

**BELLWETHER TRIAL SELECTION IN MULTI-DISTRICT  
LITIGATION: EMPIRICAL EVIDENCE IN FAVOR OF  
RANDOM SELECTION**

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## I. INTRODUCTION

For decades, courts overseeing mass tort litigation have struggled with how to identify the right plaintiffs for early trials. These initial trials, often called “bellwether” trials, are intended to help the parties evaluate the merits of other cases in the same litigation. But a successful bellwether process depends heavily on the method by which the trials are selected. A process that all litigants regard as fair and that results in the selection of plaintiffs who are representative of the claims of other plaintiffs can help to facilitate the resolution of an entire mass tort docket, whereas a process that is unfair or that results in a sample of plaintiffs whose claims are outliers in either direction will not.

In many instances, courts allow the parties to select the bellwether plaintiffs, subject to certain restrictions or supervision by the court. Less frequently, courts resort to a selection process whereby bellwether cases are chosen at random from the pool of eligible cases. To date, much of the argument about the relative merits of various bellwether selection procedures has been theoretical rather than empirical. Parties claim that their preferred method will lead to a more “representative” sample, but they proffer no empirical evidence that one method is superior to another in selecting cases that are more like many other cases in the litigation.

To address this gap, we analyzed cases selected as potential bellwethers in the Bextra and Celebrex product liability litigations using a variety of methods: selected by the plaintiffs, selected by the defense, and selected randomly. Using a detailed calculator employed in the resolution of Vioxx claims – an anti-inflammatory medication in the same class as Bextra and Celebrex and allegedly responsible for the same types of injuries – we were able to compute a specific score for each of the cases selected for the bellwether trial pool.

Prior to conducting the analysis, we hypothesized that both sets of the parties’ selections would be materially different from the random selections; that is, that the plaintiffs’ selections would have significantly higher scores than the random selections, and the defense selections would have significantly lower scores. If that were true, it would have demonstrated that a party selection process can produce an

unrepresentative sample in both directions, while a random selection process can produce a sample of cases that are more like many other cases in the docket. While such a result would raise concerns about whether a party selection process provides a reliable basis to extrapolate the results of bellwether trials to a large percentage of other cases in the docket, at least the bias would exist for both sides.

After conducting our analysis, we found that the plaintiffs' selections did, in fact, differ significantly from the random selections. We were surprised to find, however, that the defense selections – while numerically different from the random selections – did not differ significantly from the random selections. While our results confirm that party selections produce samples that differ from the remaining cases and thus do not serve as an appropriate basis for extrapolation, our results also call into question whether the bias introduced by party selection operates equally in both directions.

To explore these issues in more detail, Part II of this article begins with a brief overview of the history and purpose of the bellwether trial process. Part III summarizes the various methods that courts and litigants have used to select bellwether plaintiffs and describes the theoretical advantages and disadvantages of each. Part IV presents our empirical analysis from the Bextra and Celebrix litigation. Ultimately, we conclude that if a party selection process both produces unrepresentative bellwether cases and disadvantages one party disproportionately, then such a process cannot fulfill the fairness and information-gathering purposes of bellwether trials. Accordingly, we urge courts to employ random selection procedures where possible.

## II. THE HISTORY AND PURPOSE OF THE MODERN BELLWETHER PROCESS

### A. *Why Bellwether Trials Are Necessary*

Mass tort litigation commonly involves hundreds, if not thousands, of plaintiffs seeking relief in courts that lack the resources to hold an individual trial for each plaintiff. Courts are faced with real and significant challenges in resolving numerous cases efficiently and fairly, while respecting each litigant's due process right to his, her, or its day in court.

The class action is not an appropriate method to resolve mass torts involving personal injuries to individual plaintiffs.<sup>1</sup> Indeed, personal

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1. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624-25 (1997) (differences in class members' exposure to asbestos-containing products and various types of injuries made class certifi-

injury plaintiffs face significant obstacles in certifying a class, and certification can further complicate the process. For instance, in Florida, a plaintiff brought a class action against the major tobacco companies on behalf of himself and a class of smokers with medical conditions related to cigarette smoking.<sup>2</sup> After a two-year trial culminating in a \$145 billion award against the tobacco industry, the Florida Supreme Court decertified the class, but held that individuals could bring individual actions relying on the jury's findings.<sup>3</sup> As a result, more than 7,000 individual cases are pending in Florida state and federal courts.<sup>4</sup> Dozens of cases have been tried,<sup>5</sup> with no end in sight.<sup>6</sup>

Instead, many mass torts involving personal injuries are coordinated through the federal Multidistrict Litigation ("MDL") process.<sup>7</sup> The MDL process temporarily transfers civil actions involving common legal and factual issues to a single district court, known as the transferee court, to coordinate discovery for any number of consolidated cases.<sup>8</sup> While pending before the transferee court, litigants coordinate discovery such as taking depositions of witnesses common to all cases

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cation improper); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy."); *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604-05 (5th Cir. 2006) (affirming the denial of class certification of a Rule 23(b)(3) plaintiff class in a mass tort action alleging injury from exposure to smoke from a chemical plant because individual issues surrounding exposure, dose, health effects, and damages would predominate at the trial); *City of St. Petersburg v. Total Containment, Inc.*, 265 F.R.D. 630, 636 n.4 (S.D. Fla. 2010) (recognizing that courts traditionally have been reluctant to certify class actions under Rule 23(b)(3) in mass tort cases because individual questions predominate over common issues due to the inherent nature of personal injury suits); *see also* FED. R. CIV. P. 23 advisory committee note to the 1966 amendment ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.").

2. "In May of 1994, six named individuals filed a class action complaint [in Miami-Dade County] seeking damages for injuries allegedly caused by smoking." *Liggett Grp. Inc. v. Engle*, 853 So.2d 434, 440 (Fla. Dist. Ct. App. 2003).

3. *Id.* at 470.

4. Symposium, Elizabeth J. Cabraser, *Just Choose: The Jurisprudential Necessity to Select a Single Governing Law for Mass Claims Arising From Nationally Marketed Consumer Goods and Services*, 14 ROGER WILLIAMS U. L. REV. 29, 39 (2009).

5. LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 18:20 (2012) (estimating that since the termination of the *Engle* class-action lawsuit, there have been at least 20 individual trials by would-be *Engle* plaintiffs).

6. *See* Cabraser, *supra* note 4, at 39.

7. The MDL process is codified at 28 U.S.C. § 1407 (2013).

8. *See* 28 U.S.C. § 1407 (2013); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998).

(often, defendants' company witnesses), negotiating a single protective order, requesting and producing documents, and conducting written discovery. The MDL process increases the efficiency of discovery in that it prevents parties from having to produce documents and witnesses, or respond to written discovery, in multiple proceedings pending in different parts of the country and applying different rules of procedure.

However, at the close of discovery, litigants have a right to have their case transferred back to the transferor court for the purposes of trial. Specifically, in 1998, the Supreme Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, clarified that once pretrial proceedings terminate, the transferee court must remand the case back to the transferor court for trial.<sup>9</sup> Thus, even though the MDL process renders discovery more efficient, courts still face the prospect of conducting thousands of individual trials efficiently and fairly in multiple venues across the country. MDL transferee courts often use bellwether trials to try to establish possible values for cases throughout the docket, thereby providing information necessary to help the parties resolve cases without facing the prospect of trying every case.

### *B. History of the Bellwether Trial*

Bellwether trials<sup>10</sup> developed as a means to efficiently resolve mass tort claims unsuitable for class action.<sup>11</sup> Prior to *Lexecon*, transferee courts would conduct a series of trials of a limited number of cases deemed representative of the overall pool of cases. The trial results of the selected cases in these early bellwether trials were – in some instances – binding on the parties as to the value of the remaining cases in the litigation.

For example, in *Cimino v. Raymark Industries, Inc.*, Judge Robert M. Parker of the Eastern District of Texas selected 160 cases to be tried before two jury panels.<sup>12</sup> He allocated the cases into five disease categories and averaged the awards (including zero awards) within each category.<sup>13</sup> The court determined that these averages were typical of the

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9. *Lexecon*, 523 U.S. at 27 n.8.

10. The term "bellwether" derives from the ancient practice of belling a male sheep (wether) in the field to lead a flock. *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997). In more modern usage, it represents "one that takes the lead or initiative: LEADER; also: an indicator of trends." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 113 (11th ed. 2003).

11. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2331 (2008).

12. *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990), *vacated in part*, 151 F.3d 297 (5th Cir. 1998).

13. *Id.*

remaining plaintiffs.<sup>14</sup> He then assigned each of the remaining cases into one of the five categories and made an award in each based on the corresponding bellwether average.<sup>15</sup> These early efforts to impose binding bellwether trials were met with constitutional challenges, and largely were unsuccessful.<sup>16</sup>

### *C. Advantages and Disadvantages of Bellwether Trials*

Although binding processes largely have been rejected by appellate courts,<sup>17</sup> MDL courts continue to conduct bellwether trials as a tool for evaluating the strength and value of the larger pool of cases.<sup>18</sup> Although the values determined in the bellwether trials are not binding on the parties,<sup>19</sup> they often are needed to achieve a resolution of the mass tort docket, as they can provide helpful information about the merits and value of the cases. In essence, the bellwether trial process is intended to provide litigants with reference points or benchmarks that serve as a basis to discuss resolution of the litigation as a whole.

Most commonly, bellwether trials are employed in product liability,<sup>20</sup> pharmaceutical and medical device,<sup>21</sup> and environmental mass

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14. *Id.* at 664.

15. *Id.* at 664-65.

16. *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319-21 (5th Cir. 1998) (reversing district court's trial plan on the grounds that it violated defendants' Seventh Amendment constitutional rights to a determination of whether its products caused individual plaintiffs' asbestos-related diseases and to have jury determination of distinct and separable issues of actual damages suffered by each plaintiff); *In re TMI Litig.*, 193 F.3d 613, 725 (3d Cir. 1999) (finding that "absent a positive manifestation of agreement by Non-Trial Plaintiffs, we cannot conclude that their Seventh Amendment right is not compromised by extending a summary judgment against the Trial Plaintiffs to the non-participating, non-trial plaintiff."): *See also*, *In re TMI Litig.*, 193 F.3d at 725.

17. *See, e.g., Cimino*, 151 F.3d at 319-20; *In re TMI Litig.*, 193 F.3d at 725.

18. *See In re Hydroxycut Mktg. & Sales Practice Litig.*, No. 3:09-md-2087-BTM (KSC), 2012 WL 2522859 (S.D. Cal. June 29, 2012) (products liability action regarding injuries related to plaintiff's consumption of Hydroxycut caplets); *In re Fosamax Prods. Liab. Litig.*, 815 F. Supp. 2d 649 (S.D. N.Y. 2011) (multidistrict products liability litigation against manufacturer of osteoporosis drug); *Cooley v. Lincoln Elec. Co.*, 693 F. Supp. 2d 767 (N.D. Ohio 2010) (action against arc-welding supply company alleging failure to warn of hazards of exposure to welding fumes).

19. R. Joseph Barton, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 211 (1999) (recognizing that the traditional use of bellwether trials is not to bind non-bellwether plaintiffs but instead to facilitate settlement by providing a representative picture of a range of verdicts).

20. *See, e.g., In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, MDL No. 1785 C/A No. 2:06-MN-7777-DCN (D.S.C. Jan. 14, 2008) (pretrial order in product liability litigation regarding the process for selecting bellwether case for trial).

21. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 791 (E.D. La. 2007); *In re Levaquin Prods. Liab. Litig.*, MDL No. 08-1943 (D. Minn. Feb. 20, 2009) (pretrial order on bellwether trials and discovery); *In re Norplant Contraceptive Prods. Liab. Litig.*, 955 F. Supp. 700, 700 (E.D. Tex. 1997).

torts,<sup>22</sup> as well as other mass accidents resulting in personal injuries.<sup>23</sup> In a post-*Lexecon* world, the parties generally must consent to have their cases tried in a transferee court.<sup>24</sup> As a result, the bellwether process is highly negotiated and formalized, and the parties are invested significantly in the process.<sup>25</sup>

One advantage of the bellwether process is that it allows the parties to assess the strength of many claims and defenses early in the litigation. As the Southern District of New York explained, “bellwether trial[s] also allow a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action.”<sup>26</sup> Further, expert issues generally may be resolved in a universal manner. In the absence of a bellwether trial process, the MDL transferee court may rule on expert issues applicable to *all* cases; only in the context of a bellwether trial can the MDL court address case-specific expert issues, which then may be applied (although not necessarily binding) in other cases.<sup>27</sup> Finally, discovery motions, motions *in limine*, and other pretrial motions may be resolved in a similarly efficient manner.<sup>28</sup> As opposed to resolving the litigation without the benefit of a bellwether process, the bellwether process permits the parties to better evaluate claims and defenses related to common issues and to understand the costs and burdens that will ensue as a result of the litigation.<sup>29</sup>

The bellwether process also has disadvantages. For defendants, the

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22. See, e.g., *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, No. 1:00-1898, MDL 1358 (SAS), M21-88, 2007 WL 1791258, at \*1 (S.D.N.Y. 2007); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873 (E.D. La. Feb. 10, 2009) (pretrial order discussing, in part, the submission of potential bellwether plaintiffs).

23. Barton, *supra* note 19, at 202 (“In a mass tort case, such as an environmental exposure case or a products liability case, the plaintiffs typically do not have the same intensity, duration, and type of exposure, nor uniformity of disease or injury. In short, mass tort plaintiffs are exposed to a substance for different amounts of time, in different ways, and over different periods. These differences affect the problem of proving individual causation, making traditional representative treatment and efficient adjudication of these claims difficult, if not impossible.”).

24. See, e.g., *Mann v. Lincoln Elec. Co.*, No. 1:06-CV-17288, 2011 WL 3205549, at \*2 (N.D. Ohio July 28, 2011) (discussing plaintiff’s agreement to conduct trial in the MDL transferee court).

25. See *id.*

26. *In re MTBE*, 2007 WL 1791258, at \*2.

27. See, e.g., *Adams v. Cooper Indus., Inc.*, No. 03-476-JBC, 2007 WL 2219212, at \*3 (E.D. Ky. July 30, 2007) (granting defendants’ motion to exclude the testimony and opinions of bellwether plaintiffs’ experts regarding specific causation).

28. *Cooley*, 693 F. Supp. 2d at 790 (overruling the defendants’ blanket and document-specific objections to “historical documents” and holding that the “Court will continue to apply this reasoning in every *Welding Fume* case”).

29. Fallon, *supra* note 11, at 2325.

testimony related to issues that are the same in a large percentage of cases gets etched in stone for the duration of the litigation. Parties generally have one chance to elicit clear and meaningful testimony from their witnesses. Further, the values of a bellwether case may be influenced by the likeability of the bellwether plaintiff and the nuances of his case, which may not be generalizable to other plaintiffs.

Finally, and perhaps most importantly, the bellwether process does not always elicit meaningful results. For this process to be beneficial – for the bellwether results to be meaningful – both sides have to regard the results as truly representative and therefore capable of being extrapolated to the docket as a whole. But the question of how to obtain a truly representative pool of trial cases – one that both sides regard as a fair sample of the entire docket – to provide an unbiased basis for valuation of the litigation has proven somewhat elusive.

### III. BELLWETHER SELECTION METHODS

If the goal of a bellwether trial is to obtain meaningful results that can be extrapolated to other cases in the docket, then the process of selecting the cases for trial must be developed in a manner that ensures the cases tried are similar to a meaningful percentage of other cases in the docket. The key to meaningful bellwether results turns on whether both parties regard the results as truly representative. As the Fifth Circuit explained, “the ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray.”<sup>30</sup> If the parties do not believe that their interests will be adequately represented in the bellwether trial process, they will not accept that the results are generalizable to other cases, making the process less likely to facilitate the resolution of many cases.<sup>31</sup>

The intent of the bellwether process is to identify individual cases that are *representative* of the docket as a whole so that the initial bellwether trials can be used to guide the resolution of the remaining claims through motions, trial, or settlement.<sup>32</sup> Of course, this begs the question of in what way plaintiffs should be representative: demographically, similarity of claim, or some other metric. The specific factors that determine the representativeness of bellwether plaintiffs varies from litigation to litigation, but some qualities that generally

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

31. Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 637-38 (2008).

32. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 (2004).



should be considered by the parties include: the plaintiff's background (*e.g.*, age, education, and socio-economic status); the type of claims asserted; the degree of exposure to the allegedly harmful substance; the nature and degree of injury; the scope of damages; and any special defenses that might apply in the case. As a bellwether plaintiff generally is entitled to application of the law of the state in which she filed her claim,<sup>33</sup> the parties also should carefully consider any particularities of state law that are unique to the bellwether plaintiff.

Importantly, the manner of selecting the case for trial can greatly influence the representativeness of the trial cases, and several factors in the process can play a role. A preliminary part of any bellwether trial selection process is deciding the number of cases to be included in the trial pool. The sample should include cases that are representative of most types of cases in the litigation. A small sample may be appropriate for some industrial accident cases (*e.g.*, gas leaks) in which certain causation issues may be relatively common to all in the class and claims and damages may be similar among all plaintiffs.<sup>34</sup> On the other hand, a pharmaceutical products liability case in which plaintiffs allege one or more of several different injuries and were exposed to the drug at different dosages or at different times in the labeling history of a product may call for a greater number of cases to be tried.<sup>35</sup> Selecting a small number of bellwether cases increases the stakes for both sides, whereas selecting a larger number of cases distributes the risk, but may be less manageable.<sup>36</sup> As with selection methods more generally, the sample selected should be representative of the larger group, and there is no established number of cases that is appropriate in all cases.

The amount of information available to the parties at the time of trial selection also influences whether the chosen cases are representative. In many instances, discovery occurs after a number of

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33. *In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp. 2d 795, 812 (E.D. Tex. 2002) (stating that the court will primarily consider the law of the state in which each individual case was filed).

34. Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX L. REV. 571, 630-31 (2012) (stating that if the cases are relatively homogeneous, then a small sample will be enough).

35. *Id.* (recognizing that if there is substantial variation within the cases, the sample size will need to be larger).

36. As several commentators have explained, the sample size selected is another important point for both sides to consider, and a smaller or larger sample size should change the strategies of both sides when selecting and trying bellwether cases. *See, e.g.*, Bradley R. Stark & Alex Alvarez, *Valuations in Mass Tort Litigation Aided by Behavioral Law and Probability*, in 2 SECURITIES ARBITRATION IN THE MARKET MELTDOWN ERA: ACHIEVING FAIRNESS IN PERCEPTION AND REALITY 483, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES (Practising Law Institute 2009).

plaintiffs are selected for a “discovery pool.”<sup>37</sup> After taking discovery (which is limited by agreement in many cases), cases are selected for trial and additional discovery may be permitted.<sup>38</sup> Permitting discovery before final trial selection allows the parties to learn more about the strengths and weaknesses of each case, which helps the parties or the judge select more representative cases for trial. However, this two-tiered process adds a layer of cost to the parties, who must prepare a larger number of cases than will be tried, at least in the initial phase of trials.

Of course, the main issue of trial selection is who chooses the cases: the parties, the judge, random selection, or some combination.<sup>39</sup> The nature of the selection process – including who controls the process and what limitations are in place – directly affects the representativeness of the sample. Each method is discussed more fully below.

### A. Party Selection

Perhaps the most common strategy for selecting bellwether plaintiffs is party selection,<sup>40</sup> which can take various forms. In its most simple forms, the parties agree that each side will select a set number of cases for the discovery pool or trial.<sup>41</sup> Courts may require that cases selected by the parties meet certain minimum requirements, such as alleging a common injury<sup>42</sup> or filing before a particular date.<sup>43</sup>

#### 1. One Side Selects

In some instances, the court allows one of the parties, usually the plaintiffs, to select the trial cases.<sup>44</sup> For example, in the *Welding Fume Products Liability Litigation*, the plaintiffs selected the first three trials.<sup>45</sup>

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37. Fallon, *supra* note 11, at 2360 (stating that “[o]nce the trial-selection pool has been assembled, each of the cases within the pool must undergo case-specific discovery”).

38. Plaintiffs and Defendants Johnson & Johnson and Ethicon, Inc.’s Joint Proposed Discovery Plan, *Redden v. Mentor Corp.*, No. 4:09-cv-05042-CDL (M.D. Ga. Oct. 19, 2010) (No. 4:08-md-2004) (limiting discovery through agreement by the parties in bellwether case).

39. Fallon, *supra* note 11, at 2348-49.

40. *See, e.g., In re Welding Fume Prods. Liab. Litig.*, No. 1:03 CV 17000, 2006 WL 1173960, at \*1 (N.D. Ohio Apr. 5, 2006); *In re MTBE*, 2007 WL 1791258, at \*3.

41. Fallon, *supra* note 11, at 2363.

42. *See, e.g., In re MTBE*, 2007 WL 1791258, at \*3.

43. *See, e.g., In re Prempro Prods. Liab. Litig.*, MDL No. 4:03-CV-1507-WRW (E.D. Ark. June 20, 2005) (order outlining requirements for bellwether plaintiffs including a requirement that the selected plaintiffs filed before April 22, 2005).

44. *See, e.g., In re Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2003 WL 22023398, at \*1 (E.D. La. Mar. 11, 2003).

45. *See In re Welding Fume*, 2006 WL 1173960, at \*1.

Alternatively, a court may allow one side to control the structuring of selection without selecting the actual plaintiffs. In the *Methyl Tertiary Butyl Ether (“MBTE”) Products Liability Litigation*, the court allowed the plaintiffs to select eleven allegedly contaminated wells that would be the subject of the trials, and further, to choose three categories of bellwether plaintiffs.<sup>46</sup> The plaintiffs chose to categorize plaintiffs based on whether their claims arose from a single source, from multiple sources, or from an unknown source.<sup>47</sup> The court required that it approve plaintiffs’ ultimate selections.<sup>48</sup>

Permitting one party to control trial selection may frustrate the purpose of the process. In most instances, if one side controls selection, the trial cases almost undoubtedly will be biased in favor of the controlling party, leaving the other party to question the process and whether the results inform the evaluation of other cases in the docket.

However, single-party selection processes can be appropriate in some instances, such as where a party wishes to test a certain legal theory or defense.<sup>49</sup> If the party, using its ideal test case, cannot establish the claim or defense, it is unlikely to succeed in cases involving a weaker claim or defense. In *King v. Secretary of Health and Human Services*, for example, the plaintiffs selected three “test cases” to try their second theory of general causation related to thimerosal-containing vaccines and autism.<sup>50</sup> The court ultimately concluded that plaintiffs’ evidence fell short of demonstrating a causal link.<sup>51</sup>

## 2. Each Side Participates in Selection

More commonly, courts allow each side to select half (or some percentage) of the cases for trial.<sup>52</sup> Courts often divide the plaintiffs into categories from which each side is asked to choose plaintiffs for trial.<sup>53</sup> In those instances, courts often create categories based on a number of

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46. *In re MTBE*, 2007 WL 1791258, at \*3 n.20.

47. *Id.* at \*3.

48. *Id.*

49. *See, e.g., King ex rel. King v. Secretary of Health and Human Services*, No. 03–584V, 2010 WL 892296, at \*9 (Fed. Ct. Cl. Mar. 12, 2010).

50. *Id.*

51. *Id.* at \*90.

52. *See, e.g., In re Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708(DWF/AJB) (D. Minn. May 3, 2006) (pretrial order allowing each party to select twenty (20) potential bellwether cases); *Rivera v. United Gas Pipeline Co.*, 697 So.2d 327, 333 (La. Ct. App. 1997) (each side selected twelve (12) cases for trial).

53. *See infra* notes 55-61.

different factors, including the injury alleged,<sup>54</sup> the type of claim,<sup>55</sup> the degree of exposure or dose,<sup>56</sup> the product used,<sup>57</sup> the state in which the cases were filed,<sup>58</sup> the named defendant,<sup>59</sup> or the law firm filing the action.<sup>60</sup> For example, in *Henley v. FMC Corp.*, involving a chemical cloud from a gas leak, the court certified six subclasses of plaintiffs based on the type of injury each plaintiff allegedly suffered.<sup>61</sup> The parties agreed that each side would select an equal number of plaintiffs to serve as the fourteen “trial plaintiffs.”<sup>62</sup>

Permitting both sides to take part in selection ensures that the trial pool is not entirely biased in favor of a single party, as each side has a stake in having its best cases included in the bellwether trial pool. However, this method frequently results in a pool of outlier cases, which do not represent the vast majority of unchosen cases. In other words, while the sample may include cases on each end of the spectrum, it typically does not include cases that are most common in the larger docket.

### 3. Party Selections in Addition to Court Selections

Another method involves participation by each party and the

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54. See *In re Prempro Prods. Liab. Litig.*, MDL No. 4:03-CV-1507-WRW (E.D. Ark. June 20, 2005) (order stating that bellwether plaintiffs must have alleged a breast cancer injury); *In re Chantix (Varenicline) Prods. Liab. Litig.*, MDL No. 2092, 4 (N.D. Ala. Mar. 10, 2011) (pretrial order creating categories of plaintiffs based on the neuropsychiatric injury alleged).

55. See *Baker v. Chevron U.S.A., Inc.*, No. 1:05-CV-227, 2009 WL 3698419, at \*1 (S.D. Ohio. 2009) (bifurcating the matter into personal injury claimants and property damages claimants and permitting the parties to select bellwether plaintiffs for each group).

56. See *In re MTBE*, 2007 WL 1791258, at \*3 (selecting plaintiffs allegedly injured by exposure to contaminants from a mix of three wells).

57. See *In re Hydroxycut*, 2012 WL 2522859, at \*3 (requiring parties to each choose four bellwether cases with at least one plaintiff that used one of two product lines).

58. See *In re Genetically Modified Rice Litig.*, No. 4:06MD1811 CDP, at 4 (E.D. Mo. Nov. 3, 2008) (case management order instructing each side to select five plaintiffs from each state for inclusion in the initial trial pool).

59. See, e.g., *In re Prempro Prods. Liab. Litig.*, MDL No. 4:03-CV-1507-WRW (E.D. Ark. June 20, 2005) (order outlining requirements for bellwether plaintiffs including a requirement that Wyeth must be named as a defendant); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873 (E.D. La. Feb. 10, 2009) (pretrial order stating, in part, that only plaintiffs who have identified and sued one of four named manufacturers, a contractor, and the government were eligible to serve as bellwether plaintiffs).

60. *In re Neurontin Mktg., Sales Practices, and Prods. Liab. Litig.*, 1:04-cv-10981-PBS, at 2-3 (D. Mass. Jan. 17, 2007) (discovery order stating that bellwether trial cases be randomly selected from a pool of eighty plaintiffs whose cases were all filed by the same law firm, from which the district court judge ordered each side to pick its two best cases).

61. *Henley v. FMC Corp.*, 20 Fed. App'x 108, 111-12 n.4 (4th Cir. 2001).

62. *Id.* at 111.

court.<sup>63</sup> In the *Fosamax Products Liability Litigation*, the court ordered that twenty-five trial cases would be worked up through expert discovery, from which three cases would be selected for trial.<sup>64</sup> Each side would choose twelve proposed trial cases.<sup>65</sup> The court ordered that it would select, at random, the additional case to fill out the pool of twenty-five cases.<sup>66</sup> The court also ordered that, in the event the plaintiff withdrew a case from its proposed list or dismissed a case, it would be replaced by a case selected by defense counsel.<sup>67</sup> Similarly, if the defendant settled a case, then the plaintiff would choose a replacement.<sup>68</sup>

As opposed to pure party selection (which often results in a pool of outlier cases), judicial selection often enhances the pool by inclusion of some cases which are likely to be more typical of cases in the docket as a whole. The parties also have some comfort in knowing that their best cases remain in the pool. However, cases selected by the court produce meaningful results only if the parties believe they are truly representative. The challenge for any court, then, is to ensure that the parties have faith in the process, leaving the same challenge for the court: how to identify cases that are truly representative of the entire pool of cases.

#### 4. Agreement of Both Sides

Some courts require the parties to agree on trial plaintiffs from a set pool.<sup>69</sup> In the *Levaquin Products Liability Litigation*, the court initially selected fifteen cases for evaluation and initial case-specific fact

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63. See, e.g., *In re Trasylol Prods. Liab. Litig.*, 1:08-md-01928-DDM (S.D. Fla. Sept. 19, 2008) (order outlining that the court will select two cases for the initial trials, then one case would be selected from each set of three cases identified by the parties).

64. *In re Fosamax Prods. Liab. Litig.*, No. 1:06-MD-1789, at 2 (S.D. N.Y. Jan. 30, 2007) (case management order dealing with the selection of cases to be chosen for discovery and bellwether trials).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* Although outside the scope of this article, this feature – allowing a party to select a replacement case if the other party dismisses or settles a case – is often critical to maintaining the representative nature of the trial pool. If the parties are able to selectively dismiss or settle cases they do not want to try, permitting the other side to select the replacement case ensures that an equally unfavorable case is selected for the pool as a replacement.

69. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 791 (E.D. La. 2007) (the parties agreed on the first bellwether trial); *Hennessey v. Dep't of Health and Human Servs.*, 91 Fed. Cl. 126, 130 (Fed. Ct. Cl. 2010) (the parties agreed on one test case for approximately 15 others in a case under the National Childhood Vaccine Injury Compensation Act for a Hepatitis B vaccine).

discovery.<sup>70</sup> The court required the parties to meet and confer on several occasions to select the final group for trial.<sup>71</sup> After agreeing to eliminate several cases, the parties agreed on six cases for trial.<sup>72</sup>

In *Silivanch v. Celebrity Cruises, Inc.*, involving the outbreak of Legionnaires' disease on a cruise ship, the parties agreed to try the *Silivanch* action as a bellwether case, which would determine the liability of the defendants as to all plaintiffs, the allocation of defendants' responsibility, and punitive damages.<sup>73</sup> The court in *Adams v. Shell Oil Co.* used a matching strategy.<sup>74</sup> The court randomly selected a pool of 100 plaintiffs from the entire pool, and each party designated claimants it deemed to have "representative claims."<sup>75</sup> The court compared the lists from each side, and the first twenty names to match became the bellwether plaintiffs.<sup>76</sup>

The obvious difficulty in requiring parties to jointly select cases is that parties rarely agree on what is a representative case. Where parties can agree to try certain cases for trial, it is likely that each side will believe the results of the trial can be extrapolated to the docket as a whole.

## 5. Benefits and Drawbacks of Party Selection Methods

Party selection offers some surface appeal to litigants because they get to maintain some control over the selection process. For example, parties could use selections to exploit the strengths or weaknesses of certain types of cases in the docket or to burden a particular plaintiffs' firm or a particular defendant.

In party selection, though, both sides tend to choose their best cases, ultimately resulting in a trial pool of either very strong or very weak cases which may not be representative of the broader pool. This problem is aggravated where one party has an information advantage at

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70. *In re Levaquin Prods. Liab. Litig.*, MDL No. 08-1943 (D. Minn. Feb. 20, 2009) (pretrial order on bellwether trials and discovery).

71. *Id.* at 2.

72. *In re Levaquin Prods. Liab. Litig.*, MDL No. 08-1943 (D. Minn. Feb. 12, 2010) (pretrial order detailing the cases that shall be made ready for trial).

73. *Silivanch v. Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241, 250-51 (S.D. N.Y. 2001). Ultimately, the jury rendered a verdict finding the defendants liable and awarding more than \$9 million in compensatory and punitive damages. *Id.* at 251. Subsequently, the defendants moved for a judgment as a matter of law or for a new trial. *Id.* The court denied the defendants' motions. *Id.* at 273.

74. *Adams v. Shell Oil Co.*, 136 F.R.D. 588, 597 (E.D. La. 1991).

75. *Id.*

76. *Id.*

the time of the selection or where a party can dismiss cases in an effort to skew the pool.

Unfortunately, parties too often fail to recognize that if the goal of the bellwether process is to assess the settlement value of other cases, selecting cases skewed heavily in each party's favor does not serve this goal. For example, if plaintiffs are tasked with selecting the trial pool and they choose their best cases, the defendants are less likely to accept such cases as representative.<sup>77</sup> Conversely, if defendants choose the cases least favorable to plaintiffs, plaintiffs will be less likely to accept broader valuations based on the results of such cases.

### *B. Judicial Selection*

Judicial selection of bellwether cases generally is the default option where parties cannot agree upon a selection process, but it is used in other instances as well.<sup>78</sup> Parties may or may not provide the court with input, either through a briefing process or by narrowing the pool of cases eligible for selection.

Judicial selection can incorporate elements of party and random selection. In the *Baycol Products Litigation* MDL, the court ordered that all cases filed by Minnesota residents, plus a minimum of 200 additional randomly selected cases, would comprise the discovery pool from which only "eligible" cases would be selected for trial.<sup>79</sup> An eligible case would be any case that the plaintiffs determined warranted discovery for the purposes of trial.<sup>80</sup> The court directed the parties to meet and confer on the plaintiffs' determination of the eligible cases, and if the parties were unable to agree, the court would make the determination.<sup>81</sup> Cases from the discovery pool deemed ineligible would be subject to dismissal absent just cause.<sup>82</sup>

Another example is the *FEMA Trailer Formaldehyde Products Liability Litigation*.<sup>83</sup> The court required that the parties submit names of fifty potential bellwether trial plaintiffs, from which it would select

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77. See *Jowers v. BOC Group, Inc.*, 608 F. Supp. 2d 724, 776-77 (S.D. Miss. 2009).

78. See *In re Levaquin Prods. Liab. Litig.*, MDL No. 08-1943 (D. Minn. Feb. 20, 2009) (pre-trial order on bellwether trials and discovery); *Shimon v. Sewerage & Water Bd. of New Orleans*, 565 F.3d 195, 198 (5th Cir. 2009) (the district court selected four of the cases as bellwether trials).

79. *In re Baycol Prods. Litig.*, MDL No. 1431, at 1 (D. Minn. July 18, 2003) (pretrial order regarding discovery, cases for trial, and pretrial procedure).

80. *Id.*

81. *Id.*

82. *Id.*

83. *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873 (E.D. La. Feb. 10, 2009) (pretrial order discussing, in part, the submission of potential bellwether plaintiffs).

four.<sup>84</sup> The court further required that the plaintiff must have sued one of the four defendants estimated to have the highest number of housing units at issue and have provided basic discovery.<sup>85</sup>

A potential advantage of judicial selection is that a judge, as a neutral, may be more likely than either party to select cases that are not biased in favor of any party. As with random selection, a court-driven process may be more efficient than a party-driven process, especially one involving prolonged back-and-forth negotiation between the parties. Nevertheless, a judge is not always aware of the issues that matter most to the parties and the nuances that may affect global resolution. Judicial selection may give the appearance of representativeness, but without some party participation, it is less likely that the parties will believe that the cases selected are representative.

### C. Combination and Strike Approaches

Because of the lack of rules or standard procedures governing the bellwether trial selection process, courts have devised a range of different methods, combining elements of judicial, party, and random selection, with or without the use of an iterative strike process. For example, in *Medtronic Implantable Defibrillator Product Liability Litigation*, the court employed joint party selection, elements of random selection, and preemptory strikes.<sup>86</sup> The District of Minnesota required that the parties submit a joint report identifying six or fewer categories for bellwether cases and assign each plaintiff with a completed fact sheet to a category.<sup>87</sup> The court randomly selected an odd number of potential bellwether cases in each category.<sup>88</sup> Using alternating preemptory strikes, the sides were ordered to identify three potential bellwether plaintiffs in each category.<sup>89</sup> After additional discovery and a meet and confer process, the parties were to submit a report with a joint recommendation as to which one of the three in each category should be tried.<sup>90</sup> If the parties could not agree, then the court would select the cases and the order of the trials.<sup>91</sup>

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84. *Id.* at 1.

85. *Id.* at 2.

86. *In re Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig.*, No. CIV 05MD1726, 2007 WL 846642, at \*3 (D. Minn. Mar. 6, 2007).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at \*4.

91. *Id.*



In *Abrams v. Ciba Specialty Chemicals Corporation*, the court gave the parties such specific directions for their selection of the cases that judicial preference predominated the otherwise party-driven process.<sup>92</sup> The case involved 271 property owners whose property allegedly had been contaminated by the defendant's manufacturing plant.<sup>93</sup> The court ordered the parties to agree on a trial pool consisting of fifteen cases from a low-exposure group, seven cases from a mid-low-exposure group, one case from a mid-high-exposure group, and three cases from the highest exposure group.<sup>94</sup> With these constraints, the parties were directed to agree on test plaintiffs within each group.<sup>95</sup> If the parties could not agree, the court would hold a conference at which it would conduct a random selection.<sup>96</sup>

A few courts have employed systems in which the parties alternate striking cases selected to an initial trial pool by the parties, the judge, or randomly.<sup>97</sup> In the *Bausch & Lomb Contact Lens Solution Products Liability Litigation*, counsel jointly selected a pool of six potential bellwether cases.<sup>98</sup> Each side was ordered to strike two of the six, and then the judge would randomly select a trial case from the two that remained.<sup>99</sup> In the *Gadolinium-Based Contrast Agents Products Liability Litigation*, the parties each selected ten cases and were permitted to strike five cases selected by their opponent.<sup>100</sup> After the strike process, the parties had one week to attempt to agree on the first four cases to be tried, two from each side's remaining selections.<sup>101</sup>

Notably, even using a complex process involving strikes and/or a

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92. *Abrams v. Ciba Specialty Chemicals Corp.*, No. 08-00068, 2008 WL 4710724, at \*5 (S.D. Ala. Oct. 23, 2008).

93. *Id.* at \*3.

94. *Id.* at \*5.

95. *Id.*

96. *Id.*

97. *See, e.g.*, *Mirapex Prods. Liab. Litig.*, MDL No. 07-1836, at 6 (D. Minn. Aug. 23, 2007) (pretrial order explaining that the bellwether selection process will include Plaintiffs' counsel and Defendants' counsel alternatively striking cases until a single case remains); *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, MDL No. 1785 C/A No. 2:06-MN-7777-DCN, at 3 (D.S.C. Jan. 14, 2008) (pretrial order stating that plaintiffs' counsel and defendant's counsel will each strike cases).

98. *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, MDL No. 1785 C/A No. 2:06-MN-7777-DCN, at 3 (D.S.C. Jan. 31, 2008) (pretrial order noting that plaintiffs' counsel and defendant's counsel jointly selected six cases).

99. *Id.*

100. *In re Gadolinium-Based Contrast Agents Prods. Liab. Litig.*, No. 1:08GD50000, at 1 (N.D. Ohio May 12, 2009) (case management order discussing that each party shall strike five cases from the opposing parties' ten eligible trial pool cases).

101. *Id.* (case management order discussing the final selection procedure).

combination of judicial and party selection, the cases selected for trial may not be representative of the pool as a whole. In the *Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, the court divided the alleged injuries into three categories: stroke and heart attack cases (comprising 9%-10% of the total pool); venous thromboembolisms (comprising 40%-41% of the total pool); and gallbladder injuries (comprising 43% of the total pool).<sup>102</sup> Each side selected a specified number of cases for the trial pool, and each side was permitted to strike an equal number of cases selected by the other side after discovery.<sup>103</sup> Ultimately, the parties agreed to not try any stroke or heart attack cases.<sup>104</sup> Eight venous thromboembolism cases and four gallbladder cases were selected for trial.<sup>105</sup> Although venous thromboembolisms represented only 40%-41% of the total pool of cases, they represented two-thirds of the trial cases.

#### D. Purely Random Selection

##### 1. Use of Random Selection Methods

In random selection, bellwether trials are selected at random from a pool of cases. Courts have used various methods for random selection that range from choosing cases out of a hat<sup>106</sup> to more controlled methods such as randomizer computer software program.<sup>107</sup>

Random selection may be used as a primary method or in combination with another selection method.<sup>108</sup> In the *Prempro Products Liability Litigation*, the court randomly selected bellwether trials from plaintiffs satisfying certain criteria established by the court.<sup>109</sup> These

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102. *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100, 2010 WL 4024778, at \*2 (S.D. Ill. Oct. 13, 2010).

103. *Id.* at \*4.

104. *Id.* at \*2.

105. *Id.*

106. *In re Prempro Prods. Liab. Litig.*, MDL No. 4:03-CV-1507-WRW, at 2 (E.D. Ark. June 20, 2005) (order stating that the judge “will randomly draw from a hat (literally) fifteen cases”).

107. *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-CV-01699, at 3 (N.D. Cal. Nov. 17, 2006) (pretrial order detailing use of random selection by randomizing software).

108. *See, e.g., In re Norplant Prods. Liab. Litig.*, MDL No. 1038, 1996 WL 571536, at \*1 (E.D. Tex. Aug 13, 1996) (noting that the court randomly selected twenty-five bellwether plaintiffs); AMERICAN BAR ASSOCIATION, TOXIC TORT LITIGATION 293 N. 321 (D. Alan Rudlin ed., 2007) (noting that the court in *Mark v. Reichhold Chemicals, Inc.* devised a four-category system for alleged injuries and randomly selected two to three bellwether plaintiffs from each of the categories).

109. *In re Prempro*, MDL No. 4-03-CV-1507-WRW, at 1.

plaintiffs must have: (1) been residents of Arkansas; (2) filed their case in either Eastern or Western Districts of Arkansas; (3) included Wyeth as a defendant; (4) alleged breast cancer as an injury; (5) served completed fact sheets; and (6) filed before April 22, 2005.<sup>110</sup> From the ninety-four cases meeting these criteria, the judge randomly drew fifteen cases out of a hat for trial.<sup>111</sup> A portion of the trial selection process in the *Bextra & Celebrex MDL* also was random.<sup>112</sup> The parties used a third-party randomizer computer program to conduct its selection of twenty-five cases included in the discovery pool. The parties also each selected ten cases to round out the pool.<sup>113</sup>

## 2. Benefits of Random Selection Methods

There are a number of methods for drawing a random sample from a population. The pure, or “simple,” random selection is where every member of the population has the same probability of being included in the sample.<sup>114</sup> A random sampling is most likely to yield a sample that is truly representative of the docket as a whole because it limits – if not eliminates – tactical manipulation by the parties. The scientific literature is replete with articles explaining how samples which are drawn from a population using random sampling are more likely to be representative of the population.<sup>115</sup> No non-random sampling techniques have been shown to generate systematically a representative sample.

For this reason, pure random selection is the selection method preferred by many commentators and courts. For example, the *Manual for Complex Litigation* endorses the use of random selection:

If individual trials, sometimes referred to as bellwether trials or test cases, are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases . . . To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases.<sup>116</sup>

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110. *Id.*

111. *Id.* at 2.

112. *In re Bextra & Celebrex*, No. M:05-CV-01699, at 3.

113. *Id.*

114. B.S. EVERITT & A. SKRONDAL, *THE CAMBRIDGE DICTIONARY OF STATISTICS* 394 (4th ed. 2010).

115. *See, e.g.*, STEVEN K. THOMPSON, *SAMPLING* 3-4, 6, 8, 11-37 (3d ed. 2012); BERNARD ROSNER, *FUNDAMENTALS OF BIostatISTICS* 167-77 (6th ed. 2006).

116. *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 22.315 (2004).

The Fifth Circuit agrees, explaining that the key to any bellwether process is to obtain a representative sample that is capable of determining causation, liability, and the value of the case, and to do so in any meaningful way, “the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained.”<sup>117</sup> Leading practitioners concur as well, arguing that the representative nature of bellwether plaintiffs is “something that can be ensured only by using *random* selection,” which eliminates the gamesmanship inherent in party-selected models.<sup>118</sup>

### 3. Concerns Expressed About Random Selection Methods

Some commentators and courts are skeptical of a random selection process for the very reason that this selection method detaches the attorneys from the process.<sup>119</sup> For example, the Southern District of Illinois refused to utilize random selection in the *Yasmin and Yaz* litigation “in order to have better control over the representative characteristics of the cases selected.”<sup>120</sup> The court suggested that the better manner to achieve a representative sampling of cases would involve party selection, coupled with a veto process “in case advocacy has trumped altruism and both sides have decided to ignore [the court’s] efforts at objectivity.”<sup>121</sup>

Critics of random selection methods emphasize the importance of the opportunity for the attorneys to make strategic decisions regarding which cases to try and to select cases that will meet their strategic goals. However, it is difficult to imagine a litigation where advocacy does not trump altruism (and arguably, counsel’s duty of zealous representation requires advocacy over altruism). Unless both parties trust opposing counsel to favor altruism over advocacy, neither party is likely to view the process as being likely to result in selection of cases that are capable of being extrapolated to the entire docket.

At the same time, the court’s concerns in the *Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability*

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

118. Conference on Civil Litigation, Amy Schulman & Sheila Birnbaum, *From Both Sides Now: Additional Perspectives on “Uncovering Discovery,”* at 21-22 (2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Amy%20Schulman%20and%20Sheila%20Birnbaum,%20From%20Both%20Sides%20Now.pdf>.

119. *Id.*

120. *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100, 2010 WL 4024778, at \*2 (S.D. Ill. Oct. 13, 2010).

121. *Id.*

*Litigation*— the lack of assurance that all relevant subgroups within the pool are represented – must not be overlooked.<sup>122</sup> Random selection, if applied to the *Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, for example, would not guarantee that the stroke and heart attack plaintiffs (representing less than 10% of the docket) were neither over- nor under-represented in the cases selected for trial.<sup>123</sup> Similar representation problems may occur with any sub-issue important to the MDL, including issues such as exposure, injuries, claims, alternative causation, and affirmative defenses.

#### 4. Potential Modifications to Random Selection Methods to Address Those Concerns

One solution to this problem is to subdivide the plaintiffs into categories based on issues relevant to the MDL (*e.g.*, claim, exposure, injury, etc.). However, any attempt to limit the “randomness” of random selection threatens to undercut its superiority over other selection methods. The *Prempro Products Liability Litigation* example illustrates how the threshold criteria used, even with random selection, can skew results.<sup>124</sup> The court assumed that by selecting plaintiffs who are residents of the same state, the pool of cases from that state will be representative of the national pool.<sup>125</sup> But because of differences in state law and commercial practices, it is unclear whether plaintiffs from one state will be representative of those from every other state. Further, imposing other threshold requirements for selection, such as limiting the pool of eligible cases based on filing date, allow some of the strategic docket manipulation and gamesmanship concerns inherent in the party selection models to creep into the random selection model.<sup>126</sup>

Rather than attempt to modify a random selection process manually, statisticians have developed standard, widely used forms of random sampling, such as cluster sampling, which can ensure specific representation while maintaining the random nature of the selection

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122. *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100, 2010 WL 4024778, at \*2 (S.D. Ill. Oct. 13, 2010); *see also* Fallon, *supra* note 11, at 2348.

123. *In re Yasmin and Yaz*, 2010 WL 4024778, at \*2; *see* discussion *supra* Section III.

124. *In re Prempro Prods. Liab. Litig.*, MDL No. 4:03-CV-1507-WRW (E.D. Ark. June 20, 2005) (order outlining requirements for bellwether plaintiffs).

125. *Id.* at 1.

126. *See, e.g.*, *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 87 F.R.D. 560, 564 (D. D.C. 1980) (reprimanding counsel for gamesmanship).

process.<sup>127</sup> Further, statisticians can calculate the exact size of a random sample (such as a bellwether discovery pool) that is required to ensure representativeness of a given character or characteristics, an advantage not shared by subjective sampling methods.

Notwithstanding these statistical methods, it may be useful for courts employing random selection to set some limits for the sake of judicial economy. To yield meaningful bellwether results, random selection should include cases that do not overly favor either side and that allege injuries that are widely represented in the docket as a whole (which should occur naturally if the random sample is sufficiently large), while excluding weak or unsupported claims that were filed merely to bolster the numbers of cases filed.<sup>128</sup>

#### IV. AN EMPIRICAL SAMPLE DEMONSTRATES THE SUPERIORITY OF A RANDOM SELECTION

In the past, when litigants presented bellwether selection proposals to courts, they largely resorted to theoretical arguments about the likelihood that their suggested alternative would yield “representative” plaintiffs that advance the information-gathering and fairness purposes of bellwether trials. While courts can look to other courts to see how they have handled the challenge of identifying appropriate plaintiffs for bellwether trials, it can be hard to assess the relative success of competing selection methods after the fact, especially if only one selection method is used. As a result, courts often are left with little assurance that one method or the other will produce representative plaintiffs, as opposed to outliers that are not selected fairly and that will not materially advance the litigation.

To address the lack of empirical data, and to provide litigants with more concrete information for evaluating bellwether selection proposals, we analyzed the results of different bellwether selection methods used in the Bextra and Celebrex product liability litigations, in which we represented Pfizer Inc. In those litigations, the parties used both party selection and random selection, enabling us to compare the relative strength of the plaintiffs selected according to each method.

We also had the benefit of a detailed methodology for assessing the claims, which was established by non-parties to the litigation – the point

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127. THOMPSON, *supra* note 115, at 3-4.

128. JOHN H. BEISNER & JESSICA D. MILLER, LITIGATE THE TORTS, NOT THE MASS: A MODEST PROPOSAL FOR REFORMING HOW MASS TORTS ARE ADJUDICATED 26 (Washington Legal Foundation 2009).

system used to resolve cardiovascular injuries in the Vioxx settlement – so that we could measure the relative strength of the plaintiffs’ claims quantitatively and objectively. By applying the Vioxx calculator to each plaintiff selected for the bellwether pools in the Bextra and Celebrex litigation, we were able to examine the impact of the relevant selection method on the plaintiffs who were chosen as potential bellwethers. To the authors’ knowledge, our analysis represents the first empirical, numerical comparison of various selection procedures in a mass tort litigation.

*A. Background: The Selection Methods Used in the Bextra/Celebrex Litigation*

Bextra and Celebrex are both selective COX-2 inhibitors, a type of non-steroidal anti-inflammatory drug (“NSAID”), which have been widely used for pain relief.<sup>129</sup> On September 30, 2004 Merck & Co., Inc. (“Merck”) withdrew Vioxx, another selective COX-2 inhibitor, after a clinical trial demonstrated a two-fold increased risk of adverse cardiovascular events such as heart attacks and strokes.<sup>130</sup> In 2005, after the U.S. Food & Drug Administration (“FDA”) convened an advisory committee meeting to evaluate the cardiovascular safety of selective COX-2 inhibitors and other NSAIDs, Pfizer voluntarily withdrew Bextra from the worldwide market.<sup>131</sup> Over the next three years, thousands of plaintiffs filed suit against Pfizer and various predecessor entities alleging that Bextra and/or Celebrex caused them to suffer heart attacks, strokes, and other cardiovascular injuries.

The vast majority of the Bextra and Celebrex claims asserted against Pfizer were aggregated into two proceedings: (1) a federal multi-district litigation in the U.S. District Court for the Northern District of California (“the MDL”), and (2) a coordinated state-wide proceeding in the Supreme Court of the State of New York in New York County (“the New York litigation”). In both litigations, the parties employed both party selection and random selection to identify plaintiffs eligible for the bellwether trial pool. In the MDL, the parties each initially selected ten plaintiffs and randomly selected twenty-five plaintiffs (for a total of forty-five plaintiffs);<sup>132</sup> in the New York litigation, the parties each

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129. *In re Bextra & Celebrex Mktg., Sales Practices & Prod. Liab. Litig.*, 524 F. Supp. 2d 1166, 1169 (N.D. Cal. 2007).

130. *Id.*

131. *Id.* at 1170.

132. *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-CV-01699, at 3 (N.D. Cal. Nov. 17, 2006) (pretrial order detailing selection process).

initially selected five plaintiffs and randomly selected eight plaintiffs (for a total of eighteen plaintiffs).<sup>133</sup>

In both litigations, the parties selected replacement plaintiffs for those whose claims were dismissed using the same selection method as had been used to select the dismissed plaintiff.<sup>134</sup> Over the course of the bellwether discovery period, thirty-eight plaintiffs dismissed their claims; the parties replaced those selections, resulting in a total of 103 plaintiffs in the bellwether pools in the MDL and New York litigations. Prior to selection, each plaintiff in the bellwether pool provided a Plaintiff Fact Sheet and authorizations for the collection of medical records.<sup>135</sup>

### *B. Objectives and Methods*

To examine how the various bellwether selection methods affected the strength of the plaintiffs selected, we needed a systematic, objective, and quantitative way to assess the plaintiffs' claims. Fortunately, we had the benefit of such a method developed in connection with the Vioxx litigation. On November 9, 2007, Merck announced that it had settled thousands of claims of plaintiffs who had suffered heart attacks, sudden cardiac death, or ischemic strokes.<sup>136</sup> In connection with that settlement, the parties developed a detailed system for evaluating the claims of plaintiffs who participated in the settlement, awarding points based on factors such as the plaintiff's age, injury level, duration of use, pre-existing cardiovascular risk factors (such as high cholesterol, high blood pressure, diabetes, smoking history, obesity, family history, prior cardiovascular disease, and other factors), and the period of time during which the plaintiff used Vioxx.<sup>137</sup> The Vioxx criteria gave us a widely accepted method for calculating a score that summarizes the same types

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133. *In re New York Bextra & Celebrex Prod. Liab. Litig.*, No. 762000/06, at 2 (N.Y.S. Jan. 29, 2007) (case management order stating that each party would select five plaintiffs and eight of the plaintiffs would be selected randomly).

134. For example, if Pfizer selected a plaintiff and that plaintiff chose to dismiss her claim, Pfizer selected a replacement plaintiff. If the parties randomly selected a plaintiff and that plaintiff chose to dismiss his claim, the parties randomly selected a replacement. *See In re Bextra & Celebrex*, No. M:05-CV-01699, at 7-8; *In re New York Bextra & Celebrex*, No. 762000/06, at 9.

135. *See In re Bextra & Celebrex*, No. M:05-CV-01699, at 4; *In re New York Bextra & Celebrex*, No. 762000/06, at 4.

136. Press Release, Merck Settles Thousands of Vioxx Claims for \$4.85 Billion (Nov. 9, 2007), <http://www.officialvioxxsettlement.com/documents/Official%20Press%20Release%20-%20Vioxx%20Settlement.pdf>.

137. "Official Vioxx Settlement Calculator," VIOXX MDL PLAINTIFFS' STEERING COMMITTEE, <http://www.officialvioxxsettlement.com/calculator/> (last visited Feb. 24, 2014).



of injuries based on a medication in the same class as Bextra and Celebrex.

We made a number of minor adjustments to the Vioxx criteria to reflect the different issues in the Bextra and Celebrex litigation. For example, we did not apply an adjustment for the period during which a plaintiff used Bextra and/or Celebrex, because the label changes for those medications were not as dramatic as the change to the Vioxx label. Similarly, we did not alter plaintiffs' scores based on the duration of use, because that was not as significant an issue in the Bextra and Celebrex litigations as in the Vioxx litigation. We also made very small modifications to the risk factor adjustments based on the information available to us in the plaintiffs' fact sheets and medical records.

We then applied the Vioxx criteria to the bellwether plaintiffs selected in the Bextra and Celebrex litigations. Of the 103 plaintiffs selected for the bellwether pools in the MDL and New York litigations, we had sufficient information to evaluate eighty-four of the plaintiffs – forty-four plaintiffs selected randomly, sixteen plaintiffs selected by the plaintiffs, and twenty-four selected by Pfizer. We computed a score for each individual plaintiff and then compared the mean scores and standard deviations for each of the selection methods to assess the relative strength of each pool. We also performed tests of statistical significance to see whether any observed differences between the party selections and the random selections were likely due to the play of chance as opposed to a systematic bias.

### *C. Results and Discussion*

As we expected, our analysis revealed that the plaintiffs' selections were materially stronger than the random selections. The mean score for the random selections was 103.96, with a standard deviation of 74.91, while the mean score for the plaintiffs' selections was more than twice as high at 226.18, with a standard deviation of 110.27. That difference was statistically significant ( $p < 0.001$ ), which suggests that the difference was not due to random variation. Our results did not differ substantially if we analyzed only the MDL cases or if we analyzed each medication separately. Thus, our results confirmed our hypothesis that the plaintiffs' selections would be materially stronger cases than those selected randomly.

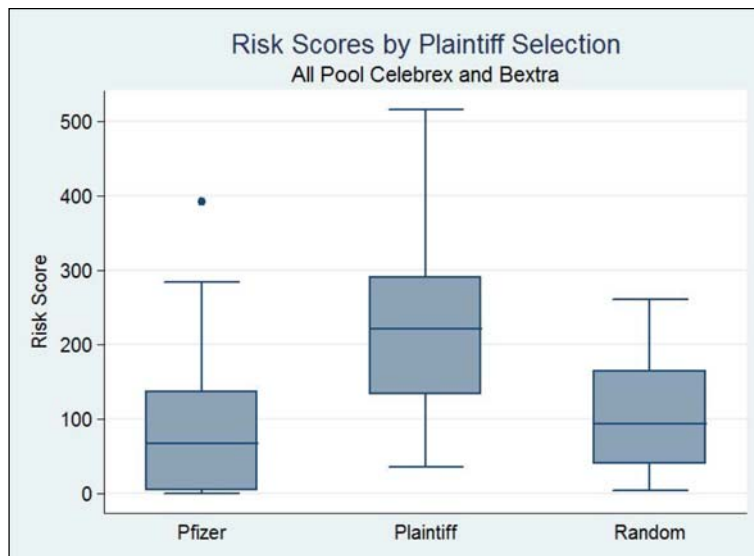
The results for the Pfizer selections, however, were surprising. While the mean score for the Pfizer selections was numerically lower than the random selections (90.67 versus 103.96, with a standard

deviation of 98.10), the difference was fairly small (less than 15%) and not statistically significant ( $p = 0.57$ ). The results were similar when we analyzed only MDL cases or each medication separately. Those results, therefore, were not consistent with our hypothesis that the defense selections would be materially weaker than those selected randomly; rather, the defense selections were within a difference one would expect by the play of chance. These results are displayed in Figures 1 and 2.

*Figure 1 – Numerical Results for Various Selection Methods*

Selection Method	Random	Plaintiffs	Pfizer
No. Plaintiffs	44	16	24
Mean Score	103.96	226.18	90.67
Standard Deviation	74.91	110.27	98.10
P-Value (relative to random selection)	—	<0.001	0.57

*Figure 2 – Graphical Results for Various Selection Methods*



In an effort to determine why the plaintiffs' selections were materially different from the random selections and the defense selections, we looked more closely at the distribution of plaintiffs' baseline factors, which we used to calculate the scores for each set of selections. We found that the primary driver of the difference was the presence (or absence) of pre-existing risk factors or other aggravating circumstances that would reduce the value of a claim. As shown in Figure 3, the plaintiffs' selections were far less likely to have cardiovascular risk factors such as obesity, high cholesterol, high blood pressure, diabetes, or prior cardiovascular disease. In other words, the plaintiffs selected "clean" bellwether candidates who did not have clear alternative causes for their cardiovascular injuries, whereas the defense and random selections were much more likely to have such risk factors.

*Figure 3 – Summary Statistics of Bellwether Plaintiffs by Risk Factor*

	Random		Plaintiff		Pfizer	
	N	%	N	%	N	%
<b>Total</b>	44	100%	16	100%	24	100%
<b>Risk Factors</b>						
Obesity						
BMI $\geq$ 30 kg/m	21	47.7%	10	62.5%	10	41.7%
BMI $\geq$ 40 kg/m	1	2.3%	0	0.0%	3	12.5%
BMI $\geq$ 50 kg/m	8	18.2%	0	0.0%	1	4.2%
Cholesterol						
Controlled	14	31.8%	8	50.0%	12	50.0%
Uncontrolled	1	2.3%	1	6.3%	0	0.0%
Hypertension						
Controlled	23	52.3%	7	43.8%	12	50.0%
Uncontrolled	2	4.5%	0	0.0%	1	4.2%
Diabetes						
Controlled	14	31.8%	1	6.3%	8	33.3%
Uncontrolled	2	4.5%	0	0.0%	0	0.0%
Prior Diagnosed Vascular Disease	8	18.2%	1	6.3%	10	41.7%
Prior MI or CABG	5	11.4%	1	6.3%	8	33.3%
Prior Coronary Artery Disease	4	9.1%	0	0.0%	6	25.0%
Pre-Event Extreme Smoking	10	22.7%	0	0.0%	5	20.8%
Pre-Event Regular Smoking	6	13.6%	1	6.3%	7	29.2%
Post-Event Smoking	15	34.1%	1	6.3%	11	45.8%
Cardiovascular Disease Family History						
Ambiguous	27	61.4%	5	31.3%	17	70.8%
Unambiguous	4	9.1%	5	31.3%	4	16.7%
Illegal Drug Use						
Within 1 year of Event	2	4.5%	0	0.0%	2	8.3%
Within 5 years of Event	1	2.3%	0	0.0%	2	8.3%
Alcohol Abuse	6	13.6%	1	6.3%	3	12.5%
Trigger	2	4.5%	2	12.5%	0	0.0%
Accelerator	9	20.5%	0	0.0%	8	33.3%

Thus, our empirical analysis confirmed that party selection did not yield bellwether plaintiffs that were representative of a random sample drawn from the rest of the docket. Party selections were more likely to produce samples which deviate from a random sample, and plaintiffs' selections were significantly more likely to result in bellwether plaintiffs whose claims were much stronger than a random sample due to their lack of pre-existing risk factors. Because the defense selections were comparable to the random selections, it appears that a party selection process disadvantaged the defense disproportionately and undermined the fairness needed for a bellwether approach to produce results that can be extrapolated fairly to other plaintiffs in the docket.

## V. CONCLUSION

For a bellwether selection process to achieve its purpose – providing the parties with information that helps them extrapolate the results to the remainder of the docket for purposes of resolving claims that cannot all be tried – the sample the court and litigants select must fairly represent the rest of the plaintiffs in the litigation. If the parties believe that the cases that are selected are outliers, then the information-gathering purpose of a bellwether process is impaired significantly. Any verdicts are not likely to be accepted as generalizable to the remainder of the docket and may have little or no value in the resolution process.

If a bellwether selection process yields unrepresentative plaintiffs, but the parties are equally able and likely to select non-representative samples, then any impairment of the information-gathering function of bellwether trials may not be fatal. After all, there are other ways for parties to gain useful data from bellwether trials, such as mock jury research, feedback from actual jurors, rulings on motions *in limine*, and appeals. But where the selection process is also unfair, then bellwether trials neither promote information-gathering nor serve as a fair representation of the value of other plaintiffs' claims.

Our empirical analysis demonstrates that – at least in litigations with dockets similar to the Bextra and Celebrex litigation – a party selection process may be fundamentally unfair to one side, which calls into question the integrity of party selection as a means of achieving the objectives of bellwether trials. By contrast, a random selection method cannot be manipulated by the parties and yields plaintiffs whose claims may be significantly more likely to be representative of the remainder of the docket, while eliminating any claim that the process is unfair. With random selection, the court and parties should feel more confidence in

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the process and be able to place more weight in the results of bellwether trials, which helps ensure that the bellwether process accomplishes its objectives.