

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: XARELTO (RIVAROXABAN) * 14-MD-2592
PRODUCTS LIABILITY LITIGATION *
* Section L
*
Relates to: All Cases * August 6, 2018
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MONTHLY STATUS CONFERENCE BEFORE
THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

Appearances:

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Proceedings recorded by mechanical stenography using
computer-aided transcription software.

1 PROCEEDINGS

2 (August 6, 2018)

3 THE COURT: Be seated, please. Good morning, ladies
4 and gentlemen.

5 Call the case, Dean.

6 THE DEPUTY CLERK: MDL 2592, *In Re: Xarelto Products*
7 *Liability Litigation*.

8 THE COURT: Liaison counsel make their appearance for
9 the record.

10 MR. MEUNIER: Jerry Meunier, co-liaison counsel for
11 plaintiffs.

12 MR. IRWIN: Jim Irwin for defendants. Good morning,
13 Your Honor.

14 THE COURT: We are here today for our monthly status
15 conference. I met with liaison lead counsel a moment ago to
16 discuss the agenda. We will take it in the proposed order.

17 MR. MEUNIER: Yes, Your Honor. On the joint report
18 in Section 2, in the discussion of case management orders, we
19 report that for the plaintiffs' and the defendants' selection
20 of cases in Wave 2 under CMO 6, that deadline has been extended
21 until September 17, 2018; and that the random selection of
22 cases for Wave 2 by the Court, that deadline is extended until
23 October 1, 2018. Although it's not set forth in the joint
24 report, Your Honor has entered a joint stipulating order
25 setting forth those new deadlines in the amendment of CMO 6,

09:02

1 and that order is Rec. Doc. 10340.

2 **THE COURT:** Okay.

3 **MR. MEUNIER:** Counsel contact information, we always
4 just encourage plaintiffs' counsel to do what they have been
5 doing with that and maintain currency with respect to letting
6 Lenny Davis and I know about their contact information as soon
7 as they appear in the case.

8 On plaintiff and defendant fact sheets,
9 Your Honor, I think we have a report today from Jake Woody.

10 **THE COURT:** Okay.

11 **MR. WOODY:** Good morning, Your Honor. Jake Woody
12 from BrownGreer. I have an update for you on plaintiff fact
13 sheets that we have collected through MDL Centrality.

14 To date, we have 21,823 fact sheets submitted.
15 That's an increase of 45 since my last report. We certainly
16 received more than 45 new fact sheets in that time, but we have
17 also have been marking cases as dismissed, so the net increase
18 was 45. When we mark cases as dismissed in our system, we
19 don't count them as an active case, but we do retain the
20 information and the records in the event that they are ever
21 needed.

22 We have 1,349 fact sheets in progress but not
23 yet submitted. That gives us a total of 23,172 plaintiffs in
24 our system, in our database.

25 In July 2018 we received 355 fact sheets, in

09:04

1 June 468. Our average for the last two years has been 466 a
2 month, and July was the lowest that we have seen in that time.
3 I don't know if that trend will continue, but I did note that
4 it was lower than many months in years past. So we will keep
5 an eye on that and update it as necessary.

6 **THE COURT:** It looks like that's the lowest in the
7 whole period.

8 **MR. WOODY:** It's the lowest probably since we
9 started. Yeah, it is the lowest we have had since the early
10 days of this. Although we do have ups and downs, we will see
11 if it continues that way.

12 I do have a new slide here that shows the
13 details of the CMO 6 cases that were selected by the parties
14 and randomly. There were 600 selections, as you recall. Of
15 those, 146 cases have been dismissed. That's 24 percent of the
16 600 that were selected. 87 of the dismissed cases were
17 defendant picks, 55 were random selections, and 4 were
18 plaintiff selections.

19 I think that that has sort of stabilized. I'm
20 sure there will be more dismissals, but I think most of the
21 dismissals are over with. So we will keep that in mind when we
22 do the next round and see if there's anything we can do to pick
23 a more useful pool or ones that won't be dismissed, although
24 I'm sure some of it is inevitable.

25 **THE COURT:** Now, these are from the 200 selected?

09:06

1 **MR. WOODY:** These are from the 600 that were
2 selected.

3 **THE COURT:** 600, I mean, right.

4 **MR. WOODY:** It was 200 defendant, 200 random, and 200
5 plaintiff selections.

6 **THE COURT:** Right. Okay.

7 **MR. WOODY:** Our key indicators for the MDL as a whole
8 remain unchanged. This slide shows the plaintiffs' age
9 information. You can see that 20 percent are between 60 and
10 69, 30 percent are between 70 and 79, and 26 are between 80 and
11 89. That's three-quarters of the MDL right there between 60
12 and 89. If you add in the 90-plus people, that gives you over
13 80 percent that are over the age of 60. So it is on older
14 population, as we have mentioned before.

15 The main alleged injury is gastrointestinal
16 bleeding. 49 percent of every plaintiff in the MDL alleges
17 that that was their injury, at least one of them. After that
18 it drops down to 21 percent, which is the "Other" category,
19 where people list a variety of injuries. That remains
20 unchanged since my last report.

21 Finally, the indication or the reason that
22 people took Xarelto, the highest indication is reduction of
23 risk of stroke. 53 percent of all plaintiffs allege that
24 that's the reason they took Xarelto, and again that's
25 unchanged.

09:07

1 These indicators, because of just the sheer
2 numbers of plaintiffs that we have, it takes a lot to change
3 these numbers. It would take a large number of plaintiffs
4 answering differently for these to change at this point, so
5 they are pretty static and pretty steady. When we did the
6 bellwether selections and the CMO picks, we weighted the pools
7 to reflect these main indicators. I think this has been a
8 useful exercise to try to get good pools.

9 **THE COURT:** Yes. No, that's very helpful because
10 that's exactly how we picked them.

11 **MR. WOODY:** That's my update, Your Honor. Thank you
12 very much.

13 **THE COURT:** Thank you, Jake.

14 Jerry, what's the reason for the dismissals when
15 you have the 80 percent?

16 Andy, do you want to speak to that?

17 **MR. BIRCHFIELD:** Judge, it runs across the gamut.
18 One of the things that we are seeing is that there are -- I
19 mean, there are a significant number of clients, when they are
20 faced with going forward with deposition -- this is an elderly
21 population.

22 **THE COURT:** Right.

23 **MR. BIRCHFIELD:** Their health is declining. They are
24 balancing that issue of going forward versus not. So we are
25 seeing a lot of the cases that are falling out for that reason.

09:08

1 Your Honor, in fairness, there are also
2 situations where, when the plaintiffs are looking more intently
3 at the case, as they are getting ready for these depositions,
4 plaintiffs are seeing some issues that were not really brought
5 forth as they were just filed and going through the fact sheet
6 process. So it's across the board.

7 **THE COURT:** Okay. Steve.

8 **MR. GLICKSTEIN:** Realistically, Your Honor, I do
9 think some of the dismissals have to be related to the results
10 to date. We know that the three bellwethers here were defense
11 verdicts. The first two cases in Philadelphia were a JNOV and
12 defense verdict. Some of the folks are undoubtedly also
13 looking at their damages and whether, in light of the results
14 to date, it's worth pursuing a claim.

15 **THE COURT:** I see.

16 **MR. MEUNIER:** Your Honor, the next thing to mention
17 in the joint report is in Section 7, the preservation order.
18 It's just important to keep reminding all parties, particularly
19 plaintiffs' counsel as their cases might be selected under
20 CMO 6, of the preservation obligation with respect to
21 voicemails, instant messages, etc., set forth in PTO 15B.

22 Your Honor, on bellwether cases tried here in
23 the MDL, as you know, all three of those matters that were
24 tried are consolidated on appeal in the Fifth Circuit. There
25 was an issue with respect to completing the record for appeal,

09:10

1 and because of that issue there was an agreement by the parties
2 to suspend any further briefing or scheduling of argument,
3 etc., until we have a complete record for purposes of that
4 consolidated appeal.

5 **THE COURT:** Right.

6 **MR. MEUNIER:** State/federal coordination, in
7 Section 11, Judge, we report on the trial settings. As the
8 Court knows, today, August 6, is actually the start date of one
9 of the cases being tried in Pennsylvania state court in
10 Philadelphia. It's the *Cooney v. Janssen, et al.* case. The
11 court is hearing motions this morning and opening statements
12 will take place this afternoon.

13 The next case to be tried in Philadelphia,
14 although it's not specifically mentioned in the joint report,
15 is the case of *Rush v. Janssen, et al.*, and that's set for
16 trial commencing December 3, 2018.

17 The presiding judge in that case has not yet
18 been identified. The presiding judge in the *Cooney* trial,
19 which is starting today, is Judge Teresa Sarmina.

20 Your Honor, I think that completes the main
21 items of the joint report. We just have to confirm the October
22 status conference. The next status conference in September
23 will be September 5.

24 **THE COURT:** September 5 and then the following one is
25 October 11.

09:11

1 Susan, do you want to report?

2 **MS. SHARKO:** Yes. Thank you, Your Honor.

3 On the CMO 6 cases, as Mr. Woody noted, 146 of
4 the pool has been dismissed. There are an additional 16 cases
5 that, after conferring with the plaintiffs, both sides agreed
6 to remove them from the pool because they presented off-label
7 use issues or just weird fact patterns or complicated discovery
8 issues.

9 We have three plaintiffs in the pool who have
10 not yet submitted a PFS. That's down from 25 last month. With
11 Mr. Birchfield's help, we are making substantial progress. We
12 still have 17 cases -- and these people were on an order to
13 show cause -- who have not submitted an updated certification
14 or an updated PFS. That's down from 29 for the order to show
15 cause.

16 We still have 22 plaintiffs who have died since
17 the filing of the complaint and the documentation needed has
18 not been submitted. That's down one from last month.

19 Last month we had eight cases with subject
20 matter jurisdiction. We still have four that need to be
21 resolved. Basically, those lawyers either need to dismiss a
22 defendant or dismiss completely and refile in state court. We
23 have form stipulations of dismissal that will assist them, but
24 they need to come forward and get that resolved.

25 On service of process, last month we had six,

09:13

1 this month we have 27 where a key defendant has not been
2 served. The big increase is Bayer took a second look at it.
3 The Bayer issues seem to be moving along and people are working
4 together.

5 As to the Janssen cases, there are still four
6 cases where Janssen hasn't been served. They all belong to one
7 law firm, the Fears law firm, and they have to serve us. It's
8 not that hard, but those cases are on hold until that happens.

9 **THE COURT:** I urge all of the plaintiff lawyers to
10 either serve or send the material in. If not, I will have to
11 be dismissing the cases. When I dismiss them, I dismiss them
12 with prejudice. Let's do your best to get that information in.

13 **MS. SHARKO:** Thank you. Duplicate filed cases for
14 the CMO 6 Wave 1 pool, we are down to zero. Last month we had
15 three, so that's been resolved.

16 Cases missing authorizations, we are now down to
17 zero. Last month it had been one.

18 Looking ahead to future order to show cause and
19 other issues, on the PFSs for the Wave 1 group, we have 61 that
20 have significant deficiencies. We have written to the lawyers.
21 That process is moving along, but we are at the point now where
22 unless the deficiencies are cured, we are going to need to seek
23 relief from the Court.

24 **THE COURT:** Right.

25 **MS. SHARKO:** Finally, on duplicate filed cases, so

09:15

1 there are by our count now 209 people in the MDL who have two,
2 three, or more cases filed with different lawyers. Of that
3 209, 46 are proceeding both in the MDL and Philadelphia. I
4 will give Mr. Birchfield the latest list. We have written to
5 all these lawyers, and I think we are going to have to move to
6 an order to show cause process because we don't want this to
7 gum up the selection of the Wave 2 cases.

8 **THE COURT:** Okay.

9 **MS. SHARKO:** Thank you.

10 **THE COURT:** Anything else?

11 **MR. MEUNIER:** Your Honor, can I mention one other
12 thing?

13 **THE COURT:** Yes.

14 **MR. MEUNIER:** We, as you know, are about to enter
15 into the nuts and bolts of conducting discovery for the Wave 1
16 cases. You were given in chambers this morning a pretrial
17 order that the parties have proposed which sets forth some of
18 the details about how matters such as scheduling and the order
19 of depositions will be worked out.

20 I have been designated as the liaison for the
21 plaintiffs' side and then Ms. Sharko and Ms. Dupont on the
22 defendants' side to work things out as they come up on
23 difficulties. The reason I mention it is that perhaps at the
24 September 5 conference, if both sides agree, the Court could
25 get back to scheduling the biweekly calls with Your Honor --

09:16

1 **THE COURT:** Sure.

2 **MR. MEUNIER:** -- just so we can expedite the handling
3 of any things we can't work out on our side. I think that will
4 keep us on track.

5 **THE COURT:** That worked well. Let me know and I will
6 schedule them.

7 **MR. MEUNIER:** Thank you, Judge.

8 **THE COURT:** Anything else?

9 All right, folks. Thank you very much. Court
10 will stand in recess.

11 **THE DEPUTY CLERK:** All rise.

12 (Proceedings adjourned.)

13 * * *

14 **CERTIFICATE**

15 I, Toni Doyle Tusa, CCR, FCRR, Official Court
16 Reporter for the United States District Court, Eastern District
17 of Louisiana, certify that the foregoing is a true and correct
18 transcript, to the best of my ability and understanding, from
19 the record of proceedings in the above-entitled matter.

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/s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter