

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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IN RE: PROPULSID PRODUCTS
LIABILITY LITIGATION

Docket No. MDL 1355
New Orleans, Louisiana
Tuesday, June 28, 2005

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

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P R O C E E D I N G S

(TUESDAY, JUNE 28, 2005)

(MONTHLY STATUS CONFERENCE)

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5 THE COURT: Good morning, ladies and gentlemen. Be
6 seated, please. Call the case, please.

7 THE DEPUTY CLERK: MDL No. 1355, in re: Propulsid.

8 THE COURT: Counsel, make their appearance for the record.

9 MR. HERMAN: May it please the court, good morning, Judge
10 Fallon, Russ Herman for the Plaintiff's Legal Committee.

11 MR. IRWIN: Jim Irwin for defendants.

12 THE COURT: We're here today for our monthly status
13 report. I have an agenda before me. First item on the agenda is
14 State Liaison Counsel.

15 MR. ARSENAULT: Good morning, your Honor, Richard
16 Arsenault. We've had several meetings, I think we're having very
17 productive dialogue. One of the initial things that we are trying
18 to do, of course, is to get our arms around the type of inventory
19 and the demographics of the inventory. And we have made good
20 progress on that, the dialogue is ongoing and I think it's
21 progressing satisfactorily.

22 THE COURT: Anything the court can do as you see it at
23 this point?

24 MR. ARSENAULT: I don't believe, your Honor. The defense
25 has been very corporative, we've had an open exchange, and also had

1 a lot of cooperation from people in the field in terms of assisting
2 in identifying their inventories, we have people from Mississippi
3 here today, we have Paul Pennock from New York, and we continue to
4 have cooperative dialogue with member state attorneys throughout the
5 country.

6 THE COURT: Keep me advised if you need any court
7 intervention or court assistance, get in touch with me.

8 MR. ARSENAULT: Thank you, your Honor.

9 THE COURT: Service List is the next item.

10 MR. IRWIN: Your Honor, we are not aware of any
11 significant changes to the list. We are going to give the current
12 copies out as usual.

13 THE COURT: Okay. What about the Trust Account is the
14 next item.

15 MR. HERMAN: There has been no activity in the trust
16 accounts since the last meeting, your Honor. We don't anticipate
17 that there will be any until the claims process is activated.

18 THE COURT: The next item is: Trial Schedule, defendants
19 want to report on that?

20 MR. CAMPION: Mr. Pennock is in the courtroom.

21 MR. PENNOCK: Good morning, your Honor.

22 THE COURT: Good morning.

23 MR. CAMPION: We submitted a proposed case management
24 order with respect to fact discovery. There are three fact
25 depositions that remain to be done; one is being done this Friday,

1 the other two will be scheduled in due course. And we have the
2 expert discovery and the matter is proceeding well.

3 THE COURT: Are you okay with that, Mr. Pennock?

4 MR. PENNOCK: Yes, Judge, things are moving right along.

5 THE COURT: We are going to meet afterwards to schedule
6 some things and talk about what needs to be done.

7 MR. PENNOCK: Fine. Thank you, Judge.

8 THE COURT: Pharmacy Indemnity Agreements, any indemnity
9 agreements?

10 MR. IRWIN: There have been no changes on that, your
11 Honor.

12 THE COURT: That by the way has been very helpful to have
13 counsel cooperate on those matters. Sometimes we have a little
14 difficulty and I think that's helped move this case along, so I
15 appreciate the work that counsel has done on that.

16 The Mediation and Resolution Program. We have with us our
17 Special Master Mr. Pat Juneau, he's been very active in this aspect
18 of the case. So at sometime during this presentation I would like
19 him to give me a report.

20 MR. JUNEAU: Your Honor, as you know you have signed an
21 order having to do with the short form, what I call administrative
22 claims. The signing of that order is going to immediately expedite
23 from our office's standpoint a review of those files. We anticipate
24 very shortly commencing the review of those claims and the
25 authorization for actual payments. So I mean the process is really

1 on the table now to commence actual payment on these claims.

2 THE COURT: I think that will be helpful. I really do
3 feel that once the claimants see some money is moving you're going
4 to get a lot more attention and a lot more people partaking of the
5 program.

6 I also think that it would be helpful if you process a
7 couple of them first and then regroup with your people and talk
8 about the best way and most efficient way of dealing with it. And
9 be flexible in the beginning so that you can find the best way for
10 this particular case to resolve it, so I don't think you ought to
11 put anything in stone until you're comfortable that that's the right
12 way of going about it.

13 MR. JUNEAU: Well, currently when I walked in the
14 courtroom this morning one of the attorneys here who has a
15 significant number of those claims and I had engaged in dialogue
16 regarding that very subject, your Honor. And I informed him that,
17 he submitted a lot of information already, we are going to look and
18 see if we can even streamline it further to expedite the payment.
19 We want to get the flow going. But candidly and I anticipate this
20 happening very, very shortly.

21 THE COURT: Hopefully before the next meeting.

22 MR. JUNEAU: Definitely, definitely.

23 THE COURT: How about the dialogue with the government?
24 We've tried to include them at an early stage. My concern in
25 matters of this sort is that we not get to the point of distribution

1 and then find liens and other matters that stop the distribution.
2 So hold the government, pull the government in at an early stage and
3 work with counsel as well as with you. What is the situation with
4 that?

5 MR. JUNEAU: I have been in communication with the
6 government on several occasions, as recently as about two weeks ago.
7 And they have been provided information, Mr. Preuss' office has
8 provided them information about enrollees in the program. We have
9 had a discussion about limiting what they really need to know,
10 there's a lot of information they don't need, and we are trying to
11 get it immediately focused. They said they really didn't want to
12 engage in that discussion until we had a clear concept of exactly
13 what claim we would be talking about.

14 I did conceptually discuss with them various alternatives
15 that we had used in other cases to arrive at closure in this matter,
16 and I am on all fours with the court that delay in those matters
17 would result in problems at the end of the case, which presents
18 insurmountable problems insofar as distribution is concerned. I
19 think the discussions we're having now, if we're going to have a
20 problem like that we are going to know sooner rather than later. So
21 that's the status of.

22 THE COURT: If you get any feeling of that, you have to
23 get me involved early on.

24 MR. JUNEAU: And the last point on that, your Honor. I
25 have told them that once we got the crystallized list of people that

1 we're talking about and the concept, that I told them that I had
2 discussed the matter with you and you felt and I concurred 100
3 percent that we should have a conference with the government on that
4 very subject, again sooner rather than later.

5 THE COURT: Right. Okay.

6 MR. JUNEAU: Thank you, your Honor.

7 THE COURT: Thank you very much, Mr. Juneau. Yes, Mr.
8 Hill.

9 MR. HILL: Barry Hill, speaking not as a member of the
10 State Liaison Committee or on behalf of the PSC, but as an
11 individual lawyer with cases to submit into the settlement program.

12 The ten year record requirement is a problem. The fact
13 that there are a lot of people with cases to submit who have not
14 submitted anything other than to enroll in the program has to do
15 with once the claim form is submitted the ten years worth of records
16 have to follow within 60 days, you're subject to being booted out of
17 the program.

18 Getting ten years of records on somebody 60 years old or
19 so is in some instances pretty complicated, involves an awful lot of
20 stuff that has nothing to do with anything in the case. And what
21 concerns me is then that they're going to have, and I'm being
22 critical, somebody is going to use the absence of some physicial
23 record as a screening mechanism to issue a deficiency letter and
24 make you go back, get additional records when you've made a good
25 faith effort to begin with.

1 And to have cases, as we do, with -- and eight are death
2 cases, two are implanted defibrillator cases, that's all we have
3 left out of 2,500 cases, the rest of them we got rid of. We have
4 the memos, the five and one page memos completed for all of these
5 cases. We can't submit the cases though because in not a single one
6 of them have we been able to get all of the records that are
7 required by the requirement. It's not a complaint but I think this
8 is going to be found, as I talked to lawyers who submitted their
9 claim forms then couldn't get all of the records in 60 days and are
10 now concerned that their cases are going to be kicked out.

11 THE COURT: Do you have any suggestions?

12 MR. HILL: We can't very well change the term sheet with
13 respect to the medical records requirement at this point. At the
14 same time individual lawyers are collecting if it's submitted in box
15 files, I mean in paper form box files worth of medical records on
16 people. And I wonder who is going to look at this? Maybe the
17 defense folks are going to look at it in order to prepare counter
18 memos.

19 It is not feasible for the two physician panel members to
20 review all of these records on all of these cases. It will take
21 them 20 years to get through the cases if the physicians are going
22 to do.

23 If it isn't for the benefit of the physicians, it has to
24 be for someone else's benefit, or there is no point. I except
25 without question the defendants have a right to this information.

1 Maybe they're the ones that are going to look at it.

2 I don't have a specific suggestion other than the records
3 requirement in and of itself is making it difficult to get claims
4 submitted.

5 THE COURT: Okay. All right. I appreciate that. At this
6 point we ought to all be in the same boat and we ought to be able to
7 learn from each other's comments and see whether or not we can
8 resolve it. Mr. Campion, do you have anything to say?

9 MR. CAMPION: In the term sheet is a good faith provision,
10 you are not mandated to get every single record, you are mandated to
11 get every single record you can. If you don't, for whatever the
12 reason may be, the Special Master has leave, in fact, to give you a
13 pass. We're going to know, if we see most of the records there,
14 that's it.

15 But if you can't get a couple of records because of this,
16 that or the other thing, all you have to do is ask Mr. Juneau, he is
17 going to make an independent judgment. He is, in fact, the Supreme
18 Court on that. I think you're overreacting, Barry.

19 MR. HILL: I am passing on the concerns expressed to me by
20 people on the staff who are working on these. Then the next
21 question I'll get is, okay. Mr. Juneau says no and the 60 days
22 passes, what happens to us?

23 MR. CAMPION: I do not think you're going to have any
24 long-term problem.

25 MR. HILL: I accept anything you say. You've always dealt

1 with us in complete good faith and candor. If we have 90 percent of
2 what we're supposed to have and we submit a letter saying, look,
3 we've been working on this for a year to get these records, this is
4 the best we can do.

5 MR. CAMPION: All you have to go is make a simple record
6 with Mr. Juneau and I believe he is going to exercise his discretion
7 in your favor.

8 THE COURT: It may be a question of communication, so we
9 have to keep an eye on that. Mr. Herman.

10 MR. HERMAN: Your Honor, we are going to have at least one
11 seminar that all of the lawyers that have claims to submit who are
12 having problems can attend. We will help them fill out the claim
13 forms, if they have medical record problems we will be able to deal
14 with them.

15 I appreciate Barry Hill's concern, it is a concern. All
16 of us know how difficult it is to get three year's worth of records
17 and the time delays. But the relationship with defense counsel in
18 this case has been remarkably professional and cordial and we've
19 been able to resolve differences such as these. Hopefully within
20 the next 30 days some of the impediments that are apparent such as
21 the ones that Barry brings up will be resolved.

22 I think we also have to keep in mind that in the event
23 that all you have is three or four years records and that's all you
24 can get within the time frame, the defendants have the option to
25 order records through their own sources in order to supplement those

1 records, and that's also part of the agreement that we reached. So
2 no one is really going to suffer any prejudice once we have these
3 issues dealt with directly.

4 THE COURT: I think you need to set up some kind of
5 meeting, face-to-face discussions with the plaintiff lawyers who are
6 handling the cases, I think you need to set up some kind of hotline
7 so that they can call and find out any questions or ask any
8 questions or find out answers to any questions that you might have.
9 So let's do that in the future.

10 MR. HERMAN: We have, Barry is co-chair of the ATLA
11 Propulsid litigation group, I apologize for walking away from the
12 podium, but he advises me that that group will be meeting at the
13 ATLA convention, and we will try to get a notice out right away
14 telling folks that if they want assistance with claim forms or
15 they're having a problem with this medical record issue to please
16 come and we will stay as long as we have to in order to deal with
17 those issues. But we will also provide a date and a place for folks
18 to come to New Orleans where we can meet with them face-to-face.

19 THE COURT: I think that's important. And also I think
20 it's important that you keep your ear to the ground and find out
21 what problems there are and then communicate those problems
22 immediately to the defendant and see whether or not they're real
23 problems. If they are problems, find a solution. If you can't,
24 bring it to me and I'll find a solution to it.

25 MR. HERMAN: On June 21st a joint motion was submitted,

1 it's now been signed by the court in an abbreviated process in
2 submitting what I'll call the de minimus claims that qualify for the
3 \$250 payments.

4 Very recently both the defendants and plaintiffs have
5 agreed on the six physicians that will be reviewing claims. What
6 awaits is a process to educate the six physicians in an objective
7 way. The defendants are preparing a proposal which we will review
8 and then we will get together and hopefully we can begin physician
9 orientation very soon.

10 THE COURT: Bring them in the court, I think it would be
11 helpful to bring them into court. I'd like to talk with the
12 physicians, and also you may use the court's facilities to do any
13 power point or education that they need to have. I do think that it
14 would be appropriate to bring them into this courtroom and let them
15 understand that they are in a neutral position, they are to look at
16 it in a neutral way in making their decision, and I would like to
17 have a word with them.

18 MR. HERMAN: It would be our hope that after your Honor
19 meets with them that perhaps the Special Master can address the
20 physician panel at the Special Master's Propulsid office so that
21 they can become acclimated to that environment.

22 In addition, we've submitted our joint agreement in terms
23 of payment, hourly payment to the reviewing physicians from the
24 administrative fund, and we are working on a process to handle a
25 deficiency so that minor deficiencies will not delay the process in

1 the claims forms and the Special Master, Mr. Juneau is involved in
2 that process.

3 The notification to parties commencing the 60 day period
4 for the submission of memoranda or one page summary has not
5 commenced yet but will commence when those notifications are sent
6 out. We're working on a very short notification form, jointly
7 working on that.

8 THE COURT: When do you feel the first funds will be
9 disbursed? Do you have any input on that, Mr. Juneau?

10 MR. JUNEAU: I am fairly optimistic. I am thinking there
11 is no reason why within the next three weeks we shouldn't be able to
12 have all of that out. We are trying to expedite that quickly.

13 THE COURT: Somebody report back to me on that and keep me
14 informed.

15 MR. HERMAN: I think Mr. Juneau's been provided with a
16 database of eligible claimants, and I think that Mr. Preuss has a
17 report on the number of claim forms received.

18 MR. PREUSS: Thank you, Mr. Herman. Yes, your Honor, on
19 the enrollee present total number is 24,361. In the categories:
20 Wrongful death, 247; personal injury, 3,086; and then we have
21 claimants on tolling agreements, 19,775; and as to the Achord
22 plaintiffs 1,253. That again equals 24,361, your Honor.

23 THE COURT: What about the number of claim forms so far
24 received?

25 MR. PREUSS: The number is around 1,300.

1 THE COURT: That's about 5% and we've got to push it
2 because it's coming up to deadline, we have something like August to
3 deal with and we're already in July now, beginning of July so we
4 have another month, six weeks or so. So we are really going to have
5 to push on that. I don't think we ought to wait until the last
6 moment.

7 MR. HERMAN: Given your Honor's remark, we will make sure
8 that the notice that we send out for the meeting with plaintiff
9 counsel that we will remind them of the August deadline.

10 THE COURT: The next item is Global Application of Daubert
11 and Pro Se Plaintiffs.

12 MR. HERMAN: With respect to Daubert there are no
13 additional information, your Honor, it's on hold pending the outcome
14 of the settlement program.

15 THE COURT: What about the Pro Se Plaintiffs?

16 MR. HERMAN: We have been working on a joint
17 recommendation and order. I've reviewed it, Mr. Preuss I believe,
18 his group is responsible for that. We have no objections to it.

19 There are two issues outstanding, one would be the curator
20 fee, which your Honor will set, which we have no joint
21 recommendation on. And the other is a monthly submission by the
22 curator as to hourly endeavors as well as costs. I would anticipate
23 that we could get that order to you no later than Friday.

24 THE COURT: The next item is Verilaw/Lexis.

25 MR. HERMAN: There are some continuing problems with the

1 migration from Verilaw to Lexis. One of the problems is paramount
2 in this case because of the several hundred attorneys that have
3 Propulsid cases. Verilaw/Lexis only has between 80 and 90 of those
4 lawyers or law firms receiving notice at the current time. The
5 letter as to migration has not gone out and should have gone out
6 from Verilaw/Lexis.

7 As I understand it, your Honor will be meeting with
8 Verilaw/Lexis representatives in order to deal with this issue. I
9 believe that Monique Garsaud from Jim Irwin's office and Leonard
10 Davis from our office will be involved in the Verilaw/Lexis issue.

11 THE COURT: I am getting a little disappointed about this
12 situation. Verilaw has been working for years and they've been able
13 to do the job without any problem. This is a corporation started by
14 a law clerk ten years or so ago and got it off the ground. And
15 since it's been sold to LexisNexis we have had problems on it.

16 So I am meeting tomorrow with the individuals from
17 LexisNexis got to tell them that it's going to be a court order that
18 they do certain things. And if they don't do it, I am going to hold
19 somebody in contempt. We are getting to the point where it's going
20 to have to be done, done or somebody's going to be paying a price
21 for it. I'll explain that to them personally tomorrow.

22 MR. HERMAN: I do want to point out on the record that as
23 your Honor knows, Verilaw before they were bought out was doing not
24 only an excellent job but it made the case much less expensive to
25 handle, and I am not sure that the Lexis people understand that

1 there is a cost function here for the attorneys when they don't
2 operate and we have to send out notices by fax or overnight mail.
3 At this stage of the game the costs could become very expensive.

4 THE COURT: I may have to shift the cost to Lexis. I will
5 talk with them about it and see what's happening on this. Let's do
6 the status of the pending remand motions. Any report on those
7 motions?

8 MR. CAMPION: All withdrawn without prejudice, your Honor.

9 THE COURT: I appreciate that, the parties consideration
10 on that, I think that that is the way of handling it and I am happy
11 that it's worked itself out.

12 The next, Proposed Remand Order.

13 MR. HERMAN: That's in the works.

14 THE COURT: Preservation of Electronic Data.

15 MR. HERMAN: Your Honor, we are going to agree with the
16 defendants that once the claims process, the actual payments begin
17 that they be relieved of the preservation procedures. The trial
18 package is complete, it's available for those folks that don't enter
19 the settlement. And we see no reason to further burden the
20 defendants with that preservation order once the claims start being
21 paid.

22 THE COURT: Okay. Next item is Motion to Amend the June
23 28th Order Regarding the Special Master.

24 MR. HERMAN: Yes, your Honor. What we proposed is that
25 Mr. Juneau consistent with the settlement agreement be given the

1 additional power by the court to resolve any division of attorney
2 fee problems and expenses.

3 I further report to the court that once the payments begin
4 to claimants, a questionnaire will go out to each attorney who has
5 submitted time and expenses in accord with your original order. The
6 questionnaire will be sent to each one, we will get them back, they
7 will be evaluated and we will make a report to the court and to
8 Mr. Juneau.

9 THE COURT: Finally, the Lomax cases. Is there anybody in
10 the audience dealing with Lomax?

11 MR. HERMAN: Mr. Ingram, I believe he has filed a motion
12 to consolidate.

13 THE COURT: Mr. Ingram, do you want to come forward and
14 tell us about those cases, sir?

15 MR. INGRAM: May it please the court, I am Carroll Ingram
16 from Hattiesburg.

17 THE COURT: Appreciate you being with us, Mr. Ingram.

18 MR. INGRAM: Thank you, your Honor. And I represent,
19 along with my firm, represent the plaintiffs in the two Lomax cases
20 now before the court. The Lomax case was originally filed in Jones
21 County Circuit Court and it had 1,462 plaintiffs. That case
22 remained filed and was responded to by the defendants in the circuit
23 court of Jones County.

24 And then at the time the settlement in the MDL became a
25 potential reality then an identical case with the exception of

1 adding 24 plaintiffs to it, an identical case was filed of the Lomax
2 plaintiffs in the federal court in Hattiesburg, United States
3 District Court in Hattiesburg. That case was subsequently
4 transferred to the MDL court here.

5 And then in the Jones County circuit court case, the Lomax
6 case, the resident defendants were dismissed and the defendants
7 moved to remove the case to the federal court and that case was
8 subsequently transferred to this court.

9 We wish to consolidate and have filed a motion before the
10 court to consolidate those two cases, and the main reason that I
11 wish to consolidate the cases rather than go through a process of
12 dismissal of one or the other of the cases is that I want to make
13 sure that we are preserving the statute of limitations and that we
14 have a continuity of the original case filed. And we don't believe
15 that there would be any prejudice to anyone and, in fact, think that
16 that is the most efficient way to handle these cases that are
17 pending before the court.

18 THE COURT: I have your motion and I signed it. So I
19 agree with you, I think that's the way we ought to do. You have a
20 nice courthouse in Hattiesburg. I tried a case there last week, I
21 have been visiting over there and helping out with the docket in my
22 spare time. Nice spot.

23 MR. INGRAM: Thank you, your Honor.

24 THE COURT: Thank you for coming, Mr. Ingram.

25 The last item is Vernon L. Gray.

1 MR. HERMAN: Yes, your Honor. I am reminded that after
2 this agenda and order was submitted that Mr. Rebennack filed an
3 intervention and we ask that that intervention motion be deferred at
4 this point until our next meeting.

5 THE COURT: All right. Is Mr. Rebennack here, anybody
6 from his office? So it's in his interest that I not sign it until
7 next meeting?

8 MR. HERMAN: That's the PLC's recommendation, and we will
9 make sure he is here at the next meeting.

10 THE COURT: Okay. I will do that. Vernon Gray is the
11 next one.

12 MR. HERMAN: The claimant has contacted the court, we were
13 also contacted, we have called and spoken with Mr. Gray, and we have
14 sent him a list of Mississippi attorneys who handle Propulsid cases
15 for him to choose a lawyer of his choice.

16 In connection with the correspondence and discussions, we
17 believe that Mr. Gray has been represented by and either discharged
18 or been discharged in the process of Propulsid with at least two
19 firms and probably three. If he finds additional difficulty in
20 retaining counsel, we will notify the court and the defense counsel
21 and he can be added to the pro se list.

22 THE COURT: Okay. Let's keep me posted on that so I can
23 get involved if I need to.

24 MR. HERMAN: Yes, your Honor.

25 THE COURT: Anything further? Anything from anybody?

1 MR. IRWIN: We are just happy to hear that you have a
2 little spare time, Judge.

3 THE COURT: When I do I get in trouble, so my staff keeps
4 me busy, they're always concerned about that.

5 Let's see. The next meeting will be August 23rd, Tuesday,
6 August 23rd, starting at 9 o'clock, I will see counsel in this case
7 at 8:30.

8 Anything further? Okay. Thank you, folks. The court
9 will stand in recess.

10 THE DEPUTY CLERK: Everyone rise.

11 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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15 REPORTER'S CERTIFICATE

16
17 I, Karen A. Ibos, CCR, Official Court Reporter, United States
18 District Court, Eastern District of Louisiana, do hereby certify
19 that the foregoing is a true and correct transcript, to the best of
20 my ability and understanding, from the record of the proceedings in
21 the above-entitled and numbered matter.

22
23
24 _____
25 Karen A. Ibos, CCR, RPR
Official Court Reporter