

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

IN RE: GUIDANT  
DEFIBRILLATORS PRODUCTS  
LIABILITY LITIGATION

MDL No. 05-1708 (DWF/AJB)

This Document Relates to All Actions

**PRETRIAL ORDER NO. 8**

**ESTABLISHING AN INSTRUCTIVE-BELLWETHER CASE SELECTION PLAN**

On January 31, 2006, the Court entered an Order addressing the issue of so-called representative, instructive, or bellwether cases in paragraphs 2, 3, and 4 of the Order. The intent of the Court's January 31, 2006 Order, to the extent it addressed selection of bellwether cases, was to jump-start a plan and discussion among the parties and the Court as to how best to select such cases and proceed to trial in March 2007, consistent with the deadlines established in Pretrial Order No. 5 and prior orders, and consistent with a March 2007 trial ready date. Since that time, the Court has had additional pretrial conferences and discussions with counsel with respect to establishing a selection plan for such bellwether cases.

Based upon the additional presentations, proposals, and submissions of the parties since January 31, 2006, and the Court having reviewed the contents of the file in this matter, and being otherwise duly advised in the premises, the Court hereby enters the following:

## **ORDER**

1. Except to the extent modified herein, all existing case management orders of this Court shall remain in full force and effect.

2. There are two ways in which the Court may select a plan for representative trials. The Court's preference, if it can be done expeditiously and meaningfully, is to seek the input of counsel in establishing truly representative trial categories that are proportionately representative of the range of cases pending in the MDL before the Court. If the Court concludes that it is unable to select such trial categories that are truly proportionate representatives of the range of cases pending in the MDL, then it will, in the immediate future, enact a random selection system which has been utilized in other MDL cases across the United States, as noted by counsel. However, the Court prefers first to seek a category of cases that are truly and proportionately representative of the range of cases pending in the MDL before the Court.

To that end, the Court directs that the parties begin consulting with one another for the express purpose of agreeing on trial categories that are proportionately representative of the range of cases before the Court. This shall be done by the parties so that short written submissions can be made by respective counsel for Plaintiffs and Defendants no later than the end of the business day, Friday, April 14, 2006. In those submissions, the Court expects the parties to identify those issues they agree on with respect to the process for selecting representative trials and those issues they do not agree on.

The Court also expects the parties to identify a process by which the individual selection of cases will be made from these categories on a time line that is consistent with

the trial ready month of March 2007, the fact discovery deadline, and the final deadline for dispositive motions established at paragraph 7 of the Court's January 31, 2006 Order.

3. With or without agreement of the parties, it is the intent of the Court to proceed with an established trial selection plan within one week of the April 19, 2006 Status Conference, including establishing deadlines for disclosure of the parties' expert reports, completion of depositions of the experts, and any other issues necessary to decide to continue the selection of cases and begin trying the cases in March 2007, at the latest.

If time permits, the Court is prepared to discuss the issue of a trial selection plan at the next telephone conference on April 5, 2006.

Dated: March 23, 2006

s/Donovan W. Frank  
DONOVAN W. FRANK  
Judge of United States District Court

### **MEMORANDUM**

The parties seem to agree that the first representative trial or trials should be limited to cases involving only the VENTAK PRIZM No. 2 DR Model 1861 ("PRIZM 2"), which is an automatic implantable cardioverter defibrillator ("AICD").

Whether that is the case or not, the Court expects the parties to have a serious discussion on the following issues that, at least from the Court's point of view, may facilitate the MDL case as a whole, but certainly will facilitate the selection of representative trials:

a) It strikes the Court that there are liability issues with respect to some of the medical devices in question that will be typical of many of the cases before the Court, and therefore especially instructive, quite separate from the issue of causation and damages.

b) Routine explantation versus premature or immediate explantation is also an issue that may define some of the cases. There necessarily must be some truly representative cases, at least as they relate to the device or devices themselves, circumstances under which they were implanted or removed, and the timing of the implantation or explantation compared to routine replacement based upon battery life. A number of these issues would capture many of the cases before the Court, separate from the issue of causation and damages. Specifically, the Court has in mind some expert testimony that could be of significant use not just to the bellwether cases, but to many of the cases before the Court. The Court believes that issue should be seriously discussed and explored by the parties.

c) The Court expects the parties to discuss issues of criteria for immediate depositions of individual Plaintiffs with grave health conditions and whether there can be a stipulation as to the proper measure of damages so that damages do not vary depending upon whether the Plaintiff is deceased or not. Resolving some of these issues likely would allay the fears and concerns of some of the Plaintiffs, and address the urgency of some of those cases from the Plaintiffs' point of view.

d) The Court is prepared to discuss causation and damage issues in terms of what the Court views as the more difficult task of selecting representative cases capturing a range of typical situations on the issue of causation and damages.

e) There may be a separate group of cases that could be deemed less serious than other groups or, if not less serious, isolated to perhaps one or two key issues that can be set for some type of settlement discussions during this same period of time. Whether this would involve limited use of summary jury trials or the involvement of Magistrate Judge Arthur J. Boylan, is an issue the Court can discuss with the parties at a later date. However, the Court does not want discussions on this narrowly drawn set of cases to sidetrack or otherwise interfere with the preparation of those cases that are selected for trial. We can discuss whether a master complaint and answer would resolve any of these issues in a more timely manner at the next telephone status conference on April 5, 2006.

Although the Court is willing to alternatively embrace a random selection process for representative cases, the Court is only willing to do so if the Court, in consultation with counsel, cannot expeditiously come up with a plan that calls for truly representative trial categories that are proportionately representative of the MDL cases before the Court. If we can accomplish that and the Plaintiffs before this Court conclude that we have accomplished a fair and representative selection process, it will increase the likelihood that the trial and/or settlement of this group of cases could resolve many issues before the Court for most Plaintiffs and the Defendants. Again, the Court intends to come up with a final selection plan before the month of April leaves us, absent agreement on some or all issues that will leave intact the existing dates of October for the completion of fact

discovery, followed by expert selection and preparation of expert reports. If anything, the Court would consider moving the completion of fact discovery to September 22, 2006, to give some additional time to firm up the selection and identification of experts, expert reports, and any depositions of experts that may be necessary so that we can proceed with any dispositive motions and, absent settlement, trial of four or five cases beginning in March 2007.

The Court is also hopeful that a discussion can occur with respect to the effect of this selection process on class-certification issues.

D.W.F.