

Duke Law Bolch Judicial Institute
Documenting and Seeking Solutions to Mass-Tort MDL Problems

*“Inappropriately Filed Cases – The Problem and Some
Solutions”*

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Fed. R. Civ. P. 1 - “[The Federal Rules of Civil Procedure] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

I. Issue: Improvidently Filed Cases

a. Lack of Proof of Key Elements

i. A Pharmaceutical Product State Court Coordinated Proceeding

1. **2,126** total cases filed – **1,344** cases dismissed (**63%**)

ii. A hypertension medicine MDL

1. **316** cases dismissed by voluntary stipulations of dismissal with prejudice or Court order (**17%**)

iii. A Birth Control Product MDL

1. **4,617** total cases - **1,428** cases dismissed (**31%**)

b. At the Bellwether Stage

i. An anti-coagulation medicine in state court

1. **9 of 24** bellwether pool cases dismissed with prejudice (**37.5%**)

ii. A hypertension medicine MDL

1. **22 of 53** bellwether pool cases dismissed with prejudice (**41.5%**)

c. At the Dispositive Motion Stage

i. A Pelvic Mesh Litigation

1. **30%** of total filed cases dismissed

II. Issue: Attorney Advertising

a. Over **\$850 million** spent on legal advertisements in 2016

b. **1.7 million** ads relating to drugs and medical devices between 2012-14, costing **\$400M**

c. **9 of top 10** keywords purchased from Google to attract web searches relate to legal claims

d. Targeting advertisements before and during trial:

- i. For example, in **1.5 years**, approximately **57,000** television advertisements related to talcum powder litigation have been broadcast throughout the United States.
 1. From July 2015 through Dec. 2016, **11,527** TV ads were visible to St. Louis viewers
 2. **2,790** (about 25%) television ads on local St. Louis broadcast stations
 3. **39** television advertisements per day (2 ads per hour) in St. Louis
 4. **3,300** St. Louis radio ads in October 2016, and **1,850** radio ads in September 2016
 5. **73%** of the 100 person jury venire admitted seeing advertisements

III. Solutions

- a. **Preliminary Disclosure Form** required within 30 days of filing complaint with core information, including product identification:

III. DEPUY PRODUCT INFORMATION			
Type of Prosthesis:		Product Code/Lot Code:	
Side of Body:	Right / Left / Both (circle one) (Complete one Plaintiff's Preliminary Disclosure form for each implantation surgery involving an ASR product)	Date of Implantation:	
Name and Address of Implanting Surgeon:			
Name and Address of Hospital or Clinic where surgery performed:			
*ATTACH MEDICAL RECORDS WITH MANUFACTURER/PRODUCT STICKERS FROM IMPLANTATION SURGERY.			

(In re DePuy ASR Hip Implant Products Liability Litigation, MDL No. 2197)

- b. **Rigorous Monthly Orders to Show Cause** for Overdue and Core Deficient Plaintiff Fact Sheets
 - i. *In re Xarelto Products Liability Litigation, MDL No. 2592* - **~750 cases** dismissed to date

1. “The **most basic elements** of any products liability case include the proof of use of the product that allegedly caused the plaintiff’s alleged injury, as well as the damage allegedly caused by the use of the product. . . any plaintiff who fails to provide (1) **records demonstrating proof of use of Xarelto®**; (2) **medical records demonstrating the injury alleged**; and/or (3) a signed declaration

cannot maintain a products liability action against the defendants in this case.”

ii. *A hypertension medicine MDL - **232 cases** dismissed (**12%**)*

c. **Limiting Cases to JPML Definition**

In re Benicar (Olmesartan) Products Liability Litigation, MDL No. 2606

“This litigation involves allegations that taking Benicar . . . may cause serious gastrointestinal injury, including sprue-like enteropathy . . .” JPML declined to transfer cases to the MDL alleging injuries outside the scope of the litigation.

- d. **Targeted Discovery** – focus on proof of use and event up front, supported by **contemporaneous medical records**
- e. **Sequencing Discovery** – focuses and narrows the issues in dispute. Example – first stage of discovery focuses on causation issues, marketing discovery deferred to later in litigation
- f. **Dispositive Motions First** (*eg. Daubert* and pre-emption). No discovery or limited discovery until motions to dismiss are decided
- g. **Science First**
 - i. Science Day
 - ii. Early Expert Disclosures
 - iii. General Causation Motions
- h. **Regulation of attorney advertising**