

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: E. I. DU PONT DE  
NEMOURS AND COMPANY C-8  
PERSONAL INJURY LITIGATION,

Civil Action 2:13-MD-2433  
JUDGE EDMUND A. SARGUS, JR.  
Magistrate Judge Elizabeth P. Deavers

This document relates to: ALL CASES.

**DISCOVERY ORDER NO. 6**

**Scheduling the Depositions of Treating Physicians**

This matter is before the Court on Defendant E. I. du Pont de Nemours and Company's ("DuPont") Motion to Limit *Ex Parte* Communications With Treating Physicians and to Allow Deposition Scheduling Contacts (ECF No. 243), Plaintiffs' Memorandum in Opposition (ECF No. 255), and DuPont's Reply (ECF No. 259.) DuPont asks the Court for an Order permitting its counsel's representatives to contact Plaintiffs' treating physician's offices to schedule and coordinate depositions. DuPont also seeks an order precluding Plaintiffs' counsel from *ex parte* communicating with Plaintiffs' treating physicians concerning matters outside the scope of their treatment of Plaintiffs. This Order addresses DuPont's request relating to deposition scheduling, which is **GRANTED**. The Court will issue a separate order addressing DuPont's request concerning limiting Plaintiffs' counsel's interactions with Plaintiffs' treating physicians.

DuPont is in the process of scheduling approximately twenty-five depositions of the treating physicians of the discovery pool plaintiffs. During the April 17, 2014 telephone

conference with the Court, the parties raised a dispute relating to the protocol for scheduling these depositions. Plaintiffs' counsel read paragraph sixteen of Case Management Order Number Four ("CMO No. 4") and argued that the language precluded DuPont from administratively contacting the treating physicians for purposes of scheduling depositions. Based upon the arguments the parties offered during the conference, the Court concluded that the language of CMO No. 4 governed, but indicated that either party could file a motion on this issue or move to modify the Case Management Orders. (Tr. of Apr. 17, 2014 Tele. Conf. 24, ECF No. 250, PPO No. 17 2, ECF No. 244.)

Thereafter, DuPont filed the subject Motion. DuPont submits that the limited scope of CMO No. 4 does not address the scheduling of treating physician depositions, but that it supports its proposed protocol because it recognizes the propriety of non-substantive, administrative contacts with physicians' offices. DuPont points out that the discovery pool process did not yet exist when the Court entered CMO No. 4. DuPont proposes the following protocol:

[A] non-attorney acting on behalf of DuPont's counsel, such as a paralegal or a legal secretary, would contact the offices of all the treating physicians to determine a number of dates in which the various treating physicians are available for a deposition. At the same time, DuPont's counsel would contact the various Plaintiffs' lawyers to determine what days they are available for depositions. DuPont's counsel would then develop an overall matrix that works best in light of the availability of the witnesses and counsel.

(DuPont's Mot. 4-5, ECF No. 243.) DuPont submits that this protocol maximizes efficiency and minimizes the inconvenience to individual physicians because it allows DuPont to coordinate travel schedules and schedule depositions back-to-back for physicians who treated more than one of the twenty discovery pool plaintiffs.

Plaintiffs object to DuPont's proposed scheduling methodology, asserting that the

proposal is precluded under CMO No. 4, raises privacy concerns, and heightens the potential for abuse. The Plaintiffs Steering Committee (“PSC”) proposes the following alternative protocol:

[D]efense counsel would send a request to [a plaintiff’s] counsel for a given treating doctor’s deposition and provide dates that defense counsel would be available for the deposition. Plaintiff’s counsel would then endeavor to reach out to the treating doctor’s office and schedule the deposition and report to defense counsel within seven (7) days either that (1) the deposition has been scheduled and a notice for deposition can be issued, or (2) what the status/progress is in reaching the doctor and/or scheduling the deposition. If the latter, the reason for not reaching the doctor or scheduling the deposition must be justifiable, and if so, plaintiff’s counsel is required to continue to try and reach the doctor’s office and schedule the deposition for another seven (7) day period. This process would continue, albeit unlikely after two weeks of efforts. Lastly, any given plaintiff counsel could also elect to simply allow defense counsel to schedule the deposition with the doctor’s office.

(Pls.’ Mem. in Opp. 19–20, ECF No. 255.)

In addition, Plaintiffs ask the Court to set the order of examination of the treating physicians, allowing defense counsel to question the deponent first in the ten defense-designated cases and Plaintiffs’ counsel to question the deponent first in the ten PSC-designated cases. Plaintiff contends that absent such a protocol, the parties may race to notice the treating physician depositions. With regard to this particular request, DuPont expresses its agreement that having an understanding concerning which side will proceed first would be helpful and indicates that it will work with the PSC to agree upon such an approach.

Having reviewed CMO 4 in its entirety, the Court agrees with DuPont, that it is limited in scope and was not intended to address the scheduling of depositions. By its express terms, CMO No. 4 “govern[s] the form, procedure and schedule for the completion and service of Plaintiff Fact Sheets (“PFS”) and the execution of authorizations for the release of certain records.” (CMO No. 4 ¶ 1, ECF No. 68.) The relevant scope of CMO No. 4 is defined within the Order

follows:

**I. Scope of Order**

\* \* \*

3. *This order shall not limit or otherwise affect the procedures or timing of any additional MDL discovery (including depositions) beyond that which is described herein.* Such additional discovery shall be carried out in accordance with the applicable Rule of Civil Procedure and will be the subject of a subsequent CMO.

(*Id.* at ¶ 3 (emphasis added).) The language of CMO 4 upon which Plaintiffs rely provides as follows:

16. *Ex Parte Physician Communications:* Defendant and its counsel/authorized agents shall not conduct engage in, nor authorize any *ex parte* communications, beyond what is reasonably necessary to facilitate the ordering and/or obtaining of medical records for any particular Plaintiff with any Plaintiff's treating physicians without advance notice to and pre-approval of the PSC and/or a subject Plaintiff's representative counsel. Should the parties be unable to reach agreement about those communications, Defendant and its counsel shall refrain from any such contact until such time as the Court has entered an appropriate order.

(CMO No. 4 ¶ 16, ECF No. 68.) The foregoing language reflects that the provisions set forth in CMO No. 4, including paragraph sixteen, were limited in their application to the PFS and records authorizations. Even if, however, the Court extends CMO No. 4 beyond its expressed limited scope, paragraph sixteen contemplates that DuPont may seek a Court order authorizing certain treating-physician communications beyond those permitted in CMO No. 4. DuPont is requesting such an order.

DuPont's request is well taken. Although Plaintiffs object to DuPont's proposed methodology because of "privacy concerns" and "potential for abuse," the Court is unable to

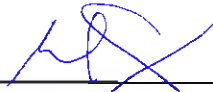
discern how the proposed non-substantive, administrative contracts by a non-lawyer are qualitatively different than the administrative contacts contemplated within CMO No. 4. Given the specific parameters of the administrative contact contemplated, the Court concludes that this is not the slippery slope Plaintiffs contend.

DuPont's proposed methodology, which contemplates overall coordination, eliminates the inefficiencies inherent in the PSC's proposed protocol and minimizes the disruption to the individual physicians, some of whom treated more than one of the twenty discovery pool plaintiffs. In their briefing on this issue, Plaintiffs do not dispute that DuPont's proposed methodology is more efficient as it allows for overall coordination. During the April 17, 2014 telephone conference with the Court, however, PSC Counsel suggested that DuPont's proposal "actually takes longer" because it does not set forth a deadline by which a plaintiff's firm has to respond to DuPont with its available dates. (Tr. of Apr. 17, 2014 Tele. Conf. 19, ECF No. 250.) This criticism is easily remedied by requiring Plaintiffs' firms to respond with their available dates within three business days of an inquiry.

Accordingly, a non-attorney acting on behalf of DuPont's counsel may have non-substantive, administrative contact with the offices of the discovery pool plaintiffs' treating physicians for the limited purpose of facilitating the scheduling of depositions. Counsel for the discovery pool plaintiffs must respond to DuPont's inquiries regarding their availability for depositions within three business days. In addition, given the lack of a formal motion and DuPont's representation that it will work with Plaintiffs to reach an agreement as to which side will proceed first in depositions, it is premature for the Court to issue a ruling regarding this issue.

**IT IS SO ORDERED.**

5/6/2014  
**DATE**

  
**EDMUND A. SARGUS, JR.**  
**UNITED STATES DISTRICT JUDGE**

  
**ELIZABETH A. PRESTON DEAVERS**  
**UNITED STATES MAGISTRATE JUDGE**