

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCT MDL 1355
LIABILITY LITIGATION Section "L"
New Orleans, Louisiana
~~Tuesday, October 15, 2002~~
~~8:30 a.m.~~ Jan 29, 2004

TRANSCRIPT OF STATUS CONFERENCE
HEARD BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(STATUS CONFERENCE)

(THURSDAY, JANUARY 29, 2004)

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5 THE COURT: Be seated, please. Good morning, ladies
6 and gentlemen. We're here for the monthly meeting of the MDL
7 committees. I am happy to see the states are represented
8 today, as well as all of the other litigants. Let me hear from
9 the parties.

10 MR. HERMAN: May it please the court, good morning,
11 your Honor, and learned counsel, I'm Russ Herman for the PSC,
12 MDL-1355.

13 MR. IRWIN: And Jim Irwin for the defendants.

14 THE COURT: Let me turn to the joint report that I've
15 been presented, the first several items are Update Rolling
16 Document Production, State Liaison Counsel, Patient Profile
17 Form and Service List of Attorneys.

18 MR. HERMAN: Your Honor, there is nothing new as to
19 those issues, and under 3 there is a Patient Profile Form
20 report from the defendants, and with your Honor's permission
21 I'd like to move to Item No. 5, the motion on class cert.

22 THE COURT: Before we do that, Item 2 - State Liaison
23 Counsel, anything from the state that you'd like to discuss
24 with the court?

25 MR. ARSENAULT: No, your Honor, there is nothing new to

1 report.

2 MR. IRWIN: Your Honor, I have distributed the service
3 list, Item 4 on the agenda of the report.

4 THE COURT: Okay.

5 MR. HERMAN: Your Honor, with respect to the motion on
6 class certification, the briefing is done, we're assembling the
7 documents to be attached to the motion. There is a technical
8 problem with VeriLaw, and we hope to have all of that resolved
9 within the next ten days and the motion for class certification
10 filed.

11 THE COURT: Mr. Arsenault, are you going to get a copy
12 of that motion? Are you in this loop?

13 MR. ARSENAULT: We would like to, your Honor, yes.

14 MR. HERMAN: We're going to put it on VeriLaw, your
15 Honor, so it can be accessed by all of the state attorneys who
16 have signed up.

17 THE COURT: I mention that particularly because that
18 may be something that is significant to the states, they ought
19 to either have some input in or at least monitor it closely.

20 Item 6.

21 MR. HERMAN: Your Honor, with respect to Item XI,
22 Request For Production of Documents, we've had discussions with
23 counsel opposite this morning, and we're going to meet and come
24 up with a way which we hope will expedite the determinations as
25 to whether these documents meet admissibility tests without the

1 necessity of 30(b)(6) depositions, but reserving plaintiffs'
2 rights to take the 30(b)(6) depositions. As part of the trial
3 package the PLC is directed to prepare, it's necessary that
4 there be some resolution.

5 THE COURT: Any comments?

6 MR. IRWIN: We agree with that. I will meet with
7 Mr. Davis, we will prepare binders and CD ROM of these
8 exhibits, brief blurb with respect to each exhibit. We think
9 your Honor will see patterns develop that will accommodate a
10 rather efficient way for you to review these documents. There
11 are 223 of them at issue now as far as we can tell.

12 THE COURT: Give them to me in ten days, I will review
13 them and get them back to you within a day or two with my
14 rulings.

15 MR. HERMAN: Your Honor, we have Item No. 7, continued
16 to make deposits, or defendants have made deposits in the
17 court's registry in accord with the court's prior orders
18 regarding settlement funds.

19 No mediations have taken place since we last met.

20 The DLC will furnish a list of trials which are
21 scheduled.

22 MR. IRWIN: That is correct.

23 THE COURT: How many of them are there scheduled?

24 MR. IRWIN: I do not know off the top of my head,
25 Judge, but we're pulling that together.

1 THE COURT: Are we talking about in this court?

2 MR. IRWIN: No, sir, it's around the country.

3 THE COURT: Throughout the country.

4 MR. IRWIN: There are none in this court pending right
5 now.

6 MR. HERMAN: Your Honor, we've continued to discuss
7 some form of global resolution. We do not have a global
8 resolution. A number of outstanding issues, but in accord with
9 your Honor's directive we've continued to have discussions. I
10 want to thank Mr. Irwin, Mr. Preuss and Mr. Champion for their
11 continuous attention in these matters, as well as Mr. Levin,
12 Mr. Zimmerman and Mr. Davis of my office.

13 And we'll keep talking, your Honor, as long as
14 we're directed to.

15 THE COURT: Yes. This is my feeling on it. This is
16 the first meeting of 2004, and this is the last year of this
17 case. I want to finish this case this year, either by sending
18 it back to the states or trying it here or resolving it here.
19 You need to know that.

20 Secondly, I recognize the delicacy of discussions
21 at this point in this case, and I have not involved myself up
22 until now in those negotiations, other than through the
23 appointment of a mediator and monitoring the matter in that
24 fashion. And the reason for that is not only the delicacy of
25 the discussions at this stage, but oftentimes it's been my

1 feeling, both as a lawyer and as a judge, that there are times
2 when the parties in the litigation have to be left to their own
3 discussions without any input from the court so that they can
4 evaluate and discuss the matter between and among themselves.
5 That has been done and now I am getting back into it, and I
6 want to either resolve this entire matter or resolve as many
7 cases as we can, try those that we can try, and remand the rest
8 to the states. But as I have said, we've got to move it this
9 year and everybody needs to know that.

10 MR. HERMAN: Your Honor, page 4 of the joint submission
11 under XIII, defendants have persisted in their contention that
12 your Daubert rulings ought to have global application rather
13 than on individual cases. Of course the PSC opposes such
14 notion based upon differences in various federal circuits and
15 in various federal district courts, also as regards issues of
16 state law applying where cases may be remanded and upon the
17 changing nature of the science. We've had no further
18 discussions regarding that issue. I think I fairly stated the
19 position.

20 MR. IRWIN: I think that's correct, your Honor. Our
21 view is that this is not a unique circumstance, that the
22 application of Daubert on an MDL wide basis is not unusual. We
23 have postponed those discussions recently to address other
24 matters, and it remains to be seen when and how we will resume
25 discussions about that. But I agree with Mr. Herman's comments

1 about what we have discussed in the past on that issue.

2 THE COURT: All right. Well, we can bring that to a
3 head before the case gets away from me and I'll give you my
4 view of it one way or the other.

5 MR. HERMAN: Yes, your Honor. We still have not agreed
6 to a stipulation for use at trial of depositions in state or
7 federal courts, but we certainly either have to have a
8 stipulation or a ruling from the court on that issue. And it's
9 next on our list, that is the PSC's list, once the class cert
10 motions and briefs have been filed; and in order to get the
11 issue before the court and expedite matters, it would be our
12 intention either to have a stipulation in place or a motion and
13 brief in place so that it can be presented to your Honor at the
14 same time your Honor's ready to hear or consider the class cert
15 issue.

16 THE COURT: By the next monthly meeting, come up with
17 some timetable for both the global application of Daubert
18 motions and the stipulation. Meet and confer on that, come up
19 with some timetable, tell me whether you need a hearing, any
20 briefing schedules, and we'll put it on the calendar and we'll
21 forward those two areas.

22 MR. HERMAN: Your Honor, with regards to the CIS-NED-32
23 deposition, it's set in Amsterdam on February 19th and 20th. I
24 want to thank the defendants for moving it from Brussels to
25 Amsterdam. I'm not going to regret missing Mardi Gras because

1 I understand every day is Mardi Gras in Amsterdam. And we
2 intend to move forward with that at this point.

3 THE COURT: Will that deposition be on the internet?
4 Can anybody watch that? Will you all do that for this
5 deposition?

6 MR. HERMAN: We haven't had a request, and I hope we
7 don't because it will slow the deposition down and it will be
8 more expensive. But what we will do is we'll post -- unless
9 your Honor orders us to do, and of course we'll do it. If your
10 Honor would like us to do that, we'll make arrangements.

11 THE COURT: Well, I'm interested in the state's input
12 there, if you need it, if that's important to you, you have to
13 bring that to me so I can deal with it.

14 MR. ARSENAULT: We will make some calls, your Honor,
15 and advise the court if that's the case.

16 MR. HERMAN: Your Honor, I need to state this for the
17 record. If there are state attorneys with cases out there
18 whether they're set for trial or not, unless they've signed an
19 agreement with the PSC we are going to object to their
20 participation in any way. The idea that they can use this
21 MDL's work product and interrupt our deposition with questions
22 that they have for their own purposes is not something that the
23 PSC will look with favor on, so I ask your honor to consider
24 that.

25 THE COURT: You confer with counsel and see how it can

1 be resolved. If you can't resolve it, I'll resolve it.

2 MR. HERMAN: We discussed previously the motion for
3 summary judgment, it really is an alter ego type consideration
4 as to whether Johnson & Johnson will be liable for Janssen's
5 responsibility, if any, and vice versa. The defendant's
6 position is that there is no alter ego and that this is a
7 difficult issue. The plaintiffs believe it's a simple issue.

8 MR. IRWIN: We do believe it's a difficult issue.

9 THE COURT: Okay.

10 MR. HERMAN: Your Honor, with respect to the Bailey
11 motion, I am going to confirm that all of the plaintiff
12 attorneys involved in those cases have been served, and the PSC
13 takes no position with regard to that motion.

14 THE COURT: The court has been receiving some motions,
15 one motion is a Bailey motion, to dismiss various doctors as
16 named defendants in the case. Of course that has some impact
17 on the motions to remand.

18 I've also received a motion today from an
19 Assistant United States Attorney from Mississippi asking that
20 the United States be substituted for a particular doctor,
21 Dr. William L. Booker, in that particular case. So I'll be
22 calling upon counsel for both sides to respond to those
23 motions, if they have any response, to give me their input in
24 any event and then I will rule on it.

25 MR. HERMAN: Your Honor, in connection with the motion

1 which your Honor has just received from the U.S. Attorney in
2 Mississippi, the PSC will take no position with regard to that
3 motion.

4 MR. IRWIN: Your Honor, our position is we need to take
5 a look at it. We haven't seen it. It may be on my desk back
6 at the office. If it's not, we will get a hold of the attorney
7 and get a copy and we'll report to the court our position in
8 due course.

9 MR. HERMAN: Your Honor, I realize that we've moved
10 rapidly through the agenda for today. There are not a great
11 many issues, but Mr. Irwin may have some comments on some of
12 these matters. Jim, would you like to address the court?

13 MR. IRWIN: I appreciate the courtesy, Mr. Herman. We
14 were able to discuss many of these in chambers this morning,
15 and I am comfortable that they were properly presented by
16 Mr. Herman.

17 THE COURT: Anything further? Anything from the
18 states, anything from anyone in the audience? Do we have
19 another date?

20 MR. HERMAN: Your Honor, if I might -- excuse me, I'm
21 sorry. If I might, I would like to remind all of the attorneys
22 that are here in court that they should sign the sheet. I
23 think there may be one or two missing.

24 THE COURT: If you haven't signed the sheet, please
25 sign the sheet before we finish.

1 Thursday or Friday March 4th or 5th, what's a good
2 time for you all? The last week in February is Mardi Gras and
3 that's a difficult time for this city to get everybody in.

4 MR. IRWIN: We're not available that day, that whole
5 week. The next week, Judge?

6 THE COURT: How about the next week, March the 11th?
7 Is that Thursday? Thursday is a better day for everybody than
8 Friday, is that what I'm hearing? Okay. How about the 11th?

9 MR. HERMAN: Your Honor, I believe that Mr. Murray and
10 I may be otherwise engaged on that day; and if Mr. Levin is
11 available, I'll ask him to make a report.

12 MR. LEVIN: May I make a phone call? It seems to me I
13 got something yesterday for March 11th in Philly, so I can
14 probably do it the 10th or the 12th. Let me just call.

15 THE COURT: All right. In the event, anything more? I
16 would like to see the attorneys, liaison counsel for both sides
17 in the conference room. The court will stand in recess.

18 THE DEPUTY CLERK: Everyone rise.

19 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)
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3 REPORTER'S CERTIFICATE
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5 I, Karen A. Ibos, CCR, Official Court Reporter, United
6 States District Court, Eastern District of Louisiana, do hereby
7 certify that the foregoing is a true and correct transcript, to
8 the best of my ability and understanding, from the record of
9 the proceedings in the above-entitled and numbered matter.
10

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12 _____
13 Karen A. Ibos, CCR, RPR
14 Official Court Reporter
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