

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Baycol Products)
 Litigation) File No. MDL 1431
) (MJD)
)
) Minneapolis, Minnesota
) February 9, 2006
) 9:00 a.m.
)

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)

APPEARANCES

For the Plaintiffs: RICHARD LOCKRIDGE, ESQ.

For Defendant Bayer: ADAM HOEFLICH, ESQ.
 PETER SIPKINS, ESQ.
 SUSAN WEBER, ESQ.
 GARY McCONNELL, ESQ.

For Defendant FRED MAGAZINER, ESQ.
GlaxoSmithKline: TRACY VAN STEENBURGH, ESQ.
 JAMES GRASTY, ESQ.

Court Reporter: LORI A. SIMPSON, RMR-CRR
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Proceedings recorded by mechanical stenography;
transcript produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

1 THE COURT: Let's call this matter, please.

2 THE CLERK: In re: Baycol Products Litigation,
3 Multidistrict Litigation No. 1431. Please state your
4 appearances for the record.
5

6 MR. LOCKRIDGE: Good morning, Your Honor. Richard
7 Lockridge here on behalf of the estate of Erwin Lucke and
8 the PSC.
9

10 THE COURT: Good morning.

11 MR. HOEFLICH: Good morning, Your Honor. Adam
12 Hoeflich for Bayer.

13 THE COURT: Good morning.

14 MS. WEBER: Good morning, Your Honor. Susan Weber
15 for Bayer.

16 THE COURT: Good morning.

17 MR. SIPKINS: Good morning, Your Honor. Peter
18 Sipkins for Bayer.

19 THE COURT: Good morning.

20 MR. MAGAZINER: Good morning, Your Honor. Fred
21 Magaziner for GlaxoSmithKline.

22 THE COURT: Good morning.

23 MR. McCONNELL: Good morning, Your Honor. Gary
24 McConnell with Bayer.

25 THE COURT: Good morning.

1 MR. GRASTY: Good morning, Your Honor. James
2 Grasty with GlaxoSmithKline.

3 THE COURT: Good morning.
4 Tracy.

5 MS. VAN STEENBURGH: Good morning, Your Honor.
6 Tracy Van Steenburgh on behalf of GSK.

7 THE COURT: All right. Mr. Lockridge.

8 MR. LOCKRIDGE: Your Honor, today we are here to
9 ask for the remand of the case involving the estate of
10 Mr. Erwin Lucke. This case was filed in June of 2003 in the
11 Southern District of Texas and it's currently before Judge
12 John Rainey. That's who it was filed with. All witnesses
13 are in Texas.

14 THE COURT: In federal court, right?

15 MR. LOCKRIDGE: In federal court, yes, Your Honor.
16 All witnesses are in Texas. It's a death case, Your Honor.
17 All witnesses are in Texas. The prescribing physician is in
18 Texas.

19 THE COURT: Mr. Lockridge, why can't I do it
20 better than the judge in Texas?

21 MR. LOCKRIDGE: Because, Your Honor, there is no
22 reason whatsoever for this MDL to keep this case. All fact
23 witnesses other than the defendants are in Texas.

24 THE COURT: Why can't I take care of all the
25 discovery matters in this matter and get it ready for trial?

1 MR. LOCKRIDGE: First of all, let me say, Your
2 Honor, that most of the discovery is done.

3 THE COURT: I didn't hear anything that would keep
4 me from doing that.

5 MR. LOCKRIDGE: Well, Your Honor, the only reason
6 for this Court to keep cases --

7 THE COURT: Why would I send this down to a
8 federal judge so it goes on his docket of -- I could have my
9 clerk go on his docket and see that he's probably got 500
10 cases and it will be one of 500 cases that he'll be starting
11 from day one.

12 If you want an accelerated matter, I can lock you
13 in my jury room with the defendants today and we can have an
14 accelerated discovery plan that you can have everything done
15 within 60 days, have the Daubert hearing within 90 days, and
16 I have a ruling within a short period of time after that and
17 send it back down to Texas at that time ready to go if it's
18 ready for trial and the judge down in Texas would call me
19 and say, Thank you. Now, you can't tell me that that is not
20 the better route.

21 MR. LOCKRIDGE: Well, I can try to, Your Honor.

22 THE COURT: Well, tell me why I shouldn't
23 accelerate the discovery plan. Because if you're saying
24 that you've got to get this ready and tee this up and go,
25 let me lock you up in my jury room and you've got my

1 discovery plan from yesterday. You know exactly what I want
2 done and just -- I want everything to be capsulated into,
3 instead of a longer period of time, into 60 days and get
4 this case ready and going. So convince me otherwise now.

5 MR. LOCKRIDGE: Because it is our position, Your
6 Honor, that this case, obviously, and -- well, I'll stay
7 with this case -- that this case should be remanded because
8 all common discovery is done. We have pulled our discovery,
9 our depositions of Mr. Wenning and Mr. Schneider. We are
10 not going to take the last expert deposition of -- there was
11 a GSK expert. All common discovery is done. All generic
12 discovery is done.

13 The defendants have relied primarily, Your Honor,
14 on the Lehmann case, which is from New York, where this
15 Court denied remand and at that time Your Honor noted that
16 there were a number of the top executives' depositions still
17 pending. That's off the table.

18 Your Honor noted in that order that generic expert
19 discovery was still going on. That's off the table. You
20 noted in that order that the PSC was still attempting to get
21 documents from the Italian prosecutor in Italy. That's off
22 the table.

23 Everything is off the table now and indeed Your
24 Honor, I think probably following up in the Patenaude case
25 perhaps, noted that a final reason for keeping the Lehmann

1 case was, and I'm quoting, The parties are in mediation and
2 are close to a settlement.

3 Here there is no settlement. The specials in this
4 case are in a range of a million dollars. I believe that I
5 don't think it's any secret that there was a mediation
6 scheduled and the defendants called up and said, We will
7 attend the mediation, but we will not be offering anything.
8 Now, ultimately, I think in a desperate attempt to avoid
9 remand, they did offer \$25,000.

10 The sole issue is causation here. The trial is
11 going to be in Texas before Judge John Rainey. It will be
12 pursuant to Texas law. As the Taxable Municipal Bonds case
13 noted and many other cases note, the federal district court
14 that sits within the state is much better able to handle
15 state law matters.

16 So we would like this case remanded, Your Honor.

17 THE COURT: So you're saying everything is done,
18 you're not going to go down to Texas and say, Oh, Judge, we
19 failed to do this and may we re-open discovery and take this
20 deposition or that deposition or --

21 MR. LOCKRIDGE: Well, I think in all fairness,
22 Your Honor, the defendants will want to be taking some
23 depositions. Our case is ready to go.

24 THE COURT: Well, you didn't answer my question.

25 MR. LOCKRIDGE: I'm sorry. And the question was

1 whether or not we would be going down to Texas to ask for
2 more depositions?

3 THE COURT: Yes.

4 MR. LOCKRIDGE: I don't believe --

5 THE COURT: Or other discovery matters.

6 MR. LOCKRIDGE: I would hate to say for certain,
7 but I don't believe that we would be. We have our expert in
8 place. We have the executor of the estate. There is a
9 gentleman who found the injured Mr. Lucke. The question is
10 causation.

11 THE COURT: If the defendants have other
12 depositions to take, let's get you into the jury room and
13 let's get everything teed up and do it on an accelerated
14 basis. Because if I send it down to Texas, they would still
15 be making the same motions before that judge; and that's
16 what I'm trying to avoid. I don't know why you're trying to
17 get around that.

18 You're saying we're ready to go, that you're not
19 going to do anything else, you don't need to do any other
20 discovery, but you know that the defendants have to do some
21 things. So why don't you want to sit in my jury room, set
22 up a schedule so it's accelerated and so everything is done
23 so this case is ready to go?

24 MR. LOCKRIDGE: Because in our opinion, Your
25 Honor, this case belongs in the Southern District of Texas

1 since all generic discovery is done and that that court is
2 better able to supervise any remaining case-specific
3 discovery and to rule on Texas law.

4 Thank you, Your Honor.

5 THE COURT: Good morning.

6 MR. HOEFLICH: Good morning, Your Honor. Adam
7 Hoeflich for Bayer.

8 We are about to begin case-specific discovery
9 pursuant to an order that the Court issued yesterday. There
10 is no reason that would justify putting Mr. Lucke's case on
11 a separate track.

12 In fact, consistency of rulings that will apply to
13 more than just Mr. Lucke's case and that will come up in
14 multiple cases, reducing duplication of effort by judges
15 around the country and avoiding an avalanche of cases
16 claiming that they should be set on specific or different
17 tracks justifies keeping this case with the MDL on the
18 schedule set by this Court already.

19 The background of Mr. Lucke's case is relatively
20 straightforward. It was filed in the second half of -- it
21 was filed in June of 2003 and served on us in the second
22 half of 2003. It was then sent to this Court.

23 Mr. Lucke was one of 10,000 plaintiffs. He's now
24 represented by his estate. He's deceased. So there's no
25 elderly plaintiff seeking a trial, as there was in the

1 Lehmann case where this Court, in fact, decided that remand
2 was inappropriate.

3 The issues that would come up in Mr. Lucke's case
4 will come up in a great number of cases. The general
5 Daubert rulings that this Court is scheduled to hear this
6 summer will apply to Mr. Lucke's case. There's no reason to
7 hear them separately. It would be enormously inefficient.

8 And we would also add that settlement negotiations
9 are ongoing. We did make an offer and we reinstated
10 settlement discussions in December. We've been waiting to
11 hear from plaintiffs, who told us that they needed to work
12 out some lien issues first. So it's not as though that is
13 off the table here as well.

14 The Court anticipated case-specific discovery in
15 PTO 4. Remands have been viewed as inappropriate in MDLs
16 before case-specific discovery is done.

17 Mr. Lockridge points to a case from 1995, but as
18 this Court well knows, PTO 17-C from the PPA case has
19 anticipated remands after case-specific discovery. This
20 Court issued an order yesterday that case-specific discovery
21 was taking place in the MDL.

22 Judge Bartle in the diet drugs issued a lengthy
23 opinion explaining why cases should not be remanded before
24 individual discovery takes place and there he highlighted
25 the same things we're talking about today, issues come up in

1 more than one case and it makes sense for the judge who is
2 overseeing the case for several years to decide them.

3 It's inefficient and a burden on the federal
4 system to have different judges from around the country
5 deciding the same issues and it's inappropriate for the MDL
6 court to have to deal with what could be thousands of remand
7 motions with each plaintiff asking for a quicker schedule
8 for their trial.

9 Here there is simply no prejudice to Mr. Lucke's
10 estate from participating in this MDL and there's no
11 justification for the disruption both to this Court and to
12 the court in Texas.

13 So we would ask the Court to stay the course,
14 apply the order that was put in place yesterday, and to
15 allow the parties to proceed with this matter.

16 Thank you, Judge.

17 THE COURT: Anything further, Mr. Lockridge?

18 MR. LOCKRIDGE: I have nothing further, Your
19 Honor.

20 THE COURT: The plaintiffs' motion will be denied.
21 Anything else that we want to talk about?

22 The PSC has filed a motion dealing with remand of
23 all the cases; is that correct?

24 LAW CLERK: To dissolve the MDL.

25 THE COURT: To dissolve the MDL. I would -- since

1 I appoint the lawyers on the PSC, I'll give you some advice.
2 You know what my rulings are going to be on that and so I
3 would suggest that you withdraw that. I have ruled that way
4 all the way through this. There's nothing new in your
5 memorandum and I hope you're not billing for those hours,
6 because I'll take a very close look at that.

7 My discovery plan was filed yesterday, that's
8 going to continue, and I just got an e-mail late last night
9 that Weitz & Luxenberg has a stipulation to dismiss 2,500
10 cases and whether or not I was going to sign 2,500 documents
11 or sign one document. I'm going to sign one document with
12 all the cases on it.

13 So this MDL is quickly moving to a conclusion and
14 the PSC should not be bringing motions that are frivolous
15 and a waste of time and are costing money on both sides. So
16 my suggestion for the PSC is to review that motion and
17 probably better heads will come to a realization that it not
18 only is futile, but it's frivolous and could end up with
19 sanctions.

20 So anything else that we should be dealing with?

21 MR. LOCKRIDGE: Nothing from the PSC, Your Honor.

22 THE COURT: And understand -- make sure that
23 everyone understands that I do not have a magistrate on this
24 matter, so any discovery matters are going to be coming to
25 me. And I can tell you that when I first started out I

1 didn't have a magistrate 12 years ago and the policy was
2 that if someone brought a frivolous motion before me, they
3 were sanctioned. That was on both sides. So you better be
4 very careful on bringing any discovery motions before me.

5 Anything else?

6 MR. HOEFLICH: No. Thank you, Your Honor.

7 THE COURT: All right. Have a good flight back
8 and we're in recess.

9 MR. SIPKINS: Your Honor, do you want to set a
10 status conference for March or April?

11 THE COURT: What issues are there?

12 MR. SIPKINS: I don't know if there will be any,
13 but -- should we just wait and see?

14 MR. LOCKRIDGE: I am not aware of any issues.

15 THE COURT: Let's not schedule one because let's
16 get the discovery moving and then if there's some
17 complications or things that we have to adjust, then we can
18 have a status conference in May or June. All right?

19 MR. HOEFLICH: Thank you, Judge.

20 MS. WEBER: Thank you, Your Honor.

21 MR. LOCKRIDGE: Thank you, Your Honor.

22 THE COURT: Thanks.

23 (Court adjourned at 9:30 a.m.)

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I, Lori A. Simpson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: Lori A. Simpson, RMR-CRR

Dated: February 10, 2006