,000 combined actions filed as a result.[64]

By 2005, 2,400 cases were filed in New Jersey state courts, Merck's home forum.[65] Several thousand additional cases were filed in various federal courts and transferred to Judge Fallon.[66] He conducted six bellwether trials, and only one of those cases found for the plaintiff.[67] Overall, Merck prevailed in four of five trials in federal courts and seven of eleven trials in state courts.[68] Settlement agreements were announced in November 2007, when "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."[69]

Vioxx is one of the most-cited MDLs for three reasons. First, Judge Fallon ordered the parties to agree to the first bellwether trial by way of striking or vetoing cases.[70] This demonstrated that courts do not have to wait for parties to submit proposals advancing their preferred cases. Judge Fallon's approach requires the parties to agree through a more kinetic method: by striking cases, parties agree on remaining cases through a direct process of elimination.

A second reason *Vioxx* is important is that it developed a template for calculating the potential value of each individual plaintiff's claim. This is important because *Vioxx* was not the only case involving NSAIDs. Pfizer manufactured Bextra and Celebrex—similar NSAID drugs that were the subjects of their own MDL, which could have benefitted from using a similar

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[62] *Id.*

[63] *Id.*

[64] Alex Berenson, *A Mistrial Is Declared in 3rd Suit Over Vioxx*, N.Y. TIMES (Dec. 13, 2005), https://www.nytimes.com/2005/12/13/business/a-mistrial-is-declared-in-3rd-suit-over-vioxx.html.

[65] Aaron Smith, *Merck Faces Big Vioxx Showdown in N.J.*, CNN (Aug. 12, 2005), https://money.cnn.com/2005/08/12/news/fortune500/vioxx/index.htm.

[66] Snigdha Prakash, *Million-Dollar Setback for Merck in Vioxx Cases,* NPR (Aug. 17, 2006), https://www.npr.org/templates/story/story.php?storyId=5666990.

[67] Fallon et al., *supra* note 13, at 2335; *see also* Ruff & Gillingham, *supra* note 6, at 462 n.40 (explaining that the first bellwether trial resulted in a mistrial, leaving only five trials).

[68] *Trial Scorecard*, WALL ST. J. (Nov. 9, 2007), https://www.wsj.com/articles/SB115696575193549745.

[69] Fallon et al., *supra* note 13, at 2337; *see also* Ruff & Gillingham, *supra* note 6, at 462 (describing the outcome of the *Vioxx* settlement).

[70] *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 791 (E.D. La. 2007). By a process of striking or vetoing two cases from the other party's side, the plaintiffs and defendants arrived at an agreed-upon group of cases to try.

> Initially, the PSC and DSC were each permitted to designate for trial five bellwether cases involving myocardial infarctions in which case-specific discovery was complete. Each side was given two veto strikes. The remaining cases were then set for trial on a rotating basis, starting with one of the plaintiffs' selections. To date, the Court has conducted six bellwether trials (in five individual cases).

Id.

system—a good basis for a comparison study.[71] The similarity of the drugs enabled an *In re Bextra and Celebrex* litigation study to use the same damages calculator in assessing the value of claims.[72] The study went on to show that if the court gave parties the opportunity to select bellwethers, one party would be disadvantaged.[73]

Third, even though Judge Fallon ordered the parties to agree on which cases to try, the success of the bellwether procedures based on selection by counsel outshined selections using random sampling. Even though *Vioxx* federal bellwethers ultimately resulted in only one verdict for the plaintiffs,[74] the trials were instructive enough to bring the parties to the negotiating table.

Vioxx created a standard against which other MDLs have been measured. But that does not mean the method of party selection used in *Vioxx* is always successful. For example, *In re General Motors LLC Ignition Switch Litigation* ("*GM Ignition*") ordered the plaintiffs and defendants to select six bellwether cases to go to trial.[75] But only one of these cases produced a verdict, finding for the defendant; two were dropped or dismissed; and three were confidentially settled.[76] These settlements run against the aims of yielding meaningful information toward global settlement. Thus, a second round of bellwether trials was ordered. Only one case went to trial, finding for the defendants.[77]

The problem in *GM Ignition*, unlike in *Vioxx*, was that some bellwether cases settled before trial, circumventing their value as bellwethers. Whereas Merck did not settle any cases until 2007,[78] GM was willing to pick off some cases before trial. It is likely that the cases that went to settlement were riskier for GM than the cases that proceeded to trial, so settling them shielded the case pool from information favorable to the plaintiffs, thereby

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[71] *See generally In re* Bextra & Celebrex Mktg., Sales Prac. & Prod. Liab. Litig., 524 F. Supp. 2d 1166 (N.D. Cal. 2007) (noting similar clinical issues among Bextra, Celebrex, and Vioxx).

[72] Brown et al., *supra* note 18, at 686–87 ("The Vioxx criteria gave us a widely accepted method for calculating a score that summarizes the same types of injuries based on a medication in the same class as Bextra and Celebrex."); *see also Vioxx Settlement Calculator*, OFFICIAL VIOXX SETTLEMENT, *available at* https://web.archive.org/web/20140327170627/http://officialvioxxsettlement.com/calculator/. Not everyone, however, was happy with reaching a settlement agreement. *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 320 (2011) ("Can a healthcare system that is hemorrhaging money afford to pay billions of dollars for highly sophisticated lawyers to hash out deals that end up paying them fifty cents on the dollar? . . . [S]hould we stomach a resolution that pays out modest amounts to victims and their families while lawyers are empowered to take home hundreds of millions of dollars?").

[73] Brown et al., *supra* note 18, at 686–87 ("As we expected, our analysis revealed that the plaintiffs' selections were materially stronger than the random selections. . . . Thus, our results confirmed our hypothesis that the plaintiffs' selections would be materially stronger cases than those selected randomly.").

[74] Ruff & Gillingham, *supra* note 6, at 462.

[75] Thomas Sekula, *Selective Settlement and the Integrity of the Bellwether Process*, 97 TEX. L. REV. 859, 866 (2019).

[76] *Id.*

[77] *Id.*

[78] *See supra* note 69 and accompanying text.

skewing the information they provided to the MDL. *Vioxx* and *GM Ignition* are respectively productive and counterproductive examples in using selection by counsel.

II. BELLWETHER TRIALS AND SELECTING PLAINTIFFS

The following Part discusses methods courts have used in selecting bellwether contenders. There are three overall approaches: selection by counsel, selection by transferee court, and random sampling.[79]

These methods are seldom mutually exclusive, as the MDLs in this Part demonstrate. The first group of MDLs employ selection-by-counsel methods. Transferee courts, however, have included their own set of cases through random sampling in addition to those selected by counsel. In the second group of MDLs, an initial pool of cases is randomly selected before counsel culls it into a smaller pool. This lack of uniformity enables courts to tailor bellwether processes to the size, facts, and specifics of the MDL. This tailoring is evident from cases such as *In re Stryker* at the small end of the spectrum of aggregated cases and *In re 3M* at the large end.

During the past decade, three MDLs with roughly 10,000 actions or fewer have opted for selection-by-counsel bellwether processes, while two MDLs that aggregate more than 10,000 actions have used a hybrid random sampling model.

A. *Selection by Counsel*

All three MDLs that opted for selection-by-counsel bellwether processes[80] described below are a hybridization between parties' selection proposals and the judge's ideas. In other words, in all three cases, while counsel nominated cases for trial, the courts had some role in shaping which cases are selected and how—never purely adopting any one party's proposals. Described first, *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation* ("*DePuy*"), was transferred to the JPML in 2011 and had just over 10,000 total actions at its peak.[81] Second, *In re Stryker Rejuvenate and ABG II Hip Implant Products Liability Litigation* ("*Stryker*"), was transferred in 2013 and had just over 3,000 total

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[79] Fallon, *supra* note 2, at 953.

[80] The *DePuy* court intended for the parties to agree to a group of bellwether plaintiffs, but because of disagreements, the court issued an order with its own selection of cases for trial. Order on Bellwether Trials, *In re* DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig., No. 11-md-02244 (N.D. Tex. Feb. 18, 2015). On their path to proposing a list of cases for bellwether trials, the *Stryker* parties proposed a settlement agreement the day before their submission deadline for an agreed list of bellwether cases. *See* Pretrial Order No. 24, Order Regarding Private Settlement Agreement, *In re* Stryker Rejuvenate & ABG II Hip Implant Prods. Liab. Litig., No. 13-2441 (D. Minn. Nov. 3, 2014) (announcing that a settlement was reached).

[81] 787 F. Supp. 2d 1358 (J.P.M.L. 2011); *MDL Statistics Report*, *supra* note 4.

actions.[82] Third and finally, *In re Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation* ("*Juul*"), is a newer MDL from 2019, and has just under 5,000 pending cases.[83] Variations of the bellwether processes are described in the MDLs below.

1. *DePuy*

DePuy presents an example of an MDL where the court stepped in to select bellwether cases when parties are unable to select cases together. This litigation involved a hip implant manufactured by DePuy Orthopaedics. Central to the litigation is the metal-on-metal design of the ball and socket joint liner of the device, which allegedly caused medical issues in the plaintiffs. The court planned for the plaintiffs and defendants, with some guidance from a special master, to both select four cases as bellwethers for an "initial pool of eight."[84] The plaintiffs and defendants were then to collectively submit a list of four recommended bellwether trial selections and, if they were unable to agree, to submit proposals advancing their ideas for trial management.[85] The parties were unable to reach an agreement, and the plaintiffs submitted a brief asking the court to consolidate six cases for trial—four of their cases and two of the defendants'.[86]

The defendant opposed the plaintiffs' suggestion, proposing instead that each side pick one of the opponents' cases for trial (rather than consolidate a group of cases), with two more cases selected at a later date "after the parties [had] the benefit of additional information about the course of the litigation."[87] Although the court initially intended to have the parties select the bellwether plaintiffs, the court "conduct[ed] its own review of potential bellwether selections" and issued an order with none of the party's proposed bellwether plaintiffs, ultimately selecting a batch of its own.[88] After a series of additional orders culling the number of cases to six, five were consolidated to be tried all at once, leaving one case remaining.[89] During this process, if the parties were unable to reach an agreement in selecting cases, then the court would select for them.[90] The orders in this case—limited to roughly four that outline the bellwether process—demonstrate the court's willingness to provide the parties with the least restrictive method for selecting cases.

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[82] 949 F. Supp. 2d 1378 (J.P.M.L. 2013); *MDL Statistics Report*, *supra* note 4.

[83] 396 F. Supp. 3d 1366 (J.P.M.L. 2019); *MDL Statistics Report*, *supra* note 4.

[84] Special Master's Report Relating to Bellwether Trial Selection Protocol at 2, *In re DePuy*, No. 11-md-02244 (Jan. 16, 2013) [hereinafter Special Master's Report].

[85] *Id.*

[86] Plaintiffs' Steering Committee's Preliminary Memorandum of Law Regarding Bellwether Trial Procedure & Selection at 2, *In re DePuy*, No. 11-md-02244 (Sept. 3, 2013).

[87] Defendants' Response to Plaintiffs' Proposal for Bellwether Trial Selection Process at 6, *In re DePuy*, No. 11-md-02244 (Sept. 6, 2013) [hereinafter *DePuy* Defendants' Response].

[88] Order on Bellwether Trials, *supra* note 80.

[89] Order Consolidating Bellwether Cases for Trial, *In re DePuy*, No. 11-md-02244 (Jan. 8, 2016).

[90] Special Master's Report, *supra* note 84, at 2–3.

On June 1, 2022, however, the court issued an order concluding the MDL.[91] Over the course of the litigation, four bellwether trials were completed, and a fifth started but settled.[92]

2. *Stryker*

Stryker is an example of parties reaching a settlement agreement while still in the process of selecting bellwether cases. Like *DePuy*, *Stryker* also involved faulty hip implant replacements. The lawsuits alleged that metal components in the implant device's design degenerated and led to health complications.[93] In a further similarity to *DePuy*, the court in *Stryker* gave the parties liberty to choose plaintiffs for bellwether trials; but, given that this MDL was three times the size of *DePuy*, the court also instructed the parties to come up with ways in which the plaintiffs could be categorized.[94] The court began by outlining how many cases it ideally wanted to try one year after issuing the order outlining the scope of the bellwether process.[95] The order specifically required the parties to agree to three to five categories in which plaintiffs could be organized, agree to three lead cases per category, and agree to a scheduling order to govern the lead bellwether cases.[96]

The court then addressed what would happen if the parties could not agree to the number of categories. The order required parties to submit proposals for the ideal number of categories. Unable to agree, the plaintiffs proposed three categories[97] and the defendants proposed five.[98] Ultimately, the court ordered for trial five distinct categories of injury related to the product at issue.[99] Although the court adopted some aspects of both parties' proposed categories containing groups of "complicated revisions" and "uncomplicated revisions," the court's proposal most resembled the defendant's proposal, with some minor changes.[100] The court also ordered that three lead cases per category would be tried. Finally, "based upon all of

[91] Order at 1, *In re DePuy*, No. 11-md-02244 (June 1, 2022).

[92] *Id.* at 3.

[93] Transfer Order, *In re* Stryker Rejuvenate & ABG II Hip Implant Prods. Liab. Litig., No. 13-2441 (D. Minn. Jun. 12, 2013).

[94] Amended Pretrial Order No. 12, *In re Stryker*, No. 13-2441 (Mar. 26, 2014).

[95] *Id.*

[96] *Id.*

[97] Plaintiffs' Proposal for Bellwether Categories, *In re Stryker*, No. 13-2441 (Apr. 21, 2014) [hereinafter *Stryker* Plaintiffs' Proposal].

[98] Letter from Ralph A. Campillo, Sedgwick LLP, to Judge Frank & Judge Noel, D. Minn., *In re Stryker*, No. 13-2441 (Apr. 21, 2014) [hereinafter Campillo Letter].

[99] Stipulated Order Regarding Bellwether Categories, *In re Stryker*, No. 13-2441 (May 9, 2014).

[100] *Compare* Campillo Letter, *supra* note 98 (suggesting categories of "complicated" and "uncomplicated" revisions, pre- and post-implant, and a fifth group of ABG II Modular hip implants), *with* Stipulated Order Regarding Bellwether Categories, *supra* note 99, at 3 (creating five categories similar to the defendant's proposals, with cases including "on or after January 1, 2011" as opposed to defendants' suggestion of after January 11, 2011).

the files, records, and proceedings [t]herein, including oral argument,"[101] the court declared the categories would be tried in the sequence ordered.[102]

3. *Juul*

Juul provides another example of parties settling before starting bellwether trials. It is an MDL about the addictive qualities of electronic cigarettes or vaporizers (also known as "vapes"). The plaintiffs alleged, among other claims, that Juul Labs' products promoted nicotine addiction and were designed to attract minors.[103] The court adopted the parties' agreement to either submit a joint bellwether selection proposal or submit competing proposals from which the court could choose.[104]

As in the two hip replacement cases described above, the parties did not agree on how cases should be selected.[105] They proposed two diametrically opposed selection models.[106] The plaintiffs proposed "using a hybrid method, with the plaintiffs selecting eight cases, the defendants selecting eight cases, and the court selecting an additional eight cases."[107] The defendants proposed a primarily randomized selection process, having the court "randomly select [sixty] cases from all cases" and then having the parties strike plaintiffs from the pool to create a smaller discovery pool.[108]

The plaintiffs argued that allowing parties to select cases for trial gave the parties greater control over assessing whether the cases being selected were most representative of the majority.[109] Defendants argued that

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[101] Pretrial Order No. 19, Order Regarding Bellwether Categories at 4, *In re Stryker*, No. 13-2441 (May 28, 2014).

[102] The parties ultimately reached a settlement agreement a day before the deadline for a list of agreed-upon bellwether cases. *See supra* note 80.

[103] *In re* Juul Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig., 396 F. Supp. 3d 1366, 1367 (J.P.M.L. 2019).

[104] *See* Joint Case Management Conference Statement, 26(F) Report, & [Proposed] Agenda at 12, *In re* Juul Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig., No. 19-md-02913 (N.D. Cal Feb. 12, 2020) ("Plaintiffs propose that the parties either agree to bellwether selection procedure proposal or provide competing submissions in the joint statement to be filed before the March 20 status conference."); Civil Minutes at 2, *In re Juul Labs*, No. 19-md-02913 (Mar. 20, 2020) ("The Court also appreciates the parties' agreement to use a bellwether selection process to identify and then test a subset of the claims in each of the three types of cases (government entity claims, class claims, and individual personal injury claims)."); Joint Case Management Conference Statement & Proposed Agenda at 3, *In re Juul Labs*, No. 19-md-02913 (July 15, 2020) ("The initial bellwether discovery pool will be selected (pursuant to procedures to be determined by agreement and/or by order of the court) from the bellwether selection pool on or before December 15, 2020."); Civil Minutes at 1, *In re Juul Labs*, No. 19-md-02913 (July 17, 2020) ("The parties' agreements as to briefing schedules, bellwether selection, page limits, and preservation of defenses contained in the joint Case Management Conference Statement . . . are ADOPTED.").

[105] Supplemental Joint Case Management Conference Statement Regarding Case Schedules & Personal Injury Bellwether Selection Procedures, *In re Juul Labs*, No. 19-md-02913 (Aug. 20, 2020) [hereinafter *Juul* Supplemental Conference Statement]; *DePuy* Defendants' Response, *supra* note 87, at 5; *Stryker* Plaintiffs' Proposal, *supra* note 97.

[106] *Juul* Supplemental Conference Statement, *supra* note 105.

[107] *Id.*

[108] *Id.*

[109] *Id.*

randomizing the selection could still generate a representative sample and that this method would mitigate bias.[110] Neither party cited case law with respect to selection procedures.[111] Rather, both parties based their arguments primarily on Judge Fallon's philosophy in his article *Bellwether Trials in Multidistrict Litigation*.[112] This illustrates how important models of successfully settled MDLs are among the mass tort bar.

In the end, the court ultimately adopted a process similar to the plaintiffs' proposal "because they are more likely to achieve a representative bellwether trial pool and meet in a realistic manner the aggressive trial schedule that [the judge] seek[s]."[113] Selecting from the "bellwether selection pool," the court ordered that the "Plaintiff will select 6 cases, Defendants will collectively select 6 cases, and the Court will select 12 cases through a random selection process after excluding the 12 cases selected by the parties" for the discovery pool.[114] This first group of cases, called the "bellwether discovery pool," would then be reduced to a smaller group for bellwether trials, from which counsel would each identify "four cases from the [discovery] pool that they contend are representative bellwether trial cases . . . . The Court will then select a total of four cases to be set for bellwether trials, prioritizing for trial the order of the cases."[115]

In December 2022, on the "eve"[116] of the first set of bellwether trials, the parties announced that they had reached a $1.7 billion settlement.[117] The settlement covered the imminent bellwether trials as well as the personal injury plaintiffs, the government entity plaintiffs, and the tribal plaintiffs.[118] Settling nearly 5,000 claims addressed almost all of the pending actions on the JPML's tracker.[119]

4. *Reflections on Selection by Counsel*

The bellwether processes described in this Section provide three key insights as to why selection by counsel undermines the philosophy of "representative" cases.

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[110] *Id.*

[111] *Id.* at 16–19, 22–23.

[112] *Id.*

[113] Order Regarding Bellwether Selection & Case/Trial Schedule at 1, *In re* Juul Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig., No. 19-md-02913 (N.D. Cal. Sept. 9, 2020).

[114] *Id.*

[115] *Id.* at 2. There are multiple groups of claims here, including personal injury groups and government entity complainants.

[116] Dorothy Atkins, *Juul Cuts Deal to End MDL on Eve of Bellwether Trial*, LAW360 (Dec. 6, 2022, 10:11 PM), https://www-law360-com.ezproxy.law.uconn.edu/articles/1555869/juul-cuts-deal-to-end-mdl-on-eve-of-bellwether-trial.

[117] Jennifer Maloney, *Juul to Pay $1.7 Billion in Legal Settlement*, WALL ST. J. (Dec. 9, 2022, 3:13 PM), https://www.wsj.com/articles/juul-to-pay-1-7-billion-in-legal-settlement-11670616693.

[118] Jennifer Maloney, *Juul Reaches Settlement of Over 5,000 Lawsuits*, WALL ST. J. (Dec. 6, 2022, 8:49 PM), https://www.wsj.com/articles/juul-reaches-settlement-of-over-5-000-lawsuits-11670374226.

[119] *Id.*

First, in *Juul*, the judge's reasoning for selection by counsel is common. It is attractive to say selection by counsel will yield cases representative of the rest.[120] However, this assumes that the parties have an idea of the scope of all of the plaintiffs' cases prior to selection. In other words, how can parties know what the case pool from which they must select representatives looks like as a whole? To gain insight, parties would (and should) have to catalogue the case universe first,[121] but this does not always happen.

Second, allowing the parties to select their cases inevitably introduces bias. For example, if parties select outlier cases, the settlement amounts likely will be over- or underinflated, resulting in plaintiffs being awarded more or less than they are entitled.[122] Even allowing the parties to decide what is important to representativeness and what is not important introduces party bias into the selection process.

Third, selection by counsel also presents issues on how to organize selected plaintiffs. For example, in *Stryker*, the parties disagreed over plaintiff categories, pool sizes, and schedules, which suggests that the plaintiffs' counsel recognized the tactical importance in creating a legal strategy most favorable to their side—as counsel should. Therefore, since selection by counsel gives attorneys too much control over a case pool, information these cases provide relevant to the MDL's global resolution—toward which bellwethers strive—is misleading.

Juul was the only case of the three to publicize joint proposals for selection protocols—providing a front-row view as to how and why parties advocated for one selection method over the other. The cited facts and cases in the proposals overlap, but both arguments are carefully tailored to what the parties think a judge would find more attractive.

Additionally, nowhere in the parties' reasoning do they argue for the selection method being related to the size of the MDL. The defendants might have simply realized that they would fare better under a random case selection model, as cases chosen by plaintiffs could result in rewards misrepresentative of the other actions filed in the MDL. It is likely no coincidence that, perhaps in efforts to mitigate the enormous amounts they would pay plaintiffs if trials proceeded, the defendants in *Juul* "urgently sought" a $40 million settlement in North Carolina prior to trying the state's bellwethers.[123] Perhaps at that point, the defendants recognized that settling

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[120] *But see* Lahav, *Primer on Bellwether Trials*, *supra* note 22, at 193 ("I think what judges mean by this [is] that they want the lawyers to pick cases that will resemble the rest of the population of cases along the relevant variables.").

[121] *See* Fallon, *supra* note 2, at 952.

[122] *But see* Edward K. Cheng, *When 10 Trials Are Better than 1000: An Evidentiary Perspective on Trial Sampling*, 160 U. PA. L. REV. 955, 964 (2012) (noting the consequences of using extreme value sampling outliers from an asymmetrical distribution).

[123] *See* Sheila Kaplan, *Juul to Pay $40 Million to Settle N.C. Vaping Case*, N.Y. TIMES (June 28, 2021), https://www.nytimes.com/2021/06/28/health/juul-vaping-settlement-north-carolina.html (describing how the settlement was a way for the company to avoid a jury trial).

before trial was the best way to mitigate the financial hardships that can result from selection-by-counsel methods.

B. *Random Sampling Selection Models*

Scholars have noted that the random sampling approach has "fallen out of favor"[124] and the plaintiffs in *Juul* would agree.[125] But two cases in the last five years, *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation* ("*J&J*") and *3M*—MDLs numbering nearly 40,000 and 300,000 total actions at their peaks, respectively—have both adopted random sampling in their bellwether processes. Although it is difficult to determine whether judges overseeing MDLs with tens of thousands to hundreds of thousands of cases *prefer* random sampling for bellwether trials, these two massive MDLs indicate that similar-sized MDLs are at least more likely to adopt randomized processes than smaller ones.

1. *J&J*

The *J&J* litigation involves allegations that its talcum powder contained cancer-causing asbestos.[126] As of December 2022, there are currently over 37,000 pending actions in the U.S. District Court for the District of New Jersey.[127]

This MDL is an example of a hybrid model in which random selection creates the bellwether pool. Counsel and the court selected the subsequent individual cases. The judge ordered that bellwether trials were to be chosen from a larger random sample to be culled by the parties, who would pick the cases that would be tried from this random pool.[128] First, Judge Wolfson ordered that one thousand cases would be randomly selected using a randomizing website.[129] This first thousand was called the Stage One pool.[130] Next, the court issued an order establishing a Stage Two pool, for which parties would select ten cases each from stage one and the court would randomly select ten of its own—a process similar to the one followed in

[124] Lahav, *Primer on Bellwether Trials*, *supra* note 22, at 195.

[125] *See Juul* Supplemental Conference Statement, *supra* note 105, at 17 ("Accordingly, purely random selection as a method for selecting bellwether trials is frequently disfavored.").

[126] *See In re* Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Prods. Litig., 509 F. Supp. 3d 116, 128 (D.N.J. 2020).

[127] *MDL Statistics Report*, *supra* note 4.

[128] Order, *In re* Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Prods. Liab. Litig., No. 16-md-02738 (D.N.J. May 26, 2020).

[129] *See id.* ("Utilizing the Third-Party Draw Service available on Random.org (https://www.random.org/integer-sets/), Judge Pisano or his designee shall generate a list of 1,000 random numbers and provide the parties with . . . an electronic copy of the list of 1,000 random numbers.").

[130] Order, *In re Johnson & Johnson*, No. 16-md-02738 (May 15, 2020).

Juul.[131] Then, the court issued an order establishing the Stage Three pool.[132] In this stage, parties were to select four cases each from stage two, for a total of eight, and given the opportunity to strike one each, reducing the number to a final six cases to proceed to trial.[133]

In October 2021, J&J announced that its newly created subsidiary filed for bankruptcy.[134] This filing stayed all pending litigation.[135] In February 2022, Judge Kaplan denied the plaintiffs' request to remove the subsidiary out of the bankruptcy system[136] and certified the plaintiffs' direct appeal of the ruling to the Third Circuit.[137] As of December 2022, the litigation remains stayed and there are now two bankruptcy rulings on appeal before the Third Circuit.[138]

2. *3M*

The *3M* MDL is important because of its sheer size and because of the contrast between the methods Judge Rodgers employed with the methods employed by courts overseeing MDLs with fewer than 10,000 cases.[139]

This MDL involves cases against 3M for manufacturing and distributing faulty earplugs to the military, subsequently causing hearing damage. When the judge published the bellwether selection protocol in January 2020, *3M* had amassed over 139,000 actions; it now has just over 260,000 pending actions.[140] First, Judge Rodgers ordered that one percent of the 139,000 were to be randomly selected.[141] Then, she ordered the plaintiffs in these cases to complete census forms, which asked questions about their age and injuries related to the earplugs.[142] A review of the results of these forms indicated that "the most representative claimant is between the ages of 30 and 49, serves or served in the Army, and alleges a combination of tinnitus and

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[131] Order Regarding the Selection of, & Case-Specific Discovery for Stage Two Cases, *In re Johnson & Johnson*, No. 16-md-02738 (July 23, 2020).

[132] MDL Order, *In re Johnson & Johnson*, No. 16-md-02738 (Apr. 1, 2021).

[133] *Id.*

[134] *Johnson & Johnson Takes Steps to Equitably Resolve All Current and Future Talc Claims*, JOHNSON & JOHNSON (Oct. 14, 2021), https://www.jnj.com/johnson-johnson-takes-steps-to-equitably-resolve-all-current-and-future-talc-claims.

[135] *Id.*

[136] Steven Church, *J&J's Controversial Bankruptcy Strategy Upheld by Judge (1)*, BLOOMBERG L. NEWS (Feb. 25, 2022, 11:56 AM), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XDN5V37G000000.

[137] Daniel Gill, *J&J Claimants Can Appeal Spinoff Bankruptcy to Third Circuit (1)*, BLOOMBERG L. NEWS (Mar. 30, 2022, 3:11 PM), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/X90BFOH8000000.

[138] Amanda Bronstad, *"Law Remains Unsettled": Talc Bankruptcy Judge Lets States Appeal His Stay Order*, LAW.COM (Dec. 6, 2022), https://www.law.com/2022/12/06/law-remains-unsettled-talc-bankruptcy-judge-lets-states-appeal-his-stay-order.

[139] *See supra* Section II.A.

[140] *See* Pretrial Order No. 23, Bellwether Selection Protocol at 1, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-02885 (N.D. Fla. Jan. 21, 2020); *MDL Statistics Report*, *supra* note 4.

[141] Pretrial Order No. 23, Bellwether Selection Protocol, *supra* note 140, at 1.

[142] *Id.*

hearing loss."[143] The judge created the initial pool of the 175 plaintiffs that met all three criteria.[144] Next, the court randomly selected six cases and one alternate to proceed with discovery.[145] Then, the plaintiffs and the defendants were given the opportunity to pick nine cases each from the pool of 175—"seven cases to proceed with discovery, two cases as alternates"—to create a discovery pool of twenty cases and five alternates.[146]

A month later, in a separate order, the court further refined the number of cases that would proceed as plaintiffs: "Assuming at least twenty bellwether cases remain after case-specific discovery and dispositive motions practice, the Court will randomly select four pools of five cases each to proceed with bellwether trials."[147] In this order, Judge Rodgers also mentioned the possibility and later eventuality of consolidating cases.[148] The court eventually proceeded with four groups of six cases instead of four groups of five.[149] In January 2021, and consistent with scheduling orders, Judge Rodgers announced the consolidation of three cases as the first bellwether trial.[150] Going forward, the court stated that in light of the COVID-19 pandemic and backlogs, it was "inclined to consolidate three bellwether cases" in the next grouping.[151]

On June 10, 2022, Judge Rodgers issued an order sending the parties to mediation.[152] The case lasted over three years and resulted in sixteen bellwether trials and nineteen verdicts,[153] of which the plaintiffs won ten to 3M's six. On July 26, 2022, 3M's subsidiary, Aearo Technologies, filed its brief for bankruptcy in the Southern District of Indiana in order to "advance the resolution of tort claims related to the Combat Arms earplug."[154] On August 26, 2022, bankruptcy Judge Graham ruled,

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[143] *Id.* at 1–2. This finding is worded in a way to suggest that the average or median age of the claimant was "between the ages of 30 and 49," which raises questions about how findings (or even a settlement) based on an average or median age might be representative of claimants outside of that age range. *See* Alexandra D. Lahav & Felipe Villalón, *Developments in Bellwether Trials*, BLOOMBERG L.: PRAC. GUIDANCE (Sept. 2022), https://www.bloomberglaw.com/product/blaw/document/X755B5FS000000 (summarizing the research in this Note and discussing what representativeness means in *3M*'s context).

[144] *Id.* at 2.

[145] *Id.*

[146] *Id.*

[147] Pretrial Order No. 26 at 2, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-02885 (N.D. Fla. Feb. 11, 2020).

[148] *Id.* "Consolidating" here means holding trials of multiple plaintiffs at once for a single bellwether trial.

[149] Pretrial Order No. 40, Amendments to Pretrial Order No. 28, *In re 3M*, No. 19-md-02885 (June 2, 2020).

[150] Order, *In re 3M*, No. 19-md-02885 (Jan. 12, 2021).

[151] Pretrial Order No. 80, *In re 3M*, No. 19-md-02885 (June 10, 2021).

[152] Order, *In re 3M*, No. 19-md-02885 (June 10, 2022).

[153] *Id.*

[154] Informational Brief of Aearo Technologies LLC at 5, *In re* Aearo Techs. LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890).

however, that 3M could not proceed with the bankruptcy.[155] The bankruptcy decision remains on appeal with the U.S. Court of Appeals for the Seventh Circuit.[156]

3. *Reflections on Selection by Random Sampling*

J&J and *3M* are examples of how courts can incorporate some level of random sampling without sacrificing control or representation. If anything, the methods thus far seem to imply a gesture of good faith toward the bellwether philosophy the *Chevron* court discussed.[157] Contrary to the inefficiency the plaintiffs' proposals suggest in *Juul*,[158] the documents in *J&J* do not evidence the court struggling with random sampling.[159] In fact, it is possible that *J&J* is moving so well that it served as the model for Judge Rodgers to follow in *3M*, an MDL eight times larger. The *3M* approach, contrary to primarily party-driven selections, encompasses a better survey of the underlying claims. Given that the case pool is so massive, ordering a random one percent of plaintiffs to fill out profile forms as bellwether contenders can reveal variances among their claims. This one percent also has the potential to include some outliers and cases in the middle of a damages spectrum—a pool likely to more accurately represent the distribution of claimants than one curated by the parties.[160] Once these fact sheets are complete, the court and the parties can analyze, as they did, what type of cases are most representative without sacrificing the opportunity to gain "meaningful information, experience, and data" from the case pool as a whole.[161]

The next Part analyzes more closely the impact of random sampling in *3M*'s bellwether process and case outcomes. Thus far, random sampling has been broadly shown to be effective for massive MDLs.

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[155] *In re Aearo*, 642 B.R. at 912; *see also* Steven Church, *3M Cannot Use Bankruptcy to Halt 230,000 Suits, Judge Says (2)*, BLOOMBERG L. NEWS (Aug. 26, 2022, 4:29 PM), https://news.bloomberglaw.com/bankruptcy-law/3m-cannot-use-bankruptcy-to-halt-230-000-lawsuits-judge-rules.

[156] Alison Frankel, *Citing Bankruptcy Judge's "Errors," 3M Begs Appeals Court for Stay in Earplugs MDL*, REUTERS (Dec. 14, 2022, 5:44 PM), https://www.reuters.com/legal/government/citing-bankruptcy-judges-errors-3m-begs-appeals-court-stay-earplugs-mdl-2022-12-14/.

[157] *See supra* Section I.A.

[158] Plaintiffs' Revised Proposals Regarding Case Schedules & Personal Injury Bellwether Selection Procedures at 3–5, *In re* Juul Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig., No. 19-md-02913 (N.D. Cal. Aug. 28, 2020).

[159] Status Report & Proposed Joint Agenda for February 17, 2021 Status Conference at 1–5, *In re* Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Prods. Liab. Litig., No. 16-md-02738 (D.N.J. Feb. 15, 2021).

[160] If the defendants and plaintiffs pick an equal number and they are outliers, that means there would be outlier wins for both parties. Without a census of most claimants, it cannot be known which party this would benefit more.

[161] Fallon, *supra* note 2, at 952.

III. PROPOSALS

This Part advances two ideas. The first is that all MDLs should use random sampling. The second is that even if random sampling is not the standard, it should be used for MDLs with tens of thousands or more cases to create a robust case pool, as was done in *3M*.

A. *Random Sampling for All*

As of this writing, no MDL has adopted a purely random selection method. The closest courts have come is *3M*, in which the case pool was a random one percent of all cases, which were then catalogued to deduce patterns from which the court and parties selected for trial.[162] This is not to say that a purely random method is unworkable. The question is: Why have courts been reluctant to conduct purely random samples in which the bellwether cases are completely selected at random with no party or judicial input?

A purely random selection entails no interference from the court or the parties.[163] Why would judges not want this? Judges may believe that giving the parties a stake in choosing provides better control over representative cases[164]—but this philosophy runs counter to the blind fairness implied by selecting randomly. Yet, scholars concede that some random sampling is better than none at all. For example, Loren H. Brown et al. describe how the judge of one MDL combined random sampling and refined the plaintiff pool to plaintiffs from one state only, but that this "assume[d]" that this pool would be representative of the national pool.[165] The authors go on to mention that statisticians have developed "standard, widely used forms of random sampling . . . which can ensure specific representation while maintaining the random nature of the selection process," but they do not mention how this could be accomplished as easily as they imply.[166]

Judge Fallon mentioned in two of his articles that the parties can and should catalogue the case universe, but there is some ambiguity as to when in the process this cataloguing should occur.[167] One option is to catalogue the entire case universe before any sorting is done. Depending on the size of the MDL—meaning how many cases the judge is dealing with, because efficiency is a factor—parties can have plaintiffs fill out fact sheets to determine the "claims, exposure, injury, etc."[168] This option makes sense if

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[162] *See supra* Subsection II.B.2.

[163] *See* Brown et al., *supra* note 18, at 681 ("A random sampling is more likely to yield a sample that is truly representative of the docket as a whole because it limits—if not eliminates—tactical manipulation by the parties.").

[164] *Id.* at 682.

[165] *Id.* at 683 (discussing *In re Prempro Products Liability Litigation* (MDL No. 1507)).

[166] *Id.* at 683–84.

[167] Fallon, *supra* note 2, at 952; Fallon et al., *supra* note 13, at 2325–26.

[168] Brown et al., *supra* note 18, at 683.

there are hundreds to perhaps thousands of cases, and cases could be randomly selected thereafter.

What if there are already several thousand cases? The second option would be to catalogue after cases have been randomly selected to form an unbiased case pool, something like in *3M*.[169] This proposes establishing the case pool first and cataloguing them second. By eliminating the opportunity for parties to select outlier cases prior to case pool selection, this method can vastly limit the possibility of outlier cases being selected and subsequently selected again for trial. Although there can and will be some cases that are more favorable to one side than others, such partiality is always unavoidable in a random pool of cases.

Are there any legal issues with how courts determine bellwether protocols? Not yet, though parties bring up their grievances in their proposals advancing their respective methods. However, it is almost too intuitive to assume that case selection via random sampling (or some degree of random sampling) would least offend the parties. After all, it is also possible to assume—as seen—that, if anything, parties prefer to avoid random sampling because of a lack of control.[170] Then again, the defendants in *Juul did* advocate for random sampling;[171] they might have recognized a random sample could skew in their favor. Thus, would it not stand that as a legal advocate, counsel would want to control the outcome most favorable to the client? Random sampling can act like a legal safeguard or a regulation to stymie one side benefitting over the other as much as possible.

This is why *3M* is so instructive as to how bellwether protocols should be structured. With the success of the cases that have proceeded to trial, Judge Rodgers demonstrated that sheer size need not be a factor in controlling any part of the litigation—an excuse parties have invoked in other MDLs. In fact, parties need not worry about control because *3M* provides a model that bellwether cases can proceed in a controlled manner while providing insightful information about the degree of injuries among plaintiffs.

B. *Random Sampling for Massive MDLs*

Even if participants in multidistrict litigation choose to disregard the benefits of random sampling—as will often be the case—the method should still be adopted in some form along the bellwether continuum for MDLs numbering in the tens of thousands of cases for two reasons: time and efficiency.

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[169] *See supra* Subsection II.B.2.

[170] *See supra* note 109 and accompanying text. The plaintiffs in *Juul did* succeed in convincing the judge to adopt their proposal over the defendants' random selection procedures.

[171] *See supra* note 110 and accompanying text.

Take *Chevron*'s sheep analogy,[172] for example, and apply it to the original pool of 140,000 cases in *3M*. The parties' counsel, the judge, and a special master are the shepherds, and they have to corral 140,000 sheep. These shepherds cannot lead the sheep all at once, so they must select a handful to lead the rest. The question then becomes about the method of selection, where time and efficiency are factors. Handpicking the sheep to figure out which ones are the best and worst wastes too much time and is inefficient. An alternative would be to select a large group of sheep at random, evaluate this group by seeing what traits they have in common, isolate the sheep that have stronger traits and weaker traits, and pick a few from the remainder to test their ability to lead. Once the shepherds see how these sheep perform, they can determine the best way of leading the other several thousand. Some sheep will fail, and some will succeed, and that is the cost of running these tests; but what is reassuring about this method is that these sheep represent traits common among the 140,000 and so testing them can develop results that are "fair" among all.

Randomly selecting sheep would still be better than letting the shepherds pick—they probably have their favorites among the sheep, and it would be unfair to pick the best and worst and generate results based on those selected; but without a census, it is difficult to know what sheep are "representative."

Random selection reduces time wasted and results in the fairest selection practice. Most, if not every, example in the selection-by-counsel cases wastes time when judges allow parties to pick.[173] If the parties cannot agree on what categories or which cases to select, courts ask them to submit proposals for the judge to review. The parties can also ask for extensions, which further prolongs the process. And in all the MDL case studies, parties did not agree on selection methods. Perhaps with smaller MDLs (and some exist with fewer than 100 cases[174]), a court could justify parties picking cases from the beginning, but the judge may then be unable to rely on data that is based on their biases.[175] Assuming selecting at random at all stages is blind justice, selection by counsel would be blindness of a different kind.

CONCLUSION

By surveying a small sample of products liability MDLs, this Note has identified bellwether procedure trends that courts have followed—that judges overseeing MDLs composed of a few thousand cases have allowed for counsel to have greater discretion over how bellwether candidates are

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[172] *See supra* note 34 and accompanying text.

[173] *See, e.g.*, *supra* notes 84–86 (*DePuy*), 97–99 (*Stryker*), 105–112 (*Juul*) and accompanying text.

[174] *MDL Statistics Report*, *supra* note 4.

[175] *See supra* Subsection II.A.4.

selected, while judges overseeing massive MDLs composed of tens of thousands or hundreds of thousands of cases have used inferential statistics to shape bellwether selection. Large MDLs should incorporate at least some level of random sampling into the beginning of their bellwether selection process, such as in *J&J*, *3M*, and as the defendants proposed in *Juul*. Putting this into practice is efficient, fair, and important with large numbers of claims needing to be resolved as quickly as possible.