

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: St. Jude Medical, Inc. File No. 01-MD-1396
Silzone Heart Valves (JRT/FLN)
Products Liability Litigation

Minneapolis, Minnesota
April 26, 2006
2:19 P.M.

BEFORE THE HONORABLE JOHN R. TUNHEIM
UNITED STATES DISTRICT COURT JUDGE
(PLAINTIFFS' RENEWED MOTION TO CERTIFY CONSUMER PROTECTION
CLASS)

APPEARANCES

For the Plaintiffs: LEVY, ANGSTREICH, FINNEY, BALDANTE,
 RUBENSTEIN & COREN
 STEVEN E. ANGSTREICH, ESQ.
 1616 Walnut Street, 18th Floor
 Philadelphia, Pennsylvania 19103

ZIMMERMAN REED
DAVID M. CIALKOWSKI, ESQ.
651 Nicollet Mall
Suite 501
Minneapolis, Minnesota 55402

For the Defendant: HALLELAND, LEWIS, NILAN & JOHNSON
 TRACY J. VAN STEENBURGH, ESQ.
 600 Pillsbury Center South
 220 South Sixth Street
 Minneapolis, Minnesota 55402

REED, SMITH, CROSBY, HEAFEY
STEVEN M. KOHN, ESQ.

JAMES C. MARTIN, ESQ.
DAVID E. STANLEY, ESQ.
STEVEN BORANIAN, ESQ.
355 South Grand Avenue
Suite 2900
Los Angeles, California 90071

LIZ PORTER, ESQ.

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

Court Reporter: KRISTINE MOUSSEAU, CRR-RPR
1005 United States Courthouse
300 Fourth Street South
Minneapolis, Minnesota 55415
(612) 664-5106

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(612) 664-5106

1 (In open court.)

2

3 THE COURT: You may be seated, everyone. Good
4 afternoon. This is civil case number 01-1396, In re:
5 St. Jude Medical, Incorporated, Silzone Heart Valves
6 Products Liability Litigation.

7 Counsel, would you note appearances today first
8 for the plaintiffs?

9 MR. ANGSTREICH: Yes, Your Honor. Good
10 afternoon, Your Honor. Steven Angstreich for the class.

11 THE COURT: Mr. Angstreich.

12 MR. CIALKOWSKI: David Cialkowski for the class.

13 THE COURT: Good afternoon.

14 MR. MARTIN: James Martin, Your Honor, for
15 St. Jude Medical.

16 THE COURT: Return appearance.

17 MR. KOHN: Steven Kohn for St. Jude Medical.

18 MR. STANLEY: David Stanley for St. Jude Medical.

19 MR. BORANIAN: Steven Boranian for St. Jude
20 Medical.

21 MS. PORTER: Liz Porter for St. Jude Medical.

22 MS. VAN STEENBURGH: Tracy Van Steenburgh for

23 St. Jude Medical.

24 THE COURT: Well, good afternoon to all of you.

25 We have the renewed motion today to certify the class in

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(612) 664-5106

1 the consumer protection claim, and I guess we also have a
2 motion to strike the surreply brief, and as I understand
3 it, we really have not much to talk about by way of a
4 status conference this afternoon. Things, there haven't
5 been much in the way of change, is that correct?

6 MR. ANGSTREICH: Your Honor, there is one issue
7 that I think we need to bring to the Court's attention. It
8 relates to the AVERT information questionnaire and
9 information that has been rattling around for quite some
10 time. Positions were submitted to Mr. Solum. He has as of
11 I believe Wednesday -- the 26th. Is the 26th today?

12 THE COURT: Yes, today.

13 MR. ANGSTREICH: Well, then I don't know how he
14 dated it the 26th, but he submitted it to Your Honor on the
15 26th.

16 THE COURT: Right.

17 MR. ANGSTREICH: Mr. Solum effectively has done a
18 sampling or established a sampling protocol for the AVERT
19 information or the questionnaires from it. Our problem is
20 that nobody submitted a statistical model from which his
21 sampling numbers are matched against, and we don't know at

22 this moment whether or not based upon the number of
23 questionnaires within the universe and the subset that he
24 has selected from each of the twelve sites, that is going
25 to give us a statistically significant model from which we

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1 can make argument, whether it's St. Jude Medical or
2 ourselves.

3 I've asked Mr. Kohn whether or not they're going
4 to agree that it in fact is a statistically significant or
5 random sample that would yield a statistically significant
6 result. We haven't gotten that feedback from our experts
7 yet. Our concern obviously is that we go ahead. We get
8 these 60 records.

9 And despite what they say on either side, either
10 the plaintiff or the defendant will argue that the sample
11 was not statistically significant and therefore the results
12 have no meaning, and what we will have done is spent an
13 inordinate amount of time going through the records, going
14 through the whole fight and then finding out that it
15 benefits nobody, and we have to come back again.

16 My thought would be for Mr. Kohn to comment to us
17 on what their position is. We will get our expert to
18 review it, but if in fact neither one of us or one of us
19 believes that it's -- it is an appropriate, random sample,
20 I think we still have the issue of whether or not we should
21 be presenting that issue to Your Honor for resolution

22 because, again, I don't want to, excuse me, at the end of
23 the day find out that whatever argument either side wants
24 to make effectively has no validity because some expert
25 says it wasn't done properly in the first place.

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1 THE COURT: Okay.

2 MR. ANGSTREICH: And that would be the only issue
3 for the status conference, Your Honor.

4 MR. KOHN: Yes, Your Honor. First of all, we
5 have not read the order, so I really can't comment on it.
6 Mr. Solum picked the number of 60, and we don't really
7 understand the basis for it, but moreover, the briefing on
8 this issue is not done by St. Jude Medical but by counsel
9 for the University of Pittsburgh, and they have at their
10 disposal beyond this other statisticians who are equipped
11 to analyze it.

12 So until they have had a chance to read it and
13 digest it, Mr. Solum because I was party to the e-mails did
14 say that in the event either side felt that the numbers
15 needed to be adjusted in any way, either side was free to
16 go back to him and address it.

17 So I think at this point it's premature for us to
18 bring it before this Court.

19 MR. ANGSTREICH: Your Honor, I still need to know
20 St. Jude's position because although they were not the
21 party advocating against turning over all the

22 questionnaires, notwithstanding the fact that the
23 documentation belongs to them, and they're entitled to it.
24 The fact of the matter is that the University of Pittsburgh
25 is not in this courtroom, and whatever the results are will

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1 not affect them. It will affect St. Jude Medical.

2 So we need to know what their position is with
3 respect to the appropriateness of the sampling. That's
4 all.

5 THE COURT: Well, I think that St. Jude Medical
6 probably needs a chance to review the material and probably
7 gather the input from the holders of the information right
8 now as well. Why don't we try to get, if there is -- if
9 there is an agreement that can be reached between the two
10 sides, that would be ideal and try to get that done soon.

11 If not, then perhaps we'll have to take up the
12 issue in a month or so.

13 MR. ANGSTREICH: Your Honor, the order as written
14 by Mr. Solum is a 30-day turnover.

15 THE COURT: Right.

16 MR. ANGSTREICH: So we really need to come to
17 grips with that before somebody starts doing all of the
18 work embodied in that. So maybe if we could hear in two
19 weeks what their position is, and if we have a
20 disagreement, we could then by telephone present it to Your
21 Honor.

22 THE COURT: Two weeks?

23 MR. KOHN: Your Honor, with all due respect, I

24 don't think it's St. Jude's burden to comment one way or

25 the other whether the sample chosen by the special master

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1 is appropriate. It's their motion. It's their burden to
2 come up with a statistical model.

3 If they feel that what the special master did was
4 inappropriate, then I think they ought to tell us. If it's
5 appropriate, then there is no dispute, but for us to run
6 around and find statisticians to evaluate what the special
7 master did or didn't do, I don't think it's our burden to
8 do that.

9 THE COURT: Well, the problem will come later as
10 issues are raised concerning the manner in which this was
11 done. I imagine that's your problem, Mr. Angstreich,
12 right?

13 MR. ANGSTREICH: That's correct, Your Honor.
14 Your Honor, our position is that we wanted and we were
15 entitled to all of the records, at least the North American
16 records. We don't know how or why Mr. Solum chose the
17 number that he chose, whether he sought guidance from a
18 statistician as to this approach.

19 Maybe if we knew that, it may give us a better
20 comfort level. Our problem is that if St. Jude is going to
21 raise the issue down the road that it wasn't appropriate,

22 even if we thought it were appropriate today, we're going
23 to butt heads over that at some point.

24 So I guess if Mr. Kohn's position is St. Jude is
25 not going to comment on it, our position is, this is

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(612) 664-5106

1 inadequate, and we're going to need a date from Your Honor
2 to bring the University of Pittsburgh here so we could
3 argue why Mr. Solum's analysis is inappropriate.

4 THE COURT: What about the option of going back
5 to Mr. Solum first? Is there time for that?

6 MR. ANGSTREICH: We have -- we had requested the
7 North American questionnaires. We had indicated that we
8 were concerned over a random sampling, and we were
9 concerned about a small number from a small number of a
10 universe.

11 And that was the argument that we made. We did
12 not believe that the University of Pittsburgh's argument
13 one way or the other would yield this. They wanted 25.
14 They wanted to give us 25 records, and this became a
15 compromise, I guess, for Mr. Solum as to 60.

16 If that compromise is in fact one predicated upon
17 an analysis of statistical significance within random
18 sampling, that's fine. We didn't think it were, it was,
19 and therefore we wanted it all. So I think going back to
20 him and asking him to reconsider this is not going to get
21 us very far.

22 And the only alternative is, either both sides
23 agree that we're going to be bound by whatever is found out
24 from this, or give us all the records, and we will bring it
25 to Your Honor for Your Honor to rule on it.

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(612) 664-5106

1 MR. KOHN: Well, let me just respond to that,
2 Your Honor. You can't determine whether it's statistically
3 significant or not until counsel gives the documents or the
4 numbers to statisticians. They should be able to run
5 whatever tests they want to run and make that
6 determination, but can't make that in the abstract.

7 THE COURT: Well, let's -- let's have the -- this
8 initial examination with your experts with the University
9 as well. Perhaps we can address this by telephone, say, in
10 two weeks and see where we go from there.

11 MR. ANGSTREICH: Very good.

12 THE COURT: See what's necessary at that point in
13 time, and if St. Jude Medical has a view on it at that
14 point in time, that's fine. If they don't, we'll proceed
15 with the parties that are directly involved.

16 MR. ANGSTREICH: Very good.

17 THE COURT: Okay. Let's turn to the plaintiffs'
18 motion.

19 Mr. Angstreich?

20 MR. ANGSTREICH: Yes, Your Honor. Thank you.

21 Your Honor, we are here because the Eighth

22 Circuit in its opinion came to a conclusion that Your Honor
23 should conduct a proper choice of law analysis under Shutts
24 and remanded the case for that analysis. That appears at
25 the conclusion of the section dealing with the UDAP class

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(612) 664-5106

1 and before the discussion about the medical monitoring
2 class.

3 That's why we're here. We're here to talk about
4 whether or not Minnesota law should be applied, can be
5 applied constitutionally across the country with respect to
6 this class, and in doing so, we need to determine whether
7 or not there are conflicts between the various state UDAP
8 laws, and if there are, whether they're real conflicts and
9 then what the analysis should be.

10 As the Eighth Circuit recognized, the application
11 of Minnesota law to all class member claims ultimately may
12 be proper, and the Court wanted to make certain that there
13 was sufficient contacts between Minnesota and the claims of
14 the class members.

15 We do not believe that the remand to Your Honor
16 had anything to do with doing a claimant by claimant
17 analysis. That isn't the law. That never has been the law
18 and never can be the law in the context of a class action.

19 Now, if the Eighth Circuit felt that there were
20 Rule 23 analyses that needed to be done by Your Honor, then
21 one might look at whether or not the claims are typical,

22 there is common questions, et cetera, that which we did
23 four years ago and several times thereafter when these
24 issues were briefed by way of reconsideration, reargument,
25 decertification, however St. Jude characterized the

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(612) 664-5106

1 position at that particular time.

2 So the sole issue as the Eighth Circuit phrased
3 it was, can we apply it and if so, will it meet the test.
4 I'm not going to address the arguments that St. Jude
5 Medical has raised with respect to Rule 23 arguments
6 because it is inappropriate.

7 The one thing that I guess has to be said is that
8 if you call something a duck that looks like a cow and you
9 call it a duck repeatedly, it doesn't make it a duck. They
10 kept calling this a medical monitoring case. It's not.
11 It's a UDAP case. It's a case seeking enforcement of the
12 consumer protection laws of Minnesota for misleading and
13 false advertising, for selling a product that did not
14 conform to the advertising.

15 It is not a product liability case. I seem to be
16 getting feedback here. Is somebody sending me Morse Code
17 messages?

18 THE COURT: Could be. You never know.

19 MR. ANGSTREICH: The consumer protection laws
20 were designed to protect consumers from false and
21 misleading advertising. They were modeled after the

22 Federal Trade Commission act. They were called baby or
23 little FTC acts. The national conference of commissioners
24 on uniform laws looked at all of this. There was a
25 specific purpose behind the consumer fraud laws.

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(612) 664-5106

1 Product liability laws focus on the product and
2 the injury caused by the product to the consumer. Consumer
3 protection laws look at the manufacturer's conduct in the
4 selling of the product, and that's what we're looking at
5 here, the conduct of St. Jude Medical.

6 It goes back to the old days of the snake oil
7 salesman, not that I'm suggesting that St. Jude Medical is
8 in the snake oil business, but there were two aspects to
9 that snake oil salesman's liability, if you would. One is
10 the toxic properties of the snake oil that caused personal
11 injuries to people, and the other was the misrepresentation
12 and misleading advertising telling the people what the
13 product could do.

14 Consumer protection designed to deal with the
15 advertising, the misrepresentations. Product liability, to
16 deal with the injury caused by the product. There are
17 three Minnesota statutes that are involved. We have
18 briefed them. I don't need to elucidate upon them before
19 Your Honor.

20 The significant aspect, as the Court found the
21 last time, is that the purpose of the statute is to protect

22 any person injured by a violation of any of the laws, and
23 that means any person, and that means any person from any
24 other state has a right to come into Minnesota to sue a
25 Minnesota corporation for the injuries that the misleading

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(612) 664-5106

1 advertising has caused.

2 The Minnesota Attorney General in the amicus
3 brief submitted to the Eighth Circuit had some important
4 policy points as it relates to the enforcement of
5 Minnesota's laws as it relates to its own citizens. The AG
6 pointed out that a state has an important interest in
7 ensuring that its merchants deal honestly with citizens of
8 other states.

9 The Minnesota consumer protection laws are
10 designed to prevent and remedy deceptive conduct directed
11 from within the state and not to protect the local
12 businessmen from foisting inappropriate products on others
13 in other states.

14 If in fact a Minnesota corporation that engages
15 in consumer fraud around the country couldn't be sued in
16 Minnesota by those other people but only by Minnesota
17 citizens, then effectively what Minnesota would become is a
18 haven for corporations that engage in those kind of -- that
19 kind of conduct nationwide but avoid the conduct within
20 their home state, and therefore they would be safe from
21 litigation.

22 It's a tool, according to the AG, of making
23 certain that Minnesota's marketplace is a place where
24 conduct is one of honest dealing. There is no intent by
25 the enforcement of the act to impose Minnesota's consumer

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(612) 664-5106

1 fraud laws on other states in any way interfering with
2 interstate trade or commerce. This is locally enforcing it
3 against St. Jude Medical.

4 So we start with the premise that there is a
5 strong public policy as enunciated by the attorney general
6 of this state to seeing to it that Minnesota's corporations
7 are held responsible under Minnesota law for injuries that
8 their advertising and their conduct causes
9 extraterritorially.

10 Now, two questions: Can Minnesota's law apply to
11 all the claims? We submit it can. Are there other state
12 laws that could apply? Absolutely there are. As Your
13 Honor recognized in the early proceedings, the site of
14 implantation and the home state of the implantee do have an
15 interest as it relates to those individuals.

16 So as we did in our submission, Your Honor, there
17 is a question or a table or a step chart, and the question
18 becomes, What laws could conceivably be applied, which is
19 the constitutional question based on sufficient contacts.
20 So the first question is, Does Minnesota have sufficient
21 contacts so that its law may apply, and I'm going to get

22 into that.

23 If Minnesota has sufficient contacts, the

24 question then is, Do the other states have such contacts,

25 and are we talking about substantive aspects of their UDAP

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(612) 664-5106

1 laws. What are substantive aspects? Those are the ones
2 that can create, define and regulate the rights.

3 As the Court is aware, if the only conflict
4 relates to a procedural or remedial aspect of the UDAP law,
5 and Minnesota has a right to have its law applied in the
6 context of the case, then Minnesota's procedural and
7 remedial aspects would apply.

8 It's only as to the substantive that we get into
9 an issue. So the question is, Are there conceivably
10 conflicting substantive issues? If so, we now look at the
11 Leflar five factors in Milkovich which adopted those five
12 factors to see whether or not applying each of those five
13 factors Minnesota law should still apply.

14 Now, we submitted in our papers, Your Honor, an
15 analysis of every state and the District of Columbia's UDAP
16 law. It's our position that 33 of the states, 32 states
17 and the District of Columbia, have no conflict. Within
18 that is Minnesota. So the real issue relates to the
19 conflict between the remaining 17 which we also identified,
20 and with respect to each of those states, we applied the
21 five factor test.

22 And let's step back a second, and let's look at
23 the contacts. St. Jude Medical is incorporated and
24 headquartered, and it has its principal place of business
25 in Minnesota. The Silzone heart valves were substantially

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(612) 664-5106

1 created, manufactured and marketed from Minnesota. All
2 corporate acts that are implicated in this case occurred in
3 Minnesota.

4 The product's design and marketing, the
5 regulatory affairs were conducted here. All of the
6 documentation, all of the materials were assembled here.
7 The adverse events reporting in management with respect to
8 the Silzone valve was here. The advertising in medical
9 communities and communications were created in Minnesota.
10 The AVERT study information was reported to Minnesota.

11 The recall was decided here. The methodology of
12 it was established here. If you go back to St. Jude
13 Medical's own submission in the Grovatt case when it sought
14 to transfer from the district court in New Jersey to this
15 Court, St. Jude's transfer motion said, and I'm quoting,
16 "Here St. Jude Medical's Silzone coated valves were
17 designed, researched, developed, engineered, manufactured,
18 tested, quality controlled in Minnesota, and all labels,
19 warnings and instructions were drafted in Minnesota by
20 witnesses in Minnesota. Likewise all marketing and
21 distribution efforts were based in Minnesota. All of these

22 facts point strongly towards transfer to Minnesota."

23 So I guess the argument becomes from a contacts

24 standpoint, for transfer purposes, those contacts have

25 significance, but for application of the law, they have no

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1 significance. They're not sufficient contacts to satisfy
2 constitutional considerations. We submit that you can't
3 have it both ways. Those are very, very significant
4 contacts.

5 As St. Jude also said in the Grovatt motion, the
6 only connection this case has to a New Jersey court -- and
7 I would submit it would be the same, you can plug in any
8 state -- is that plaintiff resides in that state. That is
9 not enough to maintain venue, whereas here the defendant is
10 based in Minnesota. The evidence is based in Minnesota,
11 and identical litigation is proceeding in Minnesota.

12 So from its own perspective, it can't say that
13 there aren't significant contacts in this state. Also in
14 the advertising that St. Jude Medical put out, the
15 telephone number that is provided in case you have any
16 questions is a 612 telephone number.

17 Now, I know that in this day and age you can call
18 612 and be talking to somebody in Alaska because of the way
19 they transfer numbers around, but the reality is that at
20 least on paper, the 612 area code is a Minnesota area code.
21 So there, the advertising that was intended to cause

22 people, physicians, surgeons, to use the Silzone valve told
23 them if they had any questions, they wanted more
24 information, call us in Minnesota.

25 So while there is a contact for where the Silzone

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1 valve was implanted, be that in the implanting state or in
2 the home state of the implantee, that's the extent of the
3 contact. In fact, as we pointed out in our submission in
4 reviewing their standard form contracts, the overwhelming
5 majority of the contracts between St. Jude Medical and the
6 institutions that entered into contracts had venue and the
7 law of Minnesota being applied regardless of where the
8 institution was.

9 There are some over the years that were in Texas
10 and in other locations, but the majority of their contracts
11 called for everything to be in Minnesota.

12 THE COURT: Do you have an estimated percentage
13 there?

14 MR. ANGSTREICH: It's in our submission, Your
15 Honor, and my memory is not -- is not absolute, but it's
16 substantially above 55 percent, as I recall.

17 THE COURT: I don't remember seeing it, but I'll
18 find it, if necessary.

19 MR. ANGSTREICH: So we look at the relevant
20 inquiry. Does there or did St. Jude's conduct violate the
21 consumer protection law of this state? There is no

22 question that what we have articulated in this case is that
23 there were misrepresentations that were made in
24 advertising, advertising literature, that was placed in the
25 medical community, misrepresented advertising that was

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1 provided for in the various conferences where they spoke on
2 behalf of their product, in mailings that went out that
3 were disseminated from Minnesota.

4 THE COURT: So let me just clarify,
5 Mr. Angstreich. It is your position that in the 17 states
6 that you have identified, there is or there are substantive
7 conflicts?

8 MR. ANGSTREICH: That's correct, Your Honor.

9 THE COURT: Okay. So we have no disagreement on
10 that point as to those states?

11 MR. ANGSTREICH: We have no disagreement, and
12 what we did was, we said, look at each of them, and then
13 let's decide whether it's a scienter requirement, whether
14 it's a reliance requirement. What would applying the
15 choice of law analysis for this, for Minnesota, what would
16 you do? Would you take Arizona? I believe Arizona was the
17 first -- no, Alabama was the first in the 17.

18 Does it make sense based upon the choice of laws
19 to say Alabama has a greater interest in dealing with the
20 claims in this case than Minnesota would. We've said that
21 in the context of this case, there has been a

22 representation that the Silzone valve had characteristics,
23 ingredients or benefits that it didn't have.
24 That's a violation of Section 325D.44,
25 subdivision 1, small 5, that there was a misrepresentation

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(612) 664-5106

1 that the goods were of a particular standard or quality or
2 grade that they were not, which is Subsection 7, and that
3 they engaged in conduct which similarly creates a
4 likelihood of confusion or misunderstanding as it relates
5 to this product, which is Subsection 13.

6 So it's our position that every state, even those
7 17, seek to protect the consumer from that kind of conduct.
8 When you take the five factors, the predictability of
9 result, I'm not really certain whether or not the
10 predictability of result isn't for the benefit of the
11 defendant. It would seem to make the most sense that one
12 would want to know if one is being sued by 11,000 people
13 that a success applying one law should be a success
14 applying all laws.

15 So the predictability, which is the first of the
16 five factors, it seems to me there is no question but that
17 it makes the most sense, and it is the most predictable to
18 know where you're going under your own state's law.
19 St. Jude Medical being a citizen of this state should know
20 the laws in this state, and should know whether or not its
21 conduct will expose it to liability.

22 It's predictable to have them be held to that
23 standard. It does not affect interstate orders. If you
24 applied Minnesota's law for the benefit of somebody from
25 Alabama, that's not telling Alabama corporations that they

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(612) 664-5106

1 must meet Minnesota's consumer protection laws in order to
2 do business in Minnesota.

3 What it is saying is, everybody in Minnesota that
4 is doing business outside of the state has to conform to
5 Minnesota's law. May have to conform to other people's law
6 as well, but as far as Minnesota is concerned, you have to
7 conform to ours.

8 Simplification of the judicial task, I don't know
9 how it could be argued that 17 subsets of potential classes
10 or 17 individual class actions, UDAP class actions, plus a
11 33 state class action in this court would be a
12 simplification of the case, and the advancement of the
13 forum's governmental interest, which we submit the
14 governmental interest test is paramount here, there can be
15 no argument that Alabama, Arizona or any of the other 17
16 states has a governmental interest in preventing its
17 citizens from recovering for consumer fraud caused to them
18 by citizens of a foreign state.

19 It just is not reasonable. There is no case law
20 to support that kind of an analysis that Alabama,
21 et cetera, would want to protect the Minnesota corporation

22 here, St. Jude, in favor of protecting their own citizens,
23 and the application or the better rule of law, I think that
24 when you balance Minnesota's consumer protection laws and
25 the benefits it affords, the better rule of law would be to

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(612) 664-5106

1 provide that opportunity.

2 Now, if somebody from one of the other states
3 believes that his or her law is more favorable, well, there
4 is a methodology and a mechanism for providing to the class
5 member that opportunity to get the betterment if they want,
6 and that's to opt out and bring their own action in their
7 own state.

8 So from a due process standpoint, you always have
9 an opportunity through the notice process to give somebody
10 an opportunity to opt out, to go forward under its own law
11 if it wants to do that. Applying all of the five factors
12 to each of those 17 states, we submit that we established
13 without a question that Minnesota law does and should apply
14 because of the overwhelming contact and the governmental
15 interest that exists here.

16 THE COURT: What about looking at the coin from
17 the other side, and that is the interests of the 17 states
18 in ensuring that their own consumer protection law gets
19 applied to their own citizens' potential claims? Is that a
20 relevant factor here for this analysis or not?

21 MR. ANGSTREICH: Well, it is, Your Honor but if

22 you look at the governmental interest, what we're saying is
23 that where Minnesota is intent upon making certain that its
24 citizens don't cause injury outside, that rises to a higher
25 level than a state saying that we want to punish that state

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(612) 664-5106

1 for injuring our citizens by consumer fraud.

2 If you -- if you did that and then you had to
3 look at the other analyses, the other four factors, those
4 other four factors would then swing the scale back to
5 Minnesota because of the issues of predictability,
6 simplification of the judicial task. Again so long as --
7 and I think that a state has a right to say, so long as our
8 citizens are protected.

9 Now I would say that if we were seeking to apply
10 a state law that effectively circumscribed the rights of
11 the consumer versus the rights in another jurisdiction,
12 then one might say that jurisdiction might have a greater
13 interest because by its statute, it's given greater rights.
14 It hasn't limited the rights.

15 Here there is no question that Minnesota has
16 provided the right to any person to be protected against
17 the very kinds of conduct that all of the other statutes
18 are designed to prevent. So whichever side of the coin you
19 look at, there is a greater governmental interest in
20 dealing with the conduct of the citizen from this state so
21 long as the rights of the class member are sufficiently

22 protected.

23 And as I said, if another state had a remedy that
24 that person can't get here, that person has a right to opt
25 out and seek that remedy. We're not looking at remedies

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 now. The issue, and that's one of the differences between
2 the analyses that we've supplied. Pre suit, post suit
3 notices, whether you can have a class action or you can't
4 have a class action, individuals versus businesses versus
5 attorney generals, the types of remedies, those are
6 procedural or remedial in which Minnesota's law must be the
7 one applied.

8 So we're not dealing with the remedy, and that's
9 the other aspect of the attack from St. Jude Medical. It's
10 a constant attack that this is medical monitoring, medical
11 monitoring, medical monitoring. It is a remedy that we
12 seek as part of the injunction. There is no question about
13 that, but at this stage of the proceeding we're seeking,
14 our claim is for consumer fraud.

15 That seeks a damage component which the statute
16 gives and an injunction or injunctive component which the
17 statutes are for, and the remedy does not wag the dog. It
18 doesn't work that way, and the Court has the right to say
19 at some point down the road, I don't believe that medical
20 monitoring is within the confines of the injunctive remedy
21 afforded by the statute.

22 You can't have it, or conversely, I don't believe
23 that an epidemiological study is of the -- rises to the
24 level of injunctive relief for which you're entitled, but
25 that's not today, and that doesn't determine whether or not

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 certification should be had.

2 We recognize that the damages could be different
3 for each of the members of the class, just as the damages
4 are different in an antitrust case, in a securities case,
5 in every other consumer fraud case, but that doesn't negate
6 the right to class certification. You don't look at
7 damages. It's interesting that in their surreply, they
8 look at the Vioxx decision in New Jersey from the wrong
9 end, but that's because they say this is a medical
10 monitoring case, and we say it's a UDAP case.

11 So the 2006 opinion in *International Operating*
12 *Engineers vs. Merck* where the Court said, New Jersey's
13 interest in this litigation in our opinion far outweighed
14 the interests of all other states. All consumer fraud laws
15 in the nation are designed to protect consumers to some
16 degree. Their differences do not represent competing or
17 conflicting resolutions of a particular policy issue.
18 Rather, the laws reflect the legislative determination to
19 attack the same evil.

20 And then it went on to say that no state has an
21 interest in denying its own citizens recovery while

22 protecting a foreign New Jersey corporation when the
23 conduct at issue took place to a significant degree in
24 New Jersey.

25 I think that that language could be read, no

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 state has an interest in denying its own citizens recovery
2 while protecting a foreign Minnesota corporation when the
3 conduct at issue took place to a significant degree in
4 Minnesota. It's on all fours. This was a UDAP case
5 seeking to have New Jersey's consumer protection law
6 applied against Merck, a New Jersey corporate citizen.

7 We are seeking to have Minnesota's consumer
8 protection laws applied against St. Jude Medical, a
9 Minnesota corporation that admittedly from St. Jude Medical
10 has not only its headquarters here, but every significant
11 material aspect of the creation, the marketing and the
12 recall of this product, every marketing piece of
13 literature, every advertisement created, disseminated,
14 everything, from Minnesota.

15 To say that it has a significant degree, I think
16 it has an overwhelming contact. The only contact it
17 doesn't have is the situs of the implantation. Other than
18 that, it is all here. That's why, among other things, they
19 sought to bring everybody here. So when you analyze
20 whether or not courts, whether it's in Lutheran
21 Brotherhood, whether it's in the Vioxx case or in this

22 case, should -- first we ask, can it. The answer is, it
23 can, and then should it, and the answer is, it should apply
24 the Minnesota law because the balancing all tilts.
25 And it's not by a preponderance of the evidence.

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 The scale just falls to the bottom when you put all of the
2 contacts that this state has from a constitutional, due
3 process analysis. St. Jude Medical clearly is not being
4 denied due process or equal protection by being called upon
5 to answer to all consumers in Minnesota because every
6 single consumer under Minnesota statute had an absolute
7 right to come here.

8 The Eighth Circuit mentioned the fact that it
9 wasn't sure whether or not the consumers at the time they
10 entered into the transaction thought about bringing a
11 lawsuit or that their remedy would be in Minnesota. I
12 don't think that the consumers in this case knew where
13 their valve came from to start with, where it was
14 manufactured, so that in the context of analyzing a
15 business transaction where parties know going in where
16 everybody is from and what laws may or may not apply, that
17 may have an analysis, and it may have some viability.

18 But in the context of this case, you just simply
19 look at whether or not it benefits the consumer by applying
20 the Minnesota statute, and the answer is that it does, and
21 it is of absolute importance for this state as articulated

22 by the attorney general to make sure that its corporate
23 citizens behave appropriately, and if not, be held to the
24 standards that Minnesota sets.

25 Your Honor, the positions that we've articulated

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 are amply set forth both in our principal brief and in our
2 reply. I've touched upon as I believe the important
3 highlights. If there is any -- if Your Honor has any
4 questions, I would be happy to answer them.

5 I'm not sure, though, that as part of rebuttal
6 it's even appropriate for me to address what I know will be
7 coming you, and that is the no human being is the same.
8 Everybody is a snowflake. You've got to look at all the
9 other Rule 23 requirements at this point because I don't
10 believe that when you look at the Eighth Circuit's language
11 and mandate that it's appropriate to go back and do that
12 again.

13 If the Eighth Circuit believed that this was a
14 medical monitoring case, it could have done to the UDAP
15 claim what it did to the 17 state analysis, which we
16 believe, Your Honor, was in error regardless because Your
17 Honor did do a 50 state analysis and in fact created a
18 single class where all of the laws were identical, but
19 leaving that alone, it could have just simply said
20 reversed, there is no reason to do a Shutts analysis and
21 applied Minnesota's choice of laws if it wanted to do that,

22 and with that I thank you, Your Honor.

23 THE COURT: Thank you, Mr. Angstreich.

24 Let's take about a, maybe a five-minute break

25 here, and then we will start with Mr. Martin, and then

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(612) 664-5106

1 there will be rebuttal time as well.

2 MR. ANGSTREICH: Thank you.

3 (Recess taken.)

4

5 (In open court.)

6 THE COURT: You may be seated.

7 Mr. Martin?

8 MR. ANGSTREICH: Your Honor, before Mr. Martin

9 begins --

10 THE COURT: Yes.

11 MR. ANGSTREICH: -- two very fast points:

12 Exhibit 1 to our submission, to our document submission, is

13 an affidavit from myself where I analyze the contracts, and

14 82.6 percent of those contracts are from Minnesota, and the

15 second point, it's been suggested to me that I might have

16 suggested that Your Honor's 17 state certification we view

17 to have been error.

18 I was referring to the Eighth Circuit's

19 determination that your certification was in error that we

20 disagreed with.

21 THE COURT: I, of course, had assumed that to be

22 the case.

23 MR. ANGSTREICH: Thank you.

24 THE COURT: Okay. Go ahead, Mr. Martin.

25 MR. MARTIN: Thank you, Your Honor, and good

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(612) 664-5106

1 afternoon.

2 THE COURT: Good afternoon. Welcome back.

3 MR. MARTIN: Happy to be here. Thank you. Much
4 has changed in this MDL since this Court last addressed the
5 issue of class certification on the plaintiffs' consumer
6 fraud cause of action. The vast majority of the individual
7 cases have been resolved, and there is no influx of new
8 claims.

9 The foundational perspective study regarding the
10 valve continues to show no increased risk. The supposed
11 risks from the valve envisioned by plaintiffs in their
12 original pleadings have not come to pass, and the class
13 before this Court now is described as asymptomatic or
14 uninjured, and finally and most importantly for the hearing
15 today, we have the directives from the Eighth Circuit's
16 opinion which are relevant to the class certification
17 issues the Court faces.

18 Now, plaintiffs had their metaphor of snake oil
19 salesmen, and with the Court's indulgence, I'm not going to
20 adopt that one. I do have my own metaphor, however, and
21 that is that we are two ships passing in the night on

22 virtually every issue that should be in front of this Court

23 today and the way those issues should be resolved.

24 We are two ships passing in the night on the

25 meaning and effect of the Eighth Circuit's decision for

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 class certification. We are two ships passing in the night
2 on the meaning and effect of the constitutional conflict
3 analysis that is required in this proceeding. We are two
4 ships passing in the night on Minnesota's own conflict
5 principles and what they mean, and we are two ships passing
6 in the night on whether the requisites for class
7 certification under Rule 23 need to be examined at this
8 point.

9 And, Your Honor, I'm going to pick up each one of
10 those issues in turn, but the overall message is that when
11 the proper focus is given on all these issues, there are
12 insurmountable barriers to class certification. Let me
13 start with the Eighth Circuit's opinion.

14 That opinion, Your Honor, exposes two fundamental
15 flaws in plaintiffs' analytical route to class
16 certification: One on the need for individualized proof
17 for medical monitoring and the other on their conflicts
18 analysis. Both of these flaws together compelled the
19 denial of their motion without the need to look at any
20 other issue.

21 Now on the need for individualized proof and

22 medical monitoring, we know that it's a part of the class
23 and we know that it's a part of the relief sought, and on
24 that issue, the Eighth Circuit very pointedly said that
25 medical monitoring claims involving the Silzone heart valve

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 patients present too many individualized issues to support
2 class certification under any prong of Rule 23.

3 There are three indisputable premises behind the
4 Eighth Circuit's holding that class member by class member
5 proof is required to prove a medical monitoring claim
6 involving the Silzone valve. The first is that every risk
7 or complication for which plaintiffs seek medical
8 monitoring occurs in patients with any mechanical heart
9 valve and for reasons unrelated to the Silzone valve.

10 The second is that every patient requires medical
11 monitoring or treatment for these risks or complications
12 without regard to the Silzone valve, and third, based on
13 these two premises, it's impossible to determine whether a
14 Silzone valve has created any need for enhanced medical
15 monitoring without, as the Eighth Circuit provided,
16 answering questions regarding the patient's medical
17 history, the condition of the patient's own heart valves at
18 the time of implantation, the patient's risk factors for
19 heart valve complications, the patient's general health and
20 his or her own personal life-style choices.

21 Looking at the consumer fraud class before the

22 Court now, all the reasons underpinning the Eighth
23 Circuit's rejection of medical monitoring relief remain
24 because the premises that formed the basis of the Eighth
25 Circuit's reasoning have not changed.

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(612) 664-5106

1 It's still true that every risk or condition that
2 Dr. Butchart's extensive program would monitor or treat
3 occurs in heart valve patients irrespective of the presence
4 of the Silzone valve, and it's still true that the nature
5 or extent of the needed monitoring and treatment is patient
6 specific and depends on individualized inquiries.

7 Now, plaintiffs say here today that the Eighth
8 Circuit's reasoning can be ignored because they're now
9 seeking their medical monitoring as injunctive relief for
10 deceptive advertising and apparently not under the common
11 law, but that's a distinction without a difference as far
12 as the Eighth Circuit's holding is concerned.

13 In holding that medical monitoring claims
14 presented too many individualized issues under Rule 23, the
15 Eighth Circuit was not focused on the label or the specific
16 wrong supporting relief. What it looked at instead were
17 the inquiries that would have to be made before any right
18 to enhanced medical monitoring attributed to the valve
19 could even be considered no matter what the label or the
20 purported wrong.

21 THE COURT: In the consumer fraud claim, is

22 medical monitoring a claim or a remedy in your view?

23 MR. MARTIN: Your Honor, I think whether it's a

24 claim or a remedy is not relevant in terms of the class

25 certification analysis for this reason: The plaintiffs

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 would say that because it's a remedy, it's a damages issue,
2 and therefore it need not concern the court at class
3 certification stage.

4 Well, Your Honor, that's ordinary class action
5 law when there aren't factual disputes underlying the right
6 to relief, and this is what the Eighth Circuit was focused
7 on. So even if this was labeled a remedy or damages issue,
8 whatever else we might say about it, we know that these
9 individual inquiries are going to be required just to
10 determine the right to relief, and that overtakes, as the
11 Eighth Circuit said, any request for class certification no
12 matter what state law it's supposedly based on, and that
13 was more than any prong of Rule 23 would tolerate.

14 So on that basis alone, Your Honor, the Eighth
15 Circuit's opinion compels rejection of a claim for medical
16 monitoring relief without the need to look at or resolve
17 any other issue. Now, apart from those factual inquiries
18 related to medical monitoring, plaintiffs' request for
19 class certification hits its next insurmountable hurdle
20 when we move to the Eighth Circuit's conflict analysis.

21 Now, to start with, the Eighth Circuit

22 unequivocally held that where an attempt is made to bring a
23 nationwide class under the law of a single state, what we
24 have here, the Constitution requires a two prong conflict
25 inquiry into, number one, the contacts that each out of

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(612) 664-5106

1 state class member's claim has with this state; and two, an
2 examination of each class member's individual state laws,
3 and that has to be done before concluding that a single
4 state's law can be applied.

5 The Eighth Circuit's holding is a recognition
6 that by virtue of the due process and full faith and credit
7 clauses, the conflicts inquiry here cannot be treated as
8 though an out-of-state plaintiff or even a group of out of
9 state plaintiffs voluntarily had elected to sue in
10 Minnesota.

11 In that kind of case, a choice of law
12 determination simply could be made by resort to Minnesota's
13 conflict principles, but as the Eighth Circuit indicated,
14 and the Constitution requires, where a named representative
15 brings suit on behalf of those with no connection to
16 Minnesota, who did not elect to sue here, and who can
17 pursue their own claims in a forum of their own choosing,
18 the Constitution demands a different inquiry.

19 THE COURT: Who is the Constitution protecting in
20 that instance?

21 MR. MARTIN: Your Honor, it is protecting the

22 class members, and it is protecting their right to bring
23 their own suits under their own laws. Now, if we look at
24 this constitutionally driven inquiry, what the Eighth
25 Circuit said the Constitution compels is that if the class

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 members' claims lack the requisite connection to Minnesota
2 or their own state's laws are different than Minnesota's,
3 then Minnesota law cannot constitutionally be applied to
4 the nationwide class. Instead the laws of the 50 states
5 have to be applied.

6 Now, we know that the Eighth Circuit refrained
7 from making that analysis, and it left it to this Court to
8 do it. The Eighth Circuit took that narrow view because
9 that was the issue that was before it. The only issue was
10 the propriety of this Court's conflict analysis as applied
11 to the nationwide consumer fraud class.

12 Having held that the inquiry was incomplete, it
13 did what an appellate court would be expected to do and
14 sent the case back to the trial court. Now, it didn't send
15 the case back to this Court with an endorsement on this
16 constitutional conflict inquiry.

17 On the contrary, what the Court did say is
18 express some degree of skepticism on whether the
19 constitutional prongs could be met. The Eighth Circuit,
20 for example, could not perceive any apparent connection
21 with Minnesota that would make it likely that an

22 out-of-state class member would have expected Minnesota law
23 to control on a claim involving their own Silzone valve at
24 the time of implantation of the valve, and that is the
25 relevant constitutional inquiry.

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(612) 664-5106

1 Now, it likewise cited the Bridgestone case as
2 support for the likelihood that there were going to be key
3 differences in the state consumer fraud laws, and that
4 would emerge from the constitutionally required class
5 member specific analysis. Now, clearly the Court believed
6 that these were significant hurdles and expected an
7 affirmative showing that they would be met.

8 But plaintiffs don't offer the requisite
9 affirmative showing on either prong, and they can't. Now,
10 looking at the first prong which deals with the
11 expectations of each out of state class member, plaintiffs
12 have refused, and still refuse, to make a class member by
13 class member analysis.

14 They instead focus on St. Jude's contacts with
15 Minnesota, including decisions on the valve's design that
16 were made in Minnesota, a marketing campaign supposedly
17 initiated in Minnesota, the fact that we're headquartered
18 here or some of the valves were made here.

19 They come back to the any person language in
20 Minnesota's statute. They highlight the attorney general's
21 interests, and they even point to our venue motion again,

22 which very carefully carved out this conflict analysis that
23 we're talking about today.

24 Having identified what they say are the relevant
25 contacts, plaintiffs then contend that if a more specific

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 inquiry is required it's up to us to do it, but it's
2 certainly not part of the constitutional analysis, but we
3 know from the Eighth Circuit's opinion that that can't be
4 right because plaintiffs are pointing here today to the
5 same contacts to satisfy this constitutional inquiry that
6 the Eighth Circuit previously rejected as insufficient.

7 And the Eighth Circuit makes clear that this
8 class member specific inquiry is a prerequisite to
9 nationwide certification, and the burdens on certification,
10 Your Honor, fall on plaintiffs, not on St. Jude. And
11 although plaintiffs may want to condemn the Eighth
12 Circuit's decision and what it requires as unrealistic, the
13 Supreme Court already answered that rejoinder in *Shutts*,
14 and what it said was that the two prongs of this
15 constitutionally driven inquiry have to be made, and
16 they're not altered by complaints that they're too
17 burdensome.

18 So, Your Honor, the easiest path to denial of the
19 certification motion here today is the one that the Eighth
20 Circuit took. The class has to be denied for the very same
21 reason the Eighth Circuit previously reversed the failure

22 to conduct the first prong of the conflict analysis that
23 the Constitution requires.

24 Okay. But even if we moved on and we undertook
25 to take on this constitutionally required class member

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 specific analysis, the result is the same whether we look
2 at the class member connections or the diversity of law.
3 There is a lack of a sufficient constitutional connection
4 here between the out-of-state class members' consumer fraud
5 claims and Minnesota, and that mandates the rejection of
6 plaintiffs' request.

7 Now, the constitutionally required connection as
8 described by Shutts and the Eighth Circuit has to focus, as
9 I indicated, on objective facts that would make it
10 reasonable to assume that an out-of-state class member
11 would have expected Minnesota law to apply to his or her
12 claim at the time of implantation. That language comes
13 directly from the Eighth Circuit's opinion, and it comes
14 from Shutts.

15 Now, when the relevant inquiry is undertaken, it
16 becomes apparent why the Eighth Circuit expressed
17 skepticism that this prong could be met. The record shows
18 that the out-of-state class members did not have their
19 valves implanted in Minnesota, did not receive any
20 representations about their valves in Minnesota, sustained
21 any alleged harm outside of Minnesota, could determine the

22 purported causal nexus between the representations and any
23 alleged cause of their harm without regard to Minnesota,
24 and could sue under their own state's consumer fraud laws
25 without the need to do so in Minnesota.

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 That's what the class members knew at the time of
2 implantation, and those objective facts are the ones that
3 matter. They are never analyzed by plaintiffs because they
4 dictate a single answer. There is no apparent reason that
5 a class member would have expected their consumer fraud
6 claim to be brought under the law of Minnesota at the time
7 of implantation.

8 What they would have expected is that if they had
9 a problem with their valve, they would do it and resolve it
10 locally under the consumer fraud laws of their own states.
11 Now, in these circumstances, the constitutionally required
12 conflicts analysis will not permit Minnesota law to be
13 applied to the out-of-state class members' claims.

14 THE COURT: How do you know that someone would
15 have expected that any claim would have been made in their
16 own state? I mean, it seems intuitive. It also seems
17 intuitive that many of the people undergoing such an
18 extensive operation would know that the product being
19 implanted in them had come from Minnesota.

20 I mean, how can you ever state for sure in this
21 arena exactly what people would have expected at the time?

22 MR. MARTIN: Well, the United States Supreme
23 Court in Shutts and the Eighth Circuit gave us the
24 indication for the focus. They very carefully said at the
25 time of implantation.

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(612) 664-5106

1 THE COURT: Right.

2 MR. MARTIN: Okay? And I think, Your Honor, what
3 goes along with that is some skepticism on the part of both
4 the United States Supreme Court and the Eighth Circuit that
5 there would be any expectation that out-of-state law would
6 be applied to a local claim that arises locally. Why did
7 they think that? Because most people who have problems
8 with a valve or a lease, as was true in Shutts, and want to
9 bring a lawsuit, they're going to do it in their own state,
10 under their own law, and that is the preferred position
11 under the Constitution as Shutts indicates.

12 That's the result we are trying to protect, so
13 what we would need conversely is not speculation about what
14 these people would think, but some objective facts that
15 would create the expectation for Minnesota. They're not in
16 this record, Your Honor. They're not in the declarations.
17 They're not in the testimony from the plaintiffs.

18 And so intuitively, not only is there no record
19 support for it, but the facts as I listed them indicate
20 that this would still be a local lawsuit, but most
21 importantly, without an objective demonstration to the

22 contrary on the plaintiffs' knowledge at the time of
23 implantation, we can't take the next step.

24 The default position here is to apply the laws of
25 the 50 states, not to look for ways to apply Minnesota law,

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 and of course the need to apply the laws of the 50 states
2 renders any attempt at a classwide trial unmanageable and
3 establishes that a nationwide class isn't the superior
4 method of resolution.

5 The Court previously so held in dealing with
6 plaintiffs' tort and warning claims, and the overwhelming
7 majority of courts nationwide share that conclusion. So
8 where are we at this point? The first prong of the
9 constitutionally required conflicts analysis presents an
10 insurmountable barrier to plaintiffs' request for
11 certification. There is no default position here that
12 would support Minnesota law, and the Constitution won't
13 permit it.

14 But let's suppose that we can overlook the
15 failure on the first prong of the analysis and we move on
16 to the second. Now, this constitutionally driven conflicts
17 inquiry again is a class member specific inquiry into the
18 law of each class member's state to determine if there are
19 differences. It is the differences that are important for
20 the same reason, that is that the preference here, and the
21 default position under the Constitution, is for local law

22 to apply.

23 Here, too, the plaintiffs avoid the class member
24 specific inquiry, and they say it's not necessary because
25 there really are no material differences in the various

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 states' consumer fraud statutes, although they carve 17
2 out, because they all emanate from the same source, and
3 they attack the same conduct, but the constitutionally
4 driven inquiry can't be sidestepped with these
5 observations, either.

6 If a class member's specific inquiry reveals
7 differences in the consumer fraud statutes of the 50
8 states, then Minnesota law again cannot constitutionally be
9 applied. The laws of the 50 states must be applied
10 instead.

11 On the relevant inquiry, the Eighth Circuit
12 remark in reliance on what so many other courts have held
13 that the various states' consumer protection statutes are
14 not at all alike. There is no way to gather these states
15 up in groupings and paper over these differences.

16 The statutes have significant differences that
17 are highlighted in the charts we have provided, and they
18 extend across every facet of the claim. Who can sue and
19 when and whether an actual injury is required, whether a
20 plaintiff's reliance is required, and if so, in what form
21 and on what type of claim, whether a defendant must commit

22 a knowing violation of the statute or act with the intent
23 to deceive or act with any intent at all, and whether the
24 recovery of any damages is permissible and if so, for what
25 and in what form.

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(612) 664-5106

1 THE COURT: Mr. Martin, can you think of any
2 statute which is identical across the 50 states and is
3 interpreted identically?

4 MR. MARTIN: You know, Your Honor, off the top of
5 my head, I suspect that there probably are some, but here
6 we're focusing on not interpretation but the specific
7 provisions of the various statutes, and it's those
8 differences that we are looking for, and it's those
9 differences that we've highlighted.

10 And again the reason we are looking for those
11 differences is, we are trying to protect the class member's
12 right to bring suit in their own states under their own
13 laws, not look for ways to have a nationwide class action,
14 but let's move beyond to the medical monitoring relief
15 again.

16 Is there a concern that this is in play now as a
17 remedy or a damage or whatever? When we get to this prong
18 of the analysis, it's very much in play. It's probably
19 more problematic from a conflicts standpoint because of the
20 question of whether the various state's consumer fraud
21 statutes would even support medical monitoring as an

22 appropriate form of relief to asymptomatic individuals.
23 No Minnesota case directly supports that
24 conclusion, and we've noted in our briefing, we think
25 Minnesota law is to the contrary. The only published

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 decision that applies that result is in West Virginia, but
2 the Court didn't directly address the issue. Well, on the
3 other 48 states, we know from our prior hearings here that
4 their laws are disparate and they're not uniform. In many
5 states, there is no authority on this issue at all.

6 As this Court previously found when it looked at
7 medical monitoring, the lack of authority alone establishes
8 that the potential for conflict exists. It requires an
9 examination of out-of-state law, and that would reveal the
10 vast differences in how the states would treat this issue.
11 Now, when we gather up the specific differences in the
12 states' statutes and we combine them with this unique
13 request for relief, there can be no resort to Minnesota law
14 for a nationwide class given the number of differences
15 here.

16 Principles of federalism implemented through Erie
17 would foreclose that result even if the constitutionally
18 required conflicts analysis did not. Now plaintiffs lastly
19 claim that these material differences on the constitutional
20 analysis are of no moment because any putative class member
21 who doesn't want Minnesota law can simply opt out of the

22 class.

23 But attention to the class member specific

24 connections and the requisites of the out-of-state laws are

25 a matter of constitutional concern, not class action case

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(612) 664-5106

1 management, and both prongs of this constitutional inquiry
2 must be undertaken before the determination on
3 certification can be made, not after.

4 No contrary reading of the Eighth Circuit's
5 opinion makes sense. So in the end, a class member by
6 class member conflict analysis reveals the differences in
7 the states' statutes and compels that the laws of the 50
8 states must be applied.

9 So where are we today on this record given the
10 Eighth Circuit's opinion? The directives in the Eighth
11 Circuit's opinion when applied foreclose any attempt at
12 nationwide certification under Minnesota's consumer fraud
13 laws. The plaintiffs' motion can and should be denied
14 under the Eighth Circuit's reasoning without the need to
15 look at any other issue.

16 But let's go on and take the second part of the
17 inquiry and assume that there is the potential to apply
18 Minnesota law here and to look at Minnesota's conflict
19 principles. So we have now imagined that the Eighth
20 Circuit's opinion and the Constitution do not exist, and
21 we're taking an independent look at Minnesota's choice of

22 law principles.

23 Well, these choice of law principles and the

24 cases relying on them also confirm that the law of the 50

25 states would have to be applied to a class member's

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(612) 664-5106

1 consumer fraud claim, and there are multiple reasons for
2 that.

3 This conclusion follows from the Court's prior
4 orders and the reasoning in the overwhelming number of
5 cases St. Jude has cited. In considering tort, warranty
6 and medical monitoring laws of the various states, this
7 Court noted that the states where the class members' valves
8 were implanted and their injuries occurred had a strong or
9 paramount interest in having their law applied to heart
10 valve claims in light of Minnesota's conflict principles.

11 The vast majority of other courts applying
12 conflict principles that are the functional equivalent of
13 Minnesota's hold that this preference for the law from the
14 place of implant and injury resonates just as strongly
15 where the consumer fraud statutes are concerned.

16 Now, if there is any lingering doubt on the
17 matter, Your Honor, and we don't think there is,
18 Minnesota's conflict principles when independently applied
19 point to this preference for out-of-state law. Plaintiff's
20 first try to reduce the number of differences in the
21 various states' statutes by saying once you dissect them

22 most of them differences are really just procedural or
23 remedial and therefore they don't belong in the conflict
24 basket.

25 But plaintiffs' effort to characterize these

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(612) 664-5106

1 statutory differences as purely procedural has no grounding
2 in reality, and it finds no support in Minnesota law. The
3 consumer fraud statutes are enacted as self-contained
4 schemes which reflect the states' public policy on who can
5 recover, what they can recover and when. Every state
6 legislature that makes a decision on the elements of
7 standing to require or not to require reliance for scienter
8 or to limit what can be recovered is making a policy
9 decision on the controlling law.

10 Since all the facets of the consumer fraud
11 statutes create, define and regulate rights, under
12 Minnesota law, they are in no sense procedural. Under
13 Minnesota law, substantive law creates, defines and
14 regulates rights. That's the Zaretsky case. Substantive
15 law directly impacts on the right to sue and the elements
16 of the cause of action. That's the Gate City case.

17 Given their substantive character then, because
18 this is exactly what these states' statutes accomplish, a
19 conflicts comparison is called for on the consumer fraud
20 statutes, just as it was with the states' product
21 liability, warranty and medical monitoring laws.

22 Now, we know the factors in Minnesota's analysis:
23 Predictability of results, maintenance of interstate order,
24 simplification of judicial task, advancement of
25 governmental interest and finally the application of a

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(612) 664-5106

1 better rule of law.

2 Let's take a look at the first factor,
3 predictability. The paramount goal we know from Minnesota
4 case law in considering this factor, and the Nodak case
5 tells us this, is to avoid forum shopping by applying the
6 law that an out-of-state class member would likely expect
7 to be applied in litigation over the implantation of his or
8 her valve.

9 Well, the Eighth Circuit gave us the insight we
10 needed here. There is no apparent reason that an
11 out-of-state plaintiff reasonably would expect their claim
12 to be litigated under Minnesota law unless they were forum
13 shopping. They would litigate that case in their home
14 forum under their own consumer fraud laws, prove their case
15 there without ever leaving the state.

16 This factor on predictability favors the
17 application of out-of-state law.

18 THE COURT: I'm assuming you're referring here
19 simply to a consumer fraud or misrepresentation claim and
20 not an injury or an independent monitoring claim, correct?

21 MR. MARTIN: I'm referring to the consumer fraud

22 claim and all of the relief that the plaintiffs would
23 attach to it, yes, Your Honor, and because all the states
24 have consumer fraud statutes, the same analysis
25 functionally would apply.

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(612) 664-5106

1 Now, what about the regard for the foreign states
2 laws? Well, there would be a manifest disregard of foreign
3 states' laws for Minnesota to prefer its consumer fraud
4 laws in this controversy. The state where the valve is
5 implanted, the surgery is performed, the follow-up care is
6 administered and the wrong allegedly occurred has a
7 paramount interest in its own residents' cases for reasons
8 that resonate just as strongly as Minnesota's.

9 And those states also have a significant interest
10 in determining under circumstances under which their
11 residents can obtain relief and what law ought to apply to
12 their own residents' claims. So this second factor also
13 favors the application of out-of-state law.

14 On the third factor, simplification of the
15 judicial task, federal courts and diversity can apply the
16 laws of the various states. This is a neutral factor in
17 the analysis.

18 Now, turning to the fourth factor, advancement of
19 governmental interest, pointing to the AG's brief and
20 considerations, the plaintiffs emphasize Minnesota's strong
21 regulatory interests and indicate that that should be the

22 overriding consideration in the analysis of this factor,
23 but when you take a close look at what the Minnesota case
24 law provides, this factor is intended to evaluate each
25 forum's interest and policies in light of the factual

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(612) 664-5106

1 circumstances of the litigation. The Schwartz case
2 provides that directly.

3 So there has to be a more balanced view on this
4 factor, and as this Court again noted in dealing with
5 plaintiffs' personal injury, warranty and medical
6 monitoring causes of action, all of the affected states
7 have strong interests in claims related to the implantation
8 of medical devices within their borders. A claim brought
9 under a consumer fraud statute here is related to the
10 implantation of a medical device within their borders, and
11 these interests are reflected in the enactment of each
12 state's consumer fraud statute.

13 Now, this Court further held, and many other
14 courts have done so as well, that this interest is the
15 strongest in the plaintiff's state of residence and the
16 place where plaintiff's injury occurred. The Baycol and
17 Nodak cases both take that view as well, and other courts
18 have repeatedly taken that view where the plaintiffs sought
19 to have the law of the defendant's headquarters or the
20 state of manufacture or the state where the decisions were
21 made apply.

22 The Chin case, the Propulsid case, the Rezulin
23 case, the Ford Ignition case, the Bridgestone case, and six
24 or seven others we have cited say that very thing. So this
25 factor, too, favors the application of out-of-state law.

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(612) 664-5106

1 On the better rule of law, Your Honor, this is
2 neutral and not a part of the analysis regularly considered
3 by Minnesota's courts. So where are we? Again, when
4 Minnesota's conflict principles independently are
5 considered, the scales tips in favor of the application of
6 the consumer fraud laws of all 50 states.

7 Now plaintiffs' last rejoinder on this is they
8 find that result incongruous. Why wouldn't an out-of-state
9 claimant prefer the application of Minnesota's more liberal
10 consumer protection laws, and they ultimately ask this
11 Court to adopt a preference for Minnesota law on that
12 basis.

13 Well, for a number of very fundamental reasons,
14 this argument does not resonate, either. First, the
15 constitutionally driven conflict inquiry won't permit this
16 result for reasons I've already talked about, and no
17 preference for Minnesota law can displace that
18 constitutional inquiry.

19 Second, Minnesota's own conflict analysis does
20 not turn on which state has the most liberal remedial law.
21 As the Nodak and Nesladek cases we have cited illustrate.

22 In both those cases, Minnesota law provided for a recovery,
23 and the out-of-state law did not.

24 However, because the factorial conflicts analysis
25 dictated that the more restrictive out-of-state law be

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1 applied, the courts adopted that law. Now the Nodak and
2 Nesladek cases both hold that even where each state has an
3 interest in having its law applied, then the state where
4 the injury occurred is the state whose law should be
5 applied.

6 Well, here each of the states does have an
7 interest in having its law applied, and since the class
8 members' injuries occurred elsewhere, the conflict scale
9 again does not tip to Minnesota. Now, plaintiffs'
10 preference for Minnesota's remedial law also would promote
11 what? It would promote forum shopping, the exact result
12 Minnesota's conflict principles seek to avoid.

13 In fact, the Minnesota Supreme Court faced just
14 such a request in the Jepson case and responded that
15 Minnesota had no interest in encouraging that conduct, and
16 finally the fact that the other states take a less liberal
17 approach in their consumer fraud statutory schemes does not
18 entitle them to less dignity. These statutes are carefully
19 balanced policy choices that deserve respect.

20 The statutes also are multifaceted and complex,
21 and they defy liberal or restrictive labels. Many of them

22 are more recovery oriented than Minnesota's. In these
23 circumstances, it would be ill-advised to presume that
24 Minnesota has a monopoly on wisdom when it comes to the
25 regulation of consumer fraud or consumer protection.

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(612) 664-5106

1 Now here again, Your Honor, we do not need to
2 look past Minnesota's conflict principles to deny this
3 motion. Under the compulsion of these principles, the laws
4 of the 50 states must be applied, and that is an
5 insurmountable obstacle to certification.

6 All right. Even if all of this is ignored and we
7 somehow could assume that the Eighth Circuit's opinion, the
8 constitutional conflicts inquiries and Minnesota's conflict
9 laws as construed by their own cases are suspended, class
10 certification still should be rejected here. Plaintiffs
11 forego in their briefing, and they forego here again today,
12 any analysis under Rule 23 as far as the burdens of Rule 23
13 are concerned.

14 Well, our briefing and the evidence we have
15 submitted with it lays out the multiple reasons why
16 plaintiffs' nationwide class doesn't pass muster under
17 Rule 23, even if Minnesota law could be applied to each
18 class member's claim. Plaintiffs have claimed in their
19 briefing and argue again here today that St. Jude's
20 analysis of Rule 23 is misplaced.

21 As they would have it, once the choice of law

22 issue is resolved and Minnesota law is applied, there is
23 nothing to do done further under the compulsion of this
24 Court's original order and the endorsement of the Eighth
25 Circuit by its silence in its opinion. Neither one of

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1 these arguments, however, forecloses a reexamination of
2 Rule 23 factors.

3 With respect to the Court's original order, it
4 doesn't create any compulsion because it was vacated and no
5 class certification ruling exists, but that order also
6 involved two differently defined classes with different
7 class representatives, and a less developed record on the
8 disparities of proof under Minnesota's consumer fraud
9 statutes.

10 As to plaintiffs' reliance on the Eighth
11 Circuit's endorsement of their consumer fraud class, that
12 assertion is not defensible. The Eighth Circuit reversed
13 the certification of the consumer fraud class, and it
14 addressed the propriety of the class certification issue,
15 as it put it, only with regards to due process and full
16 faith and credit.

17 Given the Court's judgment and given its own
18 language, the sum of the parts does not equal plaintiffs'
19 whole. So a Rule 23 inquiry must be made here, and when
20 the requirements of the rule are looked at on the record
21 that is before this Court, class certification again isn't

22 possible.

23 Let's look first at Rule 23(a) and its

24 requirements. With respect to ascertainability, the

25 plaintiffs' new class definition becomes the paramount

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(612) 664-5106

1 factor to look at now. Under their definition, the
2 individuals who are in the class are those who have not
3 developed a manifest and diagnosed injury from their
4 implant of a degree and severity that would permit a
5 personal injury suit to be commenced in their state of
6 residence. That's the class that is before this court.

7 Well, this definition requires a two-part mini
8 trial just to determine who is in the class. First we have
9 to look at the severity of the class member's alleged
10 injuries and the relationship to the implant, and after
11 that, we have to make a comparison and an analysis of that
12 injury under their own state's laws.

13 Now, all the parts of this mini trial are going
14 to present disputed issues, and the needs for these kinds
15 of mini trials undermines the very efficiencies that class
16 litigation is intended to promote. As far as the adequacy
17 of representation is concerned, as we have noted,
18 plaintiffs' asymptomatic noninjury definition casts serious
19 doubt on whether the relief they seek is even available
20 under Minnesota's consumer fraud statutes.

21 It's questionable whether Mr. Grovatt can be

22 viewed as a private attorney general because of the private
23 damages he is seeking. While Minnesota's courts haven't
24 yet addressed the issue in this precise context, the
25 published case law indicates that the kind of abstract and

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1 unquantified risks that are at the heart of Dr. Butchart's
2 medical monitoring program do not meet the injury
3 requirement under Minnesota's consumer fraud statutes,
4 either.

5 Now, these sorts of legal uncertainties should
6 not be a part of a class representative's claim, but even
7 if these legal defenses are sidestepped, as far as
8 typicality is concerned, the record also shows that because
9 of Mr. Grovatt's idiosyncratic medical condition, surgeries
10 and post operative care, he is typical only of himself and
11 not any other class member, and he has a need for
12 individualized treatment on his conditions independent of
13 the presence of any heart valve.

14 And finally, he is unaware of having received any
15 representations about the Silzone valve. So his claim
16 implicates additional factual defenses that relate to the
17 consumer fraud claim, and that makes him atypical as well.

18 It doesn't get any better, Your Honor, when we
19 look at Rule 23(b)(3). With respect to Rule 23(b)'s
20 predominance, manageability and superiority requirements,
21 there are multiple, individualized issues that arise in any

22 attempt to meet each element of a plaintiff's burden of
23 proof as set forth in the Group Health case under the
24 consumer fraud statutes.

25 Now, much has been made in the briefing of the

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 Minnesota Supreme Court's opinion in Group Health as
2 supposedly eliminating the need for any individualized
3 proof on the record that is before the Court. One would
4 think on the analysis that we have heard here this
5 afternoon that there was some kind of national advertising
6 campaign referenced in the record that influenced every
7 buying decision.

8 Were that the case, as it was for the Vioxx case
9 that the plaintiffs have cited, plaintiffs' reliance on
10 Group Health and their consumer fraud class claim might
11 carry some persuasive force, but there is no evidence like
12 that in this record. The record shows that there is no
13 uniform representation about the Silzone valve that is a
14 part of every purchase, and in fact, the record shows that
15 Silzone valves were implanted in the absence of any
16 representations about the valve at all.

17 In some cases, we have sales reps talking to
18 physicians about the valve and physicians with information
19 about the valve talking to patients. Now, armed with some
20 information about the valve, some physicians talk about it
21 with their patients, and some do not. Some patients recall

22 those conversations. Others do not.
23 In other cases, Your Honor, there are no sales
24 reps, but there are physicians with information about the
25 valve who talk to their patients, but when armed with that

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(612) 664-5106

1 information, some physicians talk about the valve with
2 their patients, and some do not. Some patients recall
3 those conversations, but some do not, and as I indicated in
4 still other cases, there are no representations about the
5 valve coming from a sales rep received by a physician or
6 communicated to a patient, but it gets more complicated
7 after that.

8 There is also no uniformity in the information
9 conveyed to patients or physicians about the valve or
10 uniformity in whether the disparate types of information
11 conveyed mattered to them. The information came from sales
12 reps, as I indicated. It came from colleagues. It came
13 from journals and conferences.

14 No one says it was a national campaign, and no
15 one says the information, whatever it was, was uniform.
16 Purchasing and implantation decisions similarly were made
17 with different motivations and undertaken for a variety of
18 reasons, many of which have nothing to do with what was
19 allegedly said or read or heard about the valve, if
20 anything was heard about the valve at all.

21 Even the price paid for the valve varied among

22 the class members, and not every purchaser who received the
23 information about price cared about any representations
24 related to the price and why those representations might be
25 made, and certainly every patient and physician didn't even

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(612) 664-5106

1 receive representations about price.

2 Now, at the end of the line on this
3 representation element alone, this case is about as far
4 from the Lutheran Brotherhood or the Vioxx paradigm that
5 the plaintiffs have cited as one could imagine just on this
6 representation element alone. This representation element,
7 which is inherent in every Group Health case, every claim,
8 will demand individual proof in each case, and that would
9 be true no matter what state law is considered or applied.

10 Now, these kinds of individual inquiries as we
11 know from the Eighth Circuit's opinion and other
12 authorities overtake any attempt at class certification,
13 but when we add in the harm and causal nexus elements, the
14 complexity increases still and more individual inquiries
15 will be required.

16 Dr. Butchart's declaration, Dr. Jones'
17 declaration and Dr. Cheitlin's declaration show why.
18 Looking first at Dr. Butchart, while there is a strenuous
19 debate about the soundness of his reasoning and
20 conclusions, it's indisputable that his monitoring and
21 treatment program does nothing to ameliorate the number of

22 individual inquiries that are required before determining
23 whether a patient needs any medical monitoring or
24 treatment.

25 Dr. Butchart's program requires individualized

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(612) 664-5106

1 risk assessment based on discrete risk factors with
2 differing outcomes based on both. That will be a factual
3 dispute in every case, and it will be foundational to this
4 request for relief.

5 Looking to Dr. Jones and Dr. Cheitlin, again,
6 their reasoning and conclusions might be debated, but the
7 fact that they so sharply disagree with Dr. Butchart's
8 reasoning and the conclusions that he reaches show the
9 number and depth of individualized factual disputes that
10 would take place in any classwide trial. These
11 declarations fairly considered, Your Honor, plainly show
12 that these disputes will extend beyond medical monitoring.

13 Whether any class member is at a greater or
14 lesser risk for any complication associated with the valve,
15 including a greater or lesser risk of infection, is an
16 individualized inquiry that depends on multiple factors
17 which have nothing to do with the valve.

18 Now, as the Eighth Circuit observed and other
19 courts have held and as I indicated, the need for these
20 kinds of individual inquiries outstrips any utility for a
21 class action. The fact that common issues may exist with

22 respect to each class member does not make them predominate
23 or make them manageable where those issues must be resolved
24 individually in a case involving a nationwide class, and
25 that is true, Your Honor, whether those inquiries relate to

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(612) 664-5106

1 liability, whether they relate to causation or whether they
2 relate to damages, and the law is uniform on that.

3 I started, Your Honor, with observations about
4 the effect of the passage of time, and let me end with that
5 thought. Given the passage of time, there is no
6 demonstrable need for a class action to resolve what's left
7 of these Silzone valve cases. A class action is an
8 extraordinary procedural tool. It is the exception. It is
9 by no means the rule.

10 Where, as here, there is no threat to overwhelm
11 the judiciary, no compelling need for coordinated case
12 resolution, and asymptomatic patient population being cared
13 for and being monitored and insoluble constitutional and
14 procedural barriers confronting a request for nationwide
15 relief, Rule 23 need not be and it should not be invoked.

16 Instead the MDL should fulfill its coordination
17 function, return the handful of cases that remain to their
18 home jurisdictions for resolution under local law, and we
19 urge the Court to deny the motion. Thank you.

20 THE COURT: Thank you, Mr. Martin.

21 Mr. Angstreich?

22 MR. ANGSTREICH: There can't be anything more
23 true than the fact that we are two different ships. I must
24 confess, I sat here going through the seven paragraphs --

25 THE COURT: Might I add to that comment that it

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(612) 664-5106

1 seems as though the two different ships are passing on two
2 different planets.

3 MR. ANGSTREICH: Yes. I went through the seven
4 paragraphs of the Eighth Circuit's opinion dealing with
5 the, quote, consumer protection class, to see if there was
6 any mention of medical monitoring in those seven
7 paragraphs. There is none, or any of the analysis that
8 Mr. Martin just did for the Court.

9 Actually what the Court does is, it says St. Jude
10 Medical has asserted numerous arguments. U. S.
11 Constitution arguments, that a nationwide class violates
12 the Constitution's commerce clause, the due process clause,
13 the full faith and credit clause, the Erie doctrine and the
14 rules enabling that. It says that the Constitution doesn't
15 permit a nationwide personal injury class action using the
16 consumer protection law of one state to the exclusion of
17 all other states.

18 It says that the federal Rules 23 question
19 manageability, adequacy, et cetera, et cetera. That's what
20 St. Jude Medical argued, and what the Eighth Circuit
21 effectively said was, we're going to address the class

22 certification issue only with regard to the due process and
23 full faith and credit classes, and we conclude that you
24 didn't do, you being Judge Tunheim, did not do a sufficient
25 conflicts of law analysis.

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(612) 664-5106

1 Now, if any of the arguments that St. Jude
2 Medical made to the Eighth Circuit along the lines of
3 personal injury claims, medical monitoring claims,
4 et cetera, et cetera, et cetera, were before that court, in
5 other words, if that court believed that the UDAP case was
6 as St. Jude Medical portrayed it, we wouldn't be arguing
7 today.

8 The Court knew in the section dealing with
9 medical monitoring it had to deal with that issue,
10 manageability, Rule 23, and the court did not remand it
11 back to Your Honor to do any such analysis, and in fact,
12 what is very telling because I don't know where this first
13 prong analysis comes from. It doesn't come from Shutts,
14 and it doesn't come from the Eighth Circuit.

15 In fact, if you believe what Mr. Martin just told
16 you, there is no point in doing a conflict of law analysis.
17 There is no point in doing any of the work that the Eighth
18 Circuit asked you to do because it's impossible, and there
19 is no point in having the choice of law analysis, the five
20 factors, because you can never come to the conclusion that
21 using those five factors justifies imposing Minnesota law

22 where the plaintiff is from another state.

23 I find it incredible to argue that the suing of a

24 Minnesota corporation in its home state under its home

25 state's laws is forum shopping, but maybe that's what

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(612) 664-5106

1 St. Jude Medical thinks of this, but then again, why would
2 they seek to remove every state court action to federal
3 court so that they could then seek a transfer, where, to
4 Minnesota, which is exactly what happened in -- by the way
5 it's Grovatt is the name of the plaintiff -- exactly what
6 happened in Grovatt, and in Sliger. The plaintiff brought
7 their case in their home state.

8 And because of the overwhelming contacts with
9 Minnesota, St. Jude said, well, no, no, no, we shouldn't be
10 sued in New Jersey where the plaintiff would have had a
11 right to sue us, we should be in Minnesota. So it does
12 not -- it does not work at making that argument, and in
13 fact nothing has changed other than the fact that the
14 Eighth Circuit has said to this Court we're remanding to do
15 that analysis, and I think that's exactly what it says.

16 We reverse and remand for that analysis, in
17 quotes, and the analysis that they asked the Court to do
18 was to determine the proper choice of law analysis. Now,
19 it's interesting to note that Mr. Martin essentially
20 contends that it is a denial of due process. It offends
21 the Constitution to apply Minnesota law to an out-of-state

22 plaintiff.

23 But quite to the contrary Shutts says, there is,

24 of course, no constitutional injury to out-of-state

25 plaintiffs in applying Minnesota law -- actually, it's the

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(612) 664-5106

1 Eighth Circuit applying Shutts. There is, of course, no
2 constitutional injury to out-of-state plaintiffs in
3 applying Minnesota law unless Minnesota law is in conflict
4 with the other state's law.

5 Well, so that's the first question. Is there a
6 difference, is there a conflict, a real conflict between
7 Minnesota's law and the other state's law, and the Court
8 went on to say, therefore, we must first decide whether any
9 conflicts actually exist, and there was a chart up there in
10 which Mr. Martin said that the Court looked at all of these
11 different kinds of conflicts, but actually the Court didn't
12 look at any conflicts and rather what they said was, well,
13 we'll look to the Bridgestone/Firestone case where that
14 court said that there is inherent conflicts.

15 But what the Eighth Circuit didn't do and what
16 St. Jude Medical didn't do is to take the real conflicts
17 and actually apply in their submission to you, as we did,
18 the five factors to determine whether or not where there is
19 a substantive conflict there is a reason not to apply
20 Minnesota law.

21 There is also a basic difference. If you have a

22 statute, every aspect of the statute, even the remedies
23 afforded by the statute are no longer remedial, but they're
24 substantive. Well, that's not the law. Remedial,
25 procedural are just that, even within the context of a

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(612) 664-5106

1 statutory scheme, and therefore, the remedial aspects of
2 the statutes and therefore the procedural aspects of the
3 statutes are not the kind of conflict that the Court needs
4 to be concerned about, notwithstanding Mr. Martin's
5 assertion to the contrary.

6 And we also have to get back to the concept that
7 we're not now seeking anything different from what we were
8 seeking when we filed the case. Out-of-pocket damages
9 caused by buying a product that was misrepresented in its
10 advertising and injunctive relief, that's what we're
11 seeking.

12 Every single person who had a Silzone valve
13 implanted in him has a claim based upon the
14 misrepresentation for having that valve in him or her.
15 Now, with respect to people who have actually sustained
16 personal injuries, they have separate causes of action. A
17 lot of them have settled their claims and therefore have
18 released St. Jude Medical, but we're talking about the
19 people who have this adulterated product within them, this
20 misrepresented product, and that is the consumer fraud.

21 And it's no different than the people who

22 purchase a pill believing that it had some value to them,
23 whether it was Vioxx or any of the other prescription drugs
24 that supposedly had a benefit, when in reality they didn't.
25 They were misrepresented as to the efficacy of that

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(612) 664-5106

1 particular drug, and that's why the Vioxx case where the
2 UDAP nationwide class action under New Jersey law is on all
3 fours where the governmental interest test was applied to
4 find that New Jersey had the paramount interest.

5 So if you look at the Eighth Circuit's actual
6 language, what they were asked to analyze, you look at what
7 they analyzed, you come to the conclusion that there has to
8 be, there has to be some reality to the analysis because we
9 wouldn't be, the Eighth Circuit wouldn't have asked the
10 Court and the parties to do a fruitless task, and that is
11 to do a 50 state analysis when there is no point in doing
12 it.

13 And the argument that we didn't do an individual
14 by individual analysis, what we did was an individual state
15 claim analysis. The point being that any consumer fraud
16 claim is identical. They purchased a product based upon a
17 misrepresentation.

18 The fact that Mr. Grovatt may be six feet tall
19 and Mrs. Jones may be five feet tall doesn't change that
20 person's claim. They were defrauded pursuant to the
21 consumer fraud statute. That's the claim, and we did an

22 individual claim-by-claim analysis, state-by-state analysis

23 and applied the five factors.

24 So despite the fact that Mr. Martin says we

25 didn't do it, we in fact did do it, but what we didn't do

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(612) 664-5106

1 is determine whether or not somebody had personal injuries,
2 and those personal injuries might be different in the
3 application of different personal injury statutes because
4 quite frankly that's not what the Eighth Circuit asked us
5 to do.

6 And although the Eighth Circuit made the
7 statement that there is no indication out-of-state parties
8 had any idea that Minnesota law would control, citing to
9 Shutts, the fact of the matter is that in Shutts, the
10 parties did know what was going on in the case, and we're
11 not talking about the same kind of plaintiff here.

12 And if that is the determinative test, in other
13 words, if all that the Eighth Circuit wanted for us to do
14 was to go and canvas 11,655 people and make up a chart, how
15 many of those people thought that Minnesota law could apply
16 and how many thought it couldn't apply, what's the point of
17 having a class action in the first place if that's the test
18 because that's an individualized issue, and clearly there
19 is no point in doing the analysis if that's determinative,
20 but that isn't the determinative issue in this case.

21 The determinative issue is as we've articulated

22 it, that St. Jude Medical based in Minnesota issued a
23 product that people purchased based upon
24 misrepresentations, and the concept that we have to show
25 each individual person was or was not deceived, in Group

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 Health, the smokers were deceived and the HMOs were
2 economically injured. In our case, the doctors and
3 hospitals were deceived based upon this product, and the
4 patients were economically injured. That's what we're
5 talking about, the economic injury.

6 The issues of whether or not Mr. Butchart's
7 analysis, the former St. Jude Medical consultant who
8 actually did the initial study of the Silzone valve and
9 found that it had a higher incidence of thromboembolic
10 events who is now being criticized by Mr. Martin and their
11 expert, whatever his medical monitoring regime is is not
12 for today. None of that is for today.

13 What is for today is whether or not there is a
14 conflict because that's what the Eighth Circuit said.
15 Identify is there a conflict because there is no
16 constitutional prohibition about applying Minnesota law to
17 Mr. Grovatt's claim. See if there is a conflict. If there
18 is a conflict, do the choice of law analysis that Milkovich
19 dictates and come up with a conclusion.

20 That's what we did, and our conclusion confirms
21 what Your Honor initially concluded, and that is that

22 Minnesota law can and should apply on a nationwide basis to
23 rectify the wrong that St. Jude Medical caused from this
24 jurisdiction.
25 Thank you.

KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 THE COURT: Thank you, Mr. Angstreich.

2 The Court is going to take this motion under
3 advisement. I've also looked at the other motion to strike
4 the surreply, and I will deny that motion and will take
5 that additional document into account in this case. I
6 don't see any need to strike that.

7 The additional information is probably helpful to
8 the Court, and in the Court's view permission was granted
9 and surely anticipated by the Court's telephone conference
10 several weeks in advance.

11 The main motion I will take under advisement and
12 will issue a written order just as quickly as possible, and
13 I thank you all for your patience today in getting started
14 and for the excellent arguments. Thank you.

15 The Court is in recess.

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KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106

1 I, Kristine Mousseau, certify that the foregoing
2 is a correct transcript from the record of proceedings in
3 the above-entitled matter.

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7 Certified by:
Kristine Mousseau, CRR-RPR

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Dated: May 3, 2006

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KRISTINE MOUSSEAU, CRR-RPR
(612) 664-5106