

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

CASE NO. 1:06-CV-40000-DAK  
IN RE: ORTHO EVRA PRODUCTS LIABILITY

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PROCEEDINGS  
(Proceedings SEALED from pages 34 to 65)

Federal Courthouse  
West Palm Beach, Florida  
January 15, 2009  
1:30 p.m.

The above entitled matter came on for Status Conference before the Honorable David A. Katz, pursuant to Notice, pages 1-65.

For the PSC: BURG, SIMPSON, ELDREDGE, HERSH,  
JARDINE, P.C.

BY: JANET G. ABARAY, ESQUIRE  
MICHAEL S. BURG, ESQUIRE

For Plaintiff: WEITZ & LUXENBERG, P.C.

BY: ELLEN RELKIN, ESQUIRE  
DOUGLAS & LONDON, P.C.  
BY: MICHAEL A. LONDON, ESQUIRE  
HISSEY, KIENTZ, LLP  
BY: ERIK B. WALKER, ESQUIRE

For Johnson & Johnson: TUCKER, ELLIS & WEST, LLP  
BY: ROBERT C. TUCKER, ESQUIRE and  
JULIE CALLSEN, ESQUIRE  
DRINKER, BIDDLE & REATH, LLP  
BY: SUSAN M. SHARKO, ESQUIRE

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1 (Call to Order of the Court).

2 THE COURT: I don't know how many people are on the  
3 telephone. I hope you can at least hear me and others in the  
4 courtroom who are speaking. If you can't, please speak up  
5 because I don't think this goes through telephone, but I'm not  
6 sure.

7 This is the regularly scheduled meeting of the Ortho  
8 Evra MDL as a statuts conference. The first couple of matters  
9 involve case resolution and I'd like counsel for the defendant,  
10 Bob, if you'll please address that issue or Susan, whoever is  
11 to do it.

12 Good afternoon, Your Honor. Bob Tucker for the  
13 defendant. As we have set out in some of the recent pleadings  
14 that have been filed, over the last course of several months in  
15 this resolution process that's been put in place by the Court,  
16 taking a look at the MDL cases, we're now at approximately 85  
17 percent MDL in the state court cases, approximately 85 percent  
18 of all filed cases have been resolved or dismissed without  
19 payment. There have been a large number of cases dismissed  
20 without payment that is being improvidently filed but about 05  
21 percent of the cases are now resolved. That holds true in the  
22 in MDL that all the cases filed in the MDL, about 95 percent  
23 have been resolved and/or dismissed without payment. The  
24 remaining cases that relabled change cases, 100 percent of them  
25 are under negotiations or in the process of being negotiated

1 with plaintiff's lawyers. We have some cases that we're  
2 waiting for records on. We have some cases where there are  
3 additional records that are necessary for us to have a complete  
4 evaluation. We're working with the various plaintiffs' firms  
5 to ensure that happens and we're trying to nudge people along  
6 as quickly as we can in terms of getting us those records.

7 We do know of the remaining cases in the MDL, 25  
8 percent of them have been-- we have looked at, we have  
9 evaluated them as cases which there has not been use or not an  
10 injury or we have been told that the plaintiffs' firm is going  
11 to dismiss them or withdraw from representation. So about 25  
12 percent of that which remains in the MDL right now we know will  
13 be subject to motion practice, dismissal or non-payment.

14 Again, the remainder of those cases we are in the  
15 process of working with the various plaintiffs' firms to ensure  
16 we're getting records. That's regarding the MDL.

17 THE COURT: Thank you. Any supplementation, Ms.  
18 Abaray?

19 MS. ABARAY: Thank you, Your Honor.

20 As the Court is aware from our papers, first of all  
21 we certainly appreciate all the efforts of the defendants and  
22 the many plaintiffs' attorneys who are working to get the cases  
23 resolved. We have made fantastic strides. What we're  
24 interested in as a committee and the grouping of plaintiffs'  
25 lawyers is providing the MDL and plaintiff lawyers in resolving

1 the MDL and getting all these pre-labeled cases taken care of.  
2 The one thing, as we suggested in our papers, we don't want  
3 this delay or the process to never end, so we do have an  
4 interest in having the process come to a termination point.

5 The one other point I would like to make is there are  
6 some cases in the process of being negotiated where some of the  
7 plaintiff attorneys may feel that mediation with the court  
8 would be helpful to try to get this done sooner rather than  
9 later. I would say that there are a few cases that have  
10 reached that point also.

11 THE COURT: Yes, you have my attention. I have said  
12 this from the very beginning that I will make myself available  
13 for good or for ill to serve as a mediator in those cases which  
14 are incapable at the present time of being resolved. We will  
15 pick an advantageous, mutually advantageous time for such a  
16 mediation. It can occur either here in Florida at the  
17 courthouse or it can occur in Toledo or wherever counsel would  
18 prefer. I think I know what the preference is as long as it is  
19 zero in the north. But, be that as it may, I will make myself  
20 available. I'm working on a daily basis down here. I may as  
21 well do it in the enjoyably environs of a mediation.

22 MS. ABARAY: Thank you, Your Honor.

23 THE COURT: With respect to -- There has been a  
24 request and perhaps maybe Mr. Tucker, I think this request came  
25 through Ms. Sharko with regard to summary judgment and

1 attendant issues.

2 MS. SHARKO: That is correct. Thank you, Your Honor.

3 We have 40 cases that, based on the information we  
4 had and we spent a lot of time and effort working the cases  
5 up. We have evaluated them as zero cases; either there is not  
6 a compensable injury or the woman was not on the product or  
7 something else. We had asked the lawyers in those cases for  
8 dismissals. We explained our reasons why and we haven't been  
9 able to resolve them. So what we ask is that we now be given  
10 leave to file a motion, for leave to file a motion or be given  
11 leave just to file a motion for summary judgment in those  
12 cases.

13 This is not a complete list of cases but it is where  
14 we are. And of the 40 cases in my letter, not all of them  
15 apply anymore. A couple we have been able to work out what we  
16 need. But we need to have a mechanism to clean up the docket  
17 of the cases which are, shall we say, improvidently brought.

18 THE COURT: It seems to me, and I welcome input from  
19 both the PSC and others and defense counsel, is that in our  
20 previous meeting this morning, we had discussed that February  
21 26th status conference here. It appears to me that what ought  
22 to be done is one of two approaches, whichever we select, I  
23 think we'll get the job done.

24 One, to file a motion for authority to file in the  
25 individual cases summary judgment. The motion would go in the

1 40,000 main case. We could have that come on for hearing at  
2 the February 26th status conference. At that time, all  
3 plaintiffs' counsel would be ordered to a send for purposes of  
4 arguing whether their case should be subject to summary  
5 judgment at that juncture. That's one approach.

6 The alternative approach is merely to file the motion  
7 for authority or authorization to file motions for summary  
8 judgment and have those motions filed by a date certain. The  
9 only advantage I see to the former is that upon learning of the  
10 authority being requested, counsel for plaintiffs' has  
11 determined that's inappropriate for them to defend against the  
12 motion for summary judgment, that they will voluntarily dismiss  
13 or agree a dismissal.

14 MR. BURG: Your Honor, Michael Burg, co-lead for the  
15 PSC.

16 Certainly the PSC and plaintiffs' counsel do not  
17 concede the motion of the defendant that these cases should be  
18 dismissed and the position we take is that we believe  
19 alternative number one is better because that will allow-- We  
20 do not have all the facts of those individuals cases. That is,  
21 the individuals of the individual lawyers that have been  
22 handling them. Under procedure number one, it would give them  
23 an opportunity to be heard, come before you to either contest  
24 the claim and then move forward and would give them that  
25 opportunity to then contest it or concede it based on the

1 individual facts of those cases.

2 MS. SHARKO: The defendant consents to the first  
3 procedure.

4 THE COURT: We'll do that then. And if you will  
5 comply with that, Susan, and file your motion and in the motion  
6 attach a proposed order which would be then made of record  
7 ordering counsel of record in those individual cases to either  
8 appear in person or, if agreeing to dismissal, of course, by an  
9 entry.

10 MS. SHARKO: I'll do that. May I suggest the next  
11 item on the agenda today are the letters that we wrote with  
12 regard to discovery issues. There are 16 individual cases.

13 THE COURT: Okay. Hold on.

14 MS. ABARAY: I'm sorry to interrupt you. I just want  
15 to say, Your Honor, I think there are people on the phone and  
16 some of them may want to respond both to these letters or to  
17 the summary judgment.

18 THE COURT: I should have said and I didn't at the  
19 outset, that if there anyone on the phone who wishes to speak  
20 on an item during our discussion here in open court, please  
21 speak up at what you deem is an appropriate breaking point  
22 while someone takes a breathe here.

23 MS. SHARKO: On the discovery point, there were 16  
24 cases where we did not have information sufficient to evaluate  
25 the case. Those were identified in my letters. We're missing

1 either BFS or authorizations or both. We have made a number of  
2 requests to try to get that information. As a result of those  
3 letters, three cases can go off the list and one probably will  
4 be able to be off the list.

5 But my suggestion is that I make part of that motion  
6 or file a companion motion returnable on the 26th on the cases  
7 where we haven't received the court-ordered discovery. This is  
8 basic discovery that will enable us to evaluate the case.  
9 Because that's what we're doing right now.

10 THE COURT: Any objection?

11 MR. BURG: Again, if we follow procedure number one,  
12 we have no objection which allows counsel an opportunity to  
13 give an explanation why they have not complied with the  
14 discovery request or comply or dismiss the case. And once they  
15 get the opportunity to be heard on the 26th of February, we  
16 have no objection.

17 THE COURT: Very good.

18 MS. SHARKO: Thank you, Your Honor.

19 THE COURT: I could not quite here the question at Al  
20 issue sticks 10 individual days he is on the called inquire  
21 what was order.

22 THE COURT: That there will been an order entered  
23 requiring the compliance with previous orders of this Court  
24 with regard to production of discovery including the  
25 plaintiffs' fact sheets and that will be done on or before



1 February 26th by the time of or at the status conference,  
2 conference to be held at that time.

3 MR. WHITESEL: Thank you.

4 MS. ABARAY: Your Honor--.

5 THE COURT: For those speaking on the phone, if you  
6 would in the future identify yourselves fro the court  
7 reporter.

8 MR. WHITESEL: George Whitesel, Stewart and Whitesel.

9 THE COURT: Yes. Very good. Thank you.

10 MS. ABARAY: Just one other point we wanted to add on  
11 behalf of the PSC, and we'll get this information out to  
12 anybody who still has cases pending. If their case is in the  
13 process of negotiation and it looks like it is not going to get  
14 resolved or if they haven't gotten their records ready, it is  
15 going to be encumbant upon individual counsel to have the  
16 necessary expert reports for their own individual proximate  
17 cause issues. I wanted to be clear that the PSC does not take  
18 on the responsibility of queuing up your individual proximate  
19 cause.

20 THE COURT: I understand that.

21 MS. ABARAY: And that's the reason for making these  
22 motions applicable to the individually numbered cases rather  
23 than just the 40,000 or the main case.

24 Thank you.

25 THE COURT: We recognize that counsel for the

1 plaintiff in the individual case has the responsibility of  
2 working up the case for either purposes of trial or purposes of  
3 settlement.

4 MS. ABARAY: Thank you, Your Honor.

5 THE COURT: Thank you.

6 The next item to come up on the agenda is with  
7 respect to, and I think we already addressed that, the  
8 discovery issues. Am I correct, Susan?

9 MS. SHARKO: That is correct. Yes, sir.

10 THE COURT: Thank you.

11 The next item was Item 4, which was there is a  
12 pending motion document 326, Plaintiff's Motion on CNO Number  
13 9. For various reasons, it would appear to me that that may be  
14 premature. We should address that on our meeting on February  
15 26th. What is the position on that?

16 MR. BURG: Your Honor, under the circumstances, we do  
17 believe that it is best to defer that motion to the next status  
18 conference.

19 THE COURT: Thank you, Michael. It will be deferred  
20 and be on the agenda at that time.

21 MR. WALKER: Eric Walker, Your Honor, on behalf of the  
22 state court claimants who filed the motion. You had mentioned  
23 that it would be appropriate--.

24 THE COURT: Erik, that's a different one.

25 MR. WALKER: I'm sorry.

1 THE COURT: Should we skip to Number 6, status report  
2 on state court litigation? I would think so.

3 MS. SHARKO: That is correct.

4 THE COURT: Ms. Sharko?

5 MS. SHARKO: Thank you. The New Jersey litigation now  
6 has 91 pending cases. We have two bell weatherers remaining in  
7 the original group of six bell weatherers and they're on track  
8 for a trial date of June 23-- June 15th before Judge Hapis. It  
9 may be necessary to get that date pushed back to allow for  
10 further discovery and other items and Ms. Relkin and I will be  
11 working on that. We don't know who will have those cases and  
12 the other cases.

13 The next New Jersey conference is at the end of  
14 January.

15 MS. RELKIN: That's accurate. That's pretty much  
16 where we are. I think the trial date for those cases may need  
17 to get moved to coordinate some post-labeled discovery issues.

18 THE COURT: Thank you.

19 MR. TUCKER: In California--

20 THE COURT: How many votes in California?

21 MR. TUCKER: The report on California is consistent  
22 with what's happened in the MDL. Ninety percent of the  
23 pre-labeled cases in California have been resolved or dismissed  
24 without payment. We have actually one group in California who  
25 are collecting their records right now with whom we haven't

1 been able to resolve the cases, but we have negotiations  
2 ongoing with all of the California lawyers who have pre-labeled  
3 cases and that is in the process of working fine.

4 We have a hearing with Judge Alias next Friday on  
5 January 23rd. That agenda is being put together and the agenda  
6 will be addressing the status of the California cases and also  
7 the process for the dismissal of cases or the withdrawal of  
8 counsel from cases which are not going to be pursued.

9 THE COURT: Thank you very much.

10 MR. TUCKER: And we do-- We have got others as well.

11 THE COURT: Yes.

12 MR. TUCKER: Others are proceeding. We have a case in  
13 Wisconsin and in Arizona.

14 The Arizona case was just filed so that has not even  
15 begun. The case in Wisconsin we are pursuing discovery that is  
16 ongoing in that case. There are a number of co-defendants in  
17 other products involved which is not Ortho Evra.

18 THE COURT: Was there not also a case or were there  
19 not cases in Minnesota and Illinois.

20 MR. TUCKER: There were cases in Illinois. They're  
21 all resolved. There was a case in Minnesota and it has also  
22 been resolved.

23 THE COURT: Thank you.

24 We had an item on here, Item Number 7 involving the  
25 post-labeled cases and I had discussed that with the PSC and

1 defense counsel this morning. To say that it was in depth and  
2 at length would be an exaggeration, but it was discussed. And  
3 there are various approaches which have to be sorted and I have  
4 asked all counsel involved in those discussions to interact and  
5 to discuss that with the Court and others at the February 26th  
6 status conference, which will take place here in the Palm Beach  
7 Courthouse. At that time, we will also have a report and  
8 update on the status of all the pre-labeled cases and hopefully  
9 by that 40-day period or close to, a significant number of  
10 pending case will have been resolved. And then we will be able  
11 to go address Witzer Grosses, this two track matter, one  
12 pre-labeled and two post-labeled, because they involve  
13 significantly different considerations and significantly  
14 different, in my opinion, responsibilities by the PSC.

15 MS. ABARAY: And, Your Honor, just to follow up on  
16 that, one point that the PSC wants to make sure that everybody  
17 understands in terms of the individual cases is the fact that  
18 the Wyeth versus Levine case is pending in front of the United  
19 States Supreme Court. I think some of the people on the phone  
20 may be pro se. I might explain we're referring to the cases  
21 where the woman took product based on the label prior to the  
22 change in 2005. Those are the cases that we have been focusing  
23 on and those are the cases we're trying to get resolved.

24 To the extent those are still outstanding, and some  
25 people maybe haven't gotten their medical records, they haven't

1 finished the fact sheet, we have concerns as a committee or the  
2 plaintiff bar that the United States Supreme Court opinion  
3 could have an adverse affect on those cases and even result in  
4 all of the cases being dismissed if total preemption is found.  
5 Obviously, we're hopeful that doesn't happen. We want to  
6 communicate to everyone that we believe there is urgency and I  
7 think most plaintiffs have been acting in that way because of  
8 the Wyeth versus Levine situation.

9 THE COURT: Well, that's been the guerilla in the  
10 room for these many months. The unpredictability of the  
11 outcome of the-- it's been a case that's been overhanging since  
12 after the last case.

13 MS. ABARAY: Regal.

14 THE COURT: Yeah, Regal. And that it seems to me  
15 needs to be taken into consideration and certainly has been by  
16 the PSC and defense counsel as evidenced by the fact between 85  
17 and 90 percent of all cases pre-labeled cases being row solved  
18 up to this date.

19 I'll say it became of intense importance and intense  
20 effort subsequent to April of 2008, and I think both sides, as  
21 I said at the last status conference, are to be highly  
22 commended for the effort and the results. But I would suggest  
23 that, and I know that the PSC has made that issue a key issue,  
24 to explain to all counsel throughout the country having cases  
25 remaining. One does not know if they'll find complete

1   preemption move but whatever happens, it is going to affect  
2   both parties. One or the other perhaps will lose a tremendous  
3   amount and both if they come to some kind of compromised  
4   position.

5           MS. ABARAY: That's our concern, Your Honor. And we  
6   wanted to make that clear to everyone.

7           THE COURT: Very good. Thank you.

8           Am I correct that we joined what we had discussed as  
9   the status report on March 5th and did the same data February  
10  26th, am I correct?

11          MS. ABARAY: We'll do that on the 26th. I think that  
12  was Mr. Tucker's saw the overlap.

13          MR. TUCKER: Here's what I what recommend is that we  
14  have the February 26th hearing and report on the status and  
15  then, perhaps that March 5th date, which was going to be a  
16  report by the plaintiffs and defendants, hopefully a joint  
17  report I think the court set--

18          THE COURT: Yes.

19          MR. TUCKER: -- as always to where we were. So we  
20  we'll know more on February 26th and then I think we ought to  
21  perhaps keep that March 5th date for a written report to the  
22  Court.

23          THE COURT: Right. And that will-- A lot of whether  
24  that matures will depend on what happens on February 26th.

25          MR. TUCKER: I think we're in agreement.

1 MR. BURG: We are, Your Honor.

2 THE COURT: Very good. Thank you.

3 Another argument we have before argument on the CMO  
4 issue raised by Hissey, Kientz is whether there should be a  
5 remand of pre-labeled change cases. Was there any motion  
6 pending on that?

7 MS. ABARAY: There is not a motion pending for remand.  
8 There are people who have raised the issue because they either  
9 want to go to trial immediately or have a trial through the MDL  
10 process.

11 THE COURT: Well, at this juncture, I think they have  
12 the right to know what my feeling is. With regard to the  
13 pre-labeled cases, my feeling, and it is not one which grows  
14 out of any great sense of power as the judge who is presiding  
15 over this MDL case. As a practical matter, it would appear to  
16 me that it is premature until after March 5th or at the  
17 earliest February 26th to even consider that approach.

18 I have said in the past and I'll reiterate, and this  
19 is up to counsel, it will make a lot of judges around the  
20 country very happy if the trials and attendant Dalbert issues  
21 are monitored and overseen and conducted by me. I have  
22 indicated that I'm willing to do so. And that any such trials  
23 would preferably take place in the Northern District of Ohio.  
24 That will, of course, require two things. One, an  
25 accommodation for location. As I said probably Cleveland,



1 which is easier for a lot of people to get to and a better  
2 courthouse, courtroom. And two, waiver of venue by both  
3 parties if they're not Ohio cases. That will be up to the  
4 individual attorneys upon advice of the PSC and up to the  
5 defendant. But it is premature at this time to make that  
6 decision.

7           If, on the other hand, there is no consent, then, of  
8 necessity, those cases once deemed ready for trial, will be  
9 subject to remand and to remand, perhaps, on case specific  
10 Dalbert issues. When I say case specific, I differentiate  
11 between the science overhanging the MDL, not the specific  
12 science or testimony.

13           MS. ABARAY: I think a question may be anticipated if  
14 people are weighing cases in trying it in Cleveland or would  
15 the court anticipate those trials date would be fairly soon.

16           THE COURT: 2009.

17           MS. ABARAY: Okay. Thank you, Your Honor. Again,  
18 too, before we were talking about whether trials as  
19 representative trials, I think we have a consensus that we're  
20 well past that. We now are talking about sitting trials for  
21 cases that basically are ready and did not get resolved in the  
22 MDL.

23           THE COURT: And it would appear to me, from whatever  
24 I have learned over the past six months, those as to numerocity  
25 will be small and while not designated as Bellweather they will

1 be of interest to the cases to follow. Case one will have an  
2 impact on the parties, both parties with respect to case two,  
3 et cetera.

4 MS. ABARAY: Hopefully we'll come back and I can tell  
5 you we don't have to have that conversation.

6 THE COURT: That's fine.

7 MS. ABARAY: Thanks, Your Honor.

8 THE COURT: Are there any other matters? Mr. Walker,  
9 you had a matter and I didn't know.

10 MR. WALKER: It is one because we're talking about  
11 being in the Hissey, Kientz dispute.

12 THE COURT: Very good. I think we have covered all  
13 of the agenda items with the exception of the Hissey, Kientz  
14 matter; am I correct, folks?

15 MS. ABARAY: I just need one more clarification on the  
16 Savco dates. Are we talking about that date for Toledo, since  
17 those people are in Akron if we didn't get it resolved by  
18 February 26th, we're going to be here?

19 THE COURT: I'll be in Toledo March 27th until the  
20 end of the day on March 31st.

21 MS. ABARAY: I'll see if that will work for them.  
22 Thank you.

23 THE COURT: I need to know that ASAP, Janet, because  
24 I'm sure they're lining up a multiplicity of criminal matters.

25 MS. ABARAY: I'll get with them right away.