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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

_____)	
IN RE: PRADAXA)	3:12-md-02385-DRH-SCW
(DABIGATRAN ETEXILATE))	
PRODUCTS LIABILITY ACTION)	MDL No. 2385
_____)	

This Document Relates to:

ALL CASES

TRANSCRIPT OF PROCEEDINGS
MOTION HEARING
SEPTEMBER 29, 2014
BEFORE THE HONORABLE DAVID R. HERNDON
CHIEF UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiffs: Mikal Watts, Roger C. Denton, Seth A. Katz, Michael Kruse, Steve Davis

For the Defendant: Dan H. Ball, Paul W. Schmidt, W. Jason Rankin

For the Movants: Richard Cohen, Jeff Swann, Scott Gordon

Court Reporter:	Laura A. Esposito, RPR, CRR
	U.S. District Court
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	East St. Louis, IL 62201
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Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 **(Court convened)**

2 THE COURT: So we have the other hearing at 3:30,
3 unless everybody arrives prior thereto and is prepared to
4 start that hearing in advance of the scheduled time.

5 MR. COHEN: Your Honor, I'm Richard Cohen for the
6 defense. We're ready.

7 THE COURT: Does that include everybody for the
8 defense?

9 MR. COHEN: I have, from the Rawlings firm,
10 Scott Gordon and Jeff Swann.

11 THE COURT: All right. Why don't you share --
12 Mr. Ball, can they share a table with you?

13 MR. BALL: We'll move. We'll go over here.

14 THE COURT: So you said your name, again, was
15 Richard Cohen?

16 MR. COHEN: Yes, Your Honor.

17 THE COURT: Who else is with you today?

18 MR. GORDON: Scott Gordon with
19 Rawlings and Associates.

20 MR. SWANN: Jeff Swann with
21 Rawlings and Associates.

22 THE COURT: Jeff -- I'm sorry. Last name?

23 MR. SWANN: Swann, S-W-A-N-N.

24 MR. BALL: Is the phone line still open from
25 earlier?

1 THE COURT: It is not.

2 So Mr. Cohen, let me just make sure. You represent
3 a number of parties. You filed two different motions, is
4 that correct?

5 MR. COHEN: Your Honor, we filed a motion to
6 dissolve or vacate CMO 84 on behalf of, I believe it was 16
7 plans, and then we filed a joinder by Kaiser as the 17th, so
8 they do appear as two separate motions. We also separately
9 filed a motion for a stay, which Your Honor granted.

10 THE COURT: Okay. All right. Thanks. I recall
11 now. Thank you very much.

12 So Mr. Cohen, you want to argue your motion? Do
13 you have testimony to present? How do you want to proceed?

14 MR. COHEN: Your Honor, I can argue the motion. If
15 need be, I can present testimony. It depends how deep in
16 the weeds we need to get. If the Court believes we need to
17 probe the issue of laches, I do have Mr. Gordon here whom I
18 could put on the stand. If the Court believes the matter
19 can be -- the issue can be decided as a matter of law
20 without reaching that, then I can just argue.

21 THE COURT: Okay. So probably want to approach
22 this from both angles. I think the matter of laches may get
23 involved, so probably ought to hear a little testimony, but
24 probably most interested in your argument, particularly the
25 issue of jurisdiction. But happy for you to proceed how you

1 think best.

2 MR. COHEN: Okay. Thank you, Your Honor. With
3 your permission, I'll start with the law.

4 THE COURT: All right.

5 MR. COHEN: Our brief is simple, it's
6 straightforward. It's the point there's we cite the Supreme
7 Court precedent and the Seventh Circuit *Kirschenbaum* case.
8 Both stand for the proposition that the Court cannot issue
9 an injunction against persons who are not party to an action
10 before it.

11 THE COURT: So if I have a res, R-E-S, if I have a
12 body of property here, property -- a settlement of, in this
13 case, a product liability case, and I determine that, or
14 believe that someone is trying to obstruct my implementation
15 of an order that I've entered, being the distribution of
16 that res, would that not give the Court jurisdiction?

17 MR. SCHMIDT: I can't speak to that because that's
18 not the situation here, Your Honor.

19 THE COURT: Why is it not? I've had experience
20 with your clients. I've had experience with the Rawlings
21 people. They've substantially delayed the settlement in
22 prior cases and prejudiced claimants that have appeared
23 before me in the past, so why would I not believe that that
24 would be the case here and that they would not, once again,
25 obstruct the claimants in receiving their settlements in

1 this case?

2 MR. COHEN: Let me address both of those questions,
3 Your Honor.

4 First of all, this is not a piece of real property,
5 for instance. It's -- the res that we're referring to is
6 nothing more than the bank account where thousands of
7 settlements have been deposited for aggregation purposes
8 prior to distribution. It's a contrivance. It wasn't a
9 pre-existing res. It was just a bank account set up for
10 purposes of the master settlement agreement. It doesn't fit
11 under the Supreme Court jurisprudence of an in rem
12 jurisdiction, and even if it did, we note that the Central
13 Bank, the *Mullane* case, was cited by the PSC, and there the
14 Court held that, notwithstanding a New York statute
15 governing aggregated trusts in New York that statutorily
16 provided for a publication notice to all members of the
17 trust, that that didn't meet constitutional muster; that
18 where the res administrator could notify each person with an
19 interest in the res personally and individually, it had to
20 do so before it could extinguish the statutory rights there.

21 Here, Your Honor, there's no statutory res.
22 There's no statutory process for short-circuiting the normal
23 judicial process of -- if you have -- if you want -- if
24 you're John Doe and you were insured by Aetna and you don't
25 think you should have to pay Aetna, you could -- first off,

1 under your contract with Aetna, you're supposed to notify it
2 that you're about to get a reimbursement recovery. Aetna
3 makes a claim against you and you say no. You can then
4 serve it with process and start a declaratory judgment
5 action that, *I don't owe you any money, Aetna*. That's not
6 what happened here, and this is not -- like I say, it is not
7 a res that existed prior to -- it's a contrivance. And I
8 don't mean that in a perjurious sense. It's a judicial
9 creation or a creation of agreement between the PSC and
10 Boehringer, to which my clients are not a party, to just
11 aggregate the money and put it into an account.

12 I want to address the second point too because this
13 is very important: Nobody wants to get these liens
14 administered and resolved faster than our clients and
15 Rawlings. We have no interest in dragging this out. The
16 faster the liens get resolved, the faster we get paid.

17 *THE COURT:* The history belies that. For example,
18 in the YAZ litigation your client represented that they
19 represented a number of clients. They didn't even represent
20 those clients. If that's not obstructionist, I don't know
21 what it is. You tell me what it is.

22 *MR. COHEN:* I wasn't involved in YAZ. I can't tell
23 you. What I've been told about YAZ, including by -- was
24 that the Plaintiffs Steering Committee picked I think
25 Garretson to administer. All of the deadlines on the lien

1 resolution program apply only against my clients. They have
2 90 days to assert their liens or waive them, forever hold
3 their peace, and they do so, and then if the administrator
4 selected by the PSC doesn't administer them as quickly as
5 the PSC would like, somehow that gets pinned on our clients.
6 Our clients have no interest whatsoever.

7 *THE COURT:* Your clients represented that they
8 represented certain medical providers and then later said,
9 *Oh, by the way, we actually don't.* Now asserted that they
10 represented certain medical providers and then later said,
11 *Oh, no, we don't actually represent those medical providers.*
12 Only after considerable delay --

13 *MR. COHEN:* My clients don't represent medical
14 providers. My clients are on the other side of the table.

15 *THE COURT:* Not medical providers, sorry; the
16 insurance company. So --

17 *MR. COHEN:* Who represented they represented --

18 *THE COURT:* Your client, Rawlings.

19 *MR. COHEN:* Rawlings isn't my client, Your Honor.

20 *THE COURT:* I thought that's who you said you
21 represent.

22 *MR. COHEN:* I represent the 17 movants, as does
23 Rawlings.

24 *THE COURT:* So Rawlings is a separate --

25 *MR. COHEN:* -- law firm, yes, Your Honor. I

1 represent Aetna and Cigna and Humana and United and Blue
2 Cross of Florida. These are the plans I represent, and in
3 virtually every case there are contracts with the insureds
4 who will be -- many of whom will be settling Pradaxa
5 claimants, provide that the claimant, the insured, has an
6 obligation, if he's been injured by a tortfeasor, to tell
7 us, to alert us, not for us to have to try to find it out.
8 And that is what CMO 84 flips; it flips the obligation.
9 When I hear that we're delaying, I don't understand because
10 when a Pradaxa plaintiff sued, his obligation was to alert
11 Aetna and Cigna and Humana and United.

12 And in any context other than a mass tort
13 litigation that's the way it happens, and the settlement
14 doesn't occur until the reimbursement lien is resolved.
15 Somehow in mass torts the process has gone sideways, and not
16 through any fault of the insureds. These are nontraumatic
17 injuries where we are not on notice that someone who has
18 internal bleeding or a heart attack or stroke or cancer, we
19 don't write letters to people saying, *Who caused your*
20 *cancer?* When somebody goes to the emergency room with a
21 broken leg, yes, we have indicia that there could have been
22 an accident, a third-party tortfeasor, a letter goes out.
23 Even then it's not our obligation; it's the insured's to
24 notify us if they're going to recover from a third-party
25 tortfeasor. So the delay is not on the insureds. The

1 insureds have the obligation to alert their insureds from
2 the beginning. And now what they want to do is not alert us
3 and require us to play hide-and-seek and find them out, and
4 if we don't do it by -- within -- originally within a week
5 of CMO 84, we were forever barred.

6 *THE COURT:* Anything else?

7 *MR. COHEN:* On the law, Your Honor?

8 *THE COURT:* Yeah.

9 *MR. COHEN:* I'll rest on my papers.

10 *THE COURT:* Thanks. Who's going to argue for the
11 plaintiffs?

12 *MR. WATTS:* Your Honor, Mikal Watts for the
13 Plaintiffs Steering Committee.

14 *THE COURT:* So Mr. Watts, have you examined
15 Mr. Swann's affidavit attached to the motion in this case?

16 *MR. WATTS:* Not today, but when it was filed I did
17 look over it, yes, sir.

18 *THE COURT:* He says senior counsel at Rawlings --
19 and Rawlings has represented some of the nation's largest
20 health plans in recovering reimbursements from settlements
21 in mass tort. It lists -- there are all kinds of -- YAZ and
22 others. What knowledge do you have about their
23 representation of health plans in the YAZ litigation?
24 Mr. Denton?

25 *MR. DENTON:* Your Honor, for the record, in this

1 litigation, I'm liaison counsel in the YAZ litigation for
2 the PSC, and that has been an ongoing issue. But in the YAZ
3 case, Judge, the Rawlings firm contacted us about a proposed
4 lien resolution program. They represented to us during
5 those negotiations that they -- somewhere between 80 and
6 85 percent of the insureds in this country they represented.
7 We then negotiated settlement terms with them for a private
8 lien program, ultimately consummated it into an agreement.

9 What we found out after the fact was that there was
10 a substantial number of folks or insurance carriers that we
11 thought they represented that they ended up not
12 representing. The letter resolution program, there's only
13 about 20 percent of the individuals are health insured by
14 health insureds that this Rawlings group claims to
15 represent, and so that becomes a difficult issue for us.

16 And as it relates here, Your Honor, we have
17 asked -- I personally asked Mr. Fischer, who's not here,
18 Mark Fischer from the Rawlings group, who contacted me back
19 in August, send us a list in writing of which insurance
20 carriers you represent in Pradaxa; not whether you
21 represented them in other cases or not; that you represent
22 in Pradaxa. I have not seen that list. It's never been
23 sent to me. Friday they sent a drafted proposed lien
24 program and they have exhibit attached thereto that would
25 list the clients they represent and they've left that blank

1 and told us, *We'll fill that in later.* And that's the
2 history as it relates to YAZ. And I think Mr. Watts is
3 going to pick it up from there.

4 MR. WATTS: Your Honor, I've been involved in
5 pretty much every other case listed in there and know of
6 Avandia, which I wasn't involved in. I can tell you with
7 respect to the Fen-Phen, first introduced by people like
8 Rawlings and others, there are still active cases in my
9 office awaiting distribution in Fen-Phen litigation we
10 settled a decade ago; the Vioxx cases settled six, seven
11 years ago and are still in private lien resolution.

12 My concern, to answer your question, is this: Both
13 from what my friends tell me with respect to the YAZ
14 litigation and my own experience with respect to these other
15 litigations, what we have happening here is this: Somebody
16 comes in and says they represent people. They will not tell
17 us who they're initiating a claim for. They will not say
18 how much the lien is. What they want is they want us to
19 come in and blindly, not knowing who they represent, who
20 they don't represent, do a standard deal with them in terms
21 of holdbacks in terms of percentages, in terms of all this
22 stuff, and the problem is, as you know, I owe an independent
23 fiduciary obligation to each of my clients. What they have
24 engineered in other cases, they talk some federal judges
25 into delaying all or parts of settlements until they can get

1 around to doing the due diligence that they should have done
2 to start to assert their lien.

3 Now, I am happy about one thing that he said, and
4 that is that nobody at the Rawlings group has any incentive
5 whatsoever to delay because I think that the biggest concern
6 that everybody on our side has, and I barked on this very
7 mic upstairs to you two years ago when I was begging for a
8 fast trial: We represent a bunch of septuagenarians and
9 octogenarians who are passing away by the day. If we don't
10 get them their day in court -- and now that we've got a
11 resolution, their money, they have been denied their right
12 to redress the civil justice system. So all the fine work
13 that everybody did to get this thing done in record time --
14 and to their credit, Boehringer Ingelheim to get the
15 processing done, it's going to be revolutionary in terms of
16 the way mass torts are done in this country is for naught
17 unless folks that clearly had to have read about this
18 settlement when it happened in May, probably read about all
19 the press that some of these guys are putting out there two
20 years ago and knew where the Pradaxa litigation was. I
21 filed 715 lawsuits in this court. Every one of them's got a
22 case, Your Honor, and yet I get letters from these guys
23 saying, *We may represent somebody. Go ahead and send me*
24 *private financial information on your clients. Tell me what*
25 *their Social Security numbers are. Tell me what this is.*

1 They don't have that right from me.

2 Now, in response to what he's saying is this: He's
3 saying that, well, these insureds have an obligation to
4 notify X, Y, or Z when they file a lawsuit. Number one, I
5 can tell you inside my firm every one of my clients has been
6 told about CMO 84 and been asked to notify. But I do not
7 have an obligation, representing 700 different people,
8 especially with respect to people who are not one of his
9 insureds, to give private information with respect to that
10 person to him because he doesn't want to do the due
11 diligence. That's number one.

12 Number two, there is no -- there is no ERISA plan
13 document that gives ERISA plan jurisdiction over this Court
14 to prevent you from making a distribution of funds. Now,
15 might they have a separate right of action against an
16 individual that took funds and didn't pay liens? Sure. But
17 I think that the problem, the basic disconnect here is this:
18 There's nobody on our side of the table that wants to
19 extinguish their liens in a way that would not be
20 legitimate. We want to resolve those liens, but we want to
21 do it in a way that -- you know, I have never negotiated a
22 lien with any party who comes to me and says, *I want some*
23 *money for a lien that I have. I'm not going to tell you who*
24 *it's for, I'm not going to tell you the size of the lien*
25 *that I'm claiming, I'm not going to tell you how much I*

1 would take for that individual. What you can do, Mr. Watts,
2 is everybody you ever represented throw it in the pot and
3 give me \$30 a case and we'll call it a day. That doesn't
4 work.

5 Respectfully, and I have read these papers, I think
6 we need to step back and say that you have a party or a law
7 firm that says they represent 17 parties that have filed a
8 document in your court. You now have jurisdiction over
9 those 17 parties. At least with respect to those 17
10 parties, you know, I would like to know that they have
11 formally retained the Rawlings company, and I think we need
12 that from the standpoint of the Pradaxa case because the
13 experience that I'm being told about in YAZ where on Day 1
14 we represent a bunch of them and on Day 50, oh, we don't
15 represent all those.

16 So number one, we're in a situation where they need
17 to show authority of who they represent. That's first.
18 Secondly, as the lawyer with the most cases in this whole
19 litigation, I stand ready tomorrow to sit down with these
20 folks and to negotiate these liens, but I need to know who
21 they represent. Now, if he's saying, I have been hired in
22 the Pradaxa litigation by Aetna, by Cigna, by Humana, and
23 Blue Cross of Florida, I think that's a nice start. But
24 before I can sit down and start negotiating liens, I need to
25 know -- if he's claiming to have other clients, I need to

1 know who these. To be honest, with all due respect, I would
2 like to see an affidavit from counsel: *I have been hired in*
3 *this case, Pradaxa, with a signed contract from these people*
4 *and I speak for them.* If that starts and we get there in
5 step one, then frankly, I think the next order of business
6 would be to do what you want when we were negotiating the
7 document with Boehringer Ingelheim. You turned the air
8 conditioning off, you stuck us in a side room and didn't let
9 us leave until we got it done, and it seemed to work out
10 fine. Maybe something like that would be in order here,
11 from the standpoint of nobody's trying to eliminate their
12 lien.

13 What we're trying to do, in the vein of paying a
14 bunch of people who are in their 70's and 80's we've already
15 told, *You're going to get your money in November,* let's get
16 this deal resolved in a timely fashion. What we're being
17 told is, *Hey, why don't you give us 90 days to do our due*
18 *diligence and do our research and we'll get back with you.*
19 What we've just done is hold up \$650 million from a bunch of
20 people who need the money, who have been told they're going
21 to get it, and frankly, they deserve it. If they want to
22 assert liens, they ought to tell us who they represent, they
23 ought to tell us what liens they're asserting, and then we
24 can sit in a room like rational people and resolve the
25 liens, but that requires a certain amount of due diligence

1 on their part to tell us who they represent.

2 MR. COHEN: Your Honor, may I be heard?

3 THE COURT: Sure. Mr. Cohen.

4 MR. COHEN: If Rawlings really doesn't represent
5 the insureds then how could notice to Rawlings satisfy due
6 process to extinguish those insureds' rights? I think we've
7 got a conundrum right off the bat with the PSC argument.
8 And if Rawlings is their problem, they have a very simple
9 solution: Each John Doe whom they represent writes to Aetna
10 or Cigna or Humana or United and tells them, *I have a*
11 *settlement*, and you cut Rawlings out. We're only here
12 because they've tried to short-circuit their obligations, to
13 short-circuit the process. Our motion says exactly who we
14 do represent at the moment. Doesn't mean we won't represent
15 additional insurers, but for purposes of this motion we
16 represent the 17 insurers that are named as movants.

17 And Kirschenbaum holds point blank that by
18 objecting to the injunction, to the CMO 84, in seeking its
19 dissolution, we are not parties before the Court. We have
20 not been made parties before the Court.

21 Now, Mr. Watts waxes absolutely correct: I don't
22 have any right to demand that he notify our clients of
23 anything. That's between our clients and the movants, their
24 insureds. They have the obligations that are set forth in
25 their agreements. There's no need and no right, I would

1 argue, for the Court to take that contract and flip it
2 upside down and say, *No. I'm going to absolve you of your*
3 *obligation to notify your insurer and, instead, I'm going to*
4 *make it the obligation of your insurer to find out about*
5 *your settlement within seven days.*

6 Mr. Watts also says that this settlement was --
7 that there was publicity about it as long ago as -- long
8 ago, and that in May there was some publicity of the
9 settlement. That publicity is -- it's an exhibit to the
10 PSC's motion for the order that sought -- for the motion
11 that sought CMO 84. Exhibit A, they attach a press release:
12 "Boehringer Ingelheim settles U.S. Pradaxa litigation for
13 \$650 million." It says there are about 4,000 current cases
14 against the company in the U.S. Okay. So if our clients
15 didn't have the rights under their insuring agreements to be
16 notified by the settlement claimants and did have to go --
17 and the obligation were reversed and they had to go root
18 these out, how do they do that? I guess one thing they can
19 do is pore through every docket that's filed in this court.
20 That's far less than 4,000 current cases. Is it really the
21 argument that they also have the obligation to pore through
22 every docket in every state court in the United States and
23 root out every case that's filed?

24 Furthermore, as we've seen in other settlements --
25 I don't know if that's the case here, but many of these

1 settlement claimants didn't even file cases. Certainly in
2 Avandia many of them had tolling agreements. What we call
3 inventory plaintiffs firms bring perhaps several hundred
4 cases and have several hundred additional clients with whom
5 the defense enters into tolling agreements because the
6 defense isn't that eager to have 2,000 cases against it.
7 We'll take 1,000 cases. But even if we did root through
8 every docket in every court in the United States, we
9 wouldn't come up with these insureds. Further, even if we
10 did, the complaints in these cases don't disclose the gold
11 standard of information that we need to tie the plaintiffs
12 into being our insureds, which is their Social Security
13 numbers and dates of birth. Many people have the name
14 Richard Cohen, many people have the name Jeff Swann,
15 Mikal Watts. Probably many people have Your Honor's name as
16 well, sir. We can't just send a letter to every insured in
17 the United States saying, *Are you the John Smith who filed a*
18 *lawsuit in East St. Louis on such and such a date?*

19 The other press release attached to Exhibit A says
20 Pradaxa has been prescribed 850,000 patients in the
21 United States. I can't even imagine the havoc if the
22 obligation were on insurers to send out 850,000 subrogation
23 notice letters to everybody who ever took Pradaxa,
24 unnecessarily scaring perhaps 846,000 of them who haven't
25 brought lawsuits and perhaps stirring up tens of thousands

1 of additional lawsuits. That's not the way the
2 reimbursement system works. It works by the agreement
3 between the insured and the insurer and it almost always
4 requires that the insured notify his insurer if he was
5 injured by a third-party tortfeasor, notify the insurer when
6 he files a lawsuit, and to notify and pay and set up a
7 constructive trust over the funds when he recovers.

8 It's not just by agreement, Your Honor; it is also
9 statutory, particularly in the interest -- and I've heard
10 how it's an elderly population of Medicare Advantage and
11 Medicare secondary pay. It's an absolute requirement, and
12 there -- not only is the insured responsible for paying the
13 reimbursement, but so is the tortfeasor, and failure to do
14 so can subject them to double damages. That's Congress'
15 statutory scheme.

16 So when the PSC came to Your Honor and asked and
17 appealed to your inherent authority and inherent powers,
18 that's red flag number one. There are contracts, there are
19 statutes that govern this, and those should not be upended
20 in the name of expediency. I've heard nothing but an attack
21 on Rawlings. Rawlings is not the movant here. Aetna,
22 Cigna, United, Humana, you want to take them to task, I
23 haven't heard anything said about any of them that they have
24 any interest in delaying settlements or delaying receiving
25 reimbursements.

1 Also, insofar as Mr. Watts said -- I'm sorry, one
2 of the two Plaintiffs Steering Committee counsel, I don't
3 recall which, said that he spoke to Mr. Fischer in August
4 and he still hasn't received the list. The call was on
5 Monday, August 25th. Labor Day -- the week leading up to
6 Labor Day, Mr. Fischer was away on vacation. The PSC's
7 motion and the order was entered the Wednesday after Labor
8 Day. And indeed, Mr. Fischer does need to go around and
9 speak to all his clients and say, *Do I have authority to*
10 *represent you in the Pradaxa litigation?* It almost always
11 does occur given the time. I understand that there may have
12 been -- that there apparently is a situation in another mass
13 tort where Mr. Fischer may have said he did, and someone
14 says you didn't. I don't know if he actually signed an
15 agreement for them.

16 It's pretty simple. We'll have the insurance
17 company sign the private -- sorry, the private lien
18 resolution program document, and there'll be no if, ands, or
19 buts about it. If they don't sign it, they're not a party
20 to it. Attacking Rawlings doesn't resolve the central
21 problems here of -- it's not Rawlings' rights they're trying
22 to extinguish; it's rights of parties I heard the PSC argue
23 Rawlings doesn't represent. Well, gee whiz, why is it that
24 somehow second a notice to Rawlings would satisfy due
25 process and extinguish the rights of those people?

1 THE COURT: So it says here that you represent
2 these various insurance companies, right?

3 MR. COHEN: Yes, Your Honor.

4 THE COURT: And it says that Rawlings is of
5 counsel, meaning they also represent those companies, right,
6 in this motion?

7 MR. COHEN: Yes, Your Honor.

8 THE COURT: So what kind of a process is it where
9 lawyers say that -- how does this relate to, as you say,
10 statutory lien law where a lawyer goes to -- a lawyer such
11 as Mr. Watts here, and says, I will represent the interests
12 of the insurance providers, and I don't know who I represent
13 yet, I don't know what the lien amounts are going to be yet,
14 but I'll make this deal with you and then I'll go peddle it
15 to the insurance providers and we'll make this deal. How
16 does that work? How do you do that as a lawyer practicing
17 law in the world in which these folks operate? How does
18 that work and how does that business operate?

19 MR. COHEN: I can only speak, Your Honor, as to how
20 it operates at my firm because we regularly represent Aetna,
21 Cigna, Humana, sometimes Anthem or Wellpoint, and a couple
22 of others who aren't -- the parties in -- we regularly
23 represent Aetna, Cigna, and Humana, and we speak with their
24 litigation counsel daily, weekly about mass tort litigation,
25 about subrogation and reimbursement issues, about

1 prescription drug recoveries, and we have these
2 conversations, and we are given authority to go to try to
3 reach mass resolutions of mass tort liens, and on very
4 favorable terms, frankly, for the insureds where the
5 agreement says you pay us the first -- pay us 100 cents on
6 the dollar, first dollars to us, and every one of these
7 programs we offered a cap. It's sort of the law of big
8 numbers. We offered to cap the liens, usually somewhere
9 around 25 percent of the recovery, so that we're not going
10 to take -- in the worst case, we won't take more than
11 25 percent of a plaintiff's recovery or reimbursement. We
12 offer significant discounts. They get the better of the
13 discount or the cap. We discount the liens so that we
14 assure that the plaintiffs have a significant recovery.
15 We -- and we do it -- I know that I've heard that there are
16 still Vioxx cases and still Fen-Phen. Fen-Phen I'm too
17 young to remember, Your Honor, but there's still Vioxx cases
18 out there. There were, I don't know, 60,000 Vioxx cases,
19 and if -- I think we've resolved tens of thousands of these,
20 and yeah, there will always be stragglers but there's never
21 a straggler because we didn't put forth -- once the insured
22 identified himself, we didn't put forth the amount of the
23 lien and the basis for the lien within 90 days, because what
24 if we come on the 91st day? It's over. He walks. So the
25 hold-up occurs elsewhere. And I don't know. I'm not -- you

1 know, I'm sure the man from Providio and the Plaintiffs
2 Steering Committee and people from Rawlings can tell you how
3 that happens, but nobody, nobody at the table, not there,
4 not here, and not at the administrator has any interest in
5 delaying the resolution of the liens. What I've heard is
6 that, yeah, we're holding up the settlement because we're
7 not offering as deep discounts for as high caps as the
8 Plaintiffs Steering Committee would like. That's the only
9 delay that's going on here.

10 And I have no objection if you want to throw us in
11 an airless room for minutes, hours, or days. We'll come
12 out -- I think we'll come out with a settlement, but it's
13 not going to expedite the process to have CMO 84 because I
14 don't believe Boehringer is going to distribute this while
15 we're up fighting with it in Chicago. And what if Chicago
16 reverses -- if CMO 84 is reinstated and Chicago reverses,
17 then where are we? These poor people who are waiting for
18 their payments are going to be not informing their insureds,
19 still clinging to the hope they're go to win, and we'll be
20 six months or a year down the road and they still won't have
21 informed us of their settlements, which will just delay the
22 start of the lien resolution process.

23 In Avandia, where I do have firsthand knowledge, I
24 litigated every aspect of that lien assertion case for
25 health insurers. We came in, and from day one, we said,

1 just give us the names, match the names, we can have a
2 third-party intermediary. Give your -- identify your
3 settling claimants to them, we'll have our clients give our
4 database to them, and they'll identify the matches and get
5 it done. And they fought it for us for four years, and
6 every time we walked into court they said the insurers are
7 delaying. Just do it. Finally they've relented. Now, four
8 years later, they're finally getting these liens resolved
9 because that's how long they clunk to the hope that they
10 wouldn't have to give us the information that their insuring
11 contracts say they have to give us.

12 THE COURT: Mr. Watts.

13 MR. WATTS: Judge, I would point out that I think I
14 probably had more hair than Mr. Cohen when we settled the
15 Fen-Phen case. That's how long ago it was. There's a
16 couple things he said that I think are the crux. I wrote
17 down the first one: *I represent 17 "for purposes of this*
18 *motion." I'm sure I'll represent additional insurers. And*
19 *inside my hairless head I'm thinking, what does that mean?*
20 *And then he clarified it for me later on. He said, Well,*
21 *Mr. Fischer is going to have to get on the phone and call*
22 *his clients that he's represented in the past and say, do I*
23 *have authority to represent you in the Pradaxa litigation?*

24 So I think we're back to my original concern that
25 we have the cart a little bit before the horse. I think I'm

1 told, *I'm here for the limited purpose of objecting to CMO*
2 *84, but by the way, Judge, you don't have jurisdiction over*
3 *Cigna, this and that, this and that. So where we are is we*
4 *have a lawyer that is opposing CMO 84 that, as far as I can*
5 *tell, wants discovery of product client information on*
6 *behalf of people that he's not saying he represents for lien*
7 *claims, because he doesn't, because once he says that, he's*
8 *subject to your jurisdiction. Don't want to do that.*

9 So I'd like you to give me discovery with respect
10 to people that Mr. Fisher hasn't gotten final authority to
11 represent yet in the Pradaxa litigation. Where does that
12 put us? It puts us right back to the case that he's most
13 proud of, and Avandia is universally seen on our side of the
14 bar as the slowest mass tort settlement in history. All I'm
15 trying to do is, from a matter of timing, if you have a
16 lien, tell me what it is. And I don't think that he has the
17 right to hide behind what he calls a statutory lien and say,
18 *Well, we always represent Aetna, Cigna, United, Blue Cross,*
19 *Humana, but we haven't been retained yet here, so I need*
20 *jurisdiction over them; and say on the other side, Now,*
21 *Judge, you don't have the authority to distribute funds to*
22 *an aging population because we want you to, in effect,*
23 *enforce some third-party contract between some of those*
24 *people maybe and my clients who I don't represent yet but*
25 *I'm thinking about it.*

1 So our problem is this: What -- and I'm going to
2 say this as politely as I can -- I think is going on here,
3 is we have a law firm that does not represent 17 different
4 insureds for purposes of lien claims. They might in the
5 future. *Stick me in an airless room with Mr. Watts and I'll*
6 *cut the best deal I can with him.* That already happened in
7 YAZ. You cut a deal with them, they go and they peddle the
8 deal they've negotiated to these clients. It's subrogation
9 to solicitation.

10 Now, the bottom line is that I don't usually
11 negotiate deals with people that can't tell me they
12 represent somebody for purposes of the litigation. So what
13 I would respectfully ask you to do -- and as to what we do
14 on CMO 84, maybe just hold it in abeyance right now. We
15 have to step back and say, who is before the Court? Who is
16 asserting claims against these folks that you are about to
17 distribute this res to. Now, if he wants to in effect
18 negotiate liens on behalf of people, tell me who he
19 represents and I'll negotiate with them. If he wants to
20 say, *Watts, cut a deal with me so I can go out and hawk this*
21 *product to people I don't yet represent and have not been*
22 *hired by yet in the Pradaxa litigation, because Mr. Fischer*
23 *has not called to get authority, can I represent you in the*
24 *Pradaxa litigation,* well, we're never going to get this
25 distributed.

1 So with all due respect, I don't think there's
2 anything wrong with CMO 84, number one, but number two, with
3 his discussion about Chicago, I mean momma didn't raise an
4 idiot. I think I can read through code words what Chicago
5 means. I don't think there's anything to reverse by
6 starting back with the idea of standing. Who do you
7 represent? If you want these guys to resolve a lien claim
8 that maybe one of your clients has, come before the Court
9 with authority. Show me who has hired you with a piece of
10 paper. Who has hired you to resolve the claims on their
11 behalf? And then at that point, with all due respect, I
12 know that you are perfectly capable of turning the air
13 conditioner off and throwing us in a room but it's not going
14 to be of any value if I'm thrown in a room with this
15 gentleman and we come out and we're all sweating and he's as
16 bald as I am because we're both so tired, we got a deal and
17 then everybody feels good about it, and we're going to
18 distribute all this money in late November, and then clients
19 18, 19, 20, 21 and 22 don't like the deal that we cut.
20 We're right back here where we were.

21 Now, last comment: I don't believe that there's a
22 statutory lien in the world that entitles somebody to lay
23 behind the law and stop the resolution of the entire
24 settlement. I don't think there's a statutory lien in the
25 world that says he's entitled, when he's not representing

1 anybody, and he's not appearing before the Court on the lien
2 resolution process, to discovery of my client's private
3 information. Frankly, I don't think I'm entitled to give it
4 to him.

5 So I would respectfully ask the Court to have this
6 gentleman notify all of his clients, that the Court would
7 like to know of all of these insurance companies that he
8 says he represents. Does he represent them for purposes of
9 negotiating with Mikal Watts and the other members of the
10 PSC for a lien resolution? Because I will cut that deal
11 with him. What I will not do is cut a deal with him and
12 allow him to go hawk the settlement product to see how many
13 new clients he can round up because I think I've just
14 violated a fiduciary duty of confidentiality and, frankly,
15 it's practically going to put us right back in the same
16 place. So we would ask the Court to have him show authority
17 within seven days. If you want me a in a hot room with
18 somebody, I'll be there, but I need to know who I'm
19 negotiating against and I need to know it's going to achieve
20 resolution so we can distribute these funds. I'll go back
21 to quoting myself: If we don't get this thing done in two
22 years these folks are going to die and never see this money.
23 That's how important this is. We need to get the lien
24 resolution guys moving and need to distribute this money.

25 MR. COHEN: Your Honor, can I respond?

1 THE COURT: Sure.

2 MR. COHEN: So we're back full circle again. I
3 don't represent health insurers and Rawlings doesn't
4 represent health insurers, yet notice of CMO 84 extinguishes
5 their rights. The issue of, who do they represent? Yes, we
6 go into a room and we negotiate. It's not a matter of
7 whether we represent the clients; it's a matter of whether
8 we walk in with a blank check and have the ability to
9 pre-agree on any terms without calling the clients. I've
10 been practicing law over 30 years, and to this day, when I
11 represent a client I still have to call and say, *Okay. Here*
12 *are the terms. Are we on board?* And the solution is so
13 simple. I offered it the last time I was at the podium.
14 You don't believe us, have a signature line for the clients,
15 and then there's no ifs, and's, or but's. It's not Rawlings
16 representing or Lowey representing. Humana is signing,
17 saying, *We agree.* And put up your -- whatever the agreement
18 says. If it says once the insured discloses himself and his
19 settlement, you have 90 days, 45 days, 120 days. Whatever
20 the agreement says, they have to do it or they've lost their
21 lien.

22 He says Avandia's the slowest. Well, of course,
23 it's the slowest because the PSC has fought for four years
24 against divulging the names. They made the same arguments:
25 *We're not going to let Mr. Cohen get rich going out and*

1 *soliciting clients.* Your Honor, they want us to solicit
2 *clients.*

3 Finally, the PSC in Avandia finally figured that
4 out after three years. The first lien resolution program,
5 they absolutely barred us from disclosing the lien
6 resolution program or marketing it, if you will, to anybody
7 other than the 35 health plans that we represented there.
8 Two years later they're telling Judge Roof: *Judge, for the*
9 *other hundred health plans with significant liens here, or*
10 *500, we can't get this thing resolved because we don't know*
11 *who represents them.* Well, finally, they've come to us and
12 said, *Can you reach out to them?* We asked them for that
13 three years ago. We are the solution. We are a solution to
14 their problem. The problem -- but the genesis of the
15 problem, we wouldn't be needed if they would just do what
16 their contracts obligate them to do. You write a letter
17 directly to Aetna; Aetna resolves it through its subrogation
18 department and never calls me. But then you have 4,000
19 people who aren't writing their letters to Aetna and Cigna
20 and United because, I'm going to infer that their lawyers
21 tell them don't, we'll try and get this thing resolved
22 through a broad brush order. Don't do it.

23 Well then, that's where we get involved. The
24 clients say, *We don't -- we don't know who these people are.*
25 Mr. Watts said, *If you have a lien, you know, why don't you*

1 tell us what it is. We've explained it in the papers.
2 We've done -- the way we know we have a lien is when the
3 insured honors his contract and informs us that he was
4 injured, he was made ill through a tort. We don't know the
5 people who have internal bleeding had a tortfeasor. It's
6 99 percent of the time that's a natural cause, it's an act
7 of God, and we do not have any third-party reimbursement
8 rights against the Almighty. We acknowledge that.

9 So the solution is simple: Just do what your
10 contract says you need to do and you don't have to worry
11 about Rawlings and Lowey. But thank goodness, I guess, for
12 my family and its well-being, it seems to be the process in
13 mass tort litigation that they don't do that, and then we do
14 get involved, and once we do get involved we're the best
15 solution they have because we can get thousands or tens of
16 thousands -- well, in this case thousands of settlements
17 resolved and the liens resolved at discounts, at caps
18 with -- once they disclose their settlements to us with a
19 ticking clock that ticks only against us.

20 Thank you, Your Honor.

21 *THE COURT:* Good afternoon.

22 *MS. ARTRAY:* Sharon Artay on behalf of the
23 defendants.

24 I just want to reiterate what Mr. Ball said earlier
25 this afternoon, which is that from the defendants'

1 perspective, our interest is similar to the plaintiffs in
2 the sense that we want to head up a settlement and get it
3 resolved in a timely manner. But again, we also have the
4 dual purpose of making sure that the provisions of the
5 settlement are adhered to, particularly 8.7 and 8.8.

6 Mr. Watts made a comment earlier about claimants
7 being paid in November, and I don't know if that was just by
8 way of example or something more concrete, but just wanted
9 to clarify for the record that under the terms of the
10 settlement agreement, the payout is more likely to be done
11 at the end of December or January. But just to reiterate
12 our position that we just want to make sure that the terms
13 and deadlines in the MSA are adhered to.

14 *THE COURT:* Mr. Watts.

15 *MR. WATTS:* The timeline that you got today says
16 that the payout's going to be earlier, but we'll get to that
17 when we get to it.

18 The best thing that I could do is quote two things
19 that this gentleman said to you, and it's really the crux of
20 where we are. We don't know if we have a lien, and he wants
21 us to solicit clients. I've been practicing law in federal
22 court a long time. I don't think I've ever had a lawyer
23 appear in federal court and say, *I don't represent these*
24 *people yet. The other side wants us to solicit clients*
25 *because it's good for me and my family's well-being.* The

1 bottom line is, what you have here is you have a law firm
2 that does this in all these different mass tort cases and
3 they don't represent the client. They don't have authority
4 from the client to make the lien resolution deal.

5 They come in, they stop everybody's settlement,
6 everybody's money -- I mean I sat in on the last 15 minutes
7 of your YAZ hearing, but it seemed like it was taking
8 awhile. So these things stretch out over periods of
9 years -- Avandia, Vioxx, Fen-Phen. There's no law that says
10 this stuff, after we reached a settlement, has to take
11 years. If somebody has a lien, those 17 people that he
12 professes to represent, they can choose whether or not they
13 want to come in and assert it or not. If they choose not to
14 because they don't want you to have any jurisdiction over
15 them, they're certainly not in the place to tell you, give
16 me discovery, stop the distribution of \$650 million so that
17 you can enforce some ephemeral contractual right between one
18 of my future clients that I may go solicit and one of the
19 plaintiffs who might not have a contract with my client.

20 So I think where we are again is, I need to know
21 who they represent. If they want to make an appearance in
22 this Court to state their claim, we will settle it, and I
23 will sit in that hot room, whether or not you order it, and
24 we will resolve that claim with them. But I don't think
25 that you're required to play a game where we've got to set

1 up a marketing bonanza so that he and his family can have
2 well-being.

3 Thank you.

4 *THE COURT:* Ms. Ellis, would you approach the
5 podium, please. What's your schedule over the next
6 week-and-a-half, two weeks?

7 *MS. ELLIS:* Hold on just a second. Ten days, seven
8 days, more than that?

9 *THE COURT:* Ten days, let's say. Between now and
10 next Wednesday.

11 *MS. ELLIS:* October 8th and 9th and 10th would
12 be -- or 7, 8, 9, 10, one of those days; not the 6th. And
13 then the next week's not good, so --

14 *THE COURT:* Sometime next week?

15 *MS. ELLIS:* Not next week or the next. Oh, that is
16 next week. Is that too soon?

17 *THE COURT:* No. We're not worried about too soon;
18 we're worried about too late.

19 *MR. WATTS:* How about Thursday or Friday of this
20 week?

21 *MR. COHEN:* I would prefer that.

22 *THE COURT:* You prefer Thursday or Friday?

23 *MR. COHEN:* I have a family vacation planned next
24 week.

25 *MR. WATTS:* Thursday of this week?

1 THE COURT: So what's the -- Thursday, Friday?

2 MS. ELLIS: I could do that.

3 THE COURT: So I'm going to take the matter under
4 advisement. The stay of CMO 84 remains in effect. I'm
5 convinced I have jurisdiction over this matter, by the way,
6 but the other aspects of the order I'm going to have to work
7 out.

8 In the meantime, you know, one of the things that
9 shocked me about this, and I just -- I don't know how
10 ethical all this business is, but I'm shocked that the way
11 this business works is, you negotiate an agreement and then
12 you go to the clients and see if you can solicit clients to
13 sign on to the deal. That just shocks me. Maybe I'm just
14 naive, but that's not how I practice law, I know that.

15 And I think there's certain aspects of this
16 business that probably need to come to the light of day, and
17 I'm not at all fearful of this matter going to Chicago,
18 particularly in light of some of the things that have been
19 argued about here today, but -- because, believe me, there
20 are certain members of that court that are more than happy
21 to challenge certain things like that. But I'm going to
22 order that the movants in this matter, one, as Mr. Watts
23 discussed, which frankly I'd already thought of -- not to
24 steal his thunder, but I believe it appropriate that,
25 because of my at least sense of ethics, that the movants

1 provide proof to the Court prior to their meeting that I'm
2 about to direct, of who they represent for purposes of lien
3 negotiation in this litigation; not who they represent in
4 this -- relative to this motion but who they represent for
5 purposes of lien negotiation, submit that to the Court in
6 chambers. But they need to also provide that to the PSC.
7 So send it to chambers with a copy to the PSC. You can
8 submit it by e-mail is fine if you -- I think that's quicker
9 than snail mail. And then they'll meet with the PSC and the
10 Special Master, Ms. Ellis, Thursday or Friday, or both, of
11 this week to negotiate relative to the liens in this matter
12 for those companies whom they represent. And as I said, in
13 the meantime I will take the matter under advisement.

14 MR. COHEN: Your Honor --

15 THE COURT: Mr. Cohen.

16 MR. COHEN: I just have to say one thing about, you
17 know, when ethical things get flung my way. This is
18 misconstrued. We represent a lot of health insurers and
19 when we walk into a room and negotiate an LRP, as we will do
20 here, and we will present evidence to the Court, we
21 represent them. What I was referring to was once we reach
22 that lien resolution agreement, we say, *Would you like us to*
23 *take this out to the insureds who aren't in this room?*
24 Frankly, I don't need the insurers who aren't in that room.
25 I really don't. We've got a large enough market share. But

1 it's, frankly, in the interest of the PSC and the inventory
2 lawyers that we capture as wide -- if we reach an LRP
3 agreement that they think is fair, don't they want us to
4 reach as wide an audience as possible? I don't think -- if
5 they say, *No. Just the 17 insureds in this room. Don't go*
6 *beyond with that*, I'm fine with that. But we do have
7 contacts throughout the health insurance community, in the
8 United States in the counsel's office, and we can reach out
9 to them or we cannot reach out to them. There's no ethical
10 issue here. We represent who we represent. Every client
11 that's here is a movant that has employed us to come in and
12 challenge CMO 84. When we go into a room to negotiate a
13 lien resolution program we will have authority from the
14 clients we tell you we have authority to negotiate for. And
15 it may be the same 17, it may be 27, it may be 15. But I
16 have a 30-year market detail AV preeminent certification
17 that I have the highest rating in both competence and
18 ethics, which I take even more seriously, and I really take
19 umbrage when this is twisted against me as some sort of
20 ethical violation.

21 *THE COURT:* The record will reflect what you said
22 before, but I take that as a clarification of what you
23 previously argued. Certainly wasn't what you said. So I'll
24 take that as a clarification.

25 *MR. COHEN:* Thank you, Your Honor.

1 MR. WATTS: Judge, just to be clear, Thursday's the
2 day that everybody's available?

3 MR. COHEN: We'll make ourselves available.

4 MR. WATTS: Since he has offices all over the
5 United States and our magistrate's from New Orleans, would
6 it be acceptable with the Court if we met in New Orleans?

7 THE COURT: I don't care where you meet.

8 MR. WATTS: We have lien resolution counsel with
9 Providio. Would it be --

10 THE COURT: Say that again.

11 MR. WATTS: Our lien resolution counsel, Providio,
12 we'd like them to be involved just because they are smarter
13 than I am.

14 MR. COHEN: We think they're necessary parties.

15 THE COURT: Fair. Absolutely. Anything else?

16 MR. COHEN: Yeah. Could we also be included on the
17 list so that we know who you represent as well?

18 THE COURT: Sure. We stand adjourned.

19 **(Court adjourned)**

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REPORTER'S CERTIFICATE

I, Laura A. Esposito, RPR, CRR, CCR(MO), Official Court Reporter for the U.S. District Court, Southern District of Illinois, do hereby certify that I reported in shorthand the proceedings contained in the foregoing 38 pages, and that the same is a full, true, correct, and complete transcript from the record of proceedings in the above-entitled matter.

Dated this 6th day of October, 2014.

LAURA A. ESPOSITO, RPR, CRR, CCR