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Attorneys Suggest Off-the-Record Conference in Tylenol MDL

BY SARANAC HALE SPENCER
Of the Legal Staff

Disagreement over the scope of discovery in the multidistrict litigation against the makers of Tylenol prompted lawyers to suggest an off-the-record conference with the judge to prime him on the scientific and regulatory background of the case.

About 30 suits alleging that Tylenol caused liver damage or failure were consolidated earlier this year in the Eastern District of Pennsylvania and 16 similar cases are pending in state court in New Jersey.

U.S. District Judge Lawrence F. Stengel, who is presiding over the MDL, said at a status conference last week that he'd see if the judge hearing the bulk of the New Jersey cases, Superior Court Judge Carol Higbee, would like to attend the tutorial.

On the idea of holding what defense attorney Christy Jones of Butler, Snow, O'Mara, Stevens & Cannada in Ridgeland, Miss., called a "science day" to give the court background on the case, Stengel said, "I would welcome that. I've done that in patent cases."

Both parties want to resolve the issues and move along with discovery, Jones said, but they have "fundamental disagreement" about the proper scope of discovery.

Stengel suggested holding the tutorial

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the week of September 9, ahead of the next scheduled status conference at the end of September.

The idea came from Jones, who relayed it to the plaintiffs' steering committee on the morning of last week's conference. R. Clay Milling of Atlanta-based Henry Spiegel Milling, a steering committee member, told the judge that it's not something they'd resist.

But, he emphasized that the point of the plaintiffs' case is that people can die from acetaminophen even when they take an amount very close to the recommended dosage.

"How long has McNeil known this? How long has Johnson & Johnson known this?" he asked, referring to the defendants in the case who manufacture and market the over-the-counter drug.

Jones had noted the millions of pages in documents that the defendants had turned over in electronic form already, which Milling described as the companies taking their voluminous Tylenol files; converting them to electronic form, which they'd do anyway since "it's 2013"; and giving them to the PSC.

He later offered an example of searching the 7 million pages of electronic documents to find the annual reports filed to the Food and Drug Administration and coming up with several hundred matches. Milling was arguing that the PSC would need some assistance from the defendants in preparation for discussing the regulatory issues with the court in the tutorial, saying that he'd like copies of those documents.

Stengel said he would be willing to hear an expert from each side, off the record and without prejudice, or just the counsel if they feel conversant enough in the issues.

Jones suggested initially that it would be just counsel.

"This MDL is frankly very different from any MDL I've been involved with," Jones told the court, since the drug has been on the market for 50 years and the alleged injury has been recognized since the 1970s.

So, she said, there won't be disputes of many issues, but the scope of discovery is one disagreement that has come up. The defense, for example, would like to have a limit on the number of depositions to be taken, which Jones said is standard practice in MDLs to avoid duplication. She gave a loose suggestion of a 25-deposition limit.

She said also that the defendants would


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stipulate to some facts so the PSC wouldn't need discovery on everything.

Another issue on which the court will likely be asked to weigh in is the method of selection for the bellwether case — the plaintiffs want to choose, Jones said, but the defense would rather have the court pick.

The next status conference is scheduled for September 24.

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