

PRODUCT LIABILITY

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In May 2015, IADC member Sherry Knutson and Michelle Ramirez reported on the split amongst courts that had considered whether a corporate witness be required to testify live at trial by remote video testimony even if the witness resides more than 100 miles from the federal courthouse where the trial is taking place. At that time, a few courts had allowed such live testimony from “satellite witnesses” because they concluded plaintiffs had shown “good cause in compelling circumstances.” Since that time, a growing number of multidistrict litigation (“MDL”) courts in the product liability bellwether context have been receptive to using live video testimony of a witness outside of the court’s Rule 45 subpoena power. Other courts, however, have rejected such requests. In this two-part series, Michelle Ramirez will first provide an update since May 2015. Look for part two in our October issue, which will provide strategic considerations for how to best position oneself before and during trial.

Satellite Witnesses: MDL Courts Increasingly Require Corporate Witnesses to Testify Live Via Satellite, but Other Courts Do Not

ABOUT THE AUTHOR



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In May 2015, IADC member Sherry Knutson and Michelle Ramirez reported on the split amongst courts that had considered whether a corporate witness be required to testify live at trial by remote video testimony even if the witness resides more than 100 miles from the federal courthouse where the trial is taking place. At that time, a few courts had allowed such live testimony from “satellite witnesses” because they concluded plaintiffs had shown “good cause in compelling circumstances.” Since that time, a growing number of multidistrict litigation (“MDL”) courts in the product liability bellwether context have been receptive to using live video testimony of a witness outside of the court’s Rule 45 subpoena power. Other courts, however, have rejected such requests.

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Using Rule 43 and Rule 45 to Compel Live Testimony

Federal Rule of Civil Procedure 45 limits the subpoena power to “within 100 miles of where the person resides, is employed, or regularly transacts business in person.” Fed. R. Civ. P. 45(c)(1)(A) If a witness is outside the trial court’s subpoena power, a party may, in lieu of live testimony, use deposition testimony of a witness. Fed. R. Civ. P. 32(a)(4)(B).

However, Rule 43(a) contains a procedural mechanism providing a narrow exception to this rule, stating that “[f]or **good cause in compelling circumstances** and with appropriate safeguards, the court **may** permit testimony in open court by contemporaneous transmission from a different location.” Fed. R. Civ. P. 43(a) (emphasis added). *See also* Fed. R. Civ. P. 45, Adv. Comm. Notes (“When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).”).

In our prior article, we reported that the MDL court in the *Actos (Pioglitazone) Products Liability Litigation* cited Federal Rules 43 and 45 to compel witnesses residing more than 100 miles away to testify live at trial by video transmission from a local courthouse. *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-02299, 2014 WL 107153 (W.D. La. Jan. 8, 2014) (“Actos Opinion”). In issuing its ruling, the court emphasized that the case was the first bellwether trial in an MDL proceeding, and that plaintiffs had not been able to obtain the “necessary video trial depositions of [a] large number of defense witnesses.”¹ *Id.* at *6.

Plaintiffs’ counsel have seized on this interpretation of Rules 43 and 45, as evidenced by three recent product liability cases:

¹ Although subpoenas were issued to more than 15 former and current company employees, ultimately

plaintiffs’ counsel only called one satellite witness to testify live via video at the *Actos* bellwether trial.

First, in *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation*, the district court issued an order permitting plaintiffs' counsel to issue trial subpoenas to out-of-state witnesses under the defendants' control to testify at trial via video under Rule 43(a). *In re: Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:15-cv-03484-K (N.D. Tex. Sept. 20, 2016). In issuing its ruling, the court emphasized that live video testimony would provide the jury with a "more truthful witness," which was the "inherent goal" of Rule 43. *Id.* The court further emphasized that the case was complex, and flexibility was required to manage a nationwide docket of over 8,000 cases. *Id.*

The defendants filed a Petition for a Writ of Mandamus in the Fifth Circuit asking the Fifth Circuit to vacate the Order. While the Fifth Circuit denied the Petition, Judge E. Grady Jolly stated in a one sentence concurrence that the "district court misapplied Rules 43(a) and 45(c)." *In re: Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:15-cv-03484-K, No. 16-114119 (5th Cir. Sept. 27, 2016). The district court also denied Defendant's motion for reconsideration. *In Re: Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.*, No. 3:15-cv-03484-K (N.D. Tex. Oct. 3, 2016). Several of these cases are presently on appeal in the Fifth Circuit.

And in *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, No. MDL 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017), Judge Eldon Fallon allowed plaintiffs to present the defendants' Senior Director of Global Regulatory Affairs

via live video testimony. The court emphasized that one of the purposes of bellwether cases was to "inform the parties on the future course of t[he] entire litigation", which "tilts the balance . . . in favor of allowing live deposition." *Id.* The court also noted that plaintiffs had issued the subpoena in the witnesses' home state of New Jersey, rather than in Louisiana. *Id.*

Likewise, in *Mullins v. Ethicon, Inc., et al.* – a bellwether case tried in the Ethicon pelvic mesh MDL – Judge Joseph R. Goodwin granted plaintiffs' motion to permit live satellite testimony of defendants' two employees, who had not been made available to testify live. *Mullins v. Ethicon, Inc., et al.*, No. 2:12-cv-02952, 2017 WL 532102, at *4 (S.D.W.Va. Feb. 8, 2017). Although the witnesses were no longer the defendants' employees, the court found that "good cause" existed because (1) the MDL involved "complex issues and multiple parties," and that the case would "bear on many more cases;" (2) the defendants would have a de facto advantage by not bringing the witnesses live; (3) defendants had not claimed prejudice; and (4) the management of MDLs requires flexibility, and live video testimony would ensure efficient use of judicial resources by avoiding the burden of reviewing deposition transcripts and ruling on objections to deposition videos. *Id.* at *2-4.

Outside of the product liability bellwether context, however, courts have been less willing to find "good cause" permitting live video feed. For example:

- In *In re Urethane Antitrust Litigation*, the defendant sought an order compelling the live remote video testimony of eight of the plaintiff's employees. *In re Urethane Antitrust Litig.*, No. 2:08-5169, 2016 WL 723014, at *2 (D.N.J. Feb. 22, 2016). The court rejected the request, finding that there were not "compelling circumstances," and further emphasized that the witnesses were outside of the court's subpoena power. *Id.* at *2.
- In *Berlinger v. Wells Fargo, N.A.*, the plaintiffs sought to compel the live remote video testimony of four out-of-state witnesses. *Berlinger v. Wells Fargo, N.A.*, No. 2:11-CV-459-FTM-29CM, 2016 WL 316585, at *1 (M.D. Fla. Jan. 27, 2016). The court was unpersuaded that there was "good cause", finding nothing that indicated the testimony was "material and relevant" to the remaining issues in the case. *Id.*
- Finally, in *Low v. Trump University LLC.*, the plaintiff moved to allow an instructor to testify live via video transmission. *Low v. Trump Univ. LLC.*, No. 310-cv-00940, 2016 WL 6647793, at *5 (S.D. Cal. Nov. 10, 2016). The court denied plaintiffs' motion, finding that they did not carry their burden to establish that "good cause in compelling circumstances" exists. *Id.*, at *6. The court also noted that plaintiffs did not provide any

information about the instructor's location, nor any correspondence regarding attempts to procure his presence at trial. *Id.*

Considerations for Future Cases

Although the Fifth Circuit's concurrence in *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation* suggests that the *Actos* opinion and its progeny may have gone beyond the limits of what Rule 43(a) intended, MDL courts continue to show willingness to allow for live testimony via video. Defendants should continue to argue that the exception to Rule 43 is narrow, and that good cause in compelling circumstances is a high threshold, requiring more than the showing of mere inconvenience. Stay tuned for Part two of this article, which will explore strategic considerations before and during trial.

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