

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA
3 FOURTH DIVISION

3 -----
4 In re: Baycol Products) File No. MDL 1431
5 Litigation) (MJD/JGL)
6)
7) Minneapolis, Minnesota
8) November 3, 2003
9) 10:00 a.m.
10 -----

11 BEFORE THE HONORABLE MICHAEL J. DAVIS
12 UNITED STATES DISTRICT COURT JUDGE
13 (STATUS CONFERENCE)

14 APPEARANCES

15 For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.
16 RICHARD LOCKRIDGE, ESQ.
17 RON MESHBESHER, ESQ.
18 RONALD GOLDSER, ESQ.
19 RANDY HOPPER, ESQ.
20 SHAWN RAITER, ESQ.

21 For the Defendants: PHILIP BECK, ESQ.
22 ADAM HOEFLICH, ESQ.
23 PETER SIPKINS, ESQ.
24 FRED MAGAZINER, ESQ.
25 SUSAN WEBER, ESQ.
TRACY VAN STEENBURGH, ESQ.
TAREK ISMAIL, ESQ.

For New York Times: MARK ANFINSON, ESQ.

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

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 THE CLERK: Multidistrict Litigation No. 1431,

2 In Re: Baycol Products.

3 Please state your appearances for the record.

4 MR. ZIMMERMAN: Good morning, Your Honor.

5 Charles Zimmerman for the Plaintiffs.

6 THE COURT: Good morning.

7 MR. LOCKRIDGE: Good morning, Your Honor.

8 Richard Lockridge for the Plaintiffs.

9 THE COURT: Good morning.

10 MR. MESHBESHER: Ron Meshbesh for the

11 Plaintiffs, Your Honor.

12 THE COURT: Good morning.

13 MR. HOPPER: Good morning, Your Honor. Randy

14 Hopper for the Plaintiffs.

15 THE COURT: Good morning.

16 MR. GOLDSER: Good morning. Ron Goldser for the

17 Plaintiffs.

18 THE COURT: Good morning.

19 MR. RAITER: Good morning. Shawn Raiter for the

20 Plaintiffs.

21 THE COURT: Good morning.

22 MR. ANFINSON: Good morning, Your Honor. Mark

23 Anfinson for the New York Times.

24 THE COURT: Good morning.

25 MS. VAN STEENBURGH: Tracy Van Steenburgh on

1 behalf of GSK.

2 THE COURT: Good morning.

3 MR. ISMAIL: Good morning. Tarek Ismail on

4 behalf of Bayer.

5 THE COURT: Good morning.

6 MR. MAGAZINER: Good morning, Your Honor. Fred

7 Magaziner, GSK.

8 THE COURT: Good morning, Fred.

9 MR. SIPKINS: Peter Sipkins, Your Honor. Good

10 morning.

11 THE COURT: Good morning.

12 MS. WEBER: Susan Weber on behalf of Bayer. Good

13 morning.

14 THE COURT: Good morning.

15 MR. HOEFLICH: Good morning, Your Honor. Adam

16 Hoeflich for Bayer.

17 THE COURT: Good morning.

18 MR. BECK: Good morning, Your Honor. Phil Beck

19 for Bayer.

20 THE COURT: Good morning, Mr. Beck.

21 Mr. Zimmerman.

22 MR. ZIMMERMAN: May it please the Court. We have

23 provided the Court with the November 3rd status report and

24 proposed agenda.

25 There was a little bit of I'm not going to say

1 confusion, but we weren't sure if this should be a somewhat
2 limited status or if it's a full status, so we didn't
3 provide all of the information we normally put in the
4 30-day status reports. We can certainly provide that to
5 the Court.

6 I think it probably is important information, but
7 it's not included in this status. And we can comment on it
8 and the Court can ask us questions about things, about how
9 many cases are filed and how many people and how many
10 settlements and things like that, but we didn't include it.

11 THE COURT: I would like an update on the --

12 MR. ZIMMERMAN: In the body of the report?

13 THE COURT: Right, I would still like an update.

14 MR. ZIMMERMAN: Okay. Unfortunately I cannot
15 provide it. I think Susan Weber will have to provide it.
16 I can provide you with a couple of statistics and I think
17 Susan will have to give you the rest, or someone from
18 defense counsel.

19 As you recall from the last hearing, Your Honor,
20 we had approximately 10,930 cases active. Of that, 5,561
21 were in federal court and 4,833 were in state court and 536
22 had not been indexed. And then filed but not served cases
23 were not included.

24 So we probably -- and I don't know the new
25 numbers with regard to that. So maybe we can ask the new

1 numbers on that and then I can get up and we can talk about
2 what's next, but that's where we were last time and I don't
3 know where we are today.

4 MR. BECK: Your Honor, we have pending a grand
5 total of 10,922 cases. So we are actually down eight, I
6 guess, from last month. We have 5,835 in federal court,
7 which is up a couple hundred from last month. We have
8 4,754 in state court, which is down a couple hundred from
9 last month. We have 333 not yet assigned.

10 In terms of settlements -- I might as well just
11 keep standing since I know the settlement numbers -- we
12 have a grand total of settlements so far of 1,739 cases and
13 last month it was 1,514. So we have had another 200-plus
14 cases that have settled in the last month.

15 The total value of the settlements aggregate is
16 \$630,252,814, which is up, it looks to me eyeballing it,
17 about 85 million since the last month. We have -- of the
18 settlements, 429 appear to be subject to the MDL assessment
19 and this is about \$152 million aggregate value. As of last
20 month those numbers were 376 subject to the MDL assessment
21 of about \$136 million.

22 In the MDL mediation program I understand there
23 are about 78 cases right now.

24 THE COURT: Thank you.

25 MR. ZIMMERMAN: Your Honor, I had -- Phil, I had

1 a slightly different number on an e-mail from Susan on
2 total settled cases. I think you had indicated 1,739 and
3 the e-mail says 1,861.

4 MR. BECK: Susan will explain the difference.

5 MS. WEBER: The answer is a different legal
6 assistant at Shook, Hardy & Bacon was running the numbers
7 and they got it wrong. They sent me an e-mail a couple of
8 hours after I sent it to Bucky saying, oops, do it over
9 again. So Phil has the right numbers.

10 MR. ZIMMERMAN: Phil has the right numbers and
11 Shook Hardy has the wrong numbers, we'll take judicial
12 notice of that.

13 THE COURT: I was just handed a note that as of
14 8:12 a.m. on October 31st the Court had 6,151 cases filed,
15 6,151.

16 And as a side note, I just came back from the
17 annual MDL conference and I was informed that this is the
18 third largest MDL in the history of the United States
19 behind asbestos and breast implants.

20 MR. BECK: Your Honor, I think that the disparity
21 in the numbers -- in terms of the court filings and the
22 numbers that we have given is that each month we report on
23 complaints that have been served on us. So that could
24 be --

25 THE COURT: Right.

1 MR. BECK: And -- yeah.

2 MR. ZIMMERMAN: Your Honor, I think you might
3 recall at the last hearing we had some discussion about the
4 number of plaintiffs represented by these complaints.

5 MR. BECK: Oh, I can.

6 MR. ZIMMERMAN: I haven't got that, so maybe you
7 have it.

8 MR. BECK: And we don't have it yet. There's,
9 depending on one's count, 5,835 federal complaints and
10 4,754 state ones. We have been going through, but we have
11 to read each one. We have to figure out whether a named
12 plaintiff has been duplicated in another complaint, whether
13 a named plaintiff is a spouse.

14 So we are going through that as quickly as we can
15 and we expect that we will have that process complete
16 probably by the next status conference, but we don't have
17 the numbers right now.

18 THE COURT: All right.

19 MR. ZIMMERMAN: I think the other number that is
20 probably significant, and I don't know if this has been
21 verified by the Defense, but I have been told by
22 Mr. Goldser that I believe it was 7 million --

23 MR. BECK: Is he popping champagne?

24 MR. ZIMMERMAN: It's because we are the third
25 largest MDL. I am going for number one, Your Honor. You

1 know, Vince Lombardi said it. What did he say, Phil? You
2 know what he said.

3 MR. BECK: I'm a Vikings fan.

4 MR. ZIMMERMAN: There are no Vikings fans left
5 after yesterday.

6 THE COURT: We are still waiting for the Cubs.

7 MR. ZIMMERMAN: How do you do that (indicating)?

8 THE COURT: And you can't bring any goats in.

9 MR. ZIMMERMAN: The amount in the withhold fund,
10 I believe, was 7 million last --

11 MR. GOLDSER: Your Honor, I believe that's right
12 as of the end of September. If Mr. Beck's numbers are
13 accurate, with 152 million dollars' worth of MDL
14 settlements, at 6 percent that would make it closer to
15 9 million, although maybe some of those are Nevada cases.
16 So I am not sure that I have the most current numbers of
17 the amount in the withhold fund.

18 MR. BECK: I don't know anything about the
19 withhold number, so I can't --

20 MR. ZIMMERMAN: It's near and dear to my heart.

21 MR. BECK: I understand, but I don't know
22 anything about that number.

23 MR. ZIMMERMAN: Maybe we can get some
24 clarification on that.

25 There is an issue with that and I briefly

1 mentioned it to the Special Master, and it has to do -- and
2 I don't think we need to air it today, but it has to do
3 with the Nevada withholds.

4 Because Nevada did sign a participation agreement
5 with the MDL and it was a negotiated agreement where Nevada
6 state court cases, whether they be federal or state, Nevada
7 cases would be subject to -- excuse me -- the Nevada state
8 court cases, not the federal, Nevada state court cases
9 would be subject to a 3 percent withhold as opposed to a
10 6 percent withhold because the judge in that case said that
11 they are going to get information from both the state of
12 Pennsylvania and the coordinated proceedings in California
13 and the MDL. So he made an order saying that it would be
14 3 percent.

15 The issue there is a number of Nevada state court
16 cases have settled and we are getting two positions from
17 Defense, really Shook Hardy and no one here today, as to
18 whether or not those funds are being withheld or we have to
19 go and get it from the plaintiff's attorney in Nevada.

20 So I mentioned that to the Special Master and I
21 believe we are going to have a conference call on this
22 issue at his -- when the Special Master sets it, but I just
23 put it before the Court as a concern of the PSC.

24 And so I don't know that we have to do anything
25 about it today, but we are working on it and it may become

1 an important issue on that 3 percent withhold from Nevada.

2 THE COURT: Hopefully it won't become an
3 important issue. As with all other withholding, it should
4 be done before the checks are cut and not having the PSC
5 run after some attorneys trying to find some funds.

6 MR. ZIMMERMAN: That is our position and I hope
7 we can get that resolved.

8 THE COURT: Well, I think -- I have given
9 direction to my Special Master on that issue.

10 MR. ZIMMERMAN: I believe that concludes most of
11 the status issues on settlements.

12 There are, as we said, 78 or 79 cases in
13 mediation. I don't know if Special Master Remele wants to
14 deal with that now. It's really nowhere else in the
15 agenda, but I suspect it's all in play. I don't know if
16 there's anything further to comment on.

17 SPECIAL MASTER REMELE: I think that's correct,
18 Your Honor, there are a few new cases in the last month. I
19 think we were at 75 last month.

20 THE COURT: Before we move into the written
21 agenda, we have the New York Times matter. Hopefully we
22 can take care of that. I have been informed that we are so
23 close that -- is that so far away?

24 MS. WEBER: The status, Your Honor, is that we
25 have an agreement with the Plaintiffs' Steering Committee.

1 We do not have an agreement with the New York Times, and
2 Mr. Anfinson is here and he can bring you up to date on
3 what the New York Times' status is.

4 Let me hand up a draft of the agreed order that
5 we have floating around. The key provisions at this stage,
6 Your Honor, are Defendants would agree to review the
7 documents that have been designated as confidential -- most
8 of these provisions are similar to the last order that we
9 sent in, which is attached to our last brief -- and would
10 de-designate any documents that have been misdesignated or
11 will designate documents consistently with the terms of the
12 new protective order. It calls for an expedited review
13 procedure for establishing the mechanical process for
14 getting this done.

15 And what we anticipate is that we would have a
16 couple of the techno people on the Defense side and a
17 couple of techno people on the Plaintiffs' side hammer out
18 the details on that and that you would appoint either Judge
19 Lebedoff or one of the special masters, somebody who
20 understands computer speak, to stand by in case any issues
21 came up on that so the issues could be sorted out.

22 With respect to the terms of the protective
23 order, what we and the PSC have agreed to, we took the last
24 PSC submission, which was with the Schwartz declaration,
25 added in a definition of German law on which all of the

1 German law experts, Plaintiffs' and Defendants', are in
2 agreement. It's amazing.

3 We have a provision in there that covers
4 situations where an e-mail or a transmittal document would
5 have to be protected under German law, but it might be
6 transmitting a public document, a board report. So that in
7 those situations if Plaintiffs believe that the attached
8 document should be public, they will come to us and we will
9 work through a redaction procedure.

10 And the only other significant change in the
11 draft, and this is really a housekeeping matter, is that
12 down in paragraph 6 we have included a specific reference
13 to Pretrial Order 37. That was the order that said that
14 confidentiality designations on depositions would follow
15 confidentiality designations on documents.

16 No one wanted to depart from that previous
17 provision, but since this order, whenever it comes out, is
18 going to have a higher number on it, we just wanted to make
19 sure that it was clear that Pretrial Order 37 was still in
20 place.

21 You know, we think that this is consistent with
22 the practice in other MDLs; it provides for document review
23 and it does not impose needless torture on the Defendants
24 in terms of the mechanism for doing it.

25 As I said, Mr. Anfinson has not agreed to the

1 order yet and he is here to speak to that issue.

2 THE COURT: Good morning.

3 MR. ANFINSON: Good morning, Your Honor. Thank
4 you, as I approach, for moving me up the agenda here today.
5 I had been told those benches were very hard and it looked
6 like I was going to find out just how true that was.

7 Your Honor, the main issue we have is not
8 necessarily complete disagreement. It is more a mechanical
9 one at this point potentially.

10 I only got the current form of the order as
11 proposed on Friday. I was in court Friday. I sent it to
12 my clients in New York right away, but I have not heard
13 back from them. So in part I am standing here without
14 guidance on this.

15 Now, I predict, and I can't share too much of
16 what I've advised my client because I haven't had a
17 response yet, but I predict they will have some issues with
18 this, but not too terribly many.

19 So I guess to use Ms. Weber's metaphor, I am
20 prepared to possibly inflict some torture on the
21 Defendants, or at least recommend some, but not needlessly.

22 And so I guess what I'd suggest, and I understand
23 the Court's urgency in getting this done, is that we have a
24 few more days to submit a letter to you and the parties
25 offering our comments or to maybe work it out, either way.

1 THE COURT: How soon do you think your clients
2 will respond?

3 MR. ANFINSON: I would suspect I will hear today
4 from them.

5 THE COURT: All right. If you can get a letter
6 to both the PSC and the Defendants by Thursday. Then I
7 will give you -- if things have not worked out by your
8 letter saying that you are in agreement with everything --

9 MR. ANFINSON: Yes.

10 THE COURT: -- why don't we give you another two
11 weeks to work through trying to resolve those matters.

12 MR. ANFINSON: That's fine with us, Your Honor.
13 In fact, it's generous. I appreciate that.

14 MR. ZIMMERMAN: Is that two weeks from Thursday
15 or two weeks from today?

16 THE COURT: Two weeks from Thursday, once you
17 receive the letter. So what day would that be? So I would
18 have --

19 THE CLERK: November 20th.

20 THE COURT: So by the 21st I will have received
21 something from you saying that you want me to rule.

22 MR. ANFINSON: Or that we have embraced a mutual
23 agreement.

24 THE COURT: Right.

25 MR. ANFINSON: I will be optimistic about that.

1 Thank you, Your Honor.

2 THE COURT: Thank you.

3 MR. ZIMMERMAN: Your Honor, moving on then to the
4 agenda, we'll start with the status of discovery concerning
5 the Minnesota resident cases that are in the trial block.
6 There are six Minnesota resident cases which have been
7 selected for preparation for trial commencing in June 2004.

8 The Plaintiffs have provided Defendants with all
9 the medical records in our possession and Defendants -- and
10 discussions are underway to schedule the depositions of
11 plaintiffs and third party witnesses.

12 We understand and we will -- the expert reports
13 generically of the Plaintiffs are due December 1st and the
14 Defendants' submission of generic experts are due
15 January 12, 2004.

16 We have an issue before the Court of -- a couple
17 of issues that go from that. The first one, and we will go
18 just in the way it's in the agenda, is the access to
19 Plaintiffs' treating doctors. We believe that issue is now
20 ripe for argument. The issue is one we raised at the last
21 hearing.

22 THE COURT: I received your memorandums this
23 morning and I have reviewed them. If you wish to argue,
24 you may.

25 MR. ZIMMERMAN: Do you want us to do that now,

1 Your Honor? That was the only question. Do you want to do
2 it right now?

3 THE COURT: No.

4 MR. ZIMMERMAN: Which is fine.

5 THE COURT: Do we have a section for argument of
6 any motions?

7 MR. ZIMMERMAN: We really haven't set it up that
8 way. We kind of went through the agenda and said this is
9 ripe for argument.

10 THE COURT: Let's hear it now.

11 MR. ZIMMERMAN: Shawn Raiter is going to argue
12 for the Plaintiff. I don't know. Probably Phil is going
13 to argue it for the Defense.

14 MR. BECK: No.

15 MR. ZIMMERMAN: Sorry.

16 MR. BECK: Peter is going to argue it for us.

17 MR. ZIMMERMAN: I don't know who would go first.
18 I think they want the access, I think they want to create
19 the exception, but it doesn't really matter who goes first.

20 MR. SIPKINS: I'm not sure who the moving party
21 is either, Your Honor.

22 THE COURT: I'm sorry?

23 MR. SIPKINS: I'm not sure who the moving party
24 is, whether they are moving for a protective order, or
25 how --

1 MR. BECK: We are.

2 MR. SIPKINS: We are? We are moving for the
3 right to --

4 THE COURT: Come forward.

5 MR. SIPKINS: I would be happy to.

6 MR. ZIMMERMAN: We can do this in the Socratic
7 method, we can just have you both up here and you can fire
8 questions at them.

9 THE COURT: How's the foot?

10 MR. SIPKINS: Good morning, Your Honor. Peter
11 Sipkins for --

12 THE COURT: How's your foot?

13 MR. SIPKINS: My foot is fine. Thank you.

14 MR. ZIMMERMAN: It's his head. Tell him about
15 your head.

16 MR. SIPKINS: My foot was a year ago, Your Honor,
17 but my head was several months ago. As I was driving into
18 the parking ramp at our office, the arm came down and I
19 happened to have a convertible and it hit me on the head.
20 That's what Bucky is referring to.

21 MR. ZIMMERMAN: The day before your daughter's
22 wedding or the day after?

23 MR. SIPKINS: Your Honor, as Mr. Zimmerman has
24 made clear --

25 THE COURT: You are still limping, though.

1 That's why I --

2 MR. SIPKINS: I am still limping and it's from
3 trying to work out the kinks of a trial that I just
4 finished and I beat myself up yesterday. But my foot is
5 pretty good, Your Honor. Thank you.

6 Your Honor, you may recall at the last status
7 conference this issue came up sort of tangentially and I
8 had suggested to the Court that there were some decisions
9 of this district which held, contrary to state district
10 court procedures, that informal interviews with physicians
11 could take place. We believe that that clear precedence,
12 Your Honor, should, in fact, guide the Court here.

13 There are three decisions of this district by
14 Judge Rosenbaum and two by -- one by Judge Rosenbaum and
15 two by Judge Doty, the Thomsen case, the Jensen case, and
16 the Filz case respectively in which those judges held that,
17 in fact, informal ex parte interviews with physicians could
18 be held. And there's one decision to the contrary, a
19 decision in 1992 by Judge MacLaughlin of this district.

20 We think it's clear that, looking at the
21 underlying rationale of those decisions, that this Court
22 should follow the three judges who held that informal and
23 ex parte interviews would be permitted and rule that that
24 ought to be permitted here, particularly in light of the
25 Court's order of last month which allows the Plaintiffs to

1 take the first depositions of the doctors.

2 In the absence of allowing informal interviews,
3 essentially you are allowing trial depositions to take
4 place without allowing any discovery of those opinions in
5 advance of the trial depositions.

6 Minnesota Rule and Federal Rule 35.03 holds that
7 in the case in which a medical condition is put into issue,
8 such as these cases, there has been a waiver of privilege.
9 That's clear. And then the question is does 35.04 apply.
10 And under the Minnesota rules, 35.04 provides for
11 procedures and under the Wenninger case disallows informal
12 interviews.

13 But the three judges -- the two judges who I have
14 described in the three cases that I have referenced held
15 that 35.04 is procedural, because what it does is it sets
16 up the discovery process. And the discovery process being
17 procedural, it's subject to federal court and to federal
18 law and not state court and state procedure.

19 Therefore, the courts in those three cases held
20 that since there was no federal common law and there was no
21 federal procedure precluding informal and ex parte
22 interviews with the doctors, that they should be permitted.

23 The case that I suggested holds to the contrary,
24 the Gobuty case by Judge MacLaughlin, is a case that is a
25 medical malpractice case. And Minnesota Statute 595.02,

1 subdivision 5, was applied by Judge MacLaughlin to hold
2 that there were very clear statutory procedures and because
3 of those clear statutory procedures it was not a procedural
4 issue, but rather a substantive law issue and therefore the
5 state law should apply.

6 This is not a medical malpractice case. There
7 are no medical malpractice claims in any of the six cases
8 that we have and therefore we think that the Gobuty case is
9 inapplicable and that the three decisions that we cited
10 earlier, the Thomsen, Jensen, and Filz case, are the ones
11 that this Court should look to for guidance.

12 Finally, Your Honor, let me suggest -- again, we
13 have six cases that are on a track going to trial. We are
14 seeking to have a fair and an even playing field, and it's
15 a somewhat similar and analogous situation as in the Bone
16 Screw MDL case in 1996 in which I suspect several of the
17 PSC was involved and I know Arnie Levin was involved.

18 Judge Bechtle had prohibited ex parte
19 communications with the physicians until the cases were at
20 about this stage and then he changed his mind and as trial
21 approached he held that informal interviews should be
22 permitted and that the reasons for prohibiting those
23 ex parte interviews early in the case, massive interviews
24 with hundreds and hundreds of physicians, was no longer
25 going to apply, but the limited number of cases that were

1 being remanded and therefore he changed his order and
2 permitted ex parte communications.

3 We think the same thing should apply here, as I
4 said, particularly in light of the fact that the Court has
5 already ruled that the Plaintiffs get the first shot at the
6 trial depositions of the physicians and therefore we think
7 that informal discovery should be permitted.

8 Thank you, Your Honor.

9 THE COURT: Thank you.

10 MR. RAITER: Good morning, Your Honor. Shawn
11 Raiter on behalf of the Plaintiffs.

12 The Defense doesn't speak much about Gobuty
13 because it, of course, belies their position. Gobuty is
14 the most recent decision from this court, the District of
15 Minnesota, which deals with whether or not ex parte
16 interviews or communications with physicians, and that is
17 treating physicians, are appropriate in a case that is
18 venued in the District of Minnesota.

19 Gobuty analyzed the cases that Mr. Sipkins talks
20 about: Thomsen, Filz, and Jensen. Gobuty rejects all three
21 of them. Gobuty is the most thorough analysis of those
22 three decisions. Jensen is a single page which, in fact,
23 then relies on Thomsen. And Filz is a decision from Judge
24 Doty which Judge MacLaughlin a year or two later looks at
25 and says, I don't agree with Filz because I think Judge

1 Doty is wrong and here's why.

2 There's no question that in this situation state
3 privilege law applies, so we need to look at state
4 privilege law. The question really hinges upon, Your
5 Honor, whether or not we apply a state or federal law to
6 determine the extent of any waiver of that privilege law.

7 And Mr. Sipkins is right, Minnesota's Rule of
8 Civil Procedure 35.03 talks about waiver and it talks about
9 the extent of waiver -- excuse me -- talks about the fact
10 that waiver is present when you have placed your medical
11 condition at issue.

12 We then do need to look at Minnesota Rule of
13 Civil Procedure 35.04. And 35.04 says that when a
14 privilege has been waived, a medical privilege has been
15 waived, we only really allow two forms of discovery; one is
16 the production of medical reports or medical records in
17 this case and then second you have to produce an
18 authorization to the opposing side. That's it. The rule
19 then goes on to say you cannot take a deposition in
20 Minnesota of a treating physician.

21 So if we are looking at what is state privilege
22 here, what is the privilege law in Minnesota, we have
23 really three things: We have 35.03, 35.04, and we have the
24 section -- the statute that actually creates the privilege,
25 which is 595.02.

1 595.02 has a single exception to it, which, of
2 course, as we all know, applies in a medical malpractice
3 case, which allows a defendant to conduct an informal
4 conference with that treating physician.

5 And what's important here, Your Honor, is that in
6 Minnesota even that informal conference requires notice to
7 plaintiff's counsel and requires plaintiff's counsel the
8 ability to be present during that particular informal
9 conference.

10 Only if that physician does not agree to the
11 informal conference may the defense then take the
12 deposition, upon approval from the court, of the treating
13 physician.

14 So what we have here is a very, very extreme
15 attempt to get at very sensitive and confidential
16 information about people's medical histories, their family
17 histories, and other things that, as we know, given the
18 implementation of HIPAA, is really now reviewed with a
19 heightened sense of scrutiny.

20 And the law in Minnesota, if we go through Gobuty
21 it says what we need to apply is Minnesota law regarding
22 the waiver of privilege. And the cases that they cite in
23 their brief for the proposition that Minnesota federal
24 court law must apply to determine the scope of any waiver,
25 or the ability for the Defense to conduct an ex parte

1 interview of a physician in this case, isn't even Minnesota
2 law.

3 What they cite are a District of Kansas case, an
4 Indiana case, and a District of Columbia case; when what
5 you have before you is Gobuty, which is a District of
6 Minnesota case, which says we don't apply federal
7 procedural law to determine whether there's been any kind
8 of a waiver that would allow an ex parte interview.

9 So they cite cases not from this district. We've
10 cited Gobuty, which says you need to look to Minnesota law.
11 And, again, if you go back to Minnesota law, the three
12 things that you look at are 35.03, 35.04 of the Minnesota
13 Rules of Civil Procedure, and 595.02.

14 We know that subdivision 5, which is the
15 exception for the informal conference, doesn't apply to
16 these cases because these are not medical malpractice
17 cases. So now we have the decision we have to look at what
18 does Minnesota law say about waiver.

19 The case that surprisingly the Defense doesn't
20 cite is Wenninger vs. Muesing, which is a Minnesota Supreme
21 Court case which talks about the potential for abuse and
22 the problems that arise when you allow the defense to have
23 ex parte access to treating physicians.

24 So if you want to look at what Minnesota law is,
25 which is what Gobuty tells you you have to do, Wenninger is

1 the place you should start, Your Honor. And we believe
2 that if you look at Wenninger and you weigh the interests
3 between the two parties here, it's clear that there should
4 be no ex parte access.

5 The Defense certainly is going to be present at
6 depositions, and you have to ask yourself what information
7 are they going to obtain in an ex parte setting that is
8 appropriate that they can't obtain at a deposition. Only
9 inappropriate information, we submit, Your Honor, will be
10 obtained without Plaintiffs' counsel present.

11 They can take the depositions. They can
12 participate in the depositions that Plaintiffs will take,
13 according to Your Honor's recent pretrial order, and
14 anything that is appropriate will be addressed at those
15 depositions.

16 The ability of the Plaintiffs, the ability of the
17 treating physicians to represent their interests in an
18 ex parte situation is very, very compromised, Your Honor,
19 because we've got defense counsel with the ability to cast
20 the case in its best light, the ability to talk with those
21 physicians about what the plaintiffs allegedly are claiming
22 or aren't claiming, the ability perhaps to get the
23 physician to disclose confidential medical information that
24 isn't relevant to the case that's before Your Honor; and
25 that's a very, very grave danger in this situation where we

1 have HIPAA concerns.

2 One of just the asides on this is that the
3 authorizations that the plaintiffs who are set for trial in
4 Minnesota have signed, the new HIPAA authorizations do not
5 say that the Defense or the Defense's lawyers are able to
6 communicate with those treating physicians. So we have a
7 significant authorization problem sitting here as well.

8 So if you look then at the pedicle screw case as
9 well, Your Honor, which Mr. Sipkins referred to, the
10 pedicle screw case is very, very, actually, supportive of
11 the Plaintiffs' position.

12 In that case the judge said for pretrial
13 proceedings we're not going to allow you to have ex parte
14 communications. Only when we're ready to send cases back
15 to remand for trial will you be able to conduct ex parte
16 interviews, if the state law of the state from which that
17 case originated allows those ex parte interviews.

18 So it really doesn't give you much guidance. It
19 just says that in the initial MDL proceeding the court said
20 no ex parte interviews whatsoever for any case, regardless
21 of what state court law says. When you go back for trial
22 and you remand those cases, then and only then do you look
23 at state court law. So the pedicle screw case really
24 doesn't give you much help, I don't think.

25 We really believe, Your Honor, that if you look

1 at Wenninger, if you look at 35.04, Minnesota privilege law
2 is very clear. Gobuty controls. Gobuty has the most
3 thorough analysis. Judge MacLaughlin considered Filz, he
4 considered Thomsen, and he considered Jensen; and he
5 rejected all three of those.

6 In a footnote in Gobuty it is noted, and
7 Mr. Sipkins didn't refer to this, that there were several
8 decisions from this court in products liability settings
9 that refused to allow the defense to conduct ex parte
10 interviews. So you kind of have a split even within this
11 district.

12 At the time that Gobuty was considered you had
13 some cases that said, yes, in a District of Minnesota case
14 involving a products liability situation arising in
15 Minnesota you can't conduct ex parte interviews.

16 You had Jensen where Judge Doty simply relied on
17 Thomsen, which, by the way, Thomsen was a case that
18 involved the agreement by the parties that the federal
19 discovery law applied. The parties agreed that state court
20 law doesn't apply. That's not the case here. Thomsen is
21 very, very different.

22 Judge Rosenbaum -- once he had agreement of the
23 parties that federal court procedural law applied, Judge
24 Rosenbaum looked at the federal court procedural law and
25 said I don't see any prohibition against ex parte

1 communications; therefore, the defense can go ahead and do
2 that.

3 In this case and in Gobuty you have the
4 plaintiffs saying, oh, no, you have to look at state court
5 privilege law, you have to look at state court privilege
6 law to determine the extent of any waiver and you have to
7 look at state court privilege law to determine whether a
8 waiver has been sufficient to allow an ex parte
9 communication with that treating physician.

10 And in this case there simply isn't any state
11 court law that applies. The Minnesota Wenninger case gives
12 you very, very nice guidance about the hazards and the
13 potential abuses of allowing ex parte communications; and
14 we think you should follow that, Your Honor.

15 THE COURT: Thank you.

16 MR. SIPKINS: May I respond?

17 THE COURT: Briefly.

18 MR. SIPKINS: I'll be very brief, Your Honor.
19 Your Honor, in the proposed order, which I believe that we
20 sent over this morning, we do address the authorization
21 issue. In the event the initial authorizations were not
22 sufficient, we'd ask the Court to order that new
23 authorizations be promptly provided to us.

24 What we're asking for, Your Honor, simply is a
25 level playing field. There's no question here that the

1 Plaintiffs do have the right to conduct these informal
2 interviews of the physicians and they obviously intend to.
3 All that we're asking is, in light of the Court's order
4 which gives the Plaintiffs the right to start the
5 deposition process, that we ought to have the right to have
6 discussions before that.

7 If the Court is inclined not to allow the
8 informal discussions, we think that it would be fair for
9 the Court to reconsider its order of the last status
10 conference and allow us to have sort of a bifurcated
11 deposition process where we can conduct a deposition, a
12 discovery deposition, first and then allow the trial
13 deposition to take place afterwards, which would be, in the
14 situation where informal interviews are not permitted, the
15 more ordinary and typical kind of procedure.

16 HIPAA, which was raised here, clearly is not
17 relevant, Your Honor, if the Court orders that these
18 informal contacts can take place.

19 And finally, I don't think there's any question,
20 Your Honor, that in this courtroom, under Erie, federal
21 procedure does apply. I don't think that the parties have
22 to stipulate to that fact. Federal procedural law applies
23 and 35.04 is merely procedural. You are not bound to
24 follow state procedure in that respect.

25 Thank you, Your Honor.

1 THE COURT: Thank you. I'll take this matter
2 under advisement.

3 MR. ZIMMERMAN: Thank you, Your Honor. The next
4 item on the agenda is number c on page 2 and it has to do
5 with a supplemental discovery order and trial of cases on
6 the random case list, which is not the Minnesota case list.

7 We have been working with the Special Master on
8 this issue and the proposal, as far as it goes, that the
9 Special Master has put forward with regard to the random
10 cases has been accepted by both sides.

11 By the way, just as a footnote, Vicky -- how do
12 you pronounce her last name?

13 UNIDENTIFIED SPEAKER: Maniatis.

14 MR. ZIMMERMAN: -- Maniatis is apparently trapped
15 in an airplane somewhere between La Guardia and Minneapolis
16 and wasn't able to make it here. She did try and come
17 here, but we got a message that she couldn't land or
18 something or take off. I don't know which.

19 At any rate, so the Special Master's proposal
20 with regard to random discovery is good to both sides as
21 far as it goes.

22 We raised recently with the Defense another issue
23 that we think that the random case selection order should
24 address, and that has to do with the selection of
25 additional cases possibly as backup cases on the six

1 Minnesota cases, but also to have them ready for summary
2 jury procedure should the Court choose that that is a
3 vehicle which we wish to utilize in these proceedings.

4 I've read the letters from Mr. Beck and others in
5 response to our request in this regard and I think they
6 address the wrong issue. We're not saying we're trying to
7 substitute some non-Minnesota cases for these Minnesota
8 cases. We're not trying to pull any shell games with
9 regard to these six cases.

10 What we're saying is history has shown that, of
11 these six cases, there may be some that settle. There may
12 be some that Defendants view as settleable. Rhabdo,
13 nonrhabdo, elevated CPK, I mean, the board is not exactly
14 clear as to what level they might settle.

15 The second part is that there may be some cases
16 that go away. Upon pursuit of discovery by competent
17 counsel for the Defense, they may exploit weaknesses in the
18 case and we may find that the weaknesses are such that the
19 case isn't going to get tried; or we may find that a
20 plaintiff, god forbid, somebody happens to them, they pass
21 away, they are unable to participate for whatever reason,
22 and I don't know what that might be, but it's possible. We
23 have all seen that happen.

24 All I'm saying is on a similar and parallel track
25 we get some of the non-Minnesota cases -- and we suggested

1 the cases in the Eastern District of Pennsylvania -- we get
2 some of those queued up and discovered on a parallel track.

3 So if June 7th comes and the cases that are set
4 to be tried can't for whatever reason be tried or aren't
5 tried because they're resolved, we have an ability to come
6 before this Court and say, well, there's nine other cases
7 or twelve other cases that have been fully discovered.

8 And we can at least go with -- if we have a
9 problem with where this case can get tried, which I don't
10 think we do, but if we do, we could do a summary jury
11 trial. We could do something to help us get information
12 about how jurors and people will respond to these cases.
13 And I just leave that open as a possibility.

14 Your Honor, I was -- I didn't know much about
15 summary jury trials until the Telectronics litigation. I
16 was on the Plaintiffs' Steering Committee in Telectronics
17 and we did an extensive summary jury trial.

18 This was before Judge Spiegel in Cincinnati, who
19 had written extensively on summary jury trials. He was at
20 that time a big advocate of them and those of us on the
21 plaintiffs' side weren't sure where to go. I don't know
22 how the defendants were feeling about it, but we weren't
23 exactly sure how to go.

24 But we did proceed, under Judge Spiegel's order,
25 to a summary jury trial in that case on some very important

1 issues. The issue had to do with damages, you know, what
2 would a jury respond to in damages. And there also was a
3 very important issue in that case as to respondeat superior
4 and whether or not a foreign -- the company that owned the
5 defendant had liability under a piercing corporate veil
6 kind of a theory. And it was very helpful for us to get
7 through that issue.

8 It turned out, frankly, Your Honor, we won on
9 damages and lost on liability of the corporate parent, but
10 it helped us to settle that case because we knew at that
11 point we had a very thin case against the corporate parent
12 and so it made the negotiations going forward much simpler
13 to resolve.

14 And I just put that out as an example of why I
15 believe summary jury trials may make some sense in this
16 case. Now, I have told the Defense that we'll give them an
17 outline of where we are coming from on summary jury trials.

18 I am not trying to get the Court to prejudge
19 whether we should have them or not have them. I am just
20 saying let's have some backup cases discovered -- it is not
21 going to be an unreasonable burden -- so that if we have to
22 use them June 7th or June 8th or June 15th or next
23 September for whatever reason, we don't have the lag time
24 of having to discover fully those cases.

25 It is for that reason, Your Honor, that we ask

1 that we prepare a schedule for discovery of some additional
2 backup cases, which is the second paragraph really of
3 number c. And I know --

4 THE COURT: My understanding there's, what, 78
5 cases?

6 SPECIAL MASTER HAYDOCK: 76 randomly selected.

7 THE COURT: 76. The vast majority of those are
8 Eastern District of Pennsylvania cases?

9 MR. ZIMMERMAN: Not the vast majority. Only 13
10 are Eastern District. And we suggested those just because
11 they had a nice unified package to them. I don't think
12 that's set in stone for us. It was just kind of a nice,
13 easy way to put our hands around another group of cases.
14 Again, if --

15 THE COURT: Can you give me a breakdown of where
16 those cases are? 13 are in the Eastern District.

17 MR. ZIMMERMAN: We don't have it here. We can
18 certainly get that to Your Honor. We do know. We have a
19 lot of information on it. We can certainly get that to
20 Your Honor. Unfortunately, we don't have it here today.

21 Like I said, Your Honor, I have read the response
22 of the Defendants, which is dated -- in their October 30th
23 letter, and I think they are misinterpreting, I hope they
24 are misinterpreting and not trying to misstate what I'm
25 saying.

1 We want to go to trial on the six cases. We want
2 to go to trial on all the six cases. We just know that
3 something could happen, that six becomes five and becomes
4 four and maybe becomes one or maybe becomes nothing. I
5 don't know, but I want to be prepared.

6 I'm not trying to in any way undermine the
7 information we are trying to get from these cases. I want
8 that information as badly as Mr. Beck and his team does. I
9 want to know what are the trial worthy cases and what are
10 the cases that settle because they're more than trial
11 worthy, they are in the settlement program.

12 But I also want to make sure that we don't have
13 June come and go without something that this Court can try
14 in whatever mechanism the Court believes it is appropriate
15 to try.

16 And you will notice that I did this without
17 mentioning the word Lexecon, so I am proud of myself.

18 THE COURT: Mr. Beck.

19 MR. BECK: I was going to report that my head and
20 foot both are fine and then my head started to ache because
21 Mr. Zimmerman said that we had misunderstood what they were
22 saying when they said they want to prepare these other
23 cases, that it's not so much about going to trial, which of
24 course raises Lexecon in neon, but it's his idea of a
25 summary jury trial.

1 Your Honor, if you look at today's agenda and
2 their statement under paragraph c, what they say is, "The
3 PSC has submitted a proposal to the Court for the selection
4 of additional cases to be prepared for trial on June 7,
5 2004." There's nothing in there about this old idea that
6 they've dusted off this morning for the first time about
7 summary jury trials.

8 And more importantly, if you look at
9 Mr. Zimmerman's letter that raised this issue, dated
10 October 27, 2003, and to which we responded, there's not a
11 hint in here that it's about summary jury trials, some
12 mechanism for picking cases for summary jury trials. It's
13 all about going to trial and it's having these other cases,
14 which raise insurmountable Lexecon problems, prepared to go
15 to trial.

16 And so that's what we were responding to. So
17 when he says we missed the point, I think it would be more
18 accurate to say that we hit the point square on the nose.

19 And having recognized that it would be improper
20 to go to trial in these other cases, they now are
21 backtracking and pretending that they made a different
22 proposal, pretending that they made a proposal to prepare
23 some cases for summary jury trials when we're in the midst
24 of preparing cases for real life trials. So I think there
25 is a disconnect there, Your Honor.

1 THE COURT: Let's move on to Lexecon, then, if
2 that's the issue. Let me state some things that I found
3 out. And it's nice to -- sometimes people think
4 conferences aren't worthwhile, but I've found the MDL
5 conferences to be quite worthwhile because it's been
6 able -- I have been able to raise some issues with my
7 colleagues, who have years and years of experience with
8 MDLs, some of the vexing questions that I have with this
9 case.

10 In listening to the presenters and also in small
11 group sessions, although Lexecon was used occasionally, it
12 seemed like in the vast majority of the MDLs Lexecon was
13 not an issue because both sides wanted to have bellwether
14 cases tried so they would have an idea what's going on.

15 And it seems like we're doing a dance here.
16 Plaintiffs are saying that they want cases tried and then
17 all of a sudden we get cases that aren't going to be tried.
18 And then Defense is saying that we want cases to be tried
19 and Defense doesn't -- Plaintiffs don't have any cases that
20 are worthy of trial and therefore there's nothing to be
21 tried; and if a case is worthy to be tried, we don't want
22 to try it here.

23 MR. BECK: What we're saying, Judge, is something
24 quite different from that, and that is that the cases that
25 were filed here --

1 THE COURT: Well, I've got the MDL. Let's --

2 MR. BECK: I am not waiving Lexecon.

3 THE COURT: We are moving as quickly as
4 Philadelphia or any other jurisdiction dealing with any
5 kind of cases and here we can solidify figuring out what
6 cases are worthy of being called bellwether cases and
7 trying them here.

8 If you want to try them in Philadelphia, if you
9 want me to go to Philadelphia and try them or if you want
10 me to go to California and try them, I am willing to do
11 that.

12 Why, from day one, has Defense thrown up this
13 roadblock in trying to make sure that this MDL gets settled
14 in an appropriate manner and getting some bellwether cases
15 so Plaintiffs can know what their cases are worth? If they
16 are not worth anything, then the cases disappear.

17 But you know, as well as I know when I talk to
18 the chief judge in the Eastern District of Pennsylvania and
19 he just gets 100,000 latex glove cases back, that sending
20 any case back to Philadelphia is going to be on the shelf
21 for a period of time and that we are not going to have any
22 bellwether cases if I sent one back to Philadelphia.

23 So we are talking in circles here. Let's try to
24 figure out what we can do to get to the Court's agenda,
25 which is to try some bellwether cases so both sides can

1 take a look at what these cases are worth, instead of just
2 saying, well, they're not worth anything and then
3 Plaintiffs saying they are worth something but we don't
4 know what they're worth. That's not getting us anywhere.
5 Let's get some cases tried.

6 MR. BECK: May I respond, Your Honor?

7 THE COURT: You may.

8 MR. BECK: We have a program, we believe, in
9 place that the parties agreed to to get some cases tried.
10 As they said, well, maybe they'll settle. They are only
11 going to settle if they end up being rhabdo cases instead
12 of aches and pains cases, because we ain't settling aches
13 and pains cases. So I don't see what that problem is.

14 In terms of creating a backup mechanism now so
15 that we would have not only the six cases that are
16 proceeding toward being prepared for a June trial and we
17 have all the other cases on another schedule that's going
18 forward, but now we would layer on a third schedule of
19 backup cases, all of which I think would require the
20 parties to and the Court to say we're not going to apply
21 Lexecon, number one, I don't think it's up to the parties
22 and the Court in a jurisdictional situation to decide that
23 Lexecon doesn't apply; and number two, we're not going to
24 agree to that, Your Honor, we are not going to agree to
25 such a proposal.

1 If the Plaintiffs think they have a way that
2 Lexecon -- what they call the procedural hurdles and what
3 we believe to be are the jurisdictional bars of Lexecon, if
4 they think they have a way that that can be overcome, then
5 I think what they ought to do is present that by way of a
6 motion or memorandum and give us an opportunity to respond
7 to it.

8 I am not prepared to stand here off the top of my
9 head and try to come up with a mechanism that circumvents a
10 decision from the United States Supreme Court that I think
11 is jurisdictional in nature.

12 So I think that we've been cooperative and are
13 working toward a trial in this district. You may recall,
14 Your Honor, that we proposed a more aggressive discovery
15 program than the Plaintiffs were willing to agree to on
16 getting the cases to trial.

17 If they are aches and pains cases, as they have
18 been represented to be, we are not going to settle those
19 cases and we will find out what they're worth either at
20 trial or because the Plaintiffs decide to drop them or some
21 other resolution, but it is going to be a resolution on the
22 merits.

23 In terms of us standing here at the podium and
24 trying to figure out a way to circumvent Lexecon, with all
25 respect to the Court, I am not going to do that. If they

1 think they have a way to --

2 THE COURT: Please, please. I spent time with
3 close to 90 judges that have had hundreds of years of
4 dealing with MDL cases and not a single one jumped up and
5 said Lexecon was the problem. When parties wanted to get
6 bellwether cases tried or get global settlements to settle
7 an MDL, that Lexecon did not raise an issue. So I'm
8 just --

9 MR. BECK: I wasn't at the conference. I don't
10 know, Your Honor.

11 THE COURT: Well, excuse me. I was.

12 MR. BECK: Okay.

13 THE COURT: I'm telling you what was said and I
14 am just saying don't belittle all this experience --

15 MR. BECK: Oh, no.

16 THE COURT: -- that I have coming to me from all
17 these judges saying that this is not a problem.

18 MR. BECK: I think Your Honor said, though, that
19 what they said was that when the parties agreed that
20 Lexecon should not apply, Lexecon is not a problem.

21 THE COURT: I have heard that you said it's not a
22 problem to --

23 MR. BECK: We don't agree to that.

24 THE COURT: It is a problem --

25 MR. BECK: Right.

1 THE COURT: -- and that you do not want a level
2 playing field in this case.

3 MR. BECK: Well, Your Honor, I sure have never
4 said that. With all respect, Your Honor, what I have said
5 is that we're ready to go to trial on the cases that they
6 chose to file for Minnesota residents in Minnesota.

7 And if saying that we believe that Lexecon
8 applies and are not willing to ignore Lexecon says somehow
9 we don't want a level playing field, Your Honor, with all
10 respect, I think that's incorrect.

11 My point today is if they think there is a way
12 that Your Honor, consistent with the decision from the
13 United States Supreme Court, can try cases that were filed
14 outside of this district or can go into other districts and
15 try the cases, let them file a memorandum explaining how
16 they think that can work and let us respond to it.

17 THE COURT: All right. Let's move to the Baycol
18 trial dates. Mr. Beck, if you would turn to the Baycol
19 trial dates in state court and in -- in state court. Would
20 you alert the Court which of these cases are going to be
21 bellwether aches and pains cases so the Court can be --

22 MR. BECK: I need to get the list and I don't
23 think anybody had it because it wasn't on today's agenda.
24 And if you are asking me are any of them going to be
25 bellwether cases, I suppose whether a case is a bellwether

1 case is like beauty, it's in the eye of William Holden, a
2 Mel Brooks --

3 MR. ZIMMERMAN: Repeat that.

4 MR. BECK: Mel Brooks said, Beauty is in the eye
5 of William Holden.

6 If it's a bellwether case, I guess that depends
7 on whether the Plaintiffs -- I thought the case in
8 Mississippi that they lost was a bellwether case, that was
9 an aches and pains case, but they didn't think it was a
10 bellwether case.

11 The first one that comes up that we win, I'll
12 think that that's a bellwether case and they won't. If
13 they win one, they will think it's a bellwether case and I
14 won't. So the answer is, and I was being a little
15 facetious, but whether something is a bellwether case is in
16 the eye of the beholder.

17 And when we go to trial in June, Your Honor, if
18 we win those cases, I don't think that Mr. Zimmerman is
19 going to fold his tent and say, okay, we dismiss all 4,000
20 aches and pains cases; and if we lose any of them, we are
21 not going to start settling those cases either. So that's
22 the best answer I can give on whether something is a
23 bellwether case.

24 MR. MAGAZINER: May I respond briefly, Your
25 Honor?

1 THE COURT: You may.

2 MR. MAGAZINER: Thank you, Your Honor.

3 THE COURT: Good morning.

4 MR. MAGAZINER: Good morning, sir. Just so Your

5 Honor is aware what's going on, in Pennsylvania there's

6 supposed to be eight cases selected for trial and the

7 Defendants -- the Plaintiffs selected four rhabdo cases and

8 the Defendants selected four aches and pains cases.

9 Plaintiffs then dismissed, as has been their

10 pattern throughout the country, they dismissed the four

11 aches and pains cases that the Defendants had said they

12 wished to try. Defendants made a second selection of four

13 cases in Philadelphia to be part of the eight-case program.

14 Plaintiffs dismissed those four cases.

15 The same thing has happened here in Minnesota in

16 the past. When we had the June 6th trial scheduled for

17 2003, remember the Plaintiffs dismissed the first case we

18 selected and then they dismissed the second case we

19 selected.

20 I infer from Mr. Zimmerman's concern about the

21 six Minnesota cases that the Plaintiffs may wish to dismiss

22 those cases.

23 When Your Honor asks why is there not a

24 bellwether trial, with all due respect, that question could

25 be better addressed to the Plaintiffs because it is the

1 Plaintiffs who in jurisdiction after jurisdiction, state
2 court and federal court, when Defendants or through some
3 random system cases are selected for trial and they are
4 aches and pains cases, it is the Plaintiffs who
5 consistently dismiss them, thereby depriving courts of the
6 opportunity to try an aches and pains case.

7 So I would suggest, Your Honor, to better address
8 that question to Mr. Zimmerman. If indeed he is not going
9 to dismiss the six Minnesota cases, they will be tried in
10 this court in June.

11 THE COURT: We'll get to that. I'm asking
12 what -- please be seated. We are making a copy of the
13 state court cases.

14 And if I hear you correctly, Mr. Beck, the only
15 bellwether case that you consider, that the Court should
16 consider is a victory by the Defense. Is that accurate?

17 MR. BECK: No, it's not accurate.

18 THE COURT: All right. Then explain to me what
19 you consider a bellwether case, then.

20 MR. BECK: What I said was that if we win, we'll
21 call it a bellwether case; and if they win, they'll call it
22 a bellwether case. I don't think that anybody has the
23 power, legal or otherwise, to designate in advance and say
24 this shall be a bellwether case and this shall determine
25 how the other 10,000 cases are resolved.

1 Because if we win in June, let's just focus on
2 the trials that everybody agrees this Court does have the
3 authority to conduct and we have been working together to
4 try to get them ready --

5 THE COURT: Then what's the critical mass, as you
6 see it, for Defense victories?

7 MR. BECK: I can't answer that because that's up
8 to the Plaintiffs. But what I can tell you, Judge --

9 THE COURT: You must have some --

10 MR. BECK: No, I don't. I'm not holding anything
11 back here.

12 I'm going to tell you something else which you
13 may not like to hear, and that is that if they win the next
14 aches and pains case or the next aches and pains case after
15 that, that does not mean that we're going to come up with a
16 settlement of 10,000 aches and pains cases. We are ready
17 to try these cases one by one rather than to pay money for
18 people who were not injured.

19 We recognize if we are willing to go to trial on
20 a large number of cases that sometimes we may lose, but
21 that is not going to change our approach, which from day
22 one when we went down to New Orleans I announced. If
23 somebody has an actual injury, an actual side effect where
24 they were injured by our medicine, we want to make it
25 right. If somebody is trying to cash in on claims that we

1 consider to be bogus claims, then we are not going to pay
2 and we will fight every one of them; and we will.

3 Now, if we win 20 of them in a row, will
4 Plaintiffs' lawyers start to rethink whether it makes sense
5 to invest their time and money pursuing such claims? I
6 hope they do.

7 But if we lose a whole bunch of them, that
8 doesn't mean that we are going to start settling those. We
9 are going to fight those because we don't think that any
10 injury took place.

11 And we recognize the vagaries of litigation. We
12 won one in Minnesota, but we've got two other ones
13 scheduled -- excuse me. We won one in Mississippi.

14 THE COURT: There is a difference.

15 MR. BECK: There is a difference. -- and we've
16 got two more scheduled to go in Mississippi. We may win
17 those. We may lose them.

18 If we win them, maybe Mr. Zimmerman will have
19 second thoughts, but I doubt it. If we lose them, we are
20 going to continue to contest and try aches and pains cases.
21 We are not going to agree to pay money in a settlement for
22 those cases.

23 So, you know, we are going to cooperate with the
24 Court. When the Court says I have jurisdiction over these
25 cases and I want to have a trial, then we'll do everything

1 we can to get there as quickly as possible and to cooperate
2 and to do that trial.

3 But if you ask us to waive whatever rights we
4 have under Lexecon so that the Court can have other aches
5 and pains trials, that's not something, frankly, that we're
6 prepared to do.

7 We are going to try whatever cases we have to
8 here or in state court or in other federal courts on remand
9 on aches and pains and we will fight every single one of
10 them, but we're not looking to put together a settlement
11 program for those because we think that it's just a form of
12 extortion and we're not going to pay.

13 And that has been -- this should come as no
14 surprise. That has been the position that I articulated in
15 New Orleans and that I think I probably have managed to
16 shoe horn in every single status conference we've had since
17 then.

18 THE COURT: Well, so you understand, when I am
19 talking about bellwether cases, I am talking about choosing
20 20 cases and trying them back to back to back to back to
21 back to back to back to back.

22 And at some point when you have one judge that
23 has put together cases with the best experts on both sides,
24 the best lawyers on both sides, I think at some point
25 reasonable people can agree that decisions will have to be

1 made, either on the Plaintiffs' side if you win all 20 or
2 10 or whatever the number is dealing with aches and pains
3 or they see that the writing is on the wall and they've got
4 to move on to something else and these matters are going to
5 be dismissed; or if you happen to put your best case
6 forward and you do your analysis with the jurors afterwards
7 and you find out that maybe, as trial lawyers have found
8 out, sometimes people can disagree with their assessment
9 and if that assessment is validated a number of times, then
10 you are going to have to take a second look at your
11 position.

12 That's what I want to get at. We are at these
13 positions. We've been at these positions for the last
14 year and a half, almost two years, and we haven't had any
15 cases to -- we have had all the prefight sparring in this
16 jurisdiction and we haven't had any fights.

17 MR. BECK: And we are ready to go to trial on
18 their six cases one after another starting whatever day it
19 is, June 4th. That's what we're working toward. We
20 understand that that's Your Honor's purpose and Your Honor
21 has, we agree, jurisdiction to try those cases.

22 And I think we have been cooperative in every
23 possible way we can in terms of trying to get those cases
24 ready. In fact, we tried to be a little more ambitious in
25 terms of getting them ready sooner rather than later. We

1 are going to try those cases.

2 THE COURT: Dealing with your trial schedule that
3 you have down in Mississippi, are these -- the
4 November 12th case. Did you get the list?

5 MR. BECK: Yes, I have the list.

6 THE COURT: All right. Is that an aches and
7 pains case or a rhabdo case?

8 MR. BECK: My understanding, Your Honor, is that
9 both of the -- oh, the November 12th case is an aches and
10 pains case.

11 THE COURT: Is that a limited jurisdiction court
12 or general jurisdiction?

13 MR. BECK: I don't know.

14 MR. MAGAZINER: It's a general jurisdiction. The
15 plaintiff did not do as he did in the earlier case, cap his
16 potential recovery at \$75,000, so it is uncapped.

17 MR. BECK: So it's a multimillion dollar aches
18 and pains case.

19 MR. ZIMMERMAN: Who said that?

20 MR. BECK: Oh, I'm sure that's what they'll ask
21 for.

22 MR. ZIMMERMAN: Why don't you wait and see.

23 MR. BECK: In any event, Your Honor, it's an
24 aches and pains case and it's a general jurisdiction court.

25 THE COURT: Are you trying that case?

1 MR. BECK: No.

2 THE COURT: Who's trying it for the Defense?

3 MR. BECK: The people who won the last one in
4 Mississippi.

5 THE COURT: Is this the same Plaintiff's lawyer
6 that tried the other one?

7 MR. BECK: Don't know. Anybody know?

8 MR. MAGAZINER: No, it's not.

9 MR. BECK: Different Plaintiff's lawyer.

10 THE COURT: One that knows the valuation of the
11 case if your treating doctor is going to testify against
12 you?

13 MR. BECK: I don't have any idea --

14 THE COURT: Oh, you can smile on that.

15 MR. BECK: My guess is that he's a first-class
16 lawyer, or she is.

17 THE COURT: All right. December 1st, aches and
18 pains or --

19 MR. BECK: I am informed that it is an aches and
20 pains case.

21 THE COURT: Okay. Texas cases, Orange County,
22 what -- is that Judge Davis's jurisdiction or is that
23 further south?

24 MR. BECK: No. I am now acting as sort of a sock
25 puppet up here. No, it is not Judge Davis. You don't mind

1 if I glance away occasionally, do you?

2 THE COURT: No, of course not.

3 MR. HOEFLICH: It's further south.

4 MR. BECK: It's further south.

5 THE COURT: Do we know who the Plaintiff's
6 attorney is on that?

7 MR. HOEFLICH: Williams Bailey and others.

8 MR. BECK: Williams Bailey and others. This is
9 like a submarine, Your Honor. Someone says, "Up periscope"
10 and then somebody else says, "Up periscope."

11 THE COURT: I understand.

12 MR. BECK: Do you want Mr. Hoeflich to stand up
13 here and --

14 THE COURT: He can stand beside you.

15 MR. BECK: Whisper in my ear?

16 THE COURT: Or put his hand behind your back.

17 MR. BECK: Let's do it that way.

18 THE COURT: Then we have Forrest County Circuit
19 Court in Hattiesburg, Mississippi, on January 26, 2004. Is
20 that general jurisdiction?

21 MR. HOEFLICH: This is where I have to turn to
22 Mr. Magaziner. It is general jurisdiction, Judge.

23 THE COURT: Aches and pains?

24 MR. HOEFLICH: I don't know, but I believe it is.

25 THE COURT: Now we go to Philadelphia. Are these

1 rhabdo or aches and pains cases?

2 MR. HOEFLICH: These are rhabdo cases. The first
3 case, the Frank case, is a Weitz & Luxenberg case, Judge.
4 The Galdi and Rushton cases are also rhabdo cases.

5 MR. BECK: And I believe, Your Honor, this is the
6 situation that Mr. Magaziner referred to where whenever we
7 proposed aches and pains cases, whether one wants to call
8 them bellwether or not, they end up getting dismissed by
9 the same law firm that they are now proposing come forth
10 with a bunch of other aches and pains cases from around the
11 country for this Court to try.

12 THE COURT: Okay. Then we go back to Mississippi
13 again on March 1, 2004, Hattiesburg, Forrest County. Is
14 that general jurisdiction; do we know?

15 MR. HOEFLICH: I don't know this case, Judge.

16 THE COURT: Nevada, is that an aches and pains
17 case, March 2nd?

18 MR. HOEFLICH: I believe that's a rhabdo case,
19 Judge. If the Court would like, we could prepare a list of
20 what the allegations are in all of the cases that are
21 currently set for trial and provide it to you.

22 THE COURT: That would be helpful because, again,
23 I don't need to know anything about the rhabdo cases
24 because again I will state that you've done a very fine job
25 of settling those cases. And other than being on a trial

1 calendar, I don't suspect that they will be tried, at
2 least -- well, I won't say it.

3 Harris County, that's Houston, isn't it?

4 MR. BECK: Yes, it is, Your Honor.

5 THE COURT: And I see that's a district court,
6 not --

7 MR. BECK: I think that's just the way that they
8 talk about it or that we talk about it.

9 THE COURT: Is that a --

10 MR. BECK: It's Texas.

11 THE COURT: Is that an aches and pains or a
12 rhabdo?

13 MR. HOEFLICH: As we move into 2004, Judge, I do
14 not know the specifics of each of these cases, only some of
15 them.

16 THE COURT: All right. If you would get a chart
17 so we can figure out how many aches and pains cases are on
18 this -- in the state court that might be possibly tried,
19 that would be helpful.

20 MR. BECK: We will do that, Your Honor.

21 MR. ZIMMERMAN: Can we get a time limit on that,
22 Your Honor?

23 THE COURT: I'm sorry?

24 MR. ZIMMERMAN: Can we get a timing on when that
25 could be produced so we are not chasing it down, we just

1 have a deadline?

2 MR. HOEFLICH: We will provide that to the Court
3 within 10 days.

4 THE COURT: Fine.

5 MR. ZIMMERMAN: May I have a copy, Your Honor?

6 THE COURT: You may.

7 MR. BECK: Yes, we will give Mr. Zimmerman a
8 copy.

9 And Your Honor I hope will understand that other
10 than the cases that are -- kind of people are serious about
11 and talking about actually getting ready for, we are going
12 to be going based on what they say in their complaint. And
13 as the Court knows, there's plenty of complaints that talk
14 about all kinds of injuries --

15 THE COURT: Exactly.

16 MR. BECK: -- and we finally end up with aches
17 and pains after we get rid of myopathy.

18 MR. ZIMMERMAN: Myopathy is --

19 MR. BECK: What's the eye thing?

20 MR. ZIMMERMAN: Myalgia?

21 MR. BECK: No. When you guys allege that they
22 can't see anymore.

23 MR. ZIMMERMAN: Blindness.

24 MR. BECK: When we get rid of the blindness
25 claims and the black urine and things like that --

1 MR. ZIMMERMAN: Black urine? No, we like those.

2 UNIDENTIFIED SPEAKER: Myopia.

3 MR. BECK: Myopia, that's what it is.

4 THE COURT: All right. Mr. Zimmerman, you wanted
5 to say --

6 MR. ZIMMERMAN: I do want to say a couple of
7 things, Your Honor, I think just maybe to clear the record
8 up a little bit.

9 First off, a summary jury trial is a mechanism
10 that I think we have been talking about for a long time and
11 to say that it just came up in a letter the other day is
12 really a misstatement. I don't think Phil really meant
13 that. He probably was given bad advice from Adam. No, I
14 am just kidding. I am sure he didn't mean to say that.

15 It's been something we need to consider and will
16 continue to consider. Like I said, we will put more meat
17 on that bone. But we just want to have some cases that we
18 could utilize in that fashion. I just want to make that
19 clear.

20 Number two, cases go away not necessarily because
21 they settle because they're of high value. They go away
22 for a lot of reasons.

23 THE COURT: We don't have to go through --

24 MR. ZIMMERMAN: But the point I want to make is
25 this: Phil says -- Mr. Beck says he wants to settle actual

1 injury cases, he will not pay for bogus cases; and I agree.

2 We just don't agree on what that is.

3 So we can talk disparagingly about anything we
4 want, but the point of the matter is that we've got to
5 figure out what is an actual injury and what isn't.

6 THE COURT: I understand. I am trying to get to
7 the critical mass as quickly as anyone else.

8 MR. ZIMMERMAN: Exactly.

9 THE COURT: One of the things that I learned from
10 this conference and the last two years I've gone is that as
11 a judge I've got to be in for the long haul, unfortunately,
12 that they don't move as fast as the judges want them to
13 move.

14 And I commend both sides in this case, that you
15 certainly have gotten the attention of many people across
16 the country about how well this MDL is working; and I must
17 say that it could not have occurred without both sides
18 being cooperative.

19 All I'm trying to do is force the issue to at
20 least get the percolation going on how do we get to
21 critical mass. It is going to take time to try cases and
22 teeing them up. As we know, being in the trial business
23 for over 30 years, you can tee up as many as you want and
24 only one goes or zero go. I understand that.

25 I am trying to figure out a method to get a

1 critical mass that both sides say, well, I'm tired of
2 looking at each other. Phil, you won, we'll move on, these
3 cases don't have any worth; or Mr. Beck will say, well,
4 geez, I'm shocked that someone else thinks that these are
5 worth something, but we have to take that into
6 consideration. I would like to get to that point. I'm
7 looking down --

8 MR. ZIMMERMAN: And all I'm suggesting, Your
9 Honor, is we have to look at all kinds of different angles
10 at how to do it. One of the things I am suggesting is
11 summary jury.

12 The other thing that we can suggest is that the
13 Court can go sit in other places if it has to, and you
14 brought that up, or we can do these 14.04 movements where
15 the Court sits by designation or they get referred back.

16 And all of these things are open options and I
17 just don't want to foreclose any of them while we are
18 looking to June 7th, because June 7th is still seven months
19 away and there's a lot of work we can do to prepare things
20 for the next round of whatever we have to do. And that's
21 really my whole point and I think we've aired this enough.

22 Listen, I want to get to the end too. I mean,
23 nobody in the world wants to get to the end more than a
24 plaintiff's lawyer that's on a contingency fee. I mean,
25 let's be honest.

1 So getting to the end is appropriate and if this
2 thing has -- if it closes up because Mr. Beck is correct
3 and no jury in the world will respond to these cases and
4 the Plaintiffs' lawyers have to face reality, we are going
5 to have to face reality. On the other side, there may be a
6 different reality and we think that reality will work, at
7 which point actual injuries won't be defined just as
8 rhabdo, they will be defined as something else. End of
9 story.

10 Next on --

11 THE COURT: Roman numeral II, "Other pending
12 motions."

13 MR. ZIMMERMAN: PTO 62, Your Honor, Defendants
14 want to file a brief on this, and they have the absolute
15 right to do that and perhaps we should just set a briefing
16 schedule.

17 Do you want some background on this? I think the
18 Court is aware of this issue, but there was this bundling
19 problem and then an order to unbundle and then a stay of
20 the order to --

21 THE COURT: How much time do you need?

22 MS. WEBER: Your Honor, we can do it two weeks
23 from the filing date, but our position is that by the terms
24 of your order, the stay has already expired. The stay
25 specifically said that Plaintiffs would have to unbundle

1 cases based on when class certification was ruled upon or
2 when they filed a motion for reconsideration, whichever
3 came first. Maybe I should step up there.

4 MR. ZIMMERMAN: I thought it was 45 days from
5 that, Susan. I think today is --

6 MS. WEBER: Two weeks is fine, Your Honor, but
7 that stay expired by its own terms. Plaintiffs have filed
8 a motion that doesn't even address any of the predicates
9 for the institution of a stay, much less continuance of the
10 stay. So we will file a brief, but we are going to be
11 opposing this vigorously.

12 THE COURT: Anything further?

13 MR. ZIMMERMAN: All we would ask, Your Honor, is
14 that the stay remain in effect until the Court can hear the
15 briefs as opposed to us having to go out and say we're in
16 violation of a court order, unbundle or don't bundle or
17 wait until we have a hearing.

18 I believe -- and I can check and give the Court a
19 letter on this. I believe it was 45 days from the first of
20 a filing of a motion for reconsideration or class
21 certification. But, again, I am standing up here without
22 the order in front of me. I just don't want to get
23 plaintiffs' lawyers in trouble around the country.

24 THE COURT: Give me three weeks for the Defense.

25 THE CLERK: From today's date?

1 THE COURT: From today.

2 THE CLERK: November 24th.

3 THE COURT: When is Thanksgiving?

4 THE CLERK: November 27th.

5 THE COURT: Is that enough time?

6 MS. WEBER: That would be fine, Your Honor.

7 THE COURT: November 24th. And my order will
8 stay in effect until the Court rules on this issue.

9 MR. ZIMMERMAN: Thank you, Your Honor.

10 The next item on the agenda, Your Honor, is a
11 motion to participate in third party payer negotiations.

12 And I guess you've probably heard this droning message from
13 me a lot, that we think we should participate, and we have
14 filed various pleadings and various arguments before this
15 Court.

16 THE COURT: Is this ready for me to rule on?

17 MR. ZIMMERMAN: I don't believe so. We, I
18 believe -- we just got the brief of the Defendants Friday
19 night. Is that right? I believe Friday night.

20 MR. HOEFLICH: No, that's incorrect. I believe
21 it was the Plaintiffs who stated that it was urgent that
22 this be on the agenda for today so that --

23 MR. ZIMMERMAN: Can we just say when I got the
24 brief before you argue it? I think your brief in
25 opposition -- and I could be wrong, Adam, and I apologize

1 if I am -- is dated the 30th. So it came up on Verilaw on
2 the 30th at 3:00 p.m. and I was in a hearing in New Orleans
3 and I didn't get back and see it until Friday.

4 And so I would like at least to put in a reply to
5 that brief and set it for argument at the first possible
6 time. It's a very important issue, but I just don't
7 want --

8 THE COURT: How much time do you need?

9 MR. ZIMMERMAN: Two weeks.

10 THE COURT: The 24th?

11 MR. ZIMMERMAN: The 24th would be great.

12 The next issue, Your Honor, is the compliance
13 with the nondestruction of detail people's records. This
14 one is a little concerning to me.

15 And I think if you read carefully, as I have
16 tried to do, and I don't know that I have done a perfect
17 job, the very well written letters of Fred Magaziner and
18 Adam, I think they don't quite address the questions or the
19 directions issued by the Court's order of October 17th.

20 The order stated very clearly that the Defendants
21 shall mail notice of Pretrial Order 6 to the last known
22 address of all detail representatives, whether employees or
23 nonemployees, within 14 days of this order. That's
24 paragraph 3.

25 And I believe, if I have read their letters

1 correctly, at least Mr. Hoeflich has said they don't
2 believe that they must do that, that all they need to do is
3 notify employees and they are taking the position that they
4 don't have to notify nonemployees, noncurrent employees.

5 Now, again, I got this letter on the 31st. I
6 read it twice over the weekend, once I must admit while
7 watching the ball game, but once again this morning, and I
8 believe that's what they say.

9 They have gone through this elaborate process and
10 I give them absolute credit for what they've done to let
11 people know of Pretrial -- of a nondestruct and their
12 policy with regard to nondestruct, but there's no question
13 that they don't notify nonemployees or sales agents who are
14 not within the employ of Bayer.

15 GSK, on the other hand, tells us that they don't
16 have any of these kinds of people, all of their detail
17 people are within the employ. And so they say what they've
18 done applies to both a 4,000 group of -- about 4,000 sales
19 representatives and then moved it on to 8,000 at a later
20 date, and I don't quite understand the distinction.

21 However, I think the bottom line is they have not
22 complied with the order, Bayer, with regard to detail
23 people who are not within the employ or detail people who
24 were within the employ but are no longer within the employ.

25 And, again, Your Honor, all I -- this is a very

1 well written and very lawyer-like written set of responses.
2 And I just received them over the weekend, so I am standing
3 up here giving you an interpretation of a letter that I
4 believe leaves open the question of whether or not they are
5 in compliance with paragraph 3.

6 And to the extent that I am somewhat inarticulate
7 is because it's very hard to follow some of what they say
8 when they talk about their destruction policy. Well, is
9 that the same as the court order? Is their nondestruct
10 policy, which they sent by e-mail and voice mail and
11 re-sent and re-sent and did what they did to secure, is
12 that the same as Pretrial Order 6, which is very specific
13 as to what is supposed to be preserved and what isn't?

14 So I would like to be able to study this a little
15 more clearer [sic] and at least give you a letter, to the
16 Court, saying this is what I think they haven't done; or if
17 they have done everything --

18 THE COURT: Let's find out whether or not your
19 interpretation is correct. That's the easiest part.

20 MR. ZIMMERMAN: And here we have the people who
21 know.

22 THE COURT: Right.

23 MR. HOEFLICH: Judge, we believe we have complied
24 with all aspects of Pretrial Order 6. We have not taken
25 steps with regard to former employees or people who do not

1 work for us.

2 If Mr. Zimmerman has concerns about anything that
3 we have done, we are happy to meet with him and allow him
4 to submit a letter to the Court and have it heard at the
5 next conference.

6 MR. ZIMMERMAN: But the order said -- I'm sorry.

7 MR. HOEFLICH: We do not believe that
8 Mr. Zimmerman's reading of PTO 6 is the correct one. If we
9 obtain any sort of notice of what he believes the issues
10 are, we're happy to address them with him, but we believe
11 we have been in complete compliance. They have had
12 depositions of our people. There's no secrets about what
13 we have done to preserve documents.

14 THE COURT: There's a new order signed by me on
15 October 17th. Are you in compliance with that?

16 MR. HOEFLICH: We believe we are, Judge.

17 MR. ZIMMERMAN: How can you be if it says to send
18 it to nonemployees and you said you --

19 THE COURT: Wait a minute.

20 MR. ZIMMERMAN: I'm sorry.

21 THE COURT: You all can talk about this later and
22 you can file a motion dealing with this issue.

23 MR. HOEFLICH: We believe we are in compliance
24 with all of the Court's orders. We will talk to
25 Mr. Zimmerman. If there's any issues remaining, we will

1 bring them before the Court.

2 THE COURT: All right. Let's move on.

3 MR. ZIMMERMAN: Thank you, Your Honor.

4 THE COURT: d, the Court will take that under
5 advisement, II.d.

6 MR. ZIMMERMAN: II.b is under advisement?

7 THE COURT: II.d, as in dog.

8 MR. ZIMMERMAN: I beg your pardon. Yes.

9 We've dealt with e, Your Honor, with the
10 confidentiality order, PTO 24, at the beginning of the
11 calendar.

12 And we have talked about f, which is a list of --
13 I believe that's that list of 75 cases that are on the
14 trial calendar that I believe the Court just copied. Let
15 me just make sure that's right.

16 MR. BECK: Yes.

17 MR. ZIMMERMAN: Yes, Susan Weber did provide that
18 list of calendared cases, of about 75 cases that are set
19 for trial in state courts, and I do have that.

20 MR. BECK: And as I said, as best we can we will
21 add a column -- I know we can do that, we will add a
22 column; and then as best we can we'll fill it in as to what
23 the plaintiffs' lawyers say the injuries are in these
24 cases.

25 THE COURT: All right. Thank you.

1 MR. ZIMMERMAN: Roman numeral III, Your Honor,
2 the LAC Committee. Perhaps Special Master Haydock wants to
3 comment on this, but we have been working hard on a
4 coordination order for experts and I believe Special Master
5 Haydock would have a report on that.

6 SPECIAL MASTER HAYDOCK: Good morning, Your
7 Honor.

8 THE COURT: Good morning.

9 SPECIAL MASTER HAYDOCK: Yes, Your Honor. Over
10 the past several weeks we have had weekly telephone
11 conference calls with state court lawyers and Bayer and GSK
12 lawyers and PSC lawyers regarding a draft of an expert
13 deposition protocol order. And we are having another
14 telephone conference call this Thursday, which hopefully
15 will be the last call at which the parties can reach an
16 agreement and we will submit that resolution to the Court.

17 THE COURT: Thank you. In dealing with the
18 Liaison Advisory Committee, I would transmit to the state
19 court lawyers that I appreciate their time and effort that
20 they have put into this subcommittee.

21 And if there's anything else that we can do in
22 coordination or cooperation with the state court trials,
23 whether or not we can set up trials that are pared out to
24 whatever state court trials so the experts can be in the
25 same location so there's not added expense, any creative

1 way we can be cooperative for both Defense and for the
2 Plaintiffs on those state court cases, I would like to try
3 to do that.

4 MR. ZIMMERMAN: Your Honor, I think the record
5 should reflect that I am in negotiations and conversations
6 with a number of the state court lawyers on these issues as
7 to how we can work together with some of the same experts
8 and how we can be sharing information and data.

9 And those negotiations have been ongoing for the
10 past several weeks and they are continuing, and so we are
11 making some progress on that very tough issue of whose
12 expert goes where.

13 I tell you, Your Honor, it's a very difficult
14 issue and it's never -- in any MDL I have been involved in,
15 it's never been resolved legally. It's a very hard issue
16 of who retains and who has to pay for the use and all these
17 things that are kind of plaintiff intramural problems.

18 And I am trying very hard to work them out, but
19 they are very tricky and we are working on it and I see we
20 are making some progress. I may ask Special Master Haydock
21 to get involved if we get down to something that it looks
22 like we need help on.

23 THE COURT: Whatever cooperation the Court can
24 lend, I would like to do that for my brethren on the state
25 court bench so they don't have any difficulties in their

1 trials that they have experts that they need to try the
2 cases, both on Defense and Plaintiffs' side.

3 MR. ZIMMERMAN: Your Honor, it's a proprietary
4 issue having to do with the money.

5 THE COURT: I understand. I am just saying --

6 MR. ZIMMERMAN: It's very -- if it's not about
7 the money, it's about the money. It's about the money.

8 THE COURT: I understand that and I just want to
9 make sure that the state court lawyers understand that I
10 appreciate their effort on this MDL and being on the
11 advisory committee. If there's anything that the Court can
12 do to coordinate or cooperate in those state court trials
13 that are coming up, I would like to do that.

14 MR. ZIMMERMAN: Thank you, Your Honor.

15 The last is just an update on -- and I think it
16 may have been true at the time. I think I said I heard a
17 rumor that the conditional transfer order in the Medalie
18 case is now squarely before Your Honor and I believe
19 counsel for Medalie is here and so we've got that third
20 party Medicare case in this lovely court.

21 MR. STANLEY: Good morning, Your Honor. I'm
22 back.

23 THE COURT: Good morning.

24 MR. STANLEY: David Stanley from Cuneo, Waldman &
25 Gilbert. I represent Plaintiff Rick Medalie.

1 And after my last trip out here for the previous
2 status conference, we reconsidered our position and
3 withdrew our opposition to the conditional transfer order.
4 So the MDL panel has ordered us transferred. I have not
5 received any notice yet that we have been entered on the
6 docket, but I assume it has either happened or shortly
7 will. So we are here.

8 As I was making my reservations to come out here
9 last week and I discovered that the airport code for this
10 airport is MSP, I took that as a good omen, since our case
11 is brought under the MSP statute, and that we made the
12 right decision.

13 One thing I wanted to raise with the Court. I
14 know the Court issued an order with respect to the PSC's
15 motion on the nonexistence of the Medicare lien, which the
16 Court ordered briefing on the jurisdictional issue of
17 whether -- I guess the Government has to respond on the
18 merits, but I am a little unclear on that.

19 And that obviously is very closely related to our
20 case and we want to weigh in on that at the appropriate
21 time to put in our two cents' worth, but I would ask for
22 guidance from the Court as to when the appropriate time
23 would be.

24 THE COURT: I am looking if there's anyone from
25 the Government here, but I did receive today a letter dated

1 October 31st from Mary Tripler and she sent copies to Bayer
2 and also to Plaintiffs. I don't know if you received it
3 yet.

4 MR. ZIMMERMAN: No.

5 THE COURT: We'll make a copy of this for you so
6 you can have a copy of it. And then I would suggest that
7 you sit down with Mr. Zimmerman and set up a schedule so we
8 can hear this matter.

9 MR. STANLEY: Very well, Your Honor. Obviously
10 our position is somewhat related to the PSC's, but we part
11 company at a certain point.

12 THE COURT: Oh, of course.

13 MR. STANLEY: We certainly agree that what Bayer
14 is doing in extracting these indemnification provisions is
15 wrong and contrary to the law, but we part company with the
16 PSC shortly after that point.

17 MR. BECK: Of course.

18 MR. STANLEY: We have our own position we would
19 like to get in here at the appropriate time.

20 THE COURT: After this status conference why
21 don't you all sit down and figure out what you want to do
22 with scheduling.

23 MR. ZIMMERMAN: I think there is a briefing
24 schedule on that. I think we have something due -- there
25 is an order for briefing.

1 MR. STANLEY: There is, but I understood that the
2 Court's order said on the jurisdictional issue and
3 that's --

4 MR. ZIMMERMAN: That's kind of the preliminary
5 issue that Mary had raised; we may not be entitled to be in
6 this Court because of this, that, and the other.

7 MR. STANLEY: Our position, of course, is that
8 since we represent Medicare's interests, the issue really
9 is already before the Court.

10 MR. ZIMMERMAN: State that in writing.

11 MR. STANLEY: We've maybe --

12 MR. ZIMMERMAN: I like that argument.

13 MR. STANLEY: We've superseded that issue, we
14 believe.

15 MR. BECK: You may have a really good argument.

16 MR. STANLEY: That's our story and we're sticking
17 to it.

18 THE COURT: All right. I don't know if that
19 answers your question or not about the briefing schedule.

20 MR. STANLEY: Well, I think the brief from the
21 Government is due on the 14th.

22 MR. ZIMMERMAN: November 14th by the Government,
23 January 2nd by Plaintiffs.

24 MR. STANLEY: We're --

25 MR. ZIMMERMAN: Just on jurisdiction, though.

1 MR. STANLEY: That's just on jurisdiction, right.

2 THE COURT: Do you wish to respond, be a part of
3 that briefing schedule? If so, tell me and then --

4 MR. STANLEY: I think we should do that, Your
5 Honor. And I guess January 2nd, if that would be --

6 MR. BECK: That's fine with us, Your Honor.

7 MR. ZIMMERMAN: You know, Your Honor, I think
8 what you're really saying here is that you want to file
9 something or be allowed to file something that may be on
10 the same track with ours, but then differ at some point.

11 And without prejudicing each other, we will file
12 a response on that date. We will take a position and we
13 will be together on the positions we take together and then
14 we can separate on the positions that we separate on. And
15 I think we can probably get that done by that January date.

16 MR. STANLEY: That's fine.

17 MR. ZIMMERMAN: At least preliminarily on the
18 jurisdiction issues. And then as we go forward with the
19 briefing on the substance, you will be allowed to submit
20 your own brief if it differs in analysis or position from
21 the PSC's.

22 MR. STANLEY: That sounds good, Your Honor.

23 MR. ZIMMERMAN: Does that sound all right?

24 MR. STANLEY: Yes.

25 THE COURT: That sounds good to me. The January

1 date is agreeable to the Defense for you to respond?

2 MS. WEBER: The briefing that will be filed in
3 January will be related to the jurisdictional arguments
4 raised by the Government?

5 MR. STANLEY: That's a good question. I don't
6 know what the Government is going to say about the
7 jurisdictional issue. I just -- we just want to not miss
8 our chance to have our say.

9 THE COURT: Well, I'm not going to let you miss
10 your chance, because you didn't come all the way out here
11 to miss --

12 MR. ZIMMERMAN: See it snow.

13 MR. STANLEY: It was 80 degrees in Washington
14 yesterday.

15 THE COURT: It's 80 degrees in our skyway too.

16 MS. WEBER: Our position on this, Your Honor, is
17 whenever we get to the merits, of course we want everyone
18 to be heard. We want the merits going pretty much at the
19 same time on everything.

20 THE COURT: And I think I have allowed everyone
21 to say their piece. So if there's something that comes up
22 that Defense wishes to respond to that you have put forth,
23 I certainly will allow that to happen.

24 MS. WEBER: Thank you, Your Honor.

25 MR. STANLEY: Thank you, Your Honor.

1 MR. ZIMMERMAN: Your Honor, I think that
2 concludes our agenda, although Ron Goldser did hand me a
3 note and I didn't have an answer to it. Have we resolved
4 whether or not we are going to be doing discovery on
5 another group of cases or are we going to submit some
6 further argument on that? This is that point c under Roman
7 numeral I.

8 THE COURT: c and d of Roman numeral I?

9 MR. ZIMMERMAN: Yes. What do you want us to --

10 THE COURT: You have put it forth to the Court
11 and Defense wishes to have you put something in writing and
12 as a motion so they can respond to it. So it's in your
13 ballpark.

14 MR. ZIMMERMAN: All right. I just wanted it to
15 be clear. That's what we shall do.

16 THE COURT: It's in your ballpark on that issue.

17 MR. ZIMMERMAN: Okay. Very good. And then I
18 guess the next question is the next status. Are we going
19 to set a date for that?

20 THE COURT: The next scheduled discovery deadline
21 is what, December what, 2nd, I believe?

22 MR. ZIMMERMAN: We have the expert disclosures on
23 December 1st.

24 THE COURT: December 1st.

25 MR. ZIMMERMAN: Yes, December 1st. We have a

1 hearing in front of the Magistrate on the 14th.

2 UNIDENTIFIED SPEAKER: 12th.

3 MR. ZIMMERMAN: The 12th. I beg your pardon.

4 THE COURT: December 12th?

5 MR. ZIMMERMAN: November 12th. That's probably
6 too early.

7 THE COURT: Am I in town on the 9th of December?

8 THE CLERK: Yes, you're in town.

9 THE COURT: What about the 9th of December?

10 MR. ZIMMERMAN: For a status conference? I think
11 that's fine.

12 MR. BECK: Your Honor --

13 MR. ZIMMERMAN: No Cubs games, are there?

14 MR. BECK: No, there aren't. I know Your Honor
15 will be bitterly disappointed to learn this, but I will not
16 be able to attend the next status conference if it's in
17 December.

18 MR. ZIMMERMAN: Doggone it.

19 MR. BECK: I start a trial. I actually have
20 another client. I start -- just one, but doggone it, it's
21 got a trial coming up. So I start a trial the week before
22 Thanksgiving that is expected to go through the Christmas
23 holidays, so I'm out of pocket. And we have plenty of
24 other people who can cover it, but I will not be able to
25 attend a December status conference whenever it's

1 scheduled.

2 THE COURT: December 9th for your group, how does
3 that sound?

4 MR. HOEFLICH: That works, Your Honor.

5 THE COURT: 10:00, is that agreeable to the
6 Plaintiff?

7 MR. ZIMMERMAN: Yes, Your Honor.

8 THE COURT: All right. December 9th at 10:00.
9 Anything else that we have to deal with?

10 MR. ZIMMERMAN: No, Your Honor. Thank you.

11 MR. BECK: If we settle I will come, though.

12 MR. ZIMMERMAN: Well, that means it must have
13 been a crappy case if you settled; it must be worthless.

14 THE COURT: Or they dismissed.

15 MR. BECK: That's the only way it's going away,
16 Judge.

17 MR. ZIMMERMAN: You never pay anything, I know
18 that.

19 THE COURT: All right. Thank you again and I
20 appreciate all the hard work that you've put into this
21 matter and I will see you on December 9th.

22 MR. ZIMMERMAN: Thank you, Your Honor.

23 (Court adjourned.)

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

Certified by:
Lori A. Case, RMR-CRR

Dated: November 10, 2003