

Plaintiff Fact Sheets in Multidistrict Litigation:
Products Liability Proceedings 2008–2018

Prepared for the Judicial Conference Advisory Committee on Civil Rules

Margaret S. Williams, Emery G. Lee III, and Jason A. Cantone

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Executive Summary

The Judicial Conference Advisory Committee on Rules of Civil Procedure (Committee) is currently considering various proposals to amend the Federal Rules of Civil Procedure to address the management of multidistrict litigation (MDL) proceedings. To inform its deliberations, the Committee requested that the Federal Judicial Center conduct research regarding MDL transferee courts' use of plaintiff fact sheets (PFS) and related case management tools. This report summarizes results of that research as of February 2019. Key findings include:

- PFS were ordered in 57% of the MDL litigation proceedings covered by the study (N = 116)
- PFS were more commonly ordered in the larger proceedings covered by the study. PFS were ordered in 87% of proceedings with more than 1,000 actions.
- The average time from centralization date to the date of the PFS order was 8.2 months, and the median time was 6.1 months.
- In just over half of proceedings in which PFS were ordered, 55%, there was docket evidence of activity to dismiss actions for failure to file substantially complete PFS.
- Plaintiff profile forms were ordered in 18% of proceedings covered by the study, generally in proceedings with large number of actions.
- Defendant fact sheets were ordered in 42% of proceedings covered by the study, also generally in proceedings with large numbers of actions.
- Short-form complaints were ordered in 34% of proceedings covered by the study, almost always in proceedings with more than 100 actions.

Background

For purposes of this report, plaintiff fact sheets (PFS) are standardized questionnaires that serve the same function as interrogatories and requests for production. As outlined in this report, PFS are often ordered in multidistrict litigation (MDL) proceedings with large numbers of plaintiffs. The term “plaintiff fact sheet” itself is commonly used in MDL proceedings and is generally used to distinguish PFS from other case management tools available to transferee judges.

PFS should not be confused with *Lone Pine* orders. *Lone Pine* orders are a case-management tool requiring production by the plaintiff of an expert affidavit identifying case-specific evidence of causation.¹ They differ from PFS in that PFS do not require submission of case-specific, sworn expert evidence. PFS and *Lone Pine* orders are not mutually exclusive—a *Lone Pine* order may issue at a later stage of an MDL proceeding, for example, to assist in evaluating remaining plaintiff claims after a settlement of other claims.² But they are distinct tools that serve different purposes in managing cases.

This report does not provide information about the use of *Lone Pine* orders. The PFS covered by this report were examined to determine whether the forms required plaintiffs to submit sworn statements or expert testimony as part of the PFS process. The general information required in the PFS included:

- health records (*e.g.*, general health, health issues related to the product, names of doctors, pharmacies, and denial of health insurance);
- personal identifying information (*e.g.*, names, addresses, education, and employment); and
- litigation history (*e.g.*, prior tort litigation, past bankruptcy, social security claims, and workers’ compensation claims).

All the PFS required these types of information, and many of them included other categories of litigation-specific questions. They also frequently required medical or other types of releases. In addition, ten included questions regarding third-party litigation funding of plaintiff claims. None of the PFS covered in this report required expert testimony or sworn statements to be submitted as part of the PFS process. So, even though in some instances the line between a PFS order and a *Lone Pine* order may be indistinct, the orders discussed in this report do not represent such instances.

This report covers the incidence of PFS, plaintiff profile forms (PPF), defendant fact sheets (DFS), and short-form complaints (SFC) in a subset of MDL proceedings. The report also addresses the amendment of PFS and dismissal of cases for failure to submit substantially complete PFS.

¹ See, *e.g.*, *In re: Digitek Prods. Liab. Litig.*, 264 F.R.D. 249, 255 (S.D.W. Va. 2010).

² See *In re: Vioxx Prods. Liab. Litig.*, 388 Fed. Appx. 391, 397 (5th Cir. 2010).

Study Design

In its discussion of PFS, the Judicial Conference Advisory Committee on Rules of Civil Procedure (Committee) tends to focus on large MDL proceedings typically involving personal injury claims. For this reason, Federal Judicial Center (FJC) researchers collected data from proceedings centralized 2008–2018 (through October) categorized as products liability proceedings as well as two very large non-products liability proceedings (N=116).³ The number of studied proceedings centralized each year of the study period varied from 6 to 17. The average size of these proceedings (for closed proceedings, at the closing of the proceeding; for total actions in open proceedings, as of October 2018) was 2,640 actions. The largest proceeding as of October 2018 was 40,533 actions; the smallest, 3 actions.⁴ FJC researchers examined the case management orders in these proceedings for orders establishing a PFS process and related orders.

Plaintiff fact sheets and plaintiff profile forms

PFS were ordered in 66 (57%) of the 116 MDL proceedings examined. As anticipated, PFS were more commonly ordered in larger proceedings. PFS were ordered in 81% of proceedings with more than 100 actions (59 out of 73). The corresponding figure for proceedings with fewer than 100 actions was 16%. PFS were ordered in 87% of “mega” proceedings (more than 1,000 actions) (34 out of 39). (Moreover, PPF were ordered in 3 of the 5 mega proceedings without PFS orders.)

The average time from centralization date to the date of the PFS order was 241 days, or 8.0 months (N=65).⁵ The median time was 187 days, or 6.1 months.

PPF were ordered in 21 proceedings (18% of all proceedings). As the term is generally used in orders, “plaintiff profile forms” are questionnaires, less extensive than PFS, ordered by the court. PPF appear to be less common than PFS. PPF were ordered in addition to PFS in 14 proceedings and in lieu of PFS in 7 proceedings. All PPF orders were in proceedings with more than 100 actions, and two-thirds of them (14, or 67%) were in mega proceedings.

Defendant fact sheets

DFS were ordered in 49 of the proceedings examined, 42%, with one proceeding planning a DFS for the future. DFS are questionnaires ordered by the court to collect information about plaintiffs that is in the defendant’s possession or, in some instances, to collect information about defendants.

As with PFS, DFS were more commonly ordered in large proceedings. In proceedings with more than 100 actions (N=73), DFS were ordered in 47 proceedings, 64%. The corresponding figure

³ *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, and In re: E.I. Du Pont De Nemours & Co. C-8 Pers. Inj. Litig., MDL No. 2433.*

⁴ *In re: Ethicon, Inc., Pelvic Repair Syst. Prods. Liab. Litig., MDL No. 2652, and In re: Saturn L-Series Timing Chain Prod. Liab. Litig., MDL No. 1920, respectively.*

⁵ One PFS did not have a docket entry.

for proceedings with fewer than 100 actions was 5%, with one fact sheet expected in the future. DFS were ordered in 72% of mega proceedings (28 out of 39).

The average time from centralization date to DFS order date was 315 days, or 10.5 months (N=49). The median time was 222 days, or 7.4 months. In many proceedings, one case management order directs the filing of both PFS and DFS.

Questionnaire development and amendment

The process by which PFS, PPF, and DFS are developed varies from proceeding to proceeding. Typically, however, a questionnaire is negotiated by the parties and then submitted to the court for its approval.

PFS were amended by a subsequent order in 21 proceedings (32% of proceedings with PFS). In 10 proceedings, PFS orders were amended a second time (15%). These counts do not include orders merely extending the deadline for the filing of PFS but involve changes to the PFS or related release forms.

DFS amendments were less common. DFS were amended by subsequent order in 11 of the 49 proceedings with DFS, 22%.

Dismissals of cases based on PFS

The Committee's interest in PFS is, in part, motivated by the role PFS may play in winnowing unsupported claims in large MDL proceedings. The potential screening functions of PFS are beyond the scope of this report. However, of the 66 proceedings with a PFS process, a majority (36, or 55%) included evidence (including show cause orders) of activity to dismiss cases when substantially complete PFS had not been filed.

There is no shortage of legal authority for dismissal of individual actions for failure to submit substantially complete PFS in a timely manner. Motions to dismiss actions for failing to submit completed PFS can rely, for example, on Federal Rule of Civil Procedure 41(b) (dismissal for failure to prosecute or comply with court order) or Federal Rule of Civil Procedure 37(b)(2) (dismissal for failure to comply with a discovery order). Circuit law determines the factors that a district court considers in deciding whether to dismiss in these circumstances, and the factual circumstances in the cases vary. But transferee courts have, at times, dismissed individual actions with prejudice for failure to comply with PFS obligations imposed by court order.⁶

⁶ See, e.g., *In re: General Motors LLC Ignition Switch Litig.*, 2017 WL 9772106, at *1 (S.D.N.Y. June 16, 2017) (“[T]he Court finds that dismissal with prejudice is the appropriate sanction for Plaintiff’s continued failure to submit PFSs as required by [court order].”); *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Prac. and Prods. Liab. Litig.*, 2015 WL 12844447, at *2 (D.S.C. June 19, 2015) (“The information requested should be readily available to Plaintiffs and Plaintiffs bear the responsibility for their failure to adequately supply such information. Plaintiffs have failed to provide such information despite multiple warnings from the Court . . .”).

Short-form complaints

Short form complaints (SFC) are another case-management tool sometimes employed in large MDL proceedings in conjunction with PFS. Following the filing of a master complaint, SFC may be ordered for direct-file cases in the proceeding. SFC typically require party-identifying information, a statement that the short form complaint adopts and incorporates allegations from the master complaint, a statement of appropriate venue, a checklist of counts from the master complaint adopted by the plaintiff, specific case facts regarding injuries, a jury demand, and a prayer for relief.

SFC were ordered in 34% of proceedings (40). SFC were more commonly ordered in larger proceedings. In proceedings with more than 100 actions, SFC were ordered in 39 proceedings (53%). SFC were almost never ordered in proceedings with fewer than 100 actions. In mega proceedings, SFC were ordered in 25 proceedings (64%).

Table 1 shows how often PFS and SFC were ordered together for the proceedings in which information about both was available. PFS were ordered in a fair number of proceedings without a corresponding SFC, and in a plurality of proceedings, neither was ordered.

Table 1

		SFC		
		Yes	No	Total
PFS	Yes	35	29	64
	No	4	41	45
	Total	39	70	109

Information about both PFS and SFC was available for 70 proceedings with more than 100 actions (see Table 2). For these proceedings, PFS were ordered more than 80% of the time, and almost half of the time, the court ordered both PFS and SFC. To put this in slightly different terms, in proceedings with more than 100 actions, when courts ordered PFS, they ordered SFC 60% of the time.

Table 2

		SFC		
		Yes	No	Total
PFS	Yes	34	23	57
	No	4	9	13
	Total	38	32	70

Conclusion

In 116 products liability proceedings centralized between 2008 and October of 2018, PFS were ordered in 57% of all proceedings and in 87% of proceedings with more than 1,000 total actions. PFS are typically ordered within 8 months of centralization of the proceeding, requiring plaintiffs to submit information including medical history and medical and other releases. Information about third party litigation financing was required in 10 of the 66 PFS. DFS were required in 49 proceedings, always in conjunction with PFS or PPF. In 55% of proceedings in which PFS were ordered, there was some docket activity related to dismissal of cases for failure to submit substantially complete forms. SFC were typically ordered in large proceedings in conjunction with PFS.