

FROM BOTH SIDES NOW: ADDITIONAL PERSPECTIVES ON “UNCOVERING DISCOVERY”

Amy Schulman and Sheila Birnbaum

At the discovery stage of federal litigation, the bedrock goals of “just, speedy, and inexpensive”¹ do not constitute a peaceful triumvirate. Often perceptions of what constitutes a proper balance of these goals depend on whether one is requesting discovery or responding to it, and on whether one is the plaintiff or the defendant.

The article, *Uncovering Discovery*,² proposes ways in which the federal court discovery process can best promote the policies articulated in Rule 1 of the Federal Rules of Civil Procedure. Levying a valid criticism, namely, that too many resources are wasted on the conduct of discovery, the author urges instead that more time be spent evaluating the merits of the underlying claims and defenses. The fixes proposed by *Uncovering Discovery*, however, may actually be inconsistent with the goal of reducing needless discovery – especially when applied in mass tort litigation. Particularly troubling are the presumptions that defendants game the system by using discovery to avoid the daylight of trials and that the only cost to defendants of doing so is an economic one. In fact, defendants want more emphasis and time spent by courts on evaluating the merits of the underlying claims and defenses, including trials on the merits.

To promote the “just, speedy, and inexpensive” values of Fed. R. Civ. P. 1, two words should be added to *Uncovering Discovery*’s broad policy statement for balance: It is necessary “to safeguard the litigation process itself, by ensuring that litigants are burdened primarily with the burden of proof on the substantive merits, not high costs or untenable delays that serve as

¹ Fed. R. Civ. P. 1.

² Elizabeth Cabraser, *Uncovering Discovery*, Draft (forthcoming 2010).

arbitrary barriers, barring worthy claims [*or defenses.*]³ These critical two words support a plethora of new, legitimate considerations, and the central purpose of this Response is to offer some perspectives from the “other side of the ‘v’.”⁴

Discovery and trials would be more efficient and fair if they were tethered to a specific plaintiff’s particular claims – claims that are subject to the strictures of fact pleadings. Discovery can then be targeted in such a way that controls costs and limits the length of the overall process. Judicial management is necessary to circumscribe discovery so that it focuses on defendant’s acts and conduct having a direct relationship to an individual plaintiff’s claim. For example, courts should not permit wide-ranging discovery without making a threshold assessment that the discovery is likely to lead to admissible relevant information. This requires that there be some assessment of its relationship to the plaintiff and her claims. Limiting discovery and trial to conduct related to the specifics of the plaintiff’s claims is evenhanded and fair to both sides,

Active judicial involvement, whether through exercising the gatekeeping function that requires that scientific and technical evidence be reliable or through insisting that plaintiffs have case specific experts connecting the defendant’s alleged wrongdoing to the plaintiffs’ claims, helps ensure that mass tort gamesmanship does not distort the truth-finding process. *Uncovering Discovery* effectively highlights that the discovery paradigm does not always help uncover the truth about whether there is a wrong for which an entity or individual is legally entitled to compensation, and that one way to advance that objective may be through adopting rules and practices that disincentivize the use of unfair discovery tactics to achieve strategic advantages.⁵

³ Cabraser, *supra* note 2 (manuscript at 3).

⁴ Cabraser, *supra* note 2 (manuscript at 5).

⁵ See, e.g., *infra* at II.D. (discussing how cost-shifting creates a disincentive to overlybroad, costly discovery).

This short piece will focus on mass tort proceedings. In this context, plaintiffs typically demand that defendants be subject to broad, costly discovery, while staunchly resisting disclosure of *any* facts regarding massive numbers of individual plaintiffs – or any claimants other than the small number of hand-picked individuals upon whom plaintiffs’ counsel wish to focus all attention. Plaintiffs’ strategy in most mass tort cases is clear: uncover the worst documents, secure some high verdicts early on, and force the defendants to settle the mass of cases, regardless of their individual merits. This strategy has worked successfully for plaintiffs in many mass torts, but it is unfair, overpays many meritless cases, and underpays cases that may have significant merit. Trials should and can be informative if the playing field is even, but this requires targeted discovery on both sides, a fair methodology for selecting the cases to be tried, and rules for ensuring that the trials are conducted in a fair and impartial way. In addition, if the courts impose certain threshold requirements for instituting mass torts to prevent clogging court dockets with the filings of huge inventories of cases, costs will be reduced, delay will be avoided, and meritorious claims will be handled more efficiently and fairly.

Conducting discovery with such rules and limitations does not constitute “attrition tactics”;⁶ it recognizes the basic principles that not all wrongs constitute compensable injuries and that discovery is used to find information not to harass the opposing party. Many of these issues are not explored in *Uncovering Discovery*. This Paper sets forth discovery proposals and “best practices” aimed at curtailing the abuses of the discovery process and, in the mass tort area, eliciting information useful in distinguishing meritorious cases, claims, and defenses from those that are not.

⁶ Cabraser, *supra* note 2 (manuscript at 1).

**I. BEST PRACTICES FOR INCREASING EFFICIENCY IN MASS TORTS
DISCOVERY WHILE MAINTAINING THE INTEGRITY AND
FAIRNESS OF THE DISCOVERY PROCESS**

Reaching the substantive merits⁷ of individual claims – whether through settlement, jury verdict, or otherwise – should be the ultimate goal in every lawsuit, and each stage, including discovery, should be tailored to achieve that goal. When courts are faced with a mass of plaintiffs, a necessary step toward either litigated or negotiated resolution requires developing methods to differentiate and categorize individual cases. Inquiries about individual claims in a mass tort proceeding should occur in order for the courts and the parties to understand the merits of all of the pending cases.

A. FACT-BASED PLEADINGS: MORE THAN JUST RULE 12(b)(6)

For several reasons, rules that encourage fact-based pleadings – *i.e.*, pleadings with enough factual detail to adequately “notify the opposing party and the court of the factual and legal basis of the pleader’s claims or defenses”⁸ – are highly effective in controlling discovery costs. They both deter and expose the filing of non-meritorious “junk” claims that do not warrant discovery at all. Fact-based pleadings impose a discipline of presenting a more complete, more definite picture of what the litigation is really about, allowing the parties (and the court) to more intelligently tailor discovery to explore the real issues in the case. There has been a great deal of debate – much of which involves issues beyond the scope of this article – regarding the standards of Rule 12(b)(6).⁹ Perhaps too much attention has been placed on the narrow question

⁷ Cabraser, *supra* note 2 (manuscript at 3).

⁸ Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, Final Report, at 5 (Mar. 11, 2009) (hereinafter “ACTL/IAALS Report”), *available at* www.actl.com.

⁹ Following the Supreme Court’s articulations of a “plausibility” standard in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), there has been a movement to overturn these rulings by statute. Bills pending in the House and Senate

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of what level of pleading should be required to overcome a motion to dismiss. The current debate has overlooked the fact that requiring greater pleading detail can contribute to substantial discovery cost savings.

In assessing the adequacy of a complaint, the question should not be simply whether a plaintiff has set forth enough information to state a claim, but whether a plaintiff has presented allegations with sufficient detail to justify the discovery requested. A bare-bones complaint should warrant less discovery, not more. Federal Rule of Civil Procedure 26 allows for precisely such a cost-benefit analysis. For example, this key discovery rule provides that “the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit” in light of several considerations.¹⁰

Unless the pleadings are sufficiently detailed to provide some facial justification for venturing into a particular area, discovery should be limited accordingly. When a plaintiff demands extensive and sweeping discovery of a defendant, the court should consider whether the plaintiff’s complaint provided a sufficient and fair representation of the known facts from which the defendant and the court can ascertain at least a basic understanding of the narrative underlying the claims and assess the true discovery needs. Where a complaint lacks fundamental information, broad discovery with regard to particular issues that have not been fleshed out may not be appropriate. For example, plaintiffs, who summarily plead that a particular product caused them some injury without providing any details about the use of the product or context in

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Judiciary Committees, the Open Access to Courts Act of 2009 (H.R. 4115) and the Notice Pleading Restoration Act of 2009 (S. 1504), aim to reverse the effects of the *Twombly* and *Iqbal* decisions.

¹⁰ Fed. R. Civ. P. 26(b)(2)(C)(iii).

which the injury is claimed to have occurred, should not be automatically permitted to force a defendant to turn over all marketing plans, call notes, or other documents that have no relationship or nexus to an individual claimant and her injury.

The March 11, 2009, report from the Institute for the Advancement of the American Legal System Task Force on Discovery and the American College of Trial Lawyers endorses a fact-based pleading approach. As this report noted, one of the problems with the existing rules structure is that it “does not always lead to early identification of the contested issues to be litigated.”¹¹ As such, the report recommends that “[p]leadings should notify the opposing party and the court of the factual and legal basis of the pleader’s claims or defenses in order to define the issues of fact and law to be adjudicated.”¹² Furthermore, it recommends that pleadings “should give the court sufficient information to control and supervise the progress of the case to trial or other resolution.”¹³ These recommendations highlight a key way in which courts may expedite discovery and render it more efficient for both parties.

B. FACT SHEETS AND OTHER THRESHOLD DISCOVERY TOOLS

Another discovery tool that has been utilized in mass tort proceedings is the individual plaintiff fact sheet as part of the initial discovery process.¹⁴ Fact sheets should – and often are – collected contemporaneously with medical and employment records, which together may provide a relatively clear and objective snapshot of the merits underlying each claim.

¹¹ ACTL/IAALS Report, at 2-3.

¹² *Id.* at 6.

¹³ *Id.*

¹⁴ For a related discussion of this same topic in a different context, see John H. Beisner & Jessica D. Miller, *Litigate the Torts, Not the Mass: A Modest Proposal for Reforming How Mass Torts Are Adjudicated*, Washington Legal Foundation, at 17-19 (2009).

Significantly, for purposes of this discussion, fact sheets recognize that a plaintiff should have a cognizable basis for pursuing a claim prior to initiating a lawsuit.

Fact sheets are to be answered as though they are standard discovery – i.e., plaintiffs answer the forms under penalty of perjury to ensure that useful and truthful information is collected. If used properly, fact sheets not only aid the parties in categorizing and organizing plaintiffs within a mass of cases, they may reveal new common issues associated with large groups of similarly situated plaintiffs.¹⁵ Importantly, defendants should be judicious in seeking truly relevant data. For example, in the Celebrex/Bextra litigation, the plaintiffs’ steering committee and defense were able to collaborate in developing a reasonable and uniform fact sheet, in which only certain relevant items were discoverable.

In order for discovery tools like fact sheets and the collection of medical records to be effective, judges must actively exercise their case-management authority to rigorously enforce challenges to completeness and truthfulness. As several courts have recognized, failure to diligently complete fact sheets constitutes adequate grounds for imposing dismissal as a sanction, especially in light of special concerns arising from the “large number of cases that must be coordinated”¹⁶ in the mass tort context.¹⁷

¹⁵ See, e.g., Stephen J. Carroll, Lloyd Dixon, James M. Anderson, Thor Hogan, & Elizabeth M. Sloss, *The Abuse of Medical Diagnostic Practices in Mass Litigation*, Rand Institute for Civil Justice, at 8 (2009) (noting that, in the Silica litigation, “the fact sheets showed that, in almost all the cases, the plaintiff’s claim was not based on diagnosis provided by the plaintiff’s treating physician but rather by doctors affiliated with a handful of law firms and mobile x-ray screening companies”).

¹⁶ *In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1222 (9th Cir. 2006) (citing 28 U.S.C. § 1407); see also *In re: Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2008) (“MDL courts must be given greater discretion to organize, coordinate and adjudicate its proceedings, including the dismissal of cases for failure to comply with its orders.”); *In re: Fosamax Prods. Liab. Litig.*, No. 1:08-cv-04901-JFK, 2009 WL 105502 (S.D.N.Y. Jan. 12, 2009); *In re: Rezulin Prods. Liab. Litig.*, No. 03-cv-1756, 2004 WL 1700618 (S.D.N.Y. July 27, 2004).

¹⁷ The policy weighing in favor of dismissal for non-compliance with discovery orders, such as those requiring submission of facts sheets, in multi-district complex litigation not only protects the rights of defendants, who must investigate the claims of numerous plaintiffs in a short timeframe, but it also protects the rights of other
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C. *LONE PINE ORDERS*

Another court-developed tool for managing a number of claims, promoting efficient access to relevant information, and reducing costs is the *Lone Pine* order. This technique requires a plaintiff to submit an affidavit from an independent physician to support his or her specific causation theory.¹⁸ “The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims and streamline litigation in complex cases involving numerous claimants”¹⁹

Lone Pine orders are being employed with increasing frequency in mass tort proceedings. The rise of *Lone Pine* orders as a case management tool has been accompanied by some criticism from the plaintiffs’ bar. In particular, some plaintiffs’ counsel have characterized such orders as being tantamount to a “premature” summary judgment motions coming before the opportunity for full discovery. The concerns seem misplaced when one considers that the only evidence needed to satisfy a *Lone Pine* order is entirely within plaintiffs’ control and should have been collected prior to the filing of the complaint. In this respect, plaintiffs’ resistance to providing the basic information required by *Lone Pine* orders should be considered a form of what *Uncovering Discovery* calls “discovery resistance.”²⁰

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plaintiffs, who have complied with the discovery orders, by preventing the finite resources of the MDL court from being “unfairly divert[ed] . . . away from their timely claims to that of the” uncooperative and non-diligent plaintiff. *In re: Guidant Corp.*, 460 F.3d at 867; *see also* 28 U.S.C. § 1407(a) (indicating that the goal of the multidistrict litigation process is to “promote the just and efficient conduct” of “civil actions involving one or more common questions of fact” that are pending in different districts).

¹⁸ *See generally* Beisner, *supra* note 14, at 19-23.

¹⁹ *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at *2 (S.D. Ohio Jan. 30, 2007).

²⁰ Cabraser, *supra* note 2 (manuscript at 1).

In fact, some courts have reasoned that *Lone Pine* orders flow from the mandates of Rule 11 – *i.e.*, that the basic allegations underlying any claim must be investigated and verified *before* the suit is filed.²¹ This makes sense when considering that all that is required is “information which plaintiffs should have obtained before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3).”²² To the extent that plaintiffs are already afforded significant leeway in pleading, requiring them to establish compliance with Rule 11 – by producing minimal evidence that is entirely within their control – is only fair. For example, a plaintiff may be ordered to produce “some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries.”²³ Basically, *Lone Pine* orders satisfy a need to fill in the gaps that are often created by plaintiffs’ failure to draft complaints with adequate factual detail.²⁴

The burden on individual plaintiffs is *de minimus* because the evidence necessary to satisfy *Lone Pine* orders should have already been collected *prior* to the filing of the complaint. After all, plaintiff’s counsel was ethically required to explore this aspect of their client’s claims before any pleadings were filed. As one court has noted, “[s]urely if Plaintiffs’ counsel believe that such claims have merit, they must have some basis for that belief”²⁵

Lone Pine orders have proven particularly effective when employed along with other case-management techniques. For example, in the *Baycol* MDL, the court required that plaintiff-

²¹ *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 341 (5th Cir. 2000).

²² *Id.* at 340.

²³ *Id.*

²⁴ *See supra* at II.A.

²⁵ *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008).

specific expert reports be filed along with plaintiff's fact sheets.²⁶ Even state legislatures have enacted statutory *Lone Pine*-type techniques in reaction to past abuses.²⁷ Of note, Texas requires plaintiffs to submit a report of a physician who examined the plaintiff, reviewed the plaintiff's occupational and medical history, and concluded that the illness is "not more probably the result of causes other than silica exposure revealed by the exposed person's occupational exposure, medical, and smoking history" before filing a claim for injuries related to silica.²⁸ Similarly, in the ongoing welding fume litigation, *In re Welding Fume Products Liability Litigation*, the court presiding over the federal MDL proceeding required all claimants to submit a formal "Notice of Diagnosis" certifying that the plaintiff has been diagnosed with a condition allegedly caused by exposure to welding fumes.²⁹ That requirement alone has cut the number of pending cases in half. Later, the court randomly selected subsets of 100 cases for collection of medical records.³⁰ After each selected plaintiff's medical records were collected, counsel was to interview the claimant and either certify that he intended to proceed to trial with the case, move to dismiss it, or withdraw his representation. This second step resulted in dismissal of even more cases. Of

²⁶ *In re Baycol Prods. Liab. Litig.*, Pretrial Order No. 149, MDL No. 1431 (D. Minn. Oct. 31, 2006).

²⁷ In the *Silica* litigation, thousands of silicosis lawsuits based on diagnoses from screenings run by plaintiffs' attorneys were found to be fraudulent and "manufactured for money." See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005). As the federal judge overseeing that litigation noted, medical screenings are presently "about litigation rather than health care," and the diagnoses at these screenings are "driven by neither health nor justice: they [are] manufactured for money." *Id.*

²⁸ TEX. CIV. PRAC. & REM. § 90.004.

²⁹ See *In re Welding Fume Prods. Liab. Litig.*, Case Admin. Order at 4-5, No. 1:03-CV-17000 (N.D. Ohio Mar. 31, 2006).

³⁰ See *id.* at 11-12.

the first 179 cases selected for medical records discovery, 135 were dismissed.³¹ These techniques resulted in substantial cost savings associated with both discovery and litigation.

D. COST SHIFTING: AN INCENTIVE TO CONDUCT ECONOMICALLY-PRUDENT DISCOVERY

Other steps that courts have taken to control discovery costs are orders that in appropriate circumstances shift costs, in whole or in part, from the producing party to the requesting party. Although a deviation from the general rule that parties bear the cost of their own compliance with production requests, cost-shifting is appropriate – though generally underutilized – in cases in which the costs of producing materials seem to outweigh their likely value to the litigation. In such situations, courts that are disinclined to preclude a party’s discovery request outright may simply require that the requesting party put its money where its mouth is. Cost-shifting, or even the availability of cost-shifting, is a practical and effective way to focus requests for discovery more narrowly so that parties seek only what is truly expected to result in materials relevant to the disputed issues, rather than making broad, expensive requests in the hopes of uncovering some marginally relevant information.³² In essence, it forces the parties to consider the economic consequences of their actions.³³

³¹ See *In re Welding Fume Prods. Liab. Litig.*, “First 100” Case Order at 2-3, No. 1:03-CV-17000 (N.D. Ohio Aug. 28, 2006); see also Beisner, *supra* note 14, at 23.

³² See, e.g., *In re Fosamax Prod. Liab. Litigation*, No. 1:06-md-1789, 2008 WL 2345877, at *11 (S.D.N.Y. June 5, 2008) (observing that cost-shifting creates “an incentive for plaintiffs to narrow their requests to focus on the documents they really want”); *Cognex Corp. v. Electro Scientific Indus., Inc.*, No. Civ.A 01CV10287RCL, 2002 WL 32309413, at *3 n.1 (D. Mass. July 2, 2002) (“It has also been argued that cost-shifting . . . serves an important purpose of counterbalancing the tendency to ask for more discovery material than economic efficiency would justify because the cost of producing is not being borne by the party making the request.”); MANUAL FOR COMPLEX LITIGATION (Fourth) § 11.433 (2004) (observing that “the court’s authority to shift costs will give the parties an incentive to use cost-effective means of obtaining information and a disincentive to engage in wasteful and costly discovery activity.”).

³³ See *Laethem Equip. Co. v. Deere & Co.*, 261 F.R.D. 127, 146 (E.D. Mich. 2009) (observing that that the most “practical way to curb” a party’s tendency toward excess in discovery “is to require the party seeking discovery to pay for the cost of finding and producing it”).

While the words “cost-shifting” do not actually appear in the Federal Rules of Civil Procedure, this well-recognized power is derived from a trial court’s authority under Rule 26 to impose conditions on discovery when it becomes burdensome. Those potential conditions include shifting the cost of production to the requesting party.³⁴ The recent e-discovery amendments provide some guidance with regard to when cost-shifting is appropriate for expensive production of electronically-stored information that is difficult to access.³⁵ As amended, Federal Rule of Civil Procedure 26(b)(2)(B) now states that if electronically-stored “information is not reasonably accessible because of undue burden or cost” the requesting party must establish “good cause” for production and, even then, the court “may specify conditions” including cost-shifting.³⁶ This is basically a burden-shifting test: Where the producing party demonstrates undue burdens and costs “required to search for, retrieve, and produce” the responsive documents, such documents are presumptively not discoverable and the burden shifts to the requesting party to show “good cause” for production.³⁷ To aid the Court in making this determination, the advisory committee included notes to this amendment articulating seven factors to be considered, all of which relate to the costs and benefits of discovery.³⁸ In addition

³⁴ See Fed. R. Civ. P. 26(b)(2)(B) advisory committee’s note (2006 Amendments) (“The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.”); see also The Sedona Principles, Best Practices Recommendations & Principles for Addressing Electronic Document Production, at 206 (2d ed. 2007 Annotated Version) (“[C]ost-sharing and cost-shifting remains separately available under Rule 26(b)(2)(C) and Rule 26(c) [the protective order provision].”).

³⁵ Fed. R. Civ. P. (b)(2)(B).

³⁶ Fed. R. Civ. P. 26(b)(2)(B); see also Fed. R. Civ. P. 26(c) (providing that the district court may issue an order to protect a party from “undue burden or expense” in discovery); Fed. R. Civ. P. 26(b)(2)(B) advisory committee’s note (2006 Amendments) (“The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery.”).

³⁷ See Fed. R. Civ. P. 26(b)(2)(B) advisory committee’s note (2006 Amendments) (“The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information.”).

to the provisions specifically related to electronically stored information, cost-shifting may also be available under the generally-applicable standard articulated in Rule 26(b)(2)(C) where “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive” and “the burden or expense of the proposed discovery outweighs its likely benefit.”³⁹

Several courts have recognized the benefits of cost-shifting where parties begin to treat discovery as a blank check to obtain all theoretically relevant materials from a party, regardless of the costs. Cost-shifting has been found effective as a “practical way to curb” parties’ tendencies toward excess in discovery.⁴⁰ And cost-shifting has been endorsed by the Manual for Complex Litigation as a means of “giv[ing] . . . parties an incentive to use cost-effective means of obtaining information and a disincentive to engage in wasteful and costly discovery activity.”⁴¹

In practice, courts have taken various approaches to cost-shifting. In some instances, cost-shifting is not applied in the early stages of discovery, but may be imposed after parties

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³⁸ These factors are as follows:

(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.

Fed. R. Civ. P. 26(b)(2)(B) advisory committee’s note (2006 Amendments). Furthermore, Rule 26(b)(2)(B) specifically references in Rule 26(b)(2)(C) as the touchstone for whether there is “good cause.” Additionally, many of the cost-benefit considerations are incorporated in the seven factors enumerated by the advisory committee, and the same seven factors seem to be likewise relevant in determining whether discovery “must” be limited under the proportionality requirement at Rule 26(b)(2)(C).

³⁹ See also Fed. R. Civ. P. 26(b)(1) (“All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”).

⁴⁰ *Laethem Equip.*, 261 F.R.D. at 146.

⁴¹ MANUAL FOR COMPLEX LITIGATION (Fourth) § 11.433 (2009).

begin to seek information that would be substantially cumulative of materials already produced.⁴² Furthermore, the advisory committee notes suggest that a “sampling of the sources” – to determine their propensity for containing relevant information – may also provide the court with guidance to determine whether cost-shifting is appropriate.⁴³ In multidistrict litigation involving multiple cases at various stages of discovery, this may mean that MDL courts can apply lessons learned in earlier cases to other cases that subsequently make their way through the discovery pipeline. Courts have significant leeway in crafting appropriate rules and conditions.

E. DAUBERT MOTIONS: CREATING STANDARDS AND CATEGORIZING CLAIMS

Daubert hearings may eliminate claims that will lack the requisite evidentiary support at trial – thereby curtailing unnecessary discovery and trial. In addition to distinguishing between plaintiffs, *Daubert* principles can be utilized to pinpoint what, if any, theories of causation are viable, thereby winnowing both discovery and trial. Similarly, *Daubert* hearings can limit the disputed issues, which may mean that the merits of individual claims can be tested before trial by summary judgment.⁴⁴

Consider the example of *In re PPA*,⁴⁵ which *Uncovering Discovery* also discusses favorably. Phenylpropanolamine (“PPA”) was a substance contained in many decongestant and

⁴² See, e.g., *Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 3446761, at *5 (D.N.J. Oct. 20, 2009) (“Given the resources already spent by the parties, and the Court’s finding that the requested e-mails are likely to be cumulative of other available evidence, the expenditure of another \$100,000 is not justified.”); *Murphy Oil U.S.A., Inc. v. Fluor Daniel, Inc.*, No. Civ.A. 99-3564, 2002 WL 246439, at *5 (E.D. La. Feb. 19, 2002) (determining that “the marginal value of searching the e-mail is modest at best” and weighing in favor of cost-shifting because “Murphy has not pointed to any evidence that shows that ‘the emails are likely to be a gold mine’” (citations omitted)).

⁴³ Fed. R. Civ. P. 26(b)(2)(B) advisory committee’s note (2006 Amendments).

⁴⁴ See, e.g., *Dyson v. Am. Home Prods. Corp.*, No. 2-cv-893 (W.D. Wash. Dec. 7, 2005).

⁴⁵ 289 F. Supp. 2d 1230 (W.D. Wash. 2003).

weight-control products until reports surfaced about a potential connection to hemorrhagic stroke. The numerous lawsuits that followed were consolidated for pretrial discovery in the United States District Court for the Western District of Washington before Judge Barbara Jacobs Rothstein.⁴⁶ The various plaintiffs in the MDL⁴⁷ asserted a wide variety of injuries, including hemorrhagic stroke, ischemic stroke, cardiac injuries, seizures, and psychoses. From the beginning of the MDL litigation, which comprised more than 3300 actions,⁴⁸ Judge Rothstein took an active role in moving the litigation forward through case management orders.⁴⁹ At a relatively early stage in the litigation, she held a *Daubert* hearing that involved “several days of live testimony and argument”⁵⁰ and addressed about fourteen general causation experts. Following these hearings, the Court issued detailed rulings, which would prove to be a positive step toward focusing the course of this potentially unwieldy, complex litigation and facilitating meaningful settlement.⁵¹

First, the court made multiple rulings that foreclosed several categories of unsupportable claims. In particular, the court found “insufficient basis to support expert testimony as to injuries occurring more than three days after ingestion of PPA.”⁵² It also ruled that there was no scientific basis to conclude that PPA had any connection to seizures, psychoses, or cardiac

⁴⁶ *In re Phenylpropanolamine (PPA) Prods. Liab. Litig. No. 1407*, 173 F. Supp. 2d 1377 (J.P.M.L. 2001).

⁴⁷ There were also numerous cases consolidated in state courts in New Jersey, Pennsylvania, California, Texas, and New York. (PPA Settlement Agreement, at § 2.10(a), p. 22.)

⁴⁸ *In re Phenylpropanolamine (PPA) Prods. Liab. Litig. No. 1407*, 460 F.3d 1217, 1223 n.3 (9th Cir. 2006).

⁴⁹ *In re PPA*, 460 F.3d at 1223.

⁵⁰ *In re Phenylpropanolamine (PPA) Prods. Liab. Litig. No. 1407*, 227 F.R.D. 553, 556 n.2 (W.D. Wash. 2004).

⁵¹ *In re Phenylpropanolamine (PPA) Prods. Liab. Litig. No. 1407*, 289 F. Supp. 2d 1230, 1238 (W.D. Wash. 2003).

⁵² *In re PPA*, 289 F. Supp. 2d at 1238.

injuries.⁵³ As such, the court isolated several subgroups of plaintiffs that had insufficient evidence to proceed. Second, the MDL court determined that expert testimony connecting PPA to hemorrhagic stroke in women between the ages of eighteen and forty-nine would be admissible. Third, the court addressed the causation evidence with regard to other “sub-populations” – *i.e.*, any plaintiff who was not a woman between the ages of eighteen and forty-nine – and found it to be less reliable, though admissible.⁵⁴ Finally, while the court held that the scientific evidence showing a connection between ischemic stroke⁵⁵ and PPA met the minimum standards for admissibility, it noted that many of the criticisms levied by the defendants were valid. The court made clear that, even though both types of scientific evidence were admissible, “the purported PPA-ischemic stroke association poses a far more difficult question under *Daubert* than that presented by hemorrhagic stroke.”⁵⁶ In essence, the court recognized that plaintiffs, who alleged ischemic as opposed to hemorrhagic stroke, were less likely to recover.

Judge Rothstein’s *Daubert* rulings in the preliminary stages of the PPA litigation were highly constructive in advancing the case, identifying key issues, and avoiding unnecessary discovery costs. The court not only eliminated certain categories of unsustainable claims at a sufficiently early stage to result in substantial cost savings,⁵⁷ it also provided detailed rulings as

⁵³ *Id.* at 1238, 1251.

⁵⁴ *Id.* at 1245-46.

⁵⁵ The difference between ischemic and hemorrhagic stroke is significant. Ischemic stroke involves a loss of blood to the brain, which is commonly caused by some sort of obstruction of a blood vessel. Hemorrhagic stroke, on the other hand, generally refers to the accumulation of blood within the skull. To think about the distinction in watered-down terms, a hemorrhagic stroke means the brain has too much blood, but an ischemic stroke means the brain is not getting enough blood. A vast majority of strokes fall into the ischemic category.

⁵⁶ *Id.* at 1249.

⁵⁷ *See, e.g., Grover v. Bayer*, No. C03-388 (W.D. Wash. Jan. 10, 2006) (dismissing claim partially because plaintiff was “unable to establish that he . . . ingested a PPA-containing product manufactured by defendants within 72 hours of his alleged injury”); *Dyson v. Am. Home Prods. Corp.*, No. 2-cv-893 (W.D. Wash. Dec. 7, (cont’d)

to the scientific evidence, which aided the parties in sorting through the mass of cases, provided early guidance as to the merits of the remaining claims, and ultimately facilitated settlement. In particular, the court's commentary distinguishing the quality and reliability of the scientific evidence associated with hemorrhagic stroke from that associated with ischemic stroke, was more than a mere academic exercise; it turned out to have very significant practical (and monetary) consequences. In 2004, the PPA litigation resulted in settlement agreements with some of the major PPA manufactures. The settlement agreement provided a method to score the plaintiffs' claims based on various factors, including the nature, timing, and severity of the claimed injury.⁵⁸ The settlement took into account the MDL court's *Daubert* rulings as to the scientific evidence that supported different types of claims. For instance, a plaintiff who suffered an ischemic stroke would have her gross compensation reduced 15% compared to a plaintiff who suffered a hemorrhagic stroke.⁵⁹ This reduction was explicitly based on the "court's *Daubert* ruling that proof of purported PPA-ischemic stroke association poses more difficult questions under *Daubert* than are presented by proving a link between PPA and hemorrhagic stroke."⁶⁰ In other words, the *Daubert* rulings established by Judge Rothstein were highly relevant in evaluating the merits (or value) of the claims – so much so that they were incorporated into the settlement.⁶¹ It is clear that judicial guidance on *Daubert* issues in the preliminary stages of

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2005) (granting summary judgment for PPA manufacturer because plaintiff "did not ingest a PPA-containing product manufactured by Wyeth within seventy-two hours of her alleged stroke").

⁵⁸ PPA Settlement Agreement, at § 2.10(a), p. 22.

⁵⁹ Delco Trust Scoring System, at VII., p. 20.

⁶⁰ *In re PPA*, 227 F.R.D. at 557 n.4.

⁶¹ To illustrate the practical impact of the *Daubert* ruling in monetary terms, a twenty-year-old plaintiff who suffered a Level VI ischemic stroke would receive \$750,000 less than if she had suffered a hemorrhagic stroke. Over a class of plaintiffs, this adjustment based on *Daubert* findings undoubtedly had a significant impact,
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litigation may promote well-informed settlement,⁶² ultimately resulting in a reduction of discovery and litigation costs in mass tort litigation for all parties.

Another instance in which the *Daubert* process served as an effective case management tool was *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*⁶³ This case involved a multidistrict litigation proceeding coordinating more than 3,000 personal injury suits against a drug manufacturer alleging health risks – specifically heart attack and stroke – purportedly associated with one of its products, Celebrex.⁶⁴ The presiding judge, Charles R. Breyer, held three days of hearings, conducted jointly with the presiding justice over similar cases in New York state court,⁶⁵ regarding *Daubert* challenges to the experts used to support various aspects of the parties’ claims and defenses – mostly as to general causation evidence.⁶⁶ The parties vigorously disputed whether reliable evidence could connect certain doses of Celebrex to the alleged increased health risks.⁶⁷ Initially, the court found that “dose matters” and used the example that “even water can be harmful if consumed at certain amounts even though

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especially considering that, in the general population, ischemic stroke is far more common than hemorrhagic stroke. If that same plaintiff had suffered a cardiac injury (for which the court found no scientific basis in the *Daubert* ruling), she would have only received \$2,000, regardless of the severity of her injury.

⁶² See *In re PPA*, 227 F.R.D. at 558 (noting that “[t]he Settlement has an impressively high participation rate”).

⁶³ 524 F. Supp. 2d 1166 (N.D. Cal. 2007).

⁶⁴ *Id.* at 1169.

⁶⁵ Justice Shirley W. Kornreich in New York state court resolved a motion to dismiss the nonresident Celebrex and Bextra plaintiffs in state court by cooperating with the federal MDL court and the attorneys to handle all of the New York pending cases east of the Mississippi River, including Louisiana and Minnesota, while the federal MDL coordinating judge would handle all of the New York cases west of the Mississippi River. See *Matter of New York Bextra & Celebrex Prods. Liab. Litig.*, No. 560001/2005 (N.Y. Sup. Ct. Aug. 2, 2006) (Kornreich, J.)

⁶⁶ *In re Bextra & Celebrex*, 524 F. Supp. 2d at 1169.

⁶⁷ *Id.* at 1170.

there is no harm at smaller amounts.”⁶⁸ The court held that there was no admissible evidence that established a “statistically significant association between Celebrex 200 mg/d and the risk of strokes or heart attacks.”⁶⁹ The *Daubert* rulings proved invaluable in defining the parameters for evaluating individual claims within the mass of cases filed in both state and federal court.

Recently, in *Am. Honda Motor Co. v. Allen*,⁷⁰ the Seventh Circuit recognized the need for conducting a *Daubert* analysis “at [an] early stage of the proceedings”⁷¹ in the class certification context.⁷² It held that a *Daubert* analysis must come before class certification when warranted, and that the trial court’s failure to do so constituted an abuse of discretion.⁷³ The *Allen* court explained its holding as follows:

[W]hen an expert’s report or testimony is critical to class certification, . . . a district court must conclusively rule on any challenge to the expert’s qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants. . . . The court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.⁷⁴

⁶⁸ *Id.* at 1174, 1180.

⁶⁹ *Id.* at 1180-81.

⁷⁰ ___ F.3d ___, No. 09-8051, 2010 WL 1332781 (7th Cir. Apr. 7, 2010)

⁷¹ *Id.* at *6 (quoting *Allen v. Am. Honda Motor Co.*, 264 F.R.D. 412, 425 (N.D. Ill. 2009)).

⁷² *Allen* involved a proposed class of plaintiffs who purchased “Honda’s Gold Wing GL1800 motorcycle; they allege[d] that the motorcycle ha[d] a design defect that prevent[ed] the adequate dampening of ‘wobble,’ that is, side-to-side oscillation of the front steering assembly about the steering axis. In other words, they claim[ed] that the defect [made] the steering assembly shake excessively and they want[ed] Honda to fix the problem.” *Id.* at *1.

⁷³ *Id.* at *3.

⁷⁴ *Id.* (citing *Allen*, 264 F.R.D. at 420).

The *Allen* court held that the trial court had abused its discretion by deferring its ruling on the *Daubert* issues because the case was still in its early stages.⁷⁵ While this ruling was specifically directed at the class certification stage, the underlying principles apply equally in the mass tort context: “[E]xpert testimony that is not scientifically reliable should not be admitted, even ‘at [an] early stage of the proceedings,’”⁷⁶ and the sooner that unreliable experts can be removed from the litigation, the less costly it will be for both parties.

As these cases illustrate, early *Daubert* hearings regarding issues of general causation facilitate the development of litigation-specific factual standards that can be applied to differentiate among the claims of a mass of plaintiffs. Given that a single ruling may expose a lack of foundation in hundreds of claims, the potential time and cost savings are enormous and well-worth the effort.

F. RANDOM SELECTION: THE KEY FOR “FULL DISCOVERY” AND BELLWETHER TRIAL CASES

Another way to streamline discovery (and thereby reduce overall costs) in mass tort cases is to subject a group of claimants in the mass tort pool to more intensive discovery – basically a full case work-up for trial – with the expectation that single-plaintiff bellwether trials⁷⁷ for a subset of cases in the sample will follow.⁷⁸ Although the judgment has no legally-binding effect

⁷⁵ *Id.*

⁷⁶ *Id.* at *6.

⁷⁷ Judgments in bellwether trials are not intended to have a binding effect on other cases. However, they should be designed to give both sides a sense of how their cases will be adjudicated and to help inform any settlement discussions. Bellwether trials are important in resolving mass torts, allowing courts and parties to gain a better understanding of the litigation by trying representative cases early in the life of a mass tort. Bellwether trials show the strengths and weaknesses of the various kinds of claims in the pool; streamline future trials through precedents set by early rulings on *Daubert* motions, motions in limine, and other pretrial motions; and provide guidance on the “value” of the various kinds of cases in the pool for potential settlement negotiations.

⁷⁸ MANUAL FOR COMPLEX LITIGATION (Fourth) § 22.81 (2004).

on other cases,⁷⁹ this use of bellwether cases can be effective in mitigating discovery costs by avoiding duplicative and redundant discovery efforts.

When using this case-management technique, however, courts must recognize that the method of selecting cases for “full discovery” and trials is extremely important. It is critical that the cases chosen for “full discovery” and trial, as a group, be representative of the claims in the overall pool,⁸⁰ something that can be ensured only by using *random* selection.⁸¹ Bellwether trial plaintiffs should be representative of the entire claimant pool or they will not educate courts and parties regarding the law, facts, science, or any other issues likely to recur when litigating individual cases. Only when a “representative . . . range of cases” is selected may “individual trials . . . produce reliable information about other mass tort cases.”⁸²

The selection process for bellwether cases is often a contentious issue in mass tort proceedings. The dispute usually centers on whether the bellwethers should be hand-picked by plaintiffs’ counsel or randomly-selected by the court. The answer should be clear when one considers the purpose for which bellwethers are intended. Bellwether cases that are not broadly representative of the claims in the pool of pending cases will do little to advance the litigation as a whole or reduce costs. Random selection from the entire case pool is the fairest and most efficient method of choosing cases for trial because it eliminates gamesmanship and ensures that

⁷⁹ *Cimino v. Raymark Indus.*, 151 F.3d 297, 319-21 (5th Cir. 1998) (finding the use of binding bellwether trials inconsistent with the Seventh Amendment right to trial by jury).

⁸⁰ *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (holding that the trial court must find that bellwether trials “are representative of the larger group of cases or claims from which they are selected”).

⁸¹ *See generally* Beisner, *supra* note 14, at 23-27.

⁸² MANUAL FOR COMPLEX LITIGATION (Fourth) § 22.315 (2004).

representative cases are chosen.⁸³ A frequent argument posited by plaintiffs' counsel against random selection is that, because they filed the cases, they should control the order in which they are tried. In light of the goal behind the trial of bellwether cases, however, that argument should carry little persuasive weight. By definition, cases cherry-picked by plaintiff attorneys lack representativeness with regard to other cases in the mass of cases, which defeats the purpose of designating bellwether trials and thereby subverts any efficiency gains.

The Manual for Complex Litigation endorses random selection as a means of identifying representative cases. According to the Manual:

If individual trials, sometimes referred to as bellwether trials or test cases, are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases. Some judges permit the plaintiffs and defendants to choose which cases to try initially, but this information may skew the information that is produced. To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases.⁸⁴

Other legal commentators agree that “[f]or a bellwether case to be fair, the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained.”⁸⁵

Several MDL proceedings have embraced random selection methods for identifying test trial candidates. For example, in *In re Baycol Products Litigation*, the court's selection program included all cases filed in the District of Minnesota involving Minnesota residents “plus a

⁸³ See, e.g., *In re Chevron*, 109 F.3d at 1019 (“A bellwether trial designed to achieve its value ascertainment function . . . has as a core element representativeness – that is, the sample must be a randomly selected one.”).

⁸⁴ MANUAL FOR COMPLEX LITIGATION (Fourth) § 22.315 (2004).

⁸⁵ James M. Wood, *The Judicial Coordination of Drug and Device Litigation: A Review and Critique*, 54 FOOD DRUG L.J. 325, 347 (1999).

minimum of 200 additional cases selected at random from all MDL filed cases.”⁸⁶ The MDL court also used random selection in the *In re Norplant Contraceptive Products Liability Litigation*.⁸⁷ And in *In re Prempro*, 15 cases were “randomly dr[awn] from a hat.”⁸⁸

Random selection can also help to filter out the “junk” by separating potentially meritorious cases from meritless or fraudulent ones, another effective way it reduces costs. Costs savings result when these claims are not allowed to hide in the mass of cases without discovery occurring and are subjected to the kind of scrutiny that will encourage counsel to investigate their claims fully and assert only those that are well founded.

In some mass tort litigations, there are clear, objectively-identifiable categories of cases. Test trials may provide very useful information about the viability of a particular group of cases in the claims pool. In the *Prempro* MDL, for example, before drawing the fifteen test trial cases from a hat, the court narrowed the pool of potential trial cases to those plaintiffs meeting a certain set of criteria.⁸⁹ Dividing cases in this way before random selection can help ensure that the bellwether trials are representative of all the types of cases in the proceeding. But such categories must be chosen carefully, and the court must be flexible about their significance to ensure that the cases chosen for bellwether trials are truly representative.

G. FEE SHIFTING AS A SANCTION: PREVENTING DISCOVERY ABUSE BEFORE IT STARTS

⁸⁶ See *In re Baycol Products Litigation*, MDL No. 1431, Pretrial Order No. 89 (D. Minn.).

⁸⁷ MDL No. 1038, 1996 WL 571536, at *1 (E.D. Tex. Aug 13, 1996) (“[f]ollowing random selection of the twenty-five bellwether plaintiffs . . .”).

⁸⁸ Order re Bellwether Trial Selection, *In re Prempro Prods. Liab. Litig.*, MDL No. 1507 (E.D. Ark. June 20, 2005). Courts disinclined to use old-fashioned methods like a hat can make use of websites such as Research Randomizer, www.randomizer.org (last visited June 9, 2008), that provide on-line randomizing services.

⁸⁹ See Order re: Bellwether Trial Selection, *In re Prempro*, MDL No. 1507 (E.D. Ark. June 20, 2005).

While making discovery more efficient is a major step in reducing costs, the greater potential for savings lies in preventing baseless claims from being filed in the first place. One effective way to achieve this goal is through increasing the use of fee-shifting as a sanction.⁹⁰ By requiring plaintiffs' attorneys to reimburse the court's and defendants' costs for cases that should never have been filed, courts can more effectively encourage plaintiffs' attorneys to evaluate the merits of their client's claims before filing them and refuse to proceed with cases that lack merit.

One of the biggest contributors to runaway discovery costs is the proliferation of cases that lack merit. Such cases may include claims brought by individuals who were never exposed to the allegedly defective product or dangerous event, claims by plaintiffs whose injury is faked, and claims by people whose injury was demonstrably caused by something wholly unrelated to the product or substance involved in the litigation. If it were not possible to hide such claims in the bulk of a mass tort, they would never be brought. As the court in the *Silica* MDL noted, attorneys should not be allowed to file thousands of cases and then assert that they filed too many cases to discharge their duty to investigate each one.⁹¹

There are numerous examples of cases in which unnecessary discovery and litigation costs have been imposed on defendants. For example, in *In re Welding Fume Products Liability Litigation*, plaintiffs' counsel ran a massive medico-legal "screening" program seeking potential claimants at union halls and hotels across the country. Thousands of welders subsequently filed claims alleging that the fumes generated during the welding process had caused them neurological injury, but the overwhelming majority of these claimants had never been diagnosed

⁹⁰ See generally Beisner, *supra* note 14, at 27-30.

⁹¹ *Silica*, 398 F. Supp. 2d at 677.

with any neurological condition, let alone a condition caused by exposure to welding fumes. During the MDL court's bellwether trial process, defendants learned – after expending substantial amounts of money on discovery and trial preparation – that multiple plaintiffs were faking their symptoms or had lied about their medical histories. In one instance, surveillance revealed that a man who claimed to be completely disabled could in fact engage in many household tasks that he had testified in deposition that he was incapable of performing. In fact, out of the limited number of cases that have been set for trial in the welding fume litigation, four have been dropped by plaintiffs based on revelations of fraud.⁹² Nonetheless, the MDL judge (who presided over three of those four cases) has thus far declined to impose sanctions against plaintiffs' counsel for failure to conduct appropriate pre-filing scrutiny of their claims.⁹³

Adoption of fee-shifting policies would discourage frivolous filings. For one, MDL courts should adopt case management orders that impose deadlines for dismissing cases that are subject to advanced discovery or trial workup. The rule should be that if a plaintiff is called for trial but decides not to proceed, financial consequences will result. Furthermore, fee-shifting seems fair in situations where the plaintiff forced the defendant to expend substantial resources in discovery, only to drop the case when trial was imminent. Under the current system, filing additional cases has no real cost for plaintiffs' counsel; to the contrary, the more cases they file the bigger their perceived role in the litigation and the greater the presumption of "guilt" against the defendant. By contrast, the costs of defending frivolous claims for defendants, and the costs for other plaintiffs having to wait in line are substantial. Thus, lawyers should not file claims

⁹² *Morgan v. Lincoln Elec. Co.*, No. 1:04-17251 (N.D. Ohio); *Landry v. Nichols Wire*, No. 1:03-17016 (N.D. Ohio); *Peabody v. Airco*, No. 1:05-17168 (N.D. Ohio); *Smith v. The BOC Group, Inc.*, No. 251-05-1082 (Cir. Ct., Hinds County, Miss.).

⁹³ *See generally In re Welding Fume Prods. Liab. Litig.*, Order (N.D. Ohio Apr. 3, 2006).

they are not willing to take to trial and, if such cases are filed, they should be dismissed before defendants are forced to expend substantial resources defending against them.⁹⁴

Second, courts should make better use of their authority to impose sanctions under 28 U.S.C. § 1927⁹⁵ against attorneys who “multiply the proceedings . . . unreasonably and vexatiously.” Under this statute, attorneys can be held personally liable for the excess costs, expenses, and attorneys’ fees reasonably incurred by other parties as a result of their misconduct. Although this statute has great potential for deterrence, it has been underutilized. In order to stem the tide of discovery and other unnecessary litigation costs, there are three situations in particular where courts should begin to show more willingness to impose sanctions:

[1] the attorney knew or had reason to know that the claims asserted are fraudulent or wholly lacking in foundation;

[2] the attorney failed to perform adequate diligence prior to filing the lawsuit to ensure that there was a good-faith basis for the claims being asserted; or

[3] the attorney failed to investigate evidence uncovered in the course of the litigation that indicated that the claims being asserted were fraudulent.⁹⁶

While courts should have some discretion to make judgment calls depending on the particular circumstances, there is generally no justifiable excuse for prosecuting a lawsuit under any of the above-described situations, and to do so would unreasonably multiply the proceedings. Greater

⁹⁴ The goal should be to create an environment comparable to what exists when individual tort cases are filed – there should be an expectation that the claim will be scrutinized quickly and thoroughly and that counsel will face serious consequences if the claim was not properly investigated and found to be well grounded before filing.

⁹⁵ More than 50 years ago, Congress enacted 28 U.S.C. § 1927 to dissuade lawyers from asserting and maintaining frivolous claims and otherwise abusing the legal process.

⁹⁶ Beisner, *supra* note 14, at 30.

reliance on § 1927 as a tool to stifle litigation abuse would go a long way toward reducing unnecessary discovery costs, not to mention promoting fairness in mass tort litigation.

II. CONCLUDING OBSERVATIONS ON DISCOVERY REFORM: EVOLUTION NOT REVOLUTION

Although there is much disagreement about the specific proposals in *Uncovering Discovery*, there are certainly legitimate concerns by both plaintiffs and defendants about the excessive costs of discovery and litigation. While it is important to fashion rules that allow well-founded claims to progress toward trial, it is equally important that early trials in a mass tort proceeding have real meaning. Unless the trial regimen in a mass tort proceeding is designed to be a real sample of the cases in the inventory, the trials will convey no meaningful information, and there will be no way to apply the insights gleaned from that sampling unless reliable information is separately developed about each case in the inventory.

Discovery of defendants by plaintiffs is typically front-loaded with regard to the timing of the litigation (especially multidistrict litigation), and courts should be skeptical of plaintiffs' attempts to rush cases to trial after discovery has been completed only on defendant's conduct. Otherwise, a disproportionately unfair situation exists where plaintiffs have the information they seek to go forward, and defendant's opportunity to formulate a full and fair defense to the inventory of cases is cut short. What may appear to plaintiffs as "discovery attrition" is actually nothing more than an attempt by a defendant to mount a complete defense.

The rules and the courts should support techniques that will create more efficient – and balanced – fact development in mass tort proceedings. Those "best practices" illustrate that many of the changes advocated by *Uncovering Discovery* may actually undermine the policy directives of Federal Rule of Civil Procedure 1 – and that more fully utilizing existing tools may be the best path to improvement.