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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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IN RE: VIOXX PRODUCTS  
LIABILITY LITIGATION

MDL DOCKET NO. 1657  
NEW ORLEANS, LOUISIANA  
OCTOBER 11, 2007, 9:00 A.M.

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TRANSCRIPT OF MONTHLY STATUS CONFERENCE PROCEEDINGS  
HEARD BEFORE THE HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY. TRANSCRIPT  
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1 Circuit Court for Bullock County, Alabama.

2           The *Appell/Arrigale* case is set for January 8, 2008, in  
3 the California Coordinated proceedings in the California Superior  
4 Court for Los Angeles County.

5           And the date of January 22, 2008, has been set in the  
6 New Jersey Coordinated proceeding for four trials with up to two  
7 to three plaintiffs in each trial.

8           On February 11, 2008, the *Zajicek* case is set in Jackson  
9 County, Texas.

10           And finally, on March 10, 2008, the *Frederick* case is  
11 set for trial in Jefferson County, Alabama.

12           THE COURT: Okay. The next item is Further Proceedings  
13 in the Early Trial Cases.

14           MR. HERMAN: Your Honor, the *Barnett* issue is pending.  
15 Notice of appeal has been filed by Merck. We have nothing  
16 further to report.

17           THE COURT: With regard to future federal cases, my  
18 thinking, as I mentioned to you, is next year we'll line up about  
19 five stroke cases. I'm going to give the plaintiffs the  
20 opportunity to pick the stroke cases so you should be thinking of  
21 those stroke cases.

22           Secondly, with the third-party payor cases, I've  
23 received an opinion from the Supreme Court of New Jersey which  
24 decertified the national class, so we're going to have to focus  
25 on those that are before this court, and my thinking is to try

1 one or more bellwether cases. If we can get by with one, that's  
2 fine; if we need a couple more to flesh out the whole thing,  
3 that's fine. Then I'll also be working on the remand motions.  
4 So 2008 hopefully will conclude my involvement in this case one  
5 way or the other.

6 MR. MARVIN: Your Honor, Douglas Marvin for the record.  
7 Your Honor, on the stroke cases, could we be heard on the  
8 selection process for the stroke cases?

9 THE COURT: Sure, I'll give you an opportunity, but  
10 that's my feeling. The reason for that is I think that in those  
11 particular cases, I consider those a little more problematic from  
12 the standpoint of the present state of the science as well as the  
13 law, and because of that, I think it would work best for the  
14 plaintiff to pick them, but I'll listen to you. I'll keep an  
15 open mind here.

16 MR. MARVIN: We'll try to submit a very persuasive  
17 motion on that.

18 MR. HERMAN: We'll try to oppose it just as  
19 persuasively, Your Honor.

20 With respect to, as Your Honor has indicated, a  
21 remand, Ms. Barrios has done an excellent job compiling her  
22 remands, and I understand there are 729 pending remands. We'll  
23 provide you, Your Honor, and defense counsel with the work  
24 product that Ms. Barrios has performed.

25 THE COURT: Also on that, Ms. Barrios, we had one that

1 was scheduled today. The person withdrew it but I would like to  
2 get some dates from him --

3 MS. BARRIOS: Yes, Your Honor. Mr. Tommy Jacks is in  
4 the courtroom. He's the plaintiff's counsel.

5 THE COURT: I would like to get some dates that's  
6 convenient with your schedule and with the defendants and then  
7 I'll work it in, and we'll deal with it. I think that's one that  
8 we need to deal with.

9 MR. JACKS: Yes, Your Honor.

10 MR. HERMAN: Your Honor, I would personally like to  
11 thank Mr. Jacks, who has been most helpful in the scheduling  
12 process. He will be reviewing the plaintiff trial package at  
13 Ms. Barrios' office today with representatives of the PSC, and  
14 the setting of that remand motion is very important.

15 In addition to that, I just want to, for the record,  
16 note that there is a case filed by the Attorney General of  
17 Louisiana, and we'll be asking the Court soon to look at remand  
18 in terms of that case.

19 THE COURT: And with regard to class actions, they can  
20 go one or two ways, and I need to focus a little bit on that.  
21 I'm not really rigid on it. I've already ruled that there is no  
22 national class action, but there is an issue of whether or not  
23 there are state class actions. I can do one of two things: I  
24 can deal with 50 state laws and make that decision, or I can send  
25 them back to their respective states to make that decision.

1           If I make the decision, it's difficult for me to just  
2 impose that on another judge in another area, so I probably, if I  
3 decide to make that decision, will have to also make myself at  
4 least available to that judge to try that particular class action  
5 wherever it may be going back to, if that's the situation, but  
6 I'm not there yet.

7           I don't know whether there is going to be any  
8 independent state class actions or not. If there are and I make  
9 the decision, I'm probably going to have to recognize that I'm  
10 going to have to go to the state and try those cases or at least  
11 make myself available, if they don't want me on it. Those are  
12 some of the issues that I'm going to have to deal with beginning  
13 next year.

14           Class Actions is the next one.

15           MR. HERMAN: Yes, Your Honor.

16           MR. WITTMANN: Your Honor, you've got under advisement  
17 the defendants' Rule 12 motions to dismiss the master complaints  
18 for medical monitoring and money purchase claims, and that matter  
19 has been briefed and submitted to you.

20           There are two motions that need to be set for argument:  
21 One is the PSC's motion for leave to amend the personal injury  
22 and wrongful death second amended master class action complaint  
23 to add a plaintiffs' representative from Iowa, and defendants  
24 have filed a motion to strike the class action of the plaintiffs'  
25 medical monitoring master class action complaint. That matter

1 has been briefed, and we're awaiting a hearing date and have oral  
2 argument on that. And I think that's it on the class actions.

3 MR. LEVIN: Procedurally he has it right, Your Honor.  
4 Substantively there is a big difference.

5 THE COURT: Are we ready to argue those cases?

6 MR. LEVIN: Yes.

7 THE COURT: Then I'll be getting with you all and set  
8 some argument dates.

9 MR. LEVIN: Thank you.

10 THE COURT: The next item is Discovery Directed to  
11 Merck.

12 MR. HERMAN: Yes, Your Honor. Actually item number 4,  
13 Discovery Directed to Merck, and Deposition Scheduling in  
14 connection with that, item number 6, if I might, I'll just  
15 discuss those very briefly together.

16 We recently received approximately a hundred thousand  
17 pages of deprivileged documents that would apply to the Reicin  
18 deposition which was previously set. I understand that  
19 representatives of the plaintiff and defendant have reached a  
20 mutual understanding on the taking of those deposition dates.  
21 They'll confirm something by letter.

22 So the question raised as to the moving of the dates is  
23 now moot, and in the event that we have another problem in terms  
24 of deprivileged documents coming in en masse, the plaintiff  
25 representatives and the defendant representatives will meet and

1 attempt to resolve those dates without the necessity of the  
2 court.

3           Having said that, I don't believe there is really a  
4 controversy now with respect to items four, Discovery Directed to  
5 Merck, and number 6, other than there has been a recent privilege  
6 ruling.

7           MR. WITTMANN: That's correct, Your Honor.

8           THE COURT: I do appreciate the work that Professor Rice  
9 and Attorney Brent Barriere have been doing on this. As you all  
10 will recall, we originally had 30,000 documents containing some  
11 500,000 pages. The Court reviewed the material. The  
12 Fifth Circuit asked that I re-review it.

13           I appointed Professor Rice, a well-known, well-  
14 qualified professor who specializes in privilege law to review a  
15 representative number of documents, and he was able to look at  
16 2,000 documents which were representative of the first 30,000  
17 documents, and he made recommended rulings on that.

18           I reviewed them and I accepted most of them. There were  
19 some of them that I reviewed and overruled, but substantially all  
20 of the documents were dealt with, the 2,000, and they were given  
21 back to Merck so that they could extrapolate from the 2,000 to  
22 the 30,000 documents. The 2,000 consumed about maybe 20,000  
23 pages or thereabout. So they were able to work out the 30,000,  
24 another 30,000 documents and another 500,000 pages were  
25 presented, but that was able to be worked out also with the help

1 of Professor Rice and Brent Barriere.

2           The next issue pertaining to privilege claims had to do  
3 with individuals who were third parties but were related in some  
4 way or at least hired by Merck in some way, and the question  
5 primarily was whether or not the privilege was waived, and if so,  
6 was the whole privilege waived or only partially waived. Those  
7 documents are now the subject of item 4 of the agenda, and they  
8 are also interfaced with item 6 that we talked about.

9           The Special Master has made some preliminary rulings and  
10 distributed them to the parties. I'm waiting for their input,  
11 and then I'll review the material and then make some final  
12 rulings on that. I do appreciate the cooperation of counsel as  
13 well as the splendid work of Professor Rice and Brent Barriere.

14           The next item on the agenda is --

15           MR. HERMAN: Your Honor, just one matter with respect to  
16 the third parties and the rulings: We would anticipate that by  
17 the next scheduled status conference -- will come well after all  
18 of the briefing on those third-party issues and would attempt to  
19 discuss some scheduling for the next status conference.

20           With respect to the Plaintiff Profile Form, the Merck  
21 Profile Form, both sides have worked pretty hard at this. I've  
22 agreed to meet with a representative of the defense today and see  
23 if we can come to a final document to submit to the Court, and  
24 I'm hopeful we can resolve that issue.

25           THE COURT: Fine, I am also, because I think that both

1 of you working at it will come up with a better product than I  
2 will because you're closer to it, but if you can't get it, then I  
3 would have the plaintiffs submit their proposal and the  
4 defendants submit their proposal, and I'll come up with the  
5 proposal. I really urge you all to see if you can come up with  
6 it. It will be in better form if you decide it than if I decide  
7 it.

8 MR. WITTMANN: I think you actually have the proposals,  
9 but notwithstanding that, we're still going to try to work it out  
10 so you don't have to make that decision.

11 THE COURT: The next item is Federal/State Liaison  
12 Committee.

13 MS. BARRIOS: Good morning, Your Honor, Dawn Barrios for  
14 the State Liaison Committee. I'm providing you today with some  
15 additional CDs that are comprehensive in nature. So that I don't  
16 feel like I'm bringing to the Court the last season of the  
17 *Sopranos* in a box set, we are going to convert next month's  
18 status conference to DVDs because then I only have to bring one.  
19 I cleared it with your law clerk yesterday to make sure that your  
20 chambers had DVD facilities, and I understand that they do, so  
21 I'm going to present the last box set of our last season to your  
22 law clerk.

23 THE COURT: Fine. I appreciate the work that you've  
24 been doing on this issue and also the patience of the state's  
25 claimants. I reviewed maybe a week ago the plaintiffs' trial

1 package. One of the responsibilities of the plaintiffs'  
2 committee, in addition to preparing and discovering the case,  
3 collecting documents and putting them in some form and fashion  
4 and organizing them so that they can be presented at trial, is to  
5 prepare a trial package.

6 That's an advantage of this format so that a trial  
7 package can be prepared, can be sort of canned, if you will, and  
8 sent back to the states so that anyone wishing to try the case  
9 will simply utilize the trial package and then, in addition,  
10 garnish it with some live witnesses, so to speak, to make it more  
11 presentable to a jury. I've reviewed the trial package in camera  
12 with the plaintiffs' committee. It will be very helpful, is very  
13 well prepared, and I feel that the states will benefit from it.

14 That's one of the reasons that I've been reluctant  
15 to send cases back or to focus on the remand, because they would  
16 only have access to a portion of the trial package perhaps or  
17 maybe none of it, and I wanted them to go *The Full Monty* on this,  
18 so to speak, and I think that they now have it available to them,  
19 so I will be focusing on the remand motions for the plaintiff.

20 MS. BARRIOS: Thank you, Your Honor. We did communicate  
21 with all the states' attorneys via electronic newsletter after  
22 the last status conference, and I received many calls and return  
23 e-mails, "Hallelujah, the trial package is finished." So I'll  
24 just wait and work with Mr. Herman when that would be available.

25 Your Honor, just to refer back to the document that I

1 had prepared and Mr. Herman had remarked, I just wanted to bring  
2 to your attention, the last two pages are the statistics breaking  
3 down the 729 remands. There are, Your Honor, 10 cases that are  
4 up on second remands. They have been removed, remanded, and  
5 removed again. And I know you said you would turn your attention  
6 to those.

7           Those 10 cases are contained on a separate CD-ROM for  
8 Your Honor's viewing pleasure that when you address the issue of  
9 remand, I think it would be appropriate to address these 10 that  
10 are here on a second remand.

11           THE COURT: Okay.

12           MS. BARRIOS: Your Honor, lastly, I do have another case  
13 with an ill plaintiff that has been brought to my attention. The  
14 case name is *Lewis Montgomery versus Merck*. It's case number  
15 205-01176. And I've been in touch with plaintiff's counsel just  
16 late yesterday afternoon. He's in trial today, so I'm going to  
17 work with him, but he asked that I bring that case to  
18 Your Honor's attention.

19           THE COURT: Thank you very much.

20           MS. BARRIOS: Thank you, Your Honor.

21           THE COURT: You bet.

22           MR. HERMAN: Your Honor, with respect to a trial package  
23 issue, I talked with Shellie and members of the committee, and  
24 they are accelerating their work on the stroke package, and we  
25 hope before the next status conference, we could come to you to

1 say that it's well along.

2 In addition, to that, I think it's important to again  
3 acknowledge Mr. Jacks on the record. There are not many trial  
4 lawyers in this country that aren't aware of his professionalism  
5 and abilities, and the PSC particularly wants to thank him for  
6 his cooperation. This is the third or fourth time he's left an  
7 important matter in progress to appear, and I'm very anxious to  
8 get a date for remand.

9 THE COURT: The next item is *Pro Se* Claimants.

10 MR. HERMAN: There is really no new issue on that,  
11 Your Honor.

12 THE COURT: IMS Data.

13 MR. HERMAN: There is really no new issue on that,  
14 Your Honor.

15 THE COURT: Eleven is Merck's Motion For Summary  
16 Judgment.

17 MR. WITTMANN: Your Honor, I think you have under  
18 consideration the certification of --

19 THE COURT REPORTER: Mr. Wittmann, I can't quite hear  
20 you.

21 MR. WITTMANN: I said you have under submission now our  
22 motion for certification for interlocutory appeal on the  
23 preemption issue.

24 MR. LEVIN: Your Honor, you know we're involved in  
25 discovery with regard to compliance with the executive order.

1 We'll be filing discovery shortly against the FDA on that issue.

2 THE COURT: And you're feeling still is that it's not  
3 ripe for argument at this time?

4 MR. LEVIN: That's correct, sir.

5 THE COURT: Tolling Agreements.

6 MR. HERMAN: Your Honor -- I'm sorry, Phil. Excuse me.  
7 Your Honor, we were advised this morning by liaison counsel that  
8 recently in Mississippi, Mr. Tyner, in federal court has filed  
9 over a thousand cases, bundled them, and they will be coming  
10 here, and Your Honor has a process for unbundling those. We  
11 wanted to alert the Court, both sides, so the Clerk's Office will  
12 be alerted that they are in the pipeline.

13 THE COURT: That's a problem that not only the  
14 Clerk's Office of this court but clerk's offices for courts  
15 throughout the country that are dealing with MDLs are having.  
16 The question of filing of one case and then attaching or joining  
17 another thousand cases to that case presents some problems  
18 logistically.

19 I don't want to create a problem with prescription for  
20 the other 999 cases, but at the same time, it gets really  
21 problematic when one case is filed and 999 are joined to it,  
22 because those 999 don't have a docket number, and then as the  
23 time goes by, some of those cases are dismissed, some of those  
24 cases are abandoned, some of those clients wish to get out, and  
25 there is no docket number, and then to go back in and try to find

1 them presents some logistical problems.

2           So the best way of doing it, I think, is to file  
3 individual cases, and that seems to be the consensus of courts in  
4 the country. I'm looking at that.

5           MR. WITTMANN: One other thing on the tolling  
6 agreements, Judge: We're continuing to work with the PSC on a  
7 stipulation that will let the claimant profile forms that have  
8 been filed with the tolling agreements be converted to a PPF  
9 through an addendum. We haven't gotten there yet, but we're  
10 still working on it.

11           THE COURT: I think that's the solution, frankly, so  
12 that those individuals don't have to redo what they have already  
13 done. Next time I think it would be helpful to keep that in mind  
14 when that type of material is being filed. Let's get the PPF  
15 filed with the tolling agreements since you know it's going to be  
16 used in the future.

17           I think tolling agreements are helpful in this type  
18 litigation. I think it does work, and I don't think that the  
19 bundling has worked either for this district or for other  
20 districts that I am aware of, but I totally agree they serve a  
21 purpose.

22           Issues Relating to Pretrial Order Number 9 is item 13. Is  
23 there anything on that?

24           MR. HERMAN: No, Your Honor.

25           THE COURT: You've received some agreement now from the

1 Texas MDL, and I know we have some from California and  
2 New Jersey.

3 Vioxx Suit Statistics, is there anything on that?

4 MR. WITTMANN: There hadn't been any change since the  
5 last -- I think we have new results. New statistics will be out  
6 October 15th.

7 MR. HERMAN: Except for the thousand or so numbers added  
8 to the 23,450 now pending in the MDL, I don't think they have  
9 been included.

10 THE COURT: As I understand it, those were filed in  
11 federal court in Mississippi, and so we are going to be seeing  
12 them shortly.

13 MR. WITTMANN: Yes.

14 THE COURT: Merck's Insurance.

15 MR. HERMAN: No further issue on that today, Your Honor.

16 THE COURT: And 16 is Motion to Conduct Case Specific  
17 Discovery.

18 MR. HERMAN: I would like that matter just held over to  
19 the next status conference, Your Honor.

20 THE COURT: The next, item 17 is Oxford/VICTOR Data.

21 MR. HERMAN: We have an agreement with defense counsel  
22 that when they receive additional materials from Oxford, we'll  
23 get them. We haven't received additional materials, but I'm  
24 certain that defense counsel will forward them when they receive  
25 them.

1 MR. WITTMANN: That's correct, Your Honor.

2 THE COURT: And the next item we have is the MDL Trial  
3 Package we talked about already.

4 Some items that I'm going to be focused on and will be  
5 putting out a minute entry shortly on it is the Court's ruling in  
6 the *O'Brien* case and whether or not I should certify for  
7 immediate appeal the issue of whether state procedural law or  
8 federal procedural law is to be used for dealing with the  
9 substitution of an estate.

10 I held that it should be federal law because it's  
11 procedural in nature, and the Federal Rules of Civil Procedure  
12 should apply. I'm now being asked to certify that particular  
13 question. I'll be denying that request, but I'll do it in a  
14 minute entry.

15 The *Duly* case -- there were two suits filed, one in  
16 Colorado, one in Minnesota. The case involves an individual who  
17 lives in Colorado, took medication in Colorado, has a treating  
18 physician in Colorado. His attorney, however, lives in  
19 Minnesota, and there are two suits. One filed in Minnesota; one  
20 filed in Colorado. The same suit, just two places, and a  
21 decision has to be made as to which one should be the one and the  
22 other one be dismissed.

23 I'm inclined to dismiss the Minnesota case, assuming  
24 that there are no prescriptive problems. I don't want the party  
25 to be disadvantage with prescription, but if there are no

1 prescription problems, I will be doing that.

2           Ms. Joan Petty (spelled phonetically), who is a *pro se*  
3 claimant, has filed a RICO claim. I've separated that and made  
4 that a separate claim. I've looked at the material, and it seems  
5 to me that it does not satisfy the requirements of RICO. I will  
6 be dismissing that RICO claim.

7           An issue that I'm trying to deal with is this: I'm  
8 getting a number of motions from attorneys wishing to withdraw  
9 from the case. I don't want the litigants to be disadvantaged by  
10 the attorneys withdrawing and the litigants not having any  
11 representation. On the other hand, attorneys can't be asked or  
12 required to stay in a case when they try repeatedly to find their  
13 client and their client has either abandoned the case or is no  
14 longer interested in pursuing it but will not communicate with  
15 them. I'm trying to deal with it in some way that protects the  
16 litigant and also recognizes the insurmountable problem of the  
17 attorney in that circumstance.

18           And we have also some dismissals of PPF, but I'll deal  
19 with that shortly.

20           The next meeting will be on November 9th. I'll meet  
21 with the committees at 8:30, and we'll begin this meeting at  
22 9 o'clock. Anything from anyone either on the committee or in  
23 the audience?

24           MR. HERMAN: Your Honor, would it permissible for  
25 Mr. Jacks and Ms. Barrios to meet with someone from your office

1 to look at schedules?

2 THE COURT: That's fine. And also maybe someone from  
3 the defendant so that we can coordinate some dates. I would like  
4 to pick a date, and I'll set it on a time that nothing else is  
5 taking place so that we'll focus on it and deal with it.

6 MR. WITTMANN: We have nothing further, Your Honor.

7 THE COURT: Mr. Becnel has a comment.

8 MR. BECNEL: I've been behind the striping machine,  
9 Your Honor, on the bridges putting new lines down, but I've been  
10 listening on the phone.

11 But in any event, I read the recent articles in the ADA  
12 journal this month dealing with the costs of this kind of  
13 litigation. And I'm very concerned when you brought up just a  
14 minute ago, you know, \$350 per person to file. A lot of people  
15 can't do that, and a lot of lawyers, with the cost of these  
16 trials, to both sides, you know, costing two to three million  
17 dollars a pop to try, are we going to just price all of these  
18 people out of the civil litigation?

19 THE COURT: That's a legitimate question, and that's why  
20 my first reaction was to allow it because it just seemed to me  
21 that it was problematic or difficult to have some people put out  
22 \$300. Someone who is filing a thousand cases, that's \$300,000.  
23 That's a problem, and I frankly don't have an answer to it, but  
24 it's creating logistical problems that are insurmountable.

25 New Jersey I've talked with. They've gone the way of

1 individual filings. So have a number of other states in the  
2 federal system. I frankly don't know what to do with it. It's a  
3 problem, though, and I recognize the problem.

4 MR. BECNEL: And, Your Honor, what I'm really concerned  
5 about is people with large inventories. Up to this time, almost  
6 every member of the PSC can afford to file their cases, but a lot  
7 of people that have 20 or 30 cases that don't have the finances  
8 that these people do, they're priced out of the marketplace and,  
9 you know, it's just not fair. I don't know what the answer is,  
10 other than doing eight or ten or twelve. For example, if you  
11 want me to start trying my cases and I got to do them one at a  
12 time, you and I will be dead before I get to the end.

13 So I would suggest big groups of cases. I've been  
14 suggesting that since the inception of this case, because I  
15 thought one-at-a-time cases are going nowhere, no matter where  
16 they are. It brings down the cost, and that's what the  
17 Supreme Court seems to be talking about and the ABA seems to be  
18 talking about, how to bring down the costs to make it cost  
19 effective.

20 The trial package that the PSC has put together is  
21 wonderful, but if you're doing it even with that, it's going to  
22 cost two or \$300,000 a case, and let's say a case is only worth  
23 \$100,000.

24 THE COURT: Well, the problem that presents is a lot of  
25 times a lot of things that happen happen as a result of abuses of

1 the system. A person who packages a number of cases that are  
2 good cases which have been screened and are significant cases is  
3 one thing. Oftentimes, lawyers -- I'm sure no one in this room  
4 or on the phone -- but there are some lawyers who simply say,  
5 Well, let's file a number of them. It's easier. It's cheaper.  
6 We'll take one that is really a good case, and then all the rest,  
7 the 999 or whatever it is we're not sure about, we don't have  
8 time to deal with them at this time but we'll put them in the  
9 pleading, and since it doesn't cost anything, let's just put them  
10 in. And that unfortunately brings the issue that all of you-all  
11 are dealing with. It's an abuse of the system that creates the  
12 problem.

13           Also, costs in MDL cases concerns me with the discovery.  
14 That's why I tried to do it myself first, because it was just  
15 cheaper for the litigation and cheaper on the litigants. So I  
16 took two weeks out of my life to do it, and I worked about  
17 10 hours a day looking at those documents, but it's difficult for  
18 a court to shut down for two weeks and do that sort of thing.

19           So when the Circuit suggested I do it again, I couldn't  
20 give another two weeks. I just couldn't do it. I had too many  
21 cases on my docket, so I needed some outside help. We hired or  
22 you hired, you meaning the litigants hired at my request or  
23 suggestion or order, Professor Rice. It's costing hundreds of  
24 thousands of dollars to deal with this discovery issue, but how  
25 do you deal with 500,000 documents or a million documents now

1 with the court system? You can't look at those numbers of  
2 documents.

3 My concern, just institutionally, is that I'm hearing  
4 comments about the way to do it is to do away with privilege, to  
5 do away with the attorney-client privilege, and that's a  
6 difficult thing for lawyers to deal with. We have one of the  
7 oldest privileges in the law, the attorney-client privilege, and  
8 that's in jeopardy now because of the problems that mass cases  
9 like this present.

10 Cost is another issue. When it's abused and then the  
11 cost is focused on, some people say, Well, let's do away with the  
12 vehicle. Some claim that the class action vehicle doesn't work  
13 anymore. The MDL vehicle doesn't work anymore. That's the  
14 problem that's presented, and it's a difficult issue.

15 I'm aware of the point you raise, and I don't have an  
16 answer to it. It's just that I don't know how you deal with it  
17 when you have a thousand cases, and one is a good case, and  
18 80 percent of them withdraw after a while, and it presents  
19 problems for everybody. I don't know what you do with that.

20 MR. BECNEL: Judge, the other thing is if we start  
21 dealing with preparing *forma pauperis* petitions here, that's  
22 twice as difficult for the Clerk's Office and the contesting of  
23 whether that person is truly a pauper or not. We deal with that  
24 quite a bit in the state courts, not very much in the federal  
25 courts.

1           But I think there ought to be something in all of the  
2 meetings with the various MDL judges to address these issues  
3 because, you know, I just don't think, like in the Katrina  
4 litigation, if I had to take the 71,000 clients that I have and  
5 file an individual lawsuit for them, I would either have to tell  
6 them, See you later, Get you somebody else. And they couldn't  
7 pay, so what do we do?

8           That's a typical example of most of these people who  
9 have had heart attacks or had strokes. They've lost their jobs.  
10 They are barely hanging on to their homes or whatever they have.  
11 It's issues that we have got to address as a society, not just as  
12 lawyers.

13           Thank you, Your Honor.

14           THE COURT: Thank you for your comments.

15           MR. HERMAN: Your Honor, I want to thank Mr. Becnel, who  
16 has provided very recently the PSC two articles indicating the  
17 deficiencies of the FDA, and they've been forwarded to our  
18 preemption committee.

19           Secondly, I'm not going to elaborate, but, again, it  
20 just points out that individual due process has been sacrificed  
21 at the altar of corporate due process, because I think Mr. Becnel  
22 is right. Individuals just don't have the power to bring their  
23 cases forward absent a realistic class action mode.           We  
24 all know and would have to admit under current law, it's almost  
25 impossible to certify a personal injury case, so what do those

1 injured people do? At any rate, when Mr. Becnel is right, he's  
2 right, and I will say that on the record.

3 THE COURT: We will have to have a seminar devoted to  
4 philosophy.

5 MR. WITTMANN: I'm not going to take the time of the  
6 Court to rebut this but suffice it to say, we believe defendants  
7 are entitled to due process too.

8 MR. LEVIN: Just some defendants, not --

9 THE COURT: On that note, everybody's entitled to due  
10 process. Court will stand in recess.

11 THE DEPUTY CLERK: Everyone rise.

12 (WHEREUPON, the proceedings were concluded.)

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## REPORTER'S CERTIFICATE

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3 I, Cathy Pepper, Certified Realtime Reporter, Registered  
4 Professional Reporter, Certified Court Reporter, Official Court  
5 Reporter, United States District Court, Eastern District of  
6 Louisiana, do hereby certify that the foregoing is a true and  
7 correct transcript, to the best of my ability and understanding,  
8 from the record of the proceedings in the above-entitled and  
9 numbered matter.

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12 \_\_\_\_\_  
13 Cathy Pepper, CCR, RPR, CRR  
14 Official Court Reporter  
15 United States District Court  
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