

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION

4 IN RE: CLOZAPINE ANTITRUST)
5 LITIGATION)
6) MDL Docket No. 874
7)
8) Chicago, Illinois
9) May 3, 1991
10) 1:30 o'clock p.m.
11)
12)
13)
14)

15 TRANSCRIPT OF PROCEEDINGS
16 BEFORE THE HONORABLE HARRY D. LEINENWEBER

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1 THE CLERK: MDL No. 874, in Re: Clozapine
2 Antitrust Litigation.

3 THE COURT: Good afternoon.

4 MR. GOLDBERG: Perry Goldberg on behalf of
5 plaintiff Dauer.

6 MR. SEDRAN: Howard Sedran on behalf of plaintiff
7 Newell.

8 MR. SPENCER: James Spencer from the Minnesota
9 Attorney General's Office on behalf of the states. I am
10 appearing as chair of the case management committee for the
11 states.

12 Also present in court with me -- I can introduce
13 co-counsel at this time, if the Court would like, or I can
14 have them introduce themselves, whichever the Court would
15 prefer.

16 THE COURT: You can introduce them.

17 MR. SPENCER: With me at counsel table is Robert
18 Hubbard of New York, who we are proposing act as liason
19 counsel for the states. Also at counsel table with me is
20 Laurel Price of New Jersey. Sitting in the back is Pasqua
21 Scibelli from Massachusetts, Milton Marquis of Virginia,
22 Steve Rutstein from Connecticut, Tom Greene from California,
23 Patrice Arent from Utah, Kip Sturgis from North Carolina.
24 Also present in court is Tina Rosso from the State of Illinois,
25 which at this time is not a party.

1 MR. BRAMAN: Good afternoon, your Honor. Richard
2 Braman representing defendant Sandoz. With me is Quentin
3 Wittrock, also for Sandoz, and also John Hayman, also for
4 Sandoz.

5 MR. SENNETT: Your Honor, Michael Sennett for
6 defendant Caremark. With me is Michael Forti.

7 THE COURT: As you are all aware, the panel on
8 multi district litigation, for better or for worse, has
9 presented me with this litigation. I am not sure whether you
10 are collectively as happy to have me have this case as I am
11 of having it but, be that as it may, the decision has been
12 made and I now have the case.

13 To clarify one thing, there was a suggestion that
14 there was an ex parte ruling on staying discovery. It was
15 ex parte from everybody's standpoint. I specifically stayed,
16 at the request of Sandoz, in the litigation that was pending
17 before me. I made it a part of Order No. 1 because, for
18 better or for worse, the suggested procedures for a multi-
19 district litigation suggests that one of the first things you
20 should do when you are assigned the case is to put a stay on
21 discovery so that some orderly discovery can proceed after
22 the case is brought together with all the parties together.
23 So, no party urged an ex parte stay. It was my decision and
24 my decision alone to order a stay. So, I want that clear.

25 Yes, sir?

1 MR. GOLDBERG: Your Honor, I would move that both
2 letters be stricken so that we won't have this procedure
3 followed again in this litigation. We should have motions or
4 something of that character.

5 They happened to mention in a responding letter to
6 Mr. Sennett -- happened to mention something about my having
7 the responsibility to inform the states, or at least that was
8 the obvious implication there. If anybody had an obligation,
9 it was he as opposing counsel.

10 THE COURT: It was my decision to stay and I think
11 appropriately so.

12 MR. GOLDBERG: Your Honor, I am not questioning
13 that. What I am questioning is this practice of going forward
14 and writing letters to the court ex parte which we don't learn
15 about until the eve of a hearing over here.

16 I would, of course, like to respond to Mr. Sennett's
17 letter. We can protract this litigation for a long time --

18 THE COURT: I think your suggestion to strike both
19 letters is appropriate.

20 MR. GOLDBERG: Thank you.

21 THE COURT: I am not criticizing necessarily at
22 this point the practice because there was a snafu, as far as
23 the Clerk's Office was concerned, in notifying the parties
24 both, I guess, of the consolidation here in this court plus
25 getting my Order No. 1 out.

1 One of the reasons why I set an early status was
2 by virtue of the fact that I knew I was staying discovery
3 and I have no intention to interfere with a proper and speedy
4 resolution of this case. I merely set a stay so that we
5 could all get together in one courtroom and decide an orderly
6 way so that there wouldn't have to be duplication of discovery,
7 if that was in fact the case.

8 I was not aware at the particular time that there
9 was as much communication between the various cases as there
10 apparently is. As far as I was aware, when I initially was
11 given the case, there was twenty-five or thirty cases pending
12 out there that were all going to be consolidated here. I was
13 not aware that there had been some either formal or informal
14 consolidation prior to that time. I am happy to find out
15 that that has been the case because I think it will make our
16 proceedings here much easier knowing that there has been an
17 organization of the states.

18 I believe all parties who intended to file a
19 preliminary report have done so. I received one from Caremark,
20 from Sandoz, for the counsel for the states and for both
21 plaintiffs. Is there anybody else that filed?

22 MR. BRAMAN: Your Honor, Sandoz has not received
23 a copy of the states' status report. We have received the
24 other ones you have mentioned.

25 THE COURT: I received three copies. I only

1 brought one out or I would share one with you.

2 MR. SPENCER: That is correct, your Honor. It was
3 served by mail.

4 THE COURT: There was a problem communicating
5 between the Clerk's Office and counsel for the states. As I
6 understand it, they were only notified of my order --

7 MR. SPENCER: Late last week, your Honor.

8 THE COURT: -- late last week.

9 MR. SENNETT: That was true with respect to
10 Caremark, as well, your Honor.

11 THE COURT: Yes. That was unfortunate. But I
12 think now they have got things straightened out.

13 I had set out in my original order a proposed agenda,
14 which, I suppose, we might as well utilize, at least, to get
15 started on it. Like any meeting, I guess, we will have time
16 for extra business or at the conclusion.

17 Organization of counsel. It is my understanding that
18 the states are organized.

19 MR. SPENCER: That is correct, your Honor. We have
20 established a case management committee and have been conferring
21 with each other since the beginning of the litigation.

22 THE COURT: Then there are the two individual cases,
23 Dauer and Newell, is that correct?

24 MR. GOLDBERG: Yes, your Honor. We are organized,
25 as well.

1 THE COURT: You are organized, as well. So, in
2 effect, we will have two separate plaintiffs' counsel and
3 then two separate defense counsel.

4 MR. GOLDBERG: Your Honor, we will have three.

5 THE COURT: Three.

6 MR. GOLDBERG: One for each of the --

7 THE COURT: I am not talking about numbers of
8 counsel. I mean groups. There is the individual plaintiffs'
9 group, the state plaintiffs' group and then Sandoz and
10 Caremark, is that correct?

11 MR. GOLDBERG: Right.

12 MR. BRAMAN: Right.

13 THE COURT: Service of documents. Somebody had a
14 suggested order. It is in the states' joint pretrial memorandum.
15 Does everybody want to be served with everything?

16 MR. GOLDBERG: No, your Honor.

17 THE COURT: We will just serve the two plaintiffs'
18 groups and the two defense groups?

19 MR. SENNETT: Your Honor, we have not seen that
20 proposal yet.

21 THE COURT: I am not sure that is even in there.
22 I am just suggesting for the service of documents. How do you
23 want to do it? Do you want everybody to get a copy?

24 MR. SPENCER: What we propose in the order, your
25 Honor, is that each of the state plaintiffs need to be served.

1 We have proposed that liaison counsel be the distributors of
2 documents from the court and funneled to the court but that we
3 would need to have each of the thirty-three state plaintiffs
4 separately served.

5 MR. GOLDBERG: Your Honor, we object to that. We
6 think that would needlessly add to the expense of the
7 litigation.

8 Insofar as the individual plaintiffs are concerned,
9 anything that affects us we want to be served with. Insofar
10 as anything that does not affect, for example, the states
11 that we may file against the defendants, we see no reason to
12 serve the states with, nor do we want to be served by them.

13 THE COURT: The states, at least the liaison,
14 should be served. But what purpose is there, for example, why
15 Mr. Dauer should served every single state?

16 MR. SPENCER: Your Honor, if it only affects the
17 Dauer matter, then we can probably take service through
18 liaison counsel and distribute it. What we are concerned
19 with, beyond that more general pleadings, is the fact that
20 ultimately liaison counsel will end up having to serve all the
21 states. What this does is shift the cost of the other parties'
22 litigation to the states for copying and distribution. We
23 don't believe we should have to bear that burden. We
24 ultimately will have to copy all the states. We have formed
25 a committe for it.

1 MR. BRAMAN: Your Honor, what we would recognize
2 or what Sandoz would recognize is that the states' liaison
3 counsel be served by Federal Express and then serve the
4 balance of the states by U.S. mail.

5 MR. SPENCER: We are perfectly willing to accept
6 that, your Honor.

7 MR. SENNETT: Perhaps a day later, your Honor, with
8 the understanding that there is a lot of mechanical matters
9 for getting out the type of paper we are talking about.

10 MR. SPENCER: If I could clarify one thing. What
11 we would like to see is that we believe the case management
12 committee should be served by whatever the --

13 THE COURT: They are proposing Federal Exoress?

14 MR. BRAMAN: To liaison. I don't know how many
15 attorneys are on the case management committee.

16 MR. SPENCER: It is an eight-state committee.

17 MR. GOLDBERG: Your Honor, so far as we are
18 concerned, we think it should be limited to the relevant
19 counsel. We don't see any need to receive or to send
20 documents to people who are not relevant to the issue.

21 THE COURT: Well, except it is not always readily
22 apparent.

23 I think the way they suggest, if you just serve all
24 counsel by regular mail and liaison counsel by Federal Express--
25 is that --

1 MR. SPENCER: Federal Express or telefax, whatever
2 needs to be done for the timing of that particular problem.

3 MR. GOLDBERG: Your Honor, this, I think, gives us
4 a problem right off the bat here. The problem is we could
5 have filed five hundred cases, also, on behalf of individuals.
6 Instead we chose to file two cases on behalf of individuals.
7 We can now multiply that and increase -- further in this
8 litigation.

9 THE COURT: Well, by regular mail isn't -- I don't
10 think it is --

11 MR. GOLDBERG: It is the duplication we are talking
12 about. You have a hundred-page document and, if you make
13 thirty-three copies of it, you are talking about three
14 thousand --

15 THE COURT: What are we talking about? We are
16 talking about services of notices and pleadings and things of
17 that nature.

18 MR. GOLDBERG: Briefs, documents, answers to
19 interrogatories, requests for admission. We are talking about
20 a lot of paper here, a lot of useless forest going down, your
21 Honor.

22 I respectfully suggest that to start this case off
23 with the idea of having multiple copies going all over the
24 place is just going to needlessly add to the expense of the
25 litigation.

1 MR. SPENCER: Your Honor, that fails to recognize
2 that, while the states have agreed that I may speak for
3 everybody here today, that was based on full consultation with
4 all of the states. Each of the states are their own plaintiff
5 in this matter and have a right to be served with the
6 appropriate papers in this matter.

7 MR. GOLDBERG: In their own case. I don't object
8 to that. We are neither a plaintiff nor a defendant in their
9 case.

10 MR. SPENCER: The matters at this point are almost
11 inextricably intertwined. We are having trouble seeing what
12 matters would not apply to all parties at this stage of the
13 litigation.

14 MR. GOLDBERG: I am not sure they are objecting to
15 my proposal.

16 THE COURT: Well, except they run into a problem of
17 what is relevant, what should they see and what is not.

18 MR. SENNETT: Your Honor, perhaps, if we could make
19 a suggestion here, which is that we would serve liaison
20 counsel or the management counsel, however we decide it for
21 the states, and they can make a determination, a good faith
22 determination, as to whether it is the type of document that
23 ought to be sent to the other states.

24 THE COURT: Why don't we do it this way -- I am
25 hesitant to make somebody make a decision on relevancy -- but

1 where you are talking about a large document -- and for the
2 moment I am not going to define that -- we will say that it
3 is presumptively not necessary. If you feel it is not necessary,
4 you can file it but normal or regular documents, if you feel
5 they are necessary, serve everybody and we will just try to
6 take it case-by-case. If there is something like a thousand-
7 page document, then we will see if we can work around it. We
8 will just say that presumptively everybody gets a copy, liaison
9 counsel by telefax or Federal Express and all counsel by
10 regular mail and for special cases, we will take them on
11 special cases.

12 MR. BRAMAN: Your Honor, for clarification. The
13 U.S. mail to all parties, is it okay if that comes the next
14 day because of duplication problems?

15 THE COURT: Right.

16 MR. BRAMAN: Thank you.

17 THE COURT: What have we got next? Pleadings. I
18 believe everybody has explained in their filings the current
19 status of the complaints. I guess we should get to -- I do
20 not know if this is the appropriate time to get into all of
21 this but we have several pleading issues. Number four is
22 class. We will leave that for the moment.

23 As I understand it, Caremark has motions to dismiss
24 pending?

25 MR. SENNETT: That is correct, your Honor. It had

1 been briefed before the New York court. I have had some
2 conversations with Mr. Rutstein of Connecticut, who is the
3 principal state representative in that briefing. We have
4 been discussing a briefing schedule for motions to dismiss
5 before this court which would take into consideration the
6 Seventh Circuit law and update some of the research that we
7 presented to Judge Keenan. I think we are prepared, at least
8 on our motions to dismiss, to put together a briefing schedule
9 and present it to the court.

10 MR. BRAMAN: Your Honor, from Sandoz' perspective,
11 we have not yet filed any Rule 12 motions. We understand
12 plaintiff Newell is preparing to file an amended complaint
13 some time soon and some of the states may be filing amended
14 complaints, as well. So, we would recommend as a cutoff date
15 for the filing of any amended complaint and then thirty days
16 later for the cutoff date for the filing of any Rule 12
17 motions and then whatever appropriate briefing schedule would
18 fit your Honor's schedule.

19 MR. SPENCER: At this stage, your Honor, the states
20 are aware -- California, in particular, expects to file an
21 amended complaint on a technical matter regarding the
22 counties they are representing. We may find it necessary to
23 amend our complaint with respect to, first of all, the
24 Seventh Circuit law, though we have not made a specific
25 decision. I believe we are okay on that. And the other issue

1 that is still open for the states is we are reexamining the
2 parties in this case and who should be named in our actions.
3 We expect that that will take us, at this point, sixty to
4 ninety days to complete that.

5 We don't believe anybody currently in this action
6 would be adversely affected by leaving that much time for
7 the amendments of complaints.

8 MR. SEDRAN: Your Honor, Howard Sedran for Newell.

9 THE COURT: Yes, sir.

10 MR. SEDRAN: Just to bring you up to date on the
11 status of our pleading.

12 Our complaint was answered by Sandoz in the Southern
13 District of New York and Caremark filed a motion to dismiss.
14 We have entered into a stipulation with Caremark where we will
15 file an amended complaint -- I think it's by June 3rd. If we
16 don't, then Caremark has the right to reinstate its motion to
17 dismiss. It is our intention to track the language of the
18 Dauer complaint. That complaint was answered by both Sandoz
19 and Caremark. So, I would not anticipate that there would be
20 a motion practice with respect to a complaint that has already
21 been answered.

22 THE COURT: Is your motion directed only to the
23 states, Caremark?

24 MR. SENNETT: Currently, your Honor, our motion is
25 directed to all the states' actions, that is correct. We did

1 answer Mr. Goldberg's complaint. Mr. Sedran's complaint was
2 one that we did in fact move against but it has been withdrawn,
3 assuming that it comes in the way we expect and the like, and
4 we will, you know, take a very serious look at answering that
5 one, as well.

6 MR. SEDRAN: Just to nitpick. I haven't withdrawn
7 it but I have agreed to amend it.

8 MR. SPENCER: And to clarify our position, your
9 Honor, the states have agreed with Mr. Sennett that we will be
10 able to negotiate a mutually acceptable briefing schedule on
11 Caremark's motion to dismiss. We do not believe that
12 substantive changes in the complaint are in order with respect
13 to Sandoz. And Sandoz has already answered that complaint.
14 So, we don't see any reason why that should be expected to
15 change in the future substantively and why there would be need
16 for a challenge to the complaint at this stage. We just don't
17 see any reason for that at this point just because we have been
18 moved from one circuit to another.

19 MR. BRAMAN: Your Honor, since we haven't yet seen
20 the final form of the pleadings, we haven't made a final
21 determination as to whether to make a motion for failure to
22 state a claim. At this point we have not but will preserve
23 that because we haven't made a final determination.

24 THE COURT: There has been a request for sixty to
25 ninety days. Does anybody find a problem with that, say,

1 sixty days to amend the complaint? Is there any problem with
2 that, then?

3 All amendments to complaints to be made in sixty
4 days.

5 THE CLERK: July 2nd.

6 THE COURT: By July 2nd.

7 Then how much time to answer or otherwise plead?

8 MR. BRAMAN: Thirty days would be sufficient, your
9 Honor.

10 MR. SEDRAN: Your Honor, my complaint -- I don't
11 need sixty days. We are already committed on the record with
12 the stipulation, which calls for an amendment by --

13 THE COURT: Each of you has a separate problem,
14 which we can probably take care of. We will just refer to
15 amendments to the state complaints. The individuals complaints,
16 then, Dauer to stand and Newell to be made by --

17 MR. SEDRAN: June 3rd.

18 THE COURT: By June 3rd.

19 Answers to the Newell complaint and other pleadings
20 thirty days.

21 THE CLERK: August 1.

22 THE COURT: No. It would be July 1 or July 2 or
23 something like that.

24 THE CLERK: July 2nd for amendment complaint.

25 THE COURT: Newell is amending the complaint by

1 June 3rd. So, thirty days to answer would be --

2 THE CLERK: July 3rd.

3 MR. BRAMAN: Your Honor, may we have until July 3rd,
4 also, to file any Rule 12 motions with respect to either
5 Newell or Dauer?

6 MR. GOLDBERG: Your Honor, we object. They have
7 answered our case. There is no further Rule 12 called for
8 at this point.

9 THE COURT: At least as far as Newell is concerned,
10 I said answer or otherwise plead. Whether or not you can
11 still bring a Rule 12 motion against Dauer -- if you bring one,
12 I will deal with it, I guess, basically, is what it amounts to.
13 But I am not going to enter an order allowing you to file one
14 at this time. If you seek leave for it, then we will consider
15 arguments on that.

16 I would suggest that you propose a briefing schedule.
17 If you can't agree on one, bring it before me and I will
18 impose one.

19 MR. BRAMAN: I would think that, at least, we can
20 do.

21 THE COURT: I would hope that that is the case.
22 Anything else on pleadings?

23 MR. SPENCER: One item, your Honor.

24 THE COURT: Yes, sir.

25 MR. SPENCER: The question has been raised at some

1 point in our conversations regarding new complaints from
2 additional parties. The states expect that there very well
3 may be additional complaints.

4 THE COURT: I received in the mail, I believe, this
5 week -- I didn't count them -- but a number of tagalongs
6 which had fifteen -- there was a stay on their particular
7 actions for fifteen days, which would run out -- I thought I
8 had it here. Here we go. There are ten tagalongs. Conditional
9 transfer order dated April 29th. They are stayed fifteen
10 days without objection.

11 MR. SPENCER: Those, your Honor, are additional
12 state complaints. Frankly, we are here representing those
13 ten states as well.

14 THE COURT: I am assuming, therefore, there would
15 be no objections filed within the fifteen-day period. So
16 that the transfer order will become permanent. So, we will
17 leave the same order for them, then. I will make all subsequent
18 tagalong state actions subject to the same amendment deadlines,
19 then.

20 MR. SPENCER: That is fine, your Honor.

21 The issue that I am raising here is that we expect
22 there may be additional filings in the Southern District of
23 New York, which should be treated as tagalongs and transferred
24 to this court for trial process. That would be substantially
25 the same as the current state cases and therefore would join

1 on the same basis.

2 THE COURT: As I understand, they go to the multi-
3 district panel for an order such as this.

4 MR. SPENCER: That is correct.

5 THE COURT: I suppose they could, bry agreement,
6 just -- I am not sure now whether you can file them directly
7 here or not. You might save some trouble unless they want to
8 preserve --

9 MR. SPENCER: We can anticipate they would file them
10 in New York, your Honor. Just so, if there ever was a
11 transfer back, that all the state cases would stay together.

12 THE COURT: I will make, then, the order for all
13 amended complaints for the parties presently before the court
14 and those that are subsequently assigned to the court will be
15 under the same deadline as far as filing amendments. If they
16 haven't filed their complaint yet they probably won't need to
17 amend it.

18 MR. SEDRAN: If I could make a suggestion to Mr.
19 Spencer. If his concern is to simply have all his state
20 cases transferred together, I would suggest that the parties
21 stipulate that the additional cases could be filed here and,
22 if the state cases get transferred --

23 THE COURT: I think they can be but I am not sure.

24 MR. SEDRAN: It would just avoid the step of going
25 to the Southern District of New York and going to the panel.

1 THE COURT: Is there any problem with that? Do the
2 defendants have any objection?

3 MR. BRAMAN: No objection, your Honor.

4 THE COURT: It is stipulated, then, that Clozapine
5 litigation by states may be filed directly in this court.

6 The next item I have on my agenda is the status of
7 class allegations. What is your intention?

8 MR. GOLDBERG: We have plead them, your Honor and
9 the defendants are deciding whether they want to agree with
10 them or not. If they decide to oppose them, well, then, we
11 will take the next step.

12 MR. SEDRAN: I would just add that I have had some
13 other conversations with the defendants. Mr. Goldberg is
14 right. We are waiting to see if the defendants will stipulate
15 to a class. There also have been discussions with defense
16 counsel about the timing of the filing of a motion for class
17 certification. There was a proposal to the defendants to
18 defer the resolution of the class motion until a decision on
19 the merits. I don't know if the defendants are in a position --

20 THE COURT: What do you mean "on the merits"? The
21 merits of what?

22 MR. GOLDBERG: The litigation.

23 THE COURT: I don't think you can do that.

24 MR. SENNETT: Your Honor, if I can perhaps clarify.
25 As I understand it, at least, it would put the class

1 certification after the trial, which really doesn't do very
2 much for us, as I can see it now. If the plaintiffs prevail,
3 obviously, everyone would opt in and, if they lose, they would
4 opt out.

5 MR. GOLDBERG: I think, if you think about it, you
6 may not be facing exactly that. If you want to take that
7 position, we will be glad to start the game going in that
8 direction.

9 THE COURT: What I thought I would do, without,
10 certainly, preventing you from entering into an agreement,
11 we can set a briefing schedule on the issue of class and then,
12 if you agree to it, then that will moot the need to brief it.
13 If you don't agree on it, then we can -- I think that should
14 be taken care of.

15 MR. GOLDBERG: We want forty-five days, your Honor.

16 THE COURT: Any problem with that, forty-five days
17 for plaintiff to file motion and brief for class certification?
18 And then response time.

19 MR. BRAMAN: In terms of class certification motions,
20 your Honor, we would like about a sixty-day period to conduct
21 discovery of the plaintiff representatives.

22 MR. GOLDBERG: There are two representatives, your
23 Honor. How long can it take to take two sick schizophrenic
24 people?

25 MR. BRAMAN: It is also our recommendation, to the

1 extent that there are Rule 12 motions to be decided by your
2 Honor, that the class certification briefing schedule be
3 deferred until a resolution of those motions.

4 THE COURT: In the Seventh Circuit I am not sure
5 you can do that. As I understand the rather very clear
6 directions from the Seventh Circuit, it is that you resolve
7 class certification before you resolve the case and pleadings
8 because of the fact you don't know who is going to be
9 affected. If I dismiss the case and I rule there is a class,
10 then I have affected I don't know how many schizophrenic
11 people here.

12 Let me ask this: Are there separate classes for
13 Mr. Dauer and Mr. Newell or are they the same class?

14 MR. GOLDBERG: We'll put them together.

15 THE COURT: There is no distinction, then, between
16 them?

17 MR. GOLDBERG: No.

18 THE COURT: What is the difference between Mr. Dauer
19 and Mr. Newell and the citizens for which the states are
20 bringing actions?

21 MR. GOLDBERG: They are bringing them as *parens*
22 *patriae* and we are bringing them as a class allegation. There
23 are other states covered by ours which are not covered by
24 theirs.

25 THE COURT: There is *parens patriae* -- they are

1 actually bringing the case in behalf of the people that are of
2 the class.

3 MR. GOLDBERG: They are purporting to, yes, your
4 Honor. If this issue gets raised, there will be a conflict
5 between the private plaintiffs and the states and that will
6 take up a lot of the time of the court, I think, uselessly in
7 this case. This is one of the situations where the defendants
8 are already faced with the reality of somebody is going to be
9 representing everybody here, at least somebody, and maybe a
10 large group of people are going to be representing everybody
11 here. So, therefore, their initial reaction which they have
12 given us today is that they are not interested in stipulating
13 to a class may not prove to be what they want in the long run.
14 But let's presume it is. If it is, then we have a fight
15 between the states, who we will then say are not adequate
16 representatives to these people, and us, who they will say are
17 not adequate representatives. So, that will be the fight.
18 The defendants will say nobody is, of course.

19 MR. SENNETT: I don't know if we will say that, your
20 Honor. But I will say, to address Mr. Goldberg's point a
21 little bit earlier, that we do view that conflict as
22 significant here and requiring some fairly significant
23 discovery. It is not simply a case of deposing two class
24 representatives here. It includes, frankly, an assessment
25 that the court is going to have to make which will concern

1 the representation of the individual states and it will help
2 people, what their interests are, whether they are in a
3 position to represent natural persons, the health insurance
4 companies that are represented directly in all this. There
5 are a lot of different competing interests here. We think
6 this issue will merit a full hearing for the court.

7 THE COURT: Mr. Goldberg is suggesting forty-five
8 days for Mr. Newell and Mr. Dauer to file whatever petition
9 and that there be a class certified. You will need time to
10 respond. Now, if they have forty-five days to file it, it
11 would seem to me, say, if I give you thirty days to respond
12 thereafter, then you are getting sixty-five days to, in effect,
13 conduct whatever discovery you may need.

14 MR. BRAMAN: I respectfully disagree, your Honor.
15 Until they file their motion it is hard to know exactly what
16 discovery we are going to take. Obviously, we can think of
17 some now without seeing their moving papers. But their moving
18 papers are certainly going to suggest what other evidence and
19 discovery that are necessary.

20 MR. GOLDBERG: Your Honor, our motion will be quite
21 prosaic. They don't really need that.

22 THE COURT: Do you need forty-five days?

23 MR. GOLDBERG: We really don't need forty-five.

24 THE COURT: I will give you thirty days and then I
25 will give them sixty days.

1 MR. GOLDBERG: Your Honor, I think that is a little
2 unfair. We have got the burden of coming forward. To give
3 them more time to argue against us, that is sort of unfair.

4 THE COURT: But they have got to do discovery. You
5 don't need any discovery or very little of it, unless you need
6 more.

7 MR. GOLDBERG: We don't need any discovery and
8 neither do they against us. That's the whole point of the
9 issue.

10 THE COURT: I can't presume that. They say they
11 do.

12 Why don't we do it thirty and forty-five.

13 MR. GOLDBERG: Thank you, your Honor.

14 THE COURT: I will give you fourteen days to reply
15 to theirs. So, we have got thirty, forty-five and fourteen
16 for the class allegations.

17 MR. GOLDBERG: Your Honor, one of the issues I
18 would like to take up is the real question of when we are
19 going to get to a trial. I think that is part of what is
20 involved here. When are we going to cut off the discovery?

21 THE COURT: My next item is No. 5 on my agenda,
22 discovery.

23 MR. GOLDBERG: That is why I was bearing-in on that
24 item here. It all relates together.

25 THE COURT: Except discovery on the class is

1 separate from discovery on the case-in-chief.

2 MR. GOLDBERG: Well, but they both go forward at
3 the same time separately.

4 THE COURT: We are going to get to discovery right
5 now. Unless there are strong arguments to the contrary I do
6 not see why we couldn't have discovery on both tracks at the
7 same time.

8 MR. SPENCER: On the contrary, your Honor, we would
9 suggest we should do that.

10 THE COURT: Is there any objection to that, that
11 we go ahead with discovery, now that everybody is here?

12 MR. BRAMAN: We would object, your Honor. We would
13 like to be able to focus on the certification issues, first,
14 as well as the Rule 12 issues that will be coming up and
15 defer merits discovery until after we deal with the class
16 certification.

17 THE COURT: What is the current status of discovery?
18 Let me start out.

19 MR. GOLDBERG: Your Honor, in our cases we have
20 received some documents. We have received no answers to
21 interrogatories.

22 THE COURT: You have served interrogatories and
23 document requests on both Caremark and Sandoz?

24 MR. GOLDBERG: Yes, your Honor.

25 THE COURT: And states --

1 MR. SPENCER: The states served interrogatories,
2 requests for admissions and document requests at the end of
3 February pursuant to Judge Keenan's order in New York. Those
4 requests have not been answered despite consultations with the
5 court in New York regarding that except to the extent that
6 Caremark has, in fact, given us an opportunity to review
7 documents which they previously gave to both the private
8 plaintiffs and the Federal Trade Commission. To date neither
9 Sandoz or Caremark has given us anything other than what they
10 presented to the Federal Trade Commission. Neither party has
11 answered our interrogatories or requests for admissions.

12 MR. SENNETT: Your Honor, if I may just correct
13 something.

14 THE COURT: Yes, sir.

15 MR. SENNETT: We have, in fact, answered the
16 requests to admit that have come from the states. We
17 produced over thirty thousand pages of documents to the states
18 and private parties. What we asked for and asked for from
19 Day-1 from Judge Keenan and what we are going to ask your
20 court's indulgence for today is to get one common set of
21 interrogatories that conforms to our rules in this district
22 and not to have sixty, seventy and eighty different and
23 separate interrogatories to answer. We can go forward on
24 that --

25 THE COURT: I am not sure whether you have to have

1 one common set but it would seem to me we could have two
2 common, one for the individuals --

3 MR. GOLDBERG: We will combine ours together. There
4 is no problem.

5 MR. SEDRAN: Absolutely.

6 THE COURT: So, the individuals, Mr. Goldberg and
7 Mr. Sedran, will join together with the states and present one
8 common set of interrogatories pursuant to our local rules.
9 And one common production request?

10 MR. GOLDBERG: I doubt that, your Honor. We want
11 a lot less than what the states will want, I am quite sure.

12 MR. SEDRAN: What I was representing, your Honor,
13 is I will withdraw my previous discovery request and adopt
14 Mr. Goldberg's so that the defendants do not have to deal with
15 two sets among the private plaintiffs.

16 THE COURT: Maybe there should be, since we have --
17 well, go ahead. Excuse me.

18 MR. SENNETT: I was going to suggest that the states
19 should take a look at Mr. Goldberg's interrogatories,
20 consistent with our local rules, and anything that needs to be
21 supplemented they can supplement. Again, we are talking about,
22 in this first wave of interrogatories, names, places in Mr.
23 Goldberg's. I think we can handle it. It is the long, long
24 sets of interrogatories that we are trying to avoid, get
25 together and have a group of interrogatories.

1 THE COURT: We have a local rule. What is it?
2 Rule 12?

3 MR. BRAMAN: Rule 20.

4 MR. GOLDBERG: I am sure we didn't follow the rule,
5 also but we just came close to it and within the spirit of the
6 way it is followed.

7 MR. SPENCER: Your Honor, we would request -- first
8 of all, we would point out to the court that we have several
9 causes of action which have not been raised by the private
10 plaintiffs. The nature of our standing before this court is
11 completely different from that of the private plaintiffs.
12 Therefore our discovery does not completely track with what
13 the private plaintiffs are doing.

14 Additionally, we would request that the court lift
15 the stay with respect to the discovery that was already
16 requested from the defendants and which was supposed to be
17 given to us a month later than a week after the court's stay
18 was entered. That discovery should basically be ready for us
19 to receive. Both Sandoz and Caremark have been willing to
20 answer interrogatories from Dauer. They have been willing
21 to -- Sandoz has been willing, for documents to both Dauer and
22 Newell that they have not been willing to show us -- we would
23 ask at a minimum that we start with being able to see the
24 discovery that Judge Keenan indicated that he would permit us
25 to proceed with, which we properly requested and for which we

1 went back to Judge Keenan for a clarification on and which
2 they should have been ready to give to us at the time of the
3 court's stay.

4 MR. BRAMAN: Your Honor, if I may correct a mis-
5 statement. We have produced over twelve thousand documents
6 to the states already. We have an additional ten thousand or
7 so documents ready to produce.

8 THE COURT: What are you producing? Is it pursuant
9 to a request or a court order or what?

10 MR. BRAMAN: Ten thousand or twelve thousand
11 documents, I think, we are producing in response to CID served
12 by the states.

13 The documents yet to be produced but almost ready to
14 be produced are document requests. What I would propose,
15 though, consistent with the Illinois rules, is the states have
16 one consolidated set of interrogatories and that they try not
17 to exceed the twenty-interrogatory limit.

18 THE COURT: The states are willing to do that, I
19 understand. The states will have a consolidated set and the
20 individuals will have a consolidated set. You will have two
21 sets to answer.

22 MR. BRAMAN: That would be fine.

23 THE COURT: And two requests for production because,
24 as I understand it, Mr. Goldberg does not want stuff that
25 relates to California, I would assume, or maybe he does.

1 Whatever.

2 How much time do you need to respond to these
3 individual requests?

4 MR. BRAMAN: We would request a thirty-day period,
5 your Honor.

6 MR. SPENCER: Your Honor, we should at least be
7 able to get the documents that were ordered by the court in
8 New York to be produced by April 19th, which was almost two
9 months after the initial request was made to them. They
10 should at least be giving us that. They have given that kind
11 of discovery to the private plaintiffs. They have already
12 delayed our discovery by several months here. The states
13 should be able to proceed with their first waive of discovery.

14 THE COURT: Well, we are trying to organize it so
15 that there is two first waives. There is the individuals'
16 first waive and the states first waive.

17 Now, I am going to order that interrogatories and
18 production requests be complied with by both defendants
19 within thirty days.

20 THE CLERK: June 3.

21 THE COURT: By June 3rd.

22 I am going to suggest, in interests of moving the
23 case along, that, if you were prepared to make an interim
24 production, that you can go ahead and complete that.

25 MR. BRAMAN: Your Honor, we do not yet have, though,

1 a consolidate set of interrogatories from the states. Could
2 we ask for thirty days from the receipt of same?

3 MR. SPENCER: Your Honor, they do have a set of
4 interrogatories, document requests and requests for admission.
5 They have made no production of that at all.

6 THE COURT: They may have a multiple. Is there a
7 single set?

8 MR. BRAMAN: We have been served with fifty-seven
9 interrogatories, which in no way complies with the local rule.
10 I recommend that they go back and try to comply with the local
11 rule or make a motion for --

12 MR. SPENCER: Your Honor, they complied with the
13 rules of the court that had jurisdiction over the matter at the
14 time.

15 MR. SENNETT: They did not.

16 THE COURT: In order to get this moving along I
17 will accept that as a motion for leave to file fifty-seven
18 interrogatories and I will grant the motion.

19 MR. SPENCER: Thank you, your Honor.

20 MR. BRAMAN: One other comment on discovery, your
21 Honor.

22 THE COURT: Yes, sir.

23 MR. BRAMAN: May I request deposition discovery on
24 the merits be deferred until after the certification issue?

25 THE COURT: Well, let's see.

1 MR. HUBBARD: After the certification issues -- we
2 disagree quite strenuously with both the private plaintiffs --
3 we believe that the parens claims or that the states' actions
4 should not be delayed by the class certification issues. So,
5 we would oppose that, your Honor.

6 MR. SENNETT: Your Honor, I think the cases in this
7 area are somewhat fascinating in that there is a conflict
8 between the private plaintiffs and the states and who ought to
9 be representing these people. There are some cases which we
10 have found which will hold that the states will have priority
11 over the class certification here and we have some cases which
12 go the other way.

13 THE COURT: Let me ask this: How is this issue
14 going to be presented to me and when is it going to be
15 presented to me? Is that part and parcel of the motions for
16 class certification?

17 MR. GOLDBERG: Your Honor, we wouldn't think so.
18 But, if the defendants present this issue, then it becomes
19 part and parcel of it.

20 THE COURT: Except they are sitting back here
21 telling me that they strenuously object to your being in the
22 case, as I understand it.

23 MR. SPENCER: That is incorrect, your Honor. We
24 are only saying that our parens class is a statutorily defined
25 class that does not require certification; that, at least,

1 to the extent that the thirty-three states, commonwealths
2 and District of Columbia are represented in this case, there
3 is no reason to delay discovery and the other proceedings of
4 this court pending certification of the class.

5 The certification or denial of certification will
6 in no way affect the general course of this litigation, which
7 is why we presented to the court a schedule that will lead to
8 a trial on liability in January.

9 MR. GOLDBERG: Your Honor, we happen to concur that
10 the certification or non-certification should not be allowed to
11 delay anything in this case and that the discovery on the
12 merits --

13 THE COURT: Well, certification will delay a certain
14 amount of things --

15 MR. GOLDBERG: I don't think so.

16 THE COURT: -- but that doesn't mean you can't go
17 on both tracks at the same time unless it is a manpower problem
18 that somebody might have.

19 Let me ask both groups of plaintiffs, the states and
20 the individual plaintiffs. What are you looking at as far as
21 both fact discovery and expert discovery?

22 MR. GOLDBERG: In our case?

23 THE COURT: I will take you first.

24 MR. GOLDBERG: Okay. In our case, very simply,
25 from Caremark we want the tapes. They know what tapes we want.

1 THE COURT: I am talking about depositions now.
2 That is part of your discovery, I would assume.

3 MR. GOLDBERG: We haven't quite reached a conclusion
4 but some place between zero and ten, at the very minimal, to
5 say the least.

6 THE COURT: What do the states need?

7 MR. SPENCER: It is very preliminary, your Honor,
8 because, until we see the documents and answers to interroga-
9 tories, we don't know for sure. But we believe we are talking
10 about something on the order of ten to twenty depositions of
11 fact witnesses. It's hard for me to answer on the experts
12 because that will depend largely on how many experts the
13 defendants are planning on using at trial. I am not sure what
14 we would need at this point. It would depend on exactly what
15 issues are still before the court.

16 THE COURT: Will the ten depositions that you want,
17 Mr. Goldberg, be in his twenty?

18 MR. GOLDBERG: I am sure, if we take ten, they
19 would be within his twenty.

20 THE COURT: So, we are talking about, for plaintiffs,
21 then, probably not more than twenty depositions on facts.

22 MR. GOLDBERG: I would think so, your Honor.

23 MR. BRAMAN: Your Honor, we are not aware of what
24 deposition discovery we are going to need on the certification
25 issues until we see their moving papers.

1 I can represent to the court that, carrying out that
2 discovery in good faith at the same time we have to defend
3 depositions on fact issues, at the same time we have to produce
4 documents and answers to interrogatories on fact issues, it
5 is going to be very burdensome, probably, with both defendants.

6 As Mr. Sennett mentioned, there is a conflict
7 between the *parens patriae* actions and a potential nation-wide
8 client, certified for the private plaintiffs. Until that issue
9 is resolved we are really not sure who is going to be
10 representing the people in this country that are relevant here.

11 MR. GOLDBERG: Well, the one thing that they can
12 be sure of is not all of us will still be here. Because
13 whether or not we represent a class we still represent Dauer
14 and Newell.

15 THE COURT: What he is saying is that I have given
16 them plenty of work to do for the next few months without being
17 burdened with depositions.

18 MR. GOLDBERG: Your Honor, I think you have given
19 them no work to do that they haven't been prepared to do a
20 long time ago.

21 I would make a suggestion. Here is a brief
22 suggestion which we would propose: That all document
23 discovery in this litigation be concluded by July 2nd; that
24 lay witness depositions be concluded by October 2nd; that
25 experts' identification and reports be put on the table by

1 the 17th of October; that depositions of the experts be
2 concluded by the 2nd of December; that all requests for
3 admissions be filed and answered by the 17th of December and
4 that we have a final pretrial conference some time around the
5 2nd of January and a trial, concurrent with the states'
6 suggestion, some time in January of 1992. That leaves
7 everybody the burden and takes it off the court deciding who
8 is going to do what to whom at what time. If we run into some
9 intersection problems, we will come back to you. I think that,
10 if we do something along those lines, it may solve the problems
11 of the day and hopefully good counsel can resolve the rest of
12 the problems among themselves.

13 MR. SPENCER: Your Honor, the states believe that
14 that largely comports with what we have requested from the
15 court and we would have no objection to that other than to
16 point out that we might need to do additional document
17 discovery based on the depositions but that would be the only
18 clarification we would have.

19 MR. SENNETT: Your Honor, at least, from our
20 standpoint, from Caremark's standpoint, it seems, perhaps, a
21 year or two ambitious.

22 We do have a number of issues we are trying to
23 resolve, continuing to resolve, on the certification issues,
24 which will take an awful lot of resources. We have briefing
25 to do on the motions to dismiss. I think, also, missing from

??too?

1 that is an appropriate pretrial order.

2 The difficulty with this case, your Honor, is that
3 there is a specter of this, which I will refer to as "quasi-
4 expert discovery," which is to say that we have thirty-three
5 states, a lot of mental health people, a lot of people -- I
6 know Mr. Spencer and his team have been interviewing and
7 gathering witness statements and, perhaps, have been talking
8 to literally hundreds of people on these issues. We need
9 significant discovery from the Food and Drug Administration,
10 which I know the states considered at one time making a party
11 to this litigation. And if they are not made a party, we
12 still do need significant discovery from the Food and Drug
13 Administration as part of the expert testimony here. There
14 may be some additional discovery that will come from the
15 states. We would ask at some time -- I don't think we are
16 ready to do that today -- but we would like at some time to
17 know who their witnesses are going to be at trial so that we
18 don't have to choose among three hundred potential quasi-
19 experts --

20 THE COURT: I assume you will be getting out
21 discovery, also.

22 MR. SENNETT: We will. And at that point, your
23 Honor, we will be able to assess it and to try to do these
24 things simultaneously. I mean, it leaves us in a very
25 difficult position.

1 THE COURT: I am reluctant at this initial status --
2 first of all, the case has not necessarily been assigned to
3 me for trial. It is for pretrial. So, I am reluctant to give
4 you a trial date on the first status.

5 MR. GOLDBERG: Your Honor, Dauer is assigned to your
6 Honor for trial.

7 THE COURT: Dauer is.

8 MR. GOLDBERG: We would -- and I am sure Newell
9 would join in a request for a joint trial with Dauer. We can
10 be ready to go to trial by January, whenever your Honor wants.

11 THE COURT: Well, I am reluctant to give you a
12 trial date on my initial status. I appreciate that you have
13 been in before me several times previously. To the extent
14 that I have to conduct all the pretrial matters consolidated
15 with the state cases, I have got to do that.

16 I am also reluctant to specify deadlines at this
17 particular point. Now, I am not reluctant, however, to move
18 the case along. Those of you who are familiar with me -- and
19 I am not sure anybody is -- I like to move my calendar along.

20 I think, to get the paper out of the way, that would
21 be appropriate before you commence on depositions. Now, I
22 had thirty days to answer the interrogatories and the
23 production requests. So, what I will do is I will stay
24 depositions for forty-five days and then fact discovery can
25 commence, depositions can commence. What day is that?

1 THE CLERK: Forty-five days is June 17th.

2 MR. SPENCER: To clarify one item, your Honor.
3 Would that also cover the requests for admission that the
4 states have made?

5 THE COURT: Requests for admissions I sort of lump
6 together with paper discovery.

7 MR. SPENCER: Okay. I make the point because there
8 has been some discussion about whether they are the same.
9 That is our view, as well, your Honor.

10 MR. SENNETT: We have responded to those, your
11 Honor.

12 THE COURT: Pardon?

13 MR. BRAMAN: Your Honor, may I make one comment
14 here?

15 THE COURT: Yes.

16 MR. BRAMAN: As we pointed out in our status
17 statement, the distribution system being challenged in all
18 these lawsuits has been changed by Sandoz. There is no need
19 to, in my opinion, therefore impose tremendous burdens on
20 counsel to move this along at some sort of expedited rate.
21 The briefing schedule and discovery schedule that we have for
22 class certification is about a ninety-day period of time. I
23 would request that we not allow the fact discovery depositions
24 to take place until the expiration of that ninety-day period.
25 It is actually eighty-nine days because there is fourteen days

1 for the reply brief.

2 MR. FORTI: Your Honor, may I make one other point
3 concerning the class certification issue? And I think you
4 raised it to the private plaintiffs and they did not specific-
5 ally respond. I think, as Mr. Sennett has raised the point,
6 this is a complicated issue concerning the conflict or
7 potential conflict between the private plaintiffs and the
8 states and we have to determine in what context that issue is
9 going to be resolved. I submit that, when we are talking
10 about class certification, that we as defendants can't respond
11 to the plaintiffs' class certification motion in a vacuum
12 unless we also have a sense of where the states stand in
13 connection with their parens patriae action.

14 Let me also add that our original motions to dismiss
15 are before the Court.

16 THE COURT: I have given you leave to proceed with
17 discovery on the class questions. Now, it may require some
18 discovery among the states; I don't know.

19 MR. FORTI: I think it would. That is why I am
20 suggesting that our time frame is already quite tight because
21 it is not simply two depositions of the class reps but it is
22 also depositions of the states.

23 MR. SPENCER: I am sorry, your Honor. I don't
24 understand it. The states' parens patriae authority arises
25 out of Section 4(c) of the Clayton Act. It is statutorily

1 defined. It does not require certification. It has been
2 defined by Congress.

3 MR. SPENCER: But, your Honor, the adequacy and
4 typicality of the claims --

5 THE COURT: I can see where some discovery might
6 be necessary to determine to what extent your claims diminish
7 the individual plaintiffs' claims. I mean, I understand. You
8 don't have to present a case before me in order to proceed in
9 court on behalf of whoever it is -- your children, I guess or
10 whatever the appropriate metaphor is -- but I am just saying
11 that there may be some overlapping discovery on that issue so
12 they determine to what extent you foreclose the plaintiffs.

13 MR. GOLDBERG: There may be some overlapping in
14 discovery as to what extent we foreclose them.

15 MR. SPENCER: But as a separate issue, your Honor,
16 the simple fact is that, regardless of how all that comes out,
17 there is going to be the same basic nature of the case here
18 before the court and there is therefore no reason to continue
19 to delay discovery just on the certification issues, including
20 the depositions.

21 THE COURT: Well, they are saying that you do not
22 have the time to do all this.

23 So, I will leave it at that. I will stay regular
24 deposition discovery until June 17th.

25 MR. BRAMAN: Your Honor, that is less than the

1 period allowed for the certification discovery and briefing
2 schedule. Their brief is due in thirty days and our reply is
3 due in forty-five days.

4 THE COURT: But you will only be doing two things
5 at once. Right now you are going to be doing the certification
6 and the paper discovery. Then, when you have the paper
7 discovery out of the way, you will be doing the certification
8 discovery.

9 MR. BRAMAN: Depositions would commence, under that
10 schedule, only fifteen days into the period that we have to
11 prepare our opposition to the motion for class certification.
12 That's the period when we will be taking that discovery.

13 THE COURT: What did I have, forty-five and --

14 MR. BRAMAN: It was thirty days for plaintiffs to
15 file a brief, forty-five days for the defendants to oppose it
16 and fourteen days to reply.

17 THE COURT: I will make it seventy-five days. What
18 is seventy-five days?

19 THE CLERK: Seventy-five days for --

20 THE COURT: To stay the depositions instead of --
21 forty-five days and another thirty days. So, it will be
22 July --

23 THE CLERK: That will bring us down to July --

24 THE COURT: 16th or 17th?

25 THE CLERK: It will bring it to the 19th.

1 THE COURT: July 19th you can start regular
2 discovery.

3 THE CLERK: It is stayed until July 19th.

4 THE COURT: 19th.

5 All right. The next thing on my -- well, before we
6 leave discovery, I would assume that you can agree on the
7 venue. Witnesses will be deposed one time in this proceeding.

8 MR. SPENCER: Certainly the states agree with that,
9 your Honor. We would expect to consult with all parties to
10 make sure that that happens.

11 THE COURT: If there are any problems on venue and
12 schedules, you can bring them back before me.

13 Confidentiality orders. I entered one in Dauer. Is
14 there a problem on the other cases?

15 MR. BRAMAN: What we would like to request, your
16 Honor, is to give us one week to look it over and, if we are
17 going to make any counter proposal for the massive actions
18 here, we can do that and provide it to opposing counsel
19 within one week.

20 MR. GOLDBERG: Your Honor, we agreed to that
21 conditionally. We no longer agree to a confidentiality order.

22 In our view, one of the reasons these cases are
23 brought is for the public to learn about what happened. With
24 these confidentiality orders large amounts of the material
25 get hidden from the public view. They turn into "star

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1 chamber" proceedings instead of open courtrooms. As a matter
2 of principal we object to any further imposition of a
3 confidentiality order except where individual people's lives
4 may be affected.

5 THE COURT: There is one in your case in effect
6 right now.

7 MR. GOLDBERG: That is correct, for the discovery
8 we are taking. Obviously, we agreed to that to move the
9 discovery forward to that point in time. But at some point in
10 time the proceedings have to become open to the public, and
11 that is before trial, we believe.

12 THE COURT: You would have to seek leave to
13 terminate the confidentiality order at such time that it will
14 remain in effect.

15 MR. GOLDBERG: Right, your Honor.

16 THE COURT: We are talking about the balance. Can
17 we live with the same order or --

18 MR. BRAMAN: Your Honor, we have provided it to
19 Mr. Spencer and we will do so with Mr. Sedran. Perhaps, if
20 we could have a week to come up with an agreed order, agreed
21 protective order, in two weeks.

22 MR. SPENCER: We would ask for two weeks because it
23 is going to take a while to bounce back and forth.

24 MR. SENNETT: I don't perceive a problem, your
25 Honor. There are really two interests here in the confidentiality

1 that are concerned. One, obviously, is the business
2 sensitivity of all the business plans and business documents
3 and, secondly, which the health care providers are very
4 concerned about is the confidentiality of the patients them-
5 selves.

6 MR. GOLDBERG: The patients. We, obviously, have
7 no difficulty with that.

8 We do have difficulty with continuing to hide the
9 facts of this conspiracy under a confidentiality order, your
10 Honor. We are going to file a motion at the appropriate time
11 to open this issue up so that there will be no mistake about
12 it.

13 THE COURT: I am not familiar with the terms -- I
14 suppose I should never sign an order I am not --

15 MR. GOLDBERG: Jerry Specks is one of the co-counsel
16 in our case.

17 MR. SPECKS: What has happened is that every
18 document that has been produced has been designated as
19 confidential, which, in our opinion, is an abuse of the
20 protective order. There is a provision in the protective
21 order for us to challenge those designations. Perhaps that
22 may be the appropriate way to do it.

23 THE COURT: That may be the appropriate way to do it.
24 I would suggest that you try to agree on this.

25 Two weeks to present an agreed confidentiality order

1 for the states' cases.

2 MR. SENNETT: Your Honor, if I may. The mechanics
3 of this -- as we did point out, we did produce close to
4 twenty-five cartons of documents, thirty thousand pages. We
5 did, in order to expedite this -- everyone wanted documents
6 quickly from the trade commission. We are not standing in the
7 way of anyone getting these documents. But it is, again, a
8 tremendous expense and administrative burden to go through it.

9 THE COURT: What I would suggest we do is we would
10 enter into an agreed confidentiality order and then at such
11 point that anybody feels that -- so that we can get the
12 discovery out of the way -- then, if somebody seeks to be
13 relieved of it, present a motion and in an orderly fashion I
14 will determine whether or not it is appropriate to terminate
15 it or to limit it or to keep it in full force and effect. So,
16 everybody seems to be agreed to proceedings with one at least
17 at this stage of the case.

18 All right. Designation of experts. I think I will
19 leave that for the next status.

20 I have document preservation, production, numbering
21 and possession. One of the hallmarks, as I understand it
22 from reading what they suggest in multidistrict cases, so that
23 we don't get all mixed up, is that we have a uniform marking
24 system that preferably would be the same system to be used if
25 this case goes to trial. I do not know if there is one or

1 what type of identification system you are proceeding with
2 now.

3 MR. SPENCER: All documents that the states
4 received as part of the pre-complaint discovery from various
5 parties, including the defendants, were numbered in a uniform
6 manner, a relatively uniform manner, a relatively uniform
7 manner. What they did was a different number on each page,
8 as recommended by the manual, et cetera, and numbers were
9 preceded by a letter that identified the corporate entity
10 that was producing the document. It would seem that that should
11 continue to be suitable to everybody. We might even talk a
12 little bit about which letters to use.

13 MR. SENNETT: I think, in this case, your Honor,
14 since there are two defendants, rather than having forty
15 defendants, we both have pretty good controls over our
16 documents and I think we can work together with the private
17 parties and the states to make sure we address that.

18 THE COURT: I will leave that in your hands, then,
19 to deal with.

20 MR. GOLDBERG: I think your Honor ought to enter a
21 preservation order, however, in this case.

22 MR. SENNETT: Your Honor already has, I think, in
23 the Pretrial Order No. 1.

24 THE COURT: Yes, I think I did.

25 MR. GOLDBERG: I beg your pardon.

1 THE COURT: My last item, then, other than "other
2 matters" is problems which may be encountered down the road.
3 Does anybody know of any immediately that we have not covered?
4 Yes, sir, Mr. Goldberg.

5 MR. GOLDBERG: Well, from our viewpoint, the first
6 problem that we want is -- we want a trial date. We are
7 going to raise that again and again, your Honor.

8 THE COURT: You may do that. I will assure you
9 that I will give you one but not today.

10 MR. GOLDBERG: I am quite sure of that. We hope
11 that we can persuade your Honor to give it to us the next time
12 we meet.

13 THE COURT: I may very well do that once I am in a
14 position to set cutoffs and that sort of thing. I will be
15 happy to do that. Whether January is too early or not early
16 enough I don't know. I, am not a genius. Maybe that is why
17 this case does not seem that incredibly complicated. There
18 are some rather basic issues here which kind of stand out
19 that need to be resolved. They don't seem extraordinarily
20 complicated.

21 I get to, now, No. 10 on my agenda, "other matters."
22 Does anybody want to bring anything up?

23 MR. SPENCER: Other than we would suggest that we
24 schedule our next status conference so that we will at least
25 have a date.

1 THE COURT: I am going to do that.

2 Does anybody want to bring up anything or have I
3 run over everything?

4 All right. When is our briefing on the class? When
5 is that up?

6 THE CLERK: The last brief is August 1.

7 THE COURT: How about for the next status, say,
8 mid-August?

9 MR. GOLDBERG: Your Honor, I will be out of the
10 country at that point in time.

11 MR. BRAMAN: That's a great time, your Honor.

12 THE COURT: Are you suggesting that it will proceed
13 smoother with Mr. Goldberg absent?

14 What is your schedule?

15 MR. GOLDBERG: August.

16 THE COURT: All of August?

17 MR. GOLDBERG: All of August, your Honor.

18 THE COURT: How about the next status in early
19 September?

20 MR. GOLDBERG: That's fine.

21 MR. SPENCER: That's fine, your Honor.

22 THE CLERK: September 4, one-thirty, again.

23 THE COURT: What day of the week is that?

24 THE CLERK: The 4th is on a Wednesday.

25 THE COURT: It won't be necessary for anybody but

1 the counsel who will be liaison counsel and whoever wants.
2 Obviously, everybody is invited to come. I am not interested
3 in making the airlines a winner in this case. So it will not
4 be necessary for everybody to appear other than those who have
5 a particular interest, liaison counsel, plaintiffs' counsel
6 and defense counsel.

7 What is convenient? Any day of the week? Do you
8 want Friday? Somebody comes from out of town. Who comes from
9 out of town?

10 MR. BRAMAN: I come from out of town, your Honor.
11 Frankly, mid-week is more convenient.

12 THE COURT: Mid-week?

13 MR. BRAMAN: Yes, your Honor.

14 MR. SEDRAN: I come from out of town. We hate
15 traveling on early Monday mornings or Friday afternoons.

16 MR. BRAMAN: The middle of the week is good.

17 THE COURT: Pick a day. You want Wednesday?

18 THE CLERK: September 4th.

19 THE COURT: September 4th, at one-thirty. Is that
20 the most convenient time or do you want it in the morning?

21 MR. BRAMAN: One-thirty is fine, your Honor.

22 THE COURT: September 4th, at one-thirty.

23 If anybody wants to bring anything to my attention,
24 I will be happy to entertain it. I would entertain, also --
25 in fact, you might want to do this -- perhaps we can proceed,

1 if some emergencies come up, by telephonic status. I would
2 like to have that status in person because I think there will
3 be a number of things we will want to go over. If there are
4 any problems, check with my clerk and we can set up a
5 telephonic status call so that we can keep needless travel
6 down.

7 MR. SPENCER: We appreciate that, your Honor.

8 Your Honor, may I clarify one thing?

9 THE COURT: Yes.

10 MR. SPENCER: I have been asked by one of my sister
11 states to get one thing clear on the pleadings.

12 We discussed both in terms of liaison counsel and
13 the states management committee. It is our understanding that
14 service -- that the prompt service will be made on the
15 committee as a whole rather than just on liaison counsel.

16 MR. BRAMAN: I understood it was liaison counsel.
17 The committee is eight people. Everybody will be getting it
18 by U.S. mail.

19 MR. SPENCER: Because of the fact that we need to
20 deal through the committee, just to serve it on liaison counsel
21 is going to force liaison counsel, then, to send it by
22 overnight mail to the committee, anyway. It just adds our
23 cost for their litigation.

24 I am sorry to revisit the issue, your Honor, but I
25 was afraid that we had --

1 MR. BRAMAN: Let me propose a compromise. Will you
2 designate four people on the committee so that we have a total
3 of five to serve by Federal Express?

4 MR. SPENCER: It doesn't do us anything because
5 we still have got to get it back to the entire committee.

6 THE COURT: What do you have, eight?

7 MR. SPENCER: We have eight.

8 Your Honor, we are perfectly willing to -- also, any
9 particular problem that might arise, you know, a phone call
10 will settle it with us and we can handle any specific problems
11 that may come up.

12 THE COURT: What do you call your committee, again?

13 MR. SPENCER: The case management committee.

14 THE COURT: I will say that the case management
15 committee to be served.

16 MR. SPENCER: Thank you, your Honor.

17 THE COURT: That will not prevent you from working
18 it out. Special cases you can bring either to my attention or
19 you can work out yourself. So that you do not have to send
20 hundred-page documents to everybody.

21 MR. SENNETT: Your Honor, I assume that the
22 defendants will be served by the states and by others by
23 Federal Express as well. In that circumstance I would like to
24 have the same courtesy afforded to us.

25 MR. HUBBARD: Yes, your Honor.

1 MR. SPENCER: We are only asking, your Honor, for
2 **Federal Express** if we are up on the last day of a filing.
3 Obviously, we would not expect them to do that for something
4 we get plenty of notice on.

5 THE COURT: If you get something out early, there
6 is no reason why you have to do that.

7 MR. SENNETT: I am not sure we will have to.

8 THE COURT: I will endeavor to get out what I will
9 call Order No. 2, which will summarize what we have done here
10 today. If there are any errors in it you can let me know and
11 I will try to get it out. Okay?

12 MR. SPENCER: Thank you, your Honor.

13 MR. SENNETT: Thank you, your Honor.

14 MR. BRAMAN: Thank you, your Honor.

15 (Which were all the proceedings had in the above-
16 entitled cause.)

17 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
18 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED
19 MATTER.

20

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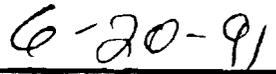
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Official Court Reporter



Date