

ROUGH DRAFT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES CONTINUED:

BECNEL, LANDRY & BECNEL
BY: DANIEL E. BECNEL, JR., ESQ.
VIRGINIE RAMIREZ
106 West Seventh Street
Reserve, LA 70084-0508

BARRIOS, KINGS DORF & CASTEIX
BY: DAWN BARRIOS, ESQ.
701 Poydras Street, Suite 3650
New Orleans, LA 70119

GAUTHIER, DOWNING, LaBARRE, DEAN &
SULZER, L.L.P.
BY: JAMES R. DUGAN, ESQ.
3500 North Hullen Street
Metairie, LA 70002

LEVIN, FISHBEIN
BY: FRED S. LONGER, ESQ.
510 Walnut Street, Suite 500
Philadelphia, PA 19301

FOR DEFENDANTS:

IRWIN, FRITCHIE, URQUHART &
MOORE, L.L.C.
BY: JAMES B. IRWIN, ESQUIRE
MONIQUE GARSAUD, ESQUIRE
400 Poydras Street, Suite 2700
New Orleans, LA 70130

DRINKER, BIDDLE & SHANLEY
BY: THOMAS F. CAMPION, ESQ.
500 Campus Drive
Florham Park, NJ 07932-1047

PREUSS, SHANAGHER, ZVOLEFF & ZIMMER
BY: CHARLES F. PREUSS, ESQ.
225 Bush Street, 15th Floor

ROUGH DRAFT

San Francisco, CA 94104-4207

APPEARANCES CONTINUED:

FOR BLUE CROSS/
BLUE SHIELD:

WALLACE, JORDAN, RATLIFF & BRANDT
BY: KIMBERLY R. WEST, ESQ.
800 Shores Creek Parkway, Suite 400
Birmingham, AL 35209

OFFICIAL COURT REPORTER:

Karen A. Ibos, CCR, RPR
501 Magazine Street, Room 406
New Orleans, Louisiana 70130
(504) 589-7776

Proceedings recorded by mechanical stenography, transcript
produced by computer.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ROUGH DRAFT

P R O C E E D I N G S

(STATUS CONFERENCE)

(THURSDAY, APRIL 29, 2004)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Be seated, please. Good morning, ladies and gentlemen. Let's call the case.

THE DEPUTY CLERK: MDL No. 1355, in re: Propulsid Products Liability.

THE COURT: Counsel, make your appearance for the record, please.

MR. ZIMMERMAN: Charles Zimmerman, your Honor, Zimmerman, Reed for the Plaintiffs Steering Committee.

MR. DAVIS: James Dugan with Gauthier Downing for the PFC. Good morning, your Honor.

MR. IRWIN: Good morning. Judge, Jim Irwin for the defendants.

THE COURT: We're here today for the monthly status conference. As is usual, I met with liaison counsel in preparation for the conference and discussed many of the issues. I'll take them in order.

The first, the Update of Rolling Document Discovery and Electronic Document Production. Anything on that?

MR. IRWIN: Judge, since Mr. Herman is engaged in

ROUGH DRAFT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

combat this morning in other venues, it was agreed that I would attempt to take the lead in addressing the court on the agenda this morning.

As the joint report indicates, we have completed the document production. The only outstanding issue now is, on the table is our effort to craft a pretrial order providing for the suspension of some of the preservation measures that are in place. Those measures are obviously expensive. And since the materials that are being preserved now, the materials that are only generated at the very tail end of these issues, we felt and we don't think there is any substantial disagreement from the PFC, that a proper supplementation of Pretrial Order No. 10 would provide for an appropriate suspension of these preservation measures.

It's complicated though because preservation of these materials is a complicated process in terms of preserving electronic documents on a live server. So we are trying to make sure we get it correct and submit the language that would make sure we didn't make any mistakes and trip up inadvertently.

So we are working on that, Ken Conour is working on drafting that order and talking with Johnson & Johnson and Janssen about that.

THE COURT: That's a significant area because these are

ROUGH DRAFT

1
2 cases that may need to be tried in other jurisdictions or in
3 the states, they have an interest in this issue because it may
4 affect the material that they will be using or will have access
5 to. When can that be done?

6 MR. IRWIN: We are hoping that by the next conference,
7 which we understand is going to be on June 11th, that we will
8 be concluded with that. We will have language prepared and
9 submit it to the Plaintiffs Steering Committee for their
10 review, and they will obviously have to have it reviewed by
11 their electronics experts; and hopefully by June 11th we will
12 be able to submit a proposed amendment to Pretrial Order No.
13 10.

14 THE COURT: Let's do that then by the next status
15 conference, and give me a copy of it the day before when you
16 send me the agenda for the meeting so that I will have an
17 opportunity to look at it.

18 Next one is State Liaison Counsel. Anything from
19 the State Liaison Counsel?

20 MS. BARRIOS: Good morning, your Honor. Dawn Barrios
21 for the State Liaison Counsel. Considering your comments at
22 the last status conference about the state's possible
23 involvement in any resolution of the Propulsid cases in state
24 court, I believe the defendants are aware that we stand ready,
25 willing and able to help in any regard in that fashion.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ROUGH DRAFT

THE COURT: Okay. We have a couple of loose ends to tie up on this. I think once we get the momentum, we have a lot of momentum started, but once it's congealed a little bit I think that hopefully we'll be able to do something. It's important that you keep up with it though and keep an eye on it.

MS. BARRIOS: Yes, your Honor.

THE COURT: Anybody else from the state? Okay. What about Patient Profile Forms?

MR. IRWIN: Your Honor, we have agreed, as reported at the last conference and we will maintain at the present conference, that the defendants will suspend filing of PTO-9 motions with respect to outstanding patient profile forms pending the settlement process.

THE COURT: Let's not do that indefinitely because if you still have 800, 837 that are overdue, if they're not participating we'll dismiss them. From a political standpoint it may not be opportune at this time, but let's keep an eye on that.

MR. IRWIN: Yes, sir. Service List of Attorneys, we have the current list.

MR. ZIMMERMAN: Your Honor, on the overdue claim form issue. The PSC, of course, doesn't want to seek dismissal because they have the claim form option. And so we would like

ROUGH DRAFT

1
2 to at least be heard on that at the time it becomes ripe for
3 settlement.

4 THE COURT: I will, I just don't want to just not do
5 anything and not address it. I've tried to give two and three
6 and four notices to people who are interested in participating
7 in it. If they're not focused on it or not interested or not
8 responding, we can't let those folks pull down the rest of the
9 people.

10 MR. ZIMMERMAN: Right. But our communication has been
11 there is a claim form coming so don't do anything because
12 you're going to have the opportunity to file a claim form.

13 THE COURT: I understand, I see that point.

14 MR. IRWIN: It is your impression that a great number
15 of these outstanding PPF's are outstanding from lawyers and
16 persons who we expect will enroll. So we're encouraged by
17 that.

18 THE COURT: All right. The Motion on Class
19 Certification.

20 MR. IRWIN: Yes, your Honor. The PLC has indicated
21 that it is putting that on hold pending settlement process for
22 the time being. We intend to talk to them about that.

23 THE COURT: Okay. I won't address that, but I have a
24 note to myself to follow-up on that. So I won't do it at this
25 point, but I am interested in resolving that.

ROUGH DRAFT

1
2 As I see it with the class certification issue,
3 the issue's going to be whether or not there are class actions
4 in the various states. The question is whether I send them
5 back to the states to make that determination or whether I do
6 it here and send them back as a class action. So that's the
7 big issues that I will be dealing with.

8 Plaintiffs' and Defendants' Respective Requests
9 for Production of Documents.

10 MR. IRWIN: Your Honor, we discussed that a little bit
11 this morning in chambers in preparation for the conference this
12 morning, and it is our impression that the court prefers
13 instead of a brief from us that we submit merely a letter
14 listing the cases that were contained in the draft brief that
15 we sent to Plaintiffs' Steering Committee.

16 THE COURT: We're talking about 803(6) issues, and the
17 parties at the last conference were told that I'd like to get
18 from them a brief description of the document and the reason
19 why it should be admitted or should not be admitted. And I
20 mentioned to counsel that I would like to have that within a
21 week. Give me any case names or case citations that support
22 your position, that's fine. If I need any additional briefing
23 on it, I'll get to you and give you dates for it. So within
24 one week give me that material, please.

25 MR. ZIMMERMAN: We understand that and that was the

ROUGH DRAFT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

agreement made in chambers, your Honor. We just want to make sure that the letter brief is limited to cases as opposed to argument.

THE COURT: I think I know the cases, but give me a list of cases but if you have more I'll look at those. But I just see this -- I really don't need a brief at this time.

MR. IRWIN: Judge, the PSC is requesting if we can have two weeks on that instead of one week to submit the whole final package to you.

THE COURT: Any problem with that?

MR. IRWIN: We have no problem with that.

THE COURT: Okay. Two weeks then.

MR. IRWIN: Your Honor, the stipulation concerning the use of electronic data, this provides for the preservation of the hard drives on the sales reps laptops, and it was agreed that these would be preserved. And if in the event it was needed to retrieve information off of a hard drive, we agreed it would be done at the transfer to a lower court. We have agreed now on the final pretrial order to submit to your Honor for consideration, and we will get that to you by the close of business tomorrow.

THE COURT: Trust Accounts, anything from the plaintiff?

MR. IRWIN: I think we are current with respect to the

ROUGH DRAFT

1
2 issues surrounding the trust account.

3 MR. ZIMMERMAN: Yes. Your Honor, there has only been
4 one addition to the trust account in the interim, and there is
5 no further report on the trust account.

6 THE COURT: Eight is Declassified Documents.

7 MR. IRWIN: And by the same token, your Honor, there is
8 nothing to be reported on that. And I think that probably
9 could be removed from the agenda.

10 THE COURT: All right. Mediation is the next item.

11 MR. IRWIN: There have been no mediations, Judge,
12 pending the program, resolution program.

13 THE COURT: And Trial Schedule, any trials throughout
14 the country, any trials in other states?

15 MR. IRWIN: I believe that there has been one case
16 scheduled in Pennsylvania, perhaps Mr. Campion can address
17 that.

18 MR. CAMPION: There is one scheduled for trial at the
19 end of June, but the expectation is that it will be resolved.

20 THE COURT: What about the Indemnity Agreements?

21 MR. IRWIN: We continue to provide indemnity agreements
22 when appropriate and when requested. I do not believe we have
23 been requested to provide any since the last status conference,
24 but we keep that on the agenda so that we can update the court
25 with respect to any development.

ROUGH DRAFT

1
2 THE COURT: The End Game Committee, any report from
3 Mr. Zimmerman?

4 MR. ZIMMERMAN: Yes, your Honor. The term sheet is now
5 completed and will be posted, I believe, forthwith on the
6 court's web site. There are no further issues with regard to
7 the term sheet. The claim forms have been drafted, there are a
8 couple of language issues that we are going to meet today on,
9 and we have committed to the court that the claim forms will be
10 resolved within two weeks and submit it to your Honor.

11 To the extent they are not resolvable between the
12 parties in two weeks, we will submit them to your Honor in
13 opposing forms and your Honor will make the call on any issues
14 that separate us within the claim forms.

15 At that point everything is ready to go. All of
16 the administrative issues are still in play with regard to
17 selecting panels and administrative offices, but all of that is
18 also in the works; and I can report to the court that we are
19 quite a ways along in exchanging the names of panelists, who
20 will be on the medical panel, and selecting administrators, of
21 course we have that, we have Patrick Juneau, and then an
22 assistant to Mr. Juneau, that issue is still in play, but we
23 have been interviewing candidates.

24 So I guess I'm very pleased to report after some
25 delay that we are ready to go and within two weeks the claim

ROUGH DRAFT

1
2 forms will be finished, and we still are trying to hold to that
3 August deadline, although there may be some extension of that
4 enrollment date, if necessary, but we are holding to that date
5 at this point.

6 THE COURT: Okay. And let's get the term sheet to the
7 government through Tom Watson so that we can keep an eye on
8 Medicare claims and have that moved along at the same time so
9 that we're not dealing with any escrows or anything of that
10 sort that might delay or might derail the issue.

11 Let's see. We have two weeks for the claim forms.
12 Either agree on one or give me two and I'll have one from you
13 the next day.

14 What is the other issue that you were going to
15 deal with?

16 MR. IRWIN: I think, Judge, we agree that it's going to
17 be very helpful to the court, for the court's involvement. We
18 agree that this conference call that we scheduled I believe on
19 the 18th of May to report to the court on that is going to be
20 very help. We're optimistic we'll be able to get this thing
21 concluded by then.

22 In all respects, these must be something that we
23 necessarily agree upon, these forms and these term sheets are
24 part of a settlement that we must agree upon. And I thought it
25 was important for us to say that.

ROUGH DRAFT

1
2 THE COURT: I understand that. But my sense of this
3 and once it starts down this road, we've got some momentum
4 going and I'm afraid if we let that drop it's going, we're
5 going to have more problems. So we have to get a form out
6 there, we have to get something that's agreeable that people
7 can fill out and file. You have 800 and some odd now that are
8 delinquent, and the reason they're delinquent plaintiff says is
9 that they're waiting for forms. So we're going to have more
10 and more of that. And then there is a certain unrest that once
11 that starts that can present problems. So we need to do that.

12 MR. IRWIN: We agree with that, Judge, and we want to
13 resolve the issues surrounding the claim form. I believe we
14 have an agreement on the enrollment form, and we should be able
15 to have this re involved by the 18th of May.

16 THE COURT: Global Application of Daubert.

17 MR. IRWIN: We've agreed that we will suspend activity
18 on that pending the program, the implementation of the program.

19 And by the same token I believe that the parties
20 agree that they will suspend activity on motions to withdraw as
21 counsel of record pending the implementation of the program.

22 THE COURT: Stipulation and Pre-Trial Order Providing
23 for Use at Trial of Depositions in State Court and Federal
24 Court.

25 MR. IRWIN: We have exchanged drafts a couple of times,

ROUGH DRAFT

1
2 Judge. We got some comments back from the PSC I believe
3 yesterday or perhaps the day before. We need to talk about it,
4 they suggested a couple of changes that are still under
5 discussion.

6 THE COURT: That's something that the PSC's got to
7 touch base with the states on so that you can get it in a form
8 that they're satisfied with, too. It's one of the aspects that
9 we've been trying to do with this case, and hopefully it'll be
10 helpful toward the ultimate resolution of it. But that's where
11 you need to move.

12 CIS-NED-32 Depositions.

13 MR. IRWIN: As is described in the joint report, Judge,
14 the efforts to conduct that deposition have been canceled
15 pending the resolution of the program and that as was reported
16 last month.

17 And the same can be said with respect to the next
18 item on the agenda concerning the possible summary judgment
19 activity regarding parental liability, Johnson & Johnson
20 liability.

21 THE COURT: And then there is a Motion to Dismiss for
22 Failure to Exhaust Administrative Claims and Notice and Order
23 to Substitute the United States as a defendant. I think I
24 substituted the United States as a defendant. I haven't
25 received any response to the motion to dismiss, I'll,

ROUGH DRAFT

1
2 therefore, grant the motion to dismiss.

3 The next one is Stipulation and Order Appointing
4 Patrick Juneau as Special Master in Compliance with Rule 53.
5 There has been some amendment to Rule 53, and I sent it to
6 counsel to take a look at and give me a draft of that
7 stipulation.

8 MR. IRWIN: We have prepared a proposed order in
9 compliance with the amendment to Rule 53. It was submitted
10 yesterday, perhaps the day before, to the Plaintiffs' Steering
11 Committee. It is my impression that they are generally okay
12 with it, a couple of small tweaks that they want to talk to us
13 about this morning. We will be meeting on that this morning
14 and a couple of other things after the conference. We then
15 need, of course, to circulate it to Mr. Juneau and we will do
16 so promptly.

17 THE COURT: Let's get it to Mr. Juneau, and I hope to
18 have that from you in week.

19 MR. ZIMMERMAN: I am happy to report, your Honor, we
20 did review the draft. Only amendments that we're concerned
21 about are structural in terms of language and ways to make
22 things a little more clear, but we have no substantive
23 problems. We're going to get that to Mr. Juneau after we
24 exchange our draft with defense counsel, and we should have
25 that down the road and completed very quickly.

ROUGH DRAFT

1
2 THE COURT: Let's do that within a week. Blue
3 Cross/Blue Shield Request for Term Sheet.

4 MR. IRWIN: I met Ms. West this morning, she has very
5 kindly introduced herself to me.

6 MS. WEST: Kimberly West from Birmingham. Nice to meet
7 you, your Honor.

8 THE COURT: Good to see you, Ms. West.

9 MR. IRWIN: And I conveyed to her that the government
10 was also interested in access to the term sheet. We thought
11 that we would be able to provide that access. She agreed that
12 if the access was provided before the general publication of
13 the term sheet that they would afford all of the necessary
14 confidentiality. I told her we would be back in touch with her
15 very promptly about that.

16 THE COURT: I am concerned about confidentiality,
17 Ms. West. I've been putting the final drafts on the web site
18 rather than have it filtered through all sorts of places in
19 various stages so as to create misinformation or incomplete
20 information.

21 MS. WEST: If I could, your Honor. Certainly our plans
22 have no interest in the term sheet other than they have
23 reimbursement, subrogation rights. It's very close to the
24 government's claims.

25 THE COURT: Yes.

ROUGH DRAFT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. WEST: They seek access only to assure themselves that those have been appropriately dealt with, and if there are any issues to bring to the court's attention before the program or the party's attention and hopefully resolve them. Any appropriate confidentiality protective order, anything that your Honor would request, we're more than willing to agree to. We have no interest in making it public or disseminating it beyond myself and my clients for any purpose whatsoever.

THE COURT: I want the public to see it, but I want the public to see it when it's finished and when it's drafted and when it's in its final form. Anything else?

MR. IRWIN: We're satisfied with Ms. West's representation on the record that she will maintain this confidentiality, your Honor.

THE COURT: Okay. Anything further?

MR. ZIMMERMAN: No, your Honor, other than the next setting of the next status.

THE COURT: The next status conference, I talked to you all in chambers, will be Friday, June the 11th. And I'd like a status conference in the meantime in-between then, a telephone status conference to see how we're doing with all of the things we talked about here today. And I'll have that telephone status conference on May the 18th at 1:30, and I can do that by phone. Just give me a list of the people who are going to

ROUGH DRAFT

1
2 participate and we'll arrange to get them on the line at that
3 time.

4 At that status conference I'm mainly interested in
5 the items that we talked about that you would get done within a
6 week or two weeks. Anything further?

7 MR. BECNEL: Can I address this Medicare problem?
8 Because with Mr. Irwin's firm, we resolved the Rezulin case six
9 months ago and we still don't have the Medicare.

10 THE COURT: What we've done is the government is
11 involved in it, I met with them this morning, they're on board,
12 and hopefully that will be resolved and then they'll give it to
13 Pat Juneau to resolve at the same time as the other things. I
14 want that resolved, I don't want it hanging out there.

15 So we have started that process, I've asked the
16 government to sit in on the conferences, they have done so the
17 last two months, they have participated; and they're
18 participating in the drafting or at least they're aware of the
19 drafting of the forms, and they have their Washington
20 counterparts up to speed on it.

21 MR. BECNEL: I have been dealing with Dallas and no one
22 will ever give you a decision, they just keep you hanging.

23 THE COURT: I don't think we will have that problem
24 here, but I appreciate you bringing it to my attention.

25 Anything further? Okay. Thank you very much, the