

Documenting and Seeking Solutions to Mass-Tort MDL Problems
Atlanta, GA
April 26-27, 2018

Panel 1: Impact of Critical Transferee Judge Decisions Not Subject to Review or Appeal

David Bernick, Paul Weiss Rifkind Wharton & Garrison LLP/Robert Heim, Dechert LLP

Impactful Decisions Not Subject to Review

- A. Case management sequence and time table: Are there meaningful data across MDLs to justify entering comprehensive CMOs (including trial dates) immediately after motions to dismiss?
- B. Scope of proportionate discovery of defendants: Has anything really changed since the rules changed? What are the metrics of proportionality when liability is disputed, no class has been certified, and the transaction cost of filing/prosecuting an individual case is low?
- C. Timing, scope of proportionate discovery of plaintiffs: What are the metrics here? How can PFSs be made reliable and compliance be made efficient? When should plaintiffs have a doctors' opinion on case specific causation?
- D. Analysis of the claimant pool: This is crucial to both effective pre-trial/trial litigation (e.g., determining cross cutting issues) and ultimate resolution, so why is it not done early, routinely, and with centralized data?
- E. Selection of bellwethers for discovery and trial: The first mission of MDLs is pre-trial litigation. How can bellwether selection facilitate the litigation of cross cutting issues? What should "representativeness" mean and how should it be determined?
- F. Selecting, scheduling post-bellwether trials: Why should the criteria of selection change from the selection of bellwethers? When does it make sense to go to multi-track trials?
- G. Recurring Core legal issues: Isn't early appellate review essential?
 - 1. Pre-emption (conflict and *Buckman*)
 - 2. *Daubert* issues: general and specific causation
 - 3. Role of FDA regulation: "off label" marketing claims
 - 4. Admissibility of post-injury liability evidence
 - 5. Admissibility of evidence regarding marketing not seen by the plaintiff/prescriber
 - 6. Choice of punitive law
- H. Settlement: If this is a primary goal of MDLs, shouldn't there be a rule-based process?