

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Baycol Products)
 Litigation) File No. MDL 1431
) (MJD/JGL)
)
) Minneapolis, Minnesota
) April 11, 2005
) 12:20 p.m.
)

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

(STATUS CONFERENCE)

APPEARANCES

For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.
 RICHARD LOCKRIDGE, ESQ.

For Defendant Bayer: PHILIP BECK, ESQ.
 SUSAN WEBER, ESQ.

For Defendant FRED MAGAZINER, ESQ.
GlaxoSmithKline:

Court Reporter: LORI A. SIMPSON, RMR-CRR
 1005 U.S. Courthouse
 300 South Fourth Street
 Minneapolis, Minnesota 55415
 (612) 664-5104

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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.

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

6 MR. ZIMMERMAN: Good afternoon, Your Honor.
7 Charles Zimmerman for the PSC.
8

9 MR. LOCKRIDGE: Richard Lockridge for the PSC,
10 Your Honor.

11 MR. BECK: Good afternoon, Your Honor. Phillip
12 Beck for the Bayer defendants.

13 MS. WEBER: Good afternoon. Susan Weber for
14 Bayer.

15 MR. MAGAZINER: Good afternoon, Your Honor. Fred
16 Magaziner for Glaxo SmithKline.

17 THE COURT: Mr. Zimmerman.

18 MR. ZIMMERMAN: Good afternoon, Your Honor. We
19 have provided the Court with a status report and proposed
20 agenda dated today that was filed, I believe, on the 7th
21 with the Court. We did have an opportunity to have a meet
22 and confer that -- and this agenda and status report is a
23 product of that.

24 Sometimes we don't always agree on the exact
25 language, so there may be a few minor comments, but we will

1 go through the agenda and each party will -- each side will
2 make comments if they have any. I don't think they will be
3 material.

4 The first item, Your Honor, is pending cases. As
5 of April 6th defendants have been served with 5,776 cases
6 that remain active, down from over 14,500 that were filed
7 since this litigation commenced. Obviously that takes into
8 consideration dismissals and settlements.

9 There are also statistics on the state court
10 filings that remain, and those numbers are down much more
11 significantly. Of the 5,696 state court filings, only 653
12 remain active.

13 So I guess that's what those statistics provide.
14 We have to take into consideration, obviously, that there
15 have been over almost 3,000 settlements that probably go
16 into those figures as well.

17 As of the last status conference, which I believe
18 was September, although we did have a conference before,
19 Your Honor, I believe in either November or December, it was
20 not a formal status, but as of the last formal status
21 defendants had been served with 6,653 cases at that time.
22 Of that total, 5,777 remain active in federal court and 871
23 were pending in state court.

24 These statistics do not include filed but unserved
25 cases. I've also been informed by the defense side that

1 this does not include claimants. This only includes
2 filings. I believe Mr. Beck has the number of claimants.
3 He gave it to me this morning. I believe it's at 11,500 and
4 some, if that's correct, or you can correct me on what the
5 number of actual claimants represented within these filings
6 are.

7 The next item is a list of plaintiffs' counsel has
8 been provided electronically last week to the PSC. So we
9 are getting updated lists of plaintiffs' counsel by the
10 defendants and we are getting that electronically.

11 So that's the status on pending cases. I don't
12 know if Mr. Beck has anything to add on pending cases.

13 MR. BECK: No, Your Honor.

14 MR. ZIMMERMAN: Settlement, Your Honor.

15 Defendants and the plaintiffs have settled 2,968 cases with
16 a total settlement value of \$1,130,668,591. The federal
17 cases, in other words, MDL cases, settled within that number
18 are 875, or at least cases that are subject to an MDL
19 assessment, with a total value of cases subject to an MDL
20 assessment of \$328,513,412.54.

21 This is up from the last status of approximately
22 112 cases, if I did my quick math correctly. Defendants had
23 settled as of the last status 2,856 cases for a total value
24 of \$1,096,000,000 roughly. The MDL cases went up from 727
25 cases settled to 875 cases settled.

1 Approximately 136 cases remain in the MDL
2 mediation -- have been submitted to the MDL mediation
3 program. I'm not sure if that's the number that remain
4 within that program or some of those have been resolved. I
5 think we will get a report from Special Master Remele on
6 that later in the agenda, but I know that 136 cases have
7 been submitted to the MDL mediation program for either
8 mediation or referrals to determine if they are mediatable
9 under the existing protocol for mediations.

10 In addition to the mediation program, Your Honor,
11 the PSC has continued to negotiate a certain number of cases
12 directly with Bayer, which means that they don't get into
13 the mediation program, the negotiations continue on a
14 one-to-one basis.

15 I would add this as a matter of comment. It was
16 not agreed to be put into the agenda. However, it is the
17 PSC's position that we should be expanding that mediation
18 program to include not just cases that have a strict
19 definition of rhabdo as defined by Bayer.

20 I believe that's been on -- that's been said from
21 my lips before and we simply put that before the Court as
22 food for thought to expand the mediation program, do not
23 just the strict definition of rhabdo as has been
24 traditionally applied, which has resulted in the
25 approximately 3,000 settlements to date.

1 The mediator -- the next item is the mediator's
2 report, the report of Special Master Remele, and I don't see
3 him.

4 THE COURT: Mr. Remele had to go to another
5 hearing.

6 SPECIAL MASTER HAYDOCK: I asked for his bowtie,
7 Your Honor, but he wouldn't let me wear his bowtie. So you
8 will have to just pretend that I've got a bowtie on.

9 Special Master Remele asked me to report to you
10 that the information in the status report is accurate and
11 that there are several cases that are in the process of
12 being scheduled to mediate.

13 THE COURT: Thank you.

14 MR. ZIMMERMAN: The next item is just a matter
15 that's been on the agenda for some time. It has to do with
16 the re-designation of previously designated confidential
17 documents. As the Court knows, the defendants had to
18 re-designate because there was overdesignation of
19 confidentiality.

20 And we are still considering the appropriateness
21 of filing a motion to recover the costs associated with
22 having to preview, monitor, and bring up for the Court the
23 inappropriate designation of confidentiality pursuant to
24 PTO 99. Defendants will vigorously oppose that motion if
25 and when we bring it, as I understand it.

1 Discovery, Your Honor, is the next item.

2 Mr. Beck, did you have any items with respect to --

3 MR. BECK: No, Your Honor.

4 MR. ZIMMERMAN: Discovery. This Court has stayed
5 PTO 131. Defendants have requested the Court to reinstate
6 114 and commence case specific discovery. The plaintiffs
7 vigorously oppose state specific -- case specific discovery
8 in this MDL and seek remand of cases to the transferor court
9 for further proceedings. I believe that's before the Court
10 and we are submitting it on the briefs.

11 In Pennsylvania -- this is, I believe, just an
12 item of commentary that I had actually objected to in the --

13 MR. BECK: Do you want me to read it, then?

14 MR. ZIMMERMAN: Yeah. It really shouldn't come
15 out of my lips.

16 MR. BECK: I will read it. In Pennsylvania state
17 court, where the plaintiffs have been required to submit
18 case specific expert reports for all nonrhabdo cases and
19 where all cases are subject to discovery, only 21 active
20 cases remain of the more than 4,000 cases that have been
21 filed there.

22 MR. ZIMMERMAN: And again my comment would be of
23 course that doesn't take into consideration all the cases
24 that were settled. So we don't know if those were all
25 dismissed with prejudice or without prejudice or they were

1 settled as rhabdo cases, but I'm sure the comments speak for
2 itself -- I mean the facts speak for themselves.

3 Next is depositions of generic expert witnesses.
4 They are being completed. I think they are just about
5 really completed. There is a very minor number that would
6 have to be finished that haven't been completed.

7 This goes to the question of the next step in
8 these proceedings. Defendants are seeking Daubert briefing
9 pursuant to PTO 120 to be continued with case specific
10 discovery. And as you know, the PSC opposes globalization
11 or any kind of Daubert hearings at this time. Again, I
12 think that just remains under advisement.

13 We have further noticed -- the PSC has noticed the
14 depositions of Bayer AG witnesses Wenning and Schneider.
15 Defendants have moved for a protective order. This matter
16 is also under advisement and held under abeyance pursuant to
17 the last orders of this Court in December.

18 There are other motions, Your Honor, that are
19 being briefed. There is the Plaintiff Norman V. Whiteside
20 brief regarding discovery order. Frankly, I'm not sure --
21 is that the one --

22 MS. WEBER: That is a prisoner who is looking for
23 appointment of counsel or remand. We have been talking with
24 the PSC about that.

25 THE COURT: All right.

1 MR. ZIMMERMAN: Right. And our position there,
2 Your Honor, is we are going to advise Mr. Whiteside of his
3 in forma pauperis -- what is the Latin term?

4 MS. WEBER: Your Honor, the standard for
5 appointment of counsel would require him to establish in the
6 first instance his pauper status, which he has not done.
7 And our understanding with plaintiffs is that they will,
8 without undertaking his representation, provide him some
9 background information on what his obligations would be.
10 And then at that time if he wants to file a brief seeking
11 appointment of counsel, he can do it at that stage. But we
12 will submit something to the Court in the near future.

13 THE COURT: Thank you. Mr. Zimmerman, make sure
14 you talk to Ms. Halfman. She will give you the name and
15 telephone number of the program that the Court uses. What
16 is it? I've forgotten.

17 THE CLERK: Volunteer Lawyers

18 THE COURT: Yeah, Volunteer Lawyers.

19 MR. ZIMMERMAN: I will do that, Your Honor.

20 The following motions are held in abeyance
21 pursuant to PTO 138:

22 Plaintiffs' renewed motion for class certification
23 and Bayer and GSK's motion to strike essentially the class
24 action complaint or master complaint.

25 As a matter of information, the Court should be

1 advised that between the filing of that motion for class
2 certification and defendants' motion to strike we were
3 advised that a class was certified of third party payer -- a
4 nationwide class of third party payers was certified in
5 Pennsylvania.

6 We are reviewing those filings to determine if an
7 appropriate motion for a third party payer certification
8 should be made in this court and attached or amended into
9 our class certification. The defendants contend that the
10 rationale set forth in the Court's previous orders on class
11 certification would preclude this certification or any
12 certification.

13 Again, that matter has not been briefed yet, it's
14 only been filed. At some point we may have to seek a
15 briefing schedule on those matters before the Court.

16 The next motion, Your Honor, is the Joyce Alfred
17 motion to fix for trial or in the alternative to transfer to
18 Alabama U.S. District Court. I don't really know exactly
19 the status of that. Is that a remand motion?

20 MS. WEBER: The case was filed in this district,
21 so it wouldn't technically be a remand motion. It was a
22 request to fix it for trial either here or to transfer it
23 under the venue provision. But there's been no briefing on
24 it to date, Your Honor.

25 MR. ZIMMERMAN: There is also, which I had

1 mentioned before, but I think it's just redundant, number 4,
2 Bayer's motion for a protective order precluding the
3 depositions of Wenning and Schneider. That is under
4 advisement.

5 There's also another motion, I believe, that
6 didn't make it on the calendar that had to do with
7 plaintiffs' motion for case specific experts or something
8 like that. Do you remember that, Susan? I just ran across
9 it.

10 MS. WEBER: Oh, right. There may actually be a
11 couple of motions that were held in abeyance, because I was
12 thinking of one that the defendants had filed directed to
13 Special Master Remele's report. The one Bucky is referring
14 to is the plaintiffs have moved to require defendants to
15 file case specific expert reports.

16 THE COURT: Right.

17 MR. ZIMMERMAN: And I believe that was filed back
18 in December and that's also held in abeyance. It just
19 slipped through and we didn't see it to get it on the
20 agenda. I think we both missed it.

21 Next is C, Your Honor. It says plaintiffs intend
22 to object to Magistrate Judge Lebedoff's report and
23 recommendation declining to reinstate certain of plaintiffs'
24 claims represented by the Branch law firm. Those claims
25 were dismissed for failure to comply with PTO 81.

1 I believe the Branch law firm has, in fact, filed
2 their objection. I believe it is of record. I have not had
3 a chance to look at it at this time because I believe it
4 came in today or over the weekend or Friday.

5 But the Zimmerman Reed law firm, because we were
6 local counsel, did file a motion pursuant to Rule 60. All
7 of this has to be re-reviewed in light of the filing by the
8 Branch law firm.

9 I would suggest that we just put it off now. I
10 don't think the defense have had a chance to look at it. We
11 will have some discussions about it and at the next status,
12 or before, we'll advise the Court how to treat it. I don't
13 know what Mr. Beck's position is.

14 MR. BECK: Yes, Your Honor. We also would like a
15 chance to review the most recent filings and assess what our
16 position should be in light of --

17 THE COURT: We will continue the matter to the
18 next status conference.

19 MR. ZIMMERMAN: Trial settings, Your Honor. There
20 are no trial settings for cases in the MDL and a list of
21 state court trial settings has been provided to us, which we
22 received on the 6th -- actually got it on the 7th. It was
23 sent on the 6th of April.

24 And there does appear to be a short list of
25 matters set for trial starting May 16th in the Court of

1 Common Pleas in Philadelphia and running through January of
2 '07, I guess. Maybe Susan or someone wants to report on the
3 status of that, but I believe the Court has received a copy.

4 THE COURT: I have received a copy. There's no
5 need for a report unless there's something that's unusual
6 about any of the cases.

7 MS. WEBER: One of the cases on the schedule for
8 Philadelphia has already been dismissed subsequent to us
9 sending you the schedule.

10 MR. ZIMMERMAN: The last item, Your Honor, on the
11 agenda is the other special master, the nonbowtied --

12 SPECIAL MASTER HAYDOCK: Special Master Remele
13 will come back and give my report. Actually, I have nothing
14 to report, Judge.

15 THE COURT: All right. Thank you.

16 MR. ZIMMERMAN: Your Honor, that does conclude
17 the --

18 THE COURT: Mr. Beck, anything you want to add to
19 the report?

20 MR. BECK: No, Your Honor.

21 THE COURT: Thank you very much. We will stand in
22 adjournment.

23 (Court adjourned at 12:40 p.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: April 13, 2005