

**STATE OF NEW YORK
LITIGATION COORDINATING PANEL**

Panel Case No. 0001/2003

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ROBERT VIERA,

Plaintiff,
- against -

THE DELACO COMPANY, as Successor by Merger to
Thompson Medical Company, Inc., RITE AID OF NEW
YORK, INC.,

Defendants.
-----X

: Index No. 10684/2001
:
: Pending in the:
Eleventh Judicial District
:
: Assigned Justice:
: Hon. Fredrick Schmidt
:
: Filed in the Queens County
Clerk's Office on April 24, 2001
:

AND OTHER CASES LISTED BELOW ¹

DECISION

Novartis Consumer Health Corporation, Novartis Corporation, and Novartis Pharmaceutical

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Osterhaus v. Bristol-Myers Squibb Co., Index No. 111741/2001 (New York); Canlas v Novartis Consumer Health Corp., Index No. 121058/2001 (New York)(Hon. Richard F. Braun); Baron v. Chattem, Inc., Index No.121727/2001 (New York)(Discontinued); Stewart v. Bristol-Myers Squibb Co., Index No. 124064/2001 (New York); Rice v. Bristol-Myers Squibb Co., Index No. 101735/2002 (New York); Gouge v. Bristol-Myers Squibb Co., Index No. 102637/2002 (New York); Keiser v. Novartis Corp., Index No. 103008/2002 (New York)(Hon. Joan A. Madden); Adams vs. Bristol-Myers Squibb Co., Index No. 104405/2002 (New York); Tyler v. Novartis Consumer Health Corp., Index No. 109654/2002 (New York)(Hon. Richard F. Braun); Robinson v. Sanofi Synthelabo, Inc., Index No. 112186/2002 (New York); Raucci v. Novartis Consumer Health, Inc., Index No. 115421/2002 (New York)(Hon. Debra James); Zaveri v. Bristol-Myers Squibb Co., Index No. 116020/2002 (New York); Randisi v. Novartis Consumer Health Corp., Index No. 114518/2002 (New York); Pineda v. Wyeth, Index No. 20590/2002 (Queens); Murray v. Bristol Myers Squibb Co., Index No. 118169/2002 (New York); McCarthy v. Bristol-Myers Squibb Co., Index No. 118546/2002 (New York); Daniel v. Bristol-Myers Squibb Co., Index No. 120893/2002 (New York); Zarkin v. Lenier Health Products, Inc., Index No. 16045/2002 (Westchester); Privitera v. Pfizer, Inc., Index No. 122095/2002 (New York)(Hon. Rosalyn Richter); Mozur v. Bristol-Myers Squibb Co., Index No. 123579/2002 (New York); Reynolds v. Novartis Consumer Health Corp., Index No. 123578/2002 (New York); Morgan v. Novartis Consumer Health Corp., Index No. 123953/2002 (New York); Hinckley v. Family Dollar Stores, Inc., Index No. 127015/2002 (New York).

Corporation, Delaco Company, Bristol Myers Squibb Company, L. Perrigo Company, and Wyeth move for an order of coordination pursuant to Section 202.69 of the Uniform Rules for the Trial Courts.² The movants seek an order of coordination of 24 cases, which are set forth in the caption to this Decision, in each of which plaintiffs seek to recover damages for personal injuries (hemorrhagic stroke or other injuries) alleged to have been suffered by virtue of ingestion of phenylpropanolamine (“PPA”). PPA was an active ingredient used in certain nasal decongestants and products designed for the suppression of appetite, including some marketed under the names Tavist-D, Contac, and Alka-Seltzer Plus. The movants are defendants in many of the captioned cases. Movants or their predecessors sold products containing PPA. The actions are pending in the First, Ninth and Eleventh Judicial Districts.

Although 24 cases are listed in the caption, the court’s computer system indicates that Baron v. Chattem, Inc., Index No. 121727/2001 (N.Y. Cty.) was discontinued on January 7, 2003. This decision will therefore refer to 23 cases.³

The plaintiffs in these actions oppose this application.⁴ So do two defendants in one of the cases (Pineda v. Wyeth, Index No. 20590/2002 (Queens County)), BJ’s Wholesale Club and Natick

² The application was brought by counsel for the first three of the movants listed above. Counsel represents that she conferred with counsel for the other defendants listed and that all agreed to join in the application.

³ Canlas v. Novartis Consumer Health, Index No. 121058/2001 (N.Y. Cty.), the computer reveals, was dismissed on March 25, 2003 because of the failure of either side to appear. However, in February 2003, the Panel had issued a stay as part of the order to show cause on this application so we assume that that case remains active.

⁴ Papers have been submitted by Weitz & Luxenberg in which Ellen Relkin, Esq. advises the Panel that she submits her affirmation in opposition on behalf of all plaintiffs’ counsel. The Panel has also received papers in opposition from Paul D. Rheingold, Esq. and letters joining in the opposing papers from Stephen J. Fearon, Jr., Esq. and Alex H. MacDonald, Esq.

N.Y. College Point Realty Corp.

Background

On August 28, 2001, the Judicial Panel on Multidistrict Litigation issued an order establishing a Multidistrict Litigation in the United States District Court for the Western District of Washington for all Federal court PPA cases. In re Phenylpropanolamine (PPA) Products Liability Litigation, Dkt. No. 1407. Approximately 700 such cases have now been included in this Litigation. In addition, PPA actions have been filed in the courts of various states. PPA actions have been coordinated in California, Connecticut, New Jersey, Philadelphia County, Pennsylvania, and parts of Texas.⁵

As noted, the 23 actions before us allege personal injuries, including hemorrhagic stroke, based upon alleged use of products containing PPA. Movants assert that this gives rise to numerous critical issues of law and fact. In movants' view, these cases present an issue of "general causation," that is, could the ingestion of PPA have been capable of causing plaintiffs' injuries?

According to movants, for years the Federal Food and Drug Administration had permitted the marketing of products containing PPA. Beginning in 1994, the Hemorrhagic Stroke Project, an epidemiological study undertaken by investigators from Yale University, examined the health risks of PPA. In 1996, movants advise, the FDA declined to remove products containing PPA from the market. In 2000, we are told, the Project issued a study stating that there was possibly a suggestion of an association between some use of PPA and hemorrhagic stroke in some women. The FDA requested that companies voluntarily discontinue the marketing of products containing PPA, which

⁵ There are approximately 63, four, 287, 343 and 87 PPA cases respectively pending in these jurisdictions.

has occurred.

In the Federal Multidistrict Litigation, discovery has taken place on the general causation issue and a Daubert⁶ hearing has apparently begun.

The movants anticipate that more PPA actions will be filed in New York in the coming months, an assertion challenged by plaintiffs.

Arguments

Movants contend that an order of coordination will conserve judicial resources in regard to questions of discovery and other pre-trial matters and streamline pre-trial procedures, leading to increased efficiency, manageability and convenience for all concerned. Coordination pursuant to Section 202.69 will also, movants urge, ease coordination with the Federal Multidistrict Litigation and state court proceedings in PPA cases. Movants point out that expert discovery, which is obviously vital with regard to general causation, and discovery of defendants have been handled on a coordinated basis involving the Federal and state proceedings.

Plaintiffs, on the other hand, contend that their use of discovery in the Federal and New Jersey PPA proceedings makes coordination in New York unnecessary; that movants' application is actually a device to avoid early trials and will bring about unreasonable and prejudicial delay; that the number of cases pending in New York is modest so that coordination is not required; that coordination is not required by motion practice in these cases since there has been none; and that New York will not be flooded with PPA cases. Plaintiffs also argue that the causation question raised by the movants is pretextual.

⁶ Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579 (1993).

Plaintiffs particularly emphasize the fact that there has been informal coordination (Relkin Aff. ¶ 5) between the parties in regard to discovery. Thus, defendants produced some documents to plaintiffs in these cases, as they did in the Multidistrict Litigation, and produced witnesses for depositions only once. As a result of the discovery process in the Federal and New Jersey proceedings and the informal coordination here, plaintiffs assert, discovery in the cases either is complete or will be so within a few months. Plaintiffs attribute the paucity of motion practice in these cases to this informal process of coordination. Plaintiffs state that because of coordination between these actions and the Federal, New Jersey or Pennsylvania proceedings, the only discovery that is occurring in these cases concerns individual actions and is not susceptible to coordination. (Relkin Aff. ¶ 10). In this connection, plaintiffs also point to the pendency of some of these actions for some time without any application by defendants under Section 202.69.⁷

Plaintiffs also urge that no Frye hearing should be held in these cases since the Yale study is prima facie admissible, having actually been relied upon by eminent experts and the FDA. Thus, only individual issues, if any, exist.

Discussion

Although plaintiffs oppose this application, it is implicit in plaintiffs' position that, from their inception, these cases presented an appropriate situation for the process of coordination. Plaintiffs oppose an order of coordination pursuant to Section 202.69 at this stage in part by arguing that coordination has already occurred, and has already produced the benefits that coordination can offer, the coordination here having taken place informally and in light of and under the influence of the

⁷ Sixteen actions were commenced in August 2002 or earlier. Four of these were initiated in 2001.

Federal Multidistrict Litigation and state court proceedings, especially, it appears, in New Jersey and Pennsylvania. Although there are some differences among plaintiffs as to products used, injuries allegedly suffered and perhaps other things and some differences among defendants as to their alleged dealings with PPA, the complaints in these cases clearly present us with an instance of an alleged mass tort -- plaintiffs who, it is claimed, suffered personal injury (hemorrhagic stroke and other injuries) as a consequence of having ingested a specific chemical, PPA, contained in decongestants and other products marketed widely. In addition to the Federal courts, five other jurisdictions have coordinated PPA cases, which is suggestive. As the Multidistrict Panel observed:

Notwithstanding differences among the actions in terms of named defendants, specific products involved, legal theories of recovery ... and/or types of injury alleged, all actions remain rooted in complex core questions concerning the safety of Phenylpropanolamine (PPA)... Centralization ... is necessary in order to eliminate duplicative discovery, prevent inconsistent pre-trial rulings ... and conserve the resources of the parties, their counsel and the judiciary. [Transfer Order filed Aug. 28, 2001, at 2.]

If, as plaintiffs contend, there will be no flood of PPA cases in New York in the coming months, indeed, even if no further action is begun, there are a sufficient number of related cases pending to justify coordination if that is otherwise appropriate.

Plaintiffs and defendants are to be commended for having worked cooperatively thus far in these cases. Although some of these cases have been pending for a significant amount of time, fifteen of them have been pending for a year or less. Coordination can provide assistance in those cases in which discovery remains. Even to the extent that only case-specific disclosure may be required, it seems to us that that process can be managed more efficiently by a single Justice particularly knowledgeable about the issues and the factual context of these cases than by six or eight

or 12 different Justices whose familiarity with relevant matters will necessarily be more diffuse. Since only a modest number of PPA cases are pending in New York and since plaintiffs assert that few more PPA cases are likely to be filed here, concentrated pre-trial processing of these cases will be manageable. The management of 23 cases will surely be more efficient if conducted by a single Justice. Although some cases are more ready for trial than others, cases that are close to trial-ready may be treated accordingly.

Coordination of these cases will eliminate the risk of inconsistent pre-trial rulings, which is also an important consideration (Section 202.69(b)(3)). There are already five different Justices assigned to these cases although in only six have RJI's been filed. As more RJI's are filed, the risk of inconsistent rulings would increase. The proper approach to causation would seem to present genuine potential for conflicting rulings in the absence of coordination.

The parties sharply disagree about whether there is a general causation issue. The movants assert that there is a Frye issue with regard to general causation and that a Frye hearing must take place. Plaintiffs argue that the science is so clear that there is no issue and that there are only questions for individual juries. A Daubert hearing was scheduled to begin in the Federal Multidistrict Litigation on April 28, 2003 and general causation, according to the movants, is being briefed and presented to the New Jersey and Pennsylvania courts (Leskin Reply Aff. ¶ 6). Efficiency and expedition can best be achieved in our cases by having these pre-trial questions considered and addressed by one Justice, who may want to consider the possible relevance of the Daubert hearing and information elicited there, or may conclude that only individual issues exist. The Justice can provide a Frye hearing most efficiently and coordination will permit resolution of the question in a uniform and consistent manner. Coordination will also clearly promote judicial economy.

Coordination is intended to improve the processing of related cases for the benefit of the parties and the court system and plaintiff's concern that it might actually delay some is taken very seriously by this Panel (Section 202.69(b)(3)). However, we think that our approach to these cases will eliminate this risk.

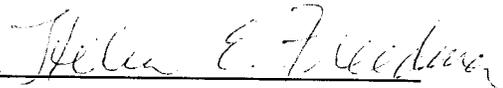
Of these 23 cases, 20 are pending in Supreme Court, Civil Branch, New York County. Of the remainder, two cases were filed in Queens County and one in Westchester and in only one of the three, the first-captioned case from Queens, has there been an assignment to a Justice. Thus, the New York PPA litigation is largely New York County-centered. The three cases from outside Manhattan come from nearby districts so that there will be minimal inconvenience to the parties and counsel involved (Section 202.69(b)(3)). It is appropriate that coordination take place in New York County. Under Section 202.69, it is up to the Administrative Judge of the First Judicial District to designate a Coordinating Justice.

Of the out-of-county cases, one was commenced in August 2002 and another in September 2002. These cases may well be less ready than others. The remaining case was the first of the 23 commenced, dating from April 2001. If the Coordinating Justice determines that no discovery remains to be completed in that case and, further, that no benefits can accrue in that case from continued coordinated processing of the causation issue or other pre-trial matters, the Justice has the authority under Section 202.69(d) to remand the case to Queens County for immediate trial. The same can, indeed, be done when and if necessary in the other two non-New York cases. Twenty of the 23 cases will, in any event, be proceeding in New York County.

Accordingly, the application is granted. Subsequently-filed, related actions and any related actions that are already pending but that have not been included in this application shall also be part

of this coordination. An appropriate order will issue. This constitutes the decision of the Panel. All concur.

Dated: New York, New York
May 8, 2003



HON. HELEN E. FREEDMAN
Presiding Justice, First Department

HON. RAYMOND E. CORNELIUS
Justice, Fourth Department

HON. E. MICHAEL KAVANAGH
Justice, Third Department

HON. JOSEPH J. MALTESE
Justice, Second Department

HON. HELEN E. FREEDMAN
Presiding Justice, First Department



HON. RAYMOND E. CORNELIUS
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Justice, Third Department

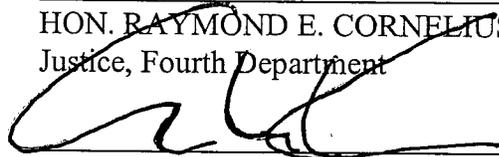
HON. JOSEPH J. MALTESE
Justice, Second Department

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