

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

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

MDL No. 2775

TRANSFER ORDER

Before the Panel: Defendant Smith & Nephew, Inc., moves under Panel Rule 7.1 to vacate our order that conditionally transferred the two actions listed on Schedule A to the District of Maryland for inclusion in MDL No. 2775. Plaintiffs in the Northern District of Georgia *Cox* action join the motion to vacate the conditional transfer of that action. No party responded to these motions.

Movants argue that transfer of these actions is inappropriate because they fall outside the scope of MDL No. 2775. More specifically, movants contend that the Panel, in its initial transfer order, excluded all actions that involved hip implant components that were subject to the U.S. Food and Drug Administration’s Section 510(k) approval procedure, as opposed to the more rigorous premarket approval procedure that was used for the Birmingham Hip Resurfacing (BHR) components. *See In re Smith & Nephew BHR & R3 Hip Implant Prods. Liab. Litig.*, 249 F. Supp. 3d 1348, 1351-52 (J.P.M.L. 2017). The actions subject to the present motions are “combination” actions—plaintiffs in each action allege that a BHR Acetabular Cup was used with non-BHR components (in particular, Smith & Nephew’s Modular Femoral Head) in total hip replacement procedures.

Contrary to movants’ arguments, the Panel did not create a “BHR only” MDL. Instead, we held that MDL No. 2775 “shall include only actions asserting *a* claim as to a BHR component.” *Id.* at 1351 (emphasis added). We excluded two other “combination” actions in the initial transfer order, not because they fell outside the scope of the MDL, but because these actions (a) alleged a different mechanism of injury, or (b) were too procedurally advanced to benefit from centralization. *Id.* at 1351-52. The only actions excluded from the MDL as falling outside the scope the litigation did not involve *any* allegations relating to BHR components. *Id.* at 1351.

The two actions at issue allege that plaintiffs suffered metallosis and other injuries as a result of the metal-on-metal construction of BHR components. These actions thus share factual questions with the actions pending in the MDL with respect to the design, manufacture, marketing or performance of the BHR system. That these actions raise additional factual and legal questions relating to non-BHR components is no bar to transfer. Section 1407 does not require a complete identity or even majority of common factual and legal issues as a prerequisite to centralization. *In re Satyam Computer Servs., Ltd., Sec. Litig.*, 712 F. Supp. 2d 1381, 1382 (J.P.M.L. 2010).

-2-

Movants also argue that, following centralization of this litigation, the transferee court and the parties themselves have limited this MDL to cases involving only the BHR system. The only transferee court order movants cite in support is a direct filing order that applies to actions brought by plaintiffs alleging that they were implanted with only BHR components. *See* Case Mgmt. Order No. 5 at 1, *In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Prods. Liab. Litig.*, C.A. No. 1:17-md-02775 (D. Md. Aug. 3, 2017), ECF No. 121. We are not persuaded that this order reflects a decision by the transferee court to alter the scope of the MDL as set forth in the Panel's initial transfer order. Movants also contend that an intention to limit the scope of the MDL can be read into the Master Amended Consolidated Complaint (MACC) filed by plaintiffs, which is limited to the common BHR issues in the litigation. Even if we were to attribute this intention to the wording of the MACC, an agreement among the parties does not override the Panel's prior orders regarding the scope of this litigation.

Finally, movants state that inclusion of these actions in the MDL could disrupt the progress of the litigation and render it less efficient. This seems unlikely given the procedural posture of the actions. The MDL remains at the pleadings stage, with an omnibus motion to dismiss pending, and the actions at issue here were only recently filed. Transfer of these actions should not result in significant delay or inefficiencies. The transferee court has the discretion to address any unique factual and legal issues through the use of appropriate pretrial devices, such as separate tracks for discovery and motion practice. *See In re McCormick & Co., Inc., Pepper Prods. Mktg. & Sales Practices Litig.*, 148 F. Supp. 3d 1364, 1366 (J.P.M.L. 2015).

Accordingly, after considering the argument of counsel, we find that the actions listed on Schedule A involve common questions of fact with the actions transferred to MDL No. 2775, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. In our order centralizing this litigation, we held that the District of Maryland was an appropriate Section 1407 forum for actions sharing factual questions concerning the design, manufacture, marketing or performance of Smith & Nephew's BHR system. The actions in this MDL focus on complications arising from the use of a cobalt-chromium alloy in the manufacture of the BHR components.¹ *See In re Smith & Nephew*, 249 F. Supp. 3d at 1350. Plaintiffs in these actions similarly allege that they suffered complications arising from the metal-on-metal nature of the BHR components.

¹ These complications include pain, adverse local tissue reaction, pseudotumors, bone and tissue necrosis, metallosis, or other symptoms, often necessitating revision surgery.

-3-

IT IS THEREFORE ORDERED that the actions listed on Schedule A are transferred to the District of Maryland and, with the consent of that court, assigned to the Honorable Catherine C. Blake for coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



Sarah S. Vance
Chair

Marjorie O. Rendell
Lewis A. Kaplan
R. David Proctor

Charles R. Breyer
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SCHEDULE A

Northern District of Georgia

COX, ET AL. v. SMITH & NEPHEW, INC., C.A. No. 1:17-03047

Southern District of Ohio

FISHER v. SMITH & NEPHEW, INC., C.A. No. 1:17-00347