



---

2020

## An Empirical Evaluation of Proposed Civil Rules for Multidistrict Litigation

Margaret S. Williams  
*Federal Judicial Center*

Jason A. Cantone  
*Federal Judicial Center*

Follow this and additional works at: <https://digitalcommons.law.uga.edu/blr>



Part of the [Civil Procedure Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Williams, Margaret S. and Cantone, Jason A. (2020) "An Empirical Evaluation of Proposed Civil Rules for Multidistrict Litigation," *Georgia Law Review*. Vol. 55: No. 1, Article 5.  
Available at: <https://digitalcommons.law.uga.edu/blr/vol55/iss1/5>

This Article is brought to you for free and open access by Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Georgia Law Review by an authorized editor of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#) For more information, please contact [tstriepe@uga.edu](mailto:tstriepe@uga.edu).

## AN EMPIRICAL EVALUATION OF PROPOSED CIVIL RULES FOR MULTIDISTRICT LITIGATION

*Margaret S. Williams & Jason A. Cantone\**

*The Civil Rules Committee of the Judicial Conference of the United States recently began considering the need for specific rules regarding multidistrict litigation (MDL) proceedings. The possibility of creating rules specifically for MDL originates with recently proposed legislation prompted by groups typically tied to the defense bar. One area the Civil Rules Committee is considering concerns the use of fact sheets in MDL proceedings. These party-negotiated questionnaires—directed at both parties to the case—inform judges and attorneys about the scope of the proceeding. Understanding whether these case management tools are currently being used and how they work with other tools, such as bellwether trials, in MDL proceedings will help inform a discussion of the need for specific MDL rules. Despite their importance, very little published, empirical work looks at fact sheets in MDL proceedings. This is the first comprehensive study of the use of fact sheets.*

*Using a sample of 116 mass tort proceedings—typically involving products liability—centralized through MDL between 2008 and 2018, we examine when fact sheets were ordered, what the procedures for complying with the case management order were, what information was collected, and what effect fact sheets had on the termination of the proceedings. The proceedings ranged between 3 and 40,533 actions and were open a minimum of 118 days and a maximum of 3811 days. Actions terminated within the proceeding at least*

---

\* The authors are Senior Research Associates at the Federal Judicial Center. The affiliation is for identification purposes only. The views expressed are our own and not necessarily those of the Federal Judicial Center. The authors would like to thank the staff of the Judicial Panel on Multidistrict Litigation, Elizabeth Burch, D. Seth Fortenbery, Alexandra Lahav, Emery G. Lee III, and Judith Resnik for their comments on earlier versions of this article. The authors would also like to thank the editorial staff of the *Georgia Law Review* for their excellent work on this Article.

*98% of the time, but little available information exists regarding how the actions terminated. These proceedings were centralized in forty districts. We find that fact sheets were ordered more than half the time and were most likely to be used in the largest proceedings. The information in fact sheets was used in proceedings in several ways, including to identify cases for bellwether trials and winnowing cases. Using fact sheets, moreover, led to quicker termination of the proceeding, all else being equal. Our sample of proceedings suggests judges use fact sheets to organize products liability proceedings when judges perceive they are merited, after considering the size of the proceeding or the nature of the litigation. The frequency with which judges already employ fact sheets and the variation in uses call into question both the need for a rule and how to write one without tying the hands of transferee judges. Many issues regarding how fact sheets are used remain to be studied more in-depth. We encourage future studies regarding how fact sheets are used across MDL proceedings.*

TABLE OF CONTENTS

I. INTRODUCTION.....	224
II. MANAGING AN MDL.....	233
III. WHERE FACT SHEETS FALL WITHIN THE FEDERAL RULES OF CIVIL PROCEDURE .....	241
IV. WHY ARE FACT SHEETS USED? .....	243
V. DATA AND ANALYSIS .....	249
A. WHEN FACT SHEETS ARE USED .....	254
B. HOW FACT SHEETS ARE IMPLEMENTED .....	257
C. THE TIMING OF FACT SHEET ORDERS .....	259
D. DEADLINES FOR COMPLIANCE .....	261
E. WHAT INFORMATION IS COLLECTED IN FACT SHEETS .....	262
F. WHY PARTIES COMPLY .....	266
G. THE EFFECT OF FACT SHEETS ON PROCEEDINGS.....	269
VI. HOW FACT SHEETS FIT .....	270
VII. CONCLUSION.....	277
VIII. APPENDIX: DESCRIPTION OF THE DATA .....	280

## I. INTRODUCTION

The Advisory Committee on Civil Rules (Advisory Committee) has begun considering the need for specific rules related to multidistrict litigation (MDL) proceedings.<sup>1</sup> The possibility of creating rules specifically for MDL proceedings originated with recently proposed legislation<sup>2</sup> prompted by groups typically tied to the defense bar.<sup>3</sup> One area the Advisory Committee is considering

---

<sup>1</sup> See, e.g., ADVISORY COMM. ON CIVIL RULES, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES: APRIL 2–3, 2019, at 48 (2019) [hereinafter ADVISORY COMMITTEE MEETING], [https://www.uscourts.gov/sites/default/files/2019-04\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf) (“Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings.”); see also MARGARET S. WILLIAMS, EMERY G. LEE III & JASON A. CANTONE, FED. JUDICIAL CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION: PRODUCTS LIABILITY PROCEEDINGS 2008–2018, at 1 (2019), <https://www.fjc.gov/sites/default/files/materials/49/PFS%20in%20MDL.pdf> (stating that a judicial conference advisory committee is “considering various proposals to amend the Federal Rules of Civil Procedure to address the management of [MDL] proceedings”).

<sup>2</sup> The Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (the Act) would have required a number of changes to both class actions and MDLs. See H.R. 985, 115th Cong. § 102 (2017) (outlining the Act’s purposes). Among the Act’s requirements for MDL proceedings was for all plaintiffs to provide “a submission sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff’s complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury.” *Id.* § 105. The proposed legislation required plaintiffs to submit this information within forty-five days of the civil action being filed or transferred. *Id.* The legislation passed the House, but it was not enacted into law. See *H.R.985 – Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/985/all-actions> (last visited Dec. 20, 2020) (detailing the Act’s history). Nonetheless, the bill is the genesis of a number of reforms the Civil Rules Committee is considering—including an examination of the use of fact sheets. See ADVISORY COMMITTEE MEETING, *supra* note 1, at 208 (noting that the Act was a useful “starting point” for potential plaintiff fact sheet reforms to MDL proceedings).

<sup>3</sup> Though the U.S. Chamber of Commerce lobbied in favor of the Act, the Lawyers for Civil Justice—a national coalition of defense counsel organizations, law firms, and corporations—proposed the Act to amend the Federal Rules of Civil Procedure. See Letter from Lisa A. Rickard, U.S. Chamber of Commerce, to Hon. Bob Goodlatte, Chairman, Comm. on the Judiciary and Hon. John Conyers, Ranking Member, Comm. on the Judiciary (Feb. 14, 2017), [https://www.uschamber.com/sites/default/files/170214\\_ilr\\_hr985\\_fairnessinclassactionlitigation\\_goodlatte\\_conyers.pdf](https://www.uschamber.com/sites/default/files/170214_ilr_hr985_fairnessinclassactionlitigation_goodlatte_conyers.pdf) (supporting the Act); LAWYERS FOR CIVIL JUSTICE, MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS: PROPOSALS FOR DISCUSSION WITH THE MDL/TPLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES 2 (2018) [hereinafter LCJ MEMO], [https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj\\_memo\\_-\\_mdl\\_tplf\\_proposals\\_for](https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_memo_-_mdl_tplf_proposals_for)

is the use of what are called “fact sheets.”<sup>4</sup> Fact sheets are standard sets of questions used in some large MDL proceedings to help transferee judges and attorneys manage substantial numbers of cases by gaining a sense of the scope of the proceeding.<sup>5</sup> These party-negotiated questionnaires are directed at both parties to a case and provide judges and attorneys with information about the proceeding’s scope. Tied generally to preliminary case management and discovery orders, fact sheets can help judges and parties better understand the contours of the litigation by gathering basic information about the cases and claims in the proceeding early on, winnowing weak cases or claims, and shaping the nature of litigation and settlement. Until now, the use of fact sheets has never been empirically studied, despite the calls for rulemaking in this area. This Article examines the use of fact sheets in 116 proceedings—which range from 3 actions to 40,533—centralized between 2008 and 2018.

A brief point about terminology: in a recent study, Federal Judicial Center researchers found that several related types of questionnaires were used in MDL proceedings.<sup>6</sup> “Fact sheet” is a general term, whereas some court orders refer to questionnaires as “profile forms,” “preliminary disclosure forms,” or, more generally, “questionnaires.”<sup>7</sup> Fact sheets collect core information (e.g., plaintiff information, use of drug or device, harm suffered) as well as more detailed information about the plaintiffs’ general health,

---

\_discussion\_9-14-18\_004\_.pdf (stating that amending Rule 26 to “requir[e] disclosure of evidence showing the cause and nature of the injury alleged” would be “a simple rule solution” to reduce “meritless claims”).

<sup>4</sup> See ADVISORY COMMITTEE MEETING, *supra* note 1, at 28 (including fact sheets as a possible method for winnowing claims).

<sup>5</sup> WILLIAMS ET AL., PLAINTIFF FACT SHEETS, *supra* note 1, at 1 (describing fact sheets).

<sup>6</sup> *Id.* (distinguishing fact sheets from other case management tools).

<sup>7</sup> The term “MDL Questionnaire” was used in *In re Silicone Gel Breast Implants Products Liability Litigation*. See, e.g., Order No. 30 at 9, *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 2:92-cv-10000 (N.D. Ala. Mar. 26, 1996) (noting that plaintiffs had to fill out “the approved MDL Questionnaire”). These documents were referred to as “fact sheet[s]”—a term that continues to be used today with some variation—in the *Diet Drug* products liability litigation. See Plaintiffs’ Brief in Opposition to Defendant’s Motion for Summary Judgment and Motion to Dismiss at 4, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 2:10-md-1203 (E.D. Pa. Apr. 2004).

employment and family history, or past involvement in litigation.<sup>8</sup> Some proceedings only require fact sheets of plaintiffs while others require them of both plaintiff and defendant.<sup>9</sup> We consider both in this Article. Defendant fact sheets tend to require information about the plaintiff that the defendant possesses.<sup>10</sup> The deadlines for completing fact sheets are often amended during the process of collecting information.<sup>11</sup> A profile form, generally speaking, is a much shorter version of the fact sheet and provides similar information.<sup>12</sup> Some large MDLs use only a fact sheet, while some use both fact sheets and profile forms. This Article provides information on the uses and types of fact sheets in MDL proceedings, using the more general term.

Fact sheets are but one case management tool transferee judges employ in MDL proceedings. When two or more cases with common sets of fact are pending in separate federal courts, they can be consolidated and transferred for pretrial proceedings to any district court in the country under 28 U.S.C. § 1407.<sup>13</sup> The purpose of these centralized proceedings is to make litigation more efficient—avoiding duplicative discovery, increasing convenience for the parties, and reducing the costs of litigation by using economies of scale.<sup>14</sup> The Judicial Panel on Multidistrict Litigation (Panel), a body of seven federal district and circuit judges who serve on the Panel in addition to serving on their home court, decides whether to consolidate and transfer cases.<sup>15</sup>

Although initially thought to be less controversial than class actions,<sup>16</sup> more attention and criticism has followed MDL

<sup>8</sup> See WILLIAMS ET AL., PLAINTIFF FACT SHEETS, *supra* note 1, at 2 (outlining the “general information required in” fact sheets).

<sup>9</sup> See *id.* at 3 (distinguishing plaintiff from defendant fact sheets).

<sup>10</sup> See *id.* at 4.

<sup>11</sup> See *id.* (noting that deadlines for completing fact sheets may be extended).

<sup>12</sup> See *id.* at 3 (describing profile forms as “less extensive” questionnaires).

<sup>13</sup> See 28 U.S.C. § 1407(a) (2018) (“When civil actions involving one or, more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”).

<sup>14</sup> See *id.* (“Such transfers . . . will promote the just and efficient conduct of such actions.”).

<sup>15</sup> See *id.* § 1407(c)–(d) (describing the Panel’s power and composition).

<sup>16</sup> See Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 46 (1991) (“[T]he 1966 class action rules were greeted with controversy, while the 1968 MDL statute was met with warm praise.”). Class actions enabled new litigation; MDL expedited existing litigation. See *id.* at 46–49. With the use of aggregation to manage the asbestos docket, both

proceedings as the Panel has created more proceedings and as the proceedings have included more cases.<sup>17</sup> The decline in class actions resulted in an increase in MDL proceedings,<sup>18</sup> some of which also contain class actions.<sup>19</sup> As the percentage of civil filings involved in MDL proceedings increased,<sup>20</sup> calls for managing the “litigation explosion” in MDL began to grow, including a perceived need to create rules for MDL proceedings.<sup>21</sup>

The rise in litigation and subsequent call for action is not new to MDL. Writing more than thirty years ago, when the federal civil caseload was seventy-seven percent of what it is today,<sup>22</sup> Judge Robert L. Carter said,

One of the contemporary challenges facing the federal courts is said to be the so-called “caseload explosion.” That very characterization, of course, obscures important questions about the success and functioning of the courts: which members of society are bringing greater numbers of federal suits, why are they doing so,

---

the use of class actions and the rules regarding it changed, merging class actions and mass torts in MDL proceedings. *See id.* at 18–19.

<sup>17</sup> *See, e.g.*, ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 4 (2019) (arguing that “all is not well” with “mass-tort” MDL proceedings); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1695 (2017) (noting that critics say MDLs “undermin[e] the class action in ways that harm litigants”).

<sup>18</sup> *See* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after Ortiz*, 58 U. KAN. L. REV. 775, 793, 806 (2010) (finding that empirical evidence shows a shift from class actions to MDLs for mass-tort and products liability claims).

<sup>19</sup> *Id.* at 794 (“[T]o be clear, MDL aggregation is not *exactly* an alternative to class action aggregation of claims. Cases consolidated in an MDL proceeding may, and often do, raise class allegations, and an MDL proceeding can very well result in a class settlement . . .”).

<sup>20</sup> *See* Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1272 fig.8 (2019) (“[T]he number of private civil cases filed that are included in proceedings has risen since 1992, from a low of about 5% to a high of 21%.”).

<sup>21</sup> *See* LCJ MEMO, *supra* note 3, at 2 (proposing new rules for MDL proceedings).

<sup>22</sup> *See* U.S. COURTS, TABLE 4.1: U.S. DISTRICT COURTS—CIVIL CASES FILED, TERMINATED, AND PENDING, DURING THE 12-MONTH PERIODS ENDING JUNE 30, 1990, AND SEPTEMBER 30, 1995 THROUGH 2018, at 1, [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_4.1\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_4.1_0930.2018.pdf) (last visited Dec. 20, 2020) (displaying the number of civil district court cases filed in 1990 and 2018).

and what would be the social and political costs of denying them access to a federal forum for resolution of their disputes?<sup>23</sup>

Though Judge Carter was referring to efforts to limit the use of class actions to bring claims to federal court, this same argument is prompting many proposed rules for MDL proceedings. References to the “black hole” of MDL,<sup>24</sup> complaints about the proceedings’ duration,<sup>25</sup> unsubstantiated arguments about “meritless” cases and claims,<sup>26</sup> and a misguided focus on the percentage of the pending civil docket involved in MDL proceedings<sup>27</sup> are modern takes on the same argument. Historically, when a particular type of litigation increasingly occupies the civil docket, proposals emerge to limit it. The recent proposal by Lawyers for Civil Justice, with its claim that “[o]ne of the greatest problems identified with the MDL process is its tendency to attract meritless claims,” is no exception.<sup>28</sup>

Thus, the question of whether rules for MDL, specifically rules regarding fact sheets, are necessary must be answered by evaluating how fact sheets are currently used in MDL proceedings and how proposed rules might change current practices. If new rules are an attempt “to get rid of technicalities and simplify procedure and get to the merits,”<sup>29</sup> they should not further complicate

---

<sup>23</sup> Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2180–81 (1989) (footnotes omitted).

<sup>24</sup> See, e.g., George M. Fleming & Jessica Kasischke, *MDL Practice: Avoiding the Black Hole*, 56 S. TEX. L. REV. 71, 72 (2014) (“[T]he MDL can become the proverbial ‘black hole,’ taking in cases with virtually no hope of fair and efficient resolution.”); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105, 123 (2010) (noting that “remand [for trial] is exceedingly unlikely”).

<sup>25</sup> See, e.g., Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 100 n.4 (2013) (noting that the longest-running MDL was twenty-two years old at the time of writing).

<sup>26</sup> See, e.g., LCJ MEMO, *supra* note 3, at 1 (“In some cases, meritless claims take up thirty to forty percent of the total case inventory.”).

<sup>27</sup> See Williams, *supra* note 20, at 1271–76 (explaining why focus on this percentage is problematic).

<sup>28</sup> LCJ MEMO, *supra* note 3, at 1.

<sup>29</sup> Carter, *supra* note 23, at 2179 (quoting *Rules of Civil Procedure for the District Courts: Hearings on H.R. 8892 Before the H. Comm. on the Judiciary*, 75th Cong. 24 (1938) (statement

procedure. If these new rules reflect an attempt to “devise standards that efficiently tend the gates of the federal court system without excluding claims for merely technical reasons,”<sup>30</sup> they should help promote access while increasing efficiency. The goals of any rules proposal should be used to evaluate new proposals for added rules.

But we should keep in mind that the goal is not efficiency at any cost. Indeed, as Professor Resnik noted in her response to Judge Carter, when evaluating new rules—even those intended to serve expediency—one must consider how the rules impact the parties and who benefits from the changes.<sup>31</sup> As she noted more than thirty years ago, “a variety of powerful ‘repeat players’ have sought, sometimes openly, to influence ‘court reform’ efforts.”<sup>32</sup> Thus, our evaluation of current case management tools and the proposed rules should consider efficiency and access while balancing the burden to the parties that is created as transferee judges actively manage sometimes thousands of cases at once. An illustrative example reveals how fact sheets can be used in MDL proceedings.

Much of what we know about the use of fact sheets in MDL proceedings comes from the well-known example of *In re Silica Products Liability Litigation*.<sup>33</sup> In September 2003, the Panel ordered the centralization of 124 cases, which were filed mostly in Mississippi<sup>34</sup> and Texas, into a single proceeding before the

---

of Hon. William D. Mitchell, Chairman of the Advisory Committee on Rules for Civil Procedure Appointed by the Supreme Court)).

<sup>30</sup> Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 644 (1987).

<sup>31</sup> See Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219 (1989) (“[W]e cannot and should not ignore the political content and consequences of procedural rules.”).

<sup>32</sup> *Id.*

<sup>33</sup> *In re Silica Prods. Liab. Litig.*, 2:03-md-1553 (S.D. Tex. 2005).

<sup>34</sup> The joinder rules in Mississippi resulted in over 10,000 claims in the MDL proceeding. See STEPHEN J. CARROLL, LLOYD DIXON, JAMES M. ANDERSON, THOR HOGAN & ELIZABETH M. SLOSS, *THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA 3* (2009) (“Nearly two-thirds of the claims filed against U.S. Silica between 2001 and 2003 were filed in Mississippi state courts, and most of the remaining were filed in Texas state courts. During this period, Mississippi had liberal joinder provisions that allowed plaintiffs to file lawsuits in Mississippi even if their connection to the state was quite tangential.”); Mark A. Behrens & Corey Schaecher, *RAND Institute for Civil Justice Report on the Abuse of Medical Diagnostic Practices in Mass Tort Litigation: Lessons Learned from the “Phantom” Silica Epidemic that may Deter Litigation Screening Abuse*, 73 ALB. L. REV. 521, 524 (2010) (“MDL 1553 began in September 2003 when over ten thousand individual

transferee judge in the U.S. District Court for the Southern District of Texas.<sup>35</sup> Plaintiffs in the proceeding claimed to suffer from silicosis, an incurable disease of the lungs found in those who inhale silica dust. While the disease was not new at the time the proceeding was created, the incidence of claims against companies manufacturing silica products had grown substantially since the 1970s.<sup>36</sup> In an early case management order, the parties were ordered to create “an affidavit that can be used to develop the factual basis for the claims of each Plaintiff.”<sup>37</sup> Plaintiffs were required, at a minimum, to include “where they believe they were exposed to silica” (including the date and location), “their particularized claims against each Defendant” (there were over 200), their medical releases, and their tax returns.<sup>38</sup> The court order on January 23, 2004, gave the parties two weeks to negotiate the affidavit, and the plaintiffs had until April 5, 2004, to complete the resulting questionnaire.<sup>39</sup> Later-filed cases were required to complete the questionnaire within sixty days of transfer into the proceeding.<sup>40</sup> As later detailed in the proceeding, the six-page questionnaire required more information than the judge stated in the original order, including information about each plaintiff’s diagnosis.<sup>41</sup> Defendants were also required to complete a questionnaire in the proceeding that provided information on the silica-related products they designed, marketed, manufactured, sold, or distributed since 1930.<sup>42</sup> All discovery information was submitted to a central depository, which was managed by counsel appointed by the court.<sup>43</sup>

---

silicosis claims that primarily originated in Mississippi state court were removed to federal court . . .”).

<sup>35</sup> *In re Silica Prods. Liab. Litig.*, 280 F. Supp. 2d 1381, 1383 (J.P.M.L. 2003).

<sup>36</sup> See CARROLL ET AL., *supra* note 34, at 52 (“After decades of quiet, silica litigation began to reemerge in the 1970s.”).

<sup>37</sup> Order No. 4 para. 19, *In re Silica Prods. Liab. Litig.*, 2:03-md-1553 (S.D. Tex. Jan. 23, 2004).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* paras. 19–20.

<sup>40</sup> *Id.* para. 20.

<sup>41</sup> Order No. 6 at 4–9, *In re Silica Prods. Liab. Litig.*, 2:03-md-1553 (S.D. Tex. Feb. 5, 2004) (providing the six-page plaintiff’s fact sheet).

<sup>42</sup> *Id.* at 11–13 (providing the defendants’ questionnaire).

<sup>43</sup> Order No. 4 para. 18, *In re Silica Prods. Liab. Litig.*, 2:03-md-1553 (S.D. Tex. Jan. 23, 2004).

In reviewing the questionnaires, defendants noticed that the same twelve doctors (and the same three screening companies) diagnosed silicosis in all the cases, and one of the diagnosing physicians stated in his sworn deposition that he had not actually diagnosed any of the plaintiffs with silicosis. This discrepancy between the testimony of the doctor and the information provided in the questionnaires prompted the judge to hold a *Daubert* hearing where the diagnosing doctor withdrew his diagnosis.<sup>44</sup> The parties discussed in detail the problems of diagnosing silicosis at the hearing, and the court ultimately found the evidence of diagnosis inadmissible. This resulted in the dismissal of most of the cases and claims in the proceeding.

The *Silica* proceeding is often touted as an example of how the collection of information about parties in fact sheets can winnow weak cases or claims in the proceeding, but one should note that the purpose of fact sheets is not only to exclude claims. The fact sheet in *Silica* was part of a general discovery order used, in part, to understand the nature of the alleged exposure and which defendant or defendants were said to be responsible. Fact sheets were required of both plaintiffs and defendants. The order was a case management tool to help the court understand the scope of the litigation. The similarities found in the fact sheets, which were explored further through additional discovery and a *Daubert* hearing, became the basis for dismissal of the cases. The dismissals resulted from evidence found as a result of completing the fact sheets, not from failure to comply with the order requiring them.

This point is often lost in the discussion of fact sheets in MDL proceedings. Some scholars quickly cite *Silica* as evidence that fact sheets usefully winnow cases and eliminate fraudulent claims without recognizing that it was not the completion of the fact sheet process itself that resulted in dismissals.<sup>45</sup> Past research has highlighted the use of fact sheets in *Silica* and the problem of fraudulent claims within the proceeding.<sup>46</sup> Proponents of this view

---

<sup>44</sup> See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 580 (S.D. Tex. 2005) (discussing the need for the *Daubert* hearing); see generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>45</sup> See generally Behrens & Schaecher, *supra* note 34; CARROLL ET AL., *supra* note 34.

<sup>46</sup> See Behrens & Schaecher, *supra* note 34, at 525 (“[T]he fact sheets showed that the diagnosis supplied by the plaintiffs treating physician was not the basis for the plaintiffs

tie one to the other, skipping the procedural safeguard of a *Daubert* hearing to explore evidentiary problems raised by the fact sheets. While fact sheets can help identify weak claims, their primary purpose lies within the discovery process as a tool to help manage the proceeding.<sup>47</sup> That said, understanding the use of fact sheets and the processes they employ for winnowing claims is an important part of the pretrial procedures of MDL. We explore both below.

Despite their importance since the *Silica* proceeding, very little published, empirical work examines the use of fact sheets in MDL proceedings.<sup>48</sup> This Article contributes to our understanding of fact sheets with an empirical study on their use in MDL proceedings. Using a sample of 116 mass tort MDL proceedings centralized since 2008, we examine when judges use fact sheets, how judges implement them, what information they require, what role they play, and what effect they have in MDL proceedings. This Article proceeds as follows. Part II highlights what we know about MDL case management from existing sources for transferee judges and some preliminary analysis of our data. Part III discusses fact sheets within the broader context of the Federal Rules of Civil Procedure. Part IV discusses why fact sheets are used in MDL proceedings. Part V discusses our data and analyzes the use of fact sheets, including when they are used, how they are implemented, what information is collected, why parties comply with orders regarding fact sheets, and what effect fact sheets have on proceeding duration. Part VI then discusses where fact sheets fit in our understanding of MDL case management and the Federal Rules of Civil Procedure. Part VII summarizes the findings and highlights areas for future research.

---

claim.”); CARROLL ET AL., *supra* note 34, at 27 (discussing how fact sheets help reveal the “abusive diagnostic practices” behind the plaintiffs’ claims).

<sup>47</sup> For a more thorough discussion of the use of fact sheets to dismiss weak cases and claims, see WILLIAMS ET AL., PLAINIFF FACT SHEETS, *supra* note 1, at 4.

<sup>48</sup> While little empirical research exists, the use of fact sheets is often cited as a “best practice” for transferee judges. *See, e.g.*, BOLCH JUDICIAL INST., DUKE LAW SCH., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 10–11 (2d ed. 2018) [hereinafter DUKE BEST PRACTICES], <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf> (recommending fact sheets as a best practice for transferee judges).

## II. MANAGING AN MDL

In 1968, Congress enacted 28 U.S.C. § 1407, which established the Judicial Panel on Multidistrict Litigation, to create a more “just and efficient” way for federal judges to manage similar cases pending in multiple districts.<sup>49</sup> Rooted in the remnants of the electrical equipment antitrust litigation, MDL proceedings were seen as a way for related civil cases—filed in separate federal districts—with common questions of fact to be managed together in a single proceeding before a single judge.<sup>50</sup> Through a common pretrial process, judges can manage multiple cases at once and then remand the cases to the court of original filing (the transferor court) for trial.<sup>51</sup> Typically, parties file a motion with the Panel to create a proceeding (a process known as centralization), and the Panel then decides if creating the proceeding will lead to more “just and efficient” case resolutions.<sup>52</sup> Proceedings can also be created with a show cause order from the Panel asking parties why related cases should not be centralized, though this occurs rarely.<sup>53</sup> If the proceeding is created—either by a show cause order or an order of the Panel on motion by the parties—the Panel also selects the district (the transferee court) and the judge (the transferee judge) tasked with managing it.<sup>54</sup> While attorneys for the individual plaintiffs and defendants can move for or against centralization and argue where and before whom proceedings should be centralized,

---

<sup>49</sup> See 28 U.S.C. § 1407(a) (2018).

<sup>50</sup> For a thorough examination of the history of MDL, see generally Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017). The Panel has its roots in the Coordinating Committee for Multiple Litigation, an *ad hoc* committee through which litigants in the electrical equipment antitrust litigation voluntarily coordinated discovery. *Id.* at 838–47.

<sup>51</sup> See 28 U.S.C. § 1407(a) (outlining the MDL transfer process).

<sup>52</sup> See Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 434 (2013) (“The Panel has substantial discretion in deciding whether and where to consolidate pretrial proceedings.”).

<sup>53</sup> See *id.* at 427 n.12 (“Show cause orders . . . are less significant to the Panel’s work today than they were in its early years when the MDL process was less familiar to litigators.”)

<sup>54</sup> See Williams, *supra* note 20, at 1281–82 (noting that there are a few instances of multiple transferee judges assigned to a single proceeding).

the Panel ultimately decides alone, and review of its decisions is only through “extraordinary writ.”<sup>55</sup>

As of 2018, the Panel had centralized 1731 proceedings, assigning them to 87 federal district courts<sup>56</sup> and 926 district judges.<sup>57</sup> The proceedings created vary by type<sup>58</sup> and by size, from a low of two actions to a high of 192,101—for an average of 401 actions per proceeding. As has been discussed elsewhere, the average size of MDL proceedings varies substantially by type of litigation—products liability proceedings (the typical litigation category for proceedings labeled “mass torts”) average thousands of actions while antitrust proceedings average between thirty and forty actions.<sup>59</sup> The varied sizes of the proceedings and the types of litigation (sometimes also involving class actions) can present unique case management challenges to the transferee judges tasked with handling the litigation.

Despite the challenges MDL proceedings bring, no single set of processes for managing MDL proceedings exists. While some criticize this unorthodox approach and the amount of discretion

---

<sup>55</sup> See 28 U.S.C. § 1407(e) (2018); Resnik, *supra* note 16, at 34 (discussing how the Panel decides whether to centralize the cases).

<sup>56</sup> No proceedings have yet been transferred to Alaska, North Dakota, South Dakota, Vermont, the Virgin Islands, the Northern Mariana Islands, or Guam. The number of districts and assignments is current through April 15, 2019.

<sup>57</sup> Because some district judges have been assigned multiple proceedings, the number of judges is less than the number of proceedings created. There have been a total of 1971 assignments of judges to proceedings, higher than the number of proceedings created due to appointment of multiple judges over the life of a proceeding. For more information on the judges appointed to MDL proceedings, see Williams, *supra* note 20, at 1281–82.

<sup>58</sup> See *id.* at 1268 tbl.1 (showing that MDL proceedings vary substantially by type of litigation). The types are air crash, antitrust, common disaster, contracts, employment practices, intellectual property, miscellaneous, products liability, sales practices, and securities. *Id.* Mass torts typically fall into the products liability category, though litigation from other categories has been given that label as well.

<sup>59</sup> See *id.* at 1274 tbl.2A.

given to transferee judges,<sup>60</sup> this was by design.<sup>61</sup> Without specific rules, procedures in MDL proceedings are developed through best practices,<sup>62</sup> guides for transferee judges, and word of mouth.<sup>63</sup> In fact, one transferee judge has said of his experience managing multiple MDL proceedings, “I see ways to change course each time, new ways to tweak it. . . . Every case is different.”<sup>64</sup> The idea of transferee judges innovating is hardly new. Judge Stanley Weigel noted that given the “creative use of their broad powers [under MDL], transferee judges have developed salutary solutions to many of the staggering problems associated with . . . [MDL].”<sup>65</sup> What makes transferee judges some of the most creative jurists on the

---

<sup>60</sup> See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT*, at viii (2007) (arguing that “the evolving response of the legal system to mass torts has been to shift from tort to administration” via “ad hoc experimentation by private lawyers”); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 74–75 (2015) (calling for judges to review MDL settlements for adequacy as they do for class action settlements); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 410 (2019) (“MDL critics . . . contend that the use of such procedure makes MDL incompatible with the rule of law.”); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 933–43 (2000) (discussing judicial discretion); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) (discussing how federal judges have adopted a more active, “managerial” stance in cases). Outside of academic critiques, interest groups tied to the defense bar have argued against the variation in case management practices by transferee judges; they claim, “the *ad hoc* use of mechanisms such as fact sheets and *Lone Pine* orders varies wildly and is inherently inconsistent with the fundamental idea of the FRCP that procedures should be uniform, clear and accessible.” LCJ MEMO, *supra* note 3, at 3.

<sup>61</sup> See Bradt, *supra* note 50, at 847 (“[W]hat makes MDL such an effective means of resolving mass litigation is also what provokes intense criticism: the almost unlimited discretion of the district judge that the Panel puts in charge of the litigation.”); FED. JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION* § 22.36, at 372–75 (4th ed. 2004) [hereinafter *MANUAL*] (detailing the discretionary powers given to transferee judges in MDL).

<sup>62</sup> See generally DUKE BEST PRACTICES, *supra* note 48 (providing best practices to guide MDL transferee judges).

<sup>63</sup> See Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2331–38 (2008) (discussing gradual adoption of bellwether trials in MDL procedure through early experimentation); see also BURCH, *supra* note 17, at 22 (“As they make their way in this brave new world, transferee judges turn to one another for guidance.”); Gluck, *supra* note 17, at 1691–92 (discussing “horizontal information sharing” among transferee judges).

<sup>64</sup> Gluck, *supra* note 17, at 1689.

<sup>65</sup> Resnik, *supra* note 16, at 46 (first alteration in original).

bench is how they employ existing tools in MDL proceedings.<sup>66</sup> Most judges issue case management and discovery orders in their proceedings, but the content of the orders, the active case management practices, and the “roll up one’s sleeves” work done within a proceeding distinguishes MDLs from the rest of civil litigation.<sup>67</sup> The variation in the management of MDLs makes them interesting to study.

As with most aspects of MDL, transferee judges adapt existing rules to the needs of the proceeding before them, and they learn from each other what works and what does not.<sup>68</sup> Emphasis on the use of existing rules explains why a case management guide for transferee judges stated, “[m]anaging an MDL fundamentally is no different from managing any other case.”<sup>69</sup> Additionally, the guide recommended that the case management order setting up the proceeding “include the usual interim breakpoints, e.g., filing of a consolidated amended complaint (where appropriate), filing and briefing on motions to dismiss, a fact-discovery deadline, a deadline for resolution of any class-certification motions, expert disclosures and discovery deadlines, and a summary judgment motions deadline.”<sup>70</sup> The guide also highlighted the need for transferee judges to make prompt rulings, especially on discovery issues, but did not reference the use of fact sheets as a tool in the discovery process.<sup>71</sup>

Because not all proceedings warrant the use of the same tools, the lack of a reference to fact sheets in the case management guide is not surprising. However, resources targeted for more specific

---

<sup>66</sup> See, e.g., BURCH, *supra* note 17, at 22–24 (describing how transferee judges creatively coordinate solutions); Gluck, *supra* note 17, at 1689 (“[T]he very hallmark of the MDL is the ability to deviate from traditional procedures—i.e., for the judge to remain flexible and creative in every case.”).

<sup>67</sup> Gluck, *supra* note 17, at 1675.

<sup>68</sup> See *id.* at 1691 (“The common law of MDL procedure has developed both individually and collaboratively. Judges innovate case by case, but there is a great deal of horizontal information sharing. All of the judges interviewed emphasized the importance of the annual conference of MDL judges as a key place for shared learning and dissemination of best practices.”).

<sup>69</sup> See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES 3 (2d ed. 2014).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 4–5 (emphasizing the need for “prompt and disciplined” rulings).

types of proceedings, such as Rothstein and Borden's guide to products liability proceedings, have referenced how fact sheets can help judges manage proceedings.<sup>72</sup> When discussing the management of discovery, Rothstein and Borden's guide states:

In other cases, however, particularly those involving "mature" mass torts, the judge and parties prefer at the outset to discover plaintiff-specific information or to conduct discovery from plaintiffs concurrently with discovery from the defendants.

Interrogatories inquiring into the extent of the plaintiffs' damages may be useful early in the litigation even if depositions of the plaintiffs are to be delayed. Answers to such interrogatories may provide a valuable starting point for settlement discussions. Alternatively, or in addition to such interrogatories, many transferee judges use "plaintiff fact sheets," standard forms disclosing information that would be relevant to both settlement and trial.<sup>73</sup>

This products-liability-focused guide also provides insight on the information fact sheets typically request. In the past, "courts have ordered claimants to complete plaintiff fact sheets, disclosing critical information such as the circumstances of their exposures and the severity of their injuries, to facilitate settlement negotiations or improve claim administration following settlement."<sup>74</sup> Fact sheets can also help identify information about the cases, organize plaintiffs into specific groups—including type of exposure and harm suffered—and select cases for more complete discovery, bellwether trials, or both.<sup>75</sup> The guide also discusses the procedures for implementing protective orders on fact sheets and the applicability of those orders to late-arriving parties, who

---

<sup>72</sup> See BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUDICIAL. CTR. & JUDICIAL PANEL ON MULTIDISTRICT LITIG., *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES* 31 (2011), <https://www.fjc.gov/sites/default/files/2012/MDLGdePL.pdf>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 41.

<sup>75</sup> See *id.* at 44–45 (describing how judges can use facts sheets to help select cases for bellwether trials).

typically can only add supplemental questions to existing fact sheets and interrogatories.<sup>76</sup>

Further guidance on the use of fact sheets is clearly warranted, and a recent publication from the Federal Judicial Center (FJC) outlines practical considerations for using fact sheets, when appropriate, in MDL proceedings.<sup>77</sup> The FJC's guide discusses in detail the factors judges should consider when using fact sheets and the sources of authority available to transferee judges for managing their proceedings.<sup>78</sup> The guide also complements recent descriptive work by the FJC analyzing the use of plaintiff fact sheets in products liability proceedings.<sup>79</sup>

The use of fact sheets and their impact on MDL proceedings has not, however, faced the level of scrutiny scholars have applied to other case management tools.<sup>80</sup> Scholars have closely examined the decisions transferee judges make regarding leadership—including steering committees, executive committees, state liaison counsel, and discovery coordinators<sup>81</sup>—as well as the use of bellwether

<sup>76</sup> See *id.* at 32, 34.

<sup>77</sup> MARGARET S. WILLIAMS, JASON A. CANTONE & EMERY G. LEE III, FED. JUDICIAL CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES 2–5 (2019) [hereinafter POCKET GUIDE], [https://www.fjc.gov/sites/default/files/materials/14/Plaintiff%20Fact%20Sheets%20in%20Multidistrict%20Litigation%20Proceedings\\_First%20Edition\\_2019.pdf](https://www.fjc.gov/sites/default/files/materials/14/Plaintiff%20Fact%20Sheets%20in%20Multidistrict%20Litigation%20Proceedings_First%20Edition_2019.pdf) (outlining cost, scope, and timing issues when using fact sheets in MDL). For additional guidance on the use of fact sheets, see DUKE BEST PRACTICES, *supra* note 48, at 10–14.

<sup>78</sup> See POCKET GUIDE, *supra* note 77, at 15 (“In designing a fact-sheet process, the transferee judge should consider how much information is needed when. Judges should also consider using fact sheets as a tool for early identification and winnowing of unsupported claims. . . . The fact sheet proposed by the parties should be clear on the timing and volume of any proposed individual-specific discovery with an eye toward achieving these goals.”).

<sup>79</sup> See WILLIAMS ET AL., PLAINTIFF FACT SHEETS, *supra* note 1, at 3–4.

<sup>80</sup> For an exception, see Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE L.J.F. 64, 78–84 (2019).

<sup>81</sup> The scholarship on MDL leadership covers everything from the types of selection mechanisms used to choose leadership to the types of settlements they tend to broker and highlights how the same tools applied differently by a variety of transferee judges can affect the nature of an MDL proceeding. See, e.g., Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 77 (2019) (arguing that “although the risks that MDL critics highlight are real, repeat players also add value,” which “may be worth the risks”); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1449 (2017) (explaining why “[r]epeat players are especially likely to

trials.<sup>82</sup> The study of these decisions by transferee judges demonstrates how general case management tools can take on a life of their own in MDL proceedings.

Decisions regarding leadership and bellwether trials are related to the use of fact sheets. For example, decisions over leadership can affect the use of fact sheets and their content. Leadership within the proceeding can shape the negotiation over the use and scope of fact sheets and can serve as the conduit through which fact sheets are submitted. Some proceedings are so large that parties negotiate through leadership the use of third-party vendors to gather information from fact sheets so summary information can be provided to the parties and the court in a timely manner.<sup>83</sup>

Fact sheets can also be relevant in bellwether trials. Bellwether trials can help MDL judges understand the parameters of litigation

---

occupy these leadership positions”); Burch, *supra* note 61, at 98 (explaining “why appointing solely or predominately repeat players may fail to serve plaintiffs’ best interests”); The Honorable Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 392–95 (2014) (listing factors judges often consider when choosing counsel for MDL proceedings); David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 466 (2020) (noting that while “the unstructured quality of the leadership appointment process gives MDL enormous flexibility to address emergent problems, it is not without costs”); Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141, 171 (2012) (noting “that the MDL plaintiffs’ bar is highly structured around a small number of very active repeat-player attorneys” who “likely play an important role in shaping the contemporary American legal landscape”).

<sup>82</sup> See MELISSA J. WHITNEY, FED. JUDICIAL CTR. & JUDICIAL PANEL ON MULTIDISTRICT LITIG., *BELLWETHER TRIALS IN MDL PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES* 3 (2019), <https://www.fjc.gov/sites/default/files/materials/19/Bellwether%20Trials%20in%20MDL%20Proceedings.pdf> (“[A] transferee judge can conduct trials of cases originally filed in the transferee district where venue is proper or cases in which the parties have waived all objections to venue. A trial held in this setting is often referred to as a bellwether trial or test case.”); see also CARROLL ET AL., *supra* note 34, at xii–xiv (recommending judicial practices and procedures relating to fact sheets); Fallon et al., *supra* note 63, at 30–40 (describing the history of bellwether trials and analyzing how they are implemented in modern MDL); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577–79 (2008) (arguing in favor of bellwether trials).

<sup>83</sup> See WHITNEY, *supra* note 82, at 32 (“To facilitate efficient review of claim information, Lead Counsel shall place all Short-Form PFSs submitted by the deadline in an electronic and searchable database. . . . Immediately after the electronic and searchable fact sheet database is made available to counsel for the MDL Defendants, Lead Counsel and counsel for the MDL Defendants will meet and confer . . . .” (citing Order No. 25, *In re Gen. Motors LLC Ignition Switch Litig.* 1:14-md-02543 (S.D.N.Y. Nov. 19, 2014))).

and provide information about the value of cases for settlement purposes.<sup>84</sup> In a proceeding with hundreds or thousands of actions, fact sheets may be the only way to help identify which cases are most appropriate for bellwether trials and which cases need further discovery.<sup>85</sup> Of course, fact sheets only provide the beginning of information used in the bellwether process, as information may need to be supplemented or modified to ensure that the trial process goes smoothly.<sup>86</sup>

Whether we are considering leadership or bellwether trials, the decisions transferee judges make in their MDL proceeding are not made in isolation. At each step in the pretrial process, the choices the transferee judges face are a function of prior choices. To understand the effects of leadership or how litigation moves toward bellwether trials, we must first understand the use of fact sheets. At their heart, these decisions are all made with an eye to helping better manage the proceeding. Understanding the available choices within MDL proceedings—and the consequences of these choices—is imperative for holistically understanding the MDL process and whether new rules are necessary. Key among these choices are the case management and discovery orders judges use to help organize proceedings, especially the decision to require fact sheets in MDL proceedings. These orders shape the litigation, set the scope of initial discovery, and potentially put cases on schedule for trial or settlement.<sup>87</sup> We now turn to the subject of how fact sheets fit within the discovery process.

---

<sup>84</sup> *Id.* at 3–7 (outlining the goals and limits of bellwether trials).

<sup>85</sup> *See id.* at 21 (discussing requirements to use fact sheets to ensure that the case is sufficiently “trial-ready”).

<sup>86</sup> *See id.* at 21 (“Early individual case workups . . . can help to ensure that any inaccuracies and misrepresentations . . . are caught sufficiently early [so] that they do not disrupt the bellwether case pool or trial sequencing process.”).

<sup>87</sup> POCKET GUIDE, *supra* note 77, at 1 (“Used during discovery, fact-sheet responses are generally treated as answers to interrogatories and requests for production, and more broadly are used to manage a wide range of pretrial issues in largescale multiparty litigation.” (footnote omitted)).

### III. WHERE FACT SHEETS FALL WITHIN THE FEDERAL RULES OF CIVIL PROCEDURE

As detailed in the Federal Rules of Civil Procedure, discovery encompasses a variety of tools to obtain information and develop the evidence necessary for trying the case.<sup>88</sup> Fact sheets and related case management tools discussed here have similar goals. While fact sheets are not explicitly mentioned in the Federal Rules of Civil Procedure, they relate to matters typically discussed at pretrial conferences, as described in Rule 16(c)(2). In particular, Rule 16(c)(2)(L) identifies “adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems” as a matter for consideration at a pretrial conference.<sup>89</sup> Fact sheets are intended to be exactly that—special procedures for managing complex cases—which makes the connection to this rule apt. Furthermore, the MDL Subcommittee of the Advisory Committee has explicitly referred to Rule 16 as a basis for fact sheets, noting that “district courts appear to have authority under Rule 16 to impose such a requirement” as plaintiff fact sheets.<sup>90</sup>

Beyond Rule 16, one could also consider fact sheets alongside the scope of discovery as envisioned by the Federal Rules.<sup>91</sup> Discovery must be relevant and proportional to the needs of the case; Rule 26 explains what should be considered in a proportionality assessment.<sup>92</sup> Rule 26(b)(1) provides the scope of discovery, including the right of the parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”<sup>93</sup> Issues such as the parties’ resources, access to the information, and the burden of

---

<sup>88</sup> See FED. R. CIV. P. 26–37 (including depositions, interrogatories, and requests for production).

<sup>89</sup> FED. R. CIV. P. 16(c)(2)(L).

<sup>90</sup> ADVISORY COMMITTEE MEETING, *supra* note 1, at 210.

<sup>91</sup> In fact, the recent proposal by LCJ focuses on rules other than Rule 16, including Rule 26. See LCJ MEMO, *supra* note 3, at 3 (discussing the shortcomings of existing federal rules to effectively govern the use of fact sheets).

<sup>92</sup> See FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment (“The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”).

<sup>93</sup> FED. R. CIV. P. 26(b)(1).

collection are to be considered when making these decisions.<sup>94</sup> Matters can also be appropriate for discovery even if they are not admitted into evidence.<sup>95</sup> Rule 26 provides for automatic disclosures of basic information relevant to the case that should be provided without a specific request from the other party, including the name, address, and phone number of individuals likely to have discoverable information and a copy or description of all documents that may be used to support the party's claims or defenses.<sup>96</sup>

Some orders requiring fact sheets tie them to the Rule 33 requirements for interrogatories.<sup>97</sup> Under Rule 33, parties are generally limited to twenty-five questions, including subparts, unless otherwise stipulated or ordered by the court.<sup>98</sup> Rule 33(a)(2) establishes a broad scope for questions that can be asked,<sup>99</sup> and the responding party must provide a full, written response to each question, under oath, within thirty days of being served.<sup>100</sup> If an interrogatory can be answered through business records (including electronically stored information) and if it does not impose an increased burden on the parties, the responding party can direct the interrogating party to the records to be reviewed and allow a reasonable opportunity to examine.<sup>101</sup> But the 1993 amendments to Rule 33 note,

[B]ecause the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles

---

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (“Information within this scope of discovery need not be admissible in evidence to be discoverable.”).

<sup>96</sup> FED. R. CIV. P. 26(a)(1)(A)(i)–(ii).

<sup>97</sup> The plaintiffs in *In re Atrium Medical Corporation C-Qur Mesh Products Liability Litigation* were required to complete a profile form and, later, a fact sheet. The case management order stated that the questions on the profile form would not be considered interrogatories but that those on the fact sheet would. See Fourth Amended Case Management Order No. 3G at paras. 1–2, *In re Atrium Medical Corp. C-Qur Mesh Prod. Liab. Litig.*, 1:16-md-02753 (D.N.H. Aug. 3, 2017).

<sup>98</sup> FED. R. CIV. P. 33(a)(1).

<sup>99</sup> FED. R. CIV. P. 33(a)(2) (permitting parties to serve any other party with interrogatories concerning “any matter that may be inquired into under Rule 26(b),” even when asking for an opinion).

<sup>100</sup> FED. R. CIV. P. 33(b)(1)–(3).

<sup>101</sup> FED. R. CIV. P. 33(d).

stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.<sup>102</sup>

As discussed below, the number of questions presented on fact sheets often far exceed the Rule 33 limit of twenty-five questions, whether one considers multi-part questions as one question or many.<sup>103</sup> However, because of the flexibility Rule 33(a)(1) bestows, judges managing MDL proceedings have broad discretion in approving the length of fact sheets without being constrained by either the Rule 33 limit or the Rule 26(b)(1) proportionality assessment afforded to discovery in civil cases generally.<sup>104</sup>

Lastly, some discussions of fact sheets place them within the Rule 34 requirements for document requests. Rule 34 authorizes requests for documents and other available evidence relevant to the case and within the scope of Rule 26(b).<sup>105</sup> A Rule 34 document request “must describe with reasonable particularity each item or category of items to be inspected”<sup>106</sup> and “must specify a reasonable time, place, and manner for the inspection and for performing the related acts.”<sup>107</sup> The directed party must respond within thirty days of being served or within thirty days after the parties’ first Rule 26(f) conference, unless otherwise stipulated.<sup>108</sup>

#### IV. WHY ARE FACT SHEETS USED?

The breadth of matters that can be included in the discovery process discussed above highlights the potential need to streamline the process in large MDL proceedings. Because they contain a

---

<sup>102</sup> FED. R. CIV. P. 33 advisory committee’s note to 1993 amendment.

<sup>103</sup> See *infra* Section V.A.

<sup>104</sup> Cf. POCKET GUIDE, *supra* note 77, at 3 (“Even though parties usually negotiate the contents of a fact sheet, transferee judges should be mindful of the length of the questionnaire and the reporting period for which information is required when they set deadlines for compliance or outline procedures for curing deficiencies.”).

<sup>105</sup> FED. R. CIV. P. 34(a).

<sup>106</sup> FED. R. CIV. P. 34(b)(1)(A).

<sup>107</sup> FED. R. CIV. P. 34(b)(1)(B).

<sup>108</sup> FED. R. CIV. P. 34(b)(2)(A).

standard set of questions created for multiple parties to answer,<sup>109</sup> fact sheets should fit well within the MDL framework of creating efficiencies that conserve scarce litigation resources. But fact sheets serve a broader purpose within MDL proceedings: they are a way for judges and parties to gain purchase on the scope of the litigation through case specific information.<sup>110</sup> Core information on the number of parties making claims of harm against a defendant for a globally marketed product, for example, can bring the proceeding's boundaries into focus. This accounting feature of fact sheets should not be understated. Knowing the number of cases and claims, and the general categories of such claims, can help transferee judges understand the resources the proceedings call for, including the need for additional law clerks, special masters, or claims administrators.<sup>111</sup> This knowledge can help judges better manage their dockets. The nature and number of cases and claims can also help judges initiate settlement negotiations, which is the ultimate disposition for most MDL proceedings.<sup>112</sup>

Fact sheet processes not only serve the courts; they can serve the parties' goals, too. While the defense bar quickly points to the use of fact sheets to winnow weak or fraudulent cases, there has been no systematic study of such efforts.<sup>113</sup> The existing literature points to

---

<sup>109</sup> POCKET GUIDE, *supra* note 77, at 1 (describing fact sheets as “standardized questionnaires that seek information about parties’ claims and defenses”).

<sup>110</sup> See *supra* note 87 and accompanying text.

<sup>111</sup> See generally Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 102 COLUM. L. REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3610197](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3610197) (discussing how transferee judges may need to “outsource” tasks during MDL proceedings).

<sup>112</sup> See BURCH, *supra* note 17, at 24–30 (outlining the incentives for settlement in mass tort MDL proceedings); see also POCKET GUIDE, *supra* note 77, at 2 (stating that fact sheets can help “facilitate settlement negotiations”).

<sup>113</sup> See JOHN H. BEISNER, JESSICA D. MILLER & JORDAN M. SCHWARTZ, U.S. CHAMBER INST. FOR LEGAL REFORM, MDL PROCEEDINGS: ELIMINATING THE CHAFF 15 (2015) [hereinafter CHAMBER PROPOSAL]; CARROLL ET AL., *supra* note 34, at 23–24 (discussing the use of fact sheets to uncover “diagnostic irregularities” before discovery); see also James Beck, *Considerations for Defense Counsel in Deciding To Seek, or Not To Seek, Lone Pine Orders in Mass Tort Litigation*, DEF. COUNS. J., Apr. 2018, at 2, 11–12 (discussing the need for winnowing earlier in proceedings); Behrens & Schaecher, *supra* note 34, at 525 (discussing a case where fact sheets used to identify deficient claims); Clint Cowan & Elizabeth Smithhart, *How Data from a Plaintiff’s Wearable Technology Can Make a Difference in Personal Injury Cases*, MASS TORTS LITIG., Winter 2018, at 2, 4, 7 (suggesting the use of data from wearable technology on plaintiff fact sheets as a means to undermine false claims); Maxwell Herman,

other uses for fact sheets. For example, they offer plaintiff's counsel a chance to take a second look at each of their cases and make decisions with regard to selecting cases for bellwether trials or seeking voluntary dismissal.<sup>114</sup> Relatedly, some scholars argue that fact sheets could serve as evidence of "work product" by attorneys that can be used in the selection of leadership appointments in the proceeding, but we found no examples of such use in the data set we collected.<sup>115</sup> The scant literature on fact sheets tends to take a defense perspective,<sup>116</sup> provide an illustrative example<sup>117</sup> of the use of fact sheets, or both, especially focusing on the use of fact sheets to dismiss cases and claims that cannot meet procedural requirements.<sup>118</sup>

The most thorough discussion of the use of fact sheets is found in a recent article by Engstrom<sup>119</sup> on *Lone Pine* orders.<sup>120</sup> However,

---

*Strategies for Early Dismissal of Meritless Cases*, MASS TORTS LITIG., Winter 2017, at 1, 6 (recommending the use of supplemental fact sheets to identify meritless cases); Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 U. KAN. L. REV. 219, 230 (2017) (discussing fact sheets as a "less formal way[]" to winnow weak claims). These sources describe the idea of case winnowing but none shows systematic empirical support for fact sheets being used in such a manner.

<sup>114</sup> See CHAMBER PROPOSAL, *supra* note 113, at 22 (discussing "early and aggressive use of fact sheets" as a method for selecting bellwether trials); CARROLL ET AL., *supra* note 34, at 4, 17 (describing how voluntary dismissals may occur after an order for fact sheets); Behrens & Schaecher, *supra* note 34, at 529 (same); Herman, *supra* note 113, at 1 ("For plaintiffs' attorneys, voluntary dismissal saves time and money otherwise spent opposing summary judgment on cases that cannot prevail at trial, increases actually injured clients' recoveries, and avoids fee-shifting sanctions.").

<sup>115</sup> See *infra* Part V.

<sup>116</sup> See *supra* note 113–114.

<sup>117</sup> See generally Alison Waldrip Bragg, *Preventative v. Punitive: How Genetically Modified Rice Litigation Shaped Regulation and Remedy for Genetically Engineered Crops*, 10 J. FOOD L. & POL'Y 157 (2014).

<sup>118</sup> See CARROLL ET AL., *supra* note 34, at 4, 8–9 (discussing how many of plaintiffs' claims were dismissed after plaintiff fact sheets showed irregularities); Behrens & Schaecher, *supra* note 34, at 525–29 (same).

<sup>119</sup> Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2 (2019).

<sup>120</sup> *Lone Pine* orders originated in a 1986 New Jersey state mass tort case, *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986), where plaintiffs sued a group of defendants for contamination from a landfill. *Id.* at \*1. At a case management conference, the defense submitted an EPA study that suggested the contamination could not be as widespread as the plaintiffs claimed. *Id.* \*1–2. The study prompted the judge to enter an order (now referred to as a *Lone Pine* order) requiring plaintiffs to submit evidence of exposure to toxic substances, including reports from expert

*Lone Pine* orders are a separate and distinct case management tool available to judges. While both fact sheets and *Lone Pine* orders require general information about exposure, and both may require information about the identity of the diagnosing or treating doctors, compliance with the *Lone Pine* order also requires submitting evidence of causation.<sup>121</sup> As Engstrom notes, the increased cost of obtaining evidence of causation from experts makes compliance with a *Lone Pine* order much more difficult than a case management order requiring a fact sheet.<sup>122</sup> Engstrom argues *Lone Pine* orders increase both the financial and time burden on plaintiffs and, while issued under the Rule 16 authority of the judge, generally do not have the procedural requirements of other case management orders.<sup>123</sup> Engstrom argues that fact sheets should be used in place of *Lone Pine* orders in mass torts and other complex proceedings because they supply the information required to understand the scope of the proceeding while imposing lower financial burdens on plaintiffs.<sup>124</sup> Engstrom argues that fact sheets have a clear place within the discovery process, where the rules of procedure are clearer, and have been subject to appellate review, neither of which is true of *Lone Pine* orders.<sup>125</sup>

Two additional points warrant consideration. First, to date, no systematic study of the use of fact sheets has occurred. This is the first such study. Second, and perhaps more important to scholars of procedural justice, fact sheets offer a way through the discovery process that *Lone Pine* orders never could because of the lower burden on parties.<sup>126</sup> *Lone Pine* orders are not necessary in every

---

witnesses supporting claim of injury *and causation*. *Id.* Ultimately, the inability of some plaintiffs to comply with the order led to the dismissal of their cases. *Id.* at \*4.

<sup>121</sup> See Engstrom, *supra* note 119, at 21 (“*Lone Pine* orders typically inquire as to specific causation. They demand evidence that product or contaminant x actually caused plaintiffs injury or ailment y. Plaintiff fact sheets do not.”).

<sup>122</sup> See *id.* (“[O]wing to their heavy reliance on notoriously pricey medical experts, *Lone Pine* orders are expensive; to enter a *Lone Pine* order is to impose a costly burden on plaintiffs.”).

<sup>123</sup> See *id.* at 42–46 (discussing the tension between *Lone Pine* orders and the existing Federal Rules of Civil Procedure, safeguards for plaintiffs’ access to discovery, and appellate review of decisions to terminate a case, especially Rule 56 protections regarding how to balance the burdens of production when deciding summary judgment).

<sup>124</sup> See *id.* at 57–60.

<sup>125</sup> See *id.* at 43–44 (discussing the tension between *Lone Pine* orders and Rule 56).

<sup>126</sup> See *id.* at 58 (“[F]act sheets are less expensive, expansive, and demanding than *Lone Pine* orders . . .”).

case. Indeed, to require *Lone Pine* orders assumes plaintiffs' claims are always unsupported by evidence without any showing, as in *Lore v. Lone Pine*.<sup>127</sup> Recent legislative efforts to require *Lone Pine* orders make the assumption that the orders will benefit every proceeding, and the proposed requirements for entering such orders would make it impossible for judges with large proceedings to do anything besides manage the *Lone Pine* process when such a process may not have been necessary.<sup>128</sup>

The same point could be made of fact sheets—they may not be necessary in every MDL proceeding. Proposals to amend the Federal Rules of Civil Procedure to address the management of MDL proceedings, including proposals for winnowing unsupported claims, have grown out of the above-mentioned legislative efforts and are under consideration.<sup>129</sup> Both the proposed legislation and the proposed amendments to the Rules require information from fact sheets, including the evidence of causation more typical of *Lone Pine* orders.<sup>130</sup> Moreover, the proposed language related to fact

---

<sup>127</sup> See *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, at \*4 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (“A reading of the reports submitted by plaintiffs . . . clearly indicates their inadequacy in establishing a prima facie case and do not constitute reasonable discovery.”).

<sup>128</sup> One could argue that the requirement H.R. 985 imposed—to force transferee judges to enter *Lone Pine* orders forty-five days into a proceeding—counters notions of orderly litigation because *Lone Pine* orders impose an unnecessary administrative burden on the court and unnecessary requirements on the litigants. See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 105 (2017) (“[C]ounsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is . . . in the proceedings shall make a submission sufficient to demonstrate that there is evidentiary support . . . for the factual contentions in plaintiff’s complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury.” (emphasis added)); see also Engstrom, *supra* note 119, at 57 (“[A]nother vehicle offers many, if not all, of the legitimate benefits *Lone Pine* orders supply with few of the attendant disadvantages.”).

<sup>129</sup> See WILLIAMS ET AL., PLAINTIFF FACT SHEETS, *supra* note 1, at 1 (“The Judicial Conference Advisory Committee on Rules of Civil Procedure (Committee) is currently considering various proposals to amend the Federal Rules of Civil Procedure to address the management of [MDL] proceedings.”); LCJ MEMO, *supra* note 3, at 2 (recommending a change to the federal rules “requiring disclosure of evidence showing the cause and nature of the injury alleged”).

<sup>130</sup> See H.R. 985 115th Cong. § 105 (2017) (requiring disclosure of information “sufficient to demonstrate that there is evidentiary support . . . for . . . the alleged cause of the injury”);

sheets is not neutral with respect to parties in MDL and does not reflect an understanding of how fact sheets are used in MDL proceedings. The proposed language (tied to amending Rule 26) requires that, within sixty days of the filing of a case, *plaintiffs* make an initial disclosure which:

- (i) identifies with particularity any product, service, or exposure at issue in the action, and provides documents or electronically stored information evidencing same; and
- (ii) identifies with particularity the specific injury at issue in the action, including the date of the injury, and provides documents or electronically stored information evidencing same.<sup>131</sup>

Plaintiffs in existing cases at the time of centralization would have to make such disclosures within sixty days of the order on centralization.<sup>132</sup> For many cases, this deadline is too early in the life of the proceeding for the parties or the transferee court to know the contours of the litigation. In addition, the proposed language offers no equivalent deadlines for defendants' fact sheets.

The calls for reform were made in the absence of empirical data.<sup>133</sup> Additional research is necessary to inform the rulemaking discussion. If transferee judges, applying their best understanding of the needs of the proceeding while balancing the burden on parties and the desire to move the litigation forward, have the tools needed to manage MDL proceedings, additional rules may be unnecessary. If, however, fact sheets are not being used in a way that helps manage the litigation, another approach—including education, training, or rulemaking—might be in order. We turn now to an analysis of the use of fact sheets in a sample of MDL proceedings.

---

LCJ MEMO, *supra* note 3, at 4 (providing proposed language of Rule 26(a)(1) that would require plaintiffs to disclose evidence of “exposure to the alleged cause”).

<sup>131</sup> LCJ MEMO, *supra* note 3, at 4.

<sup>132</sup> *Id.*

<sup>133</sup> See WILLIAMS ET AL., PLAINTIFF FACT SHEETS, *supra* note 1, at 1 (noting that its purpose was to inform the advisory committee about the use of plaintiff fact sheets).

## V. DATA AND ANALYSIS

Using a sample of 116 mass tort proceedings centralized since 2008, we examine the use of fact sheets in MDL proceedings.<sup>134</sup> While fact sheets are not unique to mass tort or even products liability proceedings, they are more likely to be used there because these proceedings frequently involve the greatest number of actions, creating organizational challenges that fact sheets may help mitigate.<sup>135</sup> Because this analysis explores the use of fact sheets, we focused on proceedings most likely to include fact sheets. If we do not find that fact sheets are used consistently here, we are unlikely to see them used in any other type of proceeding.<sup>136</sup> This decision limits the generalizability of the findings with respect to the frequency of fact sheet use and the information required within a fact sheet, but focusing on mass torts is consistent with the focus of both the recent proposals and much of the MDL literature.<sup>137</sup> Future studies may want to cast a wider net to examine the use of fact sheets and their effect on MDL proceedings more broadly.

---

<sup>134</sup> While 114 of the 116 proceedings were products liability proceedings, two fell into other categories. *In re E.I. Du Pont De Nemours and Company C-8 Personal Injury Litigation*, 2:13-md-02433 (S.D. Ohio Apr. 8, 2013) is a miscellaneous proceeding, and *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 2:10-md-02179 (E.D. La. Aug. 10, 2010) is a common disaster proceeding. See *MDL Statistics Report - Docket Type Summary*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. (Aug. 17, 2020, 12:10 PM), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_MDL\\_Type-August-17-2020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-August-17-2020.pdf) (categorizing pending MDL dockets). We did not include *In re National Prescription Opiate Litigation*, a miscellaneous proceeding where the plaintiffs are state and local governments who are more familiar with the process of litigation than a typical one-shot plaintiff in a mass tort proceeding. See 290 F. Supp. 3d 1375, 1376–77 (J.P.M.L. 2017). While fact sheets were used in this proceeding, the generalizability of the fact sheets used and the process for negotiating the information collected to the rest of MDL plaintiffs is questionable. See Case Management Order One at para. 9(i), *In re Nat'l Prescription Opiate Litig.*, 1:17-md-02804 (N.D. Ohio Apr. 11, 2018) (ordering plaintiff and defendant fact sheets).

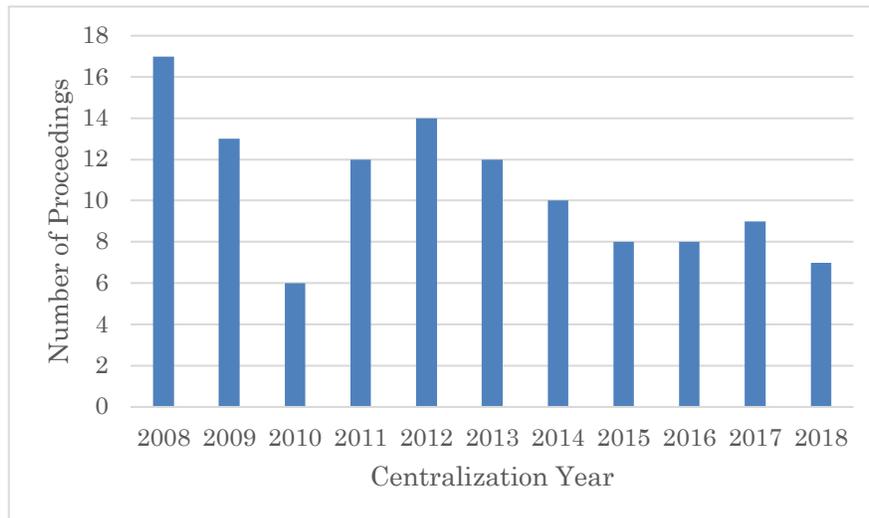
<sup>135</sup> See Williams, *supra* note 20, at 1275 (“[P]roducts liability proceedings are, on average, larger than other proceedings.”).

<sup>136</sup> The focus of the academic literature and the reform efforts tends to be on large products liability proceedings. Using the threshold of proceedings with 1000 or more actions to define “large” proceedings, 92% of the largest MDL proceedings are products liability. *Id.* at 1274–75.

<sup>137</sup> Cf. BURCH, *supra* note 17, at 10 (“A look . . . at all the actions on the Panel’s docket reveals mass torts’ dominance: 95% are products liability.”).

Despite being limited to products liability, our sample of proceedings otherwise resembles MDL litigation generally. As of October 2018, 52 of the 116 proceedings (45%) we examined were closed.<sup>138</sup> Consistent with the rest of MDL litigation, more of our proceedings were centralized early in our time period than later.<sup>139</sup> The average number of proceedings in our sample centralized each year was 10.5, with a minimum of 6 proceedings in 2010 and a maximum of 17 proceedings in 2008. Figure 1 below shows the variation in centralization year across the proceedings in our data set.

*Figure 1 – Frequency of Centralization Year in Our Sample of Mass Tort Proceedings*



Using a decade of proceedings allows us to examine at what point in the proceeding fact sheets are introduced and gives us the

<sup>138</sup> One proceeding closed and then reopened during our ten-year time period. For information on when certain proceedings were filed, transferred, and, if relevant, closed, see U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407: FISCAL YEAR 2019 (2019), [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical\\_Analysis\\_of\\_Multidistrict\\_Litigation-FY-2019\\_0.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf).

<sup>139</sup> See Williams, *supra* note 20, at 1266 for discussion of the decline in centralized proceedings.

opportunity to examine the effect fact sheets have on the duration of a proceeding. Not only are almost half of our proceedings closed, they vary in the number of years they were open, allowing us to test the hypothesis that fact sheets help judges manage proceedings more efficiently. Said differently, examining variation in closed proceedings allows us to determine whether fact sheets help judges manage proceedings, resulting in faster terminations. Of the 52 closed proceedings, the average number of days the proceeding was open was 1575.6, with a minimum of 314 days and a maximum of 3556. For pending proceedings, the average number of days pending was 1639.6, with a minimum of 118 days and a maximum of 3811. Both pending and closed proceedings show sufficiently varied duration, allowing us to examine the effect of fact sheets on efficient case management.

Though we can examine the effect of using fact sheets on a proceeding's duration, we cannot say more about the effect of fact sheets on the termination of individual cases within a proceeding. Looking at the closed proceedings in our data, we see that, on average, 487 actions were terminated within the proceeding (a minimum of 3 and a maximum of 5190) and, on average, 7 actions were remanded (a minimum of zero and a maximum of 140).<sup>140</sup> The difference between those proceedings with and without fact sheets is not statistically significant: with a fact sheet or profile form process, 99% of actions terminate within the proceeding, and without such a process, 98% of actions terminate within the proceeding. The remand rate is also so low within MDL proceedings overall that it is unlikely a fact sheet process would have an effect.<sup>141</sup> However, because "closed within the proceeding" is such a broad category, it is impossible to tell if the cases are closing through voluntary dismissal, settlement, or on motions practice that may or may not be related to the completion of fact sheets. To best understand the effect of fact sheet and profile form processes on the

---

<sup>140</sup> See *infra* Appendix.

<sup>141</sup> See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407: FISCAL YEAR 2018, at 3 (2018), [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical\\_Analysis\\_of\\_Multidistrict\\_Litigation-FY-2018.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf) (noting that "[a]s of September 30, 2018, a total of 16,728 actions had been remanded for trial and 499,865 actions had been terminated in the transferee court," a 3% remand rate for all terminated actions in MDL).

actions within a proceeding, a more detailed look at the type of case termination is in order. Such efforts are left to future research.

While we cannot examine the effect of fact sheets on the actions themselves, we are able to consider how the number of actions affects the use of fact sheets. The average size of the proceedings was 2460 actions with a minimum number of 3 actions and a maximum of 40,533 actions.<sup>142</sup> Using the Panel's metric of proceedings with 1000 or more total actions to distinguish large proceedings from others,<sup>143</sup> we find 39 of 116 (34%) proceedings involved 1000 or more total actions. Examining the variation in proceeding size generally is important to understanding the use of fact sheets because the conventional wisdom is that fact sheets help manage large MDL proceedings.<sup>144</sup> Thus, the larger the proceeding, the more likely it is we should find a fact sheet. The data show substantial variation in size, allowing us to test this hypothesis.

MDL proceedings are created to make the litigation of related cases more efficient than by proceeding separately. Because the cases involve common questions of fact, managing pre-trial matters through an MDL proceeding allows the transferee judge to make decisions that apply to multiple cases at the same time. That said, these proceedings are complex because of the substance of the litigation and because of the number of matters included. Generally, the more actions in an MDL proceeding, the more time the proceeding should take simply due to the management of thousands of cases. In our sample of 116 proceedings, we find that the number of days the proceeding is open is positively related to the number of

---

<sup>142</sup> See, e.g., *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, 299 F.R.D. 502, 508–09 (S.D.W. Va. 2014) (demonstrating the maximum number of claims within one proceeding in the dataset); *In re Saturn L-Series Timing Chain Prods. Liab. Litig.*, 8:07-cv-298, 2008 WL 4866604 (D. Neb. Nov. 7, 2008) (demonstrating the minimum number of aggregate claims within one proceeding in the dataset). To reference the data used from these cases, see *infra* Appendix.

<sup>143</sup> John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2230 (2008) (“[S]ome MDLs meet the ‘mega-case’ definition. . . . Only thirty-seven out of about 300 active MDLs comprise more than 100 constituent actions and only ten have more than 1000.”).

<sup>144</sup> See POCKET GUIDE, *supra* note 77, at 1 (“Fact sheets can be useful in organizing large groups of plaintiffs but can also be used to organize proceedings with multiple defendants. They are commonly ordered in multidistrict litigation (MDL) proceedings consisting of personal injury claims, such as those involving pharmaceuticals, medical devices, and mass disasters.”).

actions in the proceeding. In other words, proceedings with more actions take longer to close.<sup>145</sup>

The transferee courts chosen for the 116 proceedings in our sample spread across 40 of the 94 districts courts. The District of New Jersey saw the greatest number of proceedings with 11, while 19 of the remaining 39 districts managed only 1 MDL in the studied period. The distribution of proceedings across districts matters because, like many other case management techniques within the federal courts, judges often learn about using fact sheets from other judges, including those serving on their court.<sup>146</sup> Norms of using fact sheets may likewise develop as transferee judges within a district discuss their proceedings. Even if the judges did not hear about fact sheets from other judges (and we think it likely that they do), judges may learn about their use from the repeat player attorneys participating in MDL proceedings, especially within the same district.<sup>147</sup> With the expected sharing of information, uses of fact sheets likely are not independent events. Once fact sheets are successfully used in a particular court, they should be more likely to appear in a future proceeding in that district.<sup>148</sup>

---

<sup>145</sup> About 25% of the variation in the duration of the proceeding is explained by the number actions involved.

<sup>146</sup> See *supra* note 63–67 and accompanying text.

<sup>147</sup> See Burch & Williams, *supra* note 81, at 1516–18 (suggesting that social networks of repeat players form in MDL proceedings, allowing them to influence MDL procedure and case management); Burch, *supra* note 60, at 95–101 (discussing concerns raised by the prevalence of repeat players in MDL); Duval, *supra* note 81, at 392–95 (explaining factors, including colleague recommendations, that judges consider when choosing lead counsel in MDL cases); Williams et al., *Repeat Players*, *supra* note 81, at 171–72 (examining the plaintiff's bar and repeat players in MDL using social network analysis).

<sup>148</sup> Unfortunately, because our sample does not reach back to the first use of fact sheets in an MDL proceeding, we are unable to account for the possibility of non-independent events. Future analysis, with an expanded number of proceedings, should consider such factors. While it might be possible that certain judges are more likely to use fact sheets than others—a hypothesis that could be tested by looking over a longer time period—there were few repeat transferee judges in our dataset. In fact, in looking at the use of fact sheets across the eight repeat transferee judges, we found it evenly split on whether the judge always used plaintiff fact sheets in our period of study.

## A. WHEN FACT SHEETS ARE USED

Of the 116 proceedings in our dataset, 66 definitively involved the use of plaintiff fact sheets, while 50 involved defendant fact sheets (47 used both).<sup>149</sup> Of the 66 proceedings with plaintiff fact sheets, 21 were closed while the other 45 were pending. Interestingly, not all the pending proceedings with fact sheets were recently centralized—six pending proceedings were centralized between 2008 and 2010, some of the oldest proceedings in the study. Thus, our sample shows variation not only on the use of fact sheets within the proceeding but also how quickly proceedings with fact sheets terminate, allowing us to test the effect of fact sheets on proceeding duration.

Given the number of proceedings centralized each year<sup>150</sup> and the variation in the use of fact sheets across the data discussed above, one must consider whether there are trends in the use of fact sheets over time. Figure 2 shows the percentage of proceedings with fact sheets (both plaintiff and defendant) by year of centralization.<sup>151</sup> The solid lines show the percentages and the dotted lines show the linear trends. Both plaintiff and defendant fact sheets became more common in proceedings during our study period, but they are certainly not used in all proceedings.

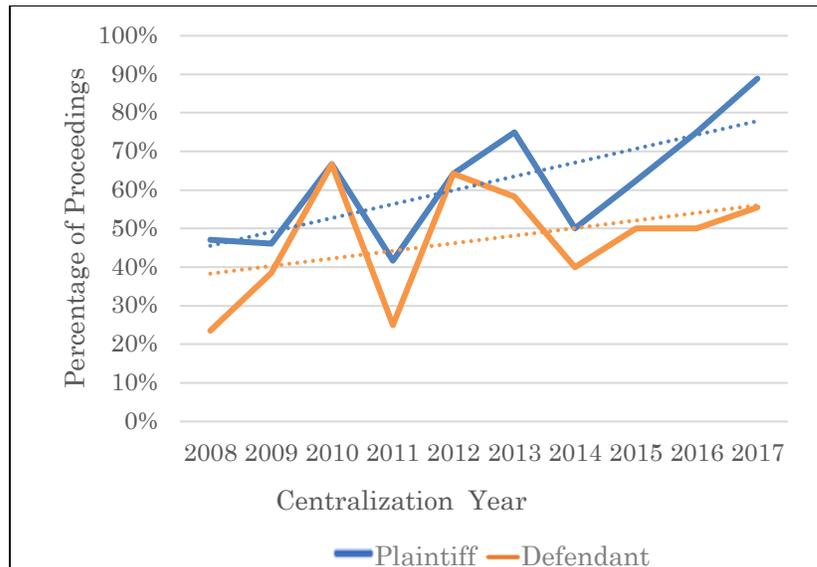
---

<sup>149</sup> One proceeding expected to use a defendant fact sheet in February 2019, outside the period of our data collection. See Order No. 7 at 2–3, *In re Zimmer M/L Taper Hip Prosthesis with Kinectiv Tech. & Versys Femoral Head Prods. Liab. Litig.*, 18-md-2859 (S.D.N.Y. Feb. 7, 2019) (setting a deadline for parties to submit both the plaintiff and defendant fact sheets).

<sup>150</sup> See *supra* Figure 1.

<sup>151</sup> Due to the amount of time it takes to order fact sheets, we excluded proceedings centralized in 2018 from the figure because, while they do not currently have fact sheets, they may in the future.

Figure 2 – Percentage of Proceedings with Fact Sheets, by Year of Centralization



Since not all proceedings require fact sheets, one must consider the proceeding characteristics that likely affect whether they are used. Fact sheets are intended to help transferee judges manage proceedings—especially large proceedings—by providing them and the attorneys with an initial understanding of the scope of the cases and claims within the proceeding.<sup>152</sup> Thus, we would expect that the larger the proceeding (here measured by the total number of actions) the more likely the proceeding will involve a fact sheet. Indeed, we find a positive relationship between the size of the proceeding and the use of fact sheets.<sup>153</sup> Whether we consider fact sheets (plaintiff or defendant) or profile forms, the more actions in the proceeding, the more likely that these case management tools are used. Table 1 shows the difference of means between proceedings with and without each case management tool, which

<sup>152</sup> See POCKET GUIDE, *supra* note 77, at 2 (detailing the purposes of fact sheets).

<sup>153</sup> See *infra* Table 1.

were examined with a *t*-test.<sup>154</sup> The difference in means is statistically significant for each group at the  $p < 0.002$  level or higher, supporting the claim that judges tend to use fact sheets in proceedings with more actions. In fact, plaintiff fact sheets were ordered in 81% of proceedings with more than 100 actions (59 out of 73) and in 87% of proceedings with 1000 or more actions (34 out of 39).<sup>155</sup>

*Table 1 – Average Number of Total Actions by Case Management Tool*

<b>Case Management Tool</b>	<b>Average Number of Actions with Tool</b>	<b>Average Number of Actions without Tool</b>
Plaintiff Fact Sheets	3971	466
Defendant Fact Sheets	4842	1579
Plaintiff Profile Forms	7086	1438
Either Facts Sheets or Profile Forms	3726	311

Several proceedings used both plaintiff profile forms and more detailed plaintiff fact sheets. Plaintiff profile forms were ordered in 21 proceedings (18% of all proceedings). Profile forms were ordered in addition to plaintiff fact sheets in 14 proceedings and in lieu of fact sheets in 7 proceedings. All plaintiff profile forms were ordered in proceedings with more than 100 actions, and two-thirds of them (14 of the 21) were ordered in large proceedings. The size of the proceeding appears to be related to the use of fact sheets and profile forms, and both case management tools tend to appear in the largest proceedings. Defendant fact sheets also tend to be used in proceedings with more actions.

---

<sup>154</sup> See THOMAS H. WONNACOTT & RONALD J. WONNACOTT, INTRODUCTORY STATISTICS 261, 295–96 (5th ed. 1990) (noting *t*-tests can be used to determine if differences between categories of data are statistically significant).

<sup>155</sup> See *infra* Appendix.

## B. HOW FACT SHEETS ARE IMPLEMENTED

The analysis above shows that fact sheets are used in MDL proceedings, so how they are implemented is an important consideration. Fact sheets begin with a case management order by the transferee judge.<sup>156</sup> The specificity of the order varies by transferee judge. Some judges order the parties to confer on whether or not fact sheets are appropriate for the proceeding,<sup>157</sup> while others assume their utility and order the parties to negotiate the items to be included.<sup>158</sup> Even among those orders that assume fact sheets should be used, implementation varies. Some transferee judges require specific pieces of information to be included in the fact sheet as a minimum of what should be asked, including medical and other releases that will be necessary later in the litigation.<sup>159</sup> Judges can even suggest the use of fact sheets for defendants, especially in multi-defendant MDLs where manufacturers, distributors and sellers of a product are all named in the proceeding.<sup>160</sup>

No matter the scope or specificity of the order, the bulk of the questions on fact sheets are negotiated by the parties to the proceeding. When parties cannot agree on the number of questions or the scope of the questionnaire, some transferee judges encourage the parties to keep negotiating while others bring them in to confer

---

<sup>156</sup> See *supra* Part II.

<sup>157</sup> For an example regarding the possible use of defendant fact sheets, see Pretrial Order No. 5 at para. 5, *In re Fluoroquinolone Products Liability Litigation*, 0:15-md-2642 (D. Minn. Apr. 26, 2016). For an example related to plaintiff fact sheets, see Case Management Order No. 4 at para. 3, *In re GAF Elk Cross Timbers Decking Marketing, Sales Practices and Products Liability Litigation*, 2:15-cv-00018 (D.N.J. Mar. 26, 2015).

<sup>158</sup> See, e.g., Pretrial Order No. 3: Initial Pretrial Conference Agenda at para. 16, *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 0:15-md-02666 (D. Minn. Feb. 9, 2016) (ordering the parties to address the use of fact sheets).

<sup>159</sup> See Order No. 4 at para. 19, *In re Silica Prods. Liab. Litig.*, 2:03-md-1553 (S.D. Tex. Jan. 23, 2004) (specifying the plaintiffs' "minimum" factual disclosure requirements).

<sup>160</sup> See, e.g., Order Granting Joint Motion for Entry of the Plaintiff Fact Sheet, *Yamaha Corp. Defendant Common Discovery and Case Specific Fact Sheets, and Dealer Defendant Common Discovery and Case Specific Fact Sheets and Related Documents at 1*, *In re Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig.*, 3:09-md-02016 (W.D. Ky. June 15, 2009) (requiring different defendant fact sheets for dealers and manufacturers of all-terrain vehicles).

over their differences.<sup>161</sup> Draft questionnaires (as noted below, averaging twenty-five pages for plaintiffs and seven pages for defendants) are submitted for approval to the court, which may or may not require revision, and the transferee judge adopts the questionnaire with a subsequent case management order.<sup>162</sup> Even after adoption by the court, questionnaires (and their corresponding case management orders) may be revised or amended. Alternatively, the information provided by plaintiffs may need to be supplemented, either through amendment or through the adoption of a second form for completion; implementing these changes also requires case management orders.<sup>163</sup> The need to amend or supplement fact sheets can depend on the decision to apply fact sheets to all plaintiffs or subsets for discovery and bellwether purposes, as well as the nature of the litigation and the timing of the fact sheet order and the deadlines for completion.<sup>164</sup>

---

<sup>161</sup> For an example of the transferee judge ordering briefing on fact sheet differences in advance of a meeting, see Case Management Order No. 4 at para. 3, *In re GAF Elk Cross Timbers Decking Marketing, Sales Practices and Products Liability Litigation*, 2:15-cv-00018 (D.N.J. Mar. 26, 2015).

<sup>162</sup> The plaintiff fact sheet was amended in Order at 1, *In re Trasylol Products Liability Litigation*, 1:08-md-01928 (S.D. Fla. Jan. 8, 2010), almost two years after the initial trial order. See Pretrial Order No. 4 Relating to Case Management at 13–14, *In re Trasylol Prods. Liab. Litig.*, 1:08-md-01928 (S.D. Fla. May 22, 2008). *But see* Pretrial Order No. 4 on Bellwether Trials and Discovery at 2, 4, *In re Levaquin Prods. Liab. Litig.*, 0:08-md-01943 (D. Minn. Feb. 20, 2009) (ordering the plaintiff fact sheet, which was not amended).

<sup>163</sup> In Pretrial Order No. 4E: Fifth Amendment to Pretrial Order No. 4: Discovery Plan (Provision of Supplemental Plaintiffs' Fact Sheets) at para. III(A)(3)(a), *In re Chantix (Varenicline) Products Liability Litigation*, 2:09-cv-02039 (N.D. Ala. Mar. 4, 2013), the transferee judge entered an order to supplement information collected in the plaintiff fact sheets for those plaintiffs alleging a “neuropsychiatric injury” and who had not entered into the settlement.

<sup>164</sup> In Case Management Order No. 9 (Plaintiff Fact Sheets and Records Authorization) at 1–2, *In re Testosterone Replacement Therapy Products Liability Litigation*, 1:14-cv-01748 (N.D. Ill. Oct. 6, 2014), the transferee judge required fact sheets for all plaintiffs in October 2014. By December 2017, while settlement discussions were ongoing, the judge entered a separate order requiring a plaintiff profile form for all plaintiffs to collect information relevant to the settlement. See Case Management Order No. 85 (Supplemental Plaintiff Profile Form – PPF) at 2, *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 1:14-cv-01748 (N.D. Ill. Dec. 8, 2017) (requiring plaintiff profile forms).

## C. THE TIMING OF FACT SHEET ORDERS

Of the 66 proceedings with a plaintiff fact sheet, 65 provided information for the date on which the fact sheets were ordered.<sup>165</sup> On average, plaintiff fact sheets were ordered 246 days after the centralization decision, with a minimum of 45 days and maximum of 1084 days (more than three years) into the proceeding. Of course, judges also order the use of plaintiff profile forms, so it is important to account for when those are ordered, too. Plaintiff profile forms were ordered, on average, 516 days into a proceeding, with a minimum of 63 days and a maximum of 2510—a range of two months to nearly seven years—into a proceeding.<sup>166</sup> Of the 50 defendant fact sheets in our proceedings, 49 included information regarding the order date, and 42 of those were available for download. On average, fact sheets for defendants were ordered within 332 days of centralization, with a minimum of 63 days and a maximum of 2510 days. Thus, it appears in our sample that plaintiff fact sheets are ordered earlier in the proceeding, on average, than plaintiff profile forms and defendant fact sheets.

If we consider the process as a whole and look at when the first order is entered in a proceeding—whether for a fact sheet or profile form—we can gather a sense of when judges are asking for the lay of the land in an MDL. While some argue, without systematic study, that “[j]udges increasingly require plaintiff fact sheets to be filed early in the litigation,”<sup>167</sup> the figure below shows that little evidence supports such claims.<sup>168</sup> While variation exists from year to year, a line trending down would be necessary to suggest increased use of

---

<sup>165</sup> See *infra* Appendix. One proceeding did not provide information for the date on which the plaintiff fact sheet was ordered during our data collection period. One defendant fact sheet failed to provide such information, too.

<sup>166</sup> The maximum value comes from Case Management Order No. 5 at 6, *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation*, 3:11-md-02244 (N.D. Tex. June 20, 2012), ordering a plaintiff fact sheet 394 days after centralization. The plaintiff profile form was ordered in Case Management Order No. 10 Pinnacle Plaintiff Profile Form at para. 1, *In re DePuy Orthopaedics, Pinnacle Hip Implant Products Liability Litigation*, 3:11-md-0224 (N.D. Tex. Apr. 6, 2018) in the proceeding to aid the mediation and remand process for remaining cases.

<sup>167</sup> Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 351 (2014)

<sup>168</sup> See *infra* Figure 3.

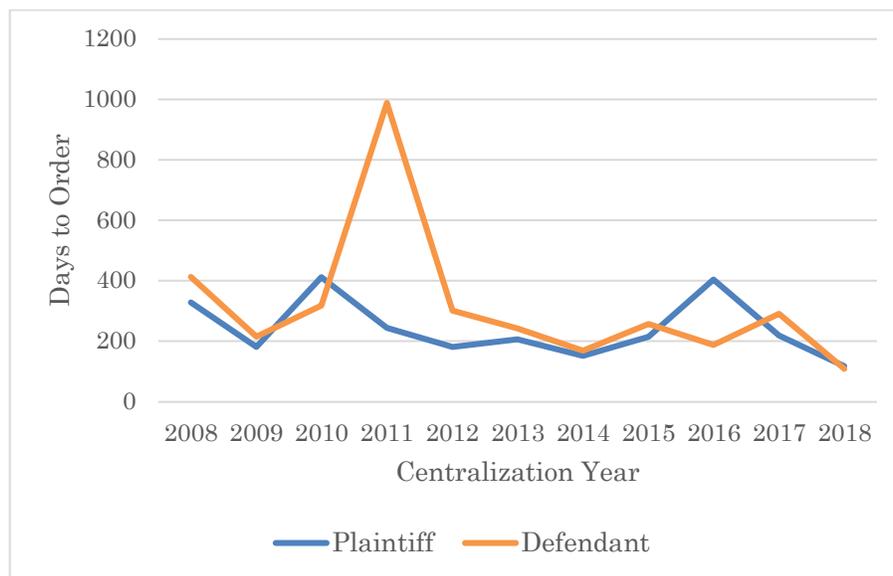
early fact sheet processes over time. We find no evidence of such a trend here, and no statistically significant relationship exists between centralization year and time to the case management order requiring the fact sheet or profile form.<sup>169</sup> Though fact sheets are more common in recent proceedings (shown above in Figure 2), orders creating them are not being entered any earlier today than in prior years.<sup>170</sup>

---

<sup>169</sup> The correlation coefficient between centralization year and time to order is -0.04 and the  $p$ -value is  $p < 0.74$ . Not only would the relationship between the two variables be weakly negative, but it is well beyond the standard values for statistical significance. The  $p$ -value demonstrates the probability that the relationship found is due to chance. That the last two years appear to go down is the result of fewer proceedings centralized in those with fact sheet processes at the time of this analysis.

<sup>170</sup> See *infra* Figure 3. The absence of a trend toward earlier plaintiff fact sheet implementation is not surprising. The fact sheet order generally follows the appointment of lead counsel, who negotiate it. POCKET GUIDE, *supra* note 77, at 6 (“The time typically varies depending on how long it takes to appoint leadership counsel (who play a key role in drafting fact sheets) and the process for negotiating the contents of fact sheets.”). Additionally, whether to use a fact sheet depends on the needs of the litigation. For example, in some MDL proceedings, courts have decided to focus on general causation during the initial phase of litigation, and thus defer fact sheets during that period. See, e.g., Order re Bifurcation and Agenda for First Case Management Conference at 1, *In re Roundup Prods. Liab. Litig.*, 3:16-md-02741 (N.D. Cal. Nov. 14, 2016) (“[T]he Court has determined that the proceedings will be bifurcated, with the first phase addressing general causation.”); Pretrial Order No. 50: Plaintiff Fact Sheet Completion and Deficiencies at 1, *In re Roundup Prods. Liab. Litig.*, 3:16-md-02741 (N.D. Cal. Sept. 26, 2018) (“Plaintiffs shall each complete . . . a Plaintiff Fact Sheet and Authorizations for Release of Records . . . in the time and format specified below.”).

Figure 3 – Average Days to Fact Sheet Order by Centralization Year<sup>171</sup>



It is fair to say that the timing of fact sheets and profile forms varies within the proceeding—some judges order them early in proceedings and others later.<sup>172</sup> The variation in the use of the case management tools will likely affect those tools’ impact on the duration of the proceeding overall.

#### D. DEADLINES FOR COMPLIANCE

The order adopting the fact sheet details not only the submission deadlines for existing cases, but also for those that may join the proceeding after the date of the order. The number of days to submit the fact sheets varies substantially by proceeding, ranging from a low of a few weeks after the order to several months depending on

<sup>171</sup> We exclude 2018 from the analysis because the amount of time to order fact sheets suggests that proceedings centralized in 2018 have had insufficient time to include a fact sheet process.

<sup>172</sup> See Burch, *supra* note 80, at 79 (“Although nearly all judges . . . ordered fact sheets, they did so at different times, ranging from forty-five to 1,084 days after the Panel centralized the proceeding.”).

when the order is issued, whom it covers, and the length of the questionnaire.<sup>173</sup> Cases brought into the proceeding after entry of the order see their deadline tied to the date of transfer—with completed forms often due sixty days later.<sup>174</sup> The order typically states the process by which all fact sheets should be submitted, including whether fact sheets are provided to leadership who make it available to opposing counsel, whether fact sheets are made available directly to opposing counsel, whether there are confidentiality or privilege measures for parties to take and whether a third-party vendor is used to manage the fact sheet process, and, if so, who pays for such a vendor and who has access to the information if such a vendor is used.<sup>175</sup>

#### E. WHAT INFORMATION IS COLLECTED IN FACT SHEETS

In an earlier study of fact sheets, we found that the information requested generally falls into a few categories, with variation within fact sheets determined by the proceeding itself.<sup>176</sup> The general information requested in the fact sheets covers:

---

<sup>173</sup> Compare Case Management Order No. 9 (Plaintiff Fact Sheet and PFS Document Production) at 11, *In re Proton-Pump Inhibitor Prods. Liab. Litig.* (No. II), 2:17-md-02789 (D.N.J. Feb. 5, 2018) at 10 (allowing 120 days to complete the fact sheets), with Case Management Order No. 12 at 2, *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.* (No. II), 1:17-md-02767, (S.D.N.Y. Aug. 30, 2017) (allowing plaintiffs 60 days to complete the fact sheets). Deadlines for late-arriving plaintiffs are often shorter than those in the proceeding at the time of the order. See, e.g., Case Management Order No. 9 (Plaintiff Fact Sheet and PFS Document Production) at 10–11, *In re Proton-Pump Inhibitor Prods. Liab. Litig.* (No. II), 1:17-md-2789 (D.N.J. Feb. 5, 2018) (allowing plaintiffs involved in the action at the time of the order 120 days to complete their fact sheets while allowing 90 days for plaintiffs added thereafter).

<sup>174</sup> See, e.g., Case Management Order No. 3G at 1, *In re Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig.*, 1:16-md-02753 (D.N.H. Aug. 3, 2017) (stating that plaintiffs from transferred cases must submit a plaintiff profile form within sixty days of transfer).

<sup>175</sup> Compare *id.* at 92–94 (directing the fact sheet submission process, including how records will be made available to the parties and how the costs of record collection will be divided), with Case Management Order No. 9 (Plaintiff Fact Sheets and Records Authorizations) at 9–11, *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 1:14-cv-01748 (N.D. Ill. Oct. 6, 2014) (directing plaintiff fact sheets to be provided directly to defendants and detailing the confidentiality measures and third-party vendor to be employed).

<sup>176</sup> WILLIAMS ET AL., PLAINTIFF FACT SHEETS, *supra* note 1, at 2.

- (1) proof of use of the product at issue or other exposure information;
- (2) “health records (e.g., general health, health issues related to the product, names of doctors, pharmacies, and denial of health insurance);”<sup>177</sup>
- (3) “personal identifying information (e.g., names, addresses, education, and employment); and”<sup>178</sup>
- (4) “litigation history (e.g., prior tort litigation, past bankruptcy, social security claims, and workers’ compensation claims).”<sup>179</sup>

For defendants, fact sheets generally require the production of information related to the plaintiff (e.g., adverse events, relationships with prescribing doctors, sales and marketing contact with medical providers, etc.) or information related to the manufacture, sale, and distribution of a specific product.<sup>180</sup> Due to the variety of sources of information plaintiffs must consult to complete fact sheets, plaintiffs and defendants face unequal burdens.

This imbalance is exacerbated by the amount of information collected in the fact sheets. Our current analysis shows that the fact sheet process collects much more information about plaintiffs than defendants. Questionnaires for plaintiffs range from as few as one

---

<sup>177</sup> *Id.* The inclusion of health records, including names of doctors and releases to produce documents, are obviously tied to the Federal Rule of Civil Procedure 34 guidelines, but the number of additional questions demonstrates how fact sheets combine the requirements of discovery across rules.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* The purpose of including litigation history for plaintiffs, while a frequent question, is unclear; it may be relevant in the selection of bellwether cases (e.g., plaintiffs subject to workers’ compensation defenses may not be good candidates for a bellwether trial).

<sup>180</sup> See POCKET GUIDE, *supra* note 77, at 8 (describing what defendant fact sheets typically require); see, e.g., Order Granting Joint Motion for Entry of the Plaintiff Fact Sheet, Yamaha Corp. Defendant Common Discovery and Case Specific Fact Sheets, and Dealer Defendant Common Discovery and Case Specific Fact Sheets and Related Documents at 1, *In re* Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig., 3:09-md-02016 (W.D. Ky. June 15, 2009) (requiring different defendant fact sheets for dealers and manufacturers of all-terrain vehicles).

page<sup>181</sup> to as many as 53 pages with releases for medical records.<sup>182</sup> The average length of plaintiff fact sheets, (without releases) is 25 pages, while the average length of defendant fact sheets is 7 pages.<sup>183</sup> Given the number of pages, plaintiff fact sheets clearly run well beyond the twenty-five question limit in Federal Rule of Civil Procedure 33, though the length of fact sheets is established in the negotiation process between both sides (or, more precisely, leadership counsel from both sides) and can be extended by the court. The amount of information is well beyond what was collected in *Silica*, the benchmark often cited for this process, and there is substantial overlap among the information collected in fact sheets from one proceeding to the next.<sup>184</sup> Some attorneys—who are familiar with these proceedings—question the need for the volume of information required by lengthy plaintiff fact sheets.<sup>185</sup> When considering the time necessary to collect the information and complete the questionnaire, specifically the number of questions allowing for additional pages to be attached for a complete answer, these concerns seem merited. This may be especially so when considering Rule 26(b)(1)’s comments on the proportionality of discovery to the needs of the case.<sup>186</sup>

---

<sup>181</sup> The plaintiff profile form order in Case Management Order No. 1 Comprehensive Pleadings, Motions and Discovery Schedule, Ex. A, *In re Wright Medical Technology, Inc., Conserve Hip Implant Products Liability Litigation*, 1:12-md-02329 (N.D. Ga. May 23, 2012), was one page long.

<sup>182</sup> Order Establishing Plaintiff’s Fact Sheet, *In re Skechers Toning Shoe Prods. Liab. Litig.*, 3:11-md-02308 (W.D. Ky. May 3, 2012).

<sup>183</sup> Counting the number of questions, or pieces of information, required in a fact sheet would be another way to measure burden on the parties. Unfortunately, many of the questions are open-ended (for example, “list all places of residence for the past 10 years” or “list all contact with the prescribing doctor for the period between 2005 and 2010”), and we would need completed fact sheets to estimate the average amount of information provided by either party.

<sup>184</sup> WILLIAMS ET AL., PLAINTIFF FACT SHEETS, *supra* note 1, at 1 (describing typical requests in plaintiff fact sheets).

<sup>185</sup> Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 SEDONA CONF. J. 1, 8 n.40 (2011) (“In some cases . . . it appears to plaintiffs that the ‘fact sheet’ process does not save them time or money, as defendants have seized and developed fact sheets as a weapon of attrition . . .”).

<sup>186</sup> See FED. R. CIV. P. 26(b)(1) (“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . .”).

Moreover, the time period about which fact sheets request information may be substantial as well. While the number of years of information fact sheets require can vary from item to item within the fact sheet, the range is almost never less than five years and has gone as high as twenty-five years in some proceedings.<sup>187</sup> Requests for information covering substantial time periods are present in both plaintiff and defendant fact sheets, but the process of collecting information for plaintiffs cannot be automated as it often can be for defendants.

One other area where the substance of plaintiff and defendant fact sheets diverges is in questions about the use of third-party litigation financing. While third-party financing can have a number of different meanings, here we focus exclusively on funding and assignment of claims by litigants.<sup>188</sup> Some, though certainly not all, fact sheets require plaintiffs to report anyone to whom they have assigned a claim, or who is helping to fund the litigation or who helped or is helping defray medical costs during the course of the litigation.<sup>189</sup> In our sample, of the 66 fact sheets we found, 10 included at least one question related to third-party financing. These questions are more common in device cases where a revision surgery occurred to remove the defective device.<sup>190</sup> The use of this type of financing is clearly in dispute within MDL,<sup>191</sup> and its relevance to the fact sheet process is not completely clear. The

---

<sup>187</sup> See, e.g., Exhibit 1 to Case Management Order No. 4 at 6, *In re E.I. Du Pont De Nemours & Co. C-8 Pers. Injury Litig.*, 2:13-md-2433 (S.D. Ohio Oct. 24, 2013) (asking plaintiffs about their exposure to certain water sources since 1950); see also POCKET GUIDE, *supra* note 77, at 3 (“Both the questionnaire length and the number of years the required information covers may pose obstacles to timely completion of fact sheets.”).

<sup>188</sup> Certainly, some funding of litigation exists—including funding for firms, investments by venture capitalists, and lines of equity or loans taken by individual attorneys—that are not asked about in these questionnaires, though the behavior would be included in a general definition of third-party financing.

<sup>189</sup> See, e.g., Case Management Order No. 9 (Plaintiff Fact Sheet) at 15, *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, 1:10-md-02197 (N.D. Ohio Sept. 26, 2011) (“Have you or your spouse . . . received any money from a third party in exchange for an assignment of any portion of your claim or recovery in this lawsuit . . . ?”).

<sup>190</sup> Of the ten instances of third-party litigation financing question we found in our sample, eight were device cases where revision surgery was at issue in the litigation.

<sup>191</sup> See Nat’l Football League Players’ Concussion Injury Litig., 923 F.3d 96, 112 (3d Cir. 2019) (discussing cash advance agreements made between NFL players and third-party funders).

inclusion of these questions here is noted to highlight the types of information requested in fact sheets and the effects of such questions on the proceeding.<sup>192</sup> No defendant fact sheets included such requests for information, despite the presence of litigation funding on both sides of the adversarial process.<sup>193</sup>

#### F. WHY PARTIES COMPLY

The case management order, in setting the deadline for submission of fact sheets, often describes the consequences for failure to comply with the court order and for fact sheets submitted with deficiencies. These consequences can be serious, including dismissal of the case. However, parties are generally provided with an opportunity to comply with the order and submit or cure deficiencies in the fact sheet.<sup>194</sup> The court order generally requires the opposing party to provide notice of the deficiency or failure to comply (often between two weeks and a month *after* the deadline for submission),<sup>195</sup> and given a number of days to remedy, ranging from seven to forty-five depending on the proceeding and the cases included in the fact sheet order.<sup>196</sup> Often, even after the period for

---

<sup>192</sup> The information regarding third-party financing of litigation provided in fact sheets can result in the voiding of these agreements. See *In re Nat'l Football League Players' Concussion Injury Litig.*, 2:12-md-02323, 2017 WL 8785717, at \*3 (E.D. Pa. Dec. 8, 2017) (striking down cash advance agreements between NFL players and third parties), *rev'd*, 923 F.3d 96, 112 (3d Cir. 2019) (voiding the district court's decision that cash advance agreements were not enforceable).

<sup>193</sup> See Ronen Perry, *Crowdfunding Civil Justice*, 59 B.C. L. REV. 1357, 1373–84 (2018) (discussing the rationale and availability of litigation funding for both plaintiffs and defendants).

<sup>194</sup> See Pretrial Order No. 16 at 6, *In re Bos. Sci. Corp., Pelvic Repair Sys. Prods. Liab. Litig.* at 6, 2:12-md-2326 (S.D.W. Va. Oct. 4, 2012) (detailing a process where ten days after the receipt of a deficient fact sheet (or ten days after a missing fact sheet), plaintiffs received a letter of notice). From the date of that letter, plaintiffs had twenty days to cure and meet and confer. *Id.* If deficiencies were not cured, the defendant could move for sanctions. *Id.*

<sup>195</sup> See Order Implementing Plaintiff Fact Sheet and Authorizations [Docket No. 31] at 6, *Scott v. Merck & Co.*, 3:12-cv-2549 (S.D. Cal. June 17, 2013) (detailing process for providing notice for deficient fact sheets); Case Management Order No. 4 Plaintiff Fact Sheets and Records Authorizations at 3, *In re E.I. Du Pont De Nemours and Co. C-8 Pers. Injury Litig.*, 2:13-md-2433 (S.D. Ohio Oct. 24, 2013) (giving plaintiffs fourteen days to cure deficiencies).

<sup>196</sup> See Case Management Order No. 6 at 6–7, *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 2:14-mn-2502 (D.S.C. May 16, 2014) (giving the

remedy has passed, the next step is for plaintiff and defense counsel to meet and confer to discuss the issue—a meeting scheduled between one and two weeks after the notice and cure period. If the parties are unable to work through their differences, or if plaintiff's counsel does not participate in the meet and confer, a further step is taken.

This next step is where substantial variation occurs in the orders requiring fact sheets.<sup>197</sup> Some judges order parties who cannot find resolution on matters of fact sheet completion to ask the court to intervene.<sup>198</sup> One transferee judge ordered that plaintiffs with deficient fact sheets who failed to cure or to meet with opposing counsel would see their cases placed on the court's calendar for discussion at a regularly scheduled case management conference. If a case appeared on two consecutive calendars, defense counsel could move to dismiss. Such deficient fact sheets also resulted in the exclusion of the case from a possible bellwether trial.<sup>199</sup> Other transferee judges allow counsel to move to compel if notice and/or meetings did not result in a response by opposing counsel.<sup>200</sup> Still others skip the meet-and-confer process altogether and allow opposing counsel to move to dismiss without prejudice thirty days

---

cases in the discovery pool seven days to cure a deficiency, while other plaintiffs had fourteen days).

<sup>197</sup> Of course, a longer lapse of time between filing the complaint and the order requiring the fact sheet may affect the ability of the parties to comply. Generally, longer time periods allow for life circumstances to change, including moving, changes in employment, and health issues which may or may not be related to the litigation. Although looking at the time between the complaint and the fact sheet would help inform our understanding of what makes compliance more or less likely, such a granular analysis is beyond the scope of this investigation.

<sup>198</sup> See Case Management Order No. 5 at 10, *In re Gadolinium Based Contrast Agents Prods. Liab. Litig.*, 1:08-gd-50000, (N.D. Ohio June 16, 2008) (“If the Parties are unable to resolve the dispute, either Party may send, by facsimile, a letter to the Court requesting the Court’s intervention.”).

<sup>199</sup> See Pretrial Order No. 14: Plaintiff Fact Sheet and Service Protocol at 2, *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 0:15-md-02666 (D. Minn. Sept. 27, 2016) (“If a deficiency letter is timely sent, and absent valid explanation or dispute by the Plaintiff, the case shall be excluded from the bellwether pool until the core deficiencies are remedied.”).

<sup>200</sup> See Case Management Order No. 8 at 3, *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, 2:18-md-2846 (S.D. Ohio Nov. 19, 2018) (“[A]t any time following expiration of the fourteen day meet and confer period, Defendants may then file a Motion to Compel the allegedly deficient discovery information . . .”).

after a notice of overdue discovery is sent.<sup>201</sup> This variation has a host of possible explanations including the nature of the litigation, the timing of the fact sheet process, and the case management preferences of the transferee judges. If fact sheets are ordered early in the proceeding, parties may have more time or opportunity to cure deficiencies because discovery is ongoing.

The ultimate punishment for failure to substantially complete fact sheets is dismissal—typically without prejudice initially, but converting to with prejudice after a set period of time or on motion of the other party.<sup>202</sup> Some orders give the court discretion regarding the reopening of the dismissed case within a specific time period.<sup>203</sup> The dismissal of cases for failure to complete fact sheets has been upheld by multiple appellate courts. In *In re Phenylpropanolamine (PPA) Products Liability Litigation*, the Ninth Circuit affirmed the use of fact sheets under Federal Rule of Civil Procedure 37, the authority of the court to manage its own docket, and the court's authority to dismiss cases for failing to complete the fact sheet process.<sup>204</sup> The Eighth Circuit similarly held that the dismissal of

---

<sup>201</sup> See Order No. 12 Regarding Completion of IH/PTC Plaintiff Fact Sheets at 6, *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.* (No. II), 1:17-md-2767 (S.D.N.Y. Aug. 30, 2017) (giving defendants thirty days to move for dismissal after plaintiffs fail to respond to a notice of overdue discovery).

<sup>202</sup> There is no shortage of examples for dismissal with a set period. See, e.g., Order No. 12 Case Management at 4–5, *In re Yasmin and YAZ (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, 3:09-md-02100-DRH-PMF (S.D. Ill. Mar. 3, 2010) (“If Defendants have not received a completed PFS within 21 days after serving a Plaintiff with a 20-day notice, Defendants may move the Court for an Order dismissing the Complaint without prejudice. . . . Unless Plaintiff has served Defendants with a completed PFS or has moved to vacate the dismissal without prejudice within 60 days after entry of any such Order of Dismissal without Prejudice, the order will be converted to a Dismissal With Prejudice upon Defendants’ motion.”).

<sup>203</sup> See Case Management Order at 7, *In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, 3:12-md-2391 (N.D. Ind. Feb. 15, 2013) (discussing the court’s discretion to reopen a case following dismissal without prejudice and the timelines that govern reinstatement).

<sup>204</sup> See *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1237 (9th Cir. 2006) (holding “that dismissal was not an abuse of discretion” when the plaintiff’s failure to complete the fact sheet was causing extensive delays). The Ninth Circuit noted that since “[t]he information called for was solely within the plaintiffs’ knowledge” and “each delay potentially affects the discovery and remand schedule in hundreds of other cases,” the plaintiff’s non-compliance constituted prejudice against the defendant even when the plaintiff complied at a later date. *Id.* at 1236–37.

cases under Federal Rule of Civil Procedure 41 for failure to complete fact sheets was within the power of transferee judges.<sup>205</sup>

Sanctions, including those for attorneys, also can be set forth in the order. Sanctions can be in response to a failure to comply with the case management order or failure to prosecute the case<sup>206</sup> as well as for false or misleading information in the fact sheets.<sup>207</sup> One order states parties “reserve their rights to seek any and all available relief . . . under the applicable federal rules for the failure to timely complete [fact sheets].”<sup>208</sup> Others mention specifically the possibility of Federal Rule of Civil Procedure 37 sanctions.<sup>209</sup>

#### G. THE EFFECT OF FACT SHEETS ON PROCEEDINGS

The ultimate question, of course, is whether fact sheets can influence the management of the proceeding overall. A number of criteria exist for evaluating the use of rules and other case management decisions in aggregate proceedings, including the speed and cost of the litigation, access to the courts, and fairness to

---

<sup>205</sup> See *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 866–68 (8th Cir. 2007) (affirming the use of Rule 41(b) to dismiss due to non-compliance with plaintiff fact sheets because the plaintiff’s actions were neither “excusable neglect” nor due to “extraordinary circumstances”).

<sup>206</sup> See *e.g.*, Order, at 1–2, *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 0:15-md-2666 (D. Minn. Feb. 15, 2018) (“Defendants . . . move to dismiss the twenty-six above-captioned member cases . . . for Plaintiffs’ failure to comply with Pretrial Order No. 14 . . . which orders service and completion of Plaintiff Fact Sheets in lieu of interrogatories. Because PTO 14 causes express warnings of dismissal and gives plaintiffs opportunities to cure noncompliance, the Court may dismiss a case with prejudice if its plaintiff has failed to comply with PTO 14 despite those warnings and opportunities. The Court may also dismiss a case for plaintiff’s failure to prosecute.” (citations omitted)); *id.* at 2–5 (granting dismissal with prejudice of 23 actions for failure to comply with PTO 14 and failing to prosecute).

<sup>207</sup> See *e.g.*, *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 674 (S.D. Tex. 2005) (applying sanctions to attorneys under 28 U.S.C. § 1927 when they should have known that “it was medically implausible for the Plaintiffs’ silicosis diagnoses to have been accurate” either while preparing to file the case or after the defendants raised the issue in a briefing).

<sup>208</sup> Amended Pretrial Order No. 10 at para. 6, *In re Heparin Prods. Liab. Litig.*, 1:08-hc-60000 (N.D. Ohio Oct. 21, 2008).

<sup>209</sup> See Case Management Order No. 6 at 3–5, *In re Fresenius Granuflo/Naturalyte Dialysate Prods. Liab. Litig.*, 1:13-md-2428 (D. Mass. Dec. 6, 2013) (noting the opportunity for parties to move for sanctions for failure to make disclosures in the case of a materially deficient plaintiff or defendant fact sheets or failure to cooperate in discovery in the case of an overdue fact sheet).

the parties. Because of the desire for active case management to combat protracted litigation that led to both 28 U.S.C. § 1407<sup>210</sup> and the rise of managerial judging,<sup>211</sup> we focus initially on speed. As the bivariate relationships demonstrate, the number of days a proceeding is open is related to the number of actions in a proceeding, and proceedings with fact sheet processes tend to be of longer duration. Moreover, we know that fact sheet use is related to the number of actions in the proceeding. Therefore, to consider the effect of using fact sheets on proceeding duration—a key assumption of the existing literature promoting the use of fact sheets—we must consider the effect of both fact sheets and the number of actions on the duration of the proceeding. Using a regression model to control for both the use of fact sheets (including plaintiff fact sheets, plaintiff profile forms, and defendant fact sheets) and the number of actions in the proceeding, we find that proceedings terminate 58% faster with either a plaintiff fact sheet or plaintiff profile form than without, all else being equal.<sup>212</sup> While the effects of fact sheets and profile forms are not significant when we examined them individually, this is likely due to the small number of proceedings included in the analysis. A more robust sample of proceedings is necessary to confirm the effect of these case management tools on the duration of proceedings.

## VI. HOW FACT SHEETS FIT

This Article has considered how often fact sheets are used, how they are implemented, and what effect they have on the proceeding. The results, however, require us to consider how fact sheets fit

---

<sup>210</sup> See Bradt, *supra* note 50, at 862, 883 (describing how the judges involved in creating 28 U.S.C. § 1407 “for the first time [had] provide[d] for identification and centralized control of multidistrict litigation” that aimed to facilitate “coordination and speed” in the proceedings).

<sup>211</sup> See Resnik, *supra* note 60, at 378–79 (noting how “pretrial discovery rights” as well as “increasing caseloads” have led judges to take a more active “case management” role in pretrial proceedings); see also Resnik, *supra* note 16, at 37 (listing strategies that courts have developed to “simultaneously” adjudicate related cases).

<sup>212</sup> The 58% figure comes from a Cox proportional hazards model, a form of regression used for models measuring duration (where time is the dependent variable) with time varying-covariates (independent variables that change value over time). See JANET M. BOX-STEFFENSMEIER & BRADFORD S. JONES, EVENT HISTORY MODELING: A GUIDE FOR SOCIAL SCIENTISTS 47–49 (2004) (explaining this model).

within the rules process. The high penalty for failure to complete fact sheets and for failure to cure deficiencies (and multiple opportunities to do so) makes sense when considering the volume of information requested in the fact sheets. As noted, these questionnaires begin to detail the harm suffered and the relief sought. Continuing litigation would be difficult without discovery of the relevant information. Dismissal for failure to comply with fact sheets may be the most common reason for dismissal, but there is no empirical study of dismissals to know if it is failure to comply at all or failure to substantially comply. This distinction matters because the amount of information, the type of information, and the time frame of information requested may be related to the dismissal of cases for deficiencies in the completion of fact sheets.<sup>213</sup> The more information (and the more detailed information) requested, the greater the burden to the producing party and the easier it is for parties, specifically plaintiffs, to be deficient and see their cases dismissed. While parties submitting information in fact sheets attest, under penalty of perjury, that the information is true and accurate to the best of their knowledge,<sup>214</sup> mistakes can occur. Ultimately, the court must decide if the errors or omissions warrant dismissal of the case or if the fact sheet process needs to be revised. As discussed above, the ordering of fact sheets is subject to reconsideration by the court to best fit the pretrial needs of the proceeding.

As described in Part II, the MDL Subcommittee of the Advisory Committee has endorsed the use of fact sheets in conjunction with matters for consideration at a pretrial conference. In conjunction with Federal Rule of Civil Procedure 16(c)(2)(L), fact sheets can be considered one of the “special procedures for managing”<sup>215</sup> complex

---

<sup>213</sup> For an interesting exchange on the use of fact sheets, compare Cabraser & Lehe, *supra* note 185, at 8 n.40 (questioning the use of fact sheets as a means of streamlining discovery), with Amy Schulman & Sheila Birnbaum, From Both Sides Now: Additional Perspectives on “Uncovering Discovery” 6–7 (unpublished manuscript), [https://www.uscourts.gov/sites/default/files/amy\\_schulman\\_and\\_sheila\\_birnbaum\\_from\\_both\\_sides\\_now.pdf](https://www.uscourts.gov/sites/default/files/amy_schulman_and_sheila_birnbaum_from_both_sides_now.pdf) (proposing the use of fact sheets to make discovery more efficient).

<sup>214</sup> See, e.g., Case Management Order No. 4 Regarding Plaintiff Fact Sheet and Related Authorizations (CMO 4) at 36, *In re Denture Cream Prods. Liab. Litig.*, 1:09-md-02051 (S.D. Fla. Sept. 23, 2009) (including the declaration, “I declare under penalty of perjury that all of the information provided in this Plaintiff’s Fact Sheet is true and correct”).

<sup>215</sup> FED. R. CIV. P. 16(c)(2)(L).

litigation available to transferee judges. The lack of dispute among parties on whether to use fact sheets among the proceedings in our data, combined with the increased use of fact sheets over time, suggests that fact sheets are already a well-accepted practice in products liability proceedings. When judges think fact sheets are merited, they order their use, which most often happens in large proceedings. Some federal appellate courts have also upheld the use of this case management tool.

Though the question of whether fact sheets can be used is beyond dispute, some issues exist for judges and attorneys to consider when adopting fact sheets. For example, some courts consider fact sheets alongside rules of discovery, including for interrogatories. But fact sheets are not exactly interrogatories; by stipulation of the parties, they often include far more than the twenty-five-question guideline in Federal Rule of Civil Procedure 33.<sup>216</sup> The Manual for Complex Litigation (Fourth) states: “In lieu of interrogatories, questionnaires directed to individual plaintiffs in standard, agreed-on forms were used successfully in the breast implant and diet drug litigations. Answers to interrogatories should generally be made available to other litigants, who in turn might then be permitted to ask only supplemental questions.”<sup>217</sup> In fact, some case management orders explicitly state that the answers to the questionnaire are *not* answers to interrogatories.<sup>218</sup> Perhaps the efforts to place fact sheets outside the scope of interrogatories is due to their typical length, which is negotiated by leadership. One must wonder what the negotiation process looks like in practice and if judges should take a more active role in it. Facts sheets in our sample averaged twenty-five pages *before completion* and they collect decades of information on plaintiffs. If leadership counsel agree that all the information is necessary early in a proceeding, then perhaps there is no cause for concern. If, however, they are not negotiating over the length of the questionnaire in order to save their resources to fight another day, more careful consideration of the information

---

<sup>216</sup> See *supra* Section V.E.

<sup>217</sup> MANUAL, *supra* note 61, § 22.83, at 438 (footnote omitted).

<sup>218</sup> See Case Management Order No. 3G at 1, *In re* Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig., 1:16-md-02753 (D.N.H. Aug. 3, 2017) (“A completed [plaintiff profile form] shall not be considered interrogatory answers under Fed. R. Civ. P. 33 . . .”).

collected in a fact sheet by the court may be merited. In either event, further study of the negotiation process is necessary.

Relatedly, the timing and deadlines associated with the use of fact sheets do not fit within the thirty-day requirement for production under Federal Rule of Civil Procedure 34. Not only do most proceedings set a longer deadline than thirty days for existing cases, but cases also continue to enter the proceeding, while the litigation is ongoing, through both direct filing and tag-along cases under 28 U.S.C. § 1407 transfers. Transferee judges must set rolling deadlines for the completion of fact sheets because the case management order creating the process is often entered before all the actions are in the proceeding. Moreover, the rolling deadlines for late-filed cases were almost always longer than thirty days in the fact sheets studied here.

Altogether, the increased frequency of their use over time suggests that fact sheets are serving at least some function for judges and parties trying to manage large products liability proceedings, including the goals of making the proceedings more efficient—they appear to do just that. The variation in the information included in the case management orders requiring fact sheets provides a wealth of information for further study.

Though the use of fact sheets appears to lead to more efficient resolution of the proceedings in our database, thus serving at least one of the goals of the civil rules, it remains a question whether a rule should be promulgated to *require* fact sheets in every MDL proceeding. Here, we would express a loud note of caution. Though fact sheets are more common now than in the past, they are not used in all the centralized proceedings in our data, not even in all the most recently centralized. This suggests that using fact sheets does not always promote efficiency. Moreover, lack of familiarity with fact sheets does not inhibit their use. Repeat players are common in MDL proceedings, so even if transferee judges are unfamiliar with the practice, research has found that the attorneys are familiar, and they suggest the use of fact sheets to the judges in early case management conferences.<sup>219</sup> Additionally, resources for transferee

---

<sup>219</sup> See Burch, *supra* note 60 (discussing the frequency of repeat players in multidistrict litigations as well as the concerns that may follow); Burch & Williams, *supra* note 81, at 1467 (discussing the prevalence and impact of repeat players as lead counsel).

judges note the potential benefits of fact sheets.<sup>220</sup> Lastly, concerns about judicial authority do not prevent the use of fact sheets. Transferee judges have the authority to issue case management orders requiring the use of fact sheets within MDL proceedings. In the proceedings in our sample, the use of fact sheets was not disputed, though the content of the fact sheets, the deadlines for completion, and the sanctions for incomplete or missing fact sheets were often the subject of negotiation by the parties.

Transferee judges clearly have the capacity and authority to require fact sheets and yet they do not always do so. This suggests other factors weigh in the decision to use such case management tools. Indeed, we find that the number of cases in the MDL proceeding is one such factor affecting the use of fact sheets, as are the number of defendants and the type of product involved. Given the variation in the size of MDL proceedings by the type of litigation being aggregated,<sup>221</sup> all types of MDL may not equally benefit from a rule regarding fact sheets. Any proposed rule should accommodate such variation. A rule that required fact sheets for one type of litigation but not others—for example, only products liability proceedings—may inhibit the ability of transferee judges to use fact sheets in other types of litigation no matter how large the proceedings become.<sup>222</sup> Additionally, a rule specific to product liability proceedings could result in additional litigation. Parties in other types of proceedings looking to reduce their procedural burden may choose to litigate the applicability of orders requiring fact sheets when the rules do not require them, slowing down the proceeding. Conversely, a rule that attempted to require fact sheets for proceedings of a certain size, or when a proceeding reached a certain size, would be difficult to determine *a priori* because new cases may be added to the proceeding as time passes. The benefits of fact sheets do not “kick-in” at a certain number of cases or claims

---

<sup>220</sup> See, e.g., ROTHSTEIN & BORDEN, *supra* note 72, at 31, 34 (providing MDL guidance for transferee judges and discussing the benefits of fact sheets); POCKET GUIDE, *supra* note 77, at 2 (same).

<sup>221</sup> Williams, *supra* note 20, at 1274 tbl.2A (displaying the average MDL proceeding size by type).

<sup>222</sup> For example, the transferee judge in the BP oil litigation used fact sheet processes even though it was a miscellaneous proceeding and not a products liability proceeding. See Pretrial Order No. 11 at 10, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on April 20, 2020, 2:10-md-02179 (E.D. La. Oct. 19, 2010) (ordering plaintiff profile forms).

in the proceeding, and the type of litigation may play a role in deciding at what threshold fact sheets are most beneficial.

Furthermore, requiring fact sheets in proceedings where they are not needed may result in unintended consequences, such as limiting access to federal courts for some litigants. The purpose of the Federal Rules of Civil Procedure was to promote efficiency while streamlining procedure to allow cases to get to the merits.<sup>223</sup> Fact sheets are burdensome for parties to complete, and the burden of completing fact sheets is enough to prevent at least some litigants from moving forward with their cases.<sup>224</sup> The substantial overlap of fact sheets with general discovery under Rule 26 and interrogatories under Rule 33 suggests that there may be sufficient guidance on how to collect information without the need for fact sheets in all proceedings. Requiring plaintiffs to meet requirements for early discovery may shift the balance of litigation in favor of efficiency without recognizing the cost to parties to produce discovery multiple times (especially if fact sheets require supplementing) or the burdens of producing such information (requesting medical or pharmaceutical records, finding information for past medical providers, etc.).

Additionally, the drafters of the Rules assumed that the burden of the Rules would balance over time: that in the next litigation, the plaintiff would be a defendant—and the obligations and burdens would shift.<sup>225</sup> This assumption, however, is inherently problematic in the world of mass torts. A plaintiff in an aggregated MDL proceeding likely will never switch to being a defendant. Parties in MDL proceedings aggregate their cases because they involve common questions and duplicative discovery. Aggregation is more efficient. Going it alone in their cases may be impossible for plaintiffs because the amount in controversy may prohibit filing in federal court, because they cannot recover more than the litigation itself costs, or because the resulting settlement brought the party

---

<sup>223</sup> See Carter, *supra* note 23, at 2179–81 (stating that the Rules intended to promote efficiency).

<sup>224</sup> See *supra* Section V.E; WILLIAMS ET AL., PLAINTIFF FACT SHEETS, *supra* note 1, at 4 (discussing evidence of dismissal pursuant to orders for fact sheets).

<sup>225</sup> See Resnik, *supra* note 31, at 2219–20 (highlighting that the Rules do not place “neutral” burdens on litigants).

into the litigation in an effort to meet closure provisions.<sup>226</sup> The odds that the same set of circumstances would exist and that the party would be the defendant in another case are beyond the realm of possibility.

Considering that fact sheets are more likely to be required of plaintiffs than defendants and create greater burdens for plaintiffs to complete, it would be difficult to argue a rule for fact sheets could be neutral on its face. Even a general rule requiring fact sheets for both plaintiffs and defendants could not overcome these problems and would likely be inefficient. As shown above, not all proceedings benefit from defendant fact sheets, and requiring all parties to complete fact sheets could increase the costs of litigation on both sides with no real benefit to the parties, thus running afoul of Rule 1 for the sake of “neutral” rules that are anything but.

In addition to the problems created by requiring fact sheets, a proposal that dictates when to use fact sheets may create unnecessary litigation burdens. Transferee judges order fact sheets when they feel they are needed, and the parties negotiate the contents of fact sheets. Only one of the proceedings in the sample ordered fact sheets within sixty days of centralization, yet the proceedings with fact sheets still terminated more quickly than those without, even after controlling for the size of the proceeding. This suggests that requiring fact sheets early in the proceeding may not be necessary. Judges and parties collaborate in a fact sheet process that collects the information needed when it is needed. Requiring fact sheets so soon after centralization may slow down litigation as the tight timeline may make negotiations more tense, requiring more appearances before the transferee judge to resolve differences. Alternatively, the fact sheet may be over inclusive, if the limited timeline does not allow for thoughtful negotiation, which could further burden the parties completing the fact sheets. Even in the absence of a required timeline, transferee judges already actively manage the proceedings before them, resulting in more efficient litigation.

This is not to argue against the use of fact sheets. Clearly, many transferee judges and some repeat player attorneys see the benefits

---

<sup>226</sup> See BURCH, *supra* note 17, at 15–16 (discussing the costs and benefits of aggregation for individual plaintiffs).

of their use. The point here is to suggest that a rule regarding the use of fact sheets is likely to be unnecessary. Transferee judges already use fact sheets (or profile forms, or both), for plaintiffs and defendants when they need them. Transferee judges order fact sheets to move the litigation forward and sequence the requests for information to fit the needs of the proceeding. When transferee judges do order fact sheets, their authority is uncontested (though it *can* be reviewed), the parties play a role in crafting the details of the fact sheets, and the proceeding reaps the benefits of the closer, more active case management, thus meeting the goals of the Federal Rules without requiring new, MDL-specific rules.

## VII. CONCLUSION

Overall, we find that in recent mass tort MDL proceedings, fact sheet processes are often part of the early case management process. In 116 proceedings, we found 66 proceedings using plaintiff fact sheets, 7 proceedings using plaintiff profile forms instead of fact sheets, and 50 proceedings with a defendant fact sheet process. The trend over time in our limited sample is that fact sheets are used more often now than in prior years. Larger proceedings tend to involve fact sheet processes, and the use of fact sheets tends to result in proceedings terminating 58% faster than those without the process, all else being equal. However, fact sheets are not ordered earlier in the life of the litigation than they have been in the past—judges order them anywhere from a few months to a few years into the life of the proceeding.

Because of the limited nature of our data, we consider the effect of fact sheets and profile forms as if they are a single category. The discussion above, however, highlights the substantial differences in the fact sheets across proceedings. The number of questions asked, the number of years of information, the time for completing fact sheets, and the process for curing deficiencies varies substantially across proceedings. A more fine-grained analysis of fact sheets should take this variation into account.

Additionally, while there has been discussion as to how fact sheets work as a case winnowing process,<sup>227</sup> there is no systematic information on case winnowing or why case dismissals occur at all.<sup>228</sup> Our prior work found evidence of case winnowing on the dockets of 55% of the proceedings in our sample, but information is not available to know whether cases are dismissed for failure to comply or to substantially comply.<sup>229</sup> Stipulated dismissal may not specify either reason, and finding any dismissal would require looking at master dockets and docketing in individual actions, and what opportunities plaintiffs had to cure deficiencies.<sup>230</sup> While the orders state that such case dismissals may occur, no published empirical studies can verify when and why they happened.

This preliminary analysis only looks at when fact sheet processes occur within the proceedings in our sample. We have, admittedly, oversampled product liability proceedings, which are more likely to involve fact sheets. This was necessary because of the descriptive nature of our questions: when are fact sheets used and what do they look like? Although we briefly discuss the effect of fact sheets on the duration of a proceeding, further study of this question is warranted. Threshold questions of when fact sheet processes are introduced outside the product liability world, how those processes may or may not differ, and the effect of fact sheets writ large merit additional study with a more robust sample of proceedings. Not all proceedings should have a fact sheet process and teasing out the nature of litigation that benefits most from the process is clearly important.

This last point, however, requires a mix of quantitative and qualitative data. Transferee judges and MDL attorneys—especially

---

<sup>227</sup> CHAMBER PROPOSAL, *supra* note 113, at 15–22 (discussing the need “weed out” meritless claims); LCJ MEMO, *supra* note 3, at 4 (proposing amendments to the Federal Rules of Civil Procedure to require mandatory plaintiff disclosures).

<sup>228</sup> D. Seth Fortenbery, Ordering Discovery to Achieve Efficiency in Multidistrict Litigation 36–40 (June 2020) (unpublished manuscript) (on file with authors) (attempting to look at the effect of case management orders on case entry and exit from the proceeding).

<sup>229</sup> See WILLIAMS ET AL., PLAINTIFF FACT SHEETS, *supra* note 1, at 4 (“[O]f the 66 proceedings with a PFS process, a majority (36, or 55%) included evidence (including show cause orders) of activity to dismiss cases when substantially complete PFS had not been filed.”).

<sup>230</sup> See Fortenbery, *supra* note 228, at 10 (attempting to look at the effect of case management orders on case entry and exit from the proceeding).

those in leadership positions—should be consulted to understand why fact sheets were or were not used in specific proceedings and whether fact sheets serve more purposes than considered in the extant literature. While we have begun an examination of the use of fact sheets, we hope other scholars pick up on the discussion to provide more information on the use of this important case management tool for MDL proceedings.

VIII. APPENDIX: DESCRIPTION OF THE DATA<sup>231</sup>

Number	Master Docket	Name	Circuit	Transferee District	Total actions	Plaintiff Fact Sheet (PFS)	Days to PFS order	Plaintiff Profile Form	Defendant Fact Sheet (DFS)	Days to DFS Order
1896	2:07-cv-291	In re: Gen. Motors Corp. Speedometer Prods. Liab. Litig.	9	WAW	4	no		no	no	313
1905	0:08-md-1905	In re: Medtronic, Inc., Spring Fidelis Leads Prods. Liab. Litig.	8	MN	1,280	no		no	no	
1909	1:08-gd-50000	In re: Gadolinium Contrast Dyes Prods. Liab. Litig.	6	OHN	729	yes	110	no	yes	110
1920	8:07-cv-298	In re: Saturn L-Series Timing Chain Prods. Liab. Litig.	8	NE	3	no		no	no	
1928	1:08-md-1928	In re: Trasylol Prods. Liab. Litig.	11	FLS	1,834	yes	45	no	no	
1938	2:08-cv-285	In re: Vytorin/Zetia Marketing, Sales Practices & Prods. Liab. Litig.	3	NJ	137	no		no	no	
1940	1:08-cv-2364	In re: Aqua Dots Prods. Liab. Litig.	7	ILN	13	no		no	no	
1943	0:08-md-1943	In re: Levaquin Prods. Liab. Litig.	8	MN	2,049	yes	252	no	no	
1953	1:08-hc-60000	In re: Heparin Prods. Liab. Litig.	6	OHN	574	yes	125	no	yes	327
1958	0:08-md-1958	In re: Zurn Pex Plumbing Prods. Liab. Litig.	8	MN	15	no		no	no	
1959	5:08-md-1959	In re: Panacryl Sutures Prods. Liab. Litig.	4	NCE	12	yes	742	no	no	
1964	4:08-md-1964	In re: Nuvaring Prods. Liab. Litig.	8	MOE	1,995	yes	77	no	yes	235
1967	4:08-md-1967	In re: Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.	8	MO W	38	no		no	no	
1968	2:08-md-1968	In re: Digitek Prods. Liab. Litig.	4	WVS	901	yes	204	no	no	
1985	2:08-cv-1946	In re: Total Body Formula Prods. Liab. Litig.	11	ALN	37	no		no	no	
2001	1:08-wp-65000	In re: Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.	6	OHN	11	no		no	no	
2004	4:08-md-2004	In re: Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.	11	GAM	862	yes	1084	no	yes	1084
2006	2:07-cv-1740	In re: Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prods. Liab. Litig.	3	NJ	8	no		no	no	

<sup>231</sup> Information on actions in pending cases from October 15, 2018 pending proceeding report.

Number	Master Docket	Name	Circuit	Transferee District	Total actions	Plaintiff Fact Sheet (PFS)	Days to PFS order	Plaintiff Profile Form	Defendant Fact Sheet (DFS)	Days to DFS Order
2008	8:09-ml-2008	In re: Land Rover LR3 Tire Wear Prods. Liab. Litig.	9	CAC	9	no		no	no	
2016	3:09-md-2016	In re: Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig.	6	KYW	333	yes	122	no	yes	122
2045	5:09-md-2045	In re: Apple iPhone 3G Prods. Liab. Litig.	9	CAN	13	no		no	no	
2047	2:09-md-2047	In re: Chinese-Manufactured Drywall Prods. Liab. Litig.	5	LAE	384	no		yes	yes	63
2051	1:09-md-2051	In re: Denture Cream Prods. Liab. Litig.	11	FLS	223	yes	106	no	no	
2066	1:09-sp-80000	In re: Oral Sodium Phosphate Sol.-Based Prods. Liab. Litig.	6	OHN	195	yes	215	no	no	
2092	2:09-cv-2039	In re: Chantix (Varenicline) Prods. Liab. Litig.	11	ALN	3,016	yes	146	no	yes	146
2098	3:09-md-2098	In re: Kitec Plumbing Sys. Prods. Liab. Litig.	5	TXN	25	no		no	no	
2100	3:09-md-2100	In re: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices & Prods. Liab. Litig.	7	ILS	11,860	yes	153	no	yes	252
2102	1:09-md-2102	In re: Sony Corp. SXR D Rear Projection Television Marketing, Sales Practices & Prods. Liab. Litig.	2	NYS	7	no		no	no	
2104	2:09-md-2104	In re: IKO Roofing Shingle Prods. Liab. Litig.	7	ILC	19	no		no	no	
2120	1:09-md-2120	In re: Pamidronate Prods. Liab. Litig.	2	NYE	23	yes	343	no	yes	498
2151	8:10-ml-2151	In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Prods. Liab. Litig.	9	CAC	456	yes	147	no	yes	
2158	2:09-cv-4414	In re: Zimmer Durom Hip Cup Prods. Liab. Litig.	3	NJ	737	yes	968	no	yes	418
2172	8:10-ml-2172	In re: Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices, & Prods. Liab. Litig.	9	CAC	14	no		no	no	
2179	2:10-md-2179	In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010	5	LAE	6,050	no		yes	no	
2187	2:10-md-2187	In re: C.R. Bard, Inc., Pelvic Repair System Prods. Liab. Litig.	4	WVS	15,713	yes	238	yes	yes	238
2197	1:10-md-2197	In re: DePuy Orthopedics, Inc., ASR Hip Implant Prods. Liab. Litig.	6	OHN	10,162	yes	297	no	yes	297

Number	Master Docket	Name	Circuit	Transferor District	Total actions	Plaintiff Fact Sheet (PFS)	Days to PFS order	Plaintiff Profile Form	Defendant Fact Sheet (DFS)	Days to DFS Order
2223	1:11-cv-2496	In re: Navistar 6.0 L Diesel Engine Prods. Liab. Litig.	7	ILN	39	no		no	no	
2226	2:11-md-2226	In re: Darvocet, Darvon and Propoxyphene Prods. Liab. Litig.	6	KYE	279	yes	364	no	no	
2233	2:11-md-2233	In re: Porsche Cars N. Am., Inc., Plastic Coolant Tubes Prods. Liab. Litig.	6	OHS	8	no		no	no	
2243	3:08-cv-8	In re: Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)	3	NJ	1,258	no		yes	no	
2244	3:11-md-2244	In re: DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.	5	TXN	9,936	yes	394	yes	yes	2510
2247	0:11-md-2247	In re: Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.	8	MN	6	no		no	no	
2270	2:11-md-2270	In re: CertainTeed Fiber Cement Siding Litig.	3	PAE	20	no		no	no	
2272	1:11-cv-5468	In re: Zimmer NexGen Knee Implant Prods. Liab. Litig.	7	ILN	1,741	yes	137	no	yes	137
2283	8:11-mn-2000	In re: Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig.	4	SC	13	no		no	no	
2284	2:11-md-2284	In re: Imprelis Herbicide Mktg., Sales Practices & Prods. Liab. Litig.	3	PAE	164	no		no	no	
2299	6:11-md-2299	In re: Actos (Pioglitazone) Prods. Liab. Litig.	5	LAW	5,194	yes	193	no	yes	320
2308	3:11-md-2308	In re: Skechers Toning Shoe Prods. Liab. Litig.	6	KYW	1,247	yes	136	no	no	
2316	1:12-md-2316	In re: Ford Motor Co. Spark Plug & 3-Valve Engine Prods. Liab. Litig.	6	OHN	5	no		no	no	
2325	2:12-md-2325	In re: Am. Med.Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig.	4	WVS	21,290	yes	240	yes	yes	240
2326	2:12-md-2326	In re: Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig.	4	WVS	25,898	yes	240	yes	yes	401
2327	2:12-md-2327	In re: Ethicon, Inc., Pelvic Repair System Prods. Liab. Litig.	4	WVS	40,533	yes	393	yes	yes	402
2329	1:12-md-2329	In re: Wright Med. Tech., Inc., Conserve Hip Implant Prods. Liab. Litig.	11	GAN	640	yes	105	no	yes	105

Number	Master Docket	Name	Circuit	Transferee District	Total actions	Plaintiff Fact Sheet (PFS)	Days to PFS order	Plaintiff Profile Form	Defendant Fact Sheet (DFS)	Days to DFS Order
2331	1:12-md-2331	In re: Propecia (finasteride) Prods. Liab. Litig.	2	NYE	1,179	no		yes	yes	942
2333	2:12-mn-1	In re: MI Windows and Doors, Inc., Prods. Liab. Litig.	4	SC	18	no		no	no	
2342	2:12-md-2342	In re: Zolofit (Sertraline Hydrochloride) Prods. Liab. Litig.	3	PAE	708	yes	183	no	yes	183
2359	0:12-md-2359	In re: HardiePlank Fiber Cement Siding Litig.	8	MN	14	no		no	no	
2372	1:12-cv-6296	In re: Watson Fentanyl Patch Prods. Liab. Litig.	7	ILN	31	no		no	no	
2385	3:12-md-2385	In re: Pradaxa Prods. Liab. Litig.	7	ILS	2,630	yes	82	no	yes	168
2387	2:12-md-2387	In re: Coloplast Corp. Pelvic Support Sys. Prods. Liab. Litig.	4	WVS	2,677	yes	137	yes	yes	137
2391	3:12-md-2391	In re: Biomet M2a Magnum Hip Implant Prods. Liab. Litig.	7	INN	2,880	yes	136	no	yes	136
2404	2:12-ml-2404	In re: Nexium (Esomeprazole) Prods. Liab. Litig.	9	CAC	55	yes	120	no	no	
2418	3:13-cv-2418	In re: Plavix Mktg., Sales Practices & Prods. Liab. Litig. (No. II)	3	NJ	347	yes	528	yes	yes	528
2419	1:13-md-2419	In re: New England Compounding Pharmacy, Inc., Prods. Liab. Litig.	1	MA	743	no		yes	no	
2428	1:13-md-2428	In re: Fresenius Granuflo/Naturalyte Dialysate Prods. Liab. Litig.	1	MA	4,351	yes	186	no	yes	186
2433	2:13-md-2433	In re: E.I. Du Pont De Nemours and Co. C-8 Personal Injury Litig.	6	OHS	3,516	yes	199	no	no	
2434	7:13-md-2434	In re: Mirena IUD Prods. Liab. Litig.	2	NYS	1,776	yes	129	no	yes	129
2436	2:13-md-2436	In re: Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litig.	3	PAE	233	yes	80	no	yes	147
2440	2:13-md-2440	In re: Cook Med., Inc., Pelvic Repair Sys. Prods. Liab. Litig.	4	WVS	644	yes	119	yes	yes	119
2441	0:13-md-2441	In re: Stryker Rejuvenate and ABG II Hip Implant Prods. Liab. Litig.	8	MN	3,507	yes	194	no	no	
2452	3:13-md-2452	In re: Incretin-Based Therapies Prods. Liab. Litig.	9	CAS	932	yes	123	no	yes	123
2454	2:13-md-2454	In re: Franck's Lab, Inc., Prods. Liab. Litig.	5	LAE	37	no		no	no	

Number	Master Docket	Name	Circuit	Transferee District	Total actions	Plaintiff Fact Sheet (PFS)	Days to PFS order	Plaintiff Profile Form	Defendant Fact Sheet (DFS)	Days to DFS Order
2458	2:13-md-2458	In re: Effexor (Venlafaxine Hydrochloride) Prods. Liab. Litig.	3	PAE	83	yes	309	no	yes	469
2495	1:13-md-2495	In re: Atlas Roofing Corporation Chalet Shingle Prods. Liab. Litig.	11	GAN	15	no		no	no	
2502	2:14-mn-2502	In re: Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig. (No. II)	4	SC	3,255	yes	73	no	yes	178
2511	2:14-md-2511	In re: Neomedic Pelvic Repair System Products Liability Litigation	4	WVS	137	no		yes	no	
2514	2:14-mn-1	In re: Pella Corp. Architect and Designer Series Windows Marketing, Sales Practices & Prods. Liab. Litig.	4	SC	25	no		no	no	
2540	1:14-cv-3722	In re: Caterpillar, Inc., C13 & C15 Engine Prods. Liab. Litig.	3	NJ	16	no		no	no	
2545	1:14-cv-1748	In re: Testosterone Replacement Therapy Prods. Liab. Litig.	7	ILN	7,787	yes	122	yes	yes	1,225
2570	1:14-ml-2570	In re: Cook Medical, Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig.	7	INS	4,979	yes	184	yes	yes	184
2575	1:14-cv-5696	In re: Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig.	7	ILN	36	no		no	no	
2577	2:15-cv-18	In re: GAF Elk Cross Timbers Decking Mktg., Sales Practices & Prods. Liab. Litig.	3	NJ	13	yes	236	no	no	
2590	1:14-cv-10318	In re: Navistar MaxxForce Engines Mktg., Sales Practices & Prods. Liab. Litig.	7	ILN	46	no		no	no	
2592	2:14-md-2592	In re: Xarelto (Rivaroxaban) Prods. Liab. Litig.	5	LAE	24,770	yes	143	no	yes	143
2599	1:15-md-2599	In re: Takata Airbag Prods. Liab. Litig.	11	FLS	327	no		no	no	
2602	1:15-cv-1364	In re: Rust-Oleum Restore Mktg., Sales Practices & Prods. Liab. Litig.	7	ILN	8	no		no	no	
2606	1:15-md-2606	In re: Benicar (Olmesartan) Prods. Liab. Litig.	3	NJ	2,309	yes	89	no	yes	228
2641	2:15-md-2641	In re: Bard IVC Filters Prods. Liab. Litig.	9	AZ	4,672	yes	214	yes	yes	214
2642	0:15-md-2642	In re: Fluoroquinolone Prods. Liab. Litig.	8	MN	1,224	yes	253	no	yes	359

Number	Master Docket	Name	Circuit	Transferee District	Total actions	Plaintiff Fact Sheet (PFS)	Days to PFS order	Plaintiff Profile Form	Defendant Fact Sheet (DFS)	Days to DFS Order
2652	2:15-md-2652	In re: Ethicon, Inc., Power Morcellator Prods. Liab. Litig.	10	KS	43	no		no	no	
2657	1:15-md-2657	In re: Zofran (Ondansetron) Prods. Liab. Litig.	1	MA	630	yes	226	no	yes	226
2666	0:15-md-2666	In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.	8	MN	5,405	yes	291	no	no	
2688	2:16-md-2688	In re: Windsor Wood Clad Window Prods. Liab. Litig.	7	WIE	8	no		no	no	
2691	3:16-md-2691	In re: Viagra Prods. Liab. Litig.	9	CAN	867	yes	967	no	no	
2734	3:16-md-2734	In re: Abilify (Aripiprazole) Prods. Liab. Litig.	11	FLN	2,108	yes	191	yes	yes	191
2738	3:16-md-2738	In re: Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Prods. Liab. Litig.	3	NJ	9,519	no		no	no	
2740	2:16-md-2740	In re: Taxotere (Docetaxel) Prods. Liab. Litig.	5	LAE	10,125	yes	133	no	yes	133
2741	3:16-md-2741	In re: Roundup Prods. Liab. Litig.	9	CAN	589	yes	709	no	no	
2750	3:16-md-2750	In re: Invokana (Canagliflozin) Prods. Liab. Litig.	3	NJ	1,178	yes	191	no	yes	191
2753	1:16-md-2753	In re: Atrium Medical Corp. C-Qur Mesh Prods. Liab. Litig.	1	NH	808	yes	238	yes	yes	238
2754	1:17-md-2754	In re: Eliquis (Apixaban) Prods. Liab. Litig.	2	NYS	283	yes	80		yes	80
2767	1:17-md-2767	In re: Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II)	2	NYS	817	yes	146	no	no	
2768	1:17-md-2768	In re: Stryker LFIT V40 Femoral Head Prods. Liab. Litig.	1	MA	466	yes	222	no	yes	222
2775	1:17-md-2775	In re: Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Prods. Liab. Litig.	4	MD	455	yes	447	no	yes	447
2776	1:17-md-2776	In re: Farxiga (Dapagliflozin) Prods. Liab. Litig.	2	NYS	66	yes	103	no	no	
2777	3:17-md-2777	In re: Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig.	9	CAN	33	yes		no	no	
2782	1:17-md-2782	In re: Ethicon Physiomesch Flexible Composite Hernia Mesh Prods. Liab. Litig.	11	GAN	1,484	yes	346	yes	yes	346

Number	Master Docket	Name	Circuit	Transferee District	Total actions	Plaintiff Fact Sheet (PFS)	Days to PFS order	Plaintiff Profile Form	Defendant Fact Sheet (DFS)	Days to DFS Order
2789	2:17-md-2789	In re: Proton-Pump Inhibitor Prods. Liab. Litig. (No. II)	3	NJ	4,885	yes	187	no	yes	362
2792	5:17-ml-2792	In re: Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig.	10	OKW	28	no		no	no	
2809	5:18-md-2809	In re: Onglyza (Saxagliptin) & Kombiglyze XR (Saxagliptin & Metformin) Prods. Liab. Litig.	6	KYE	222	no		no	no	
2814	2:18-ml-2814	In re: Ford Motor Co. DPS6 PowerShift Transmission Prods. Liab. Litig.	9	CAC	976	no		no	no	
2816	1:18-md-2816	In re: Sorin 3T Heater-Cooler Sys. Prods. Liab. Litig. (No. II)	3	PAM	86	no		no	no	
2841	1:18-md-2841	In re: Monat Hair Care Prods. Mktg., Sales Practices & Prods. Liab. Litig.	11	FLS	10	no		no	no	
2846	2:18-md-2846	In re: Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.	6	OHS	171	no		yes	yes	109
2848	2:18-md-2848	In re: Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.	3	PAE	129	yes	118	no	no	
2859	1:18-md-2859	In re: Zimmer M/L Taper Hip Prosthesis or M/L Taper Hip Prosthesis with Kinectiv Tech. & Versys Femoral Head Prods. Liab. Litig.	2	NYS	21	no				