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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)	
)	File No. 15-MD-2666
)	(JNE/DTS)
In Re: Bair Hugger Forced Air)	
Warming Devices Products)	
Liability Litigation)	Minneapolis, Minnesota
)	April 26, 2019
)	10:11 a.m.
)	DIGITAL RECORDING
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BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(STATUS CONFERENCE)

Proceedings recorded by digital recording; transcript
produced by computer.

1 you, Mr. Szerlag.

2 All right. For the Defendants?

3 MS. LEWIS: Good morning, Your Honor. Debra Lewis
4 for Defendants.

5 THE COURT: Good morning.

6 MR. HULSE: Good morning. Ben Hulse.

7 THE COURT: Good morning, Mr. Hulse.

8 MR. HULSE: Good morning.

9 MR. HARTMAN: Ted Hartman. Good morning.

10 THE COURT: Mr. Hartman. All right.

11 So here's -- here's what I think we should do --
12 well, I don't know what we should do. But here's the way
13 I'm understanding the effort to arrive at some agreement on
14 the statute of limitations and statute of repose.

15 First of all, let me ask, are the parties in
16 agreement with respect to the statute of limitations as to
17 whether fraudulent concealment, if it's found, does, in
18 fact, toll the statute of limitations under each of these
19 state laws?

20 That's probably for you guys.

21 MS. LEWIS: Your Honor, Defendants did not do a
22 deep dive into investigation of fraudulent concealment.

23 What we did for purposes of the bucketizing was
24 just identify if there was a case in which fraudulent
25 concealment was alleged.

1 So I'm not sure we would be able to answer that
2 question without doing further research into fraudulent
3 concealment and whether it --

4 THE COURT: Okay. Ms. Lewis, make sure your
5 microphone is on, okay?

6 MS. LEWIS: It is.

7 THE COURT: I'm not going to get you guys get up
8 and come over, and get up and come over and get down and all
9 that stuff, but do make sure that the microphone is
10 activated.

11 Ms. Zimmerman, or others, is that -- I mean, you,
12 I suspect, have a different view of the merits of fraudulent
13 concealment tolling. But do you at least understand that
14 that's been their -- the Defendant's position so far?

15 MS. ZIMMERMAN: So it is Plaintiffs' understanding
16 that, without getting into the merits, that Defendants have
17 recognized that in each of the states on the chart, there is
18 either a statute, or some sort of case law that would say in
19 an appropriate situation, there may be fraudulent
20 concealment that tolls a statute, which is why we have this
21 chart, I guess, what they call them, it says FC for
22 fraudulent concealment.

23 I certainly understand that the Defendants aren't
24 conceding that the Plaintiffs have established facts to
25 establish fraudulent concealment. We think that we have.

1 As they note in their footnote, we think that *Partlow* -- in
2 the -- essentially the decision there controls in the MDL.
3 We disagree, I mean, at a minimum, that's one case and one
4 state. And that can't be applicable to everybody, because
5 we haven't done all the real substantive briefing.

6 But I think that for purposes of this exercise to
7 understand, is there the possibility of a fraudulent
8 concealment? I think we are in agreement that there is
9 potentially some language on --

10 THE COURT: I don't know if (inaudible) to be
11 saying that?

12 MS. LEWIS: Correct, Your Honor.

13 And, again, it was because we did not do a deep
14 dive into looking at it.

15 What we did is, we looked for every state on the
16 list to see, has a Plaintiff alleged fraudulent
17 concealment?

18 We did not do an analysis of what are the elements
19 of fraudulent concealment for each state? And whether there
20 were states in which the Court said even though it is
21 alleged, it is -- it would not be applicable or could not be
22 applicable either -- for whatever reason.

23 THE COURT: Well, I think the -- I'll be the first
24 to admit that this process -- and particularly, you know,
25 what I've put out there, may suffer from a lack of precision

1 and -- so let me see if I can be a little bit more precise
2 on this particular aspect.

3 I think the question on fraudulent concealment is,
4 does the state in question recognize the doctrine of
5 fraudulent concealment? And that -- in a case where the
6 doctrine were found to apply, would it toll the statute of
7 limitations?

8 That I think, maybe, that's a little more precise
9 a formulation of what I was hoping to hear the parties could
10 agree on.

11 But I'm hearing from you that you still don't --
12 you -- you are not in a position to concede that the answer
13 to that question in the states is yes, correct?

14 MR. HULSE: Correct. And we -- you know, if we
15 need to do some more briefing, we'd be happy to do so.

16 MS. ZIMMERMAN: And, Your Honor, if I may?

17 THE COURT: Please.

18 MS. ZIMMERMAN: So on Monday as we were exchanging
19 things and hoping to get this final chart to Your Honor, you
20 know, the last redlines that we exchanged at, I think 2:30,
21 the Defendants' language said the Defendants recognize that
22 each listed state has case authority addressing whether
23 fraudulent concealment is a tolling provision.

24 And so this is the thing where we got a new
25 certification at 3:50 that didn't recognize that, which has

1 been part of our conversation for two weeks.

2 So I don't know if the position changed or they
3 fundamentally understood it differently at that time, but I
4 guess that's really one of the fundamental disagreements
5 that popped up at the essential close of business on Monday.

6 So it has been our understanding that we weren't
7 doing full briefing on this. They're saying, look, we think
8 *Partlow* controls. We get that these states may have some
9 language, but anyways.

10 THE COURT: Understood. Here's -- here's what I
11 think may be the options.

12 First of all, by the way, the reason I started
13 with statute of limitations and statute of repose is because
14 I knew this was going to be the hardest to get agreement
15 on. And it may be impossible to do that as a -- as a
16 voluntary process.

17 We can deal, I think, in one of two things, at
18 least, maybe three things.

19 Either we can have the parties brief the issue on
20 a state-by-state basis of, what is the statute of
21 limitations?

22 I'm hoping that the parties at least agree on what
23 the limitations period is. Meaning it's two years or four
24 years, but maybe not.

25 Whether there's a discovery rule and what the

1 discovery rule requires and whether there's a fraudulent
2 concealment that would toll a statute of limitations.

3 And then the Court, whether it would be me or
4 Judge Ericksen, I think it's appropriately Judge Ericksen,
5 but she may refer it, I don't know.

6 The Court could decide, here is the law in
7 Alabama. The law is, for example, the law is that the
8 statute of limitations is two years. That there is no
9 discovery of the rule, or that there is and it requires
10 this. And that the doctrine of fraudulent concealment is
11 recognized and will toll the statute of limitations, but
12 here is the evidentiary burden.

13 We could have that kind of briefing and the Court
14 could make a ruling as to what the state of the law is.

15 That's only sort of a first step, right?

16 Because then when we have to either decide, here's
17 a general rule, the surgery with an axe, right? That cuts
18 off only this many, and then doesn't cut off a whole bunch.
19 Well, we can simply decide that there is some other way --
20 well, I think that's really statute of repose.

21 We could decide there's another way of addressing
22 this in a broad brush or simply decide it's not -- it's not
23 productive with respect to the statute of limitations.

24 I'm sure the Defendants would say (inaudible)
25 it's productive, we really want to get to that. I'm not

1 sure what the Plaintiffs would say.

2 So let me hear from the Plaintiffs first?

3 MS. ZIMMERMAN: Thank you, Your Honor.

4 I think an initial reaction, I guess, is what --
5 or what's the purpose of the exercise?

6 And if the purpose of the exercise is to better
7 understand the nature of the cases that comprise the 5500,
8 or however many cases that are before this district, from
9 the Plaintiffs' perspective I don't know that the detailed
10 substantive briefing, and back and forth argument and, you
11 know, potential appeal, which I think we'd all rather avoid,
12 is really going to be productive to the question about how
13 do we better understand these cases for either identifying
14 additional *Bellwether* cases for, you know, potentially
15 discussing possible resolution, if and when that gets to be
16 the point or, you know, remanding these cases?

17 And it seems to me, to the Plaintiffs, that those
18 are really, from what we're trying to do is understand what
19 the universe of cases are.

20 What we understand, there's going to be arguments
21 about statute of limitations. So much of that is going to
22 be case -- case specific facts. But I don't know that it's
23 the best use of the parties' time right now, and the
24 Court's, time to fully brief -- and I don't know how many
25 states we have on here, but quite a few. About essentially,

1 what is the statute, what are the ways in it might be
2 tolled, what's the trigger. You know, is it when the blower
3 is sold? Is it when -- I mean, some of that's statute of
4 repose. But is it when the blower is sold? Is it when the
5 blanket is sold? Is it when the surgery happens?

6 There's a lot of information out there that really
7 gets, I guess, into the weeds and I don't know maybe moves
8 the ball forward for purposes of this exercise.

9 MR. HULSE: Your Honor, if we may respond?

10 We believe that the parties have agreed on certain
11 aspects, such as here's what the statute said is the correct
12 year, the period. And whether there's discovery or not, we
13 have put in our chart submission the different parties'
14 positions.

15 So I think that part is done. So we would like
16 the schedule to stay on track, as it is.

17 We have our charts for statute of limitations, and
18 statute of repose ready to be submitted to Plaintiffs this
19 coming Monday.

20 And we would suggest that if any briefing needs to
21 be done on fraudulent concealment that should not stop us
22 from getting the various cases into the various buckets.

23 THE COURT: Yeah. I -- here's I will let you
24 respond to that Ms. Zimmerman.

25 Here's what I thought the purpose of the exercise

1 with respect to statute of limitations and statute of repose
2 were.

3 I think, broadly speaking, I was hopeful that we
4 could, even recognizing that a lot of this is going to be
5 very nuanced and fact specific from case to case, that we
6 could have, in essence, some clarification around, okay,
7 these set of cases -- you know, we just know they're
8 untimely. And maybe that's a very, very skinny list.

9 And this set of cases, which is, I frankly would
10 presume, quite broad, the vast majority of cases are, we
11 know they are timely and we're not going to be spending
12 Court time or parties' time negotiating or briefing that
13 issue.

14 And then we have this third group where the
15 timeliness is going to be a matter of debate between the
16 parties.

17 And so I was hopeful that we could use this
18 process to at least to arrive at those sort of three
19 categories.

20 And I do recognize that's -- that's very -- it
21 really benefits the Defendants to do that. And that is very
22 treacherous waters to say on any Plaintiff case, look, we
23 just know this one is untimely.

24 But that was -- that was the hope here, is that we
25 could come up with some bright line that no matter what it's

1 just going to be really, you know, inarguable.

2 But maybe that's -- right now we're just talking
3 about statute of limitations. It might be different with
4 statute of repose. But let's just focus for a moment on
5 statute of limitations.

6 Ms. Zimmerman, your reaction to my comments?

7 MS. ZIMMERMAN: Well, I think that it would be
8 great if we could do that. And I think part of this all
9 goes back to what the purpose is, what we're trying to
10 understand about this.

11 And so, it's one of the reasons that we put this
12 preliminary statement at the beginning that, look, we think
13 that the parties, you know -- obviously we're adversaries,
14 but we engage in this process in good faith and sometimes
15 we're going to disagree.

16 But we want to make clear that the purpose from
17 our perspective is to better understand these cases. And
18 that the chart and the language that we have kind of worked
19 with Defendants on is something that we're prepared to agree
20 to for purposes of this exercise.

21 But we don't want the Court or Defendants to hear
22 us to be saying, we will be foregoing real substantive
23 briefing on, you know, whether or not fraudulent concealment
24 is essentially recognized in Alabama, for example --

25 THE COURT: Right.

1 MS. ZIMMERMAN: -- for each of these individual
2 cases.

3 So I think that, you know, pursuant to, you know,
4 protections of Rule 408 and that sort of thing, I think that
5 there's a way to kind of figure out, how do we learn about
6 these cases?

7 Are there some -- is there some surgery by axe
8 that we can do so that we kind of all understand as best we
9 can, you know, that kind of nobody thinks there's a fight
10 here, everybody thinks they're timely cases. I guess maybe
11 everybody thinks that these are untimely and then there's
12 some other -- there's some more discovery or nuance that we
13 need to know about. But I think kind of getting there is a
14 difficult process.

15 I mean, for the Plaintiffs to say, I mean,
16 particularly, if you take *Partlow* as an example, she was a
17 woman from Alabama. She filed her suit here. She believed
18 that Minnesota law should apply. She asked that Minnesota
19 law apply.

20 And she would have been, as I understand it,
21 timely under the Minnesota Statute of limitations.

22 But perhaps in Alabama, it, you know, where
23 there's two years, she wouldn't have been within two years.

24 But then if Alabama also recognizes fraudulent
25 concealment to toll that two-year period, you know, given

1 what we believe the facts to be, and that 3M has not
2 recognized that this is actually a risk involved with their
3 product, and they've continued to cover this up, that that
4 does meet the burden of fraudulent concealment.

5 THE COURT: They don't agree with your
6 characterization.

7 MR. HULSE: If I may, Your Honor, and not to argue
8 on the merits of this, but just talking about the process.

9 I think where we ran into trouble in this latest
10 exercise, is maybe trying to be too ambitious in reaching
11 agreement about the things that the parties are just simply
12 bound to take their advocacy positions on.

13 I mean the Plaintiffs understandably are not going
14 to concede that discovery rules don't apply. That even if
15 you've got, you know, a lawsuit filed, you know, 10 years
16 after the index surgery that there couldn't be a discovery
17 rule.

18 I understand that they have their obligations to
19 their clients.

20 This is why, I think sort of the -- the initial
21 approach, which is we reach agreement on the actual just
22 lengths is good. That we do, I think we have agreement on
23 most of those.

24 And then those issues like the discovery rule, and
25 then we can classify the cases, bucketize them, and then we

1 deal with, on the back end with, okay, so we have a dispute
2 on fraudulent concealment, we have a dispute on discovery
3 rule.

4 Generally if there's a discovery rule that's
5 applicable. That's just going to have to kind of go to the
6 side, right? There's nothing we can do about it.

7 But just to put some meat on the bones, I mean,
8 we're going to, I think the numbers we've got about
9 700 cases, is that right, Ted? 700 cases and no discovery
10 rule states and where really the only issue is going to be
11 whether fraudulent concealment applies or not.

12 And in *Partlow*, we think *Partlow* show the way that
13 you can resolve that without getting into facts or
14 case-specific issues.

15 But that's an issue that we think is more properly
16 dealt with on the back end than trying to reach agreement on
17 it, which is I think not going to be possible on the front
18 end.

19 And also to a degree we were -- and this comes up
20 also with statute repose, we were working on these in the
21 abstract instead of talking about a specific group of cases.

22 Some of these legal disputes are never going to be
23 live legal disputes. You know, we will have states where we
24 just don't have cases or don't have a meaningful number of
25 cases, we just simply won't need to fight out the legal

1 issue where we would, maybe, for some of these larger
2 states.

3 So that's just all coming back to saying that we
4 think that fraudulent concealment and discovery rule are
5 issues that we better deal with through -- through some kind
6 of briefing process on the back end after we've completed
7 the bucketizing.

8 MS. LEWIS: And, Your Honor, as you note, you
9 know, there is a provision within your order for objections
10 to be made at which time since in these spreadsheets every
11 single case is on there, we can then learn what the specific
12 objection is for that particular case.

13 THE COURT: Yeah. I think -- right.

14 I think the difficult thing is going to be -- I
15 don't know how fair it is to the Plaintiff to require them
16 to object specifically in each and every case.

17 Here's what I'm struggling with. I don't know
18 that -- I agree that certainly, one, if not the overarching
19 purpose of this exercise is to understand what the cases
20 are, right? And to put them into various categories so that
21 we know where things fall generally.

22 I'm now skeptical that the second goal with
23 respect to at least the statute of limitations of
24 identifying those cases, you know, which really they're just
25 untimely, I don't know if we can get there or not.

1 We can certainly get to those cases that we know
2 are within the statute of limitations. I mean, that's just
3 not right.

4 I mean, the statute of limitations is five years,
5 the surgery was in 2012, the lawsuit was in 2013. We're
6 done.

7 So what I'll do on statute of limitations, I
8 think, is probably revise what I want you to do and at least
9 maybe the -- maybe the less controversial categorizing would
10 be just, again, using Alabama as an example.

11 The parties agree that the statute of limitations
12 is two years. Here's a list of cases in which the suit was
13 filed more than two years after the initial surgery.

14 Here are a list of cases where the suit was filed
15 within two years. I mean, maybe -- I mean, that way at
16 least we know where they fall. Obviously in the first
17 category the Plaintiffs are not going to at least just as
18 part of this process say, all right, we give up. So, right?

19 MS. ZIMMERMAN: We're undeterred.

20 THE COURT: Yeah, you're undeterred.

21 MS. ZIMMERMAN: I think that one complication,
22 Your Honor --

23 THE COURT: Yeah.

24 MS. ZIMMERMAN: -- not to make the project more
25 difficult but, for example, with *Partlow*, again, who is from

1 Alabama, her argument, anyways, was that Minnesota law
2 should apply.

3 THE COURT: Right.

4 MS. ZIMMERMAN: And I understand what the Court's
5 ruling was, but there may very well, and we certainly expect
6 there will be, Plaintiffs that have -- that are from
7 different states and have said in their complaints that they
8 think that, you know, they would have filed in Minnesota,
9 and that Minnesota law should have applied.

10 That issue is not yet before the Eighth Circuit.
11 I expect it will be before the Eighth Circuit?

12 THE COURT: Which case, *Axline* or *Trombley*?

13 MS. ZIMMERMAN: No. *Axline* --

14 I don't know if *Partlow* will be appealed or not.
15 But I think the issue --

16 THE COURT: Okay. So *Partlow* would the vehicle
17 for that.

18 MS. ZIMMERMAN: It may be, yes.

19 Or a subsequent case where a Plaintiff decided to
20 take the issue to the Eighth Circuit.

21 So I -- what I guess when I think about a
22 spreadsheet it may well be saying *Partlow*, there could be
23 two cases or two states that would potentially apply.

24 So maybe she comes -- her name appears under
25 Alabama two years, and it was filed timely or not, she might

1 also say but actually I'm in Minnesota.

2 And I think that that is probably a spot we're
3 going to end up with some disagreement. Because I think
4 that there's a fair number of Plaintiffs, obviously none of
5 -- anybody who invoked Minnesota law couldn't have been a
6 Minnesota resident, because they would have been in state
7 court, there's no --

8 THE COURT: Right.

9 MS. ZIMMERMAN: So anyone who invoked Minnesota
10 would be from another state. And I just think that that is
11 issue out there.

12 But I wonder if, and I don't want to predict
13 agreement, I do think, by the way, that on the statute of
14 repose --

15 THE COURT: I wouldn't do that, if I were you.

16 MS. ZIMMERMAN: No.

17 On the statute of repose, I think that we, at
18 least for purposes of this exercise, agreed for the most
19 part, on most -- at least the number of years involved.

20 But to the extent that Mr. Hulse just perhaps
21 represented that we could deal with the statute of
22 limitations on the fraudulent concealment on the back end, I
23 think that the parties could agree on that.

24 THE COURT: Right.

25 MS. LEWIS: Your Honor, may I also sort of --

1 THE COURT: Please.

2 MR. HULSE: -- mention also.

3 Just based on the content of the charts from the
4 two various parties. There were at least some states in
5 which the parties don't disagree about no discovery rule
6 applicable.

7 So, you know, it could even be that for those
8 states there's not really disagreement where we would need
9 further briefing.

10 THE COURT: Well, those Plaintiffs are undeterred.

11 So even where they agree that there's no discovery
12 rule, they at least, it appears to me, have articulated the
13 theory that would essentially allow them to say that the
14 injury doesn't occur until much later than the actual
15 surgery.

16 So let's -- let's do this. I'm going to take a
17 good hard look at what you've submitted on statute of
18 limitations and revise how we go about that process.

19 I think even if we end up with the situation where
20 we've put cases into categories and -- let's just say
21 there's 1,000 cases in the category where the lawsuit is
22 five years beyond the statute of limitations period.

23 Even if we put that -- even if we put cases into
24 that category, it may be, you know, that the Court can't
25 summarily dismiss, but maybe the Plaintiffs will look at it

1 and say, you know what, I'm not sure this is worth it. You
2 never know. Maybe they will, maybe they won't.

3 But there's at least some value in understanding
4 what the cases are. And maybe the way to go about it is,
5 we'll get agreement on the limitations period. We'll get
6 agreement on, these cases were filed within the
7 limitations -- within two years of the surgery, or whatever
8 the limitations period is. And maybe we have another
9 category or two that says the suit was filed more than two
10 years past, you know, the limitations period more than --
11 with -- without prejudice to the Plaintiffs.

12 It wouldn't be an admission that the Plaintiffs
13 are making that it's untimely. But that, okay, this
14 particular lawsuit, it was filed more than five years beyond
15 the five years from the initial surgery. They now know,
16 okay, we have an issue, is it an issue worth fighting on?

17 So maybe we'll -- we'll -- I'll revise it to
18 really make it much more objectified so at least we have
19 categories that you can agree they are within this
20 definition.

21 Does that make sense?

22 MS. LEWIS: I'm just trying to think if our
23 spreadsheets would already provide that data.

24 MR. HULSE: So the way that our spreadsheets are
25 set up now, is they're within the statute of limitations

1 based on index surgery. And one of the states with the no
2 discovery rule, according to the ones that are listed here,
3 they're put into either a timely or untimely categorization,
4 one of two, it's bifurcated.

5 So we could just change the title of that and
6 ultimately provide the same data as it sounds like the Court
7 is contemplating, where we would at least give a breakdown,
8 it would give the date of the index surgery, the date of
9 filing for every one of these cases, and tell you whether
10 it's timely or untimely based on the time period, setting
11 aside questions about, you know, fraudulent concealment and
12 these sorts of exceptions to statutes.

13 So that data already exists. It sounds like we're
14 just changing the titles of how we would frame that.

15 THE COURT: Well, and I might be asking you to cut
16 the data, make another cut of the data where you identify
17 those cases that are significantly beyond the statute
18 period, something like that.

19 But let me -- I understand your point. Let me
20 think about that.

21 Look, when it comes to these timelines in the
22 Court order, right, I don't want to have to go back and, you
23 know, recalibrate every timeline.

24 But I'm not going to be yelling at you guys
25 because this process ends up taking longer than what I

1 ordered, right?

2 Because really the goal isn't to, you know, have
3 deadlines, the goal is to have the thing done and keep
4 moving.

5 Okay. Statute of repose, that one still feels a
6 little different for me. Do -- let me ask you this, do we
7 have agreement that a statute of repose exists in the
8 identified states and as to its period? Do we have that
9 much agreement?

10 MS. LEWIS: I believe so, Your Honor.

11 MS. ZIMMERMAN: Yes.

12 THE COURT: Excellent.

13 MS. ZIMMERMAN: And if it would be helpful, Your
14 Honor, if you look at the chart, I don't know enough -- as
15 much as maybe you guys do, given that you've been working on
16 your chart, but for the most part, the statute of repose
17 period is like 10 or 15 years. And at least from our
18 perspective, we just don't think it's going to come into
19 play very often.

20 And for purposes of this exercise, we have an
21 agreement that for putting the -- for categorizing the cases
22 it's going to be index surgery. So index surgery, 10 years,
23 I mean, I think --

24 THE COURT: Yeah. Because I think -- that was my
25 thought was we would use the date of the index surgery,

1 because we know that the triggering event would be no later
2 than that for purposes of statute of repose, right?

3 MR. HULSE: Right.

4 THE COURT: What's uncertain to me is, let's say
5 the triggering event is sale of the Bair Hugger. Is that
6 the sale of the first Bair Hugger? Is it the sale of the
7 Bair Hugger that's used in the person surgery? You know,
8 that level of detail, if we're going to do that, you might
9 as well do, you know, litigate every one of your cases right
10 now, right?

11 MS. ZIMMERMAN: Precisely.

12 THE COURT: Okay. I do think that there would be
13 value in continuing along that path.

14 And then categorizing those cases that are --
15 making the following assumptions, right? Using the state
16 law of the place where the surgery occurred, using the index
17 surgery as the triggering event, which cases fall within and
18 which cases fall without, right?

19 MS. LEWIS: Correct.

20 THE COURT: And I think you can get to agreement
21 on that, can't you?

22 MS. ZIMMERMAN: I think we're there.

23 THE COURT: You're there. Okay.

24 MS. LEWIS: We just, again, wanted to be clear
25 since it wasn't very clear from the papers submitted that

1 the Defendants still reserve the right, once it gets into
2 that bucket, you know, the bucket on --

3 THE COURT: The timely one. That it may not, in
4 fact, be timely.

5 MS. LEWIS: Well, that it may be -- that we would
6 be able to quickly determine -- because some of the repose
7 statutes say delivery and not sale.

8 THE COURT: Right.

9 MS. LEWIS: And for those just having the ability
10 for -- for those cases to go back and take a look to see how
11 easy that information could be obtained.

12 THE COURT: Okay.

13 MS. LEWIS: But we're -- we're absolutely in
14 agreement to get this process going in the buckets already.

15 THE COURT: Right.

16 MS. LEWIS: That we're using the index surgery to
17 get it started.

18 THE COURT: Okay. So what might be then -- what
19 might be helpful to the parties as a result of that process
20 is you -- you may have -- using those two assumptions, you
21 may have a category of cases, again, where the Plaintiffs
22 say, It's just not worth our time.

23 You may also have a category of cases where the
24 Defendants say, We're just not going to dig into this issue.
25 It's not worth our time.

1 And that process, you know -- getting a handle on
2 the cases in and of itself has value, I think.

3 So why don't we proceed along those lines with the
4 statute of repose, as you're doing. It doesn't -- nobody is
5 conceding anything as a legal matter.

6 When that -- when those buckets are filled with
7 whatever is they're full of, you then -- then I'll look at
8 them and, you know, if we think there's further progress
9 that can be made, great, we'll talk about it.

10 If you each think there is, great, we'll talk
11 about that.

12 But if there's not or if we can't reach consensus,
13 then at least having those categories will be of some use.
14 Okay?

15 MS. LEWIS: Yes. And, Your Honor, and we
16 inadvertently left off Illinois. It needs to --

17 THE COURT: Say that again?

18 MS. LEWIS: We inadvertently in our charts
19 submission left off the State of Illinois for statute of
20 repose.

21 THE COURT: Okay.

22 MS. LEWIS: And so we just want to -- it's a part
23 of the process. We just wanted to make sure that it's back
24 on pursuant to your order.

25 THE COURT: Okay. All right. Good. Thank you.

1 So, just to make sure we're all on the same page.

2 I need to do a little bit more thinking about the
3 statute of limitations, and I'll provide a little further
4 guidance, okay?

5 MS. LEWIS: Thank you.

6 THE COURT: You guys will continue on with the
7 statute of repose as you've been going, correct?

8 MS. ZIMMERMAN: Yes.

9 THE COURT: Okay. While you're all here, let me
10 ask the Plaintiffs, is there anything else that you think we
11 should discuss? God, I hate to have asked that question,
12 but you're here.

13 MS. ZIMMERMAN: Thank you, Your Honor.

14 I do think we started, I think, bringing up in
15 maybe March at one of our hearings, or maybe it was
16 February, I think it would be helpful for the parties to
17 have the Court, perhaps supervise either in chambers or in a
18 hearing like this, a kind of housekeeping how to -- how do
19 we kind of go from where we are right now, beyond just the
20 buckets, but where are we going next?

21 Are we getting ready to try *Trombley*? Are we
22 getting ready to repopulate the *Bellwether*?

23 How are we going to do amendments to cases that
24 are potentially -- to the complaints for those cases that
25 are potentially nominated as *Bellwether*?

1 What are we going to do about, you know,
2 additional cases tried here or remand?

3 And I think that there's really a lot of potential
4 areas that the parties would benefit from the Court's kind
5 of supervision of. And whether that ends up being a
6 discussion that leads to an amended scheduling order, I
7 don't know. But cleaning up the docket on some of the
8 sealed documents, I know we've talked about that.

9 We've got the expert issue I know that Your
10 Honor's considering the motion to strike.

11 But there's -- there's a lot of kind of, I think
12 kind of housekeeping issues that, frankly, as much as we
13 kind of meet and confer, I think it's going to require the
14 supervision of the Court.

15 THE COURT: I concur that it will require some
16 supervision.

17 I'll come back to that in a second.

18 Anything in addition or different from that?

19 MR. HULSE: We know it's a little larger than
20 housekeeping to us.

21 But things that are genuinely housekeeping, like,
22 under seal matters, of course, we're happy to -- and we need
23 to meet and confer and get those taken care of.

24 THE COURT: Right.

25 MR. HULSE: Others, you know, will, of course,

1 depend on what Judge Ericksen does with the pending motion.

2 THE COURT: Has that been argued yet, or is it
3 scheduled for argument?

4 MR. HULSE: It's scheduled for May 16th.

5 THE COURT: May 16th.

6 MR. HULSE: Yes. I assume you'll be invited.

7 THE COURT: Well, yeah. We might want to note
8 that on the Cal doctor somewhere.

9 UNIDENTIFIED MALE SPEAKER: May 16th. I think
10 it's at 9:00 or 9:30 in the morning. It just got set this
11 week.

12 THE COURT: Okay.

13 MR. HULSE: It's in lieu of --

14 THE COURT: I knew that.

15 MR. HULSE: It's in lieu of the status conference.
16 So the status conference is canceled.

17 THE COURT: Okay.

18 MR. HULSE: And then there's one set for June.

19 THE COURT: So however long it takes Judge
20 Ericksen to rule on that, I'm happy to hold, whether they're
21 formal or informal gatherings on a periodic basis like this.
22 I probably ought to discuss that with Judge
23 Ericksen, because she may find that that's really hers, not
24 mine, but I don't think she'll care. And I'm happy to do
25 that and I think it might be productive.

1 Are you opposed to that at all?

2 MR. HULSE: Not opposed to it, Your Honor. Not at
3 all.

4 I think the -- obviously some of those issues Ms.
5 Zimmerman brought up really very much depend on what Judge
6 Ericksen says.

7 Because as you've noted before, Your Honor,
8 there's three possible outcomes on that motion. And then
9 there's an intermediate outcome that, you know, which is
10 neither, you know, a complete win for either side, which may
11 have a significant impact if the Court were to go down that
12 path on what we do about *Bellwether* going forward.

13 THE COURT: Right. That's well possible.

14 So a couple of -- then going back to your comment,
15 Ms. Zimmerman, a couple of, I guess, matters you guys should
16 all be aware of.

17 We do, in fact, know about the *Trombley* expert
18 motion. And when *Trombley* went away, we put that to the
19 back of our queue because there were other flaming piles on
20 my desk, but we're still working on it. I -- we still
21 intend to issue an order on that.

22 And unless I'm wrong on this, my recollection is
23 our intention is to not only rule on it specifically in
24 *Trombley*, but also provide, perhaps, a little bit more
25 clarity going forward on the -- the general topic of the

1 issues raised by that motion, correct?

2 I know, it's whatever you say, Judge, right?

3 UNIDENTIFIED MALE SPEAKER: My understanding the
4 way the parties have filed this thing was to exclude it in
5 any and all other matters in the MDL.

6 MS. ZIMMERMAN: That is how it was filed.

7 THE COURT: Right.

8 MS. ZIMMERMAN: In large part, because the motions
9 to exclude Plaintiffs' experts last fall were also filed.

10 THE COURT: Right.

11 Well, and I think it's -- I think it would be
12 helpful to the parties if, you know, we not only address the
13 issues in particular in those motions, but also to the
14 extent that we can provide greater clarity about where we
15 think the lines are.

16 MS. ZIMMERMAN: Your Honor, if I could make a
17 brief --

18 THE COURT: Yep.

19 MS. ZIMMERMAN: -- observation, as well.

20 So as practitioners here in the District of
21 Minnesota, the District of Minnesota is well-known for
22 handling MDLs and handling them ably.

23 And for one of the things -- one of the reasons I
24 think it makes sense to have this kind of a housekeeping
25 meeting and talk about how we move this case, where we're

1 at, where we're going and how we're going to get there, is
2 to continue to make sure that people that are observing this
3 MDL see that we are handling it well and making sure the Ps
4 and Qs are minded.

5 I was at a --

6 THE COURT: I'm all in favor of that.

7 MS. ZIMMERMAN: Right. Well, so I was at the JPML
8 argument about a month ago and there was a big MDL that was
9 slated, lot of people thought to come here.

10 THE COURT: Yeah. It was a 3M one?

11 MS. ZIMMERMAN: It was. And the chief judge of
12 the JPML asked one of the Plaintiffs who was arguing for
13 Minnesota whether it was possible for a Plaintiff to get a
14 fair trial in Minnesota against 3M.

15 THE COURT: Okay.

16 MS. ZIMMERMAN: And that case has now gone to
17 Florida.

18 So I don't know what -- I don't know what Judge
19 Vance was getting at with that, but as somebody who intends
20 to practice here for another 25 years, I want to make sure
21 that we're getting it right and that we know where we're at,
22 and where we're going and how we're going to get there.

23 MR. HULSE: I'm not clear what's being insinuated
24 here honestly.

25 THE COURT: I --

1 MS. ZIMMERMAN: I just want to make sure that we
2 are aware of kind of how we have scheduling orders, what
3 we're going -- what we're going to do about cases that we're
4 moving forward.

5 THE COURT: I -- and I think that before -- before
6 you speak, let me say this.

7 Whatever generated that particular judge's
8 question, I can tell you that in my view, unequivocally, any
9 Plaintiff can get a fair hearing and trial against 3M in the
10 District of Minnesota.

11 To the extent that that -- that there is a
12 perception that that might not be the case, you know, I -- I
13 share the Plaintiffs' view that we should do what all is
14 appropriate to make it clear that that is an uninformed
15 opinion.

16 That's not to say that Plaintiffs will always be
17 pleased with every ruling they're going to get.

18 Frankly, you've been battered and bruised over the
19 course of the months that I've been involved in this. And
20 to the extent that that's me, it's not because I dislike the
21 Plaintiffs or their Counsel.

22 But Mr. Hulse, you want to weigh in?

23 MR. HULSE: I do not, Your Honor.

24 THE COURT: Okay. I will tell you -- well, I
25 probably better not. Never mind.

1 With -- and so the second sort of housekeeping
2 matter, as it were, we've been holding on to, deliberately,
3 motions to substitute because there were also corresponding
4 motions to dismiss.

5 And it seemed, at best inefficient, and possibly
6 ill-advised for us to be weighing on substitution when Judge
7 Ericksen would have to decide dismissal.

8 And so we've been awaiting her decision before
9 ours, which I think we will continue to do and that seems
10 appropriate to me, but.

11 Any other questions about what's going on, you
12 know, in the black box that is our chambers?

13 No?

14 UNIDENTIFIED MALE SPEAKER: No, Your Honor.

15 MS. LEWIS: No, Your Honor.

16 THE COURT: Okay. Anything else we should be
17 doing today?

18 MS. ZIMMERMAN: I don't think today.

19 THE COURT: Okay. Let's go off the record for a
20 second.

21 (Court adjourned.)

22

23

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24

25 I, Lynne M. Krenz, do certify the foregoing
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to contain, of the proceedings recorded at the time and place hereinbefore mentioned.

/s/Lynne M. Krenz
Lynne M. Krenz, RMR, CRR, CRC

Date: April 29, 2019