

# The Ins and Outs of Plaintiff Fact Sheets in Multidistrict Litigation

By Madeline Dennis  
and Connor Doughty

The successful defense of multidistrict litigation requires understanding the contours of the individual plaintiffs' claims, product usage, and alleged injuries.

Picture this: a manufacturer faces hundreds or thousands – or in the case of one major company, hundreds of thousands – of personal injury lawsuits stemming from the use of its products. Centralized multidistrict litigation (“MDL”) has proven an effective method of managing complex civil litigation of this type, but it is not without logistical challenges. Since its inception over 50 years ago, multidistrict litigation has exploded in both complexity and quantity. Over 1.1 million cases have been centralized into MDLs since 1968, and the 2022 fiscal year alone saw over 60,000 cases in MDL proceedings. *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2022*, UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, December 9, 2022. MDLs are also becoming a mainstay of federal dockets, comprising up to 51.9% of all pending federal civil cases in 2018. Wittenberg, Daniel S., *Multidistrict Litigation: Dominating the Federal Docket*, LITIGATION NEWS: AMERICAN BAR ASSOCIATION, Feb. 19, 2020.

As with any case, the successful defense of multidistrict litigation requires understanding the contours of the individual plaintiffs' claims, product usage, and alleged injuries. Conducting traditional discovery in every case through interrogatories, requests for production, and depositions, however, is cumbersome and unwieldy, if not impossible. This mass discovery conundrum gave rise to the Plaintiff Fact Sheet (“PFS”). As the savvy litigator will appreciate, the now sacrosanct PFS is much more than a mere form. When developed and used strategically, it can

become an integral tool for winnowing MDL case inventories by dispositive motions, settlement negotiations, and/or representative cases for trial (“bellwether cases”). An intimate understanding of the purposes, ideal and permissible content, and effective uses of a PFS can simplify the daunting task of defending a multitude of medical-legal cases simultaneously.

## What is a PFS (Used For)?

A PFS is a standardized questionnaire commonly used in MDL proceedings that gathers basic information from each plaintiff and is signed under oath. See MULTIDISTRICT LIT. MAN., APPX. J, *Plaintiff Fact Sheets in Multidistrict Litigation Proceedings: A Guide for Transferee Judges* (May 2022). The PFS serves the same general function as interrogatories and requests for production, and plaintiffs' responses are treated as answers to such under the Federal Rules of Civil Procedure and must be supplemented accordingly. See, e.g., *In re Xarelto (Rivaroxaban) Prod. Liab. Litig.*, MDL No. 2592, PTO No. 13 (E.D. La. May 4, 2015). Fact sheets do not necessarily replace the use of traditional discovery, however, and additional case-specific discovery in a subset of cases is often warranted as the MDL evolves. MULTIDISTRICT LIT. MAN., APPX. J.

At its core, the purpose of a PFS is to provide each defendant with the specific information necessary to defend against the cases it faces. Therefore, failure to complete a PFS can warrant dismissal because it deprives the defendant of the ability to identify and pursue its defenses.



**Madeline Dennis** serves as counsel with the Cleveland office of Tucker Ellis LLP. A trial lawyer with considerable MDL experience, she focuses on defending medical device and pharmaceutical companies against product liability and personal injury claims. Madeline has served on the DRI Young Lawyers Steering Committee, including as co-chair of the expert witness subcommittee. **Connor Doughty** is an associate attorney in the Chicago office of Tucker Ellis LLP. He represents clients in complex civil litigation, with an emphasis on pharmaceutical and medical device clients in product liability litigation. He also has experience defending clients in employment and biometric privacy litigation, as well as in multiple MDLs. Connor is a member of the DRI Young Lawyers Steering Committee.



See *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1234 (9th Cir. 2006). The benefits are not necessarily one-sided, though. Since the same counsel may represent a multitude of plaintiffs in an MDL proceeding, PFS completion can spotlight claim deficiencies and assist plaintiffs' counsel with valuing their claims and inventory. In that regard, a PFS can provide counsel for both sides with the information necessary to move the proceeding toward a swifter resolution. See *In re Intercontinental Terminals Co. LLC Deer Park Fire Litig.*, No. 4:19-CV-1460, 2022 WL 1493795, at \*1 (S.D. Tex. May 2, 2022). As the Judicial Panel on Multidistrict Litigation (the "JPML") noted, the PFS process can serve a wide variety of purposes, including "to create a census of the claims and defenses in the proceeding ... [to] group cases for motions practice or into litigation tracks, to identify cases

for targeted discovery, to select bellwether cases, [ ] to facilitate settlement negotiations ... [and] to screen cases in which plaintiffs lack information to support a claim against a defendant..." MULTIDISTRICT LIT. MAN., APPX. J.

The PFS is critical to one of the primary functions of an MDL proceeding – the selection of bellwether cases for trial work-up. See *In re Intercontinental Terminals*, 2022 WL 1493795, at \*1. The goal of MDL-based trial selection is to identify a pool of cases that reflects the "individual categories of cases that comprise the MDL *in toto*, illustrate[s] the likelihood of success and measure of damages within each respective category, and illuminate[s] the forensic and practical challenges of presenting certain types of cases to a jury." Eldon E. Fallon, et al., *Bellwether Trials in Multidistrict Litigation*, 98 TUL. L. REV. 2323, 2342–43 (2008). However, to select


representative cases, the parties must first gain insight into the characteristics of the universe of cases, which necessarily requires that "the attorneys have some knowledge about the individual cases in the MDL." *Id.* at 2344.

### What Does (or Should) a PFS Typically Contain?

An effective PFS is a pragmatic PFS. A questionnaire that is needlessly long, confusing, or complicated will not yield beneficial information in the aggregate. It is well-established that the PFS (as well as the Defense Fact Sheet) is typically the product of negotiation between the parties. See, e.g., MULTIDISTRICT LIT. MAN., APPX. J. Thus, each side must determine what information will facilitate sufficient work-up of claims and defenses. To this end, it is advisable to consult with an expert witness early in the litigation to identify



the key defense issues from a scientific standpoint, such as particular injury-specific information, type(s) of treatment, and potential alternative causes. These issues may also be elucidated during the MDL's Science Day, if applicable. Focusing on these critical inputs will help both sides arrive at a practical fact sheet and avoid unnecessarily prolonged negotiation.



## At the end of the day, certain threshold PFS information is necessary regardless of the nature of the claims in the MDL.

It is paramount to note that PFS negotiations do not start from a blank slate. In fact, the JPML has stated as much, suggesting that fact sheets approved in earlier proceedings be used as a template during the negotiation process. MULTIDISTRICT LIT. MAN., APPX. J. Thus, MDL litigators should acquaint themselves with the nature and contents of fact sheets used in similar proceedings and come to the negotiation table equipped with this information. Attorneys negotiating a PFS should also familiarize themselves with fact sheets previously approved by the judge and/or court at issue. A few representative examples of fact sheets ordered in the prescription drug and medical device context, though certainly not exhaustive, include: *In re Proton Pump Inhibitor Prod. Liab. Litig.*, MDL No. 2789, CMO No. 9 (D.N.J. Feb. 5, 2018); *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, MDL No. 2740, PTO No. 18 (E.D. La. Feb. 14, 2017); *In re Xarelto (Rivaroxaban) Prod. Liab. Litig.*, MDL No. 2592, PTO No. 13 (E.D. La. May 4, 2015); *In re Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prod. Liab. Litig.*, MDL No. 2570, CMO No. 4 (S.D. Ind. Apr. 17, 2015); *In re Zolofit Prods. Liab. Litig.*, MDL No. 2342, PTO No. 13 (E.D. Pa. Oct. 15, 2012); and *In re Avaulta*

*Pelvic Support Sys. Prod. Liab. Litig.*, MDL No. 2187, PTO No. 9 (S.D.W.Va. Jun. 7, 2011).

In its review of PFS use in the MDL context, the Federal Judicial Center found that certain baseline information was always included, specifically:

- Health records (e.g., general health information, product-related health issues, and identification of doctors, pharmacies, and health insurance history);
- Personal background information (e.g., addresses, education, and employment); and
- Litigation history (e.g., prior tort litigation, past bankruptcy, social security claims, and workers' compensation claims).

Fed. Judicial Ctr. (2019), *Plaintiff Fact Sheets in Multidistrict Litigation: Products Liability Proceedings 2008–2018*. Fact sheets typically also include other categories of litigation-specific questions and releases for medical, insurance, employment, and financial records, including in some cases inquiry into third-party litigation funding. *Id.*

Likewise, the JPML noted additional information that is often included in a PFS, including:

- When and why the plaintiff used a product, device, or service;
- Product identification records (brand used, model, manufacturer, etc.);
- The plaintiff's medical history;
- Injuries the plaintiff sustained; and
- Requests for related documents and a witness list.

MULTIDISTRICT LIT. MAN., APPX. J. Case law confirms the necessity of this baseline information. For instance, one MDL required plaintiffs to answer a broad range of questions regarding use of Federal Emergency Management Agency housing, including the average number of hours spent in such housing per day. *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, No. MDL 07-1873, 2012 WL 1664252 (E.D. La. May 11, 2012). Another MDL required plaintiffs to answer detailed questions about the nature of their alleged injuries, type(s) of hormone therapy used, personal and medical history, and all prescribing physicians(s) and potential fact

witnesses. *In re Prempro Prod. Liab. Litig.*, No. 4:03-CV-1507-WRW, 2011 WL 124188, at \*4 (E.D. Ark. Jan. 13, 2011). Other fact sheets have included questions on topics including product and litigation advertising, out-of-pocket expenses, and social media use. See *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prod. Liab. Litig.*, No. 3:09-CV-20001-DRH, 2012 WL 865041 (S.D. Ill. Mar. 13, 2012) (advertising); *Sanchez v. Bos. Sci. Corp.*, No. 2:12-CV-05762, 2014 WL 202787, at \*3 (S.D.W. Va. Jan. 17, 2014) (advertising); *In re Xarelto (Rivaroxaban) Prod. Liab. Litig.*, MDL No. 2592, PTO 13 (May 4, 2015) (expenses); *In re Proton-Pump Inhibitor Prod. Liab. Litig.*, MDL No. 2789, CMO 9 (Feb. 5, 2018) (social media); *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, MDL No. 2740, PTO 71 (E.D. La. Dec. 15, 2017) (social media); *In re Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prod. Liab. Litig.*, Am. CMO 4, 2015 WL 10320225 (S.D. Ind. Aug. 19, 2015) (social media).

At the end of the day, certain threshold PFS information is necessary regardless of the nature of the claims in the MDL. Where the negotiation lies, and where the line between pragmatic and impractical sits, is in the claim-specific information. As with any negotiation, when drafting and negotiating the PFS, determine what information must be obtained, what information would be nice to have, and what information can be done without. Be prepared to support arguments to include disputed categories with citations to previous MDL fact sheets and case law.

### How Does the PFS Process Work?

Once the parties have negotiated the PFS and the court approves its form and content, plaintiffs' counsel will have a set time to provide fact sheets on behalf of each plaintiff. In general, each plaintiff will be required to complete a PFS either within a certain period upon the entry of a scheduling order or within a certain period after having been added to the MDL – typically between 30 and 45 days. *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d at 1224 (“Plaintiffs in every case currently docketed were ordered to complete a [PFS] no later than 45 days after a blank PFS was transmitted by defendants, and plaintiffs in all cases transferred



to MDL 1407 thereafter were to complete a PFS within 45 days after service.”); see also *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, 2012 WL 1664252, at \*3 (discussing pretrial order mandating that “each plaintiff serve on the defendants a completed and verified [PFS] within thirty days after transfer (or direct filing) into the MDL”).

PFS completion essentially serves as a condition precedent for the parties to proceed to the next phase of the MDL. *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d at 1224 (“The PFS [i]s the starting point for defendants’ assessment of plaintiffs’ claims and the precondition for proceeding with further discovery, including depositions; defendants could not take case-specific fact depositions ... [until] after the plaintiff served a completed Fact Sheet.”). Defending MDL claims requires knowledge of the type of information provided by a PFS and therefore, MDL courts are quick to note that failure to complete a PFS results in prejudice to the defense. *In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig.*, MDL No. 2848, No. 20-5756, 2022 WL 3309471, at \*3 (E.D. Pa. Aug. 11, 2022) (finding dismissal with prejudice was “justly merited” given plaintiff’s delay in providing PFS); *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, No. 2:21-CV-0593-RMG, 2021 WL 7315751, at \*1 (D.S.C. Nov. 17, 2021) (“A completed PFS contains basic facts required by Defendants to assess the quality of the claims, and a Plaintiff’s failure to provide such information may result in prejudice to a Defendant.”). Defendants often are faced with the logistical challenge of properly investigating hundreds of different claims in a short time, and therefore readily can demonstrate substantial prejudice when fact sheets are not timely completed. *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, 496 F.3d 863, 865 (8th Cir. 2007) (“Given the time pressure on a defendant that must investigate the claims of nearly 1,400 plaintiffs, we consider the danger of prejudice substantial.”); *McLaughlin v. Bayer Essure Inc.*, No. 2:14-cv-07315, 2018 WL 10878125, at \*3 (E.D. Pa. Feb. 7, 2018) (emphasizing failure to produce PFSs “materially prejudices Defendants, as Defendants cannot defend [Plaintiffs’] claims in the absence of the

most basic information concerning those claims,” and recognizing impending motion for summary judgment deadline “for which the information in the Plaintiff Fact Sheets is essential”). Delay or failure to complete a PFS also negatively impacts the court and even the other plaintiffs since PFS completion is a condition precedent to other MDL activity. *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, 496 F.3d at 865 (“The delay also impacted the nearly 1,400 other plaintiffs by unfairly diverting the time and attention of the court away from their timely claims to that of the [plaintiffs who failed to submit a PFS].”).

Defendants should be familiar with the process to follow when PFS deficiencies are identified, as established by court order. As both the JPML and Federal Judicial Center note, there is no shortage of legal authority dismissing individual actions for failure to complete a PFS in a timely manner. This can take the form of a dismissal through Fed. R. Civ. P. 41(b) for failure to prosecute or comply with a court order and/or through Fed. R. Civ. P. 37(b)(2) for failure to comply with a discovery order. Fed. Judicial Ctr. (2019), *Plaintiff Fact Sheets in Multidistrict Litigation* (collecting cases). Courts are not afraid to place the blame for failure to complete a PFS squarely on plaintiffs, as the PFS “merely requires information which plaintiffs and their counsel should have possessed before filing their claims.” *In re Avandia Mktg., Sales Practices, & Prod. Liab. Litig.*, 2:07-MD-01871-CMR, PTO No. 121 (E.D. Pa. Nov. 15, 2010); see also *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig.*, MDL No. 2:14-mn-02502, 2015 WL 12844751, at \*2 (D.S.C. Aug. 14, 2015) (“The information requested should be readily available to Plaintiffs, and Plaintiffs bear responsibility for their failure to adequately supply such information.”).

### **I Obtained the PFS – Now What?**

The PFS process does not end upon initial submission. Rather, it gives the defense an opportunity to review the information provided, identify deficiencies, and catalogue pertinent information for defense purposes. See, e.g., *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, MDL No. 2740, Am. PTO No. 22 (E.D. La. Mar. 10,

2017). Through the deficiency process, the defense can gather missing information and gain an even clearer picture of plaintiffs’ claims. It is not uncommon for plaintiffs to provide a wholly deficient PFS and/or fail to supplement their responses. In that instance, defendants should use the deficiency process to flag these issues, and if not remedied, advance noncompliant cases toward a show cause hearing for ultimate dismissal. See *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, MDL No. 2740, Am. PTO No. 22A (E.D. La. Jul. 24, 2018).

Once PFS information is provided, the parties should use a secure electronic database to organize and track this information. Using a database to manage the information makes it far easier to isolate and sort specific data points of interest and, consequently, to group cases into tracks for motions practice, screen out meritless claims, and otherwise identify cases for additional targeted discovery and/or selection as a potential bellwether case. Information from the database can also be made available to the court for ease of resolving deficiency motions and for purposes of bellwether case selection.

### **Conclusion**

The PFS process is an essential aspect of multidistrict litigation that, when leveraged, can streamline MDL administration and overall defense. Defense litigators would be wise to share best practices learned with one another, collect information from past fact sheets used in similar MDL proceedings, and negotiate a comprehensive but pragmatic questionnaire. Information gleaned and used effectively from the PFS can lead to the timely identification of key inventory-wide defenses for dispositive motions or settlement leverage and/or case-specific work-up for trial, reducing the onerous burden on defendants in the MDL setting.

