

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND**

IN RE: SMITH & NEPHEW
BIRMINGHAM HIP RESURFACING
(BHR) HIP IMPLANT PRODUCTS
LIABILITY LITIGATION

MDL No. 2775
Master Docket No. 1:17-md-2775

JUDGE CATHERINE C. BLAKE

**THIS DOCUMENT RELATES TO
ALL ACTIONS**

**PLAINTIFFS' RESPONSE IN OPPOSITION TO SMITH & NEPHEW'S MOTION FOR
ENTRY OF FEDERAL AND STATE COORDINATION ORDER**

Plaintiffs respectfully submit this Memorandum in Opposition to Defendant Smith & Nephew, Inc.'s Motion for Entry of Federal and State Coordination Order.

INTRODUCTION

Smith & Nephew's proposed approach to federal-state coordination does not fit the circumstances of this case. Unlike some mass tort cases, where hundreds of plaintiffs file claims in state courts, there are very few Smith & Nephew hip implant cases pending outside this MDL. As of May 6, 2019, there were 638 cases pending in MDL 2775.¹ By comparison, there were just 12 hip implant cases pending against Smith & Nephew in a few state courts. *See* Exhibit A, list of state court cases.² Of these 12 cases, seven involve plaintiffs represented by Jones Ward, co-lead counsel for plaintiffs in this MDL. All but three of the cases are pending in Tennessee and involve Tennessee plaintiffs suing Smith & Nephew in its home state. The number of state court cases has not grown substantially in recent months. Several of the state court cases have been

¹ Smith & Nephew docket update, Doc. 1543-1 and 1543-2 (192 cases in the THA track, and 446 in the BHR track).

² Smith & Nephew provides a list of ongoing state court cases to the Plaintiff's Executive Committee.

pending since 2015 — prior to formation of this MDL — and on information and belief those cases have not been actively litigated.

Smith & Nephew, in its motion, accuses Plaintiffs of “sitting on” its proposed coordination order for 2 ½ months. To the contrary, Plaintiffs were carefully weighing the need for such an order in light of pending settlement discussions, and ultimately concluded that such an order was not only unnecessary, but counterproductive to the needs and rights of the state court plaintiffs for reasons described in more detail below. The Defendant asks this Court to impose the MDL schedule on state court judges who are responsible for their own dockets and have their own obligations to proceed apace under prevailing state laws. Rather than bring the heavy hand of the federal judiciary down on a few state court judges and plaintiffs, Plaintiffs instead propose that this Court might consider sending a letter to the few state court Judges with pending Smith & Nephew cases, a process successfully used in other hip implant MDLs.

DISCUSSION

Respectfully, Smith & Nephew seeks a Court ordered solution to a problem that does not exist. There are only a handful of cases outside this MDL, and for the most part, coordination is working well in those cases. To be clear, Plaintiffs agree that coordination between the MDL and the various state courts makes sense, and avoids duplication of effort and expense. Plaintiffs also agree with some, but not all, of the provisions in Defendant’s proposed order. For example, Plaintiffs agree that collateral state court litigants should be able to participate in discovery in the MDL, and issue their own written discovery. However, if more formal coordination were to become necessary (and Plaintiffs believe the current informal approach is working well), Plaintiffs respectfully submit that the most efficient and appropriate strategy is for this Court to send a letter to the judges in the small number of state court cases advising them of the discovery

conducted in the MDL, and giving them the option of coordinating if they choose to do so. **Exhibit B**, Plaintiffs' Proposed Letter to State Court Judges.

The result of Smith & Nephew's proposed "coordination order" would be to restrict the ability of plaintiffs in various state courts to pursue discovery. Most of the state court cases involve products in the THA Track, where Smith & Nephew has failed to produce meaningful discovery despite months and months of waiting on the part of Plaintiffs. Naturally, this has resulted in the state court THA cases being slightly more advanced in discovery and depositions compared to similar THA Track cases in the MDL. From the perspective of Plaintiffs, Smith & Nephew is using its heavy handed proposed coordination order as a tool to further delay and restrict THA plaintiffs in state courts. This is clear from the very first sentence of Smith & Nephew's proposed order, which mandates the following: "The MDL Proceeding shall be used as the lead case for discovery and pretrial scheduling in the Coordinated Actions." Smith & Nephew's Proposed Order at 2. Yet there is no trial schedule for cases in the THA Track, and Smith & Nephew has not responded to Plaintiffs' written discovery requests in the THA Track thus far. If this Court were to adopt Smith & Nephew's proposed order, it would prevent certain state court plaintiffs from receiving their day in court for the foreseeable future.

Smith & Nephew for more than a year has represented to Plaintiffs and the Court that it would be able to settle the THA Track cases in short order, and that discovery would not be necessary. Not only have the cases not settled, but there is no reasonable prospect for settlement in the foreseeable future. In the meantime, several of the THA state court plaintiffs have taken modest steps to advance their cases, mostly through depositions of sales representatives and treating surgeons. Even in those handful of cases, Smith & Nephew has objected strenuously to lines of questioning that might produce relevant information in other cases. Despite these

difficulties, the parties have worked together to cross-notice depositions and share the limited documents produced so far in the THA Track with state court plaintiffs. For example, one of the THA state court plaintiffs in Tennessee filed a motion to compel discovery in October 2018, after Smith & Nephew failed to produce responsive documents following a June 2018 set of written requests. Smith & Nephew repeatedly asked Plaintiff to delay and/or withdraw the motion to compel, in lieu of a larger production of THA documents in the MDL. Plaintiff reluctantly agreed. To date, Plaintiff in the Tennessee case and Plaintiffs in the MDL are still waiting for those documents to be produced.

Smith & Nephew points to other mass tort cases where coordination orders have been entered. Defendant's Memorandum at 4, FN 2. But in many of those cases, the coordinated state court actions involved hundreds or even thousands of plaintiffs. For example, in *In re Taxotere Products Liability Litigation*, MDL No. 2740 (2016), there are more than 11,000 cases pending in the MDL, and another 184 cases pending in a coordinated proceeding in New Jersey.³ Smith & Nephew cites approach to coordination in the Taxotere litigation as being similar to what it seeks in this MDL. However, the coordination order entered in that MDL is not similar to what Smith & Nephew seeks at all. Instead, in Taxotere, the MDL court issued a two-page order naming a federal-state liaison counsel, and requiring the parties to share a chart of cases on a regular basis. Exhibit C, Taxotere Coordination Order, Dec. 30, 2016. Both of those things are already happening in this MDL. Having the MDL as the "lead case" for discovery for state court proceedings would be a significant imposition on the state court judges who control their own dockets and are governed by their own need to process their docket.

Plaintiffs here believe that their proposal— a letter from this Court in the MDL to the various state court judges — is a far more useful and efficient approach that respects the

³ Joint Report No. 16, 2:16-md-02740, Doc. 6687, April 30, 2019.

autonomy and role of the state courts. This is the same approach used in other hip implant MDL cases in recent years. For example, in *In Re: Biomet M2a Magnum Hip Implant Products Liability Litigation*, MDL 2391, the court drafted a letter with assistance of the parties informing state court judges that "... they should make their own decision whether a case before them would benefit from coordination with our schedule." Exhibit D, Biomet Coordination Letter. Similarly, in *In Re: Stryker Rejuvenate and ABG II Hip Implant Products Liability Litigation*, MDL 2441, the MDL court took a collaborative approach with state court judges and later held a telephone conference to discuss the best approach to coordination. Exhibit E, Stryker Coordination Order.⁴

Compared to the above examples in *Biomet* and *Stryker*, Smith & Nephew seeks to hamper the ability of the state court litigants and restrict their rights to discovery by mandating that the MDL become the lead vehicle for trial preparation. Plaintiffs believe the parties' time would be better spent working cooperatively to advance the cases in both the MDL and the various state court jurisdictions, while giving the state court plaintiffs the option of using MDL discovery and depositions to avoid duplication of effort. Plaintiffs here cannot agree to stay state court discovery or agree to put it "behind" the MDL, especially because there are other state court plaintiffs not represented by MDL law firms who would be affected by such an order. Plaintiffs in the MDL have asked Smith & Nephew for proposed edits and suggestions to their draft coordination letter, and Smith & Nephew has declined to provide feedback, insisting instead that its coordination order is the only available option. To be sure, Plaintiffs remain open

⁴ Noting that, at the time, there were 773 state court cases in New Jersey, and "well over" 100 other cases in other state courts outside the MDL, and stating that, "[p]rior to coming to the federal bench in 1998, I was a state court judge for 14 years here in Minnesota. As a result of my state court experience, I am hopefully aware and sensitive to the issues confronting state court judges when they have individual cases involved in a MDL case."

to hearing from Smith & Nephew — and from this Court — about proposed edits and suggestions to their letter.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully ask this Court to deny Smith & Nephew's motion, and to consider adopting the draft letter approach to state court judges described above, and contained in the attached draft.

Dated: May 13, 2018

Respectfully Submitted,

/s/ Robert K. Jenner

Robert K. Jenner (Bar No. 04165)
JENNER LAW, P.C.
1865 Reisterstown Road, Suite 350
Baltimore, MD 21208
rjenner@jennerlawfirm.com
Telephone: (410) 413-2155
Facsimile: (410) 982-0122

Jasper D. Ward IV
JONES WARD PLC
The Pointe
1205 E. Washington St., Suite 111
Louisville, Kentucky 40206
jasper@jonesward.com
Phone: (502) 882-6000
Facsimile: (502) 587-2007

Genevieve M. Zimmerman
MESHBESHER & SPENCE LTD.
1616 Park Avenue South
Minneapolis, MN 55404
gzimmerman@meshbesh.com
Phone: (612) 339-9121
Facsimile: (612) 339-9188

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of May, 2019, that I electronically filed the foregoing with the Clerk of the Court by using CM/ECF. Notice of this filing will be sent by e-mail to all parties by operations of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic filing. Parties may access this filing through the Court's CM/ECF system.

s/ Robert K. Jenner
Counsel for Plaintiffs