

Allergan: Activation of Limited Discovery in Cases with a Medical
Malpractice Component

This court has received email communications as far back as October 6, 2022, requesting a determination whether discovery can be permitted in the three actions involving Plaintiffs who have undergone a revision surgery and have also asserted claims for medical malpractice against their implanting surgeon. There is one additional case asserting a claim for medical malpractice, however, that Plaintiff has not undergone revision surgery. The present request concerns only the three cases for which there has been a revision. Plaintiffs' counsel have taken the position that they should be permitted to work up these three cases, two of which involve the same physician. The position of Allergan's defense counsel, as well as the two defense counsel for the physicians, has been that the medical malpractice aspect of these cases should not be worked up at the present time as this select group of cases are not appropriate for a bellwether trial. This court conducted a telephone conference on January 23rd, 2023 regarding this specific issue via Zoom, all counsel appearing.

This court inquired as to what would be the scope of the work-up on the medical malpractice portion of the cases which is objected to by all defense counsel. The scope of the discovery sought for each case is written responses to paper discovery and the deposition of the defendant physicians.

After reviewing the emails submitted to this court, it is now clear that Plaintiffs are not seeking to include these three cases in their “picks” of cases to undergo discovery in preparation for bellwether selection. Plaintiffs are seeking permission from this court to create a separate track for the three cases which have a medical malpractice claim and also one revision.

This court stated during Monday’s conference that any case with a medical malpractice claim will not be considered as a bellwether trial, for obvious reasons. Plaintiffs’ counsel maintain, and reasonably so, that in the event there are settlement proposals in the future from Allergan, these three Plaintiffs will be compromised in that important portions of their medical malpractice litigation will not have yet taken place. Although not directly said during the conference, the paper discovery and the deposition of the defendant physician will contribute to the analysis by Plaintiffs’ counsel regarding the viability of the medical malpractice claims, which would otherwise not be known until disposition of the claims against Allergan.

Defense counsel have not truly presented any reasonable argument to this court to stay the written discovery and physician depositions in these three cases. The requested discovery is limited. There will be no expert discovery pertaining to the medical malpractice claims at this time.

Therefore, in response to the inquiries of all counsel in seeking guidance from this court in their October 2022 emails, this court has decided that discovery is permitted in the three actions involving Plaintiffs who have undergone a revision surgery and have also asserted claims for medical malpractice against their implanting physician. This discovery may take place in a separate track along with the other bellwether discovery cases to be selected. However, to be clear, this court again repeats that any case including a medical malpractice claim will not be chosen as a bellwether case.

The parties can now proceed to complete the CMOs they are presently discussing.

A handwritten signature in black ink, reading "Rachelle L. Harz". The signature is written in a cursive style with a large, sweeping initial "R".

RACHELLE L. HARZ, J.S.C.

1/25/2023