

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 29, 2004
9:45 A.M.

BEFORE THE HONORABLE JOHN R. TUNHEIM
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING AND STATUS CONFERENCE)

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1 (In open court.)

2 THE COURT: You may be seated, everyone. Good
3 morning. On the Court's civil calendar today is case
4 number 01-1396, in re St. Jude Medical, Incorporated,
5 Silzone Heart Valves Products Liability Litigation.

6 Counsel, let's note your appearances this morning
7 for the record.

8 MR. CAPRETZ: James Capretz for the class.

9 MR. ANGSTREICH: Steven Angstreich for the class.

10 MR. RUDD: Gordon Rudd for the class.

11 MR. MURPHY: Pat Murphy, state plaintiffs'
12 liaison counsel.

13 MR. COREN: Michael Coren for the class.

14 MR. CIALKOWSKI: David Cialkowski for the class.

15 MR. KOHN: Steven Kohn for St. Jude Medical, and,
16 Your Honor, I would like to introduce Steven Boranian who
17 is a partner in our San Francisco office and will be
18 handling some of the first items on the agenda.

19 THE COURT: Very well.

20 MR. NILAN: Michael Nilan for St. Jude Medical.

21 MS. PORTER: Liz Porter in-house for St. Jude
22 Medical.

23 MR. MARTIN: James Martin, Your Honor, for
24 St. Jude Medical.

25 THE COURT: Good morning to all of you. Now, we

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1 have a number of motions first this morning to go through.

2 Let's see. I'm not sure I actually have a list handy here

3 of who is arguing what, but maybe, Mr. Angstreich?

4 MR. ANGSTREICH: Yes, Your Honor. Your Honor,

5 it's my understanding that the request for the 1292B, the

6 preemption issue, is being submitted on the papers.

7 THE COURT: Yes.

8 MR. CAPRETZ: Your Honor, if I may just

9 interject, I have to, I told Counselor Kohn that I

10 cancelled my appearance out of federal district court in

11 New Orleans where the jazz fest was going on, so he's in

12 trouble with me, and I will say something notwithstanding

13 his tendering it.

14 If I could interrupt my colleague for a minute,

15 Your Honor. If we could get some protocol in light of what

16 Steve has just suggested that that motion will be

17 submitted. Could we get an understanding of the time frame

18 from the Court's perspective of how the Court wishes to

19 proceed today and what it foresees in the way of time

20 commitment?

21 THE COURT: Let's see. We tried to set aside

22 enough time this morning. I think we are talking about 20

23 minutes per side for each of the motions, and I think that

24 will fit with the Court's schedule, and that will leave us

25 some time for a brief status conference as well.

1 MR. ANGSTREICH: Your Honor, it's my expectation
2 that I will not take 20 minutes on the first motion. Your
3 Honor, this is our motion for reconsideration to add
4 another subclass, that subclass being a subclass for
5 medical monitoring of individuals who have had their
6 Silzone heart valve implanted in or are citizens of a state
7 which recognizes a cause of action for medical monitoring,
8 but which requires an injury in order to go forward with
9 that claim.

10 Effectively, Your Honor, we're asking that those
11 states that begin at paragraph C of page 17 of Your Honor's
12 order of January 5, 2004, be the subclass.

13 THE COURT: And you're seeking a separate
14 subclass for this group, correct?

15 MR. ANGSTREICH: That's correct, Your Honor.
16 Although as we have set forth in our brief, Your Honor, the
17 reality is that the injury suffered by the members of that
18 class, the subcellular, subclinical injury because of the
19 toxic effect of the silver, is an injury that has been
20 suffered by all members of the medical monitoring class,
21 even those who reside or had their Silzone implants done in
22 states that recognize a cause of action but don't require
23 an injury.

24 So but for purposes of the request, yes, it is a
25 separate subclass for them. We recognize that those

1 members that would fall within that second subclass who
2 have stand-alone injuries and have a right to pursue their
3 own case should not be in that subclass simply because for
4 monitoring purposes, there is nothing to monitor.

5 They have had an injury. They've had an explant.
6 Hopefully the explant has not been a Silzone coated
7 replacement, but a Master Series for St. Jude's benefit
8 without Silzone coating so that in reality you don't have
9 an issue there.

10 The only aspect of this that I would really like
11 to focus in on, Your Honor, because I think that's the only
12 argument that St. Jude really has to bring forward, and
13 that is this issue of whether or not by addressing this
14 class of injured plaintiffs we are in some manner or
15 fashion creating a claim splitting or issue preclusion
16 situation.

17 I guess the same argument could be made with
18 respect to the original subclass that Your Honor
19 recognized, those who have been entitled to medical
20 monitoring but as of today have not suffered the, quote,
21 injury other than the subcellular, the injury that would
22 not support a stand-alone case.

23 The fact of the matter is that medical monitoring
24 class actions and certifications of them are not new.
25 There is nothing unique or different about this case, and

1 as we pointed out in our submission, this is not an amalgam
2 of individual medical monitoring claims but in reality a
3 unified joint claim.

4 The benefit of the medical monitoring of the
5 larger population achieves a second aspect of what we want,
6 which is the study that will be created by monitoring what
7 could be as many as 11,000 people or 9,000 people depending
8 upon the scope and shape of the subclass so that you can
9 see the future effects or long term effects of silver in
10 the human body.

11 That's a second benefit that the medical
12 monitoring provides, and in reality it happens all the time
13 that a cause of action for medical monitoring is recognized
14 and if as and when some injury were to develop, the person
15 would have a cause of action for that injury.

16 The purpose is the ability to early detect and
17 early treat the injury. Restatement of Judgments, Second,
18 which we pointed out, specifically Section 26, articulates
19 the power to the Court in which the Court has to preserve
20 causes of action, to direct parties not to pursue issues of
21 claims preclusion.

22 And so under that scenario, Your Honor has the
23 power through molding the judgment or creating a molded
24 order to allow those rights to proceed. We also have under
25 the -- under 23B two cases, the situation where talking

1 about the prophylactic effect of, in essence, an
2 injunction, this kind of injunction however being the
3 medical monitoring cause of action and the recognition that
4 the Court can certify some, none or all causes of action in
5 a class action, unlike St. Jude's position which says that
6 you must certify all the legal theories. That's not what
7 Rule 23 requires.

8 So that what we have here today, Your Honor, is a
9 situation where people in states where there is, quote, no
10 injury required versus people in states where an injury is
11 required recognizing the cause of action are no different
12 from one and the other.

13 They have both suffered the subcellular injury,
14 the toxic damage, the insult to their cells as a result of
15 the silver, and as a result, we believe that it would be
16 appropriate to include that class.

17 Now, there is a corollary to this, which is the
18 request from St. Jude to delete certain states. I'm going
19 to let Mr. Kohn respond to this or whoever is going to do
20 that. You're going to do that, and then I'll address our
21 position with respect to deleting.

22 Unless the Court has some questions, I really
23 think that the issue is very clear and really does not need
24 more argument.

25 THE COURT: That's fine. Thank you,

1 Mr. Angstreich.

2 MR. ANGSTREICH: Thank you.

3 THE COURT: Mr. Boranian, am I pronouncing that
4 correctly?

5 MR. BORANIAN: Yes, Your Honor.

6 THE COURT: Welcome.

7 MR. BORANIAN: Thank you. Good morning, Your
8 Honor. Steven Boranian for St. Jude Medical. I plan to
9 discuss medical monitoring in two parts today, and I think
10 it meets the Court's agenda as well as Mr. Angstreich's
11 anticipation.

12 First, I want to cover how the Court should
13 neither expand the class nor reconsider its current class
14 definition, and then second, to move on to the reasons why
15 the Court should, in fact, exclude the eight states
16 identified for the simple reason that they do not meet the
17 Court's current class definition.

18 To start, Your Honor, I want to clarify exactly
19 what the plaintiffs are asking the Court to do with regard
20 to the medical monitoring class. The Court limited the
21 class to asymptomatic patients from states that recognize a
22 stand-alone medical monitoring claim without proof of a
23 current injury.

24 Plaintiffs, by contrast, ask the Court to add in
25 patients from states that require injury. That is, they

1 are trying to reintroduce the injury required states into
2 the class.

3 To demonstrate graphically, Your Honor, this
4 slide shows the 15 states whose Silzone patients are
5 currently part of the conditionally certified medical
6 monitoring class. These are the states that the Court has
7 found to meet the Court's class definition.

8 Plaintiffs propose adding an additional 15
9 states, so-called injury required states represented here
10 in green. Now the Court will note that Tennessee turned
11 from orange to green, and that's because plaintiffs appear
12 to agree that Tennessee does not currently meet the class
13 definition, but they want to add it back in as an injury
14 required state, so it went from orange to green for this
15 slide.

16 Setting that aside for now, what they're asking
17 for, Your Honor, is a significant difference based on a
18 wholesale change in this Court's class definition. It
19 challenges a basic assumption of the currently certified
20 class that there would be no inquiry into the class
21 members' injuries, whether injuries exist and to whom, if
22 they exist, in what nature and to what degree, are they
23 enough to trigger claims for relief.

24 This Court made as a core premise a basic
25 dividing line of the current class that the class would not

1 implicate those kinds of issues. Yet, plaintiffs' proposal
2 counts on those questions taking center stage for a
3 significant number of states.

4 Moreover, plaintiffs have asked the Court to make
5 this wholesale change based on extraordinarily limited
6 authority. Of the 15 states that plaintiffs want added to
7 the class, they have offered authority from only five.
8 They have provided no authority for the requested
9 augmentation in Delaware, Kentucky, Michigan, Missouri,
10 Nevada, North Carolina, Tennessee, Virginia, Washington and
11 Alabama.

12 Now, Your Honor, the parties have said much about
13 Erie and the Rules Enabling Act and the federal court's
14 role in predicting state law. There is, however, no
15 legitimate reading of Erie that would allow a federal court
16 to create state law remedies for so-called subcellular
17 injuries from no authority at all.

18 The proposal, Your Honor, is inconsistent with
19 the cautious view --

20 THE COURT: Sorry about that.

21 MR. BORANIAN: Is it me, Your Honor?

22 THE COURT: No, it's not. It's the ghosts in the
23 building, for lack of a better term.

24 MR. BORANIAN: Very well.

25 THE COURT: If it gets too bad, we can just turn

1 it off.

2 MR. BORANIAN: No, it's no problem with me, Your
3 Honor. As I was saying, it's inconsistent with this
4 Court's cautious view of the Erie doctrine, the view that
5 this Court expressly adopted in dealing with medical
6 monitoring.

7 That view faithfully follows Eighth Circuit
8 authority, such as Kovarik versus American Family, where
9 the Eighth Circuit noted that creating new remedies under
10 state law calls for prudence and not innovation.

11 The bottom line, Your Honor, is that plaintiffs'
12 motion implicates five states, which would be in addition
13 to the 15 states that are already in. These are the five
14 states not already in the medical monitoring class for
15 which plaintiffs provided any authority for their
16 subcellular medical monitoring class, California,
17 Louisiana, Minnesota, Ohio and Vermont.

18 These five states are all we're really talking
19 about, Your Honor, when it comes to plaintiffs' motion for
20 reconsideration, and when the Court looks at those five
21 states, it will see that they do not belong in any
22 monitoring class absent a manifest injury.

23 Plaintiffs clearly see what the Court did when it
24 limited the monitoring class to stand-alone claims.
25 Plaintiffs cannot, however, reconcile their proposed

1 additional states with why the Court so limited the medical
2 monitoring class. As St. Jude Medical has pointed out, we
3 read the Court's order to reflect compelling reasons.

4 We read the Court's order to limit the stand
5 alone -- I'm sorry -- to limit the class to stand-alone
6 claims without proof of injury, and in doing so, aiming to
7 reduce the diversity among the applicable state tort and
8 warranty law or as the Court put it, quote, significant
9 differences in state law that affected the personal injury
10 class.

11 We read it to be aiming to reduce the risk that
12 class members would have their later personal injury claims
13 precluded, a concern on which the Court expressed a
14 conclusive opinion, but which the Court raised as a
15 theoretical risk in connection with the medical monitoring
16 class.

17 We also read the Court's order to be aiming to
18 reduce the individual issues of causation and damages, a
19 concern the Court expressly cited as a major factor in
20 limiting the class.

21 Adding plaintiffs' proposed additional states
22 would run roughshod over these reasons. First, among
23 plaintiffs' five new states are four, California, Ohio,
24 Minnesota, and Vermont, that have adopted medical
25 monitoring, if at all, only as a remedy; that is, a remedy

1 that relies on some underlying substantive cause of action.

2 Adding these states would reintroduce into this
3 class action the diversity among the states toward warranty
4 law that led to the decertification of the personal injury
5 class.

6 Now, we hasten to note, Your Honor, that even
7 among the stand alone medical monitoring claims among the
8 various states, there is some divergence on the elements of
9 those claims, but setting aside that issue for today,
10 plaintiffs simply do not acknowledge how adding their
11 additional states would implicate the tort and warranty law
12 of those states, law which this Court has found to have
13 significant differences.

14 Second, we understand the Court's order and the
15 limitations on the monitoring class as aiming to decrease
16 the risk of claim preclusion, but including those states
17 where plaintiffs must prove an injury to obtain monitoring
18 actually increases that very risk. There is a difference
19 here, Your Honor.

20 In states where no injury is required for medical
21 monitoring, the risk of claim preclusion is reduced.
22 St. Jude Medical acknowledges and appreciates the
23 authorities from the no injury states such as Arizona,
24 Pennsylvania, New Jersey which recognize medical monitoring
25 as a distinct cause of action without an injury.

1 Under that line of authority, if and when an
2 injury manifests itself, a new and separate cause of action
3 accrues because authorities in those states treat the two
4 causes of action as conceptually distinct, claim preclusion
5 does not always come into play.

6 But once you make plaintiffs prove a current
7 injury to claim medical monitoring, just as with any other
8 tort, the claim preclusion issues get murkier and murkier.
9 The leading authority on the topic is the Kentucky Supreme
10 Court case of Wood versus Wyatt, a 2002 case that
11 considered precisely this issue, Your Honor, and determined
12 that carving out medical monitoring for class treatment
13 risked precluding class members' claims because Kentucky
14 law required proof of an injury for all torts including
15 medical monitoring.

16 A similar case is this district's Thompson case
17 where Judge Magnuson denied class certification of
18 equitable claims to the exclusion of personal injury and
19 damages claims because of the risk of claim splitting. The
20 point of cases like Thompson and Wood, especially Wood, is
21 that in states where proof of injury is required, no cause
22 of action for medical monitoring accrues unless and until
23 the plaintiff suffers an injury.

24 At that point, under traditional rules of res
25 judicata, it's incumbent on the plaintiff to bring all

1 claims arising from that injury, including claims for
2 future damages, in a single lawsuit. And as always, it is
3 not this Court that will decide how preclusion applies. It
4 will be the Court in the subsequent action, wherever that
5 may be.

6 Now, plaintiffs have answered with the idea that
7 res judicata is a flexible doctrine. They cite cases such
8 as asbestos cases that allow plaintiffs to sue for one
9 manifest injury and then another separately down the road.

10 But it is counter intuitive to say the least,
11 Your Honor, for plaintiffs to assume that a state that
12 requires proof of an injury in the first instance to prove
13 a tort will allow a later tort claim based on a progression
14 of the same injury.

15 Moreover and more importantly, I believe, Your
16 Honor, by urging a flexible application of res judicata,
17 plaintiffs have lost sight of the overall objective of a
18 class action. Once you start bending and breaking the
19 traditional rules of res judicata, you lose more key
20 benefits of a class action, a judgment that binds class
21 members for the benefit of the defendant and a resolution
22 scheme that avoids repetitive and piecemeal litigation for
23 the benefit of all.

24 At bottom, Your Honor, plaintiffs' position on
25 claim preclusion cannot be reconciled with itself. That is

1 to say, when it comes to claiming remedies, plaintiffs want
2 to be treated as though they have current injuries, as the
3 law in those days require.

4 But when it comes to applying traditional rules
5 of claim preclusion, they want to be treated as though they
6 do not have injuries, thus leaving a larger opening for
7 potential future injury claims. They cannot have it both
8 ways.

9 Third, the Court expressly noted its concern with
10 individual issues of causation and damages when it limited
11 the monitoring class, but by adding the injury required
12 states to this class action, that will cause individual
13 issues of causation and damages to proliferate.

14 THE COURT: Well, would it necessarily do that,
15 Mr. Boranian, because I mean it seems to me that if that
16 subclass were certified, the whole issue is whether or not
17 there is indeed this subcellular injury, and if there is,
18 that seems to me, everyone is in the same category then.

19 I'm not sure why you would need individualized
20 damages determinations when you're really looking at only a
21 remedy of monitoring as opposed to a remedy for additional
22 injuries that may flow from the subcellular damage. I
23 mean, isn't it just an issue -- I understand it's a real
24 live and difficult issue as to whether or not there is an
25 injury, and presumably that would be a battle of the

1 experts in the case.

2 But assuming for a moment there is, why do you
3 need at this stage if the remedy is just medical monitoring
4 to go into individualized damage calculations?

5 MR. BORANIAN: You would not need, Your Honor, at
6 that point under your assumptions to go into individualized
7 damages calculations. The emphasis here, really, is on
8 causation.

9 By putting only asymptomatic plaintiffs or
10 patients into the class, you avoid issues of that
11 altogether, but as the Court has just pointed out, it is a
12 vigorously contested issue as to whether, one, these
13 patients are all the same.

14 Plaintiffs' response on this point is centered on
15 the fact that they are all effectively the same. St. Jude
16 Medical by that same virtue will prove that they are, in
17 fact, all different.

18 There is also a dispute as to whether an injury
19 exists in those plaintiffs, again hotly disputed, a dispute
20 that could come out differently in various states once you
21 start making the inquiry as to whether an injury exists to
22 support the medical monitoring claim.

23 The point is that those controversies are there.
24 They are ones that will have to be resolved, and it's one
25 that the Court has said is not suitable for class

1 resolution. It said so in limiting the class to
2 asymptomatic patients in states that do not require an
3 injury.

4 The other point on this, Your Honor, is that this
5 controversy has multiple dimensions. The first dimension
6 is identifying who is in the class at the outset. The
7 plaintiffs will define the class as patients with no
8 manifest injury that would require treatment.

9 But merely to separate patients in the class from
10 those that are not would require, again, these sorts of
11 inquiries that we're talking about, whether an injury
12 exists, if so, to whom, the sorts of inquiries that go on
13 in states that require an injury.

14 That's the diverse issue of causation that we're
15 talking about. The other dimension obviously is
16 resolution. In order to determine if class members are
17 entitled to the relief in those states, you have to decide
18 whether they're injured. That's just another dimension of
19 this causation issue.

20 THE COURT: Is it your position that the
21 standards are different enough among the states that employ
22 this type of analysis, states that require an injury to go
23 forward, that the standards for what is an injury or not
24 are varied enough that it will make it difficult for
25 class cert.

1 MR. BORANIAN: They are certainly different, Your
2 Honor. To begin with in the numerous states for which
3 plaintiffs provide no authority, there is no indication
4 that any of those states would recognize an injury that is
5 the so-called subcellular level.

6 In the other states, all we have really is
7 guidance in a few cases which talk about the -- they use
8 such words as subcellular, subclinical, chromosomal, things
9 like that. It is not at all clear that those cases are
10 talking about the same categories of injuries.

11 The other complicating factor is if you look at
12 the expert testimony that plaintiffs have offered, it says
13 in a heading that the plaintiffs have all suffered
14 subcellular injuries, but if you look at the testimony of
15 the expert, it talks about things like increased risk and
16 increased likelihood of future manifestation.

17 In the various medical monitoring states, they
18 impose different thresholds for what you have to prove in
19 terms of your likelihood of suffering a manifest injury to
20 justify medical monitoring relief. So the inquiry is
21 different from state to state.

22 To sum up, Your Honor, plaintiffs have given the
23 Court authority for five states: California, Ohio,
24 Minnesota, Vermont and Louisiana. All require proof of
25 injury. All present a risk that pursuing their claim based

1 on a current injury, even a subcellular injury, will
2 preclude future injury claims. All reintroduce differences
3 in state law, and all present individual issues of
4 causation and damages as we discussed, especially
5 causation.

6 In all, plaintiffs have offered the Court no
7 compelling reasons to reconsider its order limiting that
8 class, nor to augment the class. Now, turning to the
9 second topic, Your Honor, the states that ought to be
10 excluded, I will be brief.

11 There are eight states in the class that just do
12 not meet this Court's class definition. Here again is the
13 graphic showing the states that are currently in. The
14 states that ought to be excluded are Tennessee, Colorado,
15 District of Columbia, Kansas, Montana, New York, Texas and
16 Connecticut.

17 The plaintiffs appear to agree that Tennessee
18 does not meet the current class definition because of the
19 Potts case, so I'm not going to discuss that at all. The
20 remaining seven states, Your Honor, basically fall into two
21 groups: Cases that allow monitoring only as a remedy and
22 those in which there are just simply not sufficient indicia
23 of state law to properly predict that those states would
24 adopt a stand-alone claim.

25 The first group, Texas, Kansas and DC, allows

1 medical monitoring only as a remedy, and as I explained
2 earlier, Your Honor, that is a significant factor.
3 Including those states in the class as currently defined
4 reintroduces the significant differences in state law that
5 the current class largely avoids.

6 For the second group, Colorado, Montana, New York
7 and Connecticut, there are simply not enough indicia of
8 state law to say that the high courts of those states would
9 adopt a stand-alone claim. On this point, Your Honor, I
10 want to circle briefly back to the Erie point.

11 What is striking about the parties' Erie
12 discussion is how much they say in common citing most of
13 the same authorities; that is, this Court's task is to
14 predict how a jurisdiction's high court would rule on state
15 law issues based on available indicia of state law, where
16 the parties diverge, Your Honor, is in their understanding
17 of the word "predict."

18 Plaintiffs read predict to mean expand or create.
19 St. Jude Medical, on the other hand, shares this Court's
20 view and the Eighth Circuit's view that prudence and
21 caution are in order when creating new and novel remedies
22 under state law such as medical monitoring without proof of
23 an injury.

24 Following this approach, the four states in this
25 group lack sufficient indicia of state law. In Montana,

1 for example, and I'll just give one example, Your Honor.
2 The only authority on the subject is a single, unpublished
3 trial court order saying that a remedy should exist. That
4 is not enough.

5 Now, recognizing that fact does not minimize or
6 denigrate that Court's dignity or authority. It merely
7 recognizes the order for what it is, one judge's order that
8 is not binding on other courts, has not been followed by
9 any other state court and is not binding even on the judge
10 in the next chambers.

11 If the issue were presented in any other court in
12 Montana, state or federal, there is no predicting the
13 result.

14 THE COURT: But there is nothing on the other
15 side of the issue, though, correct?

16 MR. BORANIAN: Nothing other than the line of
17 tort law which exists in Montana as well as other states
18 which holds that an element of a tort is an injury. To
19 allow a tort without proof of injury is an extension of
20 that law.

21 That's our point, Your Honor. It's one thing to
22 cite trial court authority to say that the law is what it
23 has always been traditionally, that is torts require an
24 injury.

25 It's another thing, Your Honor, to cite trial

1 court authority to support an extension of the law without
2 waiting for that authority to be tested, to go up, to see
3 what the high court says or might say.

4 In the end, Your Honor, plaintiffs' overall point
5 on this is that the class members in the injury required
6 states are somehow stuck. They're somehow without a remedy
7 because of this Court's decision to exclude them from the
8 class, but, Your Honor, those class members have exactly
9 the same rights and remedies as anybody else governed by
10 the applicable state's substantive law.

11 That might mean that some uninjured class members
12 have medical monitoring remedies, and others do not, but
13 that result flows from this Court's correct choice of law
14 analysis in connection with medical monitoring. Plaintiffs
15 have said nothing to alter that approach, Your Honor.

16 Thank you. I'll answer any questions.

17 THE COURT: That's fine. Thank you,
18 Mr. Boranian.

19 Mr. Angstreich?

20 MR. ANGSTREICH: Thank you, Your Honor. Your
21 Honor, I'm confused by the last argument that was made
22 because I thought counsel just said that Your Honor was
23 correct in the Court's analysis as it relates to including
24 the very states that they now seek by way of this
25 reconsideration to be excluded.

1 So if Your Honor was right in the first place,
2 why are we even raising the issue, but I'll come back to
3 that. I thought it was just a good point to start with.

4 The issue of causation, the issue of who is in
5 the class and who is not in the class, is not for today.
6 The issue of merits inquiry, the issue of, is there an
7 injury or is there not an injury, is not for today.
8 Suffice it to say that we have presented to the Court by
9 way of the declarations of Drs. Tyers and Healy the fact
10 that there has been subclinical, cellular, subcellular
11 injury.

12 We have also given to the Court the cases that
13 have effectively found that that type of injury is
14 sufficient. We recognize that people who have suffered a
15 para valvular leak and who have had an explant, they have
16 suffered an injury. Medical monitoring as a remedy is
17 irrelevant to them.

18 This argument about causation and damages makes
19 absolutely no sense when we're talking about, as Your Honor
20 pointed out, the remedy of medical monitoring. When you
21 try to compare the kinds of injury that we have presented
22 to the Court, and you compare it to rashes and coughs and
23 the kinds of injuries that really don't give rise to
24 stand-alone causes of action but are sufficient to
25 establish the entitlement to medical monitoring, we submit

1 that there is no difference between that kind of diminimus
2 injury and the injury that we've presented.

3 And therefore they should be included. It
4 doesn't raise issues, greater issues of claims preclusion,
5 and it is not for the later court to make that decision.

6 Your Honor has the power to enter an order
7 directing St. Jude Medical not to be able to advance the
8 defense of claims preclusion. That is within Your Honor's
9 power, and you have the power to do that by way of the All
10 Writs Act as well.

11 Turning to the other issue, which is the
12 exclusion -- unless Your Honor has a question.

13 THE COURT: Let me ask you one question,
14 Mr. Angstreich.

15 MR. ANGSTREICH: Sure.

16 THE COURT: Many of the cases which recognize at
17 least at their early stages the subcellular form of injury
18 are cases involving people drinking water that was somehow
19 contaminated at some earlier time and no one was aware of
20 that or breathing air or some other type of involuntary
21 deal.

22 Does it make a difference that the alleged
23 subcellular cellular injury occurred as a result of a
24 voluntary act, namely going through heart surgery, as
25 opposed to something that no one knew about for years and

1 existed in the environment? Does it make a difference?

2 MR. ANGSTREICH: It makes no difference, Your
3 Honor, but I don't see a difference between the voluntary
4 act of drinking contaminated water. I think it's more an
5 involuntary act.

6 If, in fact, your surgeon tells you you need to
7 have a valve replacement, and the surgeon is led to believe
8 that the product to implant is the Silzone coated heart
9 valve through among other mechanisms by advising them and
10 recommending, albeit in violation of the FDA conditional
11 certification, that this valve will fight infection, and in
12 reality it just does the opposite.

13 It is toxic, and it causes subcellular damage.
14 If the plaintiffs had known that, if the doctors had known
15 that, like the affidavit that we have given you from Bonnie
16 Sliger's doctor indicated, they would not have chosen this
17 valve.

18 So I don't see the difference between that. I
19 would agree with Your Honor that if they knew that there
20 was the potential for the toxic effect, maybe we could
21 argue that that somehow should make a difference, but the
22 reality is, the injury is of the same make and same model,
23 and they should get the same treatment.

24 With respect to the deletion of states, it's
25 interesting. When unpublished trial court opinions support

1 their position, allegedly, that's what you should rely upon
2 and that's what you should look at. When trial court
3 opinions don't support their position, that's what you
4 shouldn't apply.

5 Now, the fact of the matter is that these states
6 were all included within the first subclass conditionally
7 certified by Your Honor after extensive briefing and
8 extensive argument. The cases that we have cited in our
9 reply which address this issue make it clear that these
10 states belong, Colorado -- the argument that St. Jude makes
11 is that the two Colorado federal judges committed error.

12 Well, that's not a very good argument to make,
13 but we do recognize that we only have federal court
14 decisions there, but predicting means taking the decisions
15 of the courts in those jurisdictions and determining what
16 the high court would do based upon those decisions within
17 the state.

18 There is authority in each of these states from
19 which Your Honor can and did in the original order
20 determine that these states would recognize the stand-alone
21 cause of action without injury.

22 In Kansas, the intermediate appellate court
23 recognizes the remedy. Well, granted the highest court
24 didn't, but apparently nobody thought enough to take or
25 seek an appeal to the high court, and so what we have is an

1 appellate decision recognizing it.

2 In Connecticut, we have -- we have cited the
3 cases. We have provided it. The cases that St. Jude
4 relies upon are pre Martin unpublished trial court
5 opinions. They're not availing. The appellate court and
6 the district court in Watson vs. Shell Oil support Your
7 Honor's conclusion with respect to Connecticut. District
8 of Columbia Friends for All Children support it. Texas
9 Crofton versus Amoco Chemical, which is a 2003 appellate
10 authority, recognizes medical monitoring.

11 The attack on Montana, we recognize that the
12 trial court in Lamping is only a trial court, but it's a
13 2000 decision, and nobody has come forward in that
14 jurisdiction to deny the right of medical monitoring.
15 New York, again, clearly supports it as a stand-alone cause
16 of action without injury.

17 Turning to California, California is an
18 interesting jurisdiction because in reality when you look
19 at what California has done, whether they call it a
20 stand-alone cause of action or a remedy, effectively there
21 is no requirement for injury to have medical monitoring as
22 the end product of the litigation.

23 So that there should be no difference between the
24 right to get medical monitoring in a state that recognizes
25 it as a cause of action, stand-alone cause of action,

1 without an injury and a state that says we'll give you that
2 remedy without an injury. It's form over substance. The
3 reality is that California belongs there.

4 On the basis of all of that, Your Honor, the fear
5 that has been injected, and it's injected in every one of
6 the motions that is presented here that something untoward
7 is going to happen to jurisprudence if the Court, one,
8 reconsiders the injury subclass or the Court allows the
9 jurisdictions to remain within the original subclass is
10 just inappropriate.

11 You have the power to make certain that issues of
12 claims preclusion do not harm any of the plaintiffs. The
13 fact of the matter is that modern trend is to recognize the
14 fact that people should have an opportunity to get early
15 detection and early treatment to potentially avoid that
16 stand-alone cause of action down the road.

17 So under those circumstances and for those
18 reasons, Your Honor, we ask that you certify or
19 conditionally certify, since we still have to take the next
20 step with respect to that, the second subclass and that
21 Your Honor does not remove the states that you first found
22 belong there.

23 Thank you.

24 THE COURT: Thank you, Mr. Angstreich.

25 Do you have anything else on this, Mr. Boranian?

1 MR. BORANIAN: Yes, Your Honor, briefly.
2 Mr. Angstreich's first point, Your Honor, was his perceived
3 inconsistency in what St. Jude Medical has said on the one
4 hand and what it didn't say on the other.

5 Just to clarify, Your Honor, our position on the
6 motion for reconsideration is that the Court should not
7 reconsider its current class definition. If we are going
8 to have a class, a medical monitoring class, the Court's
9 class definition is one that should not be altered at this
10 time.

11 Our point on the latter motion is that these
12 eight states do not meet that definition. We're not saying
13 on the one hand the Court was right and on the other that
14 the Court was wrong. We're saying that the Court was right
15 on the one hand to limit the class, but on the other hand
16 included eight states that we think on further briefing and
17 reflection do not meet that definition. That's the point,
18 Your Honor.

19 The distinction that Your Honor mentions between
20 the subcellular injury cases and our case are significant.
21 Those cases involved toxins such as benzene and radiation.
22 Many of them involved manifest injuries.

23 Here we are talking about a medical device that
24 there is no dispute is functioning as designed in the large
25 majority of patients in which it has been implanted. There

1 was a benefit. There is a benefit, one voluntarily chosen
2 by those patients that they are enjoying. That is the
3 difference between a benzene case and this case, and that's
4 what would make medical monitoring unprecedented in this
5 case, to permit a medical monitoring for so-called
6 subcellular injuries in connection with FDA approved
7 medical devices.

8 THE COURT: Well, what about the argument that
9 Mr. Angstreich makes that the patients were not advised of
10 the possible toxic effect of Silzone?

11 MR. BORANIAN: Those patients all have remedies.
12 They all have remedies under the laws of their various
13 states. They might not have a medical monitoring remedy,
14 but that is a public policy decision that those states have
15 made and are making as we speak.

16 The mere fact that the plaintiffs are now
17 claiming subcellular injuries does not justify altering or
18 extending the law in the vast majority of states that do
19 not -- that would not give those plaintiffs that remedy.

20 If and when those patients suffer any injury from
21 a Silzone heart valve, then in most states, those patients
22 can bring a claim, but it is not -- it is the public policy
23 choice of many of the states not to allow that remedy.

24 One final point on California: California does
25 not belong for all the reasons that we have stated. The

1 Supreme Court could not have been more clear that it is a
2 remedy only. It relies on a substantive cause of action.

3 If we start saying that that is form over
4 substance, then we open up the door to all the other states
5 that allow monitoring as a remedy only, and then we are
6 back in the state law, substantive state law morass we once
7 found ourselves in, which the Court has largely gotten out
8 of.

9 With that, Your Honor, we submit.

10 THE COURT: Okay. Thank you, Mr. Boranian.

11 MR. CAPRETZ: Your Honor, may I? Excuse me. May
12 I ask counsel to kindly delete the electronic display?

13 THE COURT: Yes.

14 MR. CAPRETZ: I would like to just, one thing
15 that appeared, Your Honor, and I do want the record to
16 reflect the gentleman suggested these valves are
17 functioning as designed. I'm sure the Court is well aware
18 that we're not certain as to what damages or no damages
19 have been incurred by the people who are wearing them.

20 There is no evidence whatsoever that the purpose
21 for which it was intended, that is a reduction of
22 endocarditis is actually happening because statistically
23 for the study that is ongoing, it shows no differences. So
24 I just want that to be reflected in the Court's records.

25 THE COURT: Thank you, Mr. Capretz. Okay. What

1 do we have next here? Mr. Nilan?

2 MR. NILAN: Your Honor, I'm going to address
3 St. Jude's motion to decertify the consumer fraud class.
4 Basically, Your Honor, the Court certified the consumer
5 fraud class in a context that is very different than the
6 status of the case today.

7 Given the status that the case is now in, we
8 believe that there are insurmountable legal and practical
9 problems in proceeding with the consumer fraud class. Now,
10 we have addressed in our brief the constitutional issues
11 and the conflicts of law issues that we see in proceeding
12 with the consumer fraud class as a nationwide class and
13 under a single state's law.

14 The Court knows our position. I don't want to
15 readdress those issues, but what I do want to focus on is
16 that in light of the status of the case now, the many legal
17 and practical problems on proceeding in this numerous
18 disparate actions all within the MDL at the same time.

19 In short what the plaintiffs' trial plan leaves
20 us with in regard to the consumer fraud claim is proceeding
21 with a class under the consumer fraud for personal injuries
22 while reserving most of the personal injuries to individual
23 actions and at the same time proceeding with this limited
24 medical monitoring class and at the same time having almost
25 all of the significant personal injury actions proceeding

1 in individual actions.

2 And maybe the place to start, Your Honor --

3 THE COURT: Well, what damages are authorized
4 under the Minnesota consumer fraud statute?

5 MR. NILAN: Well, I think that's really an open
6 issue. I mean, what they are seeking are several areas of
7 damage. One is wage loss, which is clearly a personal
8 injury damage.

9 Another is medical costs, another personal injury
10 type of damage, and then they are seeking through 325.44D,
11 the Deceptive Trade Practices Act, an injunctive relief for
12 medical monitoring, and I want to talk about that because
13 all of a sudden after the Court has spent an enormous
14 amount of time working out the confines and the contours of
15 the medical monitoring class, and we have just spent an
16 hour talking about which states are in or out of the
17 medical monitoring, all of a sudden from the side we've got
18 a nationwide medical monitoring class under the consumer
19 fraud laws of Minnesota which doesn't recognize a medical
20 monitoring claim without a manifest injury, and I'm going
21 to talk about that a little more.

22 But you've got this bizarre scenario developing
23 of not only conflicts, but the case proceeding in a dozen
24 different ways. And let me start with where the case was
25 in the original motion for class certification where you

1 had the plaintiffs' complaint with the causes of action,
2 the products liability, the warranty, the consumer fraud,
3 negligence and then seeking damages and medical monitoring.

4 Now, at that time, the plaintiffs move to certify
5 all of these claims, and in fact, in one manner or another,
6 the Court certified all of those claims. It conditionally
7 certified the personal injury class pending further Erie
8 analysis and a suitable trial plan.

9 It unconditionally certified the consumer fraud
10 class, and then certified the medical monitoring class for
11 those states in which there was a medical monitoring claim.
12 So at that point and at the juncture of the first Court's
13 order, the entire claim in one manner or another was
14 certified.

15 But even at the beginning, there were obviously
16 some -- some complexities. The medical monitoring class
17 was split immediately as the Court understood and agreed
18 into subgroups: Those that recognize medical monitoring in
19 a manifest injury and those states that didn't.

20 But then you got into a further subclassification
21 of even where no manifest injury was required, some states
22 recognized it only as a remedy. So it wouldn't fit in the
23 class, but then in addition when we took the next step and
24 the Court looked at the personal injury class in light of
25 the trial plan that was presented to the Court, the Court

1 concluded, as virtually every other court has concluded in
2 reviewing class action personal injury cases and product
3 liability actions, that the disparity in the law is simply
4 too great to proceed in that manner.

5 So what happened is then we had the entire
6 personal injury class going down to individual class
7 actions. You had the remedy only medical monitoring in
8 individual actions, and then of course you had the group in
9 which some manifest injury was required. If they were
10 going to proceed at all, it would have to proceed in their
11 own state.

12 So all of a sudden, you had gone from certifying
13 the entire class at the very first juncture, the class
14 started fragmenting and seriously so, so that you had the
15 majority of those claims just at that juncture going down
16 to individual action, but we still had the consumer fraud
17 class action.

18 Now, what the plaintiffs have done is tried to
19 provide a trial plan and contours of what that might look
20 like, and what is before the Court is well, we will go
21 forward with a limited damage claim under the consumer
22 fraud for the wage loss, the medical expenses and then this
23 injunctive monitoring claim that I want to talk about a
24 little more.

25 But all of the other damages that you might see

1 and the Court said, what are those? I'm not sure, but
2 whatever else there is, all goes down to individual
3 actions. So then if you take just the part of the consumer
4 fraud class that's going forward, you now have within that
5 two parts to it.

6 You have a liability trial, which is still
7 entirely unclear exactly what is encompassed in the
8 liability trial on the consumer fraud side, but then you
9 also have necessarily so a Phase II requiring what the
10 damages are that would flow from Phase I assuming
11 liability.

12 The net result, Your Honor, is, it leaves the
13 entire manner so fragmented that I believe it constitutes
14 essentially an unprecedented situation in which the tort
15 and warranty claims are pursued through individual actions,
16 but the statutory consumer fraud claims, and a portion of
17 those damages, are pursued through a class action.

18 And this is in a situation where the underlying
19 basis for the consumer fraud claim, the elements that go
20 into it for the liability are exactly the same as the
21 elements in the personal injury action.

22 That aspect, Your Honor, we think presents two
23 very serious problems. The first is that the plaintiffs in
24 the consumer fraud class, if it was to go forward, would be
25 precluded at least in certain jurisdictions from pursuing

1 personal injury claims on the basis of claim preclusion and
2 res judicata.

3 The second problem is that the class action for a
4 limited consumer fraud claim not only fails to streamline
5 the process and make it more efficient pursuant to Rule 23,
6 it fragments the process to the extent that it is the
7 antithesis of the efficient manageable process that was
8 contemplated under Rule 23.

9 Now, let me start with the legal complications
10 that are raised by splitting the causes of action, and
11 there has already been some discussion of that, but I think
12 it is particularly germane in the context of the consumer
13 fraud claim.

14 Now, the plaintiffs suggest that St. Jude is
15 making much to do about what is really a nonissue, but this
16 issue was addressed by Judge Magnuson in the Thompson case
17 that the Court cited in connection with the necessity for
18 individual reliance under the consumer fraud class.

19 This very issue, which was also a claim under the
20 consumer fraud statutes for class certification, but what
21 Judge Magnuson said in that case I think is exactly the
22 point in this case. Judge Magnuson said in response to the
23 certification request under the consumer fraud statutes,
24 The Court finds that the named plaintiffs' efforts to
25 reserve personal injury and damages claims may in fact

1 jeopardize the class member's right to bring such claims in
2 a subsequent case.

3 The governing legal principle is that of res
4 judicata which precludes subsequent litigation when certain
5 conditions are met. Under Minnesota law, res judicata
6 principles apply to not only to every matter which was
7 actually litigated, but also as to every matter which might
8 have been litigated therein.

9 Thus, even if the Court permits the reservation
10 of issues in this case, whether a subsequent court would
11 honor such a reservation is at best undeterminable at this
12 time. A subsequent court may very well find that
13 individual injury and damage claims should have been
14 litigated in this lawsuit, indeed as recognized by Small, a
15 Minnesota case that the Court cites as well as four other
16 Minnesota citations that I left out of there.

17 Judge Magnuson's conclusion in this regard is not
18 unique. We cite at least a half dozen or more other cases
19 that raise the very same issue. Now, this wasn't an issue
20 at the time the Court first certified the class because
21 everything was certified, and there was no fragmentation.

22 But in the current posture, the plaintiffs would
23 limit their consumer fraud claims to the cost of medical
24 care, wage loss and medical monitoring. The remaining
25 aspects of the personal injury claims are all left for the

1 individual actions.

2 This not only splits the cause of action, it
3 splits it several different ways. It splits the claims
4 in -- under the same factual predicate that underlie both
5 claims in regard to who said what to whom, who knew what at
6 what time, but it also splits the damages so that you have
7 personal injury damages that are artificially split with
8 some going to individual civil actions and others remaining
9 in this consumer fraud class.

10 Now, interestingly, the plaintiffs' response to
11 Judge Magnuson's decision in Thompson and the other cases
12 we've cited is a discussion of the U. S. Supreme Court's
13 case in Cooper v Federal Reserve Bank is the answer to all
14 of this, but what happened in that case is that the jury
15 found on a class basis that the defendant company did not
16 engage in a pattern of discrimination.

17 The term is pattern or practice of
18 discrimination. That was the finding. When a putative
19 class member then brought a cause of action for individual
20 discrimination, the allegation was, no, that's taken care
21 of under the class action.

22 What the Supreme Court said is what would seem to
23 be an obvious fact, the fact that the company did not
24 engage in a pattern or practice of activity did not mean
25 that they didn't and couldn't engage in individual

1 practices of discrimination.

2 This is exactly the opposite of the situation
3 here where the exact same claims would be litigated under
4 the consumer fraud claims in the common law and warranty
5 claims. In fact, what the Cooper case stands for is that
6 there was no claim splitting in that case. They were two
7 different claims.

8 By implication, you could read the Cooper case to
9 the exact opposite of the proposition the plaintiffs
10 contend, which is had the Court found that they were the
11 same claims that the putative class member could not have
12 gone forward, and that's what we're saying. These are
13 exactly the same claims under different headings, and
14 that's what you can't do.

15 Now the plaintiffs argue that Rule 23(c)(4) gives
16 the Court essentially unbridled discretion to carve off
17 separate claims. That's not the case. Certainly the Court
18 could certify separate issues, and we're not contending
19 that the Court could not certify separate issues. In fact,
20 the Court has already certified a limited medical
21 monitoring class.

22 But if those issues have the same factual and
23 legal elements, that's where you get into claim splitting,
24 which is the case here. As a result, what we have under
25 the plaintiffs' trial plan under the consumer fraud class

1 is virtually nothing has been gained, even for the
2 plaintiffs.

3 And much has been lost, particularly for the
4 defendant, because any possible advantage of a Rule 23
5 action of bringing finality or a single action is clearly
6 out the door because proceeding in this manner guarantees
7 at least a dual track of litigation and creates a platform
8 for both class litigation and individual litigation going
9 on at the same time or subsequently.

10 Now, many of the cases cited by the plaintiffs,
11 including the Eighth Circuit's case in Marshall v Kirkland,
12 simply stand for the proposition that putative class
13 members are not estopped from pursuing claims that were not
14 part of the class and were not litigated.

15 The Eighth Circuit case that is cited, the
16 Marshall case, concluded not surprisingly that where no
17 notice was given to putative class members that their
18 rights and claims may be jeopardized, they weren't estopped
19 from proceeding. That has nothing to do with the issue in
20 this case where we're talking about pure claim splitting.

21 Also, many of the cases cited by the plaintiffs
22 refer to situations where the Court went through a complete
23 23(a) and 23(b) analysis and concluded that an issue could
24 be certified. That's not the case here.

25 The claims under the consumer fraud statutes are

1 not divisible stand-alone claims, and this is especially
2 apparent in looking at the plaintiffs' trial plan for the
3 damage claims under the consumer fraud class are the same
4 damage claims that would be included within the personal
5 injury classes.

6 Now, the plaintiffs cite the Fourth Circuit's
7 case in *Gunnell* and a Texas intermediate appellate court in
8 a Microsoft case as being similar to the present case.
9 First of all, the issues certified in those cases did not
10 overlap with the issues that were reserved to class
11 members.

12 In fact, *Gunnell*'s interestingly refused to
13 certify a consumer fraud class under different issues, but
14 it was a commercial case, all plaintiffs I believe from one
15 state, but the commercial liability issue applied equally
16 to all plaintiffs and then reserved the damage claim later,
17 a very different kind of situation.

18 You will be hard pressed to find one case cited
19 by the plaintiffs in which constituted a personal injury
20 product liability class in which one aspect of that was
21 carved off for class treatment other than medical
22 monitoring, and certainly no consumer fraud claims.

23 Now, interestingly, what I heard Mr. Angstreich
24 tell the Court this morning is, well, wholly aside from
25 this, this can all be taken care of because the Court has

1 the power to simply enjoin, apparently, St. Jude from ever
2 asserting a defense of claim preclusion in some case going
3 forward in the future.

4 There isn't one case standing for that
5 proposition that I'm aware of, and I don't believe frankly
6 the Court does have that power in future litigation to
7 enjoin a defendant from pursuing defenses.

8 And certainly as I think the Court recognizes and
9 the case recognizes, no matter what the Court did in this
10 case, even if the Court decided it's a legitimate issue to
11 separate out and we're going to go forward despite all of
12 this, on the consumer fraud, what the Court cannot be
13 certain of, as Judge Magnuson said, is what courts in other
14 jurisdictions will do.

15 And it would seem to be almost a certainty given
16 the cases we've cited that courts in at least some
17 jurisdictions would find that the plaintiffs are precluded
18 from proceeding on individual personal injury claims having
19 remained part of a class action under the Minnesota
20 consumer fraud class seeking personal injury damages.

21 Now, there is a second issue I want to address,
22 Your Honor, wholly aside from the legal issue of claim
23 preclusion and res judicata in this context which is simply
24 that the trial plan presented by the plaintiffs is
25 unworkable.

1 And let me start by going to the fact that given
2 the notice that the plaintiffs have proposed to the Court
3 in their trial plan, it is virtually impossible to define
4 who is in the class.

5 Let me start with the notice. The plaintiffs'
6 proposed notice indicates that the class will include all
7 Silzone valve recipients. It then says in bold that
8 Silzone recipients with injuries are not in the class, but
9 in the next breath, it says that Silzone recipients are no
10 longer class members with regard to claims for personal
11 injuries, including without limitation, explantation
12 surgery, medical treatment or physical injuries resulting
13 in death.

14 But then the same notice says later that the
15 plaintiffs are seeking reimbursement of the cost of the
16 defective product and related expenses including costs of
17 explantation. You cannot resolve from this who is possibly
18 in this class.

19 After months of effort by the plaintiffs'
20 counsel, the definition of the class is essentially
21 unintelligible, but then let's go on to medical monitoring.
22 The notice says that the medical monitoring subclass is
23 seeking medical surveillance only in selected states.

24 That's the medical subclass monitoring subclass
25 that we have discussed for an hour this morning. Then the

1 same notice says, plaintiffs are seeking medical monitoring
2 nationwide as a remedy on the consumer claims, and the
3 trial plan says the same thing.

4 It's inconsistent. It contradicts the Court's
5 order relative to medical monitoring. It purports to
6 create a new substantive remedy in literally dozens of
7 states, and that's where the conflict of law becomes a new
8 issue given the status of the cases now where you have on
9 one hand the Court concluding that only plaintiffs in
10 certain states, whatever those states are, can proceed on a
11 medical monitoring claim, but then at the same time a class
12 notice going out that we're seeking nationwide medical
13 monitoring.

14 It is creating substantive rights for plaintiffs
15 in states that don't have those substantive rights, and you
16 get into a very direct conflict of law. Now, the third
17 part of the notice I want to -- and the flaw in the class I
18 want to address --

19 MR. ANGSTREICH: Excuse me, Your Honor. I
20 thought the notice was the second or last item to discuss.
21 I thought we were talking about decertification here and
22 not the notice, and I think it would be more prudent to
23 deal with the notice issue when we talk about that aspect.

24 THE COURT: You're not going to separately deal
25 with the notice issue, right, Mr. Nilan?

1 MR. KOHN: Your Honor, I'm going to talk about
2 the notice, but I am not going to duplicate anything that
3 Mr. Nilan says.

4 MR. NILAN: I'm talking about the notice being
5 illustrative of why this can't go forward as a class, not
6 the specifics of what should be in there and what should be
7 out of there. Now the notice says that the plaintiffs are
8 seeking medical monitoring and epidemiological study, the
9 cost of the product and related expenses.

10 The trial plan speaks to related expenses, and we
11 learn in the trial plan that related expenses includes
12 personal injury damages. Thus, the plaintiffs are claiming
13 personal injury damages while simultaneously claiming
14 they're not claiming personal injury damages.

15 This isn't a problem with the language in the
16 notice. It's an example of the inability to create a class
17 action out of these consumer fraud claims. Let me talk
18 just a minute about the adequacy of the consumer class
19 representatives in the context we have now. It is entirely
20 unclear what claims those class members are seeking.

21 If you take three of the representatives,
22 Grovatt, Bailey and Redden, these are class representatives
23 for the consumer fraud claims, as I understand it, but here
24 is their claimed injury: Grovatt is, suffered or may
25 suffer a severe latent injury and disability.

1 Bailey, her claimed injury is statistical
2 increased risk of injuries. Redden's claimed injury is
3 fear of increased future complications. How these
4 representatives can possibly be adequate for a class
5 seeking wage loss and medical expenses is entirely unclear.
6 It's so unclear that I don't think it's possible.

7 Then if you go on to what the underlying basis is
8 that is going to be proven in this consumer fraud class,
9 the plaintiffs have not asserted any class line
10 representation at this point. Now, we understand the Court
11 has concluded that you don't have to have individual
12 reliance in order to proceed.

13 But you have to have some kind of representation
14 of some manner that would form the basis of the Consumer
15 Fraud Act. Although the plaintiffs say at length they're
16 going to present that, there isn't the slightest indication
17 of what representation there might be that would apply to
18 the entire class, mostly because there is none, we contend,
19 but we're not even close to a prima facie case as to what
20 that might be.

21 Second, the plaintiffs have not asserted any
22 class wide causal nexus between whatever this
23 representation or statement might be and their damages.
24 What the plaintiffs do say in their trial plan is, they
25 recognize they have to come forward with some kind of

1 causal connection, but what that might be is at this point
2 entirely undefined.

3 And finally, the plaintiffs have not asserted a
4 class wide damage claim. If you look at the trial notice,
5 the damages that the plaintiffs apparently are going to
6 claim in the consumer fraud is through expert testimony
7 some undefined aggregate damages, and then, as I understand
8 the proposal, is these aggregate damages would be
9 apportioned somehow pro rata among the plaintiffs in the
10 class.

11 Now, you have to recall that the damages they're
12 seeking are medical expenses and wage losses, among others.
13 How that could possibly be achieved in a pro rata format is
14 certainly unknown, and the trial plan doesn't begin to
15 address that.

16 In short, Your Honor, the trial plan and
17 especially at this juncture does not describe a fair or
18 efficient resolution of this matter, and the consumer fraud
19 class is certainly not a superior method of resolving these
20 issues.

21 The trial plan describes a resolution scheme that
22 will provide very little resolution. By splitting claims
23 and narrowing damages, plaintiffs have set the stage for
24 collateral challenges. Class members who file their own
25 lawsuits will argue that they are not bound and that they

1 are entitled to a second bite of the apple.

2 In short, the trial plan describes a resolution
3 scheme that denies all of the benefits that class actions
4 are supposed to provide and throws the entire process into
5 disarray.

6 For those reasons, Your Honor, given the status
7 of the case now, given the decertification of the personal
8 injury action, the complexities the Court is already
9 wrestling with relative to medical monitoring, the fact
10 that the vast majority of the damages claimed under the
11 consumer fraud would flow in any event to the individual
12 actions, we believe proceeding at this juncture with a
13 certified class on the consumer fraud not only adds
14 nothing, but detracts entirely and would ask that those
15 claims be allowed to proceed in the MDL process.

16 THE COURT: Thank you, Mr. Nilan.

17 Mr. Angstreich?

18 MR. ANGSTREICH: Thank you, Your Honor. Your
19 Honor, we came here to argue about decertification, a
20 burden, a very heavy burden that the defendant has, and
21 they point to a notice which the Court has not had an
22 opportunity to help craft as a basis for supporting
23 decertification?

24 I have never in my life had a case where the
25 argument was the notice somehow supports decertification.

1 That's just preposterous.

2 More importantly, the trial plan which Mr. Kohn
3 stood up and said was now the centerpiece for why
4 decertification is required, lip service has been paid to.
5 Really what the defendant says is, my goodness, we won on
6 the decertification of the PI class. We've got a limited
7 medical monitoring class.

8 Let's take a shot at seeing if this UDAP case can
9 be decertified. This is, with all due respect, *deja vu* all
10 over again. They have offered us nothing. This is the
11 same rehashing of every legal argument that they made in
12 their first motion and then in their second motion. It's
13 just a different day. That's all there is in this.

14 The trial plan is very simple, and its
15 disingenuous for anybody to stand up here and talk about
16 economic recoveries as personal injuries. Coming from a
17 state as Mr. Kohn does which has caps on personal injuries
18 and pain and suffering, there are no caps on the economic
19 aspects.

20 The cost of the valve, the cost of the explant
21 surgery, we're not talking about personal injuries. We're
22 talking about the economic losses that are clearly covered
23 by the consumer fraud statute.

24 And by putting the label of personal injuries to
25 it, they then say, oh, but those are the same personal

1 injury claims for the pain and suffering in the personal
2 injury actions. Well, they're not. They're the economic
3 aspects of it.

4 Thompson at page 553 says, medical monitoring is
5 an equitable remedy under UDAP, under the consumer fraud
6 statute. That's what we have here. They have offered you
7 nothing to suggest that when Your Honor certified this
8 unconditionally in 2003 and when Your Honor continued that
9 unconditional certification in 2004 that Your Honor did
10 anything wrong.

11 And the trial plan doesn't suggest that Your
12 Honor did anything wrong. Actually what the trial plan
13 shows is a simple consumer fraud case and how to prove it.
14 The argument about damages is preposterous. There is not
15 going to be an apportionment. There is no difference
16 between the damage aspect of this case and the damage
17 aspect of a securities fraud case.

18 The jury is going to be asked whether or not
19 refund of the explant cost is to be awarded, whether or not
20 repayment of the cost of explant surgery should be
21 included, whether or not wage loss for people who suffered
22 such wage loss as a result of the implantation of this
23 defective drug device should be awarded.

24 When they answer those questions yes, as they
25 will, then we will do in this case the same as we do in

1 every other case, submit a proof of claim where the person
2 will indicate how much they paid for the valve, how much
3 they paid for the surgery and what their wage loss was, no
4 different than somebody telling the claims administrator
5 how much they paid for the stock, how much they sold it for
6 and whether or not they still own the stock.

7 The jury isn't going to be asked to multiply
8 11,555 people or 650 people times X number of dollars.
9 They're going to determine that an award for that damage is
10 appropriate. For them to say they don't know who the class
11 is based upon the notice is just silly.

12 The class is everybody who had the Silzone valve
13 implanted in the United States. It's a finite, discrete
14 class. Yes, if you've had and suffered a personal injury,
15 a paravalvular leak resulting in an explant, we are not
16 seeking for you that damage, the pain and suffering arising
17 out of that.

18 They have to be told that. Why? Because
19 depending upon how Your Honor decides to deal with
20 application of the All Writs Act, which is in fact a
21 statute that does preclude parties from pursuing actions in
22 other jurisdictions which the Court has the power to do,
23 Your Honor can preclude them from asserting res judicata.

24 Also as recognized in Marshall versus Kirkland
25 cited at page 14 of our submission, an Eighth Circuit

1 decision from 1979 where the Court adjudicated class claim
2 without prejudice to the right of the other members of this
3 or any other class to initiate a new action if they see
4 fit.

5 Clearly the Eighth Circuit recognizing that
6 claims preclusion can be dealt with and appropriately dealt
7 with, as well as the Restatement of Judgment, Second, of
8 Section 26, so there is nothing unusual about dealing with
9 that aspect of it.

10 In addition to which, it is not their right. It
11 is the class members' right, and if the Court determines
12 that the Court does not want to preclude St. Jude from
13 asserting any res judicata effect on the pain and suffering
14 aspect of people's claims, the Court will, as we've put in
15 our form of notice, advise these people that they have a
16 right to opt out and that they can in their own stand-alone
17 personal injury action seek to recover the economic losses
18 that the consumer fraud claim gives them.

19 To suggest that we're going to have, and it makes
20 more sense, to have 11,000 individual consumer fraud claims
21 to recover the cost of a \$6600 valve and the cost of the
22 surgery, and that's a superior method, is the same argument
23 they made before. It's just wrong. It is simply wrong.

24 When you have a finite number of people with
25 stand-alone personal injury claims and as we suggest, how

1 many more will there be, 200 or 300? If there is 500 of
2 those stand-alone claims, there is 11,000 people right now
3 who have economic loss for which the class vehicle is
4 perfect.

5 That's the tail wagging the dog argument just as
6 the damage argument is the tail wagging the dog argument.
7 To simply argue that one case trial is not the superior
8 method flies in the face of 30 years or more of class
9 certifications.

10 I'm really at a loss to address some of the other
11 points because I'm not going to get into merits arguments
12 that Mr. Nilan tried to bring forward again here. I don't
13 want to argue the notice just yet because I think we need
14 to address that as we go forward.

15 When you look at the trial plan, the only way
16 their argument can succeed is if Your Honor were to
17 conclude that Your Honor was wrong and Judge Magnuson was
18 wrong in applying Minnesota law on a nationwide class
19 basis.

20 Now, while they have suggested to Your Honor that
21 you followed minority views, the reality is that Your
22 Honor's decision was not a minority view. It is the
23 majority view. It is appropriate, and consequently, you
24 will have one state law being applied in a consumer fraud
25 case, just the way Lutheran Brotherhood is going forward.

1 It is simple. It is clear. It is the easiest
2 way of dealing with all of these issues, and the parade of
3 horrors, again, just don't -- just don't cut it. They
4 have offered you nothing, Your Honor, nothing new to
5 suggest that this class should be decertified.

6 And to give more argument to it would be to
7 suggest that something has been advanced that we didn't
8 deal with before. This is the third attempt. It should be
9 summarily rejected.

10 Thank you.

11 THE COURT: Thank you, Mr. Angstreich.

12 Did you have anything else, Mr. Nilan?

13 MR. NILAN: Just briefly, Your Honor. I listened
14 very hard to get a description of who it is that would be
15 in this class as it remains. What I heard Mr. Angstreich
16 say, it is all recipients of the Silzone heart valve. It's
17 very simple who is in the class, with one caveat: Those
18 recipients who have manifest injuries and suffered personal
19 injuries, they would be out of the class except they would
20 pursue the economic damages.

21 These are personal injury damages. They're
22 divided into wage loss, medical loss, pain and suffering.
23 Those are all personal injury damages, so now you have what
24 is, I believe, the bizarre situation, Your Honor, where
25 you've got 95 percent of this class at least, even by the

1 plaintiffs' statistics, who have never suffered any
2 manifest injury of any kind, all of whom presumably needed
3 a heart valve replacement. They got a heart valve
4 replacement. The heart valve is working fine. They
5 haven't had any injuries.

6 In that situation, how could they have wage loss
7 or medical loss? So then the only ones in the class who
8 would potentially have the wage loss and medical loss are
9 the very individuals who have manifest personal injuries,
10 who are now presumably because they have personal injuries
11 are pursuing their actions in individual claims, and you've
12 got this dual track going. For what purpose?

13 Not only do you have a dual track going, then you
14 add on the potential of, if the consumer fraud class goes
15 forward, the res judicata effect on their personal injury
16 individual actions.

17 Well, if -- if this Court has the ability to
18 preclude St. Jude from asserting a defense in other
19 jurisdictions and other unknown cases, I'm sure the
20 plaintiffs would have given a citation to exactly that
21 case. There is no such case. You have a class action
22 going forward for no purpose.

23 Your Honor, just as defendant's counsel may be
24 suspect when they stand up at a class certification hearing
25 and say this is unmanageable, it's too complex, you can't

1 go forward, plaintiffs have to also be suspect and
2 especially in a situation like this where they say well,
3 this is all very easy, a class is easy to define and we can
4 go forward.

5 Well, if what we say is correct that this is a
6 fragmented, very difficult way to proceed, then what's the
7 purpose? Why would plaintiffs' counsel want to go forward?
8 Well the obvious answer, Your Honor, is the holy grail that
9 they're seeking, which is the class action club.

10 Even if it doesn't make any real sense, a
11 certified class provides a certain club they can use in
12 going forward even if it doesn't fit anything else, and
13 that, Your Honor, we believe is what the plaintiffs are
14 seeking because there is no practical or legal gain for
15 either the plaintiffs and certainly the defendants to
16 proceed at this juncture in this status with the class
17 action for consumer fraud.

18 THE COURT: Thank you, Mr. Nilan.

19 MR. ANGSTREICH: Your Honor, I cannot allow
20 Mr. Nilan to get up here and say that the valve is working
21 properly. If the mechanical valve works, the Silzone is a
22 time bomb, and for him to say that that's okay is just
23 ludicrous. The reality is that they committed a consumer
24 fraud by putting in the marketplace a defective drug
25 device.

1 They represented it to be one thing, and it is
2 not that. They sold the doctors and the surgeons a bill of
3 goods, and it was a fraud. It was a consumer fraud, and
4 the people have suffered as a result of it, and they are
5 entitled to the recoveries.

6 And to suggest something else is just
7 inappropriate, and we've argued that before, but that does
8 bring us to the class notice, Your Honor.

9 THE COURT: Why don't we take about a five-minute
10 break before we get to the class notice issue?

11 MR. ANGSTREICH: That's fine, Your Honor. The
12 question though, is, since the opposition to the notice has
13 come from Mr. Kohn's side, does Your Honor want to hear our
14 response to the opposition first, or do you want to hear
15 the opposition first?

16 THE COURT: Well, why don't we have Mr. Kohn go
17 first, and he can supplement what Mr. Nilan has already
18 presented, and then you can respond.

19 MR. ANGSTREICH: Thank you, Your Honor.

20 MR. CAPRETZ: Your Honor, I was going to ask the
21 same, if we could possibly have a short break, but there
22 are two points that I notice counsel as he is suggesting he
23 was listening carefully for the class definition ignores in
24 his argument, two most prominent points in the class action
25 club that he is referring to.

1 And one is that epidemiological study, which is a
2 very important, a truthful and honest and open and valid
3 epidemiological study that the class would have at its
4 disposal. That is one of the things that the class is
5 seeking, and then second of course is what he has not
6 mentioned, it was suggested by counsel earlier, the refund
7 of the cost of the valve itself.

8 So those are two economic issues that are major
9 issues that are exclusive of any individual personal injury
10 damages.

11 THE COURT: Thank you. Mr. Capretz.

12 Let's take about a five-minute break here,
13 please.

14 (Recess taken.)

15 (In open court.)

16 THE COURT: Sorry for the delay. Of course the
17 telephone caught me. We have the issue that has been
18 raised concerning the proposed class notice. Let me just
19 say that it seems that the parties are far enough apart
20 that it may be helpful for the parties to have a meet and
21 confer session about this and try to resolve some of the
22 differences that way in advance of the Court issuing any
23 conclusive rulings on the notice.

24 But having said that, let's spend a little bit of
25 time, anyway, with some argument on the issue, but I think

1 that it may be, the ball may be advanced there with a meet
2 and confer session, but go ahead, Mr. Kohn.

3 MR. KOHN: Thank you, Your Honor, Steve Kohn for
4 St. Jude Medical. We would be more than happy to meet and
5 confer with plaintiffs on these issues. Let me start by
6 saying in the interests of time, I believe we're already
7 almost at the appointed hour when we were supposed to
8 adjourn. I'm going to try to shortcut some of my remarks.
9 We have two fundamental objections to the notice as
10 proposed.

11 The first is that we believe the timing is
12 premature and that prudence would dictate that notice
13 certainly not go out at this time. If the arguments this
14 morning demonstrated anything, I believe that there are
15 some witty legal issues that need to be resolved and so
16 notice shouldn't go out.

17 And secondly, we have some significant
18 substantive issues with the form of notice that has been
19 proposed divided into three categories. The first is that
20 we feel strongly that the notice as drafted is really a
21 form of solicitation device designed to capture opt-outs or
22 folks that might have, patients that might have personal
23 injuries, that it is not drafted in a neutral fashion as
24 the cases demand, and then for the reasons Mr. Nilan laid
25 out this morning the notice as drafted is confusing, and

1 it's not concise.

2 Is now an appropriate time to send notice? We
3 believe that it's not. The notice as drafted is
4 tremendously confusing. It addresses three separate
5 classes. It contains significant allegations about company
6 conduct that we feel are inappropriate in a notice.

7 I don't think very many people, if any, reading
8 this notice could possibly at the end of the day figure out
9 whether they're in or out of the class. But primarily, we
10 believe that there are significant issues that will be
11 resolved in the fairly short term. In the fairly short
12 term we will know this Court's ruling on St. Jude's motion
13 to decertify the consumer fraud class.

14 In the event the Court maintains the consumer
15 fraud class, within ten days of that time, St. Jude will
16 take its 23(f) petition to the Eighth Circuit, and we
17 believe that the Eighth Circuit will probably indicate in
18 fairly short order whether or not it will take the 23(f)
19 petition and take the case.

20 And because there is that likelihood looming over
21 that class, either as a result of what this Court may do as
22 a result of the briefing and arguments or as a result of
23 what the Eighth Circuit may do, sending out notice we
24 believe would be unnecessarily alarming, confusing and
25 wasteful.

1 And just a couple of words about the patients who
2 will be receiving the notice. We are not talking in this
3 case about people who used an ATM machine and got charged
4 \$1.50 surcharge or people who have a vanishing premium
5 case.

6 We are talking about a population of elderly
7 patients for the most part with some exceptions, 11,000 in
8 number who have multiple medical problems, many of them
9 totally unrelated to the Silzone heart valve, and most of
10 them have had the valve in place and have had it working
11 perfectly as it was designed to do for four to as many as
12 seven years.

13 For them to receive a notice is necessarily going
14 to be an alarming event, especially a notice the way this
15 one is crafted, so I think particular care needs to be
16 taken by the parties and by the Court to be sure that if a
17 notice does go out that it doesn't cause harm. Now, I
18 believe that the notice that has been crafted here is
19 likely to cause confusion, concern and in some instances
20 perhaps unnecessary harm.

21 The best medical evidence is that none of these
22 patients are at any increased risk whatsoever as compared
23 to any other heart valve patient for a complication. This
24 notice should not and is not designed to sell any kind of a
25 health crisis because there is no health crisis.

1 This notice should simply tell people in a clear,
2 concise way about the parameters of the class when the
3 class has been defined.

4 Likewise the medical monitoring class should not
5 be part of the notice. First of all, a B2 class doesn't
6 even require that notice be sent, and for all the reasons
7 that were discussed this morning, the B2 class is simply
8 not right for a notice to be sent.

9 I'm going to skip over these two slides, Your
10 Honor. They simply set out what other cases have said
11 about the importance of clear and concise terms in a
12 notice, the importance of judicial neutrality and so forth
13 in the interests of time. Similarly this next slide simply
14 sets out the criteria for notice.

15 Let me turn to what I think is one of the more
16 important issues, which is does this notice as drafted, is
17 it a solicitation device, and I think all you have to do is
18 look at this excerpt from the notice to conclude that it
19 does exactly that because what the -- the part that I have
20 shown here on the screen, what it does is to advise people
21 who allegedly are injured by a Silzone valve that they're
22 not in a class. These are people who are part of the
23 previously certified personal injury class.

24 It suggests that they should immediately consult
25 an attorney to determine their rights. It has advice about

1 the statute of limitations being lifted, and then in bold
2 it states that their rights may be adversely affected by
3 inaction. Then significantly, any questions about this are
4 to be sent to class counsel, and elsewhere in the notice,
5 the addresses and telephone numbers for class counsel are
6 provided.

7 Every court that has addressed a notice that is
8 sent out to a -- members of a decertified class when notice
9 was never given to that class as is true here has rejected
10 a notice of this type as being a solicitation device and
11 unnecessary as well. A notice of decertification is not
12 only unnecessary, but it would put this Court's stamp of
13 approval on counsel's solicitation.

14 Secondly, the notice of decertification would
15 mislead patients into a perception that the Court is
16 suggesting that they consult attorneys and file lawsuits.
17 The Hervey case, the Eighth Circuit case which is cited
18 here, Your Honor, clearly states that notice is appropriate
19 to class members, not to people who are not class members.

20 This is a direct quote from the Hervey case.
21 Notice of the decertification is required only to the
22 extent necessary to reach those potential class members who
23 receive notice of certification and relied on being
24 included in the class. Neither one of those two things is
25 present in this case.

1 Other cases which have dealt with notices such as
2 this, and these are all cited in our papers, are the Lucent
3 Technologies case, the Minnesota case of Elias, all labeled
4 notices such as this as solicitation devices, and similarly
5 the Maddox case, the British Airways case. Another case
6 which I don't have displayed here is a Louisiana case,
7 which I believe is called Reinhart, where a notice almost
8 identical to this one was labeled as a solicitation device.

9 The only difference in that notice was that in
10 that notice in bold they had said, this is not a
11 solicitation device, and despite that obvious attempt to
12 get around it, the Court struck it down and said, sorry,
13 but no cigar. Just to close all this out, for all of the
14 reasons that Mr. Nilan spoke about this morning, the notice
15 as drafted doesn't adequately define the class.

16 It's not concise and clear, and it most certainly
17 is not neutral. And on that point, Your Honor, and this
18 ties directly into, and it's the last thing I will say, to
19 the solicitation issue, we have proposed, and I think it's
20 fairly appropriate under these circumstances that if notice
21 goes out, and if and when notice goes out, that the
22 opt-outs be handled by a neutral third party.

23 There is absolutely no reason other than a
24 solicitation why opt-out forms should be sent to class
25 counsel. There is no reason that other courts that are

1 cited in our papers, and I would refer the Court to
2 Exhibits 10 and 11 where we actually attached the case to
3 Mr. Nilan's affidavit, other courts when there is
4 sensitive, private, medical information involved have used
5 neutral claims administrators to receive out-opt forms.

6 There is simply no reason, as has been proposed
7 by plaintiffs here, why the class counsel should be
8 receiving the opt-out forms, and so that is another aspect
9 of a notice that we will meet and confer about.

10 And finally, Your Honor, in the event the Court
11 does decide that it's appropriate to issue notice, we would
12 respectfully request that notice be stayed until the Eighth
13 Circuit has made a final determination. Thank you, Your
14 Honor.

15 THE COURT: Thank you, Mr. Kohn.

16 Mr. Angstreich?

17 MR. ANGSTREICH: Thank you, Your Honor. I want
18 to start there because I think that the juxtaposition of
19 Section III and Section IX to suggest that somehow right
20 below telling people what their rights are we're soliciting
21 is just totally inappropriate and unfair and disingenuous
22 argument.

23 Article IX is where if you have any questions
24 about where this notice appears. Article III is where
25 we're telling -- by the way, our class clients, if Your

1 Honor recognizes, the class to which notice is being given
2 is everybody. They're all our clients. They're all
3 members of the consumer fraud class.

4 Now, I agree that the caption of III is in
5 inappropriate language, choice of language. We have no
6 problem meeting and conferring on specific choice of
7 language, such as the heading for III being personal
8 injuries are not within the scope of recovery of the class.

9 But the fact of the matter is, and the law is
10 very clear, that when a conditionally certified class is
11 decertified, and there has been publicity as well as direct
12 notice to the class -- by the way, I'm sorry. He has a
13 plane to catch here.

14 Where was I? I may have to start all over again.

15 MR. CAPRETZ: Oh, please.

16 THE COURT: The caption to number III.

17 MR. ANGSTREICH: The entirety of the class is
18 subsumed within it, those members of the conditionally
19 certified subclass as well as the members of the PI class
20 because they were all within the original number.

21 What I was saying to the Court was, the case law
22 that says the decertification notice is required to be
23 given are in cases not only where actual notice has been
24 issued by the Court, but where there has been substantial
25 enough publicity about the fact that there has been a

1 conditionally certified class.

2 There is no question that notice through
3 newspapers, et cetera, has occurred, and what is now going
4 on is that those people whose personal injury claims have
5 been -- have been suffered who believe that their claim may
6 have been subsumed within the conditionally certified PI
7 class now need to know that they are -- that that claim is
8 no longer being advanced, and therefore, the
9 decertification order is required to be given.

10 Now, you could do it in two separate notices, but
11 it makes no sense to send a notice of certification and a
12 notice of decertification to the very same person. So it's
13 easier to give it within and to give a clear and concise
14 statement of what has happened in this litigation, the fact
15 that there were conditional certifications and a
16 decertification.

17 Since we're giving notice to the same people, it
18 is informational to tell them the status of the subclass.
19 It is informational to tell them that St. Jude's motion for
20 summary judgment on preemption has been denied.

21 There are really, as I said earlier, two
22 different views or aspects to the notice. The first is the
23 wording. The second is the timing and to whom. I wish I
24 had Mr. Kohn's belief that the Eighth Circuit will rule
25 quickly. We don't know how long they will take. If they

1 do accept the appeal, we don't know how long before they
2 rule or what will happen thereafter.

3 But in the meantime, we are not being able to go
4 forward with our notice and with the information that these
5 people need, and I don't believe that there are weighty
6 issues with respect to the issue of decertification. The
7 arguments were made.

8 Your Honor even suggested when Mr. Kohn first
9 brought up the subject that there might not be that much
10 room to reconsider the earlier ruling, and so we don't
11 think that there are issues in doubt here that we're going
12 to not have a certified class.

13 We are entitled to tell our class clients all of
14 the information, so we ask that the timing be now. We ask
15 that Your Honor not stay the form of notice, and we ask
16 that the notice fairly and properly inform the class
17 members of what has gone on in this class.

18 That is, that there is an unconditionally
19 certified consumer fraud class that encompasses all of the
20 people, that there is a medical monitoring subclass
21 conditionally certified that encompasses a smaller number
22 of people, and that those people that had stand-alone
23 personal injury claims no longer have a class vehicle to
24 pursue those claims in and that they should, if they wish
25 to protect their rights, consult an attorney.

1 I have never seen a class notice where the class
2 notice doesn't tell a class member the right to consult
3 their attorney if they want to get information as to
4 whether they're to remain in the class or to opt out or to
5 contact class counsel with respect to that.

6 Finally, for somebody to suggest that we should
7 not get the opt-outs from our own clients makes little or
8 no sense. It's true that some courts have had independent
9 people get the notice of opt out. More than some cases
10 have allowed class counsel to receive them and report to
11 the Court.

12 I find it amusing, but more than amusing,
13 offensive to suggest that counsel sitting in this courtroom
14 are here to solicit the personal injury cases, and that's
15 why we want the notice to go out. We have fought this case
16 on a class wide basis for four years.

17 We have made arguments that we believe are in the
18 best interests of the class in its entirety, and we believe
19 that the case should proceed as a class action and that the
20 people who have suffered stand-alone personal injury
21 claims, who do not want to be within the class of the
22 consumer fraud class, should be told that they have a right
23 to go forward with attorneys of their own choosing or with
24 class counsel if they so choose. There is nothing wrong
25 with that.

1 We are sending notice to our own clients giving
2 them that information. With respect to the language, Your
3 Honor, we have a disagreement as to what the medical
4 evidence indicates. We do not believe that the medical
5 evidence indicates that there is no risk.

6 However, they have a right to write a statement
7 of their defense. We have a right to write a statement of
8 our claims. We are not giving medical advice, nor are we
9 giving them notice of a health crisis.

10 My goodness, the notice of a health crisis came
11 January 24, 2000, when they sent the notice of recall and
12 told people that there was an increased incidence of
13 paravalvular leakage. They should have also told people at
14 that time that there was a higher incident of
15 thromboembolic events, but they denied it then, and they
16 still deny it despite the evidence that we will establish.

17 We're not trying to alarm people. Haven't they
18 been alarmed by being told that their product was
19 defective? The Food and Drug Administration has found it's
20 adulterated and defective. The MDA in England has ordered
21 the product off the market. In the last four years, they
22 have done nothing to bring it back onto the market.

23 For them to say it's working perfectly fine
24 without one iota of evidence as to the long term effects of
25 silver in the human body is preposterous. So the notice

1 should go out. The notice is not offering medical advice.

2 The notice is telling people that there is a
3 consumer fraud class action in which economic recovery is
4 being sought as well as medical monitoring for those people
5 who do not have and have not suffered the injury of an
6 explant, paravalvular leakage presently, in other words
7 those people for whom medical monitoring will be a benefit
8 and to create the study with respect to the long term
9 effects on silver.

10 They have a right to know that now. They have a
11 right to know what is within the class, what claims are
12 within the class, and what claims are not within the class.
13 Thank you.

14 THE COURT: Thank you, Mr. Angstreich.

15 Anything else, Mr. Kohn?

16 MR. KOHN: Yes, Your Honor. With respect to
17 counsel's reference to publicity as a substitute for the
18 actual notice that never went out, it's not -- they have
19 made the argument in their papers that there was some
20 publicity. They don't say what it is. They don't cite to
21 it, that somehow put the personal injury class members on
22 notice that there was a class action.

23 Where is the publicity? Where is it? They
24 haven't put it before the Court. I have not seen any such
25 publicity. For that notice or for that to constitute

1 notice, the publicity would have to tell people that there
2 was a class. It would have to tell people what the impact
3 was on the statute of limitations and so on and so forth.
4 There isn't any publicity like that, and so they cannot
5 invent it by simply saying that it exists.

6 The fact of the matter is, notice never went out.
7 There is no reason now to tell the members of the now
8 decertified personal injury class that the class has been
9 decertified.

10 Cases have trickled into the MDL over the past
11 four years at about the same rate. They continue to
12 trickle into the MDL after this Court conditionally
13 certified a personal injury class. What that tells us is
14 that people that had claims continued to bring them.

15 There is absolutely no evidence before this
16 Court, and if plaintiffs had it, for sure they would have
17 presented it, that someone was relying on this publicity
18 and holding off on bringing a personal injury claim. That
19 never happened, and notice of the decertification is
20 inappropriate and should be stricken from the notice.

21 Thank you.

22 MR. ANGSTREICH: Your Honor, if I can just reply
23 to this notice?

24 THE COURT: Go ahead.

25 MR. ANGSTREICH: The newspapers reported Your

1 Honor's order. If you type in St. Jude on the Internet to
2 find out what is going on with the company, you will get a
3 hit for this Court's web site. If you get a hit for the
4 litigation, you will find the conditional certification
5 order.

6 Now we didn't do a survey of all of the people in
7 the class. My goodness. If we had sent notice to
8 everybody asking them whether they were aware of the
9 conditional certified order through publicity, we might
10 have gotten an objection from Mr. Kohn and St. Jude that we
11 were sending notice without court approval.

12 The reality is that everybody who has been told
13 that they have a St. Jude Silzone heart valve has been able
14 to through typing in that term been aware of this
15 litigation. Thank you.

16 THE COURT: Mr. Capretz, did you have something?

17 MR. CAPRETZ: Yes, Your Honor, and we're ready to
18 move forward as well.

19 THE COURT: Yeah. With respect to the class
20 notice issues and all these motions, the Court is going to
21 take each motion under advisement. I'm going to issue a
22 written order shortly.

23 With respect to the notice, once the Court rules
24 on the motions, then considering the then current status of
25 the class issues, it's likely that the Court would order

1 the parties to meet and confer concerning whatever notice
2 may be appropriate at that time.

3 I would -- my plan would be to continue working
4 on the notice. I'm likely not to order it to be sent out
5 until we know whether the Eighth Circuit is going to take
6 the appeal or not.

7 The only exception to that would be if for some
8 reason the circuit takes an inordinately lengthy period of
9 time to make that decision. I'm not ruling out sending out
10 a notice while the Eighth Circuit is still considering that
11 matter, but if it's a relatively short period of time,
12 which it usually is, it would seem to be not prudent to
13 send out notice during that limited period of time.

14 Okay. We've got the status conference. Anything
15 else?

16 MR. CAPRETZ: Just a couple of comments, Your
17 Honor, if I may. First, I would like on this last issue
18 that was just had dialogue on, I would first of all remind
19 counsel for St. Jude Medical that the job of class counsel
20 is to communicate with the class. So that is our
21 obligation to communicate with the class and advise them of
22 what is going on.

23 The notice in the publicity, the answer, simply
24 Mr. Kohn asked and as Mr. Angstreich pointed out we raised
25 just a couple of minutes ago is that it was posted on the

1 Internet. That is public notice to the class members, and
2 I can attest that we have had contact with the citizenry
3 wearing Silzone valves in certain instances where they did
4 indeed read the Internet notice and inquired about what was
5 going on and what their rights might be.

6 So we would encourage the Court to consider that
7 in this business of what notice goes to the class members.
8 The opt-out forms and who gets the work in the other heart
9 valve litigation that we have done so much work on in
10 Bolling in Cincinnati which was done in '92 and which is
11 still alive, the class counsel did not take after global
12 settlement was reached, when it claimed -- when it takes
13 those who opt out and who have a claim and they have been
14 paid for the services as a part of the attorneys' fee that
15 was awarded, no fees are charged, although the services are
16 rendered to the class.

17 That's different and distinct from the situation
18 where you don't get an opportunity to have fees paid, but
19 otherwise, as Mr. Angstreich points out, there has been a
20 lot of time and effort and counsel are most knowledgeable,
21 and there is no reason why counsel should be excluded in
22 those circumstances where there might be an opportunity to
23 help someone.

24 I want to thank the Court before moving on, first
25 of all, for the opportunity to be heard because in not very

1 many circumstances other than dispositive motions do
2 federal courts allow to you argue motions. They do it
3 mostly on the briefings and the papers, and we will give
4 St. Jude an A for graphics, and we have to make sure next
5 time we catch up with them.

6 I did for my mother's sake, I have to say on this
7 one motion reference to preemption, that is a subject very
8 near and dear to our hearts. I'm sure the Court is aware
9 that that's a matter of discretion. It's not a matter of
10 law with the Court.

11 And it's only in rare and extraordinary
12 circumstances, it's uncontroverted, that the court
13 certifies such a matter for an interlocutory appeal. We
14 are asking the Court basically a procedural maneuver, and
15 that is to amend its order of January of this year, and
16 that request is made some three months after.

17 While they are technically correct that they are
18 not bound by the ten day rule and they can still bring it,
19 but we suggest it's untimely. We would ask the Court to
20 take note that indeed they never did appeal the ruling in
21 state court. They had an opportunity if this issue was so
22 near and dear to their hearts to appeal it, and it was not
23 done.

24 In essence, if the Court would grant the motion,
25 and we would ask the Court to rule on this particular

1 request rather timely, if possible, would only cause a
2 further delay in the proceedings. There would be no
3 finality or termination of the proceedings by the decision
4 as was set out in our papers, and it's adverse to a strong
5 policy against piecemeal appeals. So we would ask the
6 Court to consider this and deny the application for the
7 motion to hear the reconsideration of the summary judgment
8 issue.

9 At this time, Your Honor, we would like to move
10 to the status report, the status of the MDL discovery.
11 While we speak, there is a deposition being taken. We have
12 taken several depositions on the current wave. I believe
13 there are two further -- excuse me -- three further ones
14 scheduled at the current time.

15 We will be taking two in May, mid-May, and we
16 have had trouble getting a date on one gentleman, a Mr. ^
17 Mersch. Mr. Kohn informed me just today that we would have
18 a date for his deposition by this Friday. So, again, this
19 has been a matter of frustration and difficulty for us
20 because we have not been able to get complete information
21 until this hearing today.

22 We can alert the Court that there will be a
23 further wave of depositions required, and we will request,
24 we shall have a certain number of depositions available
25 under the rule of federal procedure. We're not sure

1 exactly today what that number is.

2 There is a dispute because certain of the
3 depositions were taken for preemption issues as well as
4 merits. So we may ask the Court's indulgence, and more
5 than likely we will, to extend the number of depositions
6 that will be available to us.

7 So that's a quick thumbnail. We are still
8 waiting and working with Mr. Solum. I can never say his
9 name right. I'm not sure I'm pronouncing it right now. I
10 do know he's working on it, that there is a current issue
11 involving that matter, and I don't know. Mr. Kohn is
12 speaking now, but Mr. Angstreich, do you know the status of
13 that?

14 MR. ANGSTREICH: Your Honor, an issue arose this
15 week as to whether or not it would benefit Mr. Solum to
16 have an opportunity to question Mr. Ladner on matters that
17 have come to his attention. We indicated that we had no
18 objection to that procedure so long as we were present and
19 had an opportunity to question Mr. Ladner. That was
20 communicated to Mr. Solum.

21 Unfortunately, he cannot hold a hearing until
22 June 14th. We do not believe that it is appropriate to
23 further delay the resolution of the privilege log for
24 another month and a half, and so while it might be a good
25 procedure, he's prepared to proceed without it, and we

1 would be ready to proceed and hope to proceed so that we
2 can get a resolution long before that date.

3 I am not certain of what St. Jude's position is
4 on that. My guess might be that they would like to have
5 the June 14th argument, the hearing date, predicated upon
6 motions that have been made to stay certain other things,
7 but our position would be that we move forward on that.

8 MR. CAPRETZ: Mr. Kohn?

9 MR. KOHN: Your Honor, we would like to have a
10 hearing in front of the special master on the first day
11 that he is available. We had proposed dates in the middle
12 of May through the end of May, and he simply isn't
13 available at that time. We're only talking about five
14 weeks from now.

15 It's a process that he asked for to make a fair
16 and complete ruling on the issues before him. He has spent
17 a tremendous amount of time going through these materials,
18 and I don't think an additional five weeks is going to make
19 a bit of difference in this litigation.

20 And I think it's only fair under the
21 circumstances since it's out of our control, it's his
22 calendar that is precluding this from being finalized, to
23 schedule it to suit the earliest date that he can do it.

24 If he becomes available sooner, we will certainly
25 move it earlier, but the issues are too important to us

1 simply to say because there is a delay because of the
2 special master's calendar that we ought to suddenly have
3 the issue resolved without -- until he has all the
4 information that he feels he needs.

5 Thank you, Your Honor.

6 MR. ANGSTREICH: Your Honor, just to finalize
7 this point, the protocol was established it seems like a
8 year ago to provide a -- the privilege log and to provide
9 an opportunity to submit whatever position statement.

10 We then got in a situation, and we didn't bring
11 it back to Your Honor, where Mr. Solum indicated that he
12 would allow Mr. Ladner to supplement everything with
13 another affidavit, which came in I think at 60 some odd
14 pages, which we then had to respond to which delayed us
15 even further.

16 According to Mr. Rudd's discussions with
17 Mr. Solum, he is way down the line in reviewing these
18 records. He also indicated to us that he'll do it either
19 way, and he has no problem finishing this.

20 The burden was theirs. If this was the protocol
21 that they wanted to follow, we should have done that on day
22 one. You can't do it, and you can't simply say, well,
23 another five weeks doesn't matter. Well, it's true.

24 Another five weeks in a case that is three months
25 old doesn't matter. Another five weeks in a case that is

1 four years old does matter, and it especially matters
2 because the discovery that we're taking, is again, we're
3 being hamstrung. We took Mr. Gove's deposition yesterday
4 as an example. There are an inordinate number of documents
5 that we asked to be declassified that were either to or
6 from Mr. Gove.

7 We didn't get them, but because we wanted to
8 pursue the case to move the case along, we took his
9 deposition. We have additional depositions that need to be
10 taken. On the 13th and 14th of May including the medical
11 director, Dr. Fratter, and the president and chief
12 executive officer or former president of the heart valve
13 division and chief executive officer Messrs. Healy and
14 Shepherd on the 20th and 21st of May.

15 There is no reason why this issue should continue
16 to hang over us, and so we ask that, although nobody has
17 made a motion, and Mr. Solum is ready to go forward without
18 a hearing, we think that that's the procedure that should
19 be followed.

20 MR. CAPRETZ: Your Honor, if I may. Oh, excuse
21 me. Go ahead.

22 MR. KOHN: Plaintiffs challenged 300 documents,
23 Your Honor. Many of them I think the challenge is
24 frivolous. If you want to look to a reason why this is
25 taking so long, look at the number of documents that

1 they've challenged, and I believe at the end of the day,
2 very, very few of those are going to be released by the
3 special master.

4 We'll wait and see, but I think it's only fair
5 under the circumstances given the weight of the tasks in
6 front of him and in fairness to the parties, especially my
7 client, that we wait the additional five weeks. I can't
8 imagine what the prejudice is.

9 MR. CAPRETZ: Your Honor, if I may, I just
10 supplement my colleague's arguments, and that is is that
11 the additional depositions that we're requesting, we can't
12 define that until we have what happens with Mr. Ladner, who
13 is a key gentleman in this proceedings concerning the
14 Silzone valve.

15 So if I can do a role reversal and ask the Court
16 if it would consider meeting and conferring with Mr. Solum
17 and coming up with some way to help resolve the five week
18 sticking point, it would be most appreciated.

19 THE COURT: Well, I think it would be helpful for
20 him to have the chance to ask the questions as I understand
21 the issue. I'm a bit concerned about the length of time
22 until June 14th.

23 Maybe it's the best today for me to permit it to
24 go forward on June 14th, but that it be moved to any
25 earlier date on which Mr. Solum becomes available and the

1 parties cooperate to make whoever available on any of those
2 dates so that this can go forward at an earlier time.

3 In other words, if it happens to be a date where
4 the parties who would normally be there are involved in
5 some other depositions or something else, I would ask that
6 each side make substitute counsel available for this.

7 MR. ANGSTREICH: Your Honor, could we make a
8 request that the Court consult with the special master to
9 discuss with him whether or not he really believes it's
10 necessary and to what extent because the information that
11 we got in his e-mail was, he's more than prepared to
12 proceed without asking the questions, and he understands
13 that five weeks is a long time.

14 And, I mean, we've said our position. They've
15 said their position, but I really think that if the Court
16 could do that, and whatever the special master and the
17 Court determines, obviously we'll all go along with, but I
18 think that that might help.

19 THE COURT: I'll contact him.

20 MR. CAPRETZ: That would be appreciated. It
21 reinforces what we were requesting, Your Honor, and it also
22 might be mindful for the Court to recognize that Mr. Ladner
23 had an opportunity to submit an additional exclamatory
24 affidavit to the special master, so he has had an
25 opportunity to express his position much beyond what the

1 normal scope of contacts would be.

2 Next, Your Honor, we would like to move on to the
3 mediation protocol and mediations. I think we have
4 conducted approximately 15. I could stand to be corrected
5 on the number, and to my information and belief, six of
6 those cases have settled.

7 I'm told that one of the other cases, the very
8 first case, is still in negotiations with St. Jude Medical,
9 so hopefully something positive may happen along that line.

10 The mediator has been most congenial and
11 cooperative. We've worked with him personally last week
12 and found him to be a delight to work with and honest,
13 trustworthy person and definitely effective in his role.

14 I would suggest to the Court that there are a
15 couple of issues such as we called the Court earlier this
16 week on and a side-bar issue which I listed at the bottom
17 but we best address now is that the St. Jude Medical
18 insurance issue.

19 Going back to the settlement agreement, we have
20 exchanged information. We have been in contact with
21 St. Jude Medical's counsel. Just today, Mr. Kohn and
22 myself discussed the status of that, and he said they would
23 be back to us shortly after reviewing our comments on the
24 confidentiality and the indemnity provisions.

25 So we're hoping we can get that done sooner

1 rather than later, because those six cases that have
2 settled, those people are hoping for an early resolution so
3 that they might get their moneys, and it's contingent upon
4 us reaching an agreement on the settlement terms, so that
5 is the status of the settlement agreement itself.

6 One of the points that keeps coming up in these
7 mediations as reported by Mr. Carey and as personally we
8 experienced is the issue of insurance.

9 St. Jude Medical is fond of saying that the
10 current layers of insurance, TIG and Gulf Insurance I
11 believe are the two companies, will soon expire, that they
12 have moneys left, but considering the mediations that have
13 taken place, their funds and the expenses being incurred,
14 attorney's fees amongst them, there will no longer be funds
15 after 30, 60 days from the current time.

16 It is suggested, and actually it's used as a club
17 to use one of St. Jude Medical's counsel's terms against
18 the plaintiffs that there is trouble in River City if you
19 don't consider settling now because the next layer is
20 Kemper, and guess what, Kemper is having financial
21 troubles.

22 If you check the Internet, you'll find they're
23 based in Illinois, that the Illinois insurance commissioner
24 has them on a watch program and reporting program. No one
25 really knows what this means, if they're teetering on the

1 brink of bankruptcy.

2 It has been suggested in settlement negotiations
3 that if indeed they do go bankrupt, it possibly could put a
4 stop to the current litigation, and while I understand in
5 theory that's true, it's up to the bankruptcy judge, at
6 least the temporary stuff, to decide whether or not to go
7 forward.

8 But this can get some folks concerned and perhaps
9 consider the sums that they might not otherwise consider
10 because they want to know they're going to be paid. Now,
11 St. Jude Medical has insurance that exceeds the Kemper
12 layer, the next Kemper layer, and they have indeed turned
13 over in discovery the applicable insurance policies.

14 But quite frankly based on conversations with
15 counsel and our analysis of those insurance records, it's
16 befuddling as to what they conclude that the next layers of
17 insurance include as far as amounts of moneys are concerned
18 does not seem to be consistent with the policies we have
19 been furnished.

20 Therefore, I have asked Mr. Kohn if he would be
21 so kind as to chart out what the layers of the insurance
22 might be. Mr. Kohn has been as usual cooperative and
23 civil. However, he hasn't given me the chart of the basic
24 information, and I keep getting back a response that you
25 know that Kemper is the next layer.

1 We think the Court needs to intercede at this
2 point in time and determine what insurance layers are
3 there. We know that St. Jude Medical is a very successful,
4 viable company, and it doesn't matter what the insurance
5 is. Ultimately, they're able to withstand a judgment on
6 any verdict that might be rendered in this case.

7 And so long term, there will be payments made for
8 those who have been aggrieved. However, in the interests
9 of keeping the mediation process moving forward and for
10 people knowing what their rights and entitlements are, I
11 think we need to have more definitive information on the
12 insurance.

13 I'll let Mr. Kohn express his position.

14 MR. KOHN: I don't really have a position, Your
15 Honor. I didn't know until Mr. Capretz told me this
16 morning that he was confused and unable to decipher the
17 policies that we produced.

18 So in an effort to cooperate, I will consult with
19 the counsel at St. Jude Medical and see if we can't clarify
20 the situation for him.

21 MR. ANGSTREICH: Your Honor, if I might expand on
22 that because Tuesday we had three mediations, and Your
23 Honor has entered an order that said effectively that there
24 is no reason to give parameters, and in fact, St. Jude has
25 refused to respond to demands or to give any indication of

1 sums.

2 We flew our client out from New York who suffered
3 a stroke who effectively was told through Mr. Carey that
4 it's a shame he is doing so well, but that it's really of
5 no moment to St. Jude because they don't pay anything on
6 thrombus cases, and they made us an offer despite the fact
7 that we had a demand out there of multiple millions of
8 dollars of \$25,000.

9 If they had told us that the offer that was going
10 to be put on the table for this case was \$25,000, Mr. Cohen
11 would not have flown from New York, would not have stayed
12 over in a hotel here. Could have been available by
13 telephone should we have even been willing to go forward.

14 They should have told us what the parameters were
15 for those kind of cases, and that in effect they had no
16 intention of settling these kind of cases. We view that as
17 bad faith. We think St. Jude Medical should reimburse
18 Mr. Cohen for his air fare and his hotel, and that if they
19 are not going to make viable offers on any particular type
20 of case, they should tell people.

21 Now, Mr. Kohn wrote us a letter and said there
22 are certain cases that were listed that they would not
23 mediate. He could have said we're not going to mediate
24 thrombus cases, and especially in cases where we represent
25 our clients, and we've given them demand numbers, and they

1 knew that those demand numbers were not even in the same
2 continent, they should have at least told us that. So that
3 was one point that is very important.

4 Mr. Carey did say to us that, you know, Kemper is
5 shaky, and you may have to consider how much money you want
6 to take from the present layer. That can't be allowed in
7 these mediations. This is a one billion dollar company. I
8 don't care if they don't have any insurance anymore.

9 It's an irrelevancy, and it should not be
10 relevant in deciding what the value of a case is and what
11 people should take, and they should be prevented from
12 sending that message in any of the other mediations.

13 And that gets to the final point, Your Honor,
14 because the MDL has an order that requires the deposit into
15 the bank account, which is on item number 6A, the report on
16 the creation of the bank account.

17 But it's very important from the MDL's point of
18 view that St. Jude acknowledge on the record that with
19 respect to all of the mediations that are ongoing and all
20 of the settlements that they will deposit themselves the 6
21 percent of the gross settlement so that we don't have to go
22 and find the individual MDL lawyers or their clients to
23 protect that 6 percent entitlement to the MDL.

24 It should come off the top, and it should be paid
25 directly in by St. Jude, and we would like them to

1 acknowledge that that's the methodology that is going to be
2 followed.

3 Thank you, Your Honor.

4 THE COURT: Mr. Kohn?

5 MR. KOHN: Your Honor, I was not at the mediation
6 that counsel refers to. My partner Dave Stanley was there.
7 I have had a chance to speak with him, and Mr. Angstreich
8 raised this issue with me yesterday when we were at a
9 deposition together. I can assure the Court that St. Jude
10 acted in good faith.

11 We would very much like to have settled
12 Mr. Angstreich's three cases if we could, and I'm not going
13 to cast any aspersions on the other side of the room, but
14 there were reasons why his three cases didn't settle that
15 don't have anything to do with St. Jude. I would invite
16 the Court to speak with Mr. Carey about what went on at
17 that mediation.

18 We certainly did not want to have Mr. Cohen fly
19 out here and not settle his case. We would loved to have
20 settled his case, but there were reasons why his case
21 couldn't be settled.

22 As to the other issue he raised about the 6
23 percent, we are certainly prepared to have the 6 percent on
24 each settlement deposited into a trust account. We're
25 working together to try to get that set up, so that I don't

1 believe is an issue.

2 As to the issue about Kemper, it is true that
3 Kemper is the next layer. It is true based on information
4 that I've received that they are apparently in financial
5 difficulties, and I don't think anyone knows exactly how
6 that is going to unfold or what the consequences of that
7 mean.

8 And I don't think in response to what
9 Mr. Angstreich just said that it's being used as a club or
10 as a weapon. It's simply a piece of information that
11 people need to know, and if they don't know it, and they
12 don't settle their cases, and they weren't told about it,
13 then they're going to complain later that they should have
14 been informed.

15 So it's out there on the table. We've never
16 attempted to conceal it, and it's something that everybody
17 just needs to take into account. Thank you, Your Honor.
18 I'm sorry. One more thing. I thought that the issue of
19 the interlocutory appeal had been submitted, but counsel
20 made some remarks.

21 In view of the time and everything else, I don't
22 know that it's necessary. It appeared that Mr. Boranian
23 was ready to argue that today. We feel that all the
24 comments by counsel were addressed in our papers, and we
25 would submit it.

1 THE COURT: Yeah. I think it was adequately
2 addressed in the papers, and I appreciate that, Mr. Kohn.
3 I'm not going to order payment of expenses for the --
4 Mr. Angstreich's client from New York at this point. I do
5 want to be kept apprised of these situations.

6 There may be some point in the future where that
7 would be a remedy the Court would order if necessary. I'm
8 also not going to prevent discussion concerning Kemper. I
9 do believe that counsel for the plaintiffs who are involved
10 in these mediation sessions are well capable of
11 articulating all the points that Mr. Angstreich articulated
12 this morning concerning Kemper.

13 I would not like it to be used as a club. I
14 don't think anyone at this point is using it as a club or
15 as a consideration for these particular cases.

16 It's relevant to know, and I think so far that
17 the discussions have been appropriate, but that probably
18 shouldn't be taken to the next level, and I don't think
19 there is an issue on the bank account. I think that sounds
20 like it's moving forward.

21 MR. CAPRETZ: Yeah, Mr. Stanley and myself are
22 working on that. There is a community bank called Eagle
23 Valley Bank. Been around since 1919. We thought we would
24 attempt to use a community bank as opposed to a major bank
25 such as U.S. Bank or Wells Fargo. Their rating is very

1 high, what the FDIC refers to as a camel rating.

2 It's probably confidential, but there are those
3 connected in the industry who get some idea. I can assure
4 the Court that they are top rated, and their financial
5 statement is real strong. We will address that further
6 when we have an opportunity to talk to Mr. Stanley.

7 The next item we have on the agenda is the Ramsey
8 County litigation. Basically we left out one. There was a
9 Canadian litigation and the Ramsey County. Ramsey County
10 has approximately 20 state claims at the present time.

11 Those that had cases set for trial during this
12 calendar year, 2004, have been resolved. So there is
13 nothing pending in the way of any trial dates in Ramsey
14 County at this moment.

15 The Canadian litigation, I can report to the
16 Court that St. Jude Medical argued the right to appeal.
17 It's much like the interlocutory appeal request made here,
18 except it's made before a different judge. He heard the
19 arguments last week.

20 As of yesterday, he had not ruled on whether he
21 would allow them to appeal. If they're not allowed to
22 appeal, they're moved into a discovery phase, as I'm
23 informed, and then they will start their own discovery
24 processes.

25 Their discovery is limited in the sense that they

1 don't allow the extensive deposition taking we do here in
2 the states, and there is also a class action pending in
3 Quebec, and that matter was also argued last week.

4 THE COURT: A separate class action?

5 MR. CAPRETZ: A separate class action remembering
6 that Canada and the autonomy of the provinces is quite
7 different from what the autonomy of the 50 states might be
8 in the states, and Quebec in particular acts independent in
9 certain matters.

10 In this case, they are attempting in the action
11 pending in Ontario province to get a national class action
12 approved, but it has to respect the rights of those in
13 other provinces. So that class action is moving forward in
14 Quebec.

15 We have case management review. I'm not sure
16 that this is not a redundancy in light of what we have
17 spoken about to date. There are approximately 35 cases now
18 pending after you take out those that have settled before
19 Your Honor, MDL individual claims still pending.

20 The next status conference we have talked about
21 and agreed upon with the Court to be 9:30 a.m. on June the
22 22nd. By that time, we will be celebrating the Lakers'
23 next world championship, notwithstanding the Timberwolves.

24 THE COURT: Should we take a vote on that?

25 MR. ANGSTREICH: Your Honor, we disavow

1 Mr. Capretz's comment.

2 MR. CAPRETZ: He takes exception.

3 THE COURT: We may have all the teams covered
4 here.

5 MR. MURPHY: Well, Your Honor, I would be in a
6 position to cover all the teams.

7 THE COURT: No comment. One question that I had,
8 do we need to have another status conference in May, in the
9 latter part of May?

10 MR. CAPRETZ: We discussed this generally. I
11 don't think so unless something comes out and we need the
12 Court's attention. Is something available if we would need
13 a date?

14 MR. ANGSTREICH: Your Honor, I guess that will
15 depend upon the timing of Your Honor's ruling on the
16 motions.

17 THE COURT: Why don't we do this: If anyone
18 believes that we need to have one, we can do it probably
19 during that last week in May, 25th or the 26th. We'll just
20 leave that --

21 MR. CAPRETZ: Fine.

22 THE COURT: -- available. Let us know as soon as
23 possible if you think that another status conference is
24 necessary then. Okay?

25 MR. CAPRETZ: That would be fine.

1 THE COURT: Okay.

2 MR. CAPRETZ: Thank you, Your Honor.

3 THE COURT: Anything else for today?

4 MR. KOHN: No, Your Honor.

5 THE COURT: Okay. Very well. Thank you for the
6 arguments this morning. Very good. The Court will issue a
7 written order shortly on the matters that were taken under
8 advisement this morning, and we will see everyone at the
9 next status conference.

10 * * *

11 I, Kristine Mousseau, certify that the foregoing
12 is a correct transcript from the record of proceedings in
13 the above-entitled matter.

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17 Certified by:
Kristine Mousseau, CRR-RPR

18 Dated: May 11, 2004

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