

MOIRA JACKSON, et. al.

Plaintiffs,

v.

DEPUY ORTHOPAEDICS, INC., et. al.

Defendants.

Clerk of the
Circuit Court
JUL 11 11 2:49
PR GEO CO MD #74
IN THE
CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
No. CAL10-32147

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**DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND TO QUASH
NOTICE OF DEPOSITION
AND FOR ORDER COORDINATING PRETRIAL DISCOVERY**

The defendants, DePuy Orthopaedics, Inc. ("DePuy") and Chesapeake Surgical, Ltd. ("Chesapeake"), hereby move (a) for a protective order prohibiting the plaintiffs from taking a Rule 2-412(d) corporate designee deposition of DePuy witnesses on dates unilaterally chosen by plaintiffs, and quashing their extant Notice of Deposition, and (b) an order that the parties shall coordinate their discovery in this case with discovery in the hundreds of related cases being coordinated by the Northern District of Ohio (MDL 2197) pursuant to the Multi-District Litigation ("MDL") procedures established by federal rules. The reasons for this motion are as follows:

1. The plaintiffs have served a Md. Rule 2-412(d) Notice of Deposition demanding the depositions of corporate designees of DePuy on a date that was unilaterally selected by plaintiffs' counsel, and which is unacceptable to DePuy.
2. The plaintiffs' deposition notice would cause DePuy witnesses to have to testify at deposition in this case and then again at depositions in the MDL proceedings on the same topics, unreasonably subjecting them to multiple depositions where one would suffice.

There are hundreds of cases in which plaintiffs are seeking damages from alleged defects in DePuy's ASR Hip Replacement System that have been filed against DePuy in courts around the country. Most of these cases were initially filed in federal district courts and, of these, the vast majority (532 at last count) are currently being coordinated by a single federal judge, the Honorable David A. Katz, in the Northern District of Ohio, *In Re: DePuy Orthopaedics, Inc. ASR Hip Implant Products*, Case No. 1:10 MD 2197 ("MDL 2197"), pursuant to the multi-district litigation ("MDL") procedures allowed under federal rules. Judge Katz has indicated that he would welcome the opportunity to work with state-court judges to coordinate discovery in the MDL and cases in state courts with related claims.

The plaintiffs in this case are making the same kinds of claims and alleging the same kinds of injuries as those that are being coordinated by the MDL court. The only thing different about the plaintiffs' case is that, because the plaintiffs' claims against local defendant Chesapeake destroyed diversity and the opportunity for removal, it remains in state court. Seeking to leverage this situation to their advantage and get ahead of the MDL proceedings, the plaintiffs are demanding that DePuy respond to requests for documents that were served prematurely and requesting immediate corporate-designee depositions that will duplicate similar depositions that have already been noticed in the MDL proceedings.

State and federal courts, in accord with the Manual for Complex Litigation, have seen the virtues of coordinating state and federal pretrial litigation efforts in mass tort cases like this. There is no good reason for plaintiffs' refusal to cooperate and coordinate their discovery demands with those in the MDL proceedings. The plaintiffs will not be

prejudiced by coordination. On the other hand, to proceed as plaintiffs demand would result in a waste of judicial and private resources, would subject DePuy company employees to multiple depositions on virtually identical topics, would increase the risk of inconsistent discovery rulings from different courts, and would generally disrupt or interfere with the orderly and expeditious handling of these cases through this Court and the MDL proceedings.

For the foregoing reasons, the defendants request that the Court enter an Order that would protect the defendants from the improperly scheduled deposition by quashing the extant Notice of Deposition, and require the plaintiffs to coordinate their discovery requests with the discovery proceedings in the MDL.

II. Factual Background

1. This action was filed on September 28, 2010. Process was served on DePuy on October 8, 2010, and on Chesapeake on or about October 22, 2010. There was no delay in joining issues in this action. Both DePuy and Chesapeake timely answered the complaint on December 21, 2010.

2. On or about January 3, 2011, the parties filed a Joint Motion to Stay Proceedings Pending Mediation. They mutually agreed that it made sense to try to resolve the plaintiffs' claims before incurring significant litigation expenses. The Court granted that motion by Order dated February 24, 2011.

3. The parties participated in mediation in Washington, D.C. on January 28 and 29. The mediation was unsuccessful in resolving the plaintiffs' claims. In a Joint Status Report and Motion to Lift Stay filed with the Court on March 18, 2011, the parties advised the Court that they believed with more time and effort they might succeed in

resolving the case, but agreed that the stay of proceedings effected by the Court's February 24 Order should be lifted. The parties also jointly requested that the Court call a scheduling conference to establish a case litigation schedule.

4. Pursuant to the parties' Joint Status Report and Motion, the Court entered an order on March 30, 2011, lifting the stay and setting a scheduling conference for May 12, 2011. Pursuant to plaintiffs' counsel's request, the date of the scheduling conference has been moved to May 27.

5. Following the unsuccessful mediation efforts, and even before the Court-ordered stay of proceedings was lifted, the plaintiffs embarked on an unusually aggressive course of discovery demands.

6. The plaintiffs served requests for production of documents ("RFPs") on February 27, 2011, despite the stay on such discovery in place at that time. Even though these RFPs contained only 3 numbered requests, each of the requests is so broad that together the RFPs called for production of virtually every record relating to DePuy's recall of the subject ASR hip implant, for a period spanning more than six years. A copy of plaintiffs' RFPs are attached hereto as Exhibit 1.

7. On March 15, 2011, while the Court-ordered stay was still in place and even before the parties had filed their Joint Status Report and Motion asking the Court to lift the stay, one of the plaintiffs' counsel, Altom Maglio of Sarasota, Florida, sent a letter to defendants' counsel demanding, pursuant to Md. Rule 2-412(d), depositions of DePuy corporate designee(s), on seven separate topics, during the weeks of April 11 and 18. A copy of Mr. Maglio's March 15 letter is attached hereto as Exhibit 2.

8. On March 29, 2011, DePuy counsel Lauren Godfrey sent a letter to Mr. Maglio in response to his letter of March 15. A copy of Ms. Godfrey's March 29 letter is attached hereto as Exhibit 3. Ms. Godfrey advised Mr. Maglio that DePuy "seeks to coordinate discovery in this case with the Multi-District Litigation pending before Judge Katz in the in the Northern District of Ohio." With respect to the plaintiffs' demand for depositions of DePuy corporate designees, Ms. Godfrey informed Mr. Maglio that DePuy "will be producing a DePuy representative for deposition in the MDL proceedings" and that once the details had been established, Mr. Maglio would be apprised of "the date, time and location of that deposition" so that he could attend and participate. Ms. Godfrey also advised Mr. Maglio that DePuy could not produce witnesses or documents until an appropriate protective order was entered, and that she would provide him with the form of protective order entered in the MDL proceedings, which she expected would occur in the near future. (As promised, on April 8, defendants' counsel sent Mr. Maglio and Gregory Wells, another of plaintiffs' lawyers, the form of the protective order that had been agreed upon by the parties in MDL 2197.)

9. At the time Ms. Godfrey sent her March 29 letter, DePuy had already been served with three separate corporate designee deposition notices by plaintiffs in MDL 2197. Copies of these Rule 30(b)(6) deposition notices are attached hereto as Exhibit 4.

10. In response to Ms. Godfrey's March 29 letter, Mr. Maglio emailed a letter to defense counsel on March 30 in which he refused to coordinate the plaintiffs' discovery in this case with discovery in the MDL proceedings. A copy of Mr. Maglio's March 30 letter is attached hereto as Exhibit 5. In addition, he sent with his letter a Rule 2-412(d) "Notice of Deposition for Corporate Designee(s) of DePuy Orthopaedics, Inc." ("Notice of

Deposition”) scheduling the deposition for April 27, 2011, a date that the parties had never agreed to and which was not acceptable to DePuy. A copy of the Notice of Deposition is attached hereto as Exhibit 6.

11. A comparison of the federal Rule 30(b)(6) deposition notices served in the MDL proceedings with the plaintiffs’ parallel Rule 2-412(d) deposition notice in this case confirms that the requested deposition topics in the MDL proceedings cover six of the seven deposition topics requested by the plaintiffs’ Notice of Deposition here. A copy of a chart showing this comparison is attached hereto as Exhibit 7. Perhaps recognizing that his practice of scheduling a deposition without first getting agreement on the date, time and location was contrary to local custom and good practice, and knowing that what he did would be unacceptable to DePuy, Mr. Maglio urged DePuy to get the Court involved. This motion followed.

III. Discussion

A. The Notice of Deposition Should be Quashed

It was presumptively improper for the plaintiffs to notice a Rule 2-412(d) deposition without clearing the dates and times with defendants’ counsel. The Discovery Guidelines of the Maryland State Bar Association specifically address this situation:

(a) Attorneys are encouraged to make a good faith attempt to clear deposition dates with all opposing counsel or parties before noting a deposition.

Guideline 7: Guidelines in Scheduling Depositions. This common-sense guidance is especially pertinent when it comes to requests for corporate-designee depositions on multiple topics. In response to such requests, counsel for the deponent needs to identify the person who will testify on the corporation’s behalf, and coordinate counsel’s schedule

with theirs for preparation and deposition dates and times. When an opposing counsel unilaterally chooses a date, it disrupts the orderly process needed to make sure that the right persons are chosen and prepared to testify about the topics described in the deposition notice. This is what is happening here.

There is no exigency to excuse the plaintiffs' failure to clear acceptable dates before noticing their Rule 2-412(d) deposition. Discovery in this case is in its earliest phase. Indeed, the Notice of Deposition was issued on the same day that the Court entered its Order lifting the stay of proceedings in this action. The case is proceeding expeditiously, and there is no reason for the plaintiffs' haste and lack of courtesy.

Accordingly, the Notice of Deposition should be quashed.

B. The Parties Should Coordinate Discovery with the MDL

The Court has ample authority to direct the parties to coordinate discovery with the MDL proceedings. In doing so, it will be taking an action that many other state and federal courts have taken under the same circumstances.

Unless the Court requires the parties to coordinate their discovery with discovery in the MDL, witnesses will be unnecessarily overburdened, time-consuming and expensive discovery will be duplicated, and there will be an increased risk of inconsistent discovery rulings from different courts. The plaintiffs cannot identify any compelling reason why they should not be required to take the reasonable approach of coordinating their efforts with those of the plaintiffs in the MDL proceedings.

1. The Court has Authority to Direct the Parties to Coordinate.

Maryland Rule 2-403 permits the Court to enter "any order that justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden and

expense[.]” Additionally, the Court has inherent authority to control and supervise the discovery process. *Wilson v. N.B.S., Inc.*, 130 Md. App. 430, 447-48 (2000). In short, the Court has ample authority to grant the relief requested. Under the circumstances, a decision to grant the defendants’ motion is easily the right call.

2. **State and federal coordination of discovery is the favored approach.**

In a section devoted to coordination of related state and federal cases, the Manual for Complex Litigation, published by the Federal Judicial Center, describes the “innovative efforts” undertaken by federal and state courts “to coordinate parallel or related litigation so as to reduce the costs, delays and duplication of effort that often stem from such dispersed litigation.” Manual § 20.31 at 230. “State and federal judges” according to the Manual, “have initiated state-federal cooperation to minimize conflicts that distract from the primary goal of resolving the parties’ disputes.” *Id.* at 231.

The Manual notes that pretrial discovery is a fertile ground for coordination, and that specific elements of coordination have included, among other things, (a) ordering coordinated document production and arrangements for electronic discovery, (b) allowing scheduling and cross-noticing joint federal-state depositions, and (c) enjoining attorneys from objecting to use of depositions in one court on the grounds that they originated in the other court. *Id.* § 20.313 at 237. These are precisely the kinds of coordinating measures the defendants’ motion contemplates.

The Manual accurately reflects what is going on in state and federal courts with respect to coordination of pretrial proceedings, including discovery. For example, in *In Re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, Case No. 8:10ML2151 JVS (FMOx), the United States

District Court for the Central District of California, quoting the Manual, endorsed “cross-noticing of depositions in this MDL and in related state court and federal court actions . . . ‘so as to reduce costs, delays and duplication of effort that often stem from such [dispersed] litigation while minimizing conflicts that distract from the primary goal of resolving the parties’ disputes.’” Order No. 7 (Aug. 26, 2010). A copy of this Order is attached hereto as Exhibit 8.

In *In re Bausch & Lomb, Inc. Contact Lens Solution Products Liability Litigation*, MDL No. 1785, Civil Action No. 2:OG-MN-77777-DCN, the federal MDL court in the District of South Carolina conducted a joint *Frye/Daubert* hearing with the New York County Supreme Court “in recognition of the importance of coordinating related Federal and State litigation in order to reduce costs and delays.” 2009 WL 2750452 at *3n.23 (D.S.C. Aug. 26, 2009). See also *In the Matter of Bausch & Lomb Contact Lens Solution Product Liability Litigation*, 25 Misc. 3d 1244(A), 906 N.Y.S.2d 778 (Sup. Ct. N.Y. County 2009) (same); *In the Matter of Neurontin Product Liability Litigation*, 24 Misc. 3d 1215(A), 897 N.Y.S. 2d 671 (Sup. Ct., N.Y. County 2009) (referencing joint *Frye/Daubert* hearing hosted by the MDL court “in recognition of the importance of coordinating related federal and state litigations in order to reduce costs and delays.”)

In *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, MDL No. 1203, Judge Bechtle of the Eastern District of Pennsylvania noted in an Order that he had conferred with his counterpart on the Superior Court of Los Angeles County, and that they “agreed that state/federal coordination of discovery and other pretrial activities [including cross-noticing of depositions] will be in the best interest of the parties named in the cases under their respective jurisdictions, as well as the public

interest where it is affected by those cases.” Pretrial Order No. 467, 1999 WL 124414 (E.D. PA. Feb. 10, 1999).

Unsurprisingly, State courts have welcomed the concept of coordination. For example, in *In re South Dakota Microsoft Antitrust Litigation*, 770 N.W.2d 85, 94 (S.D. 2005) the state circuit court ordered that all pretrial discovery be coordinated with the federal antitrust actions pending in the MDL court in the District of Maryland and directed the parties to ““make every effort to avoid duplication of discovery that is propounded and taken in the federal [MDL] action as in any state action where counsel for Plaintiffs and Defendant both have the option to participate.””

In *In Re Oklahoma Breast Implant Cases*, 847 P.2d 772 (Okla. 1993), the Supreme Court of Oklahoma found that products-liability actions concerning breast implants “involve common pretrial and discovery issues and that coordination for pretrial purposes will best serve the convenience of parties and witnesses and promote the just and efficient conduct of this litigation.” *Id.* The court further found that coordination “is necessary in order to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.” *Id.*

3. Coordination makes sense in this case.

Judge Katz, who is overseeing the MDL, has indicated that he would like to work in partnership with state-court judges to coordinate discovery in these related hip-implant cases. This makes eminent good sense. In the MDL proceedings, DePuy has received three Rule 30(b)(6) deposition notices from the plaintiffs. A comparison of the topics for deposition described in these notices, and the topics in the Notice of Deposition served by the plaintiffs in this case reveals that the MDL depositions will cover fully six of the seven

topics described in the state-court Notice. See Exhibit 7 hereto. This is not at all surprising since the subject matters of the involved cases are virtually identical.

Unless the Court directs the parties to coordinate discovery, DePuy witnesses will inevitably be subject to multiple depositions on the same topics, which is an avoidable and therefore undue burden on DePuy and its lawyers and witnesses, and an avoidable and therefore undue expense for everyone involved.

Unless the Court orders coordination, any discovery disputes the parties may have - - about privileges, discovery scope, etc. -- will be subject to rulings on the same issues by two different courts. This increases unnecessarily the risk of different and inconsistent court decisions. In addition, if multiple courts are called upon to resolve the same kinds of discovery issues, that will be an inefficient and wasteful use of scarce judicial resources.

4. Coordination will not prejudice plaintiffs in any way.

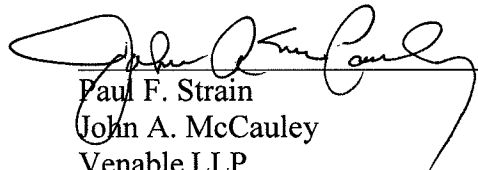
The plaintiffs cannot possibly muster a plausible suggestion that coordinating with the MDL proceedings will prejudice their case. In this case there will not be a scheduling conference until May 27. The MDL is at least as far advanced as this case in terms of procedural posture.

Rather than delaying, coordination should expedite disposition of this case. If depositions are cross-noticed and conducted for this case and the MDL simultaneously, that will make witnesses and counsel available on more dates, and will avoid delays due to scheduling conflicts. Similarly, if documents are produced under the same schedules and protocols, productions will roll out more quickly and smoothly.

IV. Conclusion

For all the foregoing reasons the Court should enter an Order, in the form attached hereto, that (a) precludes the plaintiffs' from unilaterally scheduling a Rule 2-412(d) deposition, (b) quashes this Notice of Deposition, and (c) that directs the parties to coordinate pretrial discovery with discovery in the MDL proceedings.

Respectfully submitted,



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