IADC CLE SUBMISSION

Weathering the Bellwethers: Opioid Litigation and Beyond and Impacts on Both Domestic and Foreign Corporations Subject to Lawsuit in the US

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The advent and pervasive nature of mass tort litigation over the course of the last 25 years has increasingly led to consideration of alternative methods of managing broad-based litigation frequently involving hundreds, if not thousands of individual claims. Chief among these has been the use of multidistrict litigation ("MDL"), in which related cases are consolidated into one federal forum.[1] Consolidation of cases serves several goals in the administration of efficient and just conduct of actions that have a factual nexus notwithstanding the factual distinction among individual plaintiffs.[2] In practice, the transferee court conducts "coordinated or consolidated pretrial proceedings" that is intended to resolve common issues of factual and expert discovery and testimony applicable to the consolidated claims in general.[3] In addition, litigants, including both individuals and state and local governments continue to pursue mass tort relief in state courts, seeking to take advantage of permissive state joinder rules in an effort to try cases in ostensibly friendly venues they believe will result in verdicts with utility in other state jurisdictions.

MDL "Explicit" Bellwethers

Procedurally, mass tort MDL litigation frequently then involved what are known as "bellwether trials," with the term "bellwether" based on the historical "belling" a "wether" sheep that was intended to lead a shepherded flock of sheep.[4] A select number of bellwether cases are drawn from the broad expanse of consolidated MDL cases, and scheduled for several trials that are intended to provide both plaintiffs and the defendants generally an opportunity to test legal theories, evaluate expert testimony, assess the quality and effectiveness of testimony and evidence, and gain some global perspective as to how individual cases would generally be tried. The intent thereafter is for the results of bellwether trials to provide litigants with some basis to assess the value of individual claims, oftimes to lead to mass settlements with a basis for settlement dollar

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[1] *See In re Zyprexa Prods. Liabl. Litig.*, 238 F.R.D. 539 (E.D.N.Y. 2006); *In re Fosamax Production Liab. Litig*., 248 F.R.D. 389 (S.D.N.Y. 2008); *see also* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TULANE LAW REVIEW, 2323(2008).

[2] 28 U.S.C. § 1407(a) ("…transfers shall be made by the judicial panel on multidistrict litigation authorized 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."

[3] *See* Fallon, *supra* note 1 at 2328 (*citing In Re Patenaude*, 210 F.3d 135, 142-46 (3d Cir. 2000).

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

allocation.[5] As stated clearly by District Judge Eldon E. Fallon of the Eastern District of Louisiana, "[b]y virtue of the temporarily national jurisdiction conferred upon it by the MDL Panel, the transferee court is uniquely situated to preside over global settlement negotiations."[6]

An example of this process is the bellwether trials involving Vioxx conducted in the late 2000s.[7] In the Vioxx cases the MDL Court conducted six trials (one of the six cases was retried after a hung jury in the first MDL trial) resulting in five verdicts for Merck, the manufacturer of Vioxx. One of those Merck verdicts was set aside later and not retried. Trials also were conducted in Texas, New Jersey, Illinois, and California state courts.[8] In sum, by the end of November 2007, juries in federal and state courts had decided for Merck 12 times and for plaintiff five times.[9] One Merck verdict was set aside and not retried, and another Merck verdict was set aside and retried, leading to one of the five plaintiff verdicts.[10] There were also two unresolved mistrials. Merck filed appeals or sought review in each of the five cases with plaintiff's verdicts; two of the five plaintiff verdicts later would be reversed on appeal for insufficient evidence, and judgment entered for Merck.[11] Merck engaged in substantive settlement discussions, ultimately entering into a settlement agreement with plaintiffs' counsel in November 2007 to resolve Vioxx personal injury claims in federal and state court jurisdictions.[12] Given the domestic-only application of that settlement, international cases continued apace, including a 43-day trial in 2009 involving class action claims.[13] In that case, a Justice of the Federal Court of Australia dismissed all claims against Merck & Co., Inc. on a class-wide basis, dismissed a number of claims against Merck's Australian subsidiary on a class-wide basis and then found against the subsidiary for the individual applicant on his personal claim only, which adverse judgment was later reversed on appeal.[14] The results from the Australian case that were favorable to Merck would influence the outcome of certain other non-domestic cases given the similarity between some of the claims asserted in the Australian case (for example claims made under an Australian statute modeled on the European Product Liability Directive) and claims made in other non-domestic jurisdictions.[15]

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[5] *See*, *supra* note 1 at 2337-2342; *Chevron*, 109 F.3d at 1019 ("[i]f a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts").

[6] *Supra*, note 1 at 2340.

[7] *See In re Vioxx Prods. Liabl. Litig.*, 360 F. Supp. 2d 776 (E.D. La. 2007).

[8] *See*, *e.g.*, *In re Vioxx Prods. Liabl. Litig.*, 239 F.R.D. 450, 452 n. 4 (E.D. La. 2006).

[9] Mary E. Bartkus, The Cost to Society of Pharmaceutical Mass Tort Litigation, Presented for The Foundation for Law, Justice, and Society, Oxford, England (June 11, 2019).

[10] *See id.*

[11] *See id.*

[12] *See*, *supra*, note 1 at 2335-2336 (*citing* Heather Won Tesoriero, Sarah Rubenstein & Jamie Heller, *Merck's Tactics Largely Vindicated as It Reaches Big Vioxx Settlement*, WALL ST. J. Nov. 10, 2007 at A1).

[13] *See*, *supra* note 9.

[14] *See id.*

[15] *See id.*

Bellwether trials can thus allow for the preparation of "trial packages" that oftimes include databases of extensive discovery materials, background information, deposition and trial testimony, biographies of potential witnesses, prior rulings, and organized sets of evidentiary material.[16] Bellwether trials also allow for some input on the part of both plaintiffs and defendants in the type of cases to be tried, organizing what would be otherwise inefficient and costly fact and expert discovery, and allowing adverse litigants to have some control over which specific cases are tried in what order. For example, in currently-pending hernia mesh mass tort litigation, MDL venued in the Northern District of Georgia has relieved the parties of any Initial Disclosure requirement, and gave the parties the ability to each select twelve (12) cases from the pool of all pending cases to be subject to discovery; from that pool of 24 cases, the plaintiffs and defendants will then choose five cases each to be tried, which will then (and only then) be subject to expert discovery.[17] From there, the parties can then submit to the Court their respective proposed schedule of trials, with the Court determining the manner of trial, order of selection of plaintiffs for trial, and timing of trial.[18]

While such bellwether results would appear to support use of bellwether in all manner of mass tort litigation, the MDL and associated bellwether procedure is not without its detractors. First, the concept of collective resolution of what are, at heart, individual cases of liability, is seen by many plaintiffs' counsel (and some defense counsel) as robbing their individual claimants of the opportunity to present their claims to a jury of their peers and the "realistic treat … trial provides."[19] Another concern is that MDL and bellwether trials effectively compel litigants to participate and give up their right to jury assessment of damages, as opposed to lawyers; in such cases, participants in MDL are likely recognizing that that the chance of their case being tried among the thousands being litigated is slim.[20] Other criticisms include the potential for systemic bias to affect trial outcomes, jury awards, and related post-verdict settlements given that one set of jurors in one venue is often deciding the outcome of bellwether cases.[21]

In the past several years even more complications have arisen, most notably in the pelvic repair system litigation venued in the Southern District of West Virginia.[22] In that case, the Court set up a bellwether trial scheme similar to that discussed earlier in the Georgia mesh case, where the adverse parties could select a number of claims among the total claims pending for trial.[23] Four bellwether cases were selected for trial, only to be voluntarily dismissed by the plaintiff with

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[16] *See*, *supra*, note 1 at 2339.
[17] *See* Practice and Procedure Order No. 13, *In re Ethicon Physiomesh Flexible Composite Hernia Mesh Prod. Liab. Litig.*, MDL Docket No. 2782, 1:17-md-02782-RWS.
[18] *See id.*
[19] *See* Alexandra D. Lahav, *Bellwether Trials*, 76 THE GEORGE WASHINGTON LAW REVIEW 576, 578 (2008).
[20] *See id.* at 592-93.
[21] *See*, *supra*, note 9 at 594.
[22] *In re Cook Medical, Inc. Pelvic Repair System Prods. Liabl. Litig.*, MDL No. 2440.
[23] *See* Pretrial Order #59, *In re Cook Medical, Inc. Pelvic Repair System Prods. Liabl. Litig.*, MDL No. 2440, 2015 WL 3385719 (S.D. W. Va. May 19, 2015).

prejudice, along with 20 other cases in the discovery pool, leaving only six cases remaining.[24] From there, the plaintiffs' counsel moved to withdraw from the remaining six cases rather than file summary judgment oppositions.[25] The MDL Court, as a result, decided to scrap the bellwether process entirely, ordering discovery in 250 cases in a first step to remanding them back to their transferor districts for trial.[26]

State "Implicit" Bellwethers

State court proceedings, as we will see in the Oklahoma litigation detailed more fully below, can also serve as "implicit" bellwethers. State court cases brought by state and local governments seeking compensation under state statutes will frequently involve litigation of fact and expert issues that have potentially broad application to similar cases that may be brought in other state jurisdictions, and counsel will frequently look to state court decisions such as Oklahoma's to build their own "trial package" for use in other states. With the United State Supreme Court's decision in *Bristol-Myers Squibb v. Superior Court of Ca.*, 137 S. Ct. 1773 (2017) (*BMS*), the continued pursuit of individual plaintiff claims in large cases involving joinder of plaintiffs from various states into an ostensibly plaintiff-friendly jurisdiction may not continue; however, the trials themselves subject to reversal and remand following the *BMS* decision may have long-lasting effect in cases tried (or re-tried) in other jurisdictions.[27]

Opioid Bellwether Litigation

Notwithstanding criticisms of the bellwether procedure, both explicit bellwether litigation in the MDL context and implicit bellwether litigation in the context of state lawsuits are likely here to stay in mass tort litigation. Nowhere is that more apparent in the last ten years than the advent of mass tort litigation involving opioid pain medication. Opioids are a class of drugs designed to interact with opioid receptors on nerve cells in the body and brain to resolve individual patient issues with both incipient and chronic pain.[28] Following introduction and widespread use of both immediate and extended release opioids, including OxyContin, Morphine, Fentanyl and others, in the United States from the mid-1990s through the present, issues have arisen regarding the known addictive properties of opioids, their long-term use to treat non-cancer chronic pain, and their use for periods longer than seven (7) days following surgical procedures. The U.S. Centers for Disease Control and Prevention (CDC), in assessing the risks of opioids, including overdose and

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[24] Steven Boranian, *Is This a Crack In The Bellwether?*, Drug & Device Law, May 29, 2015, https://www.druganddevicelawblog.com/2015/05/is-this-crack-in-bellwether.html, last accessed Nov. 27, 2019.

[25] *Id.*

[26] *See id.*

[27] *See, e.g.*, *Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48, 52 (Mo. App. E.D. 2017) and *Ristesund v. Johnson & Johnson*, 558 S.W.3d 77, 79 (Mo. App. E.D. 2018), two cases seeking recovery against Johnson & Johnson for cancer allegedly resulting from use of talc products. Both *Fox* and *Ristesund* proceeded to jury trials with verdicts entered, only to be reversed on appeal based on joinder issues following the Supreme Court's decision in *BMS*.

[28] *See, e.g.*, Centers for Disease Control and Prevention, "CDC Guideline for Prescribing Opioids for Chronic Pain – United States, 2016," MORBIDITY AND MORTALITY WEEKLY REPORT, Vol.65, No. 1, March 18, 2016.

development of opioid use disorder, stated that more than 165,000 people had died from opioid-related overdoses between 1999 and 2014, while an estimated 1.9 million people were identified as abusing or dependent on opioids as of 2013.[29] The Food and Drug Administration as recently as February 26, 2019, identified the "opioid crisis" as it has come to be known in the media as "one of the largest and most complex public health tragedies that our nation has ever faced."[30]

Concomitant with the increased media attention to opioids and the pronouncements of new clinical dosage guidelines by the CDC in March 2016, opioids have become the focus of extensive mass tort litigation across the United States. Patients, local governments, subdivisions of state government, and other interest groups (i.e., Native American Reservations) have filed suit in state and federal court across the country asserting claims ranging from medical negligence to consumer fraud, targeting doctors, health care providers, pharmacies, and most importantly, opioid manufacturers and distributors. State and local government cases seek to recover costs they associate with increased health care and substance abuse treatment expenditures, with associated expenses estimated at over $19.6 billion nationally.[31] Costs are alleged to include those associated with "emergency room admissions, costs of first responders and other emergency response services and equipment, emergency overdose medication (e.g. Narcan), substance abuse treatment centers, additional local health clinics, care of infants affected by prenatal opioid exposure, law enforcement costs, prison services, additional hiring of public employees (in health services and law enforcement), and indirect effects of the epidemic, such as economic instability or effects on local tax bases."[32] Following mass tort action plans previously seen in the context of tobacco litigation, state Attorneys General and private litigants have filed thousands of opioid-related lawsuits in the last 20 years, seeking to recover compensation for private litigants, or a means of funding opioid treatment and related costs for public plaintiffs.

For purposes of the IADC presentation, we will review and discuss two cases that have had recent developments and provide some insight into the potential bellwether effects of opioid litigation. The two cases include the recent Oklahoma state court trial brought by the State of Oklahoma.,[33] as well as the pending MDL litigation venued in the Northern District of Ohio.[34] The former case is representative of an implicit bellwether, while the latter represents the more formal, MDL-based explicit bellwether process.

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[29] *See id.* at 2.

[30] https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-agencys-2019-policy-and-regulatory-agenda-continued, last accessed Nov. 27, 2019.

[31] Curtis Florence, Feijun Luo, Likang Xu, and Chao Zhou, *The Economic Burden of Prescription Opioid Overdose, Abuse, and Dependence in the United States, 2013*, Med Care 2016 Oct; 54(1): 901-906, *at* https://www.ncbi.nlm.nih.gov/pubmed/27623005.

[32] Andrew Erteschik and J.M. Durnovich, *Local Governments vs. Big Pharma - A New Wave of Litigation Alleges Liability for the Opioid Epidemic*, Mondaq, November 2, 2017, *at* http://www.mondaq.com/unitedstates/x/642504/Life+Sciences+Biotechnology/Local+Governments+vs+Big+Pharma.

[33] *State of Oklahoma, ex rel., Mike Hunter, Attorney General of Oklahoma v. Purdue Pharma, L.P., et al.*, 2019 WL 4059721 (Okl.Dist. 2019).

[34] *In Re National Prescription Opiate Litigation*, MDL 2804, Case No. 1:17-md-2804, United States District Court, Northern District of Ohio, Eastern Division.

MDL Litigation

The Northern District of Ohio case involves well over 2,000 individual cases largely brought by diverse litigants against a number of opioids manufacturers and distributors. The claims include those brought by five categories enumerated by presiding Judge Dan Aaron Polster: states, Native American tribes, local governments, hospitals and third-party payors. The cases were sent to MDL to effect consolidation of claims from ten (10) district courts.[35]

In his original Case Management Order, Judge Polster placed three cases brought by Ohio counties on "Track One," status, setting guidelines for amending pleadings, conducting fact discovery (including depositions), and conducting expert discovery.[36] The stated motive behind the initial CMO was to make settlement more likely by creating a "litigation track" for the three selected cases while the parties pursued a separate "settlement track."[37] The CMO further contemplated briefing on "threshold legal issues on common claims" in the interest of judicial efficiency.[38] Judge Polster's Order therefore effectively set the first three "trial track" cases as bellwethers for the entirety of the MDL docket, made all the more clear by the Court's stated intention to set the bellwether cases to bolster the chances of settlement of claims.[39] In subsequent CMOs, Judge Polster set separate briefing schedules for other subsets of the MDL claims, specifically for third-party payors, a hospital case, and several Indian Tribe lawsuits.[40]

The Track One cases were set for trial on October 21, 2019, including eleven claims asserted against what the Court defined as 23 "Defendant Families," inclusive of related entities (e.g., Purdue Pharma, LP, Purdue Pharma, Inc., etc.).[41] It was supposed to be the first federal case of its kind but months before the trial opioid manufactures Endo, and Allergen settled out of the case.[42] Shortly after those settlements, Mallinckrodt Pharmaceuticals, a large manufacturer of generic opioids also settled.[43] Mallinckrodt's tentative settlement included $24 million in cash

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[35] *See* Transfer Order, *In Re National Prescription Opiate Litigation*, Doc. No. 1, MDL 2804, Case No. 1:17-md-2804, United States District Court, Northern District of Ohio, Eastern Division, *at* https://www.ohnd.uscourts.gov/sites/ohnd/files/2804TransferOrder.pdf.

[36] *See* Case Management Order One, *In Re National Prescription Opiate Litigation*, Doc. No. 232, MDL 2804, Case No. 1:17-md-2804, United States District Court, Northern District of Ohio, Eastern Division, *at* https://www.ohnd.uscourts.gov/sites/ohnd/files/cmo%201.pdf.

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] *See* Case Management Orders Four and Five, *In Re National Prescription Opiate Litigation*, Doc. Nos. 485 & 666, MDL 2804, Case No. 1:17-md-2804, United States District Court, Northern District of Ohio, Eastern Division, *at* https://www.ohnd.uscourts.gov/sites/ohnd/files/485.pdf and https://www.ohnd.uscourts.gov/sites/ohnd/files/17-2804cmo5.pdf

[41] *See* Civil Jury Trial Order, *In Re National Prescription Opiate Litigation*, Doc. No. 1598, MDL 2804, Case No. 1:17-md-2804, United States District Court, Northern District of Ohio, Eastern Division, *at* https://www.ohnd.uscourts.gov/sites/ohnd/files/1598.pdf

[42] Hoffman, Jan, *Johnson & Johnson Reaches $20.4 Million Settlement in Bellwether Opioids Case*, N.Y. Times, Oct. 2, 2019.

[43] *Id.*

and $6 million worth of drugs, including addiction treatment medication.[44] About three weeks before trial Johnson and Johnson reached a settlement for $20.4 million, with $10 million going to the counties, $5 million for legal fees, and the remaining 5.4 million to charitable organizations.[45] Nevertheless, several defendants still remained. Ultimately, the trial never came to pass because on the eve of the trial four distributors and the last remaining manufacturer settled with a figure in the neighborhood of a $260 million.[46] The Distributors AmerisourceBergen, Cardinal Health, and McKesson pledged to pay $215 million, while manufacturer Teva Pharmaceuticals will pay $20 million in cash and an additional $25 million in addiction and overdose treatment drugs.[47]

In the various settlements the Defendants did not admit to fault and currently only Purdue Pharma if accepted has a holistic plan that would cease all litigation against them. On November 17, 2019, Judge Polster set a new trial date for October 13, 2020 in a case that now includes five pharmacy companies including Rite Aid Corp., CVS Health Corp., and the aforementioned Walgreens Co., and separately ordered that "resolution of substantial portions of the opiate MDL will be speeded up and aided by strategic remand," and that he would be recommending 3 cases to the MDL panel for remand.[48]

Oklahoma State Litigation

While the MDL was progressing in Northern Ohio an implicit bellwether case was taking place in Cleveland County, Oklahoma. The case commenced on June 7, 2017, following a similar but slightly more expedited timeline as the federal opioid litigation. The Attorney General of Oklahoma brought the action on behalf of the State of Oklahoma, alleging opioid manufacturers, among others, created a public nuisance under Oklahoma state law.[49] The theory the state advanced was that the defendants "false, deceptive, and misleading marketing and promotional campaign ... qualifies as the kind of act or omission capable of sustaining liability under Oklahoma's nuisance law," parroting an approach taken previously in tobacco mass tort litigation.[50]

In the spring and early summer of 2019 a few months before trial began both Purdue Pharma and Teva Pharmaceuticals settled with the state for a total of $355 million, leaving Johnson & Johnson as the remaining manufacturer-defendant.[51] The case proceeded to trial, and on August 27, 2019,

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[44] *Id.*
[45] *Id.*
[46] Overlay, J. (2019). *Opioid MDL Judge Plots New Bellwether Trials Across US - Law360*. [online] Law360.com. Available at: https://www.law360.com/articles/1221570/opioid-mdl-judge-plots-new-bellwether-trials-across-us, last accessed Nov. 21, 2019.
[47] *See id.*
[48] *See id.*
[49] *State of Oklahoma, ex rel., Mike Hunter, Attorney General of Oklahoma v. Purdue Pharma, L.P., et al.*, 2019 WL 4059721 (Okl.Dist. 2019)
[50] *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929, at *12 (Okl.Dist. Aug. 26, 2019).
[51] *See* Jacqueline Howard and Wayne Drash, *Oklahoma Wins Case against Drugmaker in Historic Opioid Trial*, Cable News Network, 27 Aug. 2019, *available at*

Judge Thad Balkman issued a ruling finding for the State, awarding $572 Million dollars for an abatement of the opioid damage to the state.[52] In his ruling, Judge Balkman made several factual findings that potentially have broad application beyond Oklahoma:

> · Oklahoma is suffering a crises related to opioid abuse;
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> · Oklahoma, through state agencies, have undertaken "substantial efforts" to "combat and mitigate the consequences of the "opioid overdose crisis;"
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> · That the defendants – acting in concert with others – embarked on a "campaign" to support the message that pain was undertreated and overstate the efficacy of opioids;
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> · Defendants undertook detailed efforts to market and advocate for use of opioids with private providers, bolstered by a sales force trained to avoid discussion of "negatives" of opioids and emphasize "positives;"
>
> · Defendants made substantial payments to pain advocacy groups such as the American Pain Society to influence prescribers; and
>
> · Defendants made, were advised of, and yet continued to disseminate "false and misleading" marketing messages regarding opioids.[53]

The above factual findings, while in the context of Judge Balkman's evaluation and application of Oklahoma law, undoubtedly have some utility in other opioid litigation in other state and federal venues. As a result, the Oklahoma case serves as something of an "implicit" bellwether – occurring outside the confines of your garden-variety MDL bellwether, but with similar potential effects, including review and enumeration of factual issues with potential universal application. Certainly plaintiffs' attorneys across the country and perhaps globally, will attempt to use Judge Balkman's opinion in other pending cases, holding out a jurist's conclusions at the end of hearing volumes of evidence as instructive if not dispositive.

Bellwethers Going Forward

Given the posture of the two opioid cases detailed above, the question posed to the defense community is where bellwether litigation is going, and what the ongoing and anticipated effects are. To that end, we are focusing on the effect(s) domestically, internationally, and how corporate clients approach bellwether litigation in mass tort cases.

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https://www.cnn.com/2019/08/26/health/oklahoma-opioid-trial-verdict-bn/index.html, last accessed Nov. 21, 2019.

[52] The Court's judgment was later reduced by $107 million, leaving a current judgment of $465 million with an issue remaining as to a credit for the previous settlements. Both the State and Johnson and Johnson are appealing.

[53] *See, State of Oklahoma, ex rel., Mike Hunter, Attorney General of Oklahoma v. Purdue Pharma, L.P., et al.*, 2019 WL 4059721 (Okl.Dist. 2019).

Domestically, it appears that bellwethers – albeit in various forms and structures – are here to stay. The mere scale of mass tort litigation, and the ongoing and supported use of MDL effectively renders bellwethers a reasonably anticipate approach if not outright necessity. The volume of mass tort cases, be it opioid cases, mesh cases, or talc cases, neither plaintiff nor defense litigants can take all cases to trial, and courts are ill-equipped to manage voluminous and otherwise repetitive discovery. Plaintiffs will potentially less high-value claims as compared to better-financed claims with broader appeal will continue to see bellwethers as the best vehicle to extract settlement monies, while mass tort plaintiffs' attorneys will continue to view bellwethers as a means to assess and identify their best cases, test legal theories, and ultimately reap the rewards of trial – even if there are adverse verdicts – by likely securing total or partial settlements on behalf of all litigants. Defendants, for that matter, appear to recognize that bellwethers in the MDL context likely serve a purpose in clarifying legal issues in furtherance of settlement of the broader group of cases transferred to MDL, hence the Northern District of Ohio's recognition of a "settlement track" and "trial track."

The ramifications of the Oklahoma state court case, at least domestically, is harder to gauge. As a bench trial, the lawsuit does not provide a great deal of direction as to how a jury may assess similar claims and is focused on application of a specific Oklahoma statute; however, Judge Balkman's decision interpreting Oklahoma law (assuming no reversal on appeal) certainly resolves questions of law regarding Oklahoma statutory interpretation, and his findings of fact will inevitably serve to provide plaintiffs with a "cookbook" on presentation of certain facts relevant to the presentation of opioid claims.

From an international perspective, the experience of Merck in the Vioxx litigation provides some insight into the international effect of bellwether litigation. Using opioids in cases involving other defendants as an example, bellwether trials and verdicts may serve the same purpose that the Vioxx bellwether suits did – providing some parameters on whether claims are effective and what their settlement value may be. Ongoing pre-trial settlement of a number of litigants likely anticipates this outcome, as parties seek to "get ahead" of mass settlements after potentially adverse verdicts by globally resolving their potential liabilities when a bellwether trial looms large on the calendar. Large settlements or jury verdicts in bellwether cases domestically will oftimes influence both the international plaintiffs' bar and the international media, providing the former with some short-lived encouragement in very different jurisdictions , and the latter with rich stories of US trials or US settlements breathing life into discussion of various mass tort subjects and their danger(s). The experience has been, however, that US jury verdicts and large US settlements, generally do not influence judges outside the United States. Nor do pretrial decisions of US judges. Interestingly, well-reasoned opinions by judges in some non-domestic common law countries following trial on the merits may influence outcomes in other non-domestic common law countries (e.g., Australia, England, Scotland). These well-reasoned non-domestic decisions may also provide guidance to international plaintiffs' attorneys paying close attention to judicial decisions on the merits in leading non-domestic common law jurisdictions.

The final decision of what strategy to pursue is, of course, that of the corporate client. Frequently battling mass tort claims on a myriad of products in a myriad of jurisdictions, bellwethers give rise to some efficiencies by streamlining discovery, potentially giving corporate defendants control in addition to input on what cases are tried, and providing some cost control or at a minimum cost forecasting information for what are normally publicly-traded multinational corporations. At the

same time, avoidance of bellwethers may serve corporate defendants better, as protracted litigation may be costly, but the benefits over the long run may be realized sooner. Trial and victory in state court cases could dissuade potential litigants, and with the advent of the United States Supreme Court's decision in Bristol Meyers,[54] result in state court cases being transferred to defendant-friendly jurisdictions from less-friendly jurisdictions previously enjoying the fruits of liberal state-level joinder rules. Talc cases being tried in St. Louis, Missouri are a prime example of this phenomenon. Avoidance of bellwethers could also make settlement on an individual basis more attractive, and effectively pre-empt litigation of select claims tried merely to engender billion-dollar mass settlements. These are all considerations corporate in-house counsel must evaluate when facing mass tort litigation.

As corporate litigants continue to face mass tort claims, including remaining opioid claims, hernia mesh claims, glyphosate-related cancer claims, and talc claims alleging ovarian cancer, the merits of and best ways to approach and participate in bellwether schemes must be carefully evaluated and considered. The potential benefits of bellwethers in terms of settlement may provide some cost certainty for litigants, but must be balanced against the utility of a trial on the merits of one or more bellwether claims sufficient to stave off future lawsuits or resolve potential claims both domestic and international. In-house corporate officers must work closely with outside counsel to assess the universality of claims brought by various types of litigants, and determine the best way to approach courts in the MDL setting with respect to categorizing cases and identifying how bellwether litigation should proceed. The opioid cases discussed above provide concrete examples of the benefits and challenges of both explicit and implicit bellwethers and the organization and results of each serve to inform both in-house and outside counsel on best practices in comparable mass tort cases.

[54] *BMS*, 137 S. Ct. 1773 (2017).