

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: BIOMET M2a MAGNUM HIP)
IMPLANT PRODUCTS LIABILITY)
LITIGATION (MDL 2391))
) CAUSE NO. 3:12-MD-2391
)
_____)
This Document Relates to All Cases)
_____)

ORDER

The plaintiffs want to take depositions of generic expert witnesses to be used in trials on remand. They want me to preside at those depositions, to rule on objections consistently with my earlier rulings under Federal Rule of Evidence 702. The plaintiffs anticipate the use of that testimony as part of the trial packages they intend to provide to the attorneys who will try these cases on remand.

Biomet opposes the taking of these depositions, for several reasons. Biomet says that, especially with respect to expert witnesses, live testimony is far preferable to testimony by video. It also notes that the proposed depositions could take days to complete because the various states in which they might be used apply different standards and Biomet will be required to object continuously, lest a given question be objectionable (as inviting the wrong standard) in even a single jurisdiction.

Transferor judges might agree with Biomet that live testimony would be better, but that decision should be left to the transferor courts. Allowing the

prerecording of expert testimony seems more consistent with Federal Rule of Civil Procedure 1, given the challenge and cost of bringing experts to a large number of trials spread across the country.

But I am uncomfortable with the plaintiffs' suggestion that I rule on what amount to trial objections. As a transferee judge, 28 U.S.C. § 1407 only gives me the authority to resolve pretrial matters, and ruling on trial objections seems a quintessentially trial function. The same seems true of applying a pretrial Daubert ruling to specific questions and answers at trial. I realize other transferee judges have done what these plaintiffs ask, and that no binding precedent addresses the matter, but I believe I would be exceeding the scope of my authority were I to preside at the giving of trial testimony.

Biomet might well be correct that objections will fill the depositions, but I am also confident that trial counsel won't seek to admit those parts of the depositions that don't apply within the jurisdiction that provides the rule of decision, so the transferor judges should only need to address a small portion of the objections. If counsel don't submit focused excerpts, I'm sure the transferor judges will order them to do so.

So I'll allow the plaintiffs (and Biomet, if it chooses to do so) to take depositions of their generic expert witnesses, and leave it to the transferor judge to determine whether those depositions may be substituted for live testimony. But I will not preside over those depositions in light of my reading of a transferee

judge's authority under § 1407.

I will afford the parties two weeks, until April 9, to try to agree on a schedule for the remaining actions in the docket and to submit a proposed scheduling order.

SO ORDERED.

ENTERED: March 26, 2018

/s/ Robert L. Miller, Jr.
Judge, United States District Court
Northern District of Indiana