

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF Louisiana

* Civil Action
* No. 00-1355
IN RE: *
*
PROPULSID PRODUCTS * Section "L"
LIABILITY LITIGATION *
* New Orleans, Louisiana * September 23, 2004
*
* * * * *

STATUS CONFERENCE,
BEFORE THE HONORABLE ELDON E. FALLON,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Levin, Fishbein
By: ARNOLD LEVIN, ESQ.
510 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19106

For the Special Master: Irwin, Fritchie, Urquhart & Moore
By: JERRY VADELL, ESQ.
By: JAMES IRWIN, V, ESQ.
By: ANGELA PATERNOSTRO, ESQ.
Texaco Center
400 Poydras Street, Ste. 2700
New Orleans, Louisiana 70130

For the Defendants: Drinker Biddle
By: THOMAS F. CAMPION, ESQ.
500 Campus Drive
Florham Park, New Jersey 07932

APPEARANCES: (Cont'd)

Herman, Mathis, Casey & Kitchens
By: LEONARD A. DAVIS, ESQ.
820 O'Keefe Street
New Orleans, Louisiana 70113

BARRY HILL, ESQ.

Court Audio Operator: Cindy Usner

Transcriptionist: Dorothy Bourgeois
(504) 589-7720

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P R O C E E D I N G S

(Thursday, September 23, 2004)

(Call to Order of the Court)

THE COURT: Be seated, please. Good morning, ladies and gentlemen.
("Good morning" from all Counsel)

THE CLERK: MDL Number 1355, In Re: Propulsid.

THE COURT: Counsel, make your appearance for the record.

MR. LEVIN: Arnold Levin for the Plaintiff, sir.

MR. IRWIN: Good morning, Your Honor. Jim Irwin for the Defendants.

THE COURT: All right. We're here today in connection with our
monthly meeting in this particular matter. Before the meeting, I received from
the parties an agenda.

I'll hear from the attorneys at this time. The first item on the
agenda is update of rolling document production and electronic document
production.

MR. LEVIN: Your Honor, I just wanted to state that Mr. Herman couldn't be here this morning. His daughter is having surgery. We wish both of them well.

THE COURT: Yes, I do, too.

MR. LEVIN: Your Honor, the Defendants have stated that they have completed the document production. We're meeting with our discovery team right now to convey those views and see whether we accept that as a completion.

THE COURT: Okay. That's going to play a role in what we do, the materials to be sent with the unresolved cases, if there be any, that are not resolved.

Okay. The next item is State Liaison Counsel. Is there any report from --

MR. LEVIN: Your Honor, Mr. Campion and myself and Mr. Davis met briefly with Ms. Barrios and Mr. Capretz this morning and informed them of the status of the MDL settlement program; and Mr. Campion's position to apply what I will call the "wait and see doctrine" to see how the MDL program is getting along before we get involved in the state's being included in the participation of a second round.

THE COURT: Okay. Any comments Mr. Campion?

MR. CAMPION: Yes, Your Honor. The Defense has very much appreciated the continuing support and cooperation we have received from the attorneys on the State Liaison Committee and look forward to continuing to work in that area.

And, we have communicated to the three of them that if it comes to pass that there is a second program, we fully expect that when the terms of that program are to be negotiated, that we will have on the table across from us not only the MDL representatives and the PSC representatives, but the three of them or their designees.

THE COURT: All right. I do see this as a two step proposition. I want to take care of the claims in the MDL first. We'll learn from that and then hopefully we'll be able to "cookie cut" or apply those procedures to the state cases. Let's get the MDL first on track, though.

The next item on the agenda is Patient Profile Form.

MR. IRWIN: Your Honor, the Plaintiffs and the Defendants are in agreement, as reported before, to hold these motions in suspense pending the enrollment period for the program.

THE COURT: Okay. You have received approximately 3,000 of them and you're satisfied with that presently?

MR. IRWIN: That is correct, Your Honor.

THE COURT: All right.

Service list of attorneys, do we have that?

MR. IRWIN: Your Honor, we have a service list. There have been no changes, but we're going to provide an update to Ms. Lambert and to Mr. Arseneaux and to Mr. Davis as is customary.

THE COURT: Okay. The next item is the Motion for Class Certification.

MR. LEVIN: That has been deferred, sir.

THE COURT: All right. And, the Trust Account is the next item.

MR. LEVIN: It's my understanding that deposits are being made, sir.

THE COURT: Mediation?

MR. LEVIN: There have been no mediation since the last status conference.

THE COURT: What is the trial schedule for the state court litigation? Any comments on that from the Defendants?

MR. IRWIN: No comment, Your Honor. We have no comments.

THE COURT: All right.

Pharmacy Agreement Indemnity Agreement?

MR. LEVIN: They are being produced, sir.

THE COURT: All right. How many do we have of that and what's the significance? Would you explain that for the record?

MR. IRWIN: Yes, Your Honor. There has been no activity with respect to requests from the pharmacists for indemnities recently. Maybe about a year or so ago -- well, probably more than that now, looking back -- when things were unfolding we were requested by a number of pharmacies to indemnify them.

These indemnity requests sometimes arose out of vendor endorsements or relationships with the pharmacies. We standardized a pharmacy indemnity agreement, so it would be uniform as among the various pharmacies who were making these claims and we offered to do that, and in most instances those pharmacies accepted the indemnity agreements that we wrote up. We would copy the PSC on all those, that they would be apprised of that.

And, there really has not been -- I can't think of any requests from pharmacies recently on that, but we keep it on the agenda because it is an ongoing issue.

THE COURT: All right. Okay. What about the Mediation and Resolution Program? Someone speak on that.

MR. LEVIN: Mr. Campion has the number, sir.

THE COURT: Sure.

MR. CAMPION: In all, there are 44,800 plus people who are eligible to enroll in the program. The requirement of the term sheet is that we must have 85 percent of the death cases, 75 percent of the non-death cases, and 12,000 people under tolling agreements, whether they be written tolling agreements or membership in the Achord case.

We have for the first time in the program included in the joint report what we believe are the minimum numbers required. So, of the 285 death cases, there must 242 enrolled. Of the 3,538 non-death cases, 2,653 must enroll. I suspect that these numbers may move by one percent, but that's the most they'll move.

Under tolling agreements, there were 39,280 people and in the Achord case there were 1,763 people. All of the Achord claimants must enroll, that is part of the deal.

Now, with respect to the law firms who are involved, in all there are approximately 160 law firms having as few as one plaintiff or as many as 14,000 people under tolling agreements. We have noticed a dramatic increase in the activity level on the part of the PSC and others on enrollment.

And, what the last month has essentially involved has been straightening out the kinks in the enrollment process. The form is a simple one to complete. A lawyer has to sign it twice and must attach a schedule. What we started to do, and we used the Zimmerman Firm -- and they're the PSC member -- used them as a model. We gave them our list; they had a pretty complete list. It turned out that there were disagreements of less than one percent of the people involved, and that gave an indication to all of us of the problems that we will have.

For example, we are the only entity -- that is, the defense -- who have a complete database of everybody who's under a tolling agreement. So, we were able, as a result of searching into our tolling agreement, to advise the Zimmerman firm that of their potential enrollees some had already gone to other lawyers, had commenced litigation and were, in fact, entitled to enroll through that other counsel.

Some had gone into litigation and their cases had been resolved. One by you and one in a New Jersey case, so that they were taken care of.

Then there were a few names that simply didn't match, and with some pushing and shoving we got it all done. And, Mr. Zimmerman's form was completed. It is now in the hands of Mr. Herman's office and our office.

I am anxious to remind one and all that the enrollment process is done without any association with the Clerk's Office. It's done privately. And, the two law firms then keep a database and that's the way it will be done, and we will report to the Court from time to time. So, the Clerk's Office need not be involved in this.

We are talking about a possible change when the time for the claim forms come. It's now under discussions as to whether the claim forms will go directly to Mr. Juneau's office as opposed to the two of us. We are most anxious on the defense to be sure that the enrollment forms, when they arrive, do not have to be returned for inaccuracies, incompleteness or whatever.

And, so we have communicated from the highest mountain to any plaintiff's lawyer who wants to listen to us that we are prepared to tell you what our records show would be the clients who you represent.

I remind one and all of what the terms of the term sheet are. The members of the PSC must enroll all eligible plaintiffs. Eligible plaintiffs are those who have had their cases in a federal court before February 1 of the year 2004, and they must enroll all people they have under tolling agreements and all people whom they represent in the Achord case, and that is moving along.

With respect to the rest of the world, if you enroll one of your plaintiffs, you must enroll all of your eligible plaintiffs. Again, eligibility is in a federal court before February 1 of 2004.

With respect to your tolling agreement clients, with respect to those clients, you are at liberty to enroll all of them, some of them, or none of them. The only ones you must enroll are those who you have in the Achord case. And, I believe knowing the names of those firms, that they will all be enrolled.

So, we look forward to that. The cutoff date now is October 29th. We noticed that the tempo was picking up and we certainly hope that we can have everyone meet that date.

I am ready, willing and able to talk to any plaintiff's lawyer at any time about his or her schedule. We have communications ongoing now with several of them, and the level of the progress is extremely encouraging.

THE COURT: How about the staffing of the office?

MR. CAMPION: I'm going to ask Mr. Irwin to speak to that, Your Honor.

THE COURT: Okay.

MR. IRWIN: Your Honor, it's my privilege to introduce to the Court this morning Jerry Vadell and Angela Paternostro. If they would please stand.

They were both interviewed by representatives of the Plaintiff's steering committee, and the Defendants and by Mr. Juneau, and with assistance from Mr. Clavier. They came to us highly credentialed and experienced. They have now started. They are really undergoing orientation now and working out at Mr. Clavier's office.

The settlement space should be ready in three weeks, perhaps, at which point they would be transitioned over to that location.

THE COURT: All right. Well, welcome to the litigation. I look forward to working with you. It's going to be in your hands shortly, and so if it is successful, it will be your success. If it doesn't succeed, you'll be to blame. So with all of that, I appreciate your work on the matter.

Thank you very much.

Also, I should say that I have invited into the process the Government, and we have with us some Government attorneys from Washington who will be involved in the process and be able, hopefully, to expedite the resolution of any particular government liens which may be in place.

I would urge the Government to look at this carefully and to see whether you can come up with some program for expediting this, either in a global way or in a procedural way that it can work more smoothly than looking at

each case individually. And, I do appreciate your being here and your willingness to do that and if the Court can be of help, you need to call on me.

MR. LEVIN: I just want to add in this category that the Plaintiff's legal committee is meeting in New Orleans on September 29th, and one of the purposes of the meeting is to facilitate the enrollment program by calling out of town attorneys and informing them of the status of the same.

THE COURT: Okay.

MR. IRWIN: Your Honor, may I speak to two other points of Paragraph 10 of the report, please?

THE COURT: Sure.

MR. IRWIN: The second or third line refers to 1,100 plaintiffs having enrolled. That should be clarified to state that that's 1,100 plaintiffs and claimants. Most of those are actually tolling agreement claimants.

THE COURT: All right.

MR. IRWIN: Secondly, we are continuing to discuss with the Plaintiff Steering Committee the finalization and submission to Your Honor of an order that would identify all of the eligible MDL plaintiffs. Of course, the purpose of the order is simply to give us a guidepost to know if and when we reach the recruitment levels. It's important to note that there is no provision in this order that it be dispositive of any rights or claims of the parties. It's merely for purposes of identifying those parties.

I am told that the order has been circulated to the PSC, it's under consideration and being treated favorably. And, with the expectation that we should be able to get something finalized to Your Honor by the end of next week. If we don't, then I think perhaps Mr. Herman and I may give Your Honor's office a call and see if we can impose on the Court for a telephone conference to see if we can resolve it.

THE COURT: Okay. I'll do it.

Global Application of Daubert.

The Court ruled on the Daubert issue in several of the cases that we dealt with in trial, and the issue is whether or not that ruling, in those case, should be stepped out and made applicable to all of the cases. I haven't heard that motion yet. I haven't made a decision on that motion, and what is the status of it?

MR. LEVIN: Well, I think both the Plaintiffs and the Defendants have sort of ducked that issue at this point. It's under discussion. It has serious jurisprudential issues involved considering *Barrick v Van dusen* and its progeny.

THE COURT: All right.

Anything from the Defense?

MR. CAMPION: Yes. Defense wants to speak to that, please. If it comes to pass that there are cases to be remanded because they do not enroll in the process, we plan to advance the Daubert motion with some passion.

MR. LEVIN: No doubt.

THE COURT: All right.

And, Stipulation and Pre-Trial Order Providing for the Use at Trial of Depositions in State or Federal Court cases.

MR. IRWIN: Your Honor, we about have that resolved. The remaining issue had to do with the inclusion of the Defense experts on the list of depositions subject to the stipulation. We have agreed, for the time being, to postpone that particular issue. That issue will be addressed probably in a footnote in the order saying that the PSC's rights are reserved to revisit the question of the inclusion of the Defense experts in that prospect. They are now looking at that final order and we probably will get it to the Court next week.

THE COURT: Okay. When can you do that next week?

MR. IRWIN: Friday?

THE COURT: Okay. Let's do it by Friday.

That issue, really, the Court created an end game committee to focus on the end of this litigation. One way of bringing it to an end is to amicably resolve the matter, to settle it.

There are some cases that may not be settled; therefore, the focus must be on what to do with those cases. There's been over nine million documents presented in this particular MDL litigation, and dozens and dozens of depositions. So, that has to be focused on, considered, and what to do and how to do it is the subject matter of that motion, and that's what the parties have been discussing.

Motion for Summary Judgment is the next item on the agenda.

MR. LEVIN: The Plaintiff's legal committee has a motion in-hand, but in light of the current status of the litigation we'd like to defer that.

THE COURT: All right.

And, the next item is the Motion for Summary Judgment as to Doctor Defendant, Stephen A. Tramill.

MR. IRWIN: Your Honor, this motion has been on the docket before, I believe. I'm not quite sure how it came up on the docket again this time.

I believe, however, the issue that was before us, when it was on the docket before, had to do with the fact that the statement of undisputed facts contained some facts; namely, when certain "Dear Doctor" letters were issued, when certain labeling changes occurred that we thought were inaccurate.

We did not oppose the motion in principle. We did feel concern that the granting of such a motion, when there were disputed issues of fact that probably are not dispositive of the motion, could have some precedent, and that is why we asked that it be deferred.

It has come back up again, and our view is that we can probably work this out with the attorneys for the movers and that they can correct the statement of undisputed facts and have the Court then take up the motion, which, at bottom, we do not oppose.

And, we should be able to have that in a position for Your Honor to address it on the merits at the next status conference.

THE COURT: All right. Let's do that by the next status conference, and I'll grant the motion at that time, assuming that there's no problem with the factual description of it. But, let's get with the parties. I don't want to keep picking this up. I'd like to resolve it.

The 15th item is the Pre-Trial Order listing MDL Plaintiffs. Did we discuss that?

MR. IRWIN: Yes, Your Honor, we did in connection with Paragraph 10.

THE COURT: All right. The new items, Michael L. King, Attorney Suspension. What is the situation there?

MR. IRWIN: Your Honor, evidently this is an attorney from Ohio who was suspended from the Ohio bar, who had some Propulsid claimants. We have been informed by the authorities in Ohio, I believe. We received a letter, and I think efforts are underway to arrange for a substitute counsel who would then take up the responsibility of representing those individuals.

We will have to follow this and report back to the Court about its developments.

THE COURT: All right. Do that by next meeting. If they don't have a counsel, I'd entertain suggestions as to who the Court should appoint to represent these individuals. I think they should be represented either by a counsel of their choice or failing that, a counsel appointed by the Court.

The next is Opt Out Form of Johnnie L. Jones. Isn't this a case that I dismissed with prejudice before?

MR. IRWIN: Yes, Your Honor. You dismissed it on November 17th, 2003, by way of your minute entry that recorded the events at our status conference that month, and specifically it identified this case as one that was dismissed with prejudice for failure to comply with PTO Number 9.

We obviously take the strongest exception to any effort to opt out now after this case has been dismissed with prejudice.

THE COURT: I'm not going to revisit that. The case is dismissed. It's dismissed with prejudice. I didn't take that lightly. The Court made sure that the individuals received two, three, sometimes four notices to comply with various forms, filling out forms, and take other steps.

When they didn't do it the first time, the second time, the third time, the fourth time I had no choice but to dismiss them from the litigation. Some people don't want to participate anymore, and they shouldn't hold back the litigation for those individuals who do want to participate.

So, once I dismiss them, I dismiss them with prejudice, and I'm not going to revisit that.

MR. LEVIN: Your Honor, despite the Court's position I want to state on the record that the PLC takes no position on that motion.

THE COURT: I understand.

And, also the PFC objected, initially, to the dismissal with prejudice. I understood their objection. I considered their objection, but overruled it and granted the motion to dismiss with prejudice. So I'll assume that the committee is still opposed to the dismissal with prejudice, but the Court has acted on that.

I have two motions before me. The Defendant, Mary Thorton CNP's Motion for Summary Judgment. And, another Defendant Simon Cofrancesco's Motion for Summary Judgment. Do the parties know anything about those?

MR. IRWIN: Your Honor, I remember something about the Thorton motion. I don't know what it is, off the top of my head, at the moment. I was not aware that it was before the Court for consideration today. I have not heard of the other motion, I don't believe.

THE COURT: Okay. Well, I'll give --

MR. IRWIN: And, Mr. Davis is indicating he thinks they have not been served.

THE COURT: All right. I'll make sure that both of you receive a copy of these motions and let me hear from you before the next status conference as to your position, and I'll deal with them at the next status conference.

MR. IRWIN: We'll make sure we take it up, Your Honor.

THE COURT: Anything further? Anything from the State Liaison?

MR. HILL: Two things, Judge.

THE COURT: Yes.

MR. HILL: First with respect to the suspended lawyer in Ohio --

THE COURT: Yes.

MR. HILL: I'm licensed in Ohio. I have been for many, many years. With the Court's permission, without any objection from the Defendants or the PFC, I'll contact the Ohio disciplinary authorities, determine what it is they plan to do, offer to serve as any type of useful intermediary to help these people, and report back to the Court on any status --

THE COURT: Okay. Any objection to that?

That's fine. And, for the record, would you state your name so that we have --

MR. HILL: Barry Hill.

THE COURT: Okay. That's fine.

MR. HILL: And, the other thing is I'm also Chairman of the ATLA Propulsid litigation. As such, I've received a lot of questions I can't answer, but they're all the same question, which is: In what form is it permissible to submit the medical records which must accompany the claim form? There are a lot of lawyers who would like to submit both the claim form, itself, and supporting documents, and either a one page or five page memo in electronic form on a disk as opposed to sending, in some cases --

THE COURT: Sure.

MR. HILL: -- a box full of medical records.

And, I don't have an answer for them. I thought maybe it could be discussed --

THE COURT: Sure. Why don't we discuss that? Give me some input. It's a question of whether or not to submit it in hard copy or electronically.

MR. IRWIN: Offhand, we think that sounds fine. Either way, we will be working up a protocol with Mr. Juneau, Mr. Vadell, and Ms. Paternostro, but I think that sounds logical.

THE COURT: All right. So, Mr. Hill, either the hard copy or in disk form, electronically.

MR. DAVIS: We believe that quite frankly, all of that information ought to be sent to Mr. Juneau's office.

THE COURT: Sure.

MR. DAVIS: They ought to be handling those matters.

THE COURT: All right. From Mr. Juneau's office, are you comfortable with having it electronically or either way?

MR. VADELL: Either way.

MS. PATERNOSTRO: Either way.

THE COURT: Okay. That's the answer.

Anything else from anybody?

Okay. Folks, let's see, the next meeting -- let's see, we have the 21st, the 22nd of October. Anything? Either one of those dates? The 21st, 22nd, which is good?

MR. IRWIN: The 21st is okay.

THE COURT: The 21st? Okay. We'll have the next meeting will be the 21st of October starting at 9:00, and I'll, again, see the committee at 8:30 as usual.

At the end of the meeting, at the end of this conference, I ask that the Liaison Counsel meet with the Government attorneys and talk about some protocol for resolving any liens that the Government has.

Thank you very much. Court stands in recess.

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(Hearing is Concluded)

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