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## Fifth Circuit's Reversal in Hip Implant Bellwether Appeal Underscores Risk of Overemphasizing Bellwether Trials in MDL

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**The Fifth Circuit's recent opinion in *Greer v. DePuy Orthopaedics, Inc.* illustrates the risks inherent in bellwether multidistrict litigation (MDL) trials. MDL courts often, at great expense to the parties, use bellwether trials as a mechanism to frame the MDL issues for future discovery, trials, and settlement discussions. As *Greer* demonstrates, however, such plans work only with appropriate case management.**

The appeal in *Greer* arose out of a \$502 million verdict in favor of the five plaintiffs against DePuy and Johnson & Johnson, consisting of \$500,000 in economic damages, \$141.5 million in non-economic damages, and punitive damages totaling \$360 million. DePuy and Johnson & Johnson appealed the verdict on a number of grounds, and the Fifth Circuit reversed based on two issues: (1) the trial court's admission of irrelevant, overly prejudicial character evidence against the defendant companies, and (2) Plaintiffs' counsel's "unequivocally deceptive" statements that several Plaintiffs' experts were not compensated for their testimony, when they in fact were compensated.

The reversal based on evidentiary issues is particularly notable in the context of MDL proceedings. The trial court permitted the introduction of evidence that defendants had (1) made payments to officials in Saddam Hussein's Iraqi government, and (2) an embedded culture of institutional racism. This evidence had nothing to do with allegedly defective hips. Moreover, counsel for the plaintiffs repeatedly referenced this evidence, at one point even arguing that the payments to Hussein alone warranted a verdict against the defendants.

After years of work, the plaintiffs and their counsel are left at square one because they chose to present and focus on inadmissible evidence. While it is unclear how the jury might have ruled in the absence of such inflammatory evidence, and with proper, truthful disclosure of expert compensation, one thing is clear – the plaintiffs' approach to the trial, and the trial court's endorsement of it, rendered the second bellwether a nullity, at tremendous cost to all involved.

A subcommittee of the Federal Rules Advisory Committee has been appointed to consider whether changes are needed in MDL procedures. *Greer* appears to demonstrate that MDL reform is needed.

For more information on this or other MDL matters, please contact [Sterling Kidd](#) or a member of Baker Donelson's [Multidistrict Litigation Team](#).