

# A MODEL MASS TORT: THE PPA EXPERIENCE

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## I. INTRODUCTION

There are special problems that make fairness and efficiency difficult to achieve in contemporary mass tort litigation. Such litigation has become a war of attrition in which plaintiff and defense counsel jockey for

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favorable state or federal forums in order to gain an initial advantage in pretrial motions and verdicts. Ill-informed, early decisions can distort settlement values for the bulk of claims. This chaotic process results in a capricious assessment in which claims are over or undervalued to the detriment of the individual litigants, as well as society.<sup>1</sup>

Mass tort adjudications suffer when compared to the ideal of justice exemplified by the normal course of separate trials for individual litigants. However, such particularized justice cannot be achieved in a timely and efficient manner in a mass tort case. The duplicative transaction costs of trials of similar cases would consume much of the value of the awards, while lengthy delays would cause claimants with legitimate injuries to abandon their claims. On the other hand, attempts to aggregate similar, though not identical, claims through class actions or global settlements cause an unfortunate blurring of the merits of individual claims, often resulting in overcompensation for weak claims and undercompensation for strong claims.<sup>2</sup>

This is the first of three articles setting forth an alternative structure for the management of mass tort cases. This model, illustrated by case management examples from Multidistrict Litigation (MDL) No. 1407, *In re Phenylpropanolamine (PPA) Products Liability Litigation*,<sup>3</sup> has as its goal achieving greater fairness and equity by approximating more closely the normal evolution of claims through the litigation process. In this model, the court takes an active role in case management, allowing for the possibility of settlements once the case has been well developed. This model also seizes upon many opportunities for increased cooperation

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1. See generally Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1361–89 (2005) (explaining the various methods of claims resolution facilities and analyzing the pros and cons of each method). For an extensive discussion of the problems with mass tort litigation, see ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 28–47 (1999) [hereinafter REPORT ON MASS TORT LITIGATION] (describing twenty-three problems of mass torts).

2. Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. APPLIED PSYCHOL. 909, 911 (2000).

3. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL No. 1407 (W.D. Wash.). The case was consolidated as a multidistrict litigation in the United States District Court for the Western District of Washington before Judge Barbara J. Rothstein, one of the Authors of this Article, in August of 2001. The action is ongoing, but has reached the remand stage. Professor Francis E. McGovern, an Author of this Article, served for several years as a special master in that multidistrict litigation proceeding.

between federal and state courts in order to increase efficiency and bring about an integrated assessment of settlement values.

This Article addresses the use of the federal multidistrict litigation process to resolve fundamental disputes over common questions of scientific evidence. The second Article will focus on organization of the pretrial process and on involving federal and state judges and attorneys in a coordinated management approach to mass litigation. The final Article will examine remand, trial, and settlement of mass tort cases.

## II. THE PROBLEM

As noted previously, the volume and complexity of mass tort claims increase the difficulty of providing individualized justice. In addition, strategic manipulation by plaintiff and defense counsel aggravates such problems.<sup>4</sup> Defendants seek strategic advantage in aggregated proceedings by attempting to impose delay and transaction costs, striving for a series of favorable pretrial rulings, urging extensive assessments of individual claims, and settling the most meritorious claims. On the other hand, plaintiffs often seek to collect on large numbers of undifferentiated claims, sometimes with only minimal assessment of the merits of each claim. Plaintiffs' counsel have several motivations for preferring quantity over quality in case selection, not the least of which is that having a huge inventory offers them leverage in achieving leadership among the plaintiffs' steering committees that direct the development of the aggregated claims. In addition, a large inventory increases the likelihood of recovering sizeable attorney fee awards and tends to push defendants toward a global settlement in which all claims, including those with little merit, receive some degree of compensation. Such pressures toward global settlement are heightened when judges, parties, and shareholders in affected enterprises press for the swift resolution of claims.

The scrambling for strategic advantage in federal multidistrict litigations often spills into the state courts as plaintiffs' counsel attempt to litigate in jurisdictions with favorable discovery rules, early trial dates, and juries that are receptive to such claims,<sup>5</sup> the expectation being that sizeable early verdicts in friendly jurisdictions will sharply increase settlement

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4. REPORT ON MASS TORT LITIGATION, *supra* note 1, at 45; *see also* Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1741-50 (2002) (discussing a number of strategies and their adverse effects used by parties in mass tort cases).

5. *See* REPORT ON MASS TORT LITIGATION, *supra* note 1, at 33 (stating that some plaintiffs' lawyers forum shop and select courts that are biased toward plaintiffs).

values for similar actions.<sup>6</sup> Defense counsel counter by attempting to limit state venue, delaying state proceedings in cases they view as unfavorable, and removing cases to federal court.<sup>7</sup>

Expert testimony can be a particular source of dissatisfaction in multijurisdiction mass tort litigation.<sup>8</sup> Early trials of complex issues may include scientific theories that are not fully developed and may not have the advantage of expert discovery from more tolerant jurisdictions, thereby providing an incomplete assessment of the potential strength of such testimony. Court-appointed experts may aid the court in understanding the underlying science, but the experts do not always agree, even when presented with identical evidence.<sup>9</sup> As a result, repeated trials of complex issues in jurisdictions with differing standards of admissibility for expert evidence give rise to conflicting expert testimony and a confused assessment of the scientific foundation of allegations of a causal relationship between the exposure and the injury.

Of course, all of this jockeying for strategic advantage consumes a great deal of resources and is often unsuccessful. Sophisticated judges and attorneys in aggregated cases will discount an enormous jury verdict from a peculiar forum. Similarly, repeat players know that early settlements are poor guides to the value of later cases, and that valuation efforts are more predictive once cases representative of the aggregated claims are resolved. The inevitable consequence of the absence of coordination of such litigation are confusion and expense for those who turn to the courts for a fair assessment of their claims.<sup>10</sup>

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6. See, e.g., *Woman Wins \$23 Million in Fen-Phen Case*, HOUS. CHRON., Aug. 7, 1999, at 1A (stating the first fen-phen wrongful death action filed was settled mid-trial for \$6–\$7 million, whereas the first one to be decided by a jury awarded the plaintiff \$23 million). See generally MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.31 (2004) (providing a discussion of the coordination of federal and state litigation).

7. 28 USC §§ 1407–1452 (2000); see also *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 424 (J.P.M.L. 1991) (ordering all pending cases, not in trial, to be transferred to one district for coordinated or consolidated pretrial proceedings); RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 65 (1991) (stating that defendants often ask for centralization of claims pending against them).

8. REPORT ON MASS TORT LITIGATION, *supra* note 1, at 37–38.

9. See, e.g., *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 503–24 (W.D. Pa. 2003).

10. See generally REPORT ON MASS TORT LITIGATION, *supra* note 1, at 32–33 (describing the coordination problem).

Dissatisfaction with the lack of consideration of the merits of individual cases in global settlements and the corresponding impracticality of litigating each individual case call for a hybrid model that attempts to incorporate the attractive features of each approach. The model used in *In re PPA* employs the following features: (1) assessment of expert testimony on general causation through *Daubert* hearings;<sup>11</sup> (2) coordination with related state court litigation to avoid redundant procedures, particularly in the area of generic expert discovery; (3) completion of fact discovery and non-case specific expert discovery prior to remand; (4) rigorous assessment of variation in the universe of claims; (5) assessment of the viability of class actions; (6) resolution of common dispositive legal issues; and (7) consideration of the opportunity for a comprehensive settlement after a series of individual federal and state trials provides a basis for valuing individual claims. This Article addresses the first and second elements of the plan: the assessment of scientific evidence of general causation through an evolving system for expert discovery, *Daubert* hearings, and state-federal coordination.<sup>12</sup>

### III. EXPERT DISCOVERY IN *IN RE PPA*

#### A. *Expert Discovery Issues Particular to Mass Torts*

Expert testimony is a critical part of many complex cases, especially mass tort cases in which the underlying claims involve scientific testimony about the causal relationship between exposure to an allegedly harmful product and a wide range of injuries.<sup>13</sup> As part of the high stakes game of mass tort litigation, each side retains numerous experts who proffer detailed, complex opinions in support of the parties' wide-ranging allegations and defenses.

Certain issues are bound to arise in the particular context of multidistrict litigation that threaten the efficient management of expert discovery. For example, the existence of parallel cases in the state courts demands a procedure designed to eliminate duplicative discovery. Another complication is that members of a plaintiffs' steering committee,

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11. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (holding that "pertinent evidence based on scientifically valid principles will satisfy" the demand that expert testimony "rests on a reliable foundation and is relevant to the task at hand").

12. A more complete exploration of the pretrial, trial, and settlement features will be addressed in future articles.

13. See REPORT ON MASS TORT LITIGATION, *supra* note 1, at 37.

who represent the interests of the plaintiffs as a whole, cannot simultaneously represent the interests of the plaintiffs in individual cases. As a result, a multidistrict litigation court must devise creative provisions to allow the plaintiffs in individual actions and, ideally, also state court plaintiffs, to adopt multidistrict litigation experts or decline to do so. A multidistrict litigation court also must create a system that gives parties whose cases are transferred to the court after the structure for discovery has been set an opportunity to adopt previously established expert testimony.

The Federal Judicial Center's *Manual for Complex Litigation* offers guidance regarding issues to be considered when expert testimony arises in complex cases.<sup>14</sup> In general, it urges that judges assess the complexity of the scientific evidence and underlying areas of disagreement as part of an initial pretrial conference;<sup>15</sup> require disclosure of anticipated expert testimony through expert reports;<sup>16</sup> exercise firm control over the discovery of experts;<sup>17</sup> consider the possibility of videotaped expert depositions;<sup>18</sup> resolve disputes over the admissibility of expert testimony through individual or consolidated *Daubert* hearings, with the possible assistance of court-appointed experts;<sup>19</sup> and hear motions for summary judgment;<sup>20</sup> all in anticipation of the final pretrial conference and trial.<sup>21</sup> The manual also delineates special considerations for expert testimony arising in mass tort cases, emphasizing the need to determine if the resolution of the admissibility of such evidence will, as a practical matter, be dispositive of the litigation.<sup>22</sup>

The multidistrict litigation procedure<sup>23</sup> involves all of these issues and more. In such proceedings, the manual indicates that the transferee court may need "to conduct a *Daubert* hearing on general causation issues, leaving specific causation issues for the transferor court on remand."<sup>24</sup> In

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14. See generally MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 23.1-.37.

15. *Id.* § 23.32.

16. *Id.* § 23.33.

17. *Id.* § 23.34.

18. *Id.* § 23.345.

19. *Id.* §§ 23.344, 23.351.

20. *Id.* § 23.354.

21. *Id.* §§ 23.36-.37.

22. *Id.* § 22.87.

23. 28 U.S.C. § 1407 (2000).

24. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 22.87; see also *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1129 (9th Cir. 2002) (ordering

cases with especially complex evidence, the transferee court may consider appointing an expert or a panel of experts to help resolve the disputed issues regarding expert testimony concerning causation.<sup>25</sup> The Manual also urges coordination with the state courts handling parallel cases, citing the example of the joint federal-state hearing in the PPA litigation.<sup>26</sup>

The *In re PPA* court's primary goals with respect to the management of expert discovery have been to avoid duplicative discovery and prevent the unnecessary expenditure of judicial or party resources.<sup>27</sup> As the litigation has progressed, the court has collaborated with the parties to define and redefine the scope of expert discovery to be conducted prior to remand, to make adjustments to the schedule for conducting such discovery, and to hold extensive *Daubert* hearings to determine the admissibility of expert testimony. Active, open communication between counsel and the court, as well as the efficient dissemination of court rulings to the parties to individual actions by liaison counsel, are vital to this process. This communication has been strengthened by the maintenance of a transferee court website at which orders of general applicability to PPA cases are available.<sup>28</sup>

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generic causation discovery followed by individual causation discovery); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988) (stating plaintiffs must prove both general causation and individual causation); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714–15 (Tex. 1997) (discussing general and specific causation).

25. See JOE S. CECIL & THOMAS E. WILLGING, FED. JUDICIAL CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 83–95 (1993) (discussing a pretrial procedure to assist in determining the need for a court-appointed expert). See generally LAURAL L. HOOPER, JOE S. CECIL & THOMAS E. WILLGING, FED. JUDICIAL CTR., NEUTRAL SCIENCE PANELS: TWO EXAMPLES OF PANELS OF COURT-APPOINTED EXPERTS IN THE BREAST IMPLANTS PRODUCT LIABILITY LITIGATION (2001) (discussing the use of panels of experts in complex litigation). There also are programs available that help judges identify and obtain expert assistance. See American Association for the Advancement of Science, Court Appointed Scientific Experts: A Demonstration Project of the AAAS, <http://www.aaas.org/spp/case/case.htm> (last visited Apr. 4, 2006).

26. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 22.87 & n.1434.

27. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL No. 1407, at 2 (Dec. 23, 2002) (Case Management Order #12 Regarding Expert Deposition Discovery), available at <http://www.wawd.uscourts.gov/wawd.mdl.nsf> (follow “Case Mgmt Orders” hyperlink; then follow “12/23/2002” hyperlink).

28. Western District of Washington U.S.D.C, *In Re: Phenylpropanolamine (PPA) Products Liability Litigation*, <http://www.wawd.uscourts.gov/mdl> (last visited Apr. 4, 2006).

## B. *Management of Expert Discovery in In re PPA*

### 1. *Initial Rulings*

Prior to making any rulings, the court asked the parties to prepare proposals regarding expert discovery. At a February 27, 2002 status conference, the parties presented remarkably divergent positions.<sup>29</sup> The defendants urged the court to conduct general causation expert discovery including consideration of causation evidence relating to so-called “sub-populations.”<sup>30</sup> They noted that the Yale Hemorrhagic Stroke Project (HSP) found a “suggestion of association” between PPA consumption and injury for a defined sub-population: women aged 18–49 with a “first use” of PPA.<sup>31</sup> Accordingly, defendants argued, the court should determine whether there is any association between PPA consumption and injuries sustained in other age and gender groups.<sup>32</sup> Plaintiffs resisted expert discovery, but in the alternative allowed any expert discovery prior to remand regarding the limited question of whether PPA was capable of causing injury.<sup>33</sup> The plaintiffs specifically objected to consideration of evidence in relation to “sub-populations” which they asserted would amount to an inquiry into specific causation inappropriate for a multidistrict litigation proceeding.<sup>34</sup>

On March 22, 2002, the court set a schedule for expert disclosures and ordered expert discovery on general causation without ruling on the question of sub-populations.<sup>35</sup> The schedule provided for staggered Fed. R. Civ. P. 26 disclosures and depositions, with plaintiffs’ disclosures and depositions of plaintiffs’ expert witnesses preceding defendants’ disclosures and the depositions of defendants’ expert witnesses.

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29. *In re PPA*, MDL No. 1407 (Aug. 13, 2002) (Order Clarifying Expert Discovery Order and Modifying Expert Discovery Schedule), *available at* <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow “Recent MDL Orders & Decisions” hyperlink; then follow “8/13/2002” hyperlink).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *In re PPA*, MDL No. 1407 (Mar. 22, 2002) (Order Regarding Expert Discovery Schedule), *available at* <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow “Recent MDL Orders & Decisions” hyperlink; then follow “3/22/2002” hyperlink).



## 2. *Refinements*

For more than a year, the court worked with the parties to improve upon the expert discovery process. On August 13, 2002, the court clarified its March 22, 2002 Order, indicating that the parties needed only to “disclose experts addressing ‘generic’ or ‘general’ issues of causation and liability, but not ‘case-specific experts’ addressing the specific causation, liability, and damages issues in a given case.”<sup>36</sup> The court contemplated that such case-specific expert discovery would take place upon remand of an action to its transferor jurisdiction for trial.<sup>37</sup> The court thus split expert discovery into two distinct phases, with generic causation discovery to occur in MDL No. 1407 and case-specific expert discovery to take place upon remand.

The court further clarified its stance on allowable expert discovery within the multidistrict litigation proceeding, ruling that “expert discovery encompasses all issues of widespread applicability, including general causation evidence associated with significant sub-populations.”<sup>38</sup> The court also agreed, at plaintiffs’ suggestion, to modify the schedule to build in a two-week opt-in period following plaintiffs’ initial disclosures of general causation experts.<sup>39</sup> This window was inserted to grant plaintiffs in individual cases the opportunity to review the Plaintiffs’ Steering Committee’s Rule 26 disclosures, and determine whether to adopt those experts for use in their respective cases.<sup>40</sup>

In September 2002, the court signed a stipulated order presented by the parties, further developing the rules regarding the adoption of expert witnesses.<sup>41</sup> This Order provided that if a plaintiff in an individual case adopted the experts disclosed by certain members of the Plaintiffs’ Steering Committee (PSC) with respect to any issues of widespread applicability, that plaintiff could nevertheless designate different experts to testify at trial

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36. *In re PPA*, MDL No. 1407 (Aug. 13, 2002) (Order Clarifying Expert Discovery Order and Modifying Expert Discovery Schedule), *available at* <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow “Recent MDL Orders & Decisions” hyperlink; then follow “8/13/2002” hyperlink).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *In re PPA*, MDL No. 1407 (Sept. 9, 2002) (Stipulation and Order Regarding Expert Disclosures), *available at* <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow “Recent MDL Orders & Decisions” hyperlink; then follow “9/9/2002” hyperlink).

on the same issues, provided that: (1) the later-designated experts relied upon the same or substantially the same evidence, opinions, or theories relied upon by the PSC experts adopted by that plaintiff; and (2) “[s]uch opinions, evidence and/or theories” had not been previously determined by the court to be scientifically unreliable or otherwise inadmissible.<sup>42</sup> Similarly, the court ruled that a defendant in an individual action may later designate experts different from the generic experts disclosed by defendants to testify at trial on the same issues, provided that the later-designated experts relied upon the same or substantially the same evidence, opinions, or theories relied upon by defendants’ previously disclosed generic experts.<sup>43</sup>

On October 30, 2002, the court entered Case Management Order No. 9, which outlined Rule 26 deadlines for cases transferred to *In re PPA* after entry of the court’s March 22, 2002 Order regarding expert disclosures.<sup>44</sup> The plaintiffs in such cases are required to serve Rule 26 reports or a notice of adoption of the Rule 26 expert reports filed by multidistrict litigation plaintiffs three months or both prior to the close of fact discovery in each case.<sup>45</sup>

### 3. *Expert Depositions*

Expert depositions present a particular coordination challenge in federal cases with concurrent state actions. On December 23, 2002, the court entered Case Management Order No. 12 Regarding Expert Deposition Discovery, which detailed direction for conducting depositions of expert witnesses.<sup>46</sup> This order provided that

the parties may cross-notice the deposition of an expert noticed in MDL 1407 in any state court proceedings where the expert has been designated as an expert. Similarly, the parties may cross-notice the deposition of any expert designated in a state court proceeding in this

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42. *Id.* at 1–2.

43. *Id.* at 2.

44. *In re PPA*, MDL No. 1407, at 1–3 (Oct. 30, 2002) (Case Management Order #9 Regarding Rule 26 Deadlines for Cases Docketed After March 22, 2002), available at <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow “Case Mgmt Orders” hyperlink; then follow “10/30/2002” hyperlink).

45. *Id.* at 2.

46. *In re PPA*, MDL No. 1407 (Dec. 23, 2002) (Case Management Order #12 Regarding Expert Deposition Discovery), available at <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow “Case Mgmt Orders” hyperlink; then follow “12/23/2002” hyperlink).

MDL where the same expert has been designated in both proceedings.<sup>47</sup>

The Order further provided: “Nothing in this provision shall be construed as an injunctive or equitable order affecting state court proceedings. Rather, this provision is intended to reflect this Court’s desire for voluntary state-federal coordination.”<sup>48</sup>

The court also made an effort to streamline depositions by setting strict time limits. Pursuant to Case Management Order No. 12, depositions of experts on generic issues were not to exceed seven hours of actual examination time by parties against whose interests the opinion of the expert was likely to be offered, unless agreed by the parties or by order of the court following a showing of good cause.<sup>49</sup> The court ruled that additional examination time would be provided for attorneys in state cases on “case specific issues” where the identified expert was also named as an expert in a pending state action.<sup>50</sup>

The Order also set forth the procedure for preservation depositions of experts to be allowed in certain defined circumstances.<sup>51</sup> Case Management Order No. 14, entered on May 2, 2003, further refined the structure of expert witness preservation depositions.<sup>52</sup> Testimony elicited during preservation depositions was “limited to the opinions and bases and reasons therefor contained in the expert’s written report pursuant to Rule 26(a)(2)(B),” and were to last seven hours the first day and five the second.<sup>53</sup> “Testimony elicited from the expert witness on cross-examination may be used by any adverse party as if counsel for that adverse party had conducted the cross-examination, and accordingly an adverse party may not duplicate the cross-examination previously conducted by another adverse party.”<sup>54</sup>

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47. *Id.* at 2.

48. *Id.* (emphasis omitted).

49. *Id.* at 3.

50. *Id.*

51. *Id.* at 4.

52. *In re PPA*, MDL No. 1407 (May 2, 2003) (Case Management Order #14 Regarding Conducting of Expert Witness Trial Preservation Depositions), available at <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow “Case Mgmt Orders” hyperlink; then follow “05/02/2003” hyperlink).

53. *Id.* at 1.

54. *Id.* at 2. In late 2004, the court again spoke on the proper role of preservation depositions. See *In re PPA*, MDL No. 1407 (Oct. 29, 2004) (Order Regarding Supplemental Examinations of MDL Generic Experts), available at

As late as October 2004, the court was still making occasional clarifications to its policy for expert discovery in *In re PPA*.<sup>55</sup> The process of structuring expert discovery in the case thus took place over more than a year, with refinements being put in place as the need arose and as late as two years after the initial order.

### C. Daubert Hearings

#### 1. Background

The plaintiffs' claims of injury caused by PPA encompass a wide range of illnesses. Support for these claims rests to a large extent on the findings of the Hemorrhagic Stroke Project (HSP), an epidemiologic case control study conducted by medical researchers at Yale Medical School.<sup>56</sup> The HSP was designed in collaboration with some of the pharmaceutical manufacturers who are now defendants in the PPA litigation. The results of the study "suggest that [PPA] in appetite suppressants, and possibly also as a cold and cough remedy, is an independent risk factor for hemorrhagic stroke in women."<sup>57</sup> The study findings were inconclusive as to risk of hemorrhagic stroke in men.<sup>58</sup> The hearings came about when the defendants moved to preclude the plaintiffs' experts' opinions as to general causation pursuant to Federal Rule of Evidence 702 and *Daubert*. After reviewing the briefs, the court determined that hearings would be necessary to resolve the dispute.

#### 2. Coordination with State Court Judges

Throughout *In re PPA*, the court attempted to coordinate with

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<http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow "Recent MDL Orders & Decisions" hyperlink; then follow "10/29/2004" hyperlink).

55. See, e.g., *In re PPA*, MDL No. 1407, at 6 (Oct. 29, 2004) (Order Regarding Supplemental Examinations of MDL Generic Experts), available at <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (reaffirming, among other things, that a preservation deposition must occur at least one week after the discovery deposition of that same expert).

56. See PHENYLPROPANOLAMINE & RISK OF HEMORRHAGE STROKE: FINAL REPORT OF THE HEMORRHAGIC STROKE PROJECT (2000), [http://www.fda.gov/ohrms/dockets/ac/00/backgrd/3647b1\\_tab19.doc](http://www.fda.gov/ohrms/dockets/ac/00/backgrd/3647b1_tab19.doc).

57. Walter N. Kernan et al., *Phenylpropanolamine and the Risk of Hemorrhagic Stroke*, 343 NEW ENG. J. MED. 1826, 1830-32 (2000).

58. *Id.* at 1830-31 (stating that few men used products containing phenylpropanolamine so it could not be determined whether men have an increased risk of stroke from exposure).

judges presiding over state court PPA cases. Early in the proceedings, the court appointed a special master specifically for the purpose of assisting with state-federal coordination.<sup>59</sup> In the context of expert opinion testimony, the court worked to define the scope and timing of the hearings to avoid needless delay and expense.<sup>60</sup> Given that the *Daubert* hearings would address the admissibility of the plaintiffs' experts' opinions on issues of general causation and include the examination of experts likely to take part in numerous state court actions, the court invited state court judges with jurisdiction over PPA cases to preside over the hearings alongside the multidistrict litigation judge.<sup>61</sup> The PSC and all state counsel were given the opportunity to present their experts to the transferee court for a ruling on the admissibility of opinion evidence with the knowledge that this ruling would preempt any further adjudication on those experts' testimony in the multidistrict litigation proceeding.<sup>62</sup> The court arranged for the hearings to be thoroughly videotaped using multiple cameras to allow judges not able to participate to make use of the hearings. Eleven judges from seven states, including New Jersey, Texas, Louisiana, California, Oregon, Nevada, and Washington, participated in the transferee court's *Daubert* hearings. The presentation of evidence by counsel took into account the different standards of admissibility being applied by judges from different states.<sup>63</sup>

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59. *In re PPA*, MDL No. 1407 (Jan. 17, 2002) (Order Appointing Special Master), available at <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow "Recent MDL Orders & Decisions" hyperlink; then follow "01/17/2002" hyperlink) (appointing "Professor Francis McGovern as a Special Master to assist the court in coordinating case management matters between this court's Multidistrict Litigation and the pending related litigation in the various state courts").

60. See MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 23.353.

61. The state court judges assessed the evidence under the evidentiary standards of their individual states. See generally David Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351, 357-65 (2004) (discussing various approaches of state courts).

62. *In re PPA*, MDL No. 1407, at 6 n.2 (June 18, 2003) (Order Granting in Part and Denying in Part MDL Defendants' Motion to Preclude Plaintiffs' Expert Opinions as to General Causation Pursuant to Fed. R. Evid. 702 and 703 and *Daubert*), available at <http://www.wawd.uscourts.gov/wawd/mdl.nsf> (follow "Recent MDL Orders & Decisions" hyperlink; then follow "06/18/2003" hyperlink).

63. Two of the states, Texas and Louisiana, have adopted admissibility standards for scientific evidence that closely correspond to *Daubert* standards. See *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993) (adopting *Daubert* standards); *Lemaire v. CIBA-GEIGY Corp.*, 793 So. 2d 336, 499-50 (La. Ct. App. 2001) (discussing the appropriateness of applying close scrutiny of the expert's reasoning process); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 722-23 (Tex. 1998) (similarly close scrutiny of the expert's reasoning process) *E.I. du Pont de Nemours & Co., Inc. v.*

The hearings were convened as a joint proceeding of the federal courts and the attending state court judges. They consisted of a one-day informational hearing, followed by a four-day *Daubert* hearing that considered the application of expert testimony to claimants in various subpopulations. One month later, the court held a separate hearing concerning the relationship between PPA and cardiac injury.

State court judges' attendance at these hearings had two extremely positive effects on the litigation nationwide. First, the unusual level of state-federal coordination diffused some of the natural tension that can exist between the state and federal courts where there are concurrent proceedings. Second, including state court judges in the multidistrict litigation hearings was vastly more efficient than having substantially similar hearings in multiple jurisdictions.

### 3. *Daubert Opinion*

On June 18, 2003, the court issued its Order Granting in Part and Denying in Part MDL Defendants' Motion to Preclude Plaintiffs' Expert Opinions as to General Causation Pursuant to Fed. R. Evid. 702 and 703 and *Daubert*.<sup>64</sup> The Order held that expert testimony regarding a causative link between PPA and hemorrhagic or ischemic stroke was admissible, but only for cases in which the plaintiff had taken the medication within seventy-two hours of his or her stroke.<sup>65</sup> The Order rejected expert evidence as to a link between PPA and all other alleged injuries.<sup>66</sup>

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Robinson, 923 S.W.2d 549, 558 (Tex. 1995) (adopting *Daubert* standards); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 722–23 (Tex. 1998) (similarly close scrutiny of the expert's reasoning process). Two of the states, New Jersey and Oregon, have not explicitly adopted *Daubert* standards but follow a similar analysis for scientific evidence. See *Kemp ex rel. Wright v. State*, 809 A.2d 77, 84 (N.J. 2002); *State v. O'Key*, 899 P.2d 663, 672–73 (Or. 1995). Two of the states, California and Washington, follow Frye standards for assessing admissibility of scientific evidence. See *People v. Leahy*, 882 P.2d 321, 327–31 (Cal. Ct. App. 1994) (discussing the reasons for retaining *Frye* standards in light of *Daubert*); *State v. Copeland*, 922 P.2d 1304, 1314–15 (Wash. 1996) (reiterating support for *Frye* standard). Nevada also has a liberal standard for allowing expert testimony. See *Dow Chem. Co. v. Mahlum*, 970 P.2d 98, 108 n.3 (Nev. 1998). For a summary of state court standards of admissibility, see Jackson, *supra* note 61, at 357–66.

64. *In re PPA*, MDL No. 1407 (June 18, 2003) (Order Granting in Part and Denying in Part MDL Defendants' Motion to Preclude Plaintiffs' Expert Opinions as to General Causation Pursuant to Fed. R. Evid. 702 and 703 and *Daubert*).

65. *Id.* at 39–40.

66. *Id.* In other mass tort multidistrict litigation, some courts have decided to hold *Daubert* hearings in conjunction with each individual case, rather

The Order was the culmination of the court's consideration of the parties' briefs, expert testimony, and oral argument, all centering on the admissibility of expert opinion concerning various aspects of PPA safety. In particular, the Order recounted the history of the link between PPA and cerebrovascular incidents, summarizing various reports, studies and the HSP.<sup>67</sup>

Assuming its "gatekeeper" function prescribed by *Daubert* and Rules 702 and 703 of the Federal Rules of Evidence, the court found that testimony relying on the HSP and other related research was sufficiently reliable to be presented to a jury,<sup>68</sup> and that the results regarding the association between PPA and hemorrhagic stroke could be extrapolated to include men, children, and individuals over the age of 49,<sup>69</sup> although the HSP found an association only as to women ages 18–49 taking appetite suppressants.<sup>70</sup> The court also concluded that research linking PPA to ischemic stroke, although less thorough than the HSP, was sufficiently reliable and therefore admissible under *Daubert*.<sup>71</sup>

The court also found, however, that the scientific research did not support expert testimony concerning the causal link between PPA and other injuries, including seizures, psychoses, cardiac injuries, and any injury occurring more than seventy-two hours after ingestion.<sup>72</sup> Such research, the court found, was sparse, inconsistent, and inconclusive.<sup>73</sup>

#### IV. CONCLUSION

The role of the multidistrict transferee judge in resolving scientific issues has evolved rather substantially over time. In one of the early multidistrict mass tort cases, *In re A. H. Robins Co., "Dalkon Shield" IUD*

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than through a consolidated hearing. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 401 F. Supp. 2d 565 (E.D. La., 2005). *In re PPA* was more amenable to a consolidated *Daubert* hearing because the foundation of much of the expert testimony was a single research study completed before PPA had been removed from the market.

67. *In re PPA*, MDL No. 1407, at 1–5 (June 18, 2003) (Order Granting in Part and Denying in Part MDL Defendants' Motion to Preclude Plaintiffs' Expert Opinions as to General Causation Pursuant to Fed. R. Evid. 702 and 703 and *Daubert*), available at <http://www.wawd.uscourts.gov/wawd/mdl.nsf>

68. *Id.* at 18.

69. *Id.* at 24–28.

70. *Id.* at 18, 25.

71. *Id.* at 35.

72. *Id.* at 39–40.

73. See *id.* at 35–39 (describing the expert testimony presented for cardiac injuries).

*Products Liability Litigation*,<sup>74</sup> the multidistrict litigation judge focused on pretrial discovery and left the resolution of scientific issues to transferor judges in the context of the individual proceedings.<sup>75</sup> This approach was reinforced by the United States Supreme Court's *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*<sup>76</sup> decision that multidistrict litigation transferee judges could try only those cases originally filed in the district of the transferee judge.<sup>77</sup>

Two trends have led to the more active role for the transferee judge in resolving scientific disputes. The first began in the *In re "Agent Orange" Product Liability Litigation*<sup>78</sup> in which the role of the transferee judge expanded from the minimalist, pre-trial-discovery-only model.<sup>79</sup> In *In re Agent Orange*, the court shepherded the parties through a global resolution to the litigation in a Rule 23(b)(3) settlement class.<sup>80</sup> The court decided to dismiss all opt-out claims on the scientific basis of a failure of the plaintiffs to prove causation.<sup>81</sup> This approach suggested that the transferee judge should go beyond mere pretrial discovery and should encourage the resolution of scientific disputes.

The second trend involved the *Daubert* decision itself,<sup>82</sup> the *Reference Manual for Scientific Evidence*,<sup>83</sup> and the use of Federal Rules of Evidence 706 experts.<sup>84</sup> The *Daubert* decision by the United States Supreme Court addressed the "junk science" phenomenon in mass tort litigation by interpreting Rules 702 and 703 in the context of Rule 104(a).<sup>85</sup>

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74. *In re A. H. Robins Co., "Dalkon Shield" IUD Prods. Liab. Litig.*, 453 F. Supp. 108 (J.P.M.L. 1978).

75. *Id.* at 109; see also RONALD J. BACIGAL, *THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY* 22-28 (1990) (discussing the pretrial discovery process); SOBOL, *supra* note 7, at 14 (stating all pretrial proceedings were consolidated).

76. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

77. *Id.* at 28.

78. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987).

79. See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* 9 (1986) (stating the role of judges has changed for toxic tort cases).

80. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983).

81. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 189 (2d Cir. 1987).

82. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

83. FED. JUDICIAL CTR., *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* (2d ed. 2000).

84. FED. R. EVID. 706.

85. *Daubert*, 509 U.S. at 592.



One interpretation of *Daubert* has been that it constituted no change in existing law; that is, that the judge should rule on the admissibility of scientific evidence to be presented by a given expert witness in the context of an individual case.<sup>86</sup> A more expansive view has been that the judge should be more assertive and use the *Daubert* hearing to assess the validity of the general scientific principles as well as the testimony of the proffered experts and enter summary judgment if the underlying scientific principles are not properly established.<sup>87</sup> In the immediate aftermath of the Supreme Court's *Daubert* decision, judges tended to take the former approach.<sup>88</sup>

Soon thereafter, the Federal Judicial Center published the *Reference Manual for Scientific Evidence* and conducted a series of seminars for judges on scientific evidence.<sup>89</sup> Judges were encouraged to grapple with scientific issues in their roles as gatekeepers.<sup>90</sup> At the same time, there was renewed interest in Rule 706 of the Federal Rules of Evidence, which provides for court-appointed experts to assist in resolving scientific disputes.<sup>91</sup>

*In re Silicone Gel Breast Implant Products Liability Litigation*<sup>92</sup> is an early example of this trend. The multidistrict litigation transferee judge in that case confronted scientific issues in the context of the trial of a case that had been filed in that court's district. The judge appointed a Federal Rules of Evidence 706 panel to render opinions on the scientific issues relevant to

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86. Deborah Young, *The Impact of Science and Technology on the Courts*, 43 EMORY L.J. 853, 858–61 (1994); Michael H. Gottesman, *Scientific and Technological Evidence: Admissibility of Expert Testimony After Daubert: The "Prestige" Factor*, 43 EMORY L.J. 867 (1994).

87. Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715 (1994); David L. Faigman, *The Law's Scientific Revolution: Reflections and Ruminations on the Law's Use of Experts in Year Seven of the Revolution*, 57 WASH. & LEE L. REV. 661 (2000); see also *Weisgram v. Marley Co.*, 528 U.S. 440, 456–57 (2000) (holding that the courts of appeals may direct the entry of judgment as a matter of law when, "on excision of testimony erroneously admitted, there remains insufficient evidence to support a jury's verdict" because "[i]t is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail.").

88. Young, *supra* note 86, at 860–63.

89. FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE vii (1994).

90. *Id.* at 1–5.

91. HOOPER, CECIL & WILLGING, *supra* note 25, at 88. See generally CECIL & WILLGING, *supra* note 25.

92. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (1992).

the litigation.<sup>93</sup> The appointment of the panel provided a national forum for discussion of the scientific issues at the core of the breast implant litigation. Although other judges had independently appointed 706 experts in their own silicone gel breast implant cases, the multidistrict litigation expert panel insured a more uniform analysis.

The *In re PPA* court's decision to take an aggressive role in determining the admissibility of scientific evidence had the important practical result of setting clear parameters for motions for summary judgment. Where the plaintiffs' experts' testimony is ruled inadmissible, the plaintiffs' cases are usually subject to dismissal. Once the *Daubert* issues were decided, the court could rule on motions for summary judgment. Such motions are a major vehicle for reducing meritless claims in a large litigation.

The approach employed in *In re PPA* has become accepted as a model case management technique for incorporating the trends toward global resolution of scientific issues while respecting the limitations placed on the transferee judge by the *Lexecon* decision.

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93. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926 (N.D. Ala. May 30, 1996) (Appointment of Rule 706 Expert Witnesses), available at <http://earth.fjc.gov/BREIMLIT/ORDERS/order31.rtf>; *In re Silicone Gel Breast Implants* (June 13, 1996) (Confirming Order No. 31); *In re Silicone Gel Breast Implants* (Oct. 31, 1996) (Directions to National Science Panel Under FRE 706).