MASS TORT MANAGEMENT IN STATE AND FEDERAL COURTS: A CASE STUDY OF THE
PHENYLPROPANOLAMINE (PPA) LITIGATION *

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INTRODUCTION

Few types of litigation challenge the ingenuity of the judiciary more than mass
torts.1 Often triggered by the discovery that a widely distributed product caused a
previously unattributable harm, mass torts rush into courts with momentum that challenge
conventional case management techniques. These cases are characterized by a high
volume of repetitive litigation involving the same or similar products, multiple layers of
claims, and an evolving and uncertain group of potential claimants and defendants.2 The
sheer number of cases can create enormous pressure on courts to aggregate cases through
class certification or coordinate pre-trial management to reduce delay and docket
congestion and to avoid the costs of repetitive litigation.3 But mass torts challenge even
aggregate case management. These cases often arise in multiple jurisdictions. Because
state law usually governs these mass torts, multi-state aggregation of cases raises choice
of law questions both substantive and procedural. Moreover, not all claims raised in
mass tort actions are appropriate for aggregate resolution.4

Claims such as personal injury require courts to make individual determinations
of causation. Different categories of potential claimants may create conflicts of interest
that complicate aggregate case management.5 Compound these legal difficulties with the
overlapping jurisdiction of state and federal courts and the daunting logistics of gathering
and disseminating information to many thousands of existing and potential claimants and
one begins to appreciate why mass torts so tax the judicial system.

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1 For the purpose of this article, we will continue to use the more familiar and colloquial term “mass tort” to
refer to mass litigation generally.

2 FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, §22.1, at 344 (Stanley Marcus et al.

3 Id. at 346.

4 Id. at 343.

5 Id. at 346.
Jurisdictional borders grow ever more porous in a globalizing economy. Mass marketed, efficiently distributed goods and services quickly spread through the country and the world. Despite the adoption of some uniform rules, states have not kept pace with the growing reach of business. Each state has its own procedure for managing mass torts with varying degrees of effectiveness. Few, if any, formal mechanisms exist for state judges to consult and coordinate cases across state lines or with their federal counterparts.

The drawbacks of litigating mass torts in state courts are apparent. State plaintiffs cannot effectively share information and pool resources with their counterparts in other states to fight against often well-informed and well-funded defendants in protracted litigation. Defendants face the daunting prospect of having to litigate thousands of lawsuits in multiple state courts. Global settlement is made more difficult and costly because defendants have to negotiate with plaintiffs in each state. Repetitive litigation in numerous state courts may lead to disparate outcomes for similar cases. Duplicative proceedings on common issues could drain funds available for compensating injured plaintiffs.

The general preference of many defendants is to remove mass tort cases to federal MDL courts where possible. The federal judiciary has the tools to aggregate mass torts – consolidation orders under Federal Rules of Civil Procedure 42, the multidistrict litigation statute, and nationwide class actions. But the efficiencies captured by centralized management come at a cost. For example, in multidistrict litigation, a lengthy process of aggregating and transferring claims to an MDL court for pretrial management and remanding claims to district courts for trial must play out before the resolution of a case. Meanwhile, plaintiffs’ cases could languish in the MDL court for years. With so many claims aggregated, defendants may face a prohibitively high cost of settlement. Because mass torts often arise in multiple jurisdictions, the MDL court may have to resolve difficult conflict of laws issues when aggregating claims and maintain a delicate balance between judicial economy and due process.

Despite the trend to litigate dispersed mass torts in federal courts, ninety-eight percent of mass torts are ultimately resolved in state courts. Cases over which federal courts lack jurisdiction will stay in state courts. But there are plenty of good reasons why state courts should not yield all mass torts to federal jurisdiction. States have a strong interest in protecting their citizens and regulating the conduct of business within their borders. Trying mass torts in state courts best ensures the rights of the parties. State courts need not compromise due process to resolve difficult choice of law issues when trying tort cases under their own substantive laws. Finally, with fewer mass tort cases pending before them, state courts usually move faster than their federal counterparts in resolving individual cases.

Combining the efficiencies of centralization with the benefits of local dispute resolution lies at the heart of the management challenge posed by mass torts. To explore

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this question, this paper examines case management issues that arose in the recent Phenylpropanolamine (PPA) litigation. Specifically, this paper highlights some innovative case management techniques employed by state and federal judges individually and in cooperation with one another. The management of PPA litigation has been widely regarded as successful by both plaintiffs and defendants. This success derives from the active supervision of federal district court Judge Barbara Rothstein and her insistence on federal and state cooperation as a means to minimize duplication and maximize the efficiencies extracted from aggregate case management.

**REGULATORY HISTORY OF PPA**

PPA is a vasoconstrictor that narrows blood vessels in the sinuses, nose and chest, allowing fluid to drain from these areas and reducing congestion.\(^7\) The drug also causes a loss of appetite. As a decongestant and appetite suppressant, PPA was a popular ingredient in many over-the-counter (OTC) and prescription cough and cold medications and diet aids.\(^8\) From the 1930s until November 2000, billions of doses of medicine containing PPA were sold and consumed in the United States.

The 1938 Food, Drug, and Cosmetics (FDC) Act exempted drugs existing at the time of its passage from new testing requirements. Because of its early introduction to market, PPA was grandfathered and thus escaped close federal scrutiny. Nevertheless, in 1972, the Food and Drug Administration (FDA), at the behest of Congress, initiated a multiyear scientific review of all OTC drug products to determine the safety and effectiveness of OTC drug products marketed in the United States.\(^9\) Expert advisory panels sitting for the review recommended that the FDA recognize PPA as generally safe and effective as a nasal decongestant and for weight control. However, the FDA did not finalize a safe and effective status for PPA because of concerns about occasional reports of hemorrhagic stroke associated with using the drug.\(^10\)

In the years that followed, PPA came under increasing federal scrutiny. As early as 1982, the FDA became concerned about the safety of PPA. Case reports indicated that PPA doses higher than that marketed for weight control (75mg) elevated blood pressure. In the 1982 Advanced Notice for Proposed Rule, the FDA requested information from industry officials regarding PPA’s effect on blood pressure and the dissolution rates of

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time-released products. The FDA also limited PPA to single doses of 25 to 37.5mg or 75mg time-release, with a daily dosage limit of 75mg.\textsuperscript{11} In 1984, the FDA banned sale of products containing a combination of PPA and caffeine due to safety and health concerns. By 1990, the FDA concluded from blood pressure studies that PPA causes a biphasic blood pressure response. Initially, PPA causes blood pressure to rise above baseline (pressor effect) and then to fall below baseline (depressor effect). The pressor/depressor effects are dose-related. The drug’s effect on blood pressure diminishes with repeated use. Tolerance to the pressor effect of the drug develops within a few hours. However, the data from the blood pressure studies were inadequate to respond to the FDA’s safety concerns about the drug.\textsuperscript{12}

On September 24, 1990, soon after the FDA released the results of its blood pressure study, the House of Representatives held a hearing on diet drugs containing PPA. Several scientific witnesses testifying before the House cited wide misuse of PPA and called for the removal of PPA from the OTC market because of health concerns.\textsuperscript{13} The following year the FDA reviewed cerebro-vascular incidents in its Spontaneous Reporting System. The FDA found that from 1977 to 1991 there were 22 cases of intracranial bleeding associated with PPA. Most reports were associated with PPA weight control products and first time use of the drug. The case review suggested that PPA might increase the risk of hemorrhagic stroke.\textsuperscript{14} In 1991, the FDA held a public meeting to address the safety and effectiveness of PPA, during which reports of hemorrhagic stroke associated with PPA use were raised.\textsuperscript{15} In 1992, after its epidemiologist consultants again reviewed the case report data, the FDA concluded that although an association between PPA and an increased risk of stroke could not be ruled out, the available data did not warrant removal of PPA from the OTC market at that time. It recommended collection of additional data.\textsuperscript{16}

To allay the FDA’s concerns about the safety of PPA, the Nonprescription Drugs Manufacturers Association (NDMA) proposed and funded an epidemiological study to investigate the link between PPA and strokes. The Yale Hemorrhagic Stroke Project (HSP)\textsuperscript{17} began in September 1994 and made its final report in May 2000. The sale of OTC products containing PPA continued through the study.


\textsuperscript{12} Id. at slide 9 of 19.

\textsuperscript{13} Id. at slide 10 of 19.

\textsuperscript{14} Id. slide 13 of 19.

\textsuperscript{15} Id. slide 11 of 19.

\textsuperscript{16} Id. slides 15, 16 of 19.

\textsuperscript{17} Ralph I. Horwitz, M.D. ET. AL., Yale University School of Medicine, Phenylpropanolamine & Risk of Hemorrhagic Stroke: Final Report of The Hemorrhagic Stroke Project, (2000).
The HSP examined three questions: (1) Whether all users of PPA (men and women aged 18 to 49 years) compared with non-users had an increased risk of hemorrhagic stroke; (2) the possible association between PPA use and hemorrhagic stroke by type of exposure (appetite suppressant or cold-cough product); and (3) among women aged 18 to 49 years, the possible association between first use of PPA and hemorrhagic stroke and the possible association between use of PPA-containing appetite suppressants and hemorrhagic stroke.

The HSP was designed as a matched case control study. Investigators compared each case subject who suffered stroke after ingesting PPA to two control subjects who did not ingest PPA, but who were otherwise similar to the case subject. The control subjects were randomly chosen. The study involved 702 case subjects and 1376 control subjects.

The HSP quantified the association between PPA and incidence of hemorrhagic stroke. The study compared the incidence of stroke between case and control groups. Members of the case group ingested PPA within 3 days of suffering hemorrhagic stroke. Members of the control group did not ingest PPA within a 2 week period. In general, members of the case group were 1.49 times more likely than members of the control group to suffer hemorrhagic stroke. Risk of hemorrhagic stroke diminished with the passage of time. Within the first day of exposure, members of the case group were 1.61 times more likely to suffer hemorrhagic stroke than members of the control group. By the second and third day, case group members were only 1.16 times more likely to suffer hemorrhagic stroke than control group members. Members of the case group who had not previously been exposed to PPA faced a higher risk than members who had previously been exposed to the drug. Members of the case group who had ingested more than 75mg faced higher risks than those who took smaller doses.

PPA appetite suppressants posed a significantly greater risk than PPA cold-cough medicine. Members of the case group who ingested PPA cold-cough medicine were 1.23 times more likely to suffer hemorrhagic stroke compared to members of the control group. However, case group members who ingested PPA appetite suppressants were 15.92 times more likely to suffer hemorrhagic stroke than control group members.

Women were more vulnerable to PPA than the general population. In general, women in the case group who ingested PPA were 3.13 times more likely to suffer from hemorrhagic stroke than women in the control group. Women in the case group who ingested PPA appetite suppressants were 16.58 times more likely to suffer hemorrhagic stroke than women in the control group.

The HSP was not without limitations. Only the elevated risk caused by appetite suppressants and first time use reached the conventional threshold for statistical significance. In other words, the ingestion of PPA appetite suppressants and the first time exposure to PPA were the only factors that caused elevated risks of hemorrhagic stroke in a way that is generally recognized as not attributable to chance. Furthermore, because only 19 men were in the case group, it was not possible to determine from the study whether men exposed to PPA faced the same risk of hemorrhagic stroke as women.
Despite these limitations, the FDA deemed the HSP to be well designed and rigorous. The FDA concluded that the study found a consistent association between PPA use and hemorrhagic stroke, particularly in women. Additional case reports further corroborated the HSP’s findings. While the HSP was being conducted, the FDA continued to receive spontaneous reports of hemorrhagic stroke with cough-cold products that contain high doses of PPA. Some reports indicate that only one dose was administered. Between 1991 and 2000, the FDA recorded another 22 cases of hemorrhagic stroke associated with PPA use. The accumulating evidence of adverse effects led the agency to proclaim that the potential risk of PPA outweighed the benefits of its intended use.\(^{18}\)

In November 2000, the FDA acted to remove OTC products that contain PPA from the market. On November 3, 2000, the FDA requested manufacturers to stop marketing any drug products containing PPA and reformulate products to remove PPA as an ingredient. Three days later, the FDA issued a consumer health advisory warning consumers about the elevated risk of hemorrhagic stroke associated with using OTC products that contain PPA.

DISCUSSION

PPA was a primary ingredient in hundreds of OTC cold remedies and diet drugs. It was manufactured by multiple pharmaceutical companies over half a century. The FDA’s consumer health advisory warning spawned thousands of lawsuits, with plaintiffs’ allegations ranging from negligence to strict product liability because of product defect and failure to warn. Over 2,500 PPA lawsuits have been filed against drug manufacturers of cough, cold, and diet pills that contained PPA.\(^{19}\)

But the volume of cases poses more than a logistical challenge. In our federalist system, state and federal courts operate independently of each other under most circumstances. Few formal procedures exist for one court to influence the affairs of another. Yet, in the context of mass torts, the action of a single court can affect the management and outcome of cases pending in all other courts. What magnifies the influence of a court’s decision is the similarity of cases in a mass tort. The outcome of a few representative cases may determine the settlement value of all claims.

Successful management of mass torts requires the timely resolution of disputes, at the least cost to the parties, in a way that fairly compensates the injured and provides adequate due process for all. Achieving this goal requires cooperation among the judges, attorneys, and litigants. Where formal procedures for cooperation do not exist, judges


and attorneys should explore informal means of cooperation allowable within the bounds of the law. The PPA litigation highlights four areas of pre-trial management – removal, discovery, expert discovery and class certification— that warrant special attention. These issues often have a determinative effect on the trial and settlement outcomes. They also offer great opportunities for cooperation among judges and attorneys.

**Removal**

Plaintiffs generally prefer to litigate in state courts. State proceedings usually advance faster than federal ones. For plaintiffs’ attorneys working on a contingency basis, swift resolution of cases cuts costs and pressures defendants to settle. Litigating in state courts give local plaintiffs’ attorneys more control over their case. State juries are also perceived to be more pro-plaintiff than their federal counterparts, although empirical studies show scant evidence that juries behave differently in state and federal courts.

Defendants generally prefer centralized proceedings in federal MDL courts. Defendants benefit from the efficiencies generated by the aggregation of plaintiffs’ claims. Instead of dealing with each plaintiff individually, centralized proceedings afford defendants the opportunity to correspond and negotiate with plaintiffs as a group. Because transferring and aggregating cases take time, centralized proceedings slow the pace of the litigation. Time is money. To defendants facing thousands of claims, delaying payout can be critical to survival. Defendants’ attorneys can also better manage a steady stream of cases flowing from centralized pre-trial proceedings than an avalanche of cases in state courts around the country.

In the PPA litigation, the conflict between plaintiffs and defendants over the choice of forum played out in removal and remand motions. To defeat diversity, plaintiffs joined in suit diverse and non-diverse defendants. Defendant manufacturers then sought to remove these cases to federal court on the theory of fraudulent joinder.

To establish that a non-diverse defendant has been fraudulently joined, the defendant seeking removal must show that there is no possibility that the plaintiff could state a cause of action in state court against the non-diverse defendant or that there has been outright fraud in the plaintiff’s pleading of jurisdictional facts. While the defendant bears the burden of proving fraudulent joinder, the defendant can carry this burden via deficiencies in the plaintiff’s pleading. The plaintiff cannot rest upon mere allegations in their pleadings. The court may pierce the pleadings to see if the plaintiff has a cognizable claim against each defendant. In the absence of proof, the court will not assume that the plaintiff will succeed in proving the necessary facts to support his claim against the non-diverse defendant. Courts have found fraudulent joinder where the plaintiff fails to state a claim against the non-diverse defendant or specify the harm the defendant caused. Claims against non-diverse defendants that are over conclusory also fail.\(^\text{20}\)

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Once the defendant files a notice of removal with the federal court, state court proceedings on the case cease unless and until the federal court remands the case. After the Panel on Multidistrict Litigation granted MDL status to PPA cases, the federal district courts transferred these removal petitions to the MDL court. Even though some plaintiffs had cognizable claims against the non-diverse pharmacies under state law, the federal district courts transferred these cases to the MDL court with little scrutiny of whether federal courts had subject matter jurisdiction over the case. The transfers delayed progress on plaintiff’s cases against local pharmacies. Discovery in plaintiff’s cases against local pharmacies lagged even after the MDL court had made the decision to retain jurisdiction. Most cases in the MDL were directed at major national defendants. The plaintiffs’ steering committee was reluctant to expend discovery resources on local defendants.

Effective screening by the federal district courts before transferring cases to the MDL court would alleviate delays caused by fraudulent joinder. It would reduce the work load of the MDL court and advance state court litigation. Instead of transferring cases to the MDL court, federal district courts should screen and promptly remand cases suitable for state court adjudication.

Federal district courts also are in a better position than the MDL court to screen for fraudulent joinder. Federal district court judges know the state law within their jurisdiction well. They can best determine whether a plaintiff has a cognizable claim against non-diverse defendants under state law. They can also apply the test for fraudulent joinder adopted in their circuit to the defendant’s petition and thus ensuring procedural fairness.

Plaintiff’s bar could also contribute to the solution by discouraging its member from joining diverse and non-diverse defendants for purely strategic reasons. Defendants will seek removal. It is not in the interest of plaintiffs to burden the MDL court with unnecessary motions that will prolong the litigation. Plaintiffs with legitimate state law claims against non-diverse defendants could better advance their case by filing a separate suit in state court. As evident from the PPA litigation, the dynamics of the MDL drives plaintiffs to devote their discovery resources to national and not local defendants.

Discovery

In the PPA litigation, discovery was driven as much by the parties’ need for information as by strategic considerations of cost and time. The MDL court issued a series of instructions to promote cooperation among the parties and to enhance the efficiency of the litigation. Opposing counsel were willing to cooperate to the extent that such cooperation would not compromise their clients’ strategic positions, but at times that cooperation did not extend far.

For example, despite the formation of a joint science committee to determine the scope and extent of expert discovery at the MDL, the parties could not agree on the issue. In hope that impending trial would pressure defendants into settlement, plaintiffs were
eager for the MDL court to remand the cases for trial. They argued that the HSP conclusively established that PPA causes stroke and that the only issue left to be discovered was whether PPA caused particular plaintiffs to suffer stroke and that such discovery would be best delegated to the district courts. Defendants wanted to complete as much discovery at the MDL court as possible. Centralized proceedings at the MDL court allow defendants to deal with plaintiffs collectively and process discovery requests in bulk. Defendants were also concerned about the possibility of being overwhelmed by a large number of cases going to trial simultaneously. Conducting discovery at the MDL court would prolong the pre-trial phase of the litigation and give defendants more control over the flow of cases to trial. Defendants argued that the HSP did not definitively establish that PPA cause stroke and that discovery on this general causation issue should proceed in the MDL court. With the parties unable to agree, the MDL court resolved the dispute by ordering all expert discovery on general causation to be conducted at the MDL court and discovery on specific issues to be left to the district courts.

Despite the failure of the joint science committee, the MDL court successfully fostered cooperation among the parties and even among courts on other discovery issues. To avoid duplicative discovery requests, the MDL court ordered plaintiffs to serve on the defendants a master set of written discovery requests. No further general document requests or interrogatories were allowed to be served on the defendants without the leave of the MDL court. To avoid duplicative depositions, the MDL court ordered the MDL attorneys to invite their state counterparts to cross-notice depositions and permitted MDL attorneys to cross-notice depositions originating from state courts.

The MDL court also forbade any party to re-notice depositions of any witness already deposed without good cause. Recognizing that deposition by both the MDL and state attorneys may become repetitive, the MDL court limited repetitive questions to clarifications of prior testimony that were reasonably calculated to elicit new information. The MDL court also recognized that its order to cross-notice might create conflicts between MDL and state attorneys over the allocation of time in a cross-noticed deposition. To preempt such conflict, the MDL court ordered that the time state attorneys used in questioning would not count against the time the MDL court allowed for the deposition. Finally, the MDL court was alert to the possibility that its order to cross-notice might interfere with state court jurisdiction. To ensure that any state-federal coordination was voluntary, the MDL court limited its order, explicitly stating that its order should not be construed to affect state court proceedings.

Although the MDL court sought to minimize conflict and foster cooperation among the parties on discovery issues, some of the MDL court’s orders were controversial. One such controversy was the MDL court’s order for the parties to share objective data in their litigation support databases. Objective data is information on the parameters of a document (e.g. the title, author, date of publication, etc.) The parties could use objective data to organize and search documents stored in electronic data bases. Plaintiffs argued that since both parties had access to the underlying documents, discovery would be more efficient and less duplicative if the MDL court granted
plaintiffs access to objective data already compiled by defendants. Defendants argued that the objective data is work product, which if shared would compromise defendants’ litigation strategy. The defendants also argued that plaintiffs should not be allowed to piggy back on defendants’ efforts. If plaintiffs wanted access, then they should share in the cost of compiling the data. The MDL court allowed plaintiffs access to defendants’ objective data, but also allowed defendants to redact information that might compromise its strategic position. The plaintiffs would bear the cost of any redaction and the defendants would have equal access to plaintiff’s objective data. The MDL court would be the final arbiter over whether certain information should be redacted.

While the MDL court’s approach struck a balance between minimizing duplicative discovery and protecting work product, maintaining that balance required active judicial supervision. Defendants have a legitimate concern that plaintiffs could peer into their litigation strategy by examining the list of documents they chose to catalog. If the parties fail to cooperate, then the MDL court may have to resolve a series of disputes over whether certain information should be disclosed or redacted. In the worst case scenario, more time and resources could be expended on resolving disputes over redaction than saved by sharing objective data.

Another area of controversy was the common benefit fund. The MDL court created the fund to compensate the PSC for costs and attorneys’ fees incurred in providing case-wide services. The MDL court ordered the sequestration of 4 percent of all payments made by defendants in settlements or in satisfaction of judgments of cases transferred to MDL 1407 to be placed in the fund. The MDL court also provided for sequestration of 3 percent of all such payments in those state MDL court cases where plaintiffs used MDL 1407 work product. The latter order created significant friction between state and the federal MDL courts.

The rationale for the fund is simple. The first plaintiff who discovers defendants starts gathering information from scratch and thus bears the brunt of that cost. Subsequent plaintiffs spend less on discovery because they could use information already gathered by the first plaintiff. In theory, the common benefit fund distributes the cost of discovery among all plaintiffs by requiring subsequent plaintiffs to compensate the first plaintiff for the use of his work product.

But the fund’s cost sharing scheme is controversial. State attorneys complain that the MDL court continue to sequester funds even after the initial cost of discovery has been defrayed, making the fund into a cash cow for MDL attorneys. State courts object that the common benefit fund interferes with their jurisdiction, because it purports to prohibit them from ordering MDL attorneys to give up material they discovered. Critics of the fund also point out that because the first plaintiff voluntarily discovered the defendants, the first plaintiff must also have the most to gain from the discovery. His return from the discovery must at least be equal to his investment in it. Therefore, he should not be further compensated by the fund. Finally, some view information uncovered by discovery to be in the public domain and not work product. Therefore, information uncovered by discovery should be available to the public for free. To date,
the state and federal MDL courts have not reached an agreement over whether and how to implement common benefit funds.

Expert Discovery

When the joint science committee failed to agree on the scope and extent of expert discovery, the MDL court ordered expert discovery of general causation issues. Expert discovery of individual causation was left to the transferor courts. After hearing defendants’ Daubert challenges to plaintiffs’ experts, the MDL court found admissible expert testimony as to an association between PPA and hemorrhagic or ischemic stroke in both genders and any age group. However, the MDL court found inadmissible expert testimony as to an association between PPA and seizures, psychosis, cardiac injuries, or any injury occurring more than three days after ingestion of PPA.

In the Daubert hearings, the MDL court saw opportunity for state-federal coordination. Judge Rothstein invited interested state judges to join her at the MDL court in conducting Daubert hearings. Over the course of three days, this panel of judges heard attorney presentations and expert testimonies. Many state judges who attended the hearing adopted the MDL court’s position on admissibility of general causation expert testimony. Those judge who held separate hearings on the issue reached largely the same conclusion as the MDL court.

Some observations could be made about state-federal coordination on Daubert hearings. First, even though states have varying standards for admitting expert testimony, the science underlying expert testimony is the same. In the mass torts context, judges can minimize duplicative discovery through joint hearings or even access to video recordings of well-conducted Daubert hearings. Even if separate hearings are necessary, the joint hearings and video recordings give the presiding judges better understanding of the scientific issues in controversy. Second, state-federal coordination is meaningful regardless of whether the MDL is ahead of the state courts in the litigation. If state courts take the lead, the MDL court would find difficulty in coordinating with the various state courts at different stages of litigation. However, the leading state court could still take an active role in coordinating with the federal and other state courts.

While the parties grudgingly supported the MDL court’s effort to promote state-federal coordination, they also harbored some concerns about the procedural fairness of the joint Daubert hearings. Plaintiffs believe that some Daubert challenges were premature. At the time of hearings, few plaintiffs claimed to have suffered cardiac injury or injury 72 hours after the ingestion of PPA and none claimed to have suffered seizures or psychosis. Because only a handful of cases involved these effects, the PSC expended few resources to defend against Daubert challenges to testimony on these issues. The few attorneys who brought cardiac cases defended against Daubert challenges to expert testimony on cardiac injury. The PSC did not contest defendants’ challenge to expert testimony on seizures, psychosis, or injury after 72 hours. Whatever the merits of these claims, the PSC’s strategic allocation of resources benefited present claimants at the cost of potential future claimants. Future claimants seeking to bring seizure, psychosis, or
post 72 hour effect claims are now barred from doing so in federal court, because the
Daubert hearing excluded testimony on those categories of effects, even though Daubert
challenges to such testimony went uncontested. According to plaintiffs, a better rule
would be for the MDL court to refrain from ruling on a Daubert challenge unless the
effects challenged were alleged by plaintiffs in cases filed.

Defendants also had some due process concerns. After the first day of the
Daubert hearing, on which the attorneys presented summaries of the experts’ findings,
the Court limited the scope of subsequent hearings to experts testifying to the effect of
PPA on various subpopulations. Prior to the hearings, the MDL court reviewed
documentary evidence and briefs submitted to the court. The MDL court probably
decided to limit the scope of evidentiary hearings to avoid duplicative presentation of
evidence. Nevertheless, to defendants, it appeared that the MDL court decided to admit
oral testimony on the general association between PPA and hemorrhagic and ischemic
strokes based on the attorneys’ and not the experts’ presentations. To ensure a thorough
and fair hearing, defendants believe that a better rule would be for the MDL court to
admit expert testimony after hearing from the experts rather than the attorneys.

Class Certification

A successful bid for class certification would have given plaintiffs’ strategic
advantages. In a class action, plaintiffs could bundle weak and strong cases together and
negotiate a high settlement in exchange for the promise of global resolution. For
plaintiffs seeking compensation for economic injury, where each plaintiff sought
recovery of only a few dollars, class action is the only way for the litigation to be
economically feasible.

In the PPA litigation, most plaintiffs at the MDL sought recovery for personal
injury on an individual basis. Advocates for class action sought certification for a
national class of personal injury claimants and national or state classes of economic
federal courts have been reluctant to certify dispersed personal injury or economic
damage mass tort class actions, finding that varying state laws and individual issues of
exposure, causation, and damages defeat the predominance requirement of Rule 23(b)(3),
making trial unmanageable. Continuing this trend, the MDL court found that neither the
proposed personal nor economic injury classes satisfied the criteria for class certification
under rule 23(b).

Plaintiffs failed to convince the MDL court that the proposed national personal
injury class would qualify for class certification under Federal Rules of Civil Procedure
23(b)(1)(A), 23(b)(1)(B), or 23(b)(3). Rule 23(b)(1)(A) allows class action where
different results in separate actions would impair the defendant’s ability to pursue a
uniform continuing course of conduct toward plaintiffs. The MDL court concluded that
the risk of two similarly situated individuals in different jurisdictions receiving

21 MANUAL FOR COMPLEX LITIGATION, supra note 1, at 419.
contrast verdicts would not impair defendant’s ability to pursue a uniform continuing course of conduct toward plaintiffs. Rule 23(b)(1)(B) allows class action in limited fund cases. The MDL court found that class action is not necessary to protect the plaintiffs’ interests because defendants were not on the verge of bankruptcy. Rule 23(b)(3) allows for class certification where common issues of law or fact predominate over individual issues. The effect of PPA use may vary depending on each plaintiff’s personal characteristics. Plaintiffs’ injuries also may vary depending on the type and dosage of the PPA product ingested. Defendants’ affirmative defenses (e.g. overdose, improper use, etc.) would raise even more individual issues of causation. The MDL court concluded that, while common issues of general causation exist, the individual issues of causation predominate in the litigation.

Plaintiffs made a more persuasive case for the certification of proposed national and state economic injury classes. Plaintiffs argued that they all share common claims of breach of warranty, unjust enrichment and UCC violation against the defendants who sold them unmerchantable products. Where state laws differ, the plaintiffs requested the MDL court to subclass the national class or certify statewide classes.

Nevertheless, the MDL court denied plaintiffs’ request for certification of economic injury classes, because individual inquires required for identification of class members would render the case unmanageable. To qualify for class membership, a class member must show some proof of injury. It is unlikely that the class member retained proof of small purchases made over two years ago. The MDL court would have to rely on the class member’s memory to determine the type, amount, and expiration dates of medication purchased over two years ago. Further complicating this inquiry was the large number of OTC medication that contains PPA, not all of which were manufactured by the defendants. Defendants also changed the formulation of their products over time but retained the same brand name.

These individual inquiries threatened to turn the identification of class members into a host of mini-trials. Plaintiffs’ proposal of cy pres distribution of unclaimed funds would not resolve the problem of determining who belonged to the class. Given the minimal recovery due to each class member, the enormous cost and burden of managing an economic injury class seem unjustified, especially when the defendants already maintain refund programs. The thousands of individual personal injury lawsuits already serve the purpose of punishing the defendant and deterring future negligent behavior. To allow class actions for economic injury would benefit attorneys more than the class members.

The only class certified by the MDL court was a settlement class between plaintiffs and the defendant Chattem, Inc. Compared to other defendants, Chattem was a smaller company. It manufactured appetite suppressants, the use of which according to the HSP study correlates with a high incidence of stroke. Faced with more dangers from litigation than other defendants and perhaps more desperate for financial certainty, Chattem chose to settle with plaintiffs for $20 million. The Supreme Court held in *Amchem Products, Inc. v. Windsor* that, while Rule 23(a) and (b) still apply to the
certification of a class action, the district court “need not inquire whether the case, if tried, would present intractable management problems” under Rule 23(b)(3)(D). Consequently, the MDL court was able to circumvent management problems that hobbled the certification of the proposed litigation classes. Taking into consideration the position of the parties and judicial economy, the MDL court certified the settlement class and subsequently approved the settlement.

CONCLUSION: BEST PRACTICES

In today’s globalized economy, where more businesses can reach more people with their products and services than ever before, the number of dispersed mass torts is almost certain to rise. Concomitant with this growth will be increasing public pressure on the courts to efficiently manage such cases. More than ever, courts need to step up to the plate and manage mass torts more efficiently lest Congress reach for a legislative solution. The PPA litigation highlighted how communication and coordination could improve case management.

Communication is a prerequisite for any kind of coordination. As demonstrated in the PPA litigation, effective communication among judges and among attorneys significantly improved case management. Judge Rothstein, who presided over the PPA MDL, actively engaged her state counterparts in the management of the pre-trial phase of the PPA litigation. She appointed liaison counsel for state federal cooperation, ordered MDL attorneys to cross notice depositions, and invited interested judges to join her in Daubert hearings. Mindful of the jurisprudential independence of state courts, Judge Rothstein was careful to explain that any state-federal coordination was voluntary. For example, when ordering the MDL attorneys to cross-notice depositions, she limited her order, explicitly stating that such order shall not be construed to affect state court proceedings. By respecting state courts’ independence and consulting with, rather than commanding them, Judge Rothstein probably promoted more state-federal coordination than she otherwise could have achieved.

Active judicial supervision of the pretrial process improves case management by promoting communication and coordination among the judge and the attorneys. Effective supervision requires the judge to be informed of the dynamics of the litigation in his court and developments of the mass tort in other districts. Judges can gauge the progress of litigation in their own courts through frequent case management meetings. These meetings also give judges opportunities to address discovery disputes without formal hearings. To stay informed of development of the mass tort in other districts, judges can appoint as lead counsel attorneys who are engaged in both federal and state cases and who can update the court on the progress of related litigation in other courts. Judges can also stay informed of developments elsewhere through informal communication with their federal and state counterparts.

22 MANUAL FOR COMPLEX LITIGATION, supra note 1, at 251
In the PPA litigation, Judge Rothstein actively supervised the litigation, but she also encouraged the parties to take an active role in shaping the pretrial process. Whenever possible, she established joint committees to encourage the parties to reach consensus on trial management issues. Even though the scope of cooperation was limited by the parties’ strategic interests, many minor discovery disputes that would have been taken to court were probably resolved by the parties. Because so many PPA cases were transferred to the MDL court, Judge Rothstein used her unique position to become a transmitter of information to other judges. By actively communicating and coordinating with her state counterparts, she informed other judges and improved the efficiency of litigation in her court and theirs. The joint Daubert hearings led many state courts to adopt the MDL court’s position on the admissibility of expert evidence.

Finally, the PPA litigation showcased some case management tools that improved the efficiency of litigation. The MDL court ordered the use of master written discovery requests, document depositories, cross notices, and joint hearings. All of which reduced duplication in discovery. These tools are very simple. But it is not the mechanics of these tools that are worth noting. Rather, the effectiveness of these tools depends on the level of communication and coordination among the courts and parties.