UMKC Law Review

Volume 89
Number 4 *Multidistrict Litigation: Judicial and Practitioner Perspectives*

Article 6

6-2021

Vetting the Wether: One Shepherd's View

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VETTING THE WETHER: ONE SHEPHERD'S VIEW

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Multidistrict litigation (MDL) promotes fairness and efficiency by enabling coordinated discovery, minimizing the risk of inconsistent pretrial rulings by different courts on the same issues, and conserving the resources of the parties, their counsel and the judiciary. In many ways, MDLs effectively serve these fundamental goals. But the MDL system, like any other system, is not perfect. One criticism is that it can incentivize mass filings of unvetted—and, all too often, unsupportable—cases, which ultimately plague the litigation with the very inefficiencies MDLs are designed to prevent. This article offers a perspective from the bench, based on my experiences with two very different products liability MDLs: *In re Abilify Products Liability Litigation* ("In re Abilify"), MDL No. 2734, and *In re 3M Products Liability Litigation* ("In re 3M"), MDL 2885.

I. THE PROBLEM

In recent years, nearly half of all civil cases pending in federal courts have been part of an MDL.[1] A reported twenty to fifty percent of those cases involve plaintiffs with unsupportable claims.[2] In the products liability context, unsupportable claims are often a result of a plaintiff having not used the relevant product and/or having not suffered the injuries alleged, or, in some cases, the applicable statute of limitations having run.[3] MDLs have no built-in, uniform mechanism for efficiently filtering out these sorts of claims.[4] The procedural safeguards used effectively in one-off cases (e.g., federal pleading standards, discovery obligations, case-specific motions for summary judgment, and Rule 11 sanctions) are difficult to employ at scale in the MDL context, where the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of thousands.[5] Left unchecked, high volumes of unsupportable claims can wreak havoc on an MDL. They clog the docket, interfere with a court's ability to establish a fair and informative bellwether process, frustrate efforts to assess the strengths and weaknesses of the MDL as a whole, and hamper settlement discussions. And yes, as some may be loath to admit, the sheer volume of

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[1] *See, e.g.*, Lawyers for Civil Justice, *MDL Cases Continue to Dominate the Federal Civil Caseload*, https://351a1749-77dd-47c5-b48f-bca398eed71e.usrfiles.com/ugd/351a17_c12a92cf117a484d8ef72a1db3ab1bc9.pdf; *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2019*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf.

[2] *See* Advisory Committee on Civil Rules, MDL Subcommittee Report, 142 (Nov. 1, 2018) https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[3] *See id.*

[4] This differs from class action litigation, where the class certification process under Federal Rule of Civil Procedure 23 provides a filtering system of sorts through its requirements of numerosity, commonality, typicality, and, depending on the nature of the proposed class, predominance.

[5] For example, it would be wholly unrealistic and unduly burdensome to expect an MDL defendant to engage in a Rule 26(f) conference with every individual plaintiff in the litigation.

unsupportable claims in some MDLs can grossly distort the true merit and size of the litigation. To be sure, dealing with unsupportable claims, and with their consequences for an MDL more broadly, drains the time and resources of the parties, counsel, and the courts.

There seems to be widespread agreement that most, if not all, MDLs need a formal vetting process to address this problem. However, there is considerable disagreement on how, when, and to what extent vetting should occur. Plaintiffs generally prefer very minimal requirements, with no obligation to provide supporting documentation or supplement responses; whereas defendants tend to push for more comprehensive disclosure requirements, including proof of causation, which is, itself, a highly controversial proposition because it is seen by some as imposing an undue burden of proof much earlier than would exist in a traditional one-off case. The issue is further complicated by a fundamental tension inherent in the MDL context between the need to effectively manage *all* claims in the litigation, on the one hand, and the need to respect the autonomy of *each* individual plaintiff, on the other. In my experience, there is no one-size-fits-all solution.

II. VETTING

In the MDL context, vetting refers to the process of gathering basic information about plaintiffs' claims, often well before any case-specific discovery is complete or bellwether cases are selected for trial. Ideally, the vetting process would be purely informational, simply enabling the parties and the court to better understand and evaluate the litigation. However, in some instances—most frequently in mass tort proceedings—the vetting process becomes a necessary tool for testing the merit of the inventory of cases and for filtering out unsupportable claims.

Most court-supervised vetting is accomplished through the use of a standardized, judicially approved questionnaire that each plaintiff completes. The questionnaires are variously termed "profile forms," "supplemental profile forms," "preliminary disclosure forms," "initial census forms," or "fact sheets"; however, no matter the nomenclature used, the questionnaire is intended to serve as a straightforward disclosure that allows the parties and the court to better understand a plaintiff's claim.[6] The parties typically negotiate what information will be included on the questionnaire, with the court providing input and resolving disputes over content. Once the parties have agreed on the contents of the questionnaire, and the court has adopted it, individual plaintiffs typically have a relatively narrow window of time to complete the form and provide their responses to the defendants. Defendants then have the opportunity to review plaintiffs' responses and identify any perceived deficiencies. Deficiency disputes that the

[6] Profile forms and initial census forms are usually simplified disclosures of core information about a plaintiff's claim and the extent of his or her alleged injury, which the plaintiff's counsel should have readily available. Fact sheets generally seek more in-depth information.

parties are unable to resolve themselves may be brought to the court for resolution.[7] Unfortunately, this process can be burdensome and costly. For this reason, vetting should be approached thoughtfully with a focus on achieving a uniquely tailored balance between the parties' need for information and the resources required to obtain it.

The type and amount of information sought on a questionnaire will depend largely on the objectives of the vetting process and the nature of the plaintiffs' claims. For example, at the outset of a products liability MDL, the primary goal may be to create an initial census of the claims in the litigation. In that scenario, a vetting form might simply require plaintiffs to identify the drug or medical device used, the types of injuries alleged, and the timing of the use and injuries. The initial census form in the *3M* MDL loosely followed this approach—the form sought general identifying information about the plaintiff (e.g., name, date of birth, state of residence, counsel, branch of military service (if any)), dates and circumstances when the allegedly defective product was used, and basic details about the types and timing of alleged injuries.[8] Because the *3M* initial census forms were limited to the facts most important to the general allegations in the MDL, the completed forms effectively and efficiently informed the court's case management decisions and, more particularly, the bellwether selection process.

Sometimes the objective of vetting is to test the basis of plaintiffs' claims, in which case, more detailed information will be necessary and, where appropriate, supporting documentation required. In *Abilify*, there was a high rate of voluntary dismissals of cases in all three discovery and trial pools.[9] A similar pattern emerged each time individual plaintiffs were required to provide even the most basic information about their claims—proof of Abilify use and proof of injury.[10] At each stage, the plaintiffs were given multiple opportunities to fulfill their obligations and were advised that failure to do so would result in dismissal of a case with prejudice. Nevertheless, after three years, more than 550 cases—representing over 18% of the litigation—had been dismissed with prejudice for failure to comply with court orders, failure to prosecute, and/or failure to provide even basic

[7] *See In re* Abilify Prods. Liab. Litig., 299 F. Supp. 3d 1291, 1332 (N.D. Fla. 2018).

[8] *See In re* 3M Combat Arms Earplug Prods. Liab. Litig., 202 U.S. Dist. LEXIS 63227, at *4 (N.D. Fla. 2019).

[9] These cases certainly provided important data points about how the broader pool of cases in the MDL might fare; however, it is not in anyone's interests for individual cases to be repeatedly worked up only to be dismissed just prior to trial.

[10] Initially, Abilify plaintiffs were required to submit a Plaintiff Profile Form within thirty days of becoming a part of the MDL. When it later became apparent that additional information was needed for use in evaluating the inventory of cases, the plaintiffs were directed to submit a Supplemental Plaintiff Profile Form, along with supporting documentation. Bellwether plaintiffs were required to submit Fact Sheets. Finally, in order to participate in the global settlement program, plaintiffs were required to support their claims with varying levels of evidence.

information regarding proof of use and/or injury. This experience underscores the importance of an early vetting process in some litigation, like *Abilify*.

III. TIMING

A word about timing: in some MDLs, an early census or vetting of cases will be the prudent course from an organizational and case management perspective. For instance, the early census may take place alongside general liability discovery and dispositive motions practice. As the litigation develops, additional information may be needed from individual plaintiffs, in which case a supplemental vetting form may be used. In appropriate MDLs, an early census may streamline the data-collection process from the start and provide critical insights into the inventory which the parties and the court can use to structure the litigation more efficiently.

In other MDLs, the time and expense of a census should await resolution of some generally applicable threshold or dispositive issues, such as federal preemption or general causation. It may also be that the unique circumstances of a particular MDL forestall any "early" vetting of claims. *3M* is a prime example of this situation. There, the plaintiffs, who are primarily current and former military personnel, claim they suffered hearing damage caused by an allegedly defective earplug used during their service. The census process established early in the litigation required them to complete a questionnaire and produce certain documents related to their military service (e.g., military separation records, audiological exams, audiograms, disability benefits) within a relatively short timeframe. Unfortunately, most plaintiffs needed their military and veterans records to complete the census form, so the lengthy process of obtaining these records from the federal government—which involved submission of so-called *Touhy* requests to the Department of Defense and Department of Veterans Affairs for, at that time, tens of thousands of plaintiffs—torpedoed the parties' efforts to accomplish an "early" census of supportable claims.[11]

IV. PARTING THOUGHTS

1. Encourage Simplicity

The longer and more detailed the vetting form, the more it will resemble a full-fledged discovery request, which will take plaintiffs longer to complete and defendants longer to review, and, in all likelihood, raise more deficiency disputes that will take even more time for the parties and the court to resolve. Relatively

[11] *See* United States ex rel. Touhy v. Regan, 340 U.S. 462, 465 (1951) (limiting a private litigant's access to government information and witnesses for use in private litigation).

short and concise forms, where appropriate, can help reduce complications and delays in the vetting process.

2. Rely on the Expertise of Litigation Management Firms

Litigation management firms are indispensable to the effective and efficient management of an MDL, and, as relevant here, to the vetting of claims. In both the *3M* and *Abilify* MDLs, the parties used a litigation database called MDL Centrality® for centralized litigation management and support, which has facilitated the gathering, organizing, accessing, and analyzing of the voluminous data associated with these cases. Regarding vetting, in particular, MDL Centrality® has enabled the plaintiffs in *3M* to securely submit their initial census forms and supporting documentation to defendants, who could then review the forms and identify any perceived deficiencies using the same platform. The use of a single entity—as opposed to dozens of different plaintiffs' firms—to house, interpret, and produce the census materials helped reduce inconsistencies and deficiencies in the plaintiffs' responses. This streamlined the early vetting process in ways that manual document production and review never could. More significantly, MDL Centrality® allowed for statistical analysis of the plaintiffs' census responses, breaking down the data by types of claims and injuries, and identifying characteristics common to the entire inventory of cases (or subsets of the inventory). When a goal of the census process is to obtain a truly representative sample of cases to proceed with bellwether discovery and trial, a platform like MDL Centrality® is crucial.

Parties have also used litigation management firms in connection with tolling agreements, i.e., agreements that extend the period within which potential claims must be filed, often in exchange for the claimants registering their claims with a litigation platform firm and providing certain basic information about those claims to the defendants.[12] In theory, this approach presents a number of benefits for an MDL: for plaintiffs, it prevents the running of statutes of limitations while common discovery and vetting of individual claims is completed; for defendants, it keeps the numbers of filed cases down and provides an opportunity to evaluate the viability of the plaintiffs' claims before lawsuits are filed. For the court, the docket is not burdened with mass filings of unvetted cases. However, there are some practical difficulties with this approach. First, the court will not have jurisdiction over plaintiffs whose claims have not yet been filed in the MDL; therefore, it cannot adjudicate disputes about deficiencies in the information supplied by plaintiffs pursuant to the tolling agreement. Similarly, the court will lack jurisdiction to enforce the terms of any global settlement of unfiled claims. Finally, there may also be legal impediments to this approach. In *3M*, the parties originally reached a tolling agreement and planned to warehouse the unfiled claims in MDL Centrality® while vetting took place. While this endeavor was promising in theory, it proved impossible in practice. As noted above, the *3M* vetting process

[12] *See, e.g., In re* Proton-Pump Inhibitor Prod. Liab. Litig. (No. II), Case No. 2:17-md-2789, ECF No. 232 (D.N.J. June 27, 2018); *In re* Vioxx Prod. Liab. Litig., ECF No. 429 (E.D. La. June 9, 2005).

depended on individual plaintiffs' ability to obtain their military and veterans records from the federal government through *Touhy* requests. Under the applicable federal regulations, *Touhy* requests were only an option for plaintiffs who were actually involved in the litigation; that is, plaintiffs with filed cases. This meant that in order to properly vet the cases, the cases had to be filed on the docket. As a result, the Court created a separate administrative docket on which all of the previously unfiled cases had to be filed to enable the submission of *Touhy* requests.[13] The MDL Centrality® platform continues to be essential to the organized and efficient filing of these cases. As of January 11, 2021, there were 222,124 cases filed on the *3M* administrative docket, with another approximately 1,500 cases currently housed in MDL Centrality® and due to be filed in the coming weeks.

3. Appoint an Early Vetting Subcommittee

Ideally, all individual plaintiffs' attorneys would properly vet every case before filing a complaint, and thereafter, timely comply with all census obligations. Unfortunately, this does not always happen. Inconsistencies and deficiencies in plaintiffs' responses to census and vetting forms can result from the fact that individual plaintiffs in an MDL are represented by dozens of different law firms, each of which has its own interpretation of the census forms and devotes varying degrees of resources to completing the forms. A dedicated subcommittee can help streamline the vetting process and minimize the number of disputes requiring resolution by the court.

In *3M*, the Early Vetting Subcommittee, which was appointed as part of the leadership structure early in the litigation, was tasked with overseeing the census process by ensuring that forms were properly completed and timely submitted, that adequate records authorizations and supporting documentation were timely provided (when required), and that core deficiencies, if any, were timely cured.[14] The Subcommittee embraced that role from the start by: (1) educating individual plaintiffs' counsel on the initial census procedures and deadlines; (2) serving as a central and accessible source for questions about the census form; (3) conferring with defense counsel on recurring deficiencies, then sharing that information with individual plaintiffs' firms to help guide them in completing the form; (4) personally reviewing individual plaintiffs' census forms for deficiencies; and (5) updating plaintiffs' leadership and the court on the status of the efforts. Moreover, the Subcommittee educated non-leadership firms on the science behind the product and the types of injuries alleged in the MDL, which helped plaintiffs' firms identify claims that would likely not succeed. The Subcommittee's work was instrumental to managing the initial census process and

[13] *In re* 3M, ECF No. 898, at *2.
[14] *See In re* 3M, ECF No. 76, at *9.

conserving judicial resources by resolving countless issues between individual plaintiff firms and defense counsel without court involvement.

V. CONCLUSION

The goal of any MDL is to achieve the fair and efficient litigation and resolution of large and complex disputes, whether through disposition or settlement in the MDL court, or remand to transferor courts. Getting one's "arms around the MDL inventory," as my friend and colleague Judge Eldon Fallon puts it, is critical to this endeavor. But the devil is in the details and census procedures that operate seamlessly in one MDL may not fit well in another. Fortunately, MDL courts have broad discretion to tailor a census or vetting process to the unique needs of a particular litigation.[15] If designed and deployed effectively as part of a broader case management plan, a vetting process can identify and winnow unsupportable claims so the resources of the parties, counsel, and the court can be focused on cases that are properly a part of the MDL proceeding.

[15] *See* Adinolfe v. United Tech. Corp., 768 F.3d 1161, 1167 (11th Cir. 2014) ("District courts have broad discretion" to adopt "special procedures for managing [the] potentially difficult or protracted" matters that may arise "involv[ing] complex issues, multiple parties, difficult legal questions, or unusual proof problems.").