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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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IN RE: FRESENIUS GRANUFLO/	)	
NATURALYTE DIALYSATE	)	No. 1:13-md-02428-DPW
PRODUCTS LIABILITY LITIGATION	)	
	)	
_____	)	
	)	
STATE OF LOUISIANA, EX REL.	)	
JAMES D. "BUDDY" CALDWELL	)	
	)	
	)	
Plaintiff	)	
v.	)	
	)	No. 1:16-cv-11035-DPW
FRESENIUS MEDICAL CARE	)	
HOLDINGS, INC., D/B/A FRESENIUS	)	
MEDICAL CARE NORTH AMERICA, ET	)	
ATL.,	)	
	)	
	)	
Defendants	)	

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

MOTION HEARING

John Joseph Moakley United States Courthouse  
Courtroom No. 1  
One Courthouse Way  
Boston, MA 02210  
Tuesday, August 23, 2016  
2:50 p.m.

Brenda K. Hancock, RMR, CRR  
Official Court Reporter  
John Joseph Moakley United States Courthouse  
One Courthouse Way  
Boston, MA 02210  
(617)439-3214

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23 ALSO PRESENT:

24 Ronald L. Castle  
25 Fresenius Medical Care NA

1 (The following proceedings were held in open court  
2 before the Honorable Douglas P. Woodlock, United States  
3 District Judge, United States District Court, District of  
4 Massachusetts, at the John J. Moakley United States Courthouse,  
5 One Courthouse Way, Courtroom 1, Boston, Massachusetts, on  
6 Tuesday, August 23rd, 2016):

7 THE CLERK: All rise.

8 (The Honorable Court entered the courtroom at 2:50 p.m.)

9 THE CLERK: This Honorable Court is now in session.  
10 Please be seated. MDL Number 13-02428, In Re: Fresenius  
11 GranuFlo.

12 THE COURT: Well, let me understand who is going to  
13 have a speaking part in this.

14 Mr. Bennett, you are going to be speaking for  
15 Fresenius?

16 MR. SHAUL: Roman Shaul on behalf of the State of  
17 Louisiana, your Honor.

18 MR. DUGAN: Good afternoon, your Honor. James Dugan  
19 on behalf of Blue Cross of Louisiana.

20 THE COURT: You may be seated, Mr. Dugan.

21 I have a series of questions, but one of them is what  
22 is happening in Vioxx or has happened in Vioxx on this aspect  
23 of the case? Reading it, there is a kind of law of unintended  
24 consequences to the procedures that were undertaken in  
25 Louisiana.

1 MR. DUGAN: Yeah, absolutely, your Honor.

2 THE COURT: You always should be prepared for what you  
3 ask for, and what you asked for got you here.

4 MR. DUGAN: Absolutely.

5 THE COURT: So, I just want to understand.

6 MR. DUGAN: May it please the Court, James Dugan on  
7 behalf of Blue Cross of Louisiana. I have represented Blue  
8 Cross for 20 years in cases such as this. I was co-lead  
9 counsel in the Neurontin litigation in front of Judge Saris in  
10 this courthouse. So, I've been litigating these issue for  
11 years.

12 The Vioxx case was completely distinguishable from  
13 this, because that case I filed as a nationwide class action  
14 under RICO and the Class Action Fairness Act. Vioxx is long  
15 over with and gone. As you may or may not know, Mr. Seeger was  
16 one of the co-lead counsels in Vioxx, so we fought those wars  
17 together. It's completely distinguishable, your Honor.  
18 There's no mention in the Vioxx complaint ERISA.

19 THE COURT: I just want to see what else has happened.  
20 So, there was a war. Who won?

21 MR. DUGAN: I think nobody won, your Honor.

22 THE COURT: It is like most wars.

23 MR. DUGAN: Right.

24 THE COURT: So, let me step back. If this were a  
25 standalone case and only dealt with your private plans, it

1 would be here, right?

2 MR. DUGAN: No, your Honor.

3 THE COURT: Why not?

4 MR. DUGAN: It's very commonplace for health insurers  
5 to intervene and assert subrogation rights in --

6 THE COURT: That may be, but let's assume, as I am  
7 framing this, that it is you bring this claim, maybe there is  
8 no vehicle. Louisiana has a vehicle, Mississippi has a  
9 vehicle, but there is no other state vehicle. You bring a  
10 claim on behalf of plan participants as a subrogation claim.  
11 It would in the ordinary course pass through the MDL and come  
12 here, right? Wouldn't it?

13 MR. DUGAN: It would depend on how we filed it, your  
14 Honor.

15 THE COURT: Well, let's assume that you filed it as a  
16 standalone action on behalf of the subrogation rights of plan  
17 participants, private plan participants.

18 MR. DUGAN: Well, once again, your Honor, it would  
19 depend. We have intervened in the State of Louisiana's case.

20 THE COURT: I understood that.

21 MR. DUGAN: Because we also represent the Office of  
22 Group Benefits.

23 THE COURT: This will be a longer war if you do not  
24 answer the questions I put to you. You get to say whatever you  
25 want to say, but you can run, but you cannot hide. I am going

1 to be asking this question over and over again.

2 MR. DUGAN: I'm here, your Honor.

3 THE COURT: So, you file a standalone case.

4 MR. DUGAN: We would assert state law causes of  
5 action.

6 THE COURT: Right.

7 MR. DUGAN: And depending --

8 THE COURT: But they are ERISA causes of action,  
9 aren't they?

10 MR. DUGAN: No, nothing --

11 THE COURT: You mean private plans?

12 MR. DUGAN: Yeah, absolutely, your Honor.

13 THE COURT: What cases said that?

14 MR. DUGAN: Your Honor, we have never -- ERISA does  
15 not create a cause of action for a plaintiff to an entity such  
16 as Blue Cross Blue Shield of Louisiana. ERISA was created to  
17 protect consumers.

18 THE COURT: I understand that. If someone comes in  
19 and says, "I have got a subrogation claim," they are making the  
20 claim for the ERISA rights of the underlying plan participants.

21 MR. DUGAN: Right. We have two ways of asserting  
22 those claims. It's very commonplace, your Honor, to intervene  
23 in an underlying case.

24 THE COURT: It may be. I am not disagreeing, and  
25 maybe I can clarify where I may be going on this so you both

1 understand. My head hurt trying to figure out why people  
2 opposed and supported and went along with intervention and did  
3 not. I can look at it and say --

4 MR. DUGAN: I read ERISA last night, your Honor. My  
5 head is still hurting, too.

6 THE COURT: Well, I have had a long-term chronic pain  
7 from ERISA myself. But one way I can look at this is you  
8 asserted both private plan claims and claims in some fashion  
9 administering the Government plans. It is not as if I want to  
10 slice and dice, but I might, which is to say I will send the  
11 Government plans back with the Attorney General. I have  
12 thought long and hard about that, learned a good deal about the  
13 history of states as diversity, all of that. That all belongs,  
14 as far as I am concerned, I think, in the state courts. But  
15 you have got private plans here, and I might well sever those  
16 private plans out and say they are here properly, that there is  
17 a preemption of that. They have to be treated as federal  
18 claims in this Court. And I am not sure why I should not do it  
19 that way.

20 It seems to me that there are larger issues about the  
21 State's, the sovereign's ability to litigate where it wants to  
22 litigate and even acquiesce in the arrival of an officious  
23 intermeddler, otherwise known as an "intervenor," in the case,  
24 which apparently they did, and that is up to the State of  
25 Louisiana, as far as I am concerned, and ERISA provides an

1 exemption directly for that sort of thing. Mr. Bennett is  
2 thinking about why that is wrong, but I think that is the case.  
3 And so, now you are here on those private plans, and I guess I  
4 want to know what that means, too, for this case as well.

5 MR. DUGAN: Right. Well, thank you, your Honor, and,  
6 with all due respect, I think it would have a chilling effect  
7 if you were to rule that Blue Cross's intervention somehow  
8 implicated ERISA. It is done all the time, for example, in car  
9 accident cases. If that is done, then you are going to create  
10 legal authority that is going to be widespread around this  
11 country, having parties remove cases under these issues.

12 THE COURT: It happens all the time in ERISA cases.  
13 Maybe it just happens to me, but I do not think so. I think it  
14 happens to every Federal Judge. Somebody files something and a  
15 benefit plan is involved, even without thinking strategically  
16 defense counsel say, "They want to be in the Barnstable  
17 District Court. That means we want to be in the Federal  
18 District Court in Boston." Whether that makes sense or not is  
19 another matter. Now, maybe there are some defendants who say,  
20 "Who cares," and they do not assert their ERISA claims or they  
21 do not press it as ERISA claims. But that has not been my  
22 experience.

23 My experience has been when anything that comes within  
24 the scope of ERISA is raised, there is a removal, and the  
25 Supreme Court has been pretty broad in the way in which it



1 treats ERISA preemption, jump-starting over the idea of a  
2 well-pleaded complaint to say this is the kind of thing as to  
3 which there is a particular federal interest.

4 So, apart from a parade of horrors into the Federal  
5 Court, why shouldn't this case be here? I am adding to the  
6 things that you will get a chance to talk about, but this is  
7 also a kind of manageability issue. You are really standing in  
8 the shoes of, because you are subrogation, standing in the  
9 shoes of those who have direct claims here, who, if they  
10 brought the claims themselves, would be here, I think --

11 MR. DUGAN: Right.

12 THE COURT: -- private plan people. So, I don't know  
13 of any good reason not to sever out the private plan claims.  
14 Maybe I should be clear on this. There is no dispute that your  
15 intervention implicates private plans, right?

16 MR. DUGAN: Correct.

17 THE COURT: So, why shouldn't I?

18 MR. DUGAN: Well, two arguments, your Honor, and I'm  
19 assuming that you are going to want me to breeze over the  
20 well-pleaded complaint rule in the Gutierrez case.

21 THE COURT: Not breeze; acknowledge that it has been  
22 abrogated in the context of ERISA.

23 MR. DUGAN: As to the ERISA argument, your Honor,  
24 first of all, there's no case on point. There's never been a  
25 case on point that's addressed this issue. But if you look at

1 ERISA, there's basically four core functions of ERISA: one, to  
2 provide participants with plan information, including important  
3 information about plan features and funding; two provides  
4 fiduciary responsibilities for those who manage and control  
5 plan assets; three requires plans to establish a grievance and  
6 appeals process for participants to get benefits from their  
7 plans; and four gives participants the right to sue for  
8 benefits and breaches of fiduciary duty.

9 This is a very different situation, your Honor. This  
10 is a situation where you have Blue Cross, who is intervening,  
11 has filed a petition of intervention, and is asserting  
12 subrogation rights for state law causes of action.

13 THE COURT: Let me just ask this question separately:  
14 If this were done by the plan participants it would be an ERISA  
15 claim, right?

16 MR. DUGAN: I don't think so, your Honor. I think  
17 that, once again, ERISA is for a situation where a consumer has  
18 a problem with their health plan. I just laid out the four  
19 core functions of ERISA. If the facts pattern is in those core  
20 functions, then, yes, ERISA is implicated. As I said, there  
21 has never been a case that specifically fits this fact pattern.  
22 And, candidly, when we first filed the intervention over seven  
23 months ago we went through various motion practice in appellate  
24 all the way to the Supreme Court on the intervention, and we  
25 won on all those issues.

1 I would have thought if they thought strongly about  
2 the federal question issue that they would have removed it at  
3 the beginning of the case. And I did a lot of legal work,  
4 legal research on this issue, on my damages analysis and all  
5 this stuff many months before we actually filed our  
6 intervention, and I could never find this particular aspect of  
7 the law. If your Honor were to rule that way, you would be  
8 creating new law.

9 THE COURT: Well, if I rule the other way I will be  
10 creating new law, too.

11 There used to be an Assistant U.S. Attorney in the  
12 District of Massachusetts who, when confronted with legal  
13 arguments, would sometimes say, "I know of no law to the  
14 contrary." That was not a commentary on the law. It was a  
15 commentary on his knowledge of the law.

16 There is no case to the contrary one way or the other,  
17 right?

18 MR. DUGAN: Well, your Honor --

19 THE COURT: So, I go back to thinking about you as  
20 standing in the shoes of an ERISA participant who makes a claim  
21 like this, and I ask myself whether or not this should be an  
22 ERISA claim. I guess that is the way I would think about it.  
23 Now, you are telling me, "Well, ERISA participants make these  
24 claims all the time." That does not make it an ERISA claim.  
25 It just makes it a claim by somebody who happens to have ERISA

1 benefits.

2 MR. DUGAN: Right.

3 THE COURT: I think that is the guts of what you are  
4 saying.

5 MR. DUGAN: Your Honor, I would point you to the  
6 Gobeille decision, which is a U.S. Supreme Court case which we  
7 rely upon. There, the Supreme Court examined the limited  
8 activities that constitute core functions of ERISA. In the  
9 recent Gobeille decision holding that the principal object of  
10 ERISA is to protect plan participants and beneficiaries, not  
11 third parties like Fresenius, and that Congress's primary  
12 concern was with the mismanagement of funds accumulated to  
13 finance employee benefits and failure to pay employees'  
14 benefits from accumulated funds. Federal law, therefore, only  
15 preempts state law regarding the core functions of ERISA, such  
16 as those administrative health plans and denying of benefits  
17 mentioned.

18 Here, of course, the denial of claims of benefits is  
19 not at issue. As Blue Cross Blue Shield allowed and paid for  
20 its members to treat with NaturaLyte and GranuFlo, even as  
21 Fresenius knew of the drug's dangers, refused to communicate.  
22 Conversely, ERISA does not preempt state statutory and tort law  
23 pertaining to the regulation and promotion of drug safety in  
24 the protection of health plan participants.

25 THE COURT: Well, I guess a way of dealing with that

1 is to say we are not talking about preemption under  
2 Section 1144(a), which is the Gobeille. We are, or at least I  
3 am, talking about preemption under 1132(a), which also provides  
4 a form of complete preemption.

5 So, I guess I think that I understand where you are  
6 coming from on this. I am having more difficulty saying that  
7 we are dealing with some matter that is outside of the larger  
8 concerns of the Congress in providing a Federal law of health  
9 benefit plan provisions, somewhat different, obviously, but  
10 when we are talking about 514 or 1132(a) we are talking about a  
11 different way of approaching the question of preemption than  
12 was approached through Gobeille.

13 So, I think I understand what you are saying, and for  
14 present purposes, although Mr. Bennett will probably challenge  
15 this, I am prepared to think that most of what is involved here  
16 should go back, or not most, but so much as is dealing with  
17 Government plans should go back and quickly. But I am not so  
18 sure about the private plans.

19 MR. DUGAN: I understand, your Honor. I would like to  
20 make just one more report to your Honor, if it's okay.

21 THE COURT: Sure.

22 MR. DUGAN: We also have been engaging in discovery  
23 with Fresenius. We have produced about 50,000 pages of  
24 documents. We had a 30(b)(6) deposition, which was set for  
25 August 9, which is going to be moved. We have had a little bit

1 of a slowdown due to --

2 THE COURT: That is back to the future if it was  
3 August 9th. It has been moved.

4 MR. DUGAN: Right. So, the parties are engaging in  
5 discovery. From Blue Cross's perspective, we are about  
6 90 percent done. We are open to finishing the process up, once  
7 again, with all due respect, your Honor, the MDL, if we don't  
8 get sent back now, we will be making a lexicon argument in the  
9 very near future to try to get back to State Court. Thank you,  
10 your Honor.

11 THE COURT: Well, let me just be sure I understand  
12 that, and this is a more practical thing, which is to say at  
13 this stage somebody is going to be dealing with your claims and  
14 the discovery in your claims. I have suggested that it may be  
15 two Courts that are dealing with that. That does not appeal to  
16 you, and I suspect it does not appeal to Mr. Bennett. But, in  
17 any event, rather than sending these cases back and forth,  
18 perhaps a period of reflection with respect to the outcome  
19 while discovery is completed is an appropriate way of dealing  
20 with it. Is that the subtext of your report to me?

21 MR. DUGAN: Yes, sir, your Honor. I'll leave you just  
22 with this last note: As a practical perspective, I see this  
23 case as a car accident, where the State of Louisiana is in the  
24 front seat, we're in the back seat. Liability is going to be  
25 the same here, your Honor. We're just going to have different

1 damages. It's as plain and simple as that, as far as we are  
2 concerned. Thank you, your Honor.

3 THE COURT: Thank you.

4 So, Mr. Bennett --

5 MR. BENNETT: Yes. Thank you, your Honor.

6 THE COURT: -- you heard my inclinations.

7 MR. BENNETT: Sure. I will try to react to some of  
8 the things that I heard. One of the things that I would like  
9 to just make the Court aware of, because it could affect the  
10 timing or what you want to have in front of you before you make  
11 a decision, is that in this first batch of discovery that we  
12 just received from the State -- and the numbers are subject to  
13 a protective order, so I'm not going to state them in open  
14 court -- but if you take 100 percent of Blue Cross Blue  
15 Shield's claims, it looks like less than 3 percent are state  
16 claims, and that the overwhelming number of Blue Cross Blue  
17 Shield's claims come from their HMO and their other private  
18 plans that they've provided us, and the so-called "Office of  
19 Government Benefits" that they are suing under, which would be  
20 state participants, is a tiny sliver of that.

21 THE COURT: But whatever it is, without getting into  
22 allocation, it is subject to exemption from ERISA, right?

23 MR. BENNETT: We would acknowledge that you have to  
24 exercise supplemental jurisdiction.

25 THE COURT: Put to one side supplemental jurisdiction

1 for a moment. I will get back to your friend from Louisiana  
2 about that. But, standing alone, if this case were brought  
3 directly by Blue Cross Blue Shield and they said, "We are not  
4 looking for any private plans, we are only looking for the OGA  
5 cases," it would still be in Louisiana, right?

6 MR. BENNETT: That's true.

7 THE COURT: And you would not have a right of removal.

8 MR. BENNETT: No. We are removing it on the basis of  
9 the private plans.

10 THE COURT: So, now, as a practical matter, you said  
11 it would affect timing. I do not understand the information.

12 MR. BENNETT: Well, here's what I was thinking from  
13 your prior comments, is that one of the reasons you thought it  
14 might make sense to sever claims out and say the Government  
15 plans go back to Louisiana and the other claims stay here, was  
16 whether or not that would be even an even split or the  
17 predominant -- I think you said the predominant were public,  
18 and so it might make sense to do that. I thought that it might  
19 matter to the Court that if you kept all of the cases for  
20 discovery, all of the Blue Cross cases for discovery,  
21 98 percent of that would be pure-play ERISA cases.

22 And so, when I look at the case law on severance and  
23 remand, one of the things is what would you be remanding as to  
24 Blue Cross's claims? And what you would be remanding, if you  
25 took that approach, which, of course, we oppose, but you would



1 be remanding a tiny, little fraction of a case for another  
2 Court to resolve, for Blue Cross to be another party at trial  
3 in Louisiana if the State case was remanded as well, whereas,  
4 if you kept all of Blue Cross's claims under both your direct  
5 jurisdiction under ERISA and then supplemental jurisdiction as  
6 to the tiny sliver of claims that are State claims, all of the  
7 Blue Cross litigation, our depositions of their people to talk  
8 about what they knew and didn't know, looking at the plan  
9 language, would all be decided together. And so, I was  
10 pointing that out solely to say that in your shoes you might  
11 consider the idea that if you kept the cases, the whole Blue  
12 Cross case, almost all of it would be in front of you anyway,  
13 and all you would be remanding would be a small number of  
14 claims.

15 THE COURT: All right. Let me maybe start with what I  
16 perceive to be a practical issue and then deal otherwise. Is  
17 there any problem with the discovery, the products of discovery  
18 that are developed now in the present context being applicable  
19 to the Louisiana case if it were in Louisiana?

20 MR. BENNETT: The discovery we are doing now in  
21 Federal Court would apply if it went back.

22 THE COURT: That is agreeable to all of the parties?

23 MR. DUGAN: Yes, your Honor, absolutely.

24 THE COURT: So, now, let me, because I am not sure I  
25 fully understand what the implications of subrogation -- I have

1 said subrogation and stand in the shoes, all of that -- I am  
2 not sure I really understand what the implications are going to  
3 be of this. Let's assume that all of these private people are  
4 covered by the settlement or some large portion of it. Are  
5 they, are they not?

6 MR. BENNETT: Covered by who?

7 THE COURT: The settlement in this case.

8 MR. BENNETT: Oh, I understand. So, the difference,  
9 as I look at this, if you take a diagram of the two cases, you  
10 would start with the proposition that if an injured party who  
11 filed a suit was covered by Blue Cross Blue Shield of  
12 Louisiana, they are in the settlement or deciding whether to be  
13 in the settlement or not. However, the breadth of the  
14 Louisiana Blue Cross Blue Shield case goes much beyond that,  
15 because they want to recover what they paid for every treatment  
16 ever given to those patients with GranuFlo, and so when you  
17 think about subrogation, you would say the Louisiana case is  
18 actually -- Blue Cross's case is actually including people who  
19 were never harmed and who are on dialysis today and whose  
20 doctor has prescribed them GranuFlo the whole time and for whom  
21 Blue Cross is paying for treatments with GranuFlo today. They  
22 are suing to recover all of those payments. So, that's the  
23 breadth of that case.

24 Then, if you go over to the people who are injured and  
25 who may be plaintiffs from Louisiana, they could be Louisiana

1 Medicaid patients, in which case they are in the State's case.  
2 They could be Louisiana Blue Cross.

3 THE COURT: Well, but what happens to the State's case  
4 as to those individuals?

5 MR. BENNETT: See, we haven't gotten to that point  
6 yet, because where the overlap would be is if a portion of the  
7 settlement or the portion of the case that was brought by the  
8 plaintiffs included reimbursement for medical expenses. So,  
9 the issue there is there would be some form of double recovery,  
10 because they're suing to recover money in the private plaintiff  
11 case and they are settling and getting paid that money.  
12 Theoretically, then, they will owe under a lien or subrogation  
13 obligations to pay some of that money back to Blue Cross or to  
14 the State because they paid for the treatments.

15 However, these cases that they are bringing aren't  
16 related -- you think of a typical subrogation case, you would  
17 say you get hurt and then you go to the hospital, and you get  
18 treated, and the money that's at issue is the subsequent  
19 treatment after the injury, and if you get recovery for that  
20 you may have to pay it back to your insurance carrier. Here,  
21 the carrier, Blue Cross, is actually going after us for the  
22 cost of the underlying treatments, whether or not there was an  
23 injury at all in it, and so it's extremely broad. And that's  
24 how we get to their demands for billions of dollars from us, by  
25 saying it's every treatment over 10 years no matter what,

1 whether anybody was hurt or not. So, I guess the short answer  
2 to your question would be there is a subset of plaintiffs who  
3 have sued us where some component of their damages may overlap  
4 with the extremely broad damages that are being sought by the  
5 State Medicaid Program and by Blue Cross.

6 THE COURT: Apart from Mississippi, is that being done  
7 in any other cases?

8 MR. BENNETT: No. The only two people who have  
9 brought a claim against us for this is Louisiana and  
10 Mississippi. No other insurance carrier has done it, no other  
11 Blue Cross Blue Shield carrier has done it, no other state  
12 Medicaid Program has done it.

13 THE COURT: So, now back to the division that I talked  
14 about earlier. Put to one side supplemental jurisdiction for a  
15 moment. Isn't it the case that if the Blue Cross case were  
16 only whatever is involved, 3 percent, you say, but whatever is  
17 involved in the Government plan or Government program, and it  
18 is standing alone, they did not plead it differently, that that  
19 would be in the State Court, stay in the State Court?

20 MR. BENNETT: The main difference between the State  
21 case and that case would be, if it were brought by its lonesome  
22 we would probably have diversity.

23 THE COURT: If it were brought by?

24 MR. BENNETT: By without joining with the State.

25 The reason why we were in State Court with this in the

1 first place, and I assume why Blue Cross chose to try to join  
2 an existing case, versus filing their own, is that we are a  
3 Boston-based company and, therefore, we would have removed that  
4 under diversity.

5 THE COURT: Well, then, why don't you have  
6 jurisdiction on the basis of diversity generally as to Blue  
7 Cross?

8 MR. BENNETT: Well, they would say they sued 99 of our  
9 clinics, and we would go through the same exercise that we went  
10 through early on and whether our clinics are proper defendants  
11 or not.

12 THE COURT: Right.

13 MR. BENNETT: So, the problem with us for diversity  
14 was all defendants and all plaintiffs and intervenors being in  
15 a different category.

16 THE COURT: But that is not impossible, and it strikes  
17 me that maybe there are a couple of Massachusetts clinics  
18 involved in this with diversity spoilers? Are there any  
19 diversity spoilers?

20 MR. BENNETT: No. The 99 clinics they named are all  
21 Louisiana clinics.

22 THE COURT: So?

23 MR. BENNETT: So, if Blue Cross sued us by itself in a  
24 plaintiff Blue Cross versus defendant Fresenius and its clinics  
25 we would remove that under diversity grounds as well. We

1       couldn't remove under diversity grounds in this case because  
2       all plaintiffs have to be diverse from all defendants as  
3       citizens, and the state who was the plaintiff still was not a  
4       citizen.

5               THE COURT: All right. So, it has to be a federal  
6       question for you to get here, federal question jurisdiction for  
7       you to get here?

8               MR. BENNETT: The only difference would be if you were  
9       to say, okay, I am going to do what it sounds like you may do,  
10       which is sever out each type of these claims and treat them as  
11       totally separate actions, we could do what we have done to have  
12       other cases here, which is to say, "Okay, I've severed out Blue  
13       Cross from the State. I'm going to denominate, realign the  
14       parties. Blue Cross is plaintiff, you are defendants." And  
15       then we would have diversity jurisdiction over that case as  
16       reconfigured by this Court for all those claims.

17              THE COURT: I would not have to do that for purposes  
18       of making a determination for ERISA preemption?

19              MR. BENNETT: You would not have to do that for  
20       purposes of ERISA preemption. ERISA preemption gives us a  
21       jurisdiction for however much of this case you believe is  
22       appropriate under Rule 21 and supplemental jurisdiction for you  
23       to keep. We have an absolute -- I guess I would say we have a  
24       right to be here as to these private claims. We ask you to  
25       keep everybody else here. If you severed out and realigned the

1 parties as we have talked about, we would also have a right  
2 under diversity to be here as to Blue Cross.

3 THE COURT: Now, let me talk to you -- and I will,  
4 obviously, talk to the Attorney General's representative about  
5 this as well -- but about the question whether or not, given  
6 the unique circumstances of a sovereign here, supplemental  
7 jurisdiction is appropriate.

8 MR. BENNETT: Sure. I think that this would come down  
9 to -- we would place it into a more traditional camp of  
10 involuntary/voluntary type looking at it, which is to say the  
11 sovereign was down there, they had their case. We weren't  
12 removing it, we were going to trial, and we thought we should  
13 get more discovery, but we were down there fighting it out.  
14 Then there comes a time, literally a month before trial, when  
15 we're having a hearing about intervening to add a party, to add  
16 I don't know how much to it, and at that point in time if the  
17 State wanted the case that you had given them and said, "You  
18 can be in State Court on that," and your decision says the law  
19 requires, that would have been fine. But what they chose to do  
20 right before trial is to say, "We consent to a whole  
21 interjection of a whole bunch of new things." They say, "We're  
22 not opposing it, we don't object to it." Their lawyer stood up  
23 in court on the 12th of March or of February and said, "Your  
24 Honor, we're not opposing this," and let these cases be  
25 brought. Maybe they thought we wouldn't notice that it was an

1 ERISA case or whatever it was, but it's a voluntary/involuntary  
2 rule. If it had been involuntarily created Federal  
3 jurisdiction, that would be one thing, but they consented to  
4 this, and when they consented to it they consented to the ERISA  
5 cases --

6 THE COURT: It is probably unfair to permit you to  
7 speculate in front of me, but I am going to permit you to  
8 speculate in front of me. What is going on here?

9 MR. BENNETT: I will tell you, I will say what my take  
10 was, that February 29th we received -- 22nd to 29th, two weeks  
11 before trial, we received 899,000 pages of new discovery from  
12 the State with a trial two weeks from then. We asked to take  
13 depositions about that, and the Court said, "No, you can't."  
14 We asked for a continuance, and the Court said, "No, you  
15 can't."

16 At the same time then Blue Cross Blue Shield comes in  
17 and says, "Hey, here's our case. We have," what they are  
18 telling you in the pleadings, "hundreds of millions of dollars  
19 more, and we want to go forward without a witness list, an  
20 exhibit list or anything like that." It was being put on us  
21 just two weeks before trial, and I think that you can --

22 THE COURT: Well, that is the description, but what is  
23 the purpose? What is the motive? What is going on?

24 MR. BENNETT: Maybe that we would decide that we can't  
25 do it and that we had to settle it.



1 THE COURT: So, you would roll?

2 MR. BENNETT: Exactly, and that we had no choice.

3 THE COURT: So, let me understand from Louisiana. Why  
4 did you let them?

5 MR. SHAUL: Your Honor, we didn't have the authority  
6 to allow them in. That was the Court's decision.

7 THE COURT: Well, no, it is. I am gratified to hear  
8 that such things are the Court's decision, but frequently I  
9 have litigants who tell me that they have a position that I  
10 ought to consider, and, as I understand it, you said, "We don't  
11 have a position. You want to let them in, they can come in.  
12 You do not want to let them in, they can stay out."

13 MR. SHAUL: That's accurate, your Honor, we didn't  
14 have a position.

15 THE COURT: Why not? Why not? You are coming on to  
16 trial. This makes it more complex. Trial is up in two weeks.  
17 Why didn't you object?

18 MR. SHAUL: The sovereign routinely practices in front  
19 of this -- in this jurisdiction, and it was our position that  
20 the Court was going to manage its docket however it wanted to  
21 manage its docket. There were a lot of issues going on. The  
22 defendant outlined some of those issues. The Court wasn't  
23 happy with us or the defendants, and we weren't going to go in  
24 there and take a position and start telling the Court how it  
25 was going to manage its docket. We simply took no position.

1 We didn't argue one way are the other.

2 THE COURT: I understand that. I wish more litigants  
3 were like you, not taking a position about the way in which the  
4 Court manages its docket, but cultural differences, perhaps.

5 Now down to the question of supplemental jurisdiction.  
6 Let's assume that I take the position that there's supplemental  
7 jurisdiction here, not the question of whether I should  
8 exercise it, but just whether or not. There is no question  
9 that you would be subject to supplemental jurisdiction, is  
10 there, as a matter of law?

11 MR. SHAUL: We don't think we would be subject to  
12 supplemental jurisdiction. First off, I think the defendants  
13 can't advocate that, because I think that's inconsistent with  
14 the positions they've taken with the trial court, the trial  
15 court in Louisiana, the Appellate Court of Louisiana and the  
16 Supreme Court of Louisiana saying that these cases, that the  
17 State's case and Blue Cross Blue Shield's case simply cannot be  
18 litigated together. They've taken that position.

19 THE COURT: If that is a judicial estoppel argument, I  
20 am not persuaded by it. Now I am back to the question of the  
21 authority of the Court, faced with jurisdiction as to one  
22 portion of the case or against one of the litigants here.

23 MR. SHAUL: We think there is a difference in the  
24 operative facts, although it all stems from GranuFlo. We think  
25 if you look at the State's case, the State, first off, is a

1 Medicaid agency, and so, in order to get the jury to understand  
2 our case, we have to explain to them the Medicaid framework,  
3 how it's a joint Federal program, the sources of funding, why  
4 we are doing what we are doing. That is wholly separate than  
5 Blue Cross Blue Shield.

6 THE COURT: Weren't you going to do that with Blue  
7 Cross before?

8 MR. SHAUL: We were going to have to do that, your  
9 Honor.

10 THE COURT: Right. That is not going to take very  
11 long to do that. I just want to be clear that there is not a  
12 question about the exercise of supplemental jurisdiction if  
13 there is in this case some federal question or basis for  
14 Federal jurisdiction, that is, supplemental jurisdiction over  
15 the noncitizen that is a state.

16 MR. SHAUL: We don't believe supplemental jurisdiction  
17 exists because we don't believe -- we believe that there are  
18 more operative facts associated with -- if the Court is not  
19 persuaded with that, then, your Honor, then the Court would  
20 have discretion then, if it fell to all those parameters, to  
21 exercise --

22 THE COURT: Now, let me take it just one more step,  
23 which is to say cannibalizing this case is not a particularly  
24 attractive way of dealing with it. I suppose you would say,  
25 "That's right, send the whole thing back to Louisiana," but

1 let's assume that I am not necessarily prepared to do that. I  
2 look at it as a practical sort of thing, how do I facilitate  
3 the resolution of conflicts among the parties here in fair  
4 fashion and one that is consistent with Rule 1 of the *Federal*  
5 *Rules of Civil Procedure* to focus on lack of expense or  
6 minimizing expense? Why wouldn't I just keep this case, then,  
7 for those purposes? Not that I am looking for more cases to  
8 deal with, but I have got this collection of parties. They  
9 have got disputes that are in the same ballpark, involve lots  
10 of the same sorts of issues. Why not keep it here?

11 MR. SHAUL: A couple of reasons, your Honor. First  
12 off, the State of Louisiana and the defendants have been  
13 litigating for over a year and a half in State Court. And the  
14 Court's made rulings on a lot of those issues that would have  
15 to be revisited.

16 THE COURT: Let me just pause on that. I'm not sure  
17 that I would revisit. My general view when I get transferred  
18 cases is somebody has got to make a really good argument to get  
19 me to revisit the law of the case. That some judge makes a  
20 ruling about interrogatories, life is short, I have other  
21 things to do. Chances are I am not going to revisit  
22 interrogatories.

23 MR. SHAUL: That's comforting, your Honor, but I'm  
24 sure defendants would ask you to revisit those, and we would  
25 certainly have to brief that as a matter of course.

1 THE COURT: Maybe. I might be helpful in that regard  
2 about devoting your time to that.

3 MR. SHAUL: A followup argument, your Honor, is this  
4 Court's opinion in the Motion to Remand. It set out very  
5 detailed history about the removal statute. It cited First  
6 Circuit law that says the Federal Court is a court of limited  
7 jurisdiction, that there are issues of federalism and comity,  
8 and that when the sovereign is the party, that those are  
9 actually heightened concerns.

10 THE COURT: Right. That is why I asked the question,  
11 started out with the question of am I without power altogether  
12 when I am dealing with a sovereign? I do not think I am. The  
13 decision is inflected by these important federalism questions,  
14 but I am not sure that under proper circumstances, whether this  
15 is it, that I am proscribed, I do not think I am, from  
16 exercising supplemental jurisdiction even over a sovereign.

17 MR. SHAUL: And I think I have argued -- I've answered  
18 that. If the Court is satisfied that it has all those  
19 issues -- we would disagree with that, but if the Court is  
20 satisfied it would, in fact, have supplemental jurisdiction,  
21 but we would argue that that is not a good idea because of the  
22 unique nature of the case, because of the issues of federalism,  
23 because of the issues of comity.

24 What happened in the State Court, your Honor, the  
25 Court put us on a very aggressive trial schedule over a year.

1 We had a January 2016 trial date. We jointly agreed to  
2 continue that, and we had to work to get the Judge to move that  
3 date. And so, we were working well together. There is no  
4 reason why we should, given all that cooperation that was going  
5 on between the parties in the State Court proceeding, to now  
6 uproot all that, forget all that, and then have to bring us to  
7 Boston to redo a lot of that work. I think the best way to get  
8 it resolved is to send it back, your Honor.

9 THE COURT: Well, you say, "Redo all that work," and  
10 that goes back to the earlier question I raised, which is, so  
11 long as it is here now, while I am exercising jurisdiction to  
12 determine whether or not I have jurisdiction, I do not know why  
13 discovery cannot continue, the case cannot be put in a posture  
14 to be tried by whoever is going to end up trying the case.

15 MR. SHAUL: I guess I can't think of a reason why,  
16 given the status of the case in State Court, when we were  
17 working towards a resolution, we were seven days out from a  
18 trial date, why we would come to Boston. I can't think of the  
19 reverse.

20 THE COURT: Because the Judicial Panel for  
21 Multidistrict Litigation told you you had to. Do not look  
22 back, it could be gaining on you. And so, what you want to do  
23 is deal with it as it stands right now, which is, you have got  
24 a dispute. You want to get the dispute resolved. There are  
25 some loose ends, I guess, about discovery, but maybe there is

1 more than that. So, I foster that.

2 MR. SHAUL: You have the State employees that are in  
3 Louisiana, you have all the defendants' clinics which are  
4 relevant -- they are not just nominally in there. The records  
5 come out of there, those witnesses come out of there.

6 Convenience to a lot of those people I think dictates that we  
7 should try the case in Louisiana. There are a lot of people  
8 who would have to be uprooted to come to Boston.

9 THE COURT: I understand that. Let me, then, deal  
10 with the separation of the private claim issues, put to one  
11 side whether or not ERISA requires that. Let's assume that it  
12 does, and I am thinking about that. Do you have any particular  
13 view about severance?

14 MR. SHAUL: Well, I think the Court indicated at the  
15 beginning of this hearing that it may be considering severing.  
16 I think that is an acceptable result under the law. I think  
17 the law allows the Court --

18 THE COURT: Is this consistent with your pattern of  
19 letting the Court do whatever the hell it feels like doing with  
20 its docket?

21 (Laughter)

22 MR. SHAUL: I'm agreeing with the Court that that  
23 would be an acceptable resolution under the law, and I think  
24 the State has argued that consistently in our brief to the  
25 District Court in Louisiana originally and in the second

1 removal, and we're sticking with that position.

2 THE COURT: Let me raise this, because I want to go  
3 back and look at the materials, unless the parties have  
4 something more that they want to say, which is, I do not want  
5 to have lost time in this case. If there is discovery that is  
6 outstanding that the parties are going through, I want it to  
7 continue. I do not want a pause here. Any problem with that  
8 on the part of any of the parties?

9 MR. SHAUL: I think the discovery deadline has passed  
10 in the State Court proceeding, and I am not aware of some type  
11 of extension. I could be wrong, and certainly the defendant  
12 can speak to it if there was some type of agreement that I am  
13 not aware of to continue to do discovery.

14 MR. BENNETT: Here is where discovery stands with  
15 regard to both of them: The State of Louisiana was ordered to  
16 answer certain interrogatories towards the end of all of that,  
17 and they have not answered that.

18 THE COURT: They have not?

19 MR. BENNETT: Have not. In addition, there are  
20 inspection records that we believe to be significant that the  
21 Judge said are discoverable, but that we were supposed to go to  
22 Medicare to get them. That ruling meant that they had to be  
23 taken out of the State's office and shipped to Baltimore to be  
24 reviewed, and we had to make a FOIA request because the Federal  
25 Government is not a party and this isn't in Federal Court. So,



1 that's working its way through. Those are the two things that  
2 were open in State Court at the time the case was --

3 THE COURT: You said something about some 30(b)(6).

4 MR. BENNETT: So, that relates to the Blue Cross Blue  
5 Shield --

6 THE COURT: So, let me just pause so I can do it step  
7 by step. With respect to the State of Louisiana, those are the  
8 only two things that are outstanding for purposes of discovery?

9 MR. SHAUL: I would not have anything to add to that.  
10 I would say that those Federal records that we're talking about  
11 in Medicare, as this Court understands, Medicaid is a joint  
12 Federal-State Program. The majority of the money is Federal  
13 money. The State can't just give Medicare's records.

14 THE COURT: I have no view about that. I just want to  
15 be sure that I do not send this back, if I do, with loose ends  
16 that could have been attended to for people to say, "Oh, we  
17 didn't know what to do while we got lost in Boston."

18 MR. SHAUL: I'm not aware of any additional  
19 outstanding discovery that wasn't just mentioned.

20 MR. BENNETT: Your Honor, we have a CMO, of course,  
21 that has no discovery except in the bellwethers, and so if we  
22 stayed here while you were thinking about this and doing all of  
23 this, we would be happy to work with the State to finish those  
24 up while we're in Federal Court.

25 THE COURT: Let me just say that that is what I would

1 like you to do here, while I am thinking about this, get  
2 whatever was contemplated by the State Court Judge done so that  
3 if I sent this back then it is ready to go; you have no loose  
4 end to discovery or anything like that with the sovereign.

5 MR. SHAUL: Yes, your Honor. Just so I'm clear, the  
6 State is to do what the State Court Judge ordered us to do,  
7 nothing in addition.

8 THE COURT: Right.

9 MR. SHAUL: Okay.

10 THE COURT: I think that is correct. I am not making  
11 new initiatives, as far as that is concerned. If the case  
12 stayed here, I might, but I am not doing that in this setting.

13 Now, turning to Blue Cross Blue Shield.

14 MR. BENNETT: Certainly. There was no discovery that  
15 took place in State Court, and so all of the discovery has  
16 happened here. I would say that we served interrogatories and  
17 document requests as usual. We didn't think we got everything  
18 we were entitled to at first. They have been supplementing.  
19 We had a long meet and confer. Mr. Dugan's client had flooding  
20 issues, and so he's asked for a little more time to get back to  
21 us.

22 I think that what we could say is that we will  
23 continue working on discovery with Blue Cross, who we think  
24 will be in Federal Court no matter what, at least as to a big  
25 part of this, starting today, as far as we are concerned.

1 THE COURT: Any problem with that, Mr. Dugan?

2 MR. DUGAN: No, your Honor.

3 THE COURT: So, continue to work cooperatively to get  
4 this done while I think about this a bit more.

5 Now let me deal with what I assume is the reason that  
6 plaintiffs' counsel are sitting behind you at the table.

7 MR. DUGAN: Your Honor, can I just make one more final  
8 point?

9 THE COURT: Sure.

10 MR. DUGAN: When we were investigating this case and  
11 trying to decide where we were going to file it, the State's  
12 case is pending in Baton Rouge, Louisiana in the Nineteenth  
13 Judicial District. That is also the headquarters of Blue Cross  
14 of Louisiana. So, our options were, number one, file our own  
15 petition in the same District that the AG case is in, Blue  
16 Cross of Louisiana, a Louisiana corporation, and suing 99 other  
17 Louisiana corporations -- Mr. Bennett can say what he wants  
18 about diversity. We think we would have very strong arguments  
19 that the case would have gone back down on diversity purposes  
20 for lack of diversity.

21 So, then we looked at, if we file our own petition,  
22 then there is a chance that it would be a related case and the  
23 Clerk of that office would send it as a related case to the  
24 existing AG case as it was. So, then we looked at our second  
25 option, which was intervening in the AG case, and we have had a

1 contract with the Office of Group Benefits in the State of  
2 Louisiana for about 12 years. It's very commonplace to  
3 exercise those rights to go get money back that we helped in  
4 the administration of those claims.

5 So, for us for judicial efficiency we thought it made  
6 more sense to intervene in that case with the same State  
7 Louisiana causes of action, and once again all the general  
8 liability is the same. The only thing different would have  
9 been the damages model. And so, our envisioning of a trial is  
10 that we would participate and help on the general liability  
11 component of it. At the damages phase the AG would put on  
12 their damages expert to put on their damages, Louisiana would  
13 put on their expert for damages, and we thought that it was  
14 going to be a nice, clean, efficient way to deal with the  
15 issue.

16 And, once again, when the intervention was granted it  
17 took a month to go all the way up to the Louisiana Supreme  
18 Court. At no time did they ever remove the case. That's why a  
19 week before trial this was really a last gasp and it really  
20 came out of left field when we got the removal papers. When I  
21 first read the removal papers, this preemption under ERISA, I  
22 still can't get my head around it. And, obviously, you're a  
23 lot smarter than I am, Judge, and maybe you'll fashion  
24 something, but --

25 THE COURT: You are showing bad judgment if you

1 believe that, but put that to one side.

2 MR. DUGAN: Yes, sir.

3 THE COURT: I do ask these questions about what were  
4 people thinking about. I think I understand what you were  
5 thinking about in this case, and there are certain perverse  
6 consequences for the defendants as well. I am trying to  
7 understand that for purposes of fashioning a practical  
8 resolution as well as a legal resolution of this matter. So, I  
9 am treating this as a legal issue to be dealt with in a  
10 practical way, and so I am going to take it under advisement  
11 for that.

12 MR. DUGAN: And the really last point, Judge, is that  
13 this has been done before. In the Minnesota tobacco cases a  
14 case was tried on behalf of Minnesota Attorney General and Blue  
15 Cross of Minnesota in State Court in Minnesota, so there is  
16 precedent. That was in the late '90s, your Honor.

17 THE COURT: And is there some opinion or something  
18 that would help me?

19 MR. DUGAN: Absolutely, your Honor. I'll send it to  
20 you.

21 THE COURT: If you just do what --

22 MR. DUGAN: Supplemental authority, a Notice of  
23 Supplemental Authority.

24 THE COURT: A 28(j) is what they call it, I think, in  
25 the Court of Appeals, but just give me the citation.

1 MR. DUGAN: You will have it today, your Honor. Thank  
2 you.

3 THE COURT: Good. Thank you.

4 So, this is addressed, I think, to plaintiff's  
5 counsel, the Plaintiffs' Executive Committee. Alan Dershowitz  
6 said that his grandmother every time an issue was raised, like  
7 were the Red Sox going to win the Pennant, would say, "So, what  
8 does it mean to the Jews?" So, my question for you is what  
9 does this mean to plaintiffs and the settlement kind of  
10 process? Is this simply beyond the scope of your concern?

11 MR. TARRICONE: Well, I think so. The only cases that  
12 are on the list of cases that are included in the settlement  
13 will be in the settlement. So, if there are some individuals  
14 who are somehow in this class, they would --

15 THE COURT: So, assuming, as I do, on reliable  
16 authority that issues of liens, Medicare and Medicaid liens,  
17 are a factor in settlement, does that have any effect here, as  
18 you see it?

19 MR. TARRICONE: I don't think so. I would like to  
20 think about it some more, but I don't see it.

21 THE COURT: All right. And, if anything, it is for  
22 the defendants, Fresenius, simply a way of saying, "We have  
23 already paid those benefits," or, "There is no subrogation  
24 because the claim was extinguished in the settlement," is that  
25 it, if you have got Louisiana individual plaintiffs?

1 MR. BENNETT: I guess if we assume that -- we haven't  
2 thought about this at all, so I'm not in a position to take a  
3 position on it, and we haven't actually at all contemplated the  
4 idea that we would have paid money on these other cases, so we  
5 haven't done that either. We can talk about it and get back to  
6 the Court.

7 THE COURT: Well, I may be interested in pursuing it.  
8 Right now I think I have got a better sense of the landscape  
9 than I had before, and I will deal with it as a legal matter.

10 MR. TARRICONE: Mr. Gotz reminded me that on the list  
11 of cases the Louisiana lawsuit is on there, so with that  
12 exception. I mean, as far as the individual -- our view would  
13 be only individual plaintiffs, that is, not the State, if they  
14 are on that list those cases are in the settlement, but the  
15 Louisiana case is not part of the settlement.

16 THE COURT: Is the term of art in Louisiana the "AG  
17 case"? I have been referring to it as a "sovereign case." But  
18 you call it an "AG case"? Is that the way it works? So, the  
19 AG case is out.

20 MR. TARRICONE: Yes, that's correct, your Honor.

21 THE COURT: It is not part of this whole process, but  
22 it may affect recovering damages to some degree if it is  
23 duplicative here.

24 MR. TARRICONE: For those individual plaintiffs that  
25 are on this list.

1           THE COURT: Right. All right. So, I will take this  
2 under advisement and try to deal with it as promptly as I can.  
3 I urge you to try to work it out so that if and when I send  
4 this back to the Judge in the Nineteenth District that he does  
5 not say, "Why does he send me all his dirty laundry?" You will  
6 have it cleaned and pressed and ready to go. All right?

7           MR. SHAUL: Thank you, your Honor.

8           THE CLERK: All rise.

9           (The Honorable Court exited the courtroom at 3:45 p.m.)

10           (WHEREUPON, the proceedings adjourned at 3:45 p.m.)

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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matters of *In Re: Fresenius GranuFlo Litigation*, No.1:13-md-02428-DPW, and *State of Louisiana v. Fresenius*, No. 1:16-cv-11035-DPW.

Date: 9/14/16

/s/ Brenda K. Hancock  
Brenda K. Hancock, RMR, CRR  
Official Court Reporter