

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In Re: Baycol Products Litigation ) File No. MDL 1431  
)  
) 10:30 a.m. o'clock  
) September 19, 2002  
) Philadelphia, PA  
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BEFORE THE HONORABLE MICHAEL J. DAVIS  
UNITED STATES DISTRICT COURT JUDGE  
(STATUS CONFERENCE)

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS: CHARLES ZIMMERMAN, ESQ.  
RICHARD LOCKRIDGE, ESQ.  
RONALD GOLDSER, ESQ.  
JOHN CLIMACO, ESQ.  
STANLEY CHESLEY, ESQ.  
RICHARD ARSENAULT, ESQ.

ON BEHALF OF THE DEFENDANTS: ADAM HOEFLICH, ESQ.  
PETER SIPKINS, ESQ.  
SUSAN WEBER, ESQ.  
FRED MAGAZINER, ESQ.  
ELIZABETH CABRASER, ESQ.

ON BEHALF OF THE THIRD PARTY PAYOR: JOEL STRAUSS, ESQ.  
STEVEN SCHWARTZ, ESQ.

STATE COURT LIAISON ADVISORY COMMITTEE: SOL WEISS, ESQ.  
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1 THE COURT: Mr. Zimmerman, good morning.

2 MR. ZIMMERMAN: Good morning, Your Honor.

3 THE COURT: You may proceed.

4 MR. ZIMMERMAN: May it please the Court, I'm  
5 Charles Zimmerman, Co-Lead Counsel in the MDL 1431 In Re  
6 Baycol Products litigation in Philadelphia. We've got most  
7 of the MDL Steering Committee present as well as state  
8 counsel. We have an agenda filed with the Court and also  
9 posted on the Court's website and e-filed. I would like to  
10 go -- I won't read from the report but make comments on  
11 certain aspects of the report, and with counsel's approval  
12 go through as it appears on the agenda.

13 MR. HOEFLICH: That's fine, and we would like to  
14 respond to each point raised.

15 MR. ZIMMERMAN: The first one is the settlement  
16 program. It's also always good to -- at the same time we  
17 have been pursuing the settlement options offered to us by  
18 the defendant. We are vigorously and without delay  
19 preparing the cases for the discovery and preparing the  
20 cases for trial. So, there has been no slowdown in that  
21 process at all, which is, of course, our charge in the MDL  
22 is to prepare the cases for trials. And we are doing that  
23 and will have more of a report at the end of the calendar.

24 On the settlement program, there are two points I  
25 would like to make. First off, I want to advise the Court

1 that there are no settlements negotiations going, I think,  
2 on a global basis or a class settlement of a gridded kind  
3 of settlement which I know there have been some reports in  
4 the press about. So, as far as I know, and we would know  
5 it, almost, if not everything that's going on with regard  
6 to settlement negotiations. There are no global settlement  
7 negotiations that are under way with regard to injury  
8 claims or even under medical monitoring. There is a motion  
9 pending for a medical monitoring class, and we'll get to  
10 that later, but there are no settlement negotiations  
11 involved in those kinds of -- in that agreement.

12 Bayer, has on the other hand, initiated a program  
13 to attempt to resolve serious injury cases, and the  
14 attorneys in the MDL are actively participating in that  
15 because we believe it's an option that many clients may  
16 find to be appealing, to have their case resolved if it's a  
17 serious injury case early and appropriately. That may not  
18 be available for everyone or it may not be something  
19 everyone wants to take advantage of, but those that do  
20 we're asking that Bayer be prepared to enter into  
21 meaningful settlement negotiations with us on a  
22 case-by-case basis for serious injury cases. They have  
23 indicated a willingness to do so.

24 We have invited other members of the MDL or  
25 people who have filed cases in the MDL who want to

1 participate in that program to bring their cases forward  
2 and we will help them get the cases resolved, work with  
3 them to get the cases resolved or they can do it on their  
4 own. We offered our services for no fee. We, of course,  
5 offer our services in the cases without referral and only  
6 if they come in the MDL. That would apply with regard to  
7 an assessment of their cases, but there is no referral fee  
8 or attorney fee that will be charged on top of that.

9 A letter was directed to counsel in the MDL by  
10 myself asking if anyone wants to participate in the  
11 settlement program and wants to help with the PSC, and we  
12 are ready, willing and able to help. We have had a lot of  
13 response, favorable response with regard to that. That's  
14 the good news.

15 The not so good news is it's a long process, at  
16 least initially to get cases resolved. We have met on many  
17 occasions with counsel that have been designated by Bayer  
18 to be their negotiating counsel. It's a different law firm  
19 than we have been dealing with here in the MDL. It's the  
20 Shook, Hardy firm out of Kansas City. We have been  
21 preparing settlement brochures on each individual case that  
22 wants to be resolved. We've been entering into  
23 face-to-face negotiations. And although I stand before you  
24 with some cases settled, we have not seen overwhelming  
25 speed or overwhelming results at this moment. We hope that

1 changes. We hope we have more success in getting to  
2 resolution, but as I stand before you today on the 19th of  
3 September, we have been in the process for some time, and  
4 we have not achieved what we would consider to be a quick  
5 result or a process that has been as quick as we had hoped  
6 it to be or is streamlined.

7         Having said that, we think that we can get there.  
8 We think there will be a process that we can develop once  
9 we get our communications and recordkeeping and all of our  
10 ducks lined up on both sides, we will be able make more  
11 meaningful -- have more meaningful negotiations on a more  
12 streamlined basis, but at this point we are not there. So,  
13 I need to report that to the Court.

14         With regard to civility and working together and  
15 arranging meetings, that's working quite well. It's just  
16 getting the goal of resolution and conclusion of certain  
17 individual cases. I can't report to you at this time we  
18 have had overwhelming success.

19         I believe that's my report on the settlement  
20 program. There are obviously a lot of details with regard  
21 to it, but I don't think the Court probably wants to have  
22 that report in great detail at this time. Other than my  
23 report, which says we are in the process; we are reaching  
24 some conclusions; we're slower than we would like to be,  
25 but we are willing to see that this can be meaningful.

1 THE COURT: Thank you. Good morning.

2 MR. HOEFLICH: Good morning, Judge Davis. Adam

3 Hoeflich for Bayer. With me today are Peter Sipkins and

4 Susan Weber as well as other counsel for Bayer.

5 We stated to plaintiffs several months ago that

6 if they have clients who suffered injuries while taking

7 Baycol, we wanted to enter into settlement discussions with

8 them, regardless of whether we thought there was liability.

9 A number of plaintiffs' lawyers had given us medical

10 records for the cases they believe are appropriate for

11 settlement, and many lawyers have complimented us on how

12 quickly and efficiently the process is working.

13 We have engaged Shook, Hardy in Kansas City,

14 which has a large number of people reviewing medical

15 records and getting very quick turnarounds to plaintiffs'

16 lawyers who want to try to resolve serious injury cases.

17 Our word to the plaintiffs' community is if you have

18 clients that want to settle their cases, bring them to us

19 and we want to evaluate them on an individuals basis.

20 Mr. Zimmerman has, in the last couple of days,

21 expressed some concerns about the speed with which some

22 cases have worked for clients of PSC members. We are

23 addressing that as quickly as we can and wish to continue

24 this process as quickly as we can to make it as efficient

25 and economical for the plaintiffs for bringing us their

1 claims. We will continue to that. Thank you.

2 THE COURT: Mr. Zimmerman, Item No. 2, Discovery.

3 MR. ZIMMERMAN: Discovery, Your Honor. We have  
4 broken this into several subpoints. The first one we will  
5 discuss is the document discovery or the document turnover  
6 and the activities, the document depository.

7 THE COURT: If you see me moving around up here  
8 they made these seats for very short people. (Laughter)  
9 My legs have to be stretched out.

10 MR. ZIMMERMAN: With regard to the documents, we  
11 will talk about the status of the production and the  
12 document depository and the electronic production and  
13 access. Then we'll talk about the depositions, what has  
14 occurred and what is anticipated to occur in the next 90  
15 days, and then we'll talk about the third-party discovery  
16 and the third-party subpoenas.

17 I think Ron Goldser is going to give us a short  
18 presentation of the document depository and where we are  
19 with that.

20 MR. GOLDSER: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. GOLDSER: Ron Goldser, Zimmerman, Reed,  
23 Minneapolis. As always, it's a privilege to be before Your  
24 Honor, but all the more, a privilege to be in this historic  
25 city and this wonderful courtroom.

1           The document production has been moving along  
2 pretty steadily and pretty satisfactorily. As you know, we  
3 have the documents available in the depository so that all  
4 MDL lawyers have access to the documents and do the work  
5 they need to do in preparing memoranda and deposition  
6 summaries and deposition preparation.

7           So far, we have 225 CD's with materials from  
8 Bayer that constitutes over 138,000 documents and, I  
9 believe, 340 or 50,000 pages of documents. Most recently,  
10 that includes all of the Bayer insurance policies which, of  
11 course, leads back to Mr. Zimmerman's comments about  
12 settlement.

13           Bayer AG has produced 13 CD's worth the  
14 documents, 69,000 documents. GlaxoSmithKline has given us  
15 65 CD's and that translates into 48,000 documents. We have  
16 not gotten the documents from PLC yet, but I'm told they  
17 will be forthcoming within the next two to four weeks. I  
18 understand we will be getting the entire PLC production in  
19 that time frame, albeit, does not promise to be as large as  
20 some documents is what I'm told, and will ultimately decide  
21 from the plaintiffs' side whether that production is  
22 complete given what we know.

23           As you know, we have a number of third-party  
24 subpoenas out. We have so far 28 CD's worth of materials  
25 from the third-party, and that totals 3,600 documents.

1           We also have the adverse reaction database from  
2 Bayer. That's been computerized. We've done our own  
3 computerization work on that and that is also available on  
4 the document depository, the remote access website for  
5 people to examine the adverse reactions, what Bayer knew,  
6 when they knew of it, and what they recorded.

7           That pretty much summarizes what we have  
8 available, what we received and what we anticipate.

9           THE COURT: Thank you. Any response, Ms. Weber?  
10 Good morning.

11           MS. WEBER: Good morning, Your Honor. As you  
12 know, when we negotiated Case Management Order No. 4 we had  
13 targeted November 15th as our conclusion date for  
14 production of Bayer Corp., documents. We've advised the  
15 plaintiffs and we wanted to let you know that they are  
16 overly optimistic.

17           At this point and time, and I'm not quite sure  
18 how Ron is counting document pages, but for the Court, we  
19 have produced what we would reference to the Court is  
20 2,000,000 pages of documents. We are expecting to produce  
21 another half million pages within the next two to three  
22 weeks. We are looking at probably having more than  
23 6,000,000 pages total just for Bayer Corp. And that's in  
24 addition to the numerous databases, videotapes and  
25 miscellaneous things that we have produced and are

1 continuing to produce.

2 For Bayer AG on document production, at this  
3 stage, we have produced 175,000 pages. We are looking at a  
4 production later this month at about a million pages. And  
5 our best guess is we are probably going to be in the same  
6 range as Bayer Corp., for total production of 6,000,000  
7 pages or so.

8 We are internally evaluating what the realistic  
9 targets are for completion of document production at this  
10 stage. We anticipate meeting with the Steering Committee  
11 over the next couple of weeks to talk about it. We're  
12 hopeful that for the October conference, we will have a  
13 revised game plan for you so you can see how this plays out  
14 over the weeks to come.

15 One other little snag that came up for us is we  
16 had some electronic glitches when putting together the  
17 privilege log report which was due, I believe, this week  
18 for the last quarter. We told plaintiffs about it, and  
19 that report is going to be a couple of weeks late, and we  
20 expect to have it by the end of the week and we wanted to  
21 advise the Court of that. Thank you.

22 THE COURT: Thank you. Good morning.

23 MR. MAGAZINER: Good morning, Your Honor. Fred  
24 Magaziner with GlaxoSmithKline. We also, unfortunately,  
25 are not going to meet the deadline we hoped to meet. We

1 have spoken both to the MDL lawyers and some of the state  
2 court lawyers where we are and they understand where we  
3 are, and we will have further discussions by the next  
4 status conference. We hope to have a plan with regard to  
5 that and we plan to meet again, Your Honor.

6 MR. GOLDSER: Your Honor, if I might.

7 THE COURT: You may.

8 MR. GOLDSER: One other item I omitted, and that  
9 is a proposed pretrial order on e-mail search terms. You  
10 may recall from the last session that we were working on a  
11 list of terms that should be searched. We have agreed upon  
12 a list of search terms. Bayer and plaintiffs are still  
13 working on the terms of the proposed order and we are not  
14 there yet. One of the concerns is that apparently Bayer  
15 has already started doing some of the searches with an  
16 abbreviated list. They now need to go back and supplement  
17 those searches and the manner in getting the  
18 supplementation done remains outstanding and we need to  
19 understand a little bit more of what they are doing and how  
20 they are doing it. We hope to have that order out within  
21 the next few days. While we may not present it during a  
22 formal court session, Your Honor will receive it. We will  
23 present it to you after this court hearing.

24 THE COURT: Ms. Weber.

25 MS. WEBER: I agree with Ron, Your Honor. We

1 have gotten through the hard part and we are at the devils  
2 and the details range and I expect we will have it to you  
3 in short order.

4 THE COURT: All right. Thank you.

5 THE COURT: Mr. Zimmerman.

6 MR. ZIMMERMAN: Your Honor, the next topic under  
7 discovery is depositions, and Ron told me to speak slowly  
8 because he's got to boot up his computer because the  
9 presentation is going to be by John Climaco of the PSC and  
10 it will be a power point.

11 THE COURT: While the computer is booting up, why  
12 don't we acknowledge our state court plaintiffs' lawyers  
13 that have been gracious enough to meet with me yesterday,  
14 and it's just wonderful to have you here. If you want to  
15 do introductions, you may.

16 MR. ZIMMERMAN: Sure. Well, I'll go around the  
17 room. We have Mr. Ed Blizzard from the great state of  
18 Texas.

19 MR. BLIZZARD: Good morning, Your Honor.

20 THE COURT: Everyone should know that we are  
21 going to the great state of Texas in October.

22 MR. ZIMMERMAN: We have --

23 THE COURT: Sol Weiss and Arnold Levin.

24 MR. ZIMMERMAN: Sol Weiss and Arnold Levin of  
25 Philadelphia, Pennsylvania.

1 MR. ZIMMERMAN: Who else is with us today? We  
2 have Steve Schwartz, who's a state player from Pennsylvania  
3 who's involved with third-party payor cases; Joe Arshawsky  
4 from New Mexico.

5 THE COURT: Good morning.

6 MR. ZIMMERMAN: And who else would like to stand  
7 up. Stan would like to be recognized. (Laughter).

8 Your Honor, as we go into depositions we are  
9 going to give you a brief report on what has been  
10 accomplished and what we're looking to accomplish. I did  
11 see Laurie Langston, who is the administrator for the court  
12 reporting firm, who is in the courtroom today. We asked  
13 her to come over and say hello. We had some deposition  
14 transcript issues and they have been resolved. We worked  
15 very closely with Laurie. She was very, very helpful in  
16 providing us with an excellent product at a reasonable  
17 price with great turnaround time and terrific accuracy. At  
18 any time if the Court wants to discuss anything with the  
19 court reporters, Laurie is person to work with. She's  
20 really a very confident and accomplished person who I am  
21 very, very impressed with. Thank you, Laurie.

22 MR. CLIMACO: Good morning, Your Honor, John  
23 Climaco for the Plaintiffs Steering Committee.

24 THE COURT: Good morning.

25 MR. CLIMACO: I would also just like to on the

1 record thank Laurie Langston. She has been especially  
2 helpful, Your Honor, to those of us like myself who are  
3 somewhat electronically handicapped, helping us get through  
4 all of the electronic technology here we are using to  
5 facilitate the depositions.

6 Your Honor, I am Co-Chairmen along with Turner  
7 Branch from New Mexico and Richard Arsenault from Louisiana  
8 of the Plaintiffs Steering Committee Discovery Committee.  
9 Mr. Branch is here as is Mr. Arsenault.

10 THE COURT: Good morning.

11 MR. CLIMACO: Your Honor, by way of background,  
12 we have a meet and confer with defense counsel weekly. For  
13 the most part, I think those have been very useful. There  
14 is a cooperative attitude. Mr. Hoeflich is usually on the  
15 phone, Doug Marvin and Joe O'Connor and the three of us.  
16 We have attempted to discuss scheduling, discuss  
17 depositions, and when we can get scheduled and we sort of  
18 have an ongoing dialogue about some of the problems.

19 We on the plaintiffs' side have experienced and  
20 may have to experience in the future of having to continue  
21 depositions as a result of not having the personal files of  
22 the particular deponent.

23 Your Honor, I would just briefly, as we go  
24 through the slides so I don't have to read it all and take  
25 that much time.

1           As to Bayer, Your Honor, we have deposed to date  
2           nineteen employees, four depositions had to be cancelled.  
3           There are additional depositions numbering thirteen which  
4           are scheduled into November, and we are having under  
5           discussion five depositions and I will get to that in a  
6           moment.

7           Your Honor, pursuant to your order and request,  
8           the depositions are all being taken by experienced  
9           attorneys, backed up and second chaired, usually by a less  
10          experienced attorney, helping with the documents and  
11          personnel in our depository, both attorneys and paralegals  
12          who help us prepare the extensive deposition notebooks.

13          As to GSK, Your Honor, we have only deposed one  
14          employee so far, and we have six scheduled and we are  
15          discussing three. Basically, three early on, 30(b)(6)  
16          deponents, and we recently came back with another 30(b)(6)  
17          deponent, and Bayer has been cooperative in that. These  
18          are the depos which have been taken to date, Rajeshwar  
19          Sharma, a Clinical Safety Officer directly involved in  
20          Baycol. I deposed him for two days, Your Honor. We will  
21          have to go back because of a question as to whether certain  
22          documents that I needed to inquire of were present. And  
23          Doug Marvin of Williams and Connolly and his partner have  
24          been very cooperative in working that out.

25          The second, Roger Celesk depo, Your Honor, was

1 part of the 30(b)(6) deposition which was originally to go  
2 forward for Mr. Badalamenti.

3 Your Honor, being very up to date, Mr. Branch  
4 took the deposition earlier this week of Eric Zalamea and  
5 that will probably have to continue again because of the  
6 lack of all the necessary documents. My partner, Debra  
7 Horn, completed the deposition of Mr. Littieri yesterday in  
8 New York. So, this is up to date through yesterday, Your  
9 Honor.

10 Chris Seaton, Your Honor, I was supposed to  
11 depose last week, and I heard from Will Siegfried who was  
12 defending it -- or I first learned from our depository that  
13 a week before we had just received a Chris Seaton disk. At  
14 the time, we printed that out, etc., and there were 7,500  
15 documents that we needed to review and that deposition  
16 which was an important deposition will need to be  
17 rescheduled.

18 Depositions beginning next week, Your Honor, Mr.  
19 Plischke, Your Honor, is a very important deponent. We  
20 have been attempting to get the date. He is no longer with  
21 Bayer, and, so, I can understand some difficulty in Bayer  
22 attempting to arrange dates for former employees. In the  
23 meet and confer on Monday of this week, although I was not  
24 able to participate, Mr. Arsenault and Mr. Branch told me  
25 that that was discussed and there is an effort being made

1 by Bayer to see if we can depose Mr. Plischke in November  
2 or early December. This is the single GSK employee who we  
3 have deposed and we have these scheduled. There is some  
4 discussion with Rachel Hlay and James Holloway. It may  
5 necessitate continuing those depositions because I  
6 understand that they will both on those particular dates  
7 and in November be tied up with some important sales  
8 issues. Those are under discussion.

9           Again David Ebsworth, a former employee and very  
10 important deponent for us, who we're anxious to depose and  
11 we are discussing early dates, hopefully. Mr. Karabelas,  
12 Your Honor, is a very important deponent and we are  
13 discussing dates with GSK. We're doing that now and,  
14 hopefully, that will be soon.

15           Your Honor, I have already mentioned this. This  
16 is an ongoing problem and hopefully we can work it out.  
17 But it's a nuisance. It is a problem and it does slow down  
18 the process. I know we repeatedly hear, Your Honor, from  
19 defense counsel that that's one of the problems with  
20 starting depositions before all the documents are produced.  
21 Your Honor, we all just heard that document production,  
22 which was anticipated to be concluded November 15th, now  
23 will not be. If we had awaited full production of  
24 documents, Your Honor, and the review and coding at our  
25 depository, we probably would not be commencing discovery

1 until January, and that was not what we wanted and I don't  
2 believe it is what the Court wanted. And I thank you, Your  
3 Honor.

4 THE COURT: Thank you. Adam.

5 MR. HOEFLICH: Your Honor, as Mr. Climaco pointed  
6 out, a significant number of depositions have taken place.  
7 We have produced an enormous amount of documents.  
8 Plaintiffs expressed early on a desire to get moving with  
9 discovery, in large part because it makes things easier to  
10 coordinate with the states and it helps get the MDL ahead.  
11 We are on board with that.

12 When the plaintiffs request the deposition of an  
13 individual, we make every effort possible in order to get  
14 those documents out as quickly as possible. We have, as  
15 the Court knows, well in excess of a hundred people  
16 reviewing documents and getting them out. There have been  
17 occasions when we find out, sometimes late in the  
18 deposition preparation, that we haven't produced all of the  
19 documents for an individual. When that happens we have  
20 called Mr. Climaco and Mr. Arsenault and explained the  
21 situation, and as a matter of professional courtesy, those  
22 depositions have been moved a few weeks. They haven't been  
23 cancelled. Similarly, there have been times when  
24 plaintiffs have asked to cancel a deposition for scheduling  
25 purposes or for any other reason and we have accommodated

1 them. To date we have worked together extremely well and  
2 we're able to continue to do so.

3           When Mr. Climaco was discussing Dr. Plischke, I  
4 believe he was describing Dr. Ebsworth, but those are the  
5 minor things that can be worked out. The bigger picture is  
6 a significant number of depositions have taken place. A  
7 significant number of depositions are scheduled, and we are  
8 moving through the deposition process as quickly and  
9 productively as we can, and we're working together  
10 extremely well.

11           THE COURT: Dealing with the depositions, I  
12 haven't received any calls. I assume that when the  
13 depositions are being taken they are going fairly smoothly.

14           MR. HOEFLICH: I believe they are, Judge.

15           MR. CLIMACO: For the most part, I haven't  
16 served -- when we get into an evidentiary issue, we make an  
17 appropriate record, and, you're right, as of this date we  
18 have not had to. I will make a call to you or present  
19 something firmly. There may be some issue developing. As  
20 of now, we are, I think the three of us and the other  
21 attorneys who have participated with us, are working  
22 cooperatively.

23           MR. HOEFLICH: There are normal issues, Judge --  
24 are the plaintiffs entitled to an additional thing. Mr.  
25 Climaco presented the client's position on some of those.

1 Is a call on privilege appropriate? The parties have  
2 worked to resolve them and work things out to try to move  
3 things forward without motions.

4 THE COURT: All right. I appreciate that and I  
5 hope that continues. Again, any discovery problems are to  
6 come to me first, and then I will handle them. And if they  
7 need to go to the Magistrate, I will send them there.  
8 First come to me.

9 MR. HOEFLICH: Thank you, Judge.

10 MR. ZIMMERMAN: Your Honor, two clean-up issues  
11 on the depositions. The Court just mentioned that we  
12 should come to you with our discovery issues, at least in  
13 the first instance to make sure where -- how you may want  
14 to deal with it. I might suggest that with this deposition  
15 document problem, which is the depositions are sometimes  
16 coming late or causing us to continue depositions or we get  
17 not all of them when we need them for the deposition, that  
18 I would encourage counsel if they can't work it out to  
19 bring it to the Court and ease the frustration that they  
20 may be having. I get intercepted -- and I get e-mails on  
21 this. It does become somewhat difficult for our people to  
22 conclude the work because the documents are coming in late.  
23 But I think everyone's in good faith. I truly believe  
24 that. There are just some logistical problems, but I would  
25 encourage the Court -- counsel to bring these to the Court

1 quicker because I think they are getting a little stretched  
2 out in time and I think now that we are getting toward the  
3 middle or end of our deposition program, it could really  
4 help if the Court weighed in on that at the appropriate  
5 time if we need to bring it to you.

6 The second --

7 THE COURT: Adam.

8 MR. HOEFLICH: May I respond? I want to make  
9 sure the Court is not left with the wrong impression. I'm  
10 sure this is not a significant issue. Mr. Climaco and Mr.  
11 Arsenault both are very involved in the deposition process.  
12 I don't want this issue to be lost in the bigger picture,  
13 which is this process has moved forward extremely quickly  
14 and extremely productively.

15 For example, when we met and discussed what  
16 issues were on the table for today, this did not even come  
17 up. It doesn't mean it's not an issue, but I don't want it  
18 to be lost in the bigger picture which is we have worked  
19 extremely cooperatively to produce a very large number of  
20 people in a very short time and we will continue to do so.

21 THE COURT: I'm sure you will and the plaintiffs  
22 will continue their work. The reason why, again, I'll  
23 state it. The reason why I want discovery issues to come  
24 to me is most of these things that you can resolve  
25 yourself, and if I give you an outlet, then you're whining

1 and calls will inundate my Magistrate, and I just don't  
2 need that to occur. If you place a call to me, you know it  
3 better be a serious matter. I appreciate that.

4 MR. HOEFLICH: Thank you, Judge.

5 MR. ZIMMERMAN: Part of the other report to Your  
6 Honor is really under C of this deposition, and it's that  
7 access to these transcripts are open pursuant to PTO 25 and  
8 28, not only to MDL lawyers but to non-MDL lawyers. And  
9 although Mr. Weiss is in the courtroom, we had an issue of  
10 wanting to have the transcripts of the depositions that  
11 have been concluded in the MDL, Mr. Weiss made the request  
12 and we wanted to make sure that he got them as quickly as  
13 possible. And my orders to everyone was we were going to  
14 turn these over to him without cost and without an  
15 assessment of any kind attaching to it.

16 Not only were the transcripts requested, but the  
17 CD roms and the ASCII disks and documents, which is fine,  
18 which is what we provided.

19 There was a delay that occurred because of  
20 working out issues with the court reporter. I believe they  
21 now have all been worked out. I just want to apologize to  
22 Sol that there was a delay and it certainly wasn't intended  
23 to be a delay caused by the permission to turn them over.  
24 But it did get worked out and I think satisfactorily and I  
25 believe it's found its way to Mr. Weiss and his group.

1           MR. WEISS: That's correct, Your Honor. Thank  
2 you, Bucky, for working out a solution.

3           MR. ZIMMERMAN: Third-party discovery, Your  
4 Honor. There is a chair of the Third-Party Committee here  
5 to give a brief report. Third-party discovery is kind of a  
6 little bit under the radar because these are people who are  
7 part of the defendants' camp, so I would like people to  
8 know what we are doing, and would like the Court to know  
9 what we are doing in a brief report.

10          MR. STRAUSS: Good morning. Joel Strauss of  
11 Kaplan Fox. I'm the Chair of the Non-party Discovery  
12 Committee of the PSC, and our committee is engaged in a  
13 very extensive discovery program to gather evidence from  
14 various non-parties. To date, approximately 80 subpoenas  
15 requiring production of documents have been served on a  
16 variety of persons and entities who had some involvement  
17 in, among other things, the testing, marketing, advertising  
18 and even withdrawal of Baycol. Certain Government agencies  
19 such as the FDA have also been subpoenaed. And as  
20 information is developed, we are constantly evaluating  
21 additional non-party subpoenas, too.

22          Of the subpoenas served to date, more than half  
23 have produced documents so far resulting in approximately  
24 150,000 pages of documents being produced in addition to  
25 some audiotapes and videotapes. The process is constant

1 and ongoing. Materials as they come in are immediately  
2 reviewed to determine subpoena compliance, and they are  
3 also reviewed for substantive issues. That information is  
4 disseminated as quickly as possible to the discovery chairs  
5 of the discovery people working on the PSC and the MDL.

6 Every effort is made by my committee, and there  
7 are a number of people working with me on this, to  
8 negotiate in good faith with these various non-parties. We  
9 recognize that they are non-parties and have businesses to  
10 run, and we make every effort to negotiate with them and  
11 not to get the Court involved at all in the process.

12 However we do insist on compliance. As the Court  
13 is aware, we did file a motion to compel a particular  
14 non-party, Spherix, to produce documents. We were having  
15 some difficulty getting any response from them. Lo and  
16 behold, just this past Friday, they suddenly decided to  
17 produce documents rather than appear here today. So, we  
18 withdrew that motion. The notice was filed on Monday.

19 We still may have some issues with that  
20 particular non-party as we are having some issues with  
21 other non-parties as well. As I said before, we are making  
22 every effort to negotiate with them so we don't have to  
23 file additional motions and that that process will  
24 continue.

25 Also, just to add, in addition to document

1 production, now that we are getting significant amounts of  
2 documents, we are evaluating depositions of non-parties,  
3 and that's a process we believe will pick up in the coming  
4 weeks.

5 THE COURT: All right. Thank you very much. Any  
6 response?

7 MR. HOEFLICH: No, Your Honor.

8 THE COURT: Mr. Lockridge.

9 MR. LOCKRIDGE: Good morning, Your Honor, Richard  
10 Lockridge. I would also like to reiterate it's a pleasure  
11 to be here before Your Honor, particularly here in  
12 Philadelphia where I spent much of my time it seems like  
13 earlier in my career on antitrust cases, particularly much  
14 of my time with my very dear friend, Arnie Levin. He and I  
15 started out -- he's a little bit older than I am --

16 MR. LEVIN: (Laughter).

17 MR. LOCKRIDGE: We did much antitrust work in our  
18 careers.

19 Your Honor, very briefly, on the plaintiffs' fact  
20 sheet, as you know in June the defendants did bring on a  
21 motion, and we have been working diligently with defendants  
22 and with our co-plaintiffs' counsel and have it down to a  
23 very few now.

24 The defendants still have a motion on, for, I  
25 believe it's twelve people who they say have not served

1 documents, responsive to requests or sent me a letter  
2 indicating that they don't have any responsive documents.  
3 Let me just say on those twelve, Your Honor, that I don't  
4 think any action by this Court is appropriate because those  
5 twelve simply do not have the documents, and they have  
6 fully completed their plaintiffs' fact sheets. Their facts  
7 sheet are done. I don't believe that's an issue at all.

8 As far as the two people, quite frankly, we have  
9 been working trying to get the plaintiffs' fact sheets. We  
10 have contacted them and sent letters to them and the  
11 lawyers, and we are still working on it, Your Honor. I  
12 would ask you not to order a dismissal of those two  
13 individuals, and we are still working on trying to get  
14 those plaintiffs' fact sheets. And if Your Honor does feel  
15 that it's necessary to enter any sort of order on those two  
16 people, I would ask that we be given at least another 30  
17 days. The defendants have asked for ten days on an order  
18 to show cause. We would ask for 30 days. I don't know if  
19 the defendants want to say anything further or not, Your  
20 Honor.

21 THE COURT: Adam.

22 MR. HOEFLICH: Your Honor, we filed a motion in  
23 June with respect to plaintiffs who had not filed the fact  
24 sheets. We updated the Court twice this week on plaintiffs  
25 who were still out of compliance.

1           As I understand it, the PSC has been urging  
2 plaintiffs to send in their fact sheets, and if they have  
3 no documents, to give some verification they have no  
4 documents. We have been unable to do that. This relates  
5 to cases before March 19th, the so-called first wave.  
6 That's a relatively small number of plaintiffs.

7           There is a much larger second wave. As a matter  
8 of principle, we have no problem giving plaintiffs an  
9 extension so that they can try to resolve this issue and be  
10 more efficient in the long run. I believe we need to work  
11 on a mechanism where if we don't get discovery there is  
12 dismissal of the cases for plaintiffs refusal to come in  
13 compliance. We have continued to work with the PSC on  
14 that. I hope we will resolve that issue quickly and try to  
15 work this out as well.

16           THE COURT: All right.

17           MR. LOCKRIDGE: Very briefly, Your Honor. The  
18 next item really is not going to be teed up by anybody's  
19 multi-party complaints. As Your Honor knows, Pretrial  
20 Order 31, the Court did issue an order relative to  
21 multi-party complaints, and the defendants have put on a  
22 motion regarding multi-party complaints that have been  
23 filed in many other jurisdictions and also filed in  
24 Minnesota. And there is a briefing schedule, and we are  
25 responding and we expect that would be heard at the October

1 status conference in Dallas, Your Honor.

2 MR. HOEFLICH: Your Honor, Pretrial Order 31

3 denied plaintiffs' request for -- to allow them to

4 consolidate up to 50 plaintiffs in one case. It was

5 discussed extensively. It was briefed, it was argued, and

6 the Court ruled. Shortly after the ruling, the plaintiffs

7 took the position that in light of the ruling, they are

8 allowed to file up to 50 plaintiffs in one case. I think

9 the Court's ruling was very clear that it did not permit 49

10 plaintiffs to come together from all over the country.

11 We have filed two motions. The first motion

12 deals with individual complaints that group large numbers

13 of people together. That motion is before the Court. We

14 filed a second motion because Mr. Becnel has filed a number

15 of cases in Louisiana that are styled Louisiana class

16 actions that have surprisingly 50 people on each complaint.

17 They are repetitive of each other. It is no more than an

18 attempt to evade the Court's orders and rulings in this

19 case, and we filed a motion to sever them.

20 THE COURT: I'll hear that in October.

21 MR. BECNEL: May I address that, Your Honor?

22 THE COURT: No. Let's move on to our next

23 matter.

24 MR. LOCKRIDGE: Yes, that will be heard in

25 October as I understand.

1 THE COURT: That's correct.

2 MR. LOCKRIDGE: On the class action issues, Your  
3 Honor, I would say, first of all, as you know, the court in  
4 Oklahoma has certified a state court class that is on  
5 appeal to the Oklahoma Court of Appeals, and we are working  
6 with Mr. West on that matter now, and it's going to be a  
7 fairly short briefing schedule and I don't know when that's  
8 going to be heard by the appellate court. That the  
9 briefing is moving quite quickly. And Bayer's brief is due  
10 October 4th, and I believe the plaintiffs' brief and  
11 response is due 20 days thereafter.

12 As far as the class certification in the MDL, as  
13 Your Honor knows, we filed a supplemental brief seeking  
14 class certification. Plaintiffs' depositions of the named  
15 plaintiffs are starting next week, I believe on Tuesday is  
16 the first one for class representative depositions, and  
17 there will be further briefing, and the defendant will  
18 filed a brief and plaintiffs will file a reply brief. And  
19 as you can tell from the reports, Your Honor, the  
20 defendants' counsel and myself and Ms. Cabraser and Ms.  
21 Nast have conferred, and we have agreed to request of Your  
22 Honor a hearing date in January. We're proposing January  
23 21st and 22nd.

24 There is one slight wrinkle, Your Honor, that the  
25 defendants may address. It's the plaintiffs' position that

1 we only need oral argument on this matter, and we would  
2 like to submit the evidence by affidavit as is normally  
3 done in most class cases. I might note that's the way  
4 Judge Fallon did in Propulsid. I believe that's the way  
5 Judge Tunheim is doing it on October 2nd, I believe, in the  
6 St. Jude case back in Minneapolis. That's in our view the  
7 customary way. So, we would not need two days. Certainly  
8 one day at the most is necessary.

9           It's my understanding the defendants and,  
10 obviously, they can speak for themselves, are considering  
11 this issue as to whether or not they would actually like an  
12 evidentiary hearing.

13           THE COURT: All right.

14           MR. HOEFLICH: Your Honor, that's correct. We  
15 have begun discovery of the plaintiffs' class. That is  
16 proceeding. As we get into discovery, we will get back to  
17 Mr. Lockridge as quickly as possible as to whether we think  
18 an evidentiary hearing is necessary.

19           THE COURT: The date of January 21st and 22nd is  
20 marked on my calendar for those arguments.

21           MR. HOEFLICH: Thank you, Your Honor.

22           MR. CHESLEY: Your Honor, may I address one issue  
23 on this. I can do it from the chair. I would like to  
24 suggest that after the discovery of the plaintiffs' class  
25 members, if the defendants have a serious problem as to a

1 particular class member, rather than saving it for the  
2 hearing on the 21st, advise us because a trust cannot fail  
3 but for one of the trustees, and substitution of the class  
4 members is often done because we want to get to the root of  
5 the issue of class certification and not come in and saying  
6 is this person the class representative and make that the  
7 cause on that particular day. We will cooperate with the  
8 defendants and let them take the discovery of our class  
9 reps. And if they have serious problems with that person,  
10 let us know and we will substitute and make that person  
11 available, and that's a more modern trend to do it that way  
12 rather than make that the key argument on whether or not a  
13 person is an appropriate class rep, particularly given the  
14 size of this case.

15 MR. HOEFLICH: Your Honor, we believe class  
16 certification is inappropriate. The recent Rezulin  
17 decision which followed on the heels of the Bridgestone  
18 discussion, the Propulsid decision and the PPA makes it  
19 clear. We believe it's the plaintiffs' burdens to show  
20 adequacy as well as all the other elements of a class  
21 action, and we don't believe we should be working through  
22 with them in the discovery period where we see inadequacies  
23 in the class. We believe it's their burden to meet, and if  
24 they don't meet it that is essentially a ground for  
25 dismissing the class and not a ground for a revolving door

1 of plaintiffs. Thank you.

2 THE COURT: Thank you.

3 MR. ZIMMERMAN: Next item, Your Honor, on the  
4 agenda is trial dates.

5 THE COURT: Before we -- there is one other  
6 matter I should note dealing with the class action that's  
7 been under advisement, I will have an order out early next  
8 week on that matter.

9 MR. ZIMMERMAN: Two introductory matters on the  
10 trial date question. First off, the Court should be aware  
11 that the Plaintiffs Steering Committee has trial teams that  
12 have been assembled. In addition to members of the PSC who  
13 will be on the trial team, members of the State Liaison  
14 Committee have agreed to serve on that trial team as well  
15 as members of the Minnesota trial bar, Ron Meshbesh and  
16 John Carey, who are probably names that the Court is  
17 familiar with back in our home state. And they have agreed  
18 to join the MDL trial team.

19 I state that simply because I think the important  
20 thing as I said earlier that the Court know and that really  
21 all counsel know who might be interested in this record,  
22 the PSC is proceeding on two very parallel tracks with the  
23 two very parallel teams. And one is looking into this  
24 settlement and trying to resolve serious cases or injury  
25 cases for those who want them resolved, but we are also

1 preparing for an early trial of cases in Minnesota, either  
2 through setting of a front-to-back trials before Your Honor  
3 in Minnesota based cases or summary jury trials for the  
4 purpose of narrowing issues and understanding issues. And  
5 our trial teams are working diligently in those arenas, and  
6 we have designated three separate trial teams on three  
7 separate tracks. I don't think I'll take the time, Your  
8 Honor, to introduce them at this time, but you're going to  
9 become familiar with them.

10 For the most part these are very able and  
11 distinguished and seasoned trial lawyers who have these  
12 trials to prepare and will be the trial lawyers who will be  
13 addressing these issues before Your Honor and before  
14 jurors.

15 The second -- you want to talk about that one?

16 MR. HOEFLICH: I would. Your Honor, we have been  
17 hearing for nearly nine months that the plaintiffs would  
18 like trials in 2003. We believe the trials are necessary  
19 in this case for a whole host of reasons. Aside from the  
20 date, though, we believe that we are entitled to know how  
21 plaintiffs suggest we choose the cases that are going to  
22 trial. We believe we need a discovery plan. We need to  
23 decide when and where the first trials are. And, so, we  
24 have requested from the plaintiffs that they give us not  
25 just dates, but a full motion and a plan for the initial

1 trial of these cases, and we would propose that they act as  
2 quickly as possible so that we can choose a realistic  
3 schedule and a realistic date and plan to get the cases as  
4 early as we can in 2003.

5 THE COURT: Mr. Zimmerman, do you want to address  
6 that issue?

7 MR. ZIMMERMAN: Yes, I will, Your Honor. Can I  
8 just go back? I was actually doing two introductions  
9 before I was making that speech about an early trial date.  
10 I wanted the Court to be aware in the interest of  
11 understanding where the trials are to hear from Richard  
12 Arsenault who has a report on where some state court cases  
13 are in terms of the trial setting. I thought that would be  
14 interesting for everyone to know and for the Court to know  
15 where cases are set for trials around the country.

16 THE COURT: Mr. Arsenault. Good morning.

17 MR. ARSENAULT: Good morning, how are you?

18 THE COURT: Good.

19 MR. ARSENAULT: As Mr. Climaco indicated earlier,  
20 we have the weekly meet and confers with the defendants,  
21 and at that time we take the opportunity for them to advise  
22 us with regard to trial dates around the country,  
23 depositions around the country, and class certification  
24 proceedings around the country. We also use our network  
25 and our Federal/State Committee to help with the attorneys

1 around the country to try to keep our fingers on the pulse  
2 of what's happening around the country with regard to trial  
3 dates.

4 As of this date, Your Honor, some of these dates  
5 are tentative. We understand some of the dates get set and  
6 then they are subject to consolidation. But as of today,  
7 we understand there are fifteen trial dates, ten of which  
8 are in the state court of Texas, one in Alabama, one in  
9 Illinois, one in Washington, one in Mississippi, and one in  
10 California. The earliest of those, Your Honor, is the one  
11 in Texas, December 9, 2002. The remainder go from January  
12 of '03 to February of '04. Thank you.

13 THE COURT: Thank you very much.

14 MR. ZIMMERMAN: Now, I will address the question  
15 of seeking a trial date and responding to Adam's concern  
16 that he know who is going to be on trial.

17 First off, we would like a trial date in the  
18 month of March or April of 2003. Defendants want us to  
19 make a motion in that regard. I feel that may not be  
20 necessary and should not be necessary. If the Court wants  
21 it, we certainly can, but I think pursuant to Rule  
22 16(b)(5), the Court at a status conference can set a trial  
23 date, and we would ask that the Court set an earlier trial  
24 date of March or April 2003.

25 I think defense remarks today indicated they

1 support an early trial date, but they want to know who is  
2 going to be in trial. We have no problem with that and  
3 once the Court sets a date for trial, we will designate  
4 within a very short period of time, say 20 days, 21 days,  
5 something in that nature who we would seek to have go to  
6 trial, and they would have that within a period of many  
7 months to do the necessary discovery. Interestingly  
8 enough, I don't think the discovery would be very  
9 difficult. It's a question of what their medical  
10 conditions are and who the people -- what the backgrounds  
11 are. We are not talking about liability. We are only  
12 talking about the individualized discovery. So, I think  
13 that would allow plenty of time between, say, November and  
14 trial starting in, say, March for the defendants to do that  
15 discovery. But we have no problem of giving them the names  
16 as quickly as the Court allows us to know what the trial  
17 date will be.

18 If the Court on the other hand desires us to have  
19 some kind of a motion in that regard, we will file that  
20 forthwith. To me, it just seems like a lot of extra trees  
21 and paperwork to file what we all know is our request for  
22 an early trial date. The Court's desire to have an early  
23 trial date as stated in the record at one of the early  
24 hearings, and defense counsel's understanding that a trial  
25 date will help in regards to their request for an early

1 trial date. So, I think we are all on the same page. I  
2 think that once the Court sets the date, the mechanisms of  
3 getting the individualized cases before Your Honor and  
4 getting them to discovered will be a very simple matter  
5 between able counsel.

6 MR. CHESLEY: Your Honor, may I just supplement  
7 one point. In order to avoid any issues of Lexicon, it's  
8 our intention to put in front of the Court cases that have  
9 been originally filed in Minnesota. So, there won't be a  
10 Lexicon problem. It is also our intention to probably have  
11 four or five cases tried at the same time so we have  
12 different diseases, different timelines and different ages.  
13 And we are, I think, ready and willing to give that  
14 information to the defendants so they can do the  
15 appropriate depositions of the medical side and the  
16 plaintiffs' side. I think we want to work with them. In  
17 fact, I know who the cases are that have been filed in  
18 Minnesota or will be filed, and, so, that really is no  
19 great mystery. I just wanted to add a Lexicon.

20 MR. HOEFLICH: Your Honor, we believe that we are  
21 entitled to the input in the process of choosing what cases  
22 will go first for trial. I think that is a uniform  
23 practice that the defendants having put in one case get  
24 tried first. But we believe we are entitled to a proposed  
25 schedule, what experts they plan to put up, how quickly

1 they plan to do it. That is something that has been done  
2 elsewhere and we urge the plaintiffs to give us a process  
3 for choosing the first cases. We believe we are entitled  
4 to participate in it. We believe we are entitled to input  
5 on the schedules that we can work this through together  
6 rather than just a block of time being set aside. We are  
7 for a trial date, meaning a shorter time frame as possible,  
8 one we will go over quickly. But we don't believe the  
9 first trial should be thrown at us without having any  
10 input.

11 MR. MAGAZINER: May I speak to that?

12 THE COURT: You may.

13 MR. MAGAZINER: The situation as I understand it  
14 is that in the MDL, there are a very large number of cases  
15 that were filed originally in the District of Minnesota as  
16 well, of course, as many cases filed in other districts  
17 that have been transferred to Your Honor. Of the cases  
18 that were filed in the District of Minnesota, many of  
19 them -- the great majority of them are plaintiffs who do  
20 not reside in Minnesota. Whether that is or is not proper  
21 is something that the Court may have to address at some  
22 point down the road. All we on the defense side are saying  
23 is that we would consider it not only unfair but  
24 unprecedented if the procedure were that Your Honor were to  
25 establish a date the plaintiffs were then to say from this

1 large universe of cases filed initially in Minnesota we  
2 will select the cases that will be tried on the dates that  
3 Your Honor decides. That would be in my experience  
4 unprecedented.

5 What we are asking is that the plaintiffs propose  
6 in a motion a process or procedure by which they and we can  
7 work together and discuss what cases will be tried. And  
8 the way it is traditionally done as Your Honor knows in a  
9 subsequent action is they choose one, you choose one, we  
10 choose one.

11 I admire Mr. Zimmerman's courage in coming before  
12 the Court and saying we have a proposal and the plaintiffs  
13 get to choose it all. We don't think that that is a fair  
14 way to go about it and we would propose a motion followed  
15 by perhaps a separate conference with Your Honor, not  
16 necessarily a status conference, but these are very  
17 important issues and we think they require extensive  
18 discussion among counsel as with the Court. Thank you.

19 THE COURT: Thank you.

20 MR. ZIMMERMAN: Your Honor, Stan would like to  
21 respond to this. But, you know, I think it's pretty  
22 axiomatic that plaintiffs file case, plaintiffs have the  
23 burden of proof and plaintiffs can choose what cases they  
24 are going to bring forward, and it's not a process we agree  
25 with defendants who gets, you know, who gets tried and in

1 what order. I mean that's the converse of what Adam was  
2 trying to say when you move to certify, you have the burden  
3 to make sure you touch all the elements of commonality and  
4 predominance and numerosity, and that's our burden. But it  
5 also is our responsibility to choose who is going to be put  
6 to trial -- put into trial and what order and how we're  
7 going to do it. That's also our prerogative.

8 Stanley, if you want to respond to that further,  
9 I think it's an important issue that we at least have the  
10 Court understand our position on it.

11 MR. CHESLEY: Your Honor, I think -- I'm sorry.  
12 Stan Chesley. I believe that Mr. Zimmerman has addressed  
13 it, but I am concerned. We come in front of the court  
14 seven months prior to trial. And while the defendants  
15 suggest they want an early trial, there is -- already I can  
16 see roadblocks. Maybe we need to have a conference with  
17 the Court.

18 Number one, it is not unprecedented. It has  
19 happened in more than seven or eight examples that I know  
20 of since Lexicon, and Lexicon has not been changed by  
21 Congress. What most Judges have done, Judge Spiegel, three  
22 or four others that I can give to the Court, have set cases  
23 that have been filed in their jurisdiction by virtue of MDL  
24 rules. You have the cases. The defendant is proudly in  
25 front of you, and whether or not the person is a citizen of

1 Minnesota is of little or no consequence because it already  
2 looks like they are attempting to make it complicated. It  
3 is not complicated. You have jurisdictions on the parties  
4 by virtue of 281407. You have jurisdiction over the cases  
5 that are filed in your court because they are not  
6 transferred. You are the transferor or the transferee  
7 Judge in those cases.

8         Number 2, the plaintiffs will bring cases. It's  
9 the defendants' position that they are only willing to  
10 settle serious injury cases. That's what they have said in  
11 this court. But now they want to pick and choose which  
12 cases the plaintiffs should try. I believe the way to  
13 shortcut this is we should within fifteen days, if we can,  
14 give them the names of our plaintiffs and go from there,  
15 and we should be able to get that done. Here, I am  
16 volunteering. I believe if we can, we can. That we advise  
17 the Court at a status conference under 16(b)(5) that we  
18 want a trial provided the Court has the time on those  
19 particular months, March or April.

20         It is very, very profoundly important that we  
21 have that trial because there are trials starting in  
22 December in Texas and in jurisdictions in Mississippi,  
23 Alabama, and I believe that it is absolutely essential. We  
24 have done a remarkable job on discovery on liability. We  
25 are prepared to go to trial and we want the defendants

1 prepared to go to trial and to take the appropriate  
2 discovery, the appropriate depositions of these four or  
3 five individuals that we may to try. We may put six or  
4 seven in there just in the event the Court wants six or  
5 seven. Maybe the Court will say I only want three or four  
6 and that's the Court's call. Thank you, Your Honor.

7 MR. HOEFLICH: Your Honor, again the agenda  
8 states and our discussions with Mr. Zimmerman have been  
9 that he plans to file a motion to ask for a trial date. We  
10 believe we are entitled to a motion. We believe we are  
11 entitled to input on the process, how the first cases for  
12 trial are selected. We believe that is the norm in cases  
13 like this and that that precedent should be followed here.  
14 I don't believe there will be a trial in December in Texas  
15 or anyplace else in these cases. We do favor an early  
16 trial date, but we believe that our rights need to be  
17 protected, too.

18 Mr. Zimmerman has suggested and put in the agenda  
19 that he's filing a motion, and we believe he should do that  
20 and we believe we should have a chance to respond. We are  
21 happy to work with the Court, the Special Master in any  
22 way, shape or form. Choose these cases as quickly as  
23 possible, but we believe we are entitled to input.

24 THE COURT: As soon as I get back to Minneapolis  
25 and check my calendar, I will send out a notice, hopefully,

1 within three weeks, and we'll have a conference dealing  
2 with setting trial dates.

3 MR. HOEFLICH: Thank you, Judge.

4 MR. ZIMMERMAN: Thank you, Your Honor. Your  
5 Honor, the next item on the agenda is summary jury trials.  
6 I had the opportunity to be a part of some summary jury  
7 trials in the federal courts, and I, for one, stand before  
8 Your Honor saying that I think they are extraordinarily  
9 helpful in getting sides realistic about the issues in  
10 their case and the way the case will unfold in the  
11 courtroom and in a trial sitting. I'm a believer in them.

12 I frankly do not know what the Court's belief on  
13 the viability of summary jury trials is, but I submit to  
14 Your Honor that from the PSC side, we see a great value in  
15 setting a number of cases, a number of different kinds of  
16 cases, and, perhaps, in a number of different regions for  
17 summary jury trials before Your Honor. I think it will aid  
18 in the process for all of us to understand how best to  
19 present the ultimate trials of this case and how to present  
20 the issues in a way that would be appropriate and expedient  
21 and preserving the precious judicial resources of all  
22 parties.

23 So, without belaboring the point, I think we  
24 should address summary jury trials, and it would be our  
25 plan to have the summary jury trials commence in the first

1 week in January or thereabouts, and for a little while to  
2 help us prepare for that March or April trial that would be  
3 a front-to-back full jury trial before Your Honor.

4 So, that is my position on summary jury trials.  
5 I believe the defendants' position is they are not as  
6 enthusiastic, although --

7 MR. HOEFLICH: Thank you, Bucky. What I said to  
8 Mr. Zimmerman, and I'll repeat here, is that we have been  
9 told for a year that Mr. Zimmerman would like summary jury  
10 trials. Our response is there have been dozens, if not  
11 scores, of different types of summary jury trials. Please  
12 tell us what process you want to use, what cases you would  
13 like to use, what the discovery plan would be, and when you  
14 would like to do this and put it in a motion or meet with  
15 us informally and give us a concrete plan, not just  
16 progressive buzz words.

17 We believe that we are entitled to that before  
18 summary jury trials are set, especially during a time we  
19 are preparing for trial. They may be very helpful. We  
20 would like to see the plan and try to work through this. I  
21 would suggest this is another issue we bring together when  
22 we have a status conference in the next several weeks.

23 THE COURT: That will be added to the agenda for  
24 that status conference.

25 MR. HOEFLICH: Thank you, Judge.

1           THE COURT: Dealing with the -- so I can give you  
2 an idea of my feelings on summary jury trials. I think  
3 it's a good idea, and I've expressed privately to several  
4 lawyers, it's a good idea and that we have them in  
5 different regions of the country. I talked to Mr.  
6 Blizzard. Certainly, we would choose Texas as a location.  
7 Certainly, choose the great state of Pennsylvania for one  
8 of the locations, California is another location, of  
9 course, the great state of Minnesota. But we'll work out  
10 all of this.

11           Mr. Zimmerman, I ordered you to -- within ten  
12 days to get to the defense and sit down with them and  
13 present to them your thoughts on summary jury trials and  
14 how they should be presented. And, then, they can respond,  
15 then we'll meet within three weeks to deal with this issue.

16           MR. ZIMMERMAN: Master list, Your Honor, we have  
17 been provided, now, by defense counsel with lists of  
18 federal and state filed cases. I don't know if the Court  
19 desires to see those lists or not. They have been provided  
20 upon request. They exist and will continue to be updated.  
21 I just put that in the agenda because it had been something  
22 we had been seeming to receive. We have received and  
23 desire a copy and will get that to you. Do you want a hard  
24 copy or e-mail copy?

25           THE COURT: E-mail copy is fine.

1 MR. ZIMMERMAN: The next item --

2 MS. WEBER: I don't mean to correct you. We  
3 indicated to Bucky in a particular format specific  
4 questions they had regarding specific issues or a specific  
5 date Your Honor would like to capture and we can talk to  
6 Katie about that. The format makes no sense.

7 THE COURT: Thank you.

8 MR. ZIMMERMAN: Third-Parties Payor Class. I  
9 believe there is a motion pending, Your Honor, for the  
10 appointment of a chair for a Third-Party Payor Subcommittee  
11 and the liaison counsel for the State of Pennsylvania. The  
12 PSC really has no strong position on that other than it is  
13 pending before Your Honor and that, I believe, the defense  
14 may have some comments.

15 MR. HOEFLICH: We have no statement on that, Your  
16 Honor. Thank you.

17 THE COURT: Anything from the third-party payors  
18 that filed their motion? Anything to add from the last  
19 time that we talked.

20 MR. ARSHAWSKY: Mr. Arshawsky, no, Your Honor.

21 MR. SCHWARTZ: Your Honor, Mr. Schwartz,  
22 Pennsylvania Third-Party Payor, co-lead counsel. We sought  
23 appointment on liaison between Pennsylvania Third-Party  
24 Payor litigation and the federal Third-Party Payor  
25 litigation. We are ready and willing to do that, but

1 because the void exists right now on the federal side, we  
2 are moving forward on Pennsylvania litigation, and as long  
3 as the void exists, it's impossible for us to fill the  
4 liaison position.

5 THE COURT: I understand. If defense could  
6 informally engage in conversations with the Third-Party  
7 Payor, that would help the Court.

8 MR. HOEFLICH: We will do that, Your Honor.

9 MR. ZIMMERMAN: Next, Your Honor, on the agenda  
10 is a topic entitled Plaintiffs Steering Committee  
11 Communication. This is becoming more and more important as  
12 our PSC prepares for trial, and as we get closer to the  
13 middle and end of discovery.

14 We have a number of ways in which we have  
15 commenced communication and with people not only inside the  
16 MDL, but outside the MDL. I just want to bring those  
17 before the Court so at least the Court understands what  
18 we're are trying to do and if the Court has any further  
19 suggestions, we would be happy to do so.

20 In this electronic age, obviously information is  
21 key and it travels at the speed of light. And the only  
22 thing that travels faster than our e-mails is the rumors  
23 about the settlement numbers which aren't always accurate.

24 First off, Your Honor, the PSC has established a  
25 newsletter. What is simply a position of the PSC that we

1 give recent news on the development of the discovery, the  
2 development of developments in the case, whether it be  
3 settlement ideas that are developing, or the trial plans,  
4 or summary juries, or the date of trials, things like that.  
5 So, what we do -- this time we posted on the Zimmerman Reed  
6 website. We are getting dedicated website. At the present  
7 time, we post it on our own website simply so it's  
8 available for people to see, and we would have a dedicated  
9 website probably before the end of this month.

10 But the newsletter is also sent out in hard copy  
11 to people on our list, but we also post it on the Zimmerman  
12 Reed website under recent news. And we believe this is a  
13 good vehicle for people to understand what the PSC is  
14 doing, which they may not be able to garner from a review  
15 of these transcripts or a review of the court's website.

16 Obviously, there is the court's website which is  
17 a website which the Court has control and posts its regular  
18 schedules and orders and related matters of interest in the  
19 Baycol litigation. And I can tell you from feedback I have  
20 received from people it's extremely helpful to them. A lot  
21 of people don't know it exists until we tell them. Every  
22 communication we send out we tell them to be sure to check  
23 the court website and we give them the site. And it really  
24 is helpful to people to understand what has been said at  
25 the hearings, what the orders of the Court are, and how to

1 access information, and how to download matters of  
2 interest.

3 So, that is the second mechanism of communication  
4 that we think is working very well.

5 Third, of course, we have Verilaw. And with very  
6 minor exceptions, Verilaw is working well. My only  
7 complaint is I get too much sometimes because every answer  
8 that's published -- that's filed and each separate action  
9 becomes a separate e-mail, but I think there is a way we  
10 can filter that out. In some ways you can get too much.

11 It becomes a little hard to handle. But for the most part,  
12 with minor exceptions, it has been working extremely well.

13 We're lucky to have such a modality because it makes the  
14 paper that piles up in our offices and our respective  
15 moving papers or paper around people, it makes that issue  
16 so much easier for us to manage and it just takes so much  
17 overload off of staff. So that we are quite happy with.

18 Lastly, Your Honor, the PSC met yesterday for a  
19 number of hours, and we decided that it would be  
20 appropriate for the PSC to put on a seminar which we will  
21 be doing for plaintiffs' lawyers around the country to  
22 report on the trial preparation, where we are having  
23 issues, where we need input from others, and what kinds of  
24 discovery we're -- we have prepared, and how our trial  
25 plans and our trial ideas and our trial themes are

1 progressing, and have a seminar so we can give people an  
2 update of where we are in the MDL, what we've accomplished,  
3 what we know, and share that information in oral  
4 presentations to anyone who would like to participate.

5 We have seen this work in various other cases in  
6 MDL's around the country at various times, and it's  
7 extremely helpful. I made a comment the other day that  
8 probably most of us in this courtroom know what we need to  
9 know but there are people outside this courtroom who can't  
10 make the journey or don't make the journey to these status  
11 conferences that need to know. And we want to reach out  
12 and allow them to know. There is nothing proprietary about  
13 what we do. What we do, we do for them, and we want to  
14 make that information available incrementally. Obviously,  
15 it's not the end of the day we don't have the final work  
16 product, but we have a lot of work product. So, we want to  
17 share the ideas of our trial preparation.

18 And the second part of the seminar would be our  
19 ideas on where the settlement is going, settlement of  
20 individual cases, how you can get in the program if you  
21 want to; how we can help you; what kinds of documents we  
22 have to have assembled, etc. And, so, the program would  
23 have a double purpose to show us how to prepare for trial  
24 and how to if you want to resolve the cases through  
25 settlements, if that ends up being a working program.

1           So, that's the communication of the PSC. We're  
2 trying very hard to do this appropriately, do it  
3 responsibly, and do it professionally. And I think by  
4 virtue of the fact that we haven't heard too many  
5 complaints about it, we hope and we think we are on target  
6 on that.

7           That is the communication report, Your Honor, and  
8 if you have any questions or counsel wants to --

9           MR. HOEFLICH: I have just a couple of  
10 housekeeping matters.

11           First, Your Honor, we have an agreed order and  
12 the Court's clerk has a copy of it already, so that  
13 portions of depositions refer to confidential documents are  
14 deemed confidential and the parties can challenge them. If  
15 the Court needs extra copies, I have extra copies with me  
16 as well.

17           Second, I'd just like to update the Court on the  
18 state deposition process as well. Depositions have been  
19 proceeding in great numbers since June in conjunction with  
20 the MDL. I believe when we combined the two, sixty in the  
21 last ninety days had depositions taken place. I also  
22 believe six deposition have taken place of GSK personnel  
23 outside of the MDL, and in addition to the depositions that  
24 have taken place of Bayer's employees. So, the case  
25 overall is moving extremely quickly as well and we will be

1 prepared to update the Court at the next status conference.

2 Thank you very much, Your Honor.

3 MR. ZIMMERMAN: Your Honor, the last item on the  
4 agenda is a state and federal coordination. There is  
5 nothing listed there because I believe we are working  
6 vigorously daily on that. And it would either be too much  
7 to put down in terms of all the things we are trying to do  
8 or incomplete.

9 But the fact of the matter is that the state and  
10 federal coordination process is working. Not perfectly,  
11 but it's working. We are all talking. We are all civil.  
12 We are all committed to representing our clients' interest.  
13 We have some differences of opinion, and we now have a  
14 committee that the Court has put together to help us  
15 communicate our concerns directly to the Court should we  
16 not be able to resolve them between us. And we welcome  
17 that opportunity under the guidance of the Court and  
18 Professor Haydock. And we look forward to the meetings  
19 that will be commenced to facilitate that coordination.

20 It is a process that we are all feeling our way  
21 through a little bit because there aren't any rules of  
22 order for this. It's somewhat informal because we're  
23 crossing state and federal jurisdictional lines. But PSC  
24 stands committed to work these out and make this process as  
25 smooth and professional as possible.

1           THE COURT: The Court would like to announce that  
2 the Court will have an order out dealing with the Liaison  
3 Advisory Committee that will have state court lawyers on  
4 it, and I wish to at this time publicly thank Sol Weiss,  
5 Ronald Lopez, Ed Blizzard, Andy Birchfield, Rob Gordon,  
6 Dawn Barrios for volunteering their time to be on this  
7 committee. It should be noted that the membership or  
8 participation in this committee does not by itself subject  
9 any lawyer or party to federal court jurisdiction or to any  
10 assessment of fees. I just wanted to make sure of that.  
11 That was stated for my good friends of the state court.

12           That order will come out and will also include  
13 members of the PSC and defense. I wish to thank them for  
14 their participation in this committee. I think it would be  
15 quite helpful to the Court. We had a very good meeting  
16 yesterday, and I know that the meetings will continue.

17           Professor Haydock will be the chair of that  
18 committee, and he will make sure of meeting before the  
19 status committee -- status conference, so, we can have a  
20 report from the Liaison Committee at the status hearing.

21           The next status conference will be in Dallas,  
22 Texas. I would like Mr. Zimmerman, Ms. Weber, and Mr.  
23 Blizzard to get together and pound out some dates that you  
24 can give me for -- I know that there are some dates that  
25 are unavailable for you. So, I need to know the dates that

1 are available.

2 In November we will be back in Minneapolis.

3 December, we will be in San Francisco. I need you to work

4 with defense and to give us some dates.

5 MS. CABRASER: We will do that, Your Honor.

6 There are no earthquakes scheduled for December.

7 (Laughter) .

8 MR. CHESLEY: I note with interest no one wants

9 to come to Cincinnati where we have no earthquakes.

10 THE COURT: Mr. Blizzard, anything that you want

11 to say on behalf of the state lawyers of Texas?

12 MR. BLIZZARD: Your Honor, I'm honored to be

13 here. We are all honored to be here, and we have nothing

14 further at this time.

15 THE COURT: Sol Weiss, my good friend, anything

16 that you would like to say?

17 MR. WEISS: Thank you for allowing us too

18 participate.

19 THE COURT: Anything for the defense?

20 MR. HOEFLICH: Nothing further, Your Honor, thank

21 you.

22 THE COURT: Anything for the plaintiffs?

23 MR. ZIMMERMAN: No, Your Honor, thank you.

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REPORTER'S CERTIFICATE

I, Brenda E. Anderson, Official Court Reporter,  
in the United States District Court for the District of  
Minnesota, do hereby certify that the foregoing transcript  
is a true and correct transcript of the proceedings in the  
above-entitled matter.

CERTIFIED: \_\_\_\_\_

\_\_\_\_\_  
Brenda E. Anderson, RPR