

Order Granting In Part And Denying In Part Manufacturing Defendants' Motion To Accelerate Daubert Hearing 09/19/2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA)
PRODUCTS LIABILITY
LITIGATION,

This document relates to all
actions

MDL NO. 1407
ORDER GRANTING IN PART
AND DENYING IN PART
MANUFACTURING
DEFENDANTS' MOTION TO
ACCELERATE DAUBERT
HEARING

I. INTRODUCTION

Manufacturing defendants filed a Motion to Accelerate the Hearings on their Daubert Challenges to Plaintiffs' General Causation Evidence ("Defs.' Mot."). Having reviewed pleadings filed in support of and in opposition to this motion, and, being fully advised, the court finds and concludes as follows:

II. BACKGROUND

In a March 21, 2002 order, the court adopted the following expert discovery schedule:

Plaintiffs' Rule 26 disclosures on or before: 10/01/02
Defendants' Rule 26 disclosures on or before: 1/03/03
Depositions of Plaintiffs' experts complete by: 12/02/02
Depositions of Defendants' experts complete by: 3/03/03
Defendants' Daubert and other motions filed by: 2/03/03
Plaintiffs' Daubert and other motions filed by: 4/30/03
Oppositions to Defendants' motions filed by: 3/05/03
Oppositions to Plaintiffs' motions filed by: 5/30/03
Reply briefs to Defendants' motions filed by: 3/20/03
Reply briefs to Plaintiffs' motions filed by: 6/16/03
Daubert hearings to be scheduled after: 6/16/03

III. DISCUSSION

Defendants request that the court expedite the expert discovery schedule, which currently allows for the completion of a separate briefing schedule for any plaintiff Daubert challenges to defendants' experts, prior to a hearing on defendants' Daubert challenges. They assert that this separation in the briefing schedule imposes an unnecessary three-month delay on the hearing of

defendants' Daubert challenges. Defendants argue that this delay poses a major obstacle to federal-state coordination based on the accelerated schedule adopted by Judge Norman Ackerman in Pennsylvania, and the possibility of similar schedules that may be adopted in New Jersey and California. Defendants assert the lack of any good reason for separate and later briefing of Daubert challenges to defendants' experts. They aver that the logical time for plaintiffs to present such challenges would be in plaintiffs' papers in opposition to defendants' Daubert challenges, currently due on March 5, 2003. In that way, all of the Daubert challenges in the MDL could be scheduled for hearing promptly after defendants' reply papers are filed on March 20, 2003.

Plaintiffs strongly object to defendants' proposal. They argue that advancing the expert discovery schedule will not facilitate federal-state coordination, given that the state courts at issue all apply different standards to their assessments of the admissibility of expert evidence, and that different evidence, and possibly experts, will consequently be offered in support. That is, while the MDL court will apply the standards articulated in Daubert and its progeny, the courts in Pennsylvania, New Jersey, and California will apply their own standards, all of which entail a variation on the pre-Daubert, Frye test. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588-89 (1993) (finding test articulated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) superceded by the Federal Rules of Evidence) and Plaintiffs' Memorandum in Opposition to Defendants' Motion ("Pls.' Opp."), at 5 (discussing various state court tests). Plaintiffs also argue that the adoption of the proposed schedule would substantially prejudice their case, while providing defendants with a clear tactical advantage.

The expert discovery schedule adopted by this court provided for the completion of briefing on defendants' Daubert challenges on March 20, 2003, the completion of briefing on plaintiffs' Daubert challenges on June 16, 2003, and joint Daubert hearings to be scheduled for some time after June 16, 2003. The schedule adopted by Judge Ackerman, while maintaining several of the same initial dates, bifurcates the briefing schedule and the hearings on the parties' challenges. Judge Ackerman scheduled the hearing on defendants' motions for on or after April 3, 2003, followed by the briefing of plaintiffs' motions, and then the hearing on plaintiffs' motions for on or after May 20, 2003. See Defs.' Mot., Ex. 1.

Defendants' suggestion for advancing the scheduling of the Daubert

hearing differs in one significant respect from the schedule adopted by Judge Ackerman. Whereas Judge Ackerman bifurcated the briefing and hearing schedules, defendants request that the court require plaintiffs to both respond to defendants' challenges and supply their own challenges at the same time, allowing for a joint hearing on all Daubert challenges three months prior to the currently scheduled date.

Although the court declines to adopt defendants' suggestion of a shortened, non-bifurcated schedule, it agrees that a bifurcated schedule, similar to that adopted by Judge Ackerman, would serve the important purpose of advancing the MDL court's goal of federal and state court coordination. While the state courts admittedly apply different standards, the court sees ample potential benefits in the adoption of a similar schedule. For example, the state courts will have the benefit of observing the MDL hearings close in time to their own hearings.

Furthermore, the court finds that a bifurcated schedule would obviate any prejudice to plaintiffs. Under the current schedule, the briefing on defendants' motions will already be complete as of March 20, 2003. A bifurcated schedule will mean only that the hearing on those motions will follow closely in time to the completion of the briefing. Plaintiffs will then be provided the opportunity to follow that hearing with their own Daubert motions and a corresponding hearing. As such, the alleged tactical advantage afforded by defendants' proposal will be avoided through bifurcation. Moreover, contrary to plaintiffs' assertion, the court does not believe that disallowing simultaneous challenges will in any way prejudice plaintiffs' ability to present and defend their expert evidence.

The court hereby modifies the expert discovery schedule as follows:

Plaintiffs' Rule 26 disclosures on or before: 10/01/02
Depositions of Plaintiffs' experts complete by: 12/02/02
Defendants' Rule 26 disclosures on or before: 1/03/03
Depositions of Defendants' experts complete by: 3/03/03
Defendants' Daubert and other motions filed by: 2/03/03
Oppositions to Defendants' motions filed by: 3/05/03
Reply briefs to Defendants' motions filed by: 3/20/03
Daubert hearing on Defendants' motions

will take place after: Counsel shall be prepared to discuss and, if possible, suggest an April hearing date at the next scheduled status conference. 3/20/03

Plaintiffs' Daubert and other motions filed by: 4/30/03

Oppositions to Plaintiffs' motions filed by: 5/30/03

Reply briefs to Plaintiffs' motions filed by: 6/16/03

Daubert hearing on Plaintiffs' motions

will take place after: 6/16/03

The only modification to the original schedule may be found in the addition of a separate hearing on defendants' Daubert motions to occur after the due date for defendants' reply briefs.^{2 2} In keeping the briefing schedule dates as originally adopted, the revised schedule continues to differ from the schedule adopted by Judge Ackerman. For example, while the MDL hearings on defendants' and plaintiffs' Daubert challenges will occur after March 20, 2003 and June 16, 2003 respectively, the Pennsylvania hearings will occur on or after April 3, 2003 and May 20, 2003. The court finds these differences negligible and posing no threat to the goal of federal-state coordination.

Thus, both as previously and presently scheduled, "plaintiffs are given the same amount of time to mount their *Daubert* challenges to defendants['] experts [as] given defendants to challenge plaintiffs ['] experts." See Pls.' Opp., at 9.

IV. CONCLUSION

For the reasons stated above, the court hereby GRANTS in part and DENIES in part defendants' motion to accelerate the Daubert hearing. The parties are hereby ORDERED to abide by the modified expert discovery schedule as described above.

DATED at Seattle, Washington this 17th day of September, 2002.

/s/

BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT JUDGE