

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: XARELTO \*  
(RIVAROXABAN) PRODUCTS \*  
LIABILITY LITIGATION \* Docket No.: 14-MD-2592  
\* Section "L"  
THIS DOCUMENT RELATES TO: \* New Orleans, Louisiana  
\* December 12, 2018  
*A77 cases* \*  
\* \* \* \* \*

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

APPEARANCES:

For the Plaintiffs'  
Liaison Counsel: Herman, Herman & Katz  
BY: LEONARD A. DAVIS, ESQ.  
820 O'Keefe Avenue  
New Orleans, Louisiana 70113

For Defendants'  
Liaison Counsel: Irwin Fritchie  
BY: KIM E. MOORE, ESQ.  
400 Poydras Street  
Suite 2700  
New Orleans, Louisiana 70130

For the Plaintiffs: New Orleans, Louisiana 70113  
BY: ANDY BIRCHFIELD, ESQ.  
P.O. Box 4160  
Montgomery, Alabama 36103

1 APPEARANCES:

2 For Janssen Pharmaceuticals,  
3 Inc. and Janssen Research &  
4 Development, LLC:

Drinker Biddle & Reath, LLP  
BY: SUSAN M. SHARKO, ESQ.  
600 Campus Drive  
Florham Park, New Jersey 07932

6 Special Master:

BrownGreer PLC  
BY: JACOB WOODY  
250 Rocketts Way  
Richmond, Virginia 23231

9  
10 Official Court Reporter:

Jodi Simcox, RMR, FCRR  
500 Poydras Street  
Room HB-406  
New Orleans, Louisiana 70130  
(504) 589-7780

11  
12  
13  
14  
15 Proceedings recorded by mechanical stenography, transcript  
16 produced by computer.

17  
18  
19  
20  
21  
22  
23  
24  
25



1 non-CMO 6 cases, which relates to Pretrial Order No. 31A, which  
2 was docketed by the Court today. Those are the items really  
3 that are for discussion.

4 So, Jake?

5 **MR. WOODY:** Good morning, Judge.

6 **THE COURT:** Good morning, Jake.

7 **MR. WOODY:** I just have a brief report, Your Honor,  
8 on the status of plaintiff fact sheets in this MDL. So far to  
9 date, we have 22,446 fact sheets submitted. That's an increase  
10 of 56. That's a net increase of 56 since my last report. We  
11 have another 1,372 fact sheets in progress, which gives us a  
12 total number of 23,818 plaintiffs in our database.

13 We do -- when we receive notification that a  
14 case is dismissed, we mark those plaintiffs as inactive and  
15 they don't show up in these counts. So these are active  
16 plaintiffs, although there is some lag time between the  
17 dismissal and when we actually mark them.

18 Our monthly submission time status has continued  
19 to decrease. In November of 2018, we received 221 fact sheets.  
20 And you can see from this chart that the decline in our monthly  
21 submission really started in about July of this year, and it's  
22 decreased every month since then.

23 Our average is down to 418 per month, but that  
24 is including months and months of where we received 5- or 600  
25 fact sheets a month. So I think this is definitely a trend. I

1 think you see it also in the case filing statistics which  
2 mirror these numbers.

3 We've received 83 fact sheets so far in  
4 December. I expect December to also be a low month given the  
5 holidays and our trend here. So it is interesting to see this  
6 happening. I don't really know exactly why, although I can  
7 guess, but that's what's happening with the monthly  
8 submissions.

9 And then in terms of our CMO 6 case status, 782  
10 CMO 6 cases remain open. That's out of 1200, 65 percent.  
11 35 percent, or 418, of the CMO 6 cases have been dismissed.  
12 And the breakdown is 225 defendant picks, 153 random picks, and  
13 40 plaintiff picks have been dismissed.

14 So that is my report. All of our key statistics  
15 that I've gone over in the past in terms of age and injury and  
16 things of that nature remain the same. Given the low number of  
17 fact sheets we're receiving and the high number we've got, I  
18 don't expect those numbers to change much at all.

19 **THE COURT:** Do you have any feel for when we start  
20 seeing the types of cases sort of solidify? It looks about  
21 10 percent of the census or something like that.

22 **MR. WOODY:** I have to go back and look at my reports,  
23 but I feel like it's been pretty solid for a couple of years.  
24 Certainly, when we started to do the first round of bellwether  
25 selections, I ran the numbers at that time to get the key

1 indicators, and maybe the percentages have changed slightly,  
2 but really the main indicators have not changed since then.

3 **THE COURT:** I think that's kind of helpful for  
4 everybody to kind of focus on it. Because if the census  
5 indicates, you know, 80 percent of the people are over 70 or  
6 something of that sort, 68 or whatever, you begin to recognize  
7 that lost wages is not the major component in that particular  
8 case, and that kind of gets some at least --

9 **MR. WOODY:** I think that's right. I think at a  
10 certain point --

11 **THE COURT:** There may be outliers, some people who,  
12 you know --

13 **MR. WOODY:** Right. Right. The key statistics really  
14 are set fairly early in this case, and in other cases, too,  
15 that I've worked on.

16 **THE COURT:** Yeah. I think maybe about 10 percent.  
17 When 10 percent come in, you begin seeing something. But maybe  
18 it's different in every case, but that's been my experience.

19 **MR. WOODY:** I think that's correct, Your Honor.

20 **THE COURT:** Okay. Thank you.

21 **MR. WOODY:** That is my report for this month. Thank  
22 you, Your Honor.

23 **THE COURT:** All right. Thank you, Jake.

24 Susan, you have something on the new program?

25 **MS. SHARKO:** I do, two things. Thank you.

1           **THE COURT:** Yes.

2           **MS. SHARKO:** First, on Wave 1 and Wave 2, people are  
3 working really hard. There are depositions being taken every  
4 day. Usually, a number of depositions taken every day. In  
5 Wave 1, we have 250 cases dismissed. That's 42 percent of the  
6 docket. There are 18 cases that are tolled -- where discovery  
7 is tolled because of plaintiff fact sheet issues. There are 11  
8 cases that are stalled because of estate issues. Andy  
9 Birchfield has been extraordinarily helpful in helping us  
10 navigate these and getting issues resolved.

11           There are no longer any cases in Wave 1 with  
12 subject matter jurisdiction, duplicate filings, authorizations  
13 or service issues, which is amazing from where we were a couple  
14 months ago.

15           Turning to Wave 2, which is just kicking in, we  
16 have 170 cases dismissed. That's 28 percent of the pool.  
17 There are six where we still don't have a PFS. Two that are  
18 certification issues. 111 where discovery is tolled because we  
19 have a PFS, but there are issues as to the substance. There's  
20 one case with subject matter jurisdiction, five without  
21 service, two without authorizations, and 22 with estate issues.  
22 I'll continue to work with Andy to get those resolved.

23           **THE COURT:** What's your feeling about the reason for  
24 the dismissals? What's the reason, basically?

25           **MS. SHARKO:** So we've looked at that pretty closely,

1 actually, and it seems that -- and I have some numbers on that.

2 **THE COURT:** Okay.

3 **MS. SHARKO:** It seems that the cases with the less  
4 serious events are more likely to be dismissed. For example,  
5 77 percent of nose bleed cases in the pool were dismissed,  
6 85 percent of anemia cases. It seems that some of it is state  
7 specific. All but two of the Michigan cases in the pool were  
8 dismissed. Most but not all of the Texas cases were.

9 There are some plaintiff firms -- there's five  
10 or six of them -- where they dismissed all of the cases that  
11 they had in the pool. Those are not obviously any law firms  
12 that are here today. And then it looks like about half the  
13 dismissals come at the time the case is selected. Presumably,  
14 the lawyers go back and talk to their client. But we're seeing  
15 a fair number of cases that are getting dismissed when the  
16 deposition request goes out.

17 And now we're seeing some where the case gets  
18 dismissed after the plaintiff is deposed, which, frankly, is  
19 unfortunate for both of us. Because on the defense side, we  
20 spent all the money to get the records and get ready and depose  
21 the plaintiff. On the plaintiffs' side, why should somebody go  
22 through a deposition if they're not going to proceed with the  
23 case and get their doctors scheduled and everything? So that's  
24 how it seems to be breaking.

25 **THE COURT:** Andy, do you have any input on that? I



1 guess in the Texas issues, the law is rather difficult there  
2 for a case of this sort. The others, I guess, when you get  
3 right down to it, you recognize how much it's going to cost to  
4 try the case, that factors in sometimes.

5 **MR. BIRCHFIELD:** Yes, sir, it does. I mean, I would  
6 agree with Ms. Sharko's assessment. I mean, there is a  
7 correlation between the degree of injury, but that's not the  
8 sole -- you know, that's not the sole driver. Because there  
9 are a number -- I think it's -- it is a significant factor,  
10 what you raised, and that's just the age of the population.

11 If the plaintiff or the person who suffered the  
12 injury has subsequently died and then there are family members  
13 that are left, many of these spouses are elderly. It's just  
14 challenging. And they're facing -- and, Your Honor, we have  
15 been working with plaintiffs' counsel. We have urged  
16 plaintiffs' counsel to have conversations with their clients,  
17 candid conversations, about the cost of litigation, if there is  
18 a -- if there's a reason that the case should be dismissed, do  
19 that sooner rather than later. And I think that many  
20 plaintiffs' counsel are doing that.

21 But just because a -- you know, because a  
22 plaintiff goes through the deposition and then dismisses the  
23 case, that's not a -- that's not a signal that the plaintiff  
24 counsel didn't have that discussion earlier. It's oftentimes  
25 that going through the deposition process brings a -- puts a

1 new perspective on the case for the plaintiff.

2 **THE COURT:** For the litigant themselves.

3 **MR. BIRCHFIELD:** Right. And plaintiffs' counsel  
4 don't want to go through depositions unnecessarily. We do  
5 not -- we do not want to put unnecessary costs on the  
6 defendants. That doesn't serve anyone here. It's part of the  
7 litigation process. We're doing what we can to minimize that,  
8 but it's going to happen.

9 **THE COURT:** Yeah. I think we talk around the country  
10 a lot about the value of bellwethers. I think if you just look  
11 upon whether bellwethers are helpful in predicting results, I  
12 don't think that's really the real base, the good thing for  
13 bellwethers. I think one of the things that it gives lawyers  
14 is an opportunity to see the cost in trying these cases.

15 Now, it's more for a bellwether than an actual  
16 case, but at least it's some indication of how much it's going  
17 to cost, and the time it takes, and the logistics of the  
18 situation, and all of those things. I think that that has gone  
19 into the mix, too. I think the plaintiff lawyers who may have  
20 not participated in bellwethers at least can tell their client,  
21 this is how much it costs for a bellwether, you're looking at  
22 least maybe as much as this, maybe less, but it's around that  
23 figure, and that is helpful, I think.

24 Okay.

25 **MR. BIRCHFIELD:** Your Honor, I mean, we are -- we're

1 working toward having a trial package that would ameliorate the  
2 cost to some degree, but it would still be expensive. I think  
3 a key factor in the decision process about whether to go  
4 forward is, what's involved in taking a deposition, plaintiffs  
5 going through the preparation, going through -- you know,  
6 sitting through the deposition. It gives them a clearer idea  
7 of what the process is and what will be involved.

8 **THE COURT:** Okay.

9 **MR. BIRCHFIELD:** Okay.

10 **THE COURT:** All right. Thank you, Susan.

11 **MS. SHARKO:** CMO or Pretrial Order 31A, which Your  
12 Honor entered today -- or last night, this is something the  
13 parties agreed to. It mirrors what we've done successfully in  
14 another MDL in an effort to streamline the process for  
15 non-CMO 6 cases, but at the same time preserving or even  
16 broadening the due process protection.

17 So this is how it works: Cases are eligible for  
18 the list either because their PFS is overdue or core deficient  
19 and not cured within 20 days of receipt of the notice. That's  
20 the same as it was before. Where it differs is instead of  
21 filing motions and scheduling separate hearing dates on all  
22 those cases, we will have a first listing and a second listing.

23 So we will list the cases in the joint report.  
24 The parties will continue to meet and confer, and, hopefully,  
25 cure the deficiencies. If the case isn't cured after being

1 listed once, it will go to the second time list at the  
2 following case management conference. And if it isn't cured  
3 after the second listing, then it will go on an order to show  
4 cause list, and the plaintiff will have to show cause why the  
5 case shouldn't be dismissed with prejudice.

6 So they get two months of notice, and then  
7 really a third month when they're on the order to show cause  
8 list. The people on the defense side will still be available  
9 to meet and confer and try and get the issues resolved. We  
10 encourage the plaintiffs to do that.

11 But we hope that this will move it along in a  
12 more orderly fashion with, hopefully, fewer motions and fewer  
13 less involvement with Your Honor. What we learned from our  
14 other MDL is that the vast majority of cases were either  
15 dismissed or cured by the time they got to the order to show  
16 cause process.

17 **THE COURT:** Maybe I can put it on the Web site, too,  
18 if you think that would be helpful. The first listing, if you  
19 give it to me, I'll post it so that it's on the Web site and  
20 everybody knows.

21 **MS. MOORE:** That would be --

22 **THE COURT:** If that's helpful.

23 **MS. SHARKO:** Yes, we have one edit to the outline of  
24 how it works. So I'll send Melissa a new copy of that. The  
25 listing of cases is in the joint report. And then since that

1 was a week old, this morning, I gave Mr. Birchfield an updated  
2 redlined list because five or six cases have already come off  
3 the list. But I've -- my sense is that -- I don't want to  
4 speak for Mr. Davis, but it's really the plaintiffs'  
5 obligation, individual plaintiffs, to be checking the Web site  
6 and looking at the joint report and seeing if they're on the  
7 bad list.

8 **THE COURT:** Right.

9 **MR. DAVIS:** Your Honor, I just want to point out,  
10 specifically in the joint report, in particular for those who  
11 may be on the phone, Section 14 of Rec Doc 12014, which is the  
12 joint report, identifies overdue plaintiff fact sheets that are  
13 alleged by the defendants, as well as those that claim to have  
14 core deficiencies.

15 I encourage all plaintiffs' counsel to look at  
16 that list. The law firm is identified, as well as the claimant  
17 or the plaintiff, as well as the docket number of the  
18 particular case, and that should assist counsel in finding any  
19 claimant that may be on that list. And I encourage counsel to  
20 look at the joint report on a monthly basis. It's now probably  
21 more important as some folks may not have looked at it before,  
22 but now it will impact your individual case in particular.

23 And plaintiffs' counsel and pro se should be  
24 looking at the joint report on a regular monthly basis. They  
25 will prior to that have gotten a letter from defendants

1 asserting the assertion.

2 And so our office, plaintiffs' liaison counsel,  
3 that being Jerry Meunier, or myself, and Sindu Daniel, will  
4 continue to do what we have done in the past. Meaning if  
5 plaintiffs' counsel has an issue, I encourage them to reach out  
6 to one of us and let's address it because we do have continuing  
7 dialogue with defense counsel. We will continue to do that.  
8 I've been assured by defense counsel that that will continue.

9 So the idea is to try to get some type of  
10 resolution on these matters and make this process easier for  
11 everybody. So I encourage people to continue doing what  
12 they've been doing, but to pay attention and resolve these  
13 asserted deficiencies.

14 **THE COURT:** Susan, under your program, you put them  
15 on a first list, and then you put them on a second list. The  
16 third time, would they just be automatically dismissed, or  
17 would it be necessary to have court proceedings, or what's your  
18 thinking?

19 **MS. SHARKO:** The third time around for an order to  
20 show cause, then if Your Honor agrees, you would enter an order  
21 to show cause why the case shouldn't be dismissed. It would be  
22 returnable on a certain date. So the plaintiff would get one  
23 more chance to come in and be heard.

24 **THE COURT:** I see.

25 **MR. DAVIS:** And, Your Honor, on the third time, if

1 there's a disagreement, and that is if there's a disagreement,  
2 then it's brought to the attention of the Court. And at that  
3 point, plaintiffs' counsel will have had two opportunities in  
4 two months in the joint report to have the issue addressed. As  
5 I said, I encourage the plaintiffs' lawyers to deal with the  
6 defense counsel, who will be available.

7 Again, Chanda Miller and Sindu will be  
8 available. And at the third opportunity, if it's not resolved,  
9 then it comes to the Court's attention.

10 **THE COURT:** Okay.

11 **MS. SHARKO:** Right. I would just add one thing. I  
12 believe that these notices come from BrownGreer, so people  
13 shouldn't wait for a letter from us. They should be checking  
14 their BrownGreer now.

15 **THE COURT:** Okay. Thank you, Susan.

16 **MS. SHARKO:** All right. Thank you.

17 **THE COURT:** Anything else, Lenny?

18 **MR. DAVIS:** No, Your Honor. That's it other than the  
19 next status conference.

20 **THE COURT:** Okay. The next status conference is  
21 January 23rd, and the following one is March the 12th.

22 **MR. DAVIS:** I know it's the end of the year and I  
23 just want to wish everybody a happy holiday season.

24 **THE COURT:** Same here. Have a good holiday,  
25 everyone. I'll be back just in a couple minutes so we can make

1 telephone calls. I think we've got one or two people that want  
2 to participate. Court will stand in recess.

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

4 (WHEREUPON, the Court took a recess.)

5 (WHEREUPON, the proceedings were concluded.)

6  
7 \*\*\*\*\*

8 **CERTIFICATE**

9 I, Jodi Simcox, RMR, FCRR, Official Court Reporter  
10 for the United States District Court, Eastern District of  
11 Louisiana, do hereby certify that the foregoing is a true and  
12 correct transcript, to the best of my ability and  
13 understanding, from the record of the proceedings in the  
14 above-entitled and numbered matter.

15  
16  
17 s/Jodi Simcox, RMR, FCRR  
18 Jodi Simcox, RMR, FCRR  
19 Official Court Reporter  
20  
21  
22  
23  
24  
25