

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

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

ORDER RE: GROUP 3, MANAGEMENT OF PRO SE CASES,  
AND STATE COURT COORDINATION

I reserved ruling on these topics at the end of our November 7 status conference. I assume the reader’s familiarity with what has gone before, and refer any unfamiliar readers to the rough transcript of the hearing, which is posted on the court’s web page for this docket.

I.

The parties dispute whether certain cases belong in Group 3 for case-specific discovery purposes. I resolved the issues surrounding the *Gearon* case (3:14cv2099) at the status conference, but other issues remain.

The parties dispute whether the *Zamora* case (3:15cv13) should be included in Group 3. *Zamora* is the MDL docket’s only wrongful death case filed as such; Biomet believes that justifies deferring discovery until later. The plaintiff and PSC II argue that Group 3 is determined (with some justifiable exceptions) on the age

of the case, and that *Zamora* stands in the part of the queue that is entering into Group 3.

We have been proceeding in a roughly chronological order to move constituent cases into the case-specific discovery stage, and *Zamora* has waited its turn. I agree with Biomet that case-specific discovery in a wrongful death case will differ somewhat from discovery in a live plaintiff's revision case, but I'm not persuaded that the difference has enough significance to push *Zamora* further back in the line. There is purpose in processing these cases toward remand (or settlement) in the order they reached this court unless good reason exists to make some cases wait for later proceedings. I don't think the reasons for holding *Zamora* back are strong enough, so I am granting the *Zamora* plaintiff's motion to be included in Group 3 for case-specific discovery [Doc. No. 121 in 3:15cv13].

The parties' remaining dispute about the composition of Group 3 relates to a group of cases in which more than ten years had passed between a plaintiff's revision surgery and the filing of the case. Biomet wants to keep those cases out of Group 3; PSC II wants them in.

I'm unclear on one of Biomet's arguments: it notes that when we discussed the need for bellwether trials last year, I commented that the partial settlement — which resolved 90 percent of the cases then pending — had established the value of many of the cases. My reference dealt with the need to conduct bellwether trials to help the parties figure appropriate settlement ranges — experience under the settlement agreement had provided that information. The cases that remained

after the settlement agreement are ones in which the parties disagree about the value of the claims.

I have informed the parties that I intend to leave state law-specific dispositive motions to the transferor courts on remand, and assume Biomet intends to seek summary judgment or dismissal on statute of limitations grounds in the transferor courts when these cases are remanded. Notwithstanding my belief that cases will move more quickly if dispositive motions are decided individually by judges familiar with the governing law, I think I have a responsibility as a transferee judge to see that the bulk of discovery is complete before suggesting that the Judicial Panel on Multidistrict Litigation remand a case. So — and it may well be that everyone already agrees with me on this point — I expect the parties to conduct case-specific discovery even in the cases not filed within ten years of revision surgery.

Nonetheless, not every case can proceed as part of Group 3, and I think the length of time between the revision surgery and the date of filing provides a sound basis to distinguish between cases otherwise ripe for case-specific discovery. So I agree with Biomet that what Biomet calls the “10-year” cases should proceed with case-specific discovery in the next Group, rather than in Group 3.

II.

I invited the parties to discuss whether the court should issue a *Lone Pine* order and, if so, what it should look like. Biomet tendered a proposed order that looks very much like *Lone Pine* orders in other cases. Biomet's proposed order would require each unrepresented plaintiff to submit a report, either from his physician or another expert, to the effect that the plaintiff suffered harm from one of the Biomet devices involved in this docket. Biomet's proposed order also would encompass plaintiffs with metal-on-polyethylene devices. Biomet proposes dismissal of those cases where plaintiffs fail to comply.

PSC II's proposal would require unrepresented plaintiffs to inform the court whether they wish to proceed with their claims. Those who wish to proceed would be required to attend a status conference in person to develop a case-specific discovery plan. Failure to inform the court of an intent to proceed or failure to appear for the status conference would result in dismissal.

I agree with Biomet that the time has come to determine which unrepresented plaintiffs intend to proceed. This docket is four years old and there is still work for the transferee court to do. No feet have been dragging: about half of that time was devoted to the partial settlement and getting PSC II up and running. But this is no longer a particularly young MDL docket. It's time to see who intends to remain a part of it.

After PSC II's significant efforts to help *pro se* plaintiffs find counsel, only 18 *pro se* plaintiffs remain — a meaningful percentage of the remaining cases, but

a modest number by mass tort standards. Moreover, none of them filed *pro se* complaints. These are primarily plaintiffs whose attorneys withdrew as counsel after reaching an impasse as to whether the plaintiffs should enter into the settlement agreement. But I don't believe they should be dismissed from the MDL simply because they think their injuries were worth more than Biomet and their attorneys thought.

Because of the limited number of unrepresented plaintiffs and the reason they aren't represented, I prefer PSC II's approach. It also seems that the burden for a plaintiff to appear at this court may be at least as great as the burden for a plaintiff to get an orthopedic surgeon to fill out Biomet's proposed Expert Declaration. This is especially so when the result of plaintiff's appearance may be a discovery plan that involves an expert report. I edited the PSC's form to give plaintiffs the option — not the obligation — to send in an expert declaration rather than come to South Bend.

This is the language I propose. If Biomet and PSC II don't propose changes by November 23, I will issue the order. Exhibits B and C would be what PSC II and Biomet, respectively, tendered as part of their *Lone Pine* briefs.

This order is being sent to plaintiffs who have a case, but no lawyer, in this multidistrict litigation involving certain Biomet hip implant products. This order explains what such a plaintiff needs to do prosecute his or her case — in other words, to keep it from being dismissed.

Since 2012, cases involving alleged defects in Biomet's M2a Magnum system of hip implant products have been consolidated in this court as part of the multidistrict litigation to allow for consolidated and efficient pretrial proceedings. During these pretrial proceedings, and following the approval

of a Master Settlement Agreement, this court has granted numerous motions to withdraw as counsel in cases in this MDL, causing the plaintiffs in those cases to be *pro se* (that is, representing themselves without an attorney). A list of cases in which the Plaintiffs are currently not represented by attorneys is attached to this order as “Exhibit A.”

As the multidistrict portion of this litigation draws to a close and preparations are made for remand of pending cases back to local courts for further proceedings and individual trials, this court needs to determine which of the plaintiffs listed in Exhibit A wish to pursue their claims to trial. To accomplish this purpose, the court will use the Declaration of Intent Form attached to this order as “Exhibit B.” The Declaration of Intent Form requires each unrepresented plaintiff to indicate whether he or she intends to pursue his or her claim, or whether he or she would like the court to dismiss the pending lawsuit. If an unrepresented plaintiff listed in Exhibit A indicates that he or she would like his or her individual lawsuit to be dismissed or doesn’t respond to this order within 30 days, the court will dismiss that plaintiff’s case without prejudice.

Further, the court will require that any unrepresented plaintiff who elects to continue to prosecute his or her individual lawsuit **and** has timely submitted his or her Declaration of Intent Form **do one of two things:**

The unrepresented plaintiff may attend a hearing in person on \_\_ at \_\_ before United States District Court Judge Robert L. Miller, Jr. at the United States District Court for the Northern District of Indiana, Robert A. Grant Federal Building, 204 S. Main Street, South Bend, Indiana, 46601. At this time the court will address the activation of the individual case for discovery and entry of a scheduling order, as well as the obligations of unrepresented litigants in prosecuting claims before the court;

OR

The unrepresented plaintiff may have the Expert Declaration attached as “Exhibit C” to this order completed by an orthopedic surgeon and sent to PSC II counsel within [90 days of this order].

**Failure to complete and return the Declaration of Intent Form (Exhibit B) AND either attend the in-court hearing OR complete and return the Expert Declaration (Exhibit C) will result in dismissal of the case with prejudice.**

Based on the foregoing, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. The Plaintiffs' Steering Committee shall send a copy of this order and Exhibits B and C to each plaintiff listed in Exhibit A of this order.
2. All plaintiffs listed in Exhibit A to this order must EITHER:
  - a. Return their completed and signed Declaration of Intent Form to Biomet MDL Plaintiffs' Steering Committee, c/o Brenda S. Fulmer, Esquire, Searcy Denney Scarola Barnhart & Shipley, 2139 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33409, postmarked no later than [30 days from order] indicating whether they wish to continue litigating their lawsuit or have their lawsuit dismissed. **Any plaintiff who does not return the completed and signed Declaration of Intent Form with a postmark of [30 days from order] will have his or her lawsuit dismissed for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).**

OR

- b. Return their completed and signed Expert Declaration to Biomet MDL Plaintiffs' Steering Committee, c/o Brenda S. Fulmer, Esquire, Searcy Denney Scarola Barnhart & Shipley, 2139 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33409, postmarked no later than [90 days from order] indicating whether they wish to continue litigating their lawsuit or have their lawsuit dismissed. **Any plaintiff who does not return the completed and signed Declaration of Intent Form with a postmark of [90 days from order] will have his or her lawsuit dismissed for failure to prosecute pursuant to Federal Rule of Civil Procedure 41 (b).**
3. The Plaintiffs' Steering Committee shall immediately forward to Biomet's counsel the Declarations as they are received.

III.

Biomet asked me to send a letter to judges presiding over some 40 similar cases in the state courts, inviting their cooperation with the case management schedule in this case. PSC II objected, concerned that the MDL timetables would provide too little time for plaintiffs in state cases with less developed discovery. I told the parties I would re-draft the letter to try to make it more clear to the state judges that they should make their own decision whether a case before them would benefit from coordination with our schedule. This is the revised draft:

I understand that you have a product liability case involving Biomet's M2a Magnum or M2a-38 metal-on-metal hip implant devices. In October 2012, the Judicial Panel on Multidistrict Litigation transferred all of the federal cases involving those devices to me for centralized pretrial proceedings in MDL-2391. Most of the 2,600 cases that have been transferred to my docket have been settled, but more than 300 remain, and more arrive every month.

The proceedings in your case might be at a different stage than those in the federal MDL, but you and the people involved in your case might find our proceedings helpful in the sense that a great deal of discovery has been accomplished in the federal cases. The plaintiffs' steering committees have completed seven Rule 30(b)(6) depositions and Biomet has responded to multiple sets of master written discovery requests from the plaintiffs' steering committees. Biomet has identified and produced more than 9 million pages of documents subject to a negotiation ESI protocol and orders approving the use of search terms and predictive coding technology. (See attached ESI Protocol, April 18, 2013 Order Regarding Discovery of ESI, and August 21, 2013 Memorandum and Order).

I was a state trial judge for a decade, and would never presume to tell a state trial judge how to handle a case. But depending on the stage of your case and the law of your jurisdiction, you might find it helpful to look to the federal proceedings to the extent they might make it unnecessary for you to re-invent the wheel. My court's



website — <http://www.innd.uscourts.gov/mdl-2391> — includes all the discovery and case management issues I have addressed.

To help you compare the stage of your proceedings with those in the MDL docket before me, I am also including my December 2015 Scheduling Order that sets forth the timeline governing the federal cases through resolution of dispositive pretrial matters and core discovery.

- The parties are conducting individual Biomet employee depositions involving dozens of records custodians; those depositions are to be completed by the end of 2016.
- The parties have taken limited discovery and file dispositive motions in cases subject to statute of limitations and spoliation defenses. I will rule on several of those, most which are ripe for my decision.
- For cases not subject to those defenses, the order activates pools of about 50 cases each for certain case-specific discovery such as plaintiff and physician depositions.
- The order creates a timetable for general expert reports, taking expert depositions, and filing dispositive motions directed at those experts in early 2017.

In other mass tort litigation, state trial judges have found cooperation with the federal court in which the federal cases were centralized to be helpful in preventing duplication of efforts, avoiding undue costs, and conserving judicial resources. For example, it might be appropriate — and might promote efficiency and consistency — for state court litigants to participate meaningfully in the MDL depositions of Biomet employees. On the other hand, the needs of your individual case might be different from what we are doing in this federal docket.

You and you alone make the case management and substantive state law decisions in your case. As you do so, you might find that federal/state cooperation is the best way to bring this litigation to a global resolution. Please feel free to contact me to discuss our joint interests in this litigation.

While we haven't discussed the topic, a future agenda item will address ways in which state judges with these cases might participate in any

