

UNITED STATE DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: BAYCOL PRODUCTS LITIGATION MDL No. 1431

This Document Relates to:

All Actions

PRE-TRIAL ORDER NO.97

**STIPULATION AND ORDER AMENDING PRE-TRIAL ORDERS 7 AND 63
REGARDING PROTOCOL FOR DEPOSITIONS OF PLAINTIFFS AND
DEFENDANTS GENERIC EXPERT WITNESSES**

The parties and lawyers in both Federal and State cases in the Baycol Litigation have continued their cooperative work, through the Liaison Advisory Committee of this Court (the “LAC”), in coordinating discovery for certain matters. This Stipulation and Order addresses the protocol for depositions of Generic Expert Witnesses. This Court has reviewed and approves those changes and incorporates them in this Order.

THEREFORE, IT IS HEREBY ORDERED:

Plaintiffs and Defendants (the “Parties”) have agreed to the following protocol (“Deposition Protocol”) for the depositions of Generic Expert Witnesses. To the extent that this Deposition Protocol is inconsistent with Pretrial Order No. 7 in the MDL Proceedings (MDL No. 1431), the procedures set forth in this Deposition Protocol shall govern the depositions of all generic experts, as defined herein.

WHEREAS, Plaintiffs and Defendants in cases involving the use of Baycol (the “Baycol Litigation”) have cooperated in coordinating and taking depositions of Bayer AG witnesses;

WHEREAS, Plaintiffs and Defendants in the Baycol Litigation acknowledge that the same experts may be designated in multiple cases pending in Federal and/or State Courts to testify about issues that are common to multiple cases and do not relate only to a particular plaintiff (“Generic Experts”);

WHEREAS, the parties who have retained Generic Experts in the Baycol Litigation desire that these Generic Experts not sit for discovery type depositions by opposing counsel multiple times;

WHEREAS, Plaintiffs’ Counsel who have retained Generic Experts maintain the exclusive right to the videotapes, transcripts and the unique exhibits of such Experts and therefore this PTO shall not convey or create access to or the use of such videotapes, transcripts or unique exhibits at trial by other plaintiffs’ counsel who have not retained the Expert; and

WHEREAS, the parties wish to continue working together to coordinate expert discovery of generic expert witnesses in the various proceedings.

NOW, THEREFORE, it is hereby agreed as follows:

1. Following the date of this Order, plaintiffs and defense counsel will cooperate to insure that Generic Experts are deposed about their generic opinions once, unless the expert changes an opinion in a material way.

2. Notice of a plaintiffs’ Generic Expert deposition proceeding under this PTO will only be served on counsel who have retained the expert and who agree to participate in the taking of expert discovery as set forth in this PTO. The list of counsel who have retained the expert must be obtained from the plaintiffs counsel in whose case the deposition is originally noticed, and then provided to defendants who will issue the notices and cross-notices to counsel on the list to the extend permitted by law.

3. When the deposition of a defendants' Generic Expert is noticed by a plaintiff, the defendant offering the Generic Expert may send notices (or cross-notices) relating to the depositions of its Generic Experts to plaintiff's counsel in cases in which the defendant anticipates using the expert to the extent permitted by law.

4. Nothing herein shall preclude a party who is offering an expert who is expected to testify about issues that are common to multiple cases ("Generic Issues") as well as issues that are case specific from sending notices (or cross notices) relating to that part of the deposition that addresses Generic Issues to counsel representing other parties in the Baycol Litigation, subject to the restrictions of paragraph 2 and to the extent permitted by law.

5. Questioning of plaintiffs' Generic Expert shall be by one attorney designated by Bayer and one attorney designated by GSK, and questioning of defendants' Generic Expert may be conducted by two attorneys selected by the plaintiffs. Unless leave of Court is granted, no deposition of any Generic Expert shall last more than seven hours of actual deposition time with respect to the expert's generic opinions. There will not be time allotted for, and no party shall conduct, a trial preservation style direct examination of the witness.

6. If a trial preservation direct examination of the plaintiff's witness is needed, then it will be conducted in a separate deposition, noticed in accordance with paragraph 2 with adequate safeguards to insure that there is no unauthorized use of the testimony or exhibits.

7. If a defendant wishes to notice the deposition of its own Generic Expert for the purpose of preserving his or her testimony for trial, defendant may send notices of the deposition to counsel in all cases in which the defendant anticipates using the Expert.

8. Upon the completion of the deposition of a Generic Expert in the Baycol Litigation for whom notice was given in accordance with paragraphs 2, 3 and 7 above, no further deposition of a Generic Expert shall be taken by an opposing party unless:

- a. In a case where an expert report is required, the expert report that is served in that case is not different, in any material way, from the report on which the Generic Expert was previously examined in the Baycol Litigation; or
- b. In a case where an expert report is not required, the Generic Expert will be offered to testify about opinions or issues (i) not disclosed in a previous deposition taken in the Baycol Litigation or (ii) not covered in the expert report on which the Generic Expert was previously examined in the Baycol Litigation (collectively, “Undisclosed Issues”).

9. In the event that a Generic Expert provides a report that is different in any material way from the report on which he was previously examined in the Baycol Litigation, any party may depose the Expert on those portions of the expert report that are different.

10. In the event that a party, in a jurisdiction that allows depositions of experts or in cases in which the parties jointly agree to take depositions of experts, intends to present a Generic Expert in a case where an expert report is not required and the Generic Expert will be offered to testify about Undisclosed Issues, the party presenting the witness shall advise all other parties in the case in writing that the Expert will be offered to testify about Undisclosed Issues sufficiently in advance of the close of discovery for expert depositions so that a deposition of such expert can be arranged for examination on the Undisclosed Issues.

11. By noticing the deposition of a Generic Expert pursuant to this Protocol for the purpose of avoiding multiple depositions of such Expert and by attending the deposition of a Generic Expert or otherwise participating in the procedures established by this Protocol, a party shall not thereby become subject to any assessments under MDL Pre-Trial Order Nos. 25, 28, 47 or 53 or any assessment that any

other party may seek to impose.

12. All notices of depositions shall be served twenty (20) days in advance of the date set for the deposition.

13. If a plaintiff chooses to move to quash a notice issued pursuant to this Protocol and if a Court should grant such motion, no party to any case or cases subject to such Court order shall be bound by the Protocol. That is, if a plaintiff decides not to honor this Protocol and notices the deposition of a defendant's Generic Expert after that Expert's deposition has been taken once, the defendant may take the deposition of the plaintiff's Generic Expert(s) even if that Expert has been deposed before in the Baycol Litigation.

14. Nothing herein alters each party's obligation to designate experts properly according to governing local or federal practice. Nor does this stipulation alter the governing rules of evidence regarding the introduction or admissibility of, or other evidentiary issues relating to, any expert testimony.

Date:

Michael J. Davis
United States District Court