

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

LISA TORREY, et al.,

Plaintiffs,

vs.

INFECTIOUS DISEASES SOCIETY OF
AMERICA, et al.,

Defendants.

Civil Action No. 5:17-cv-00190-RWS
JURY DEMANDED

**DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO THE
MOTION TO BIFURCATE CASE SCHEDULE**

Rather than engage with the merits of Defendants' proposed bifurcation plan, Plaintiffs instead craft a straw man and argue against invented complications. Contrary to Plaintiffs' arguments, a bifurcated case schedule (i) will allow for possible early resolution of the litigation while conserving the Court's, the parties', and numerous nonparties' and experts' time and resources, (ii) will not add extra work for the Court or the parties, even if it results in a longer pre-trial schedule, and (iii) is favored in similar complex, multi-party cases.

REPLY

A. Plaintiffs misrepresent Defendants' bifurcation proposal to create complications that do not, and will not, exist.

Plaintiffs first contend that Defendants' proposal to bifurcate the case schedule would make discovery longer, costlier, and less convenient because, according to Plaintiffs: (i) they would need to depose Defendants twice; (ii) Defendants would need to make multiple document productions; and (iii) the Court would face disputes concerning two sets of discovery requests. *See* Dkt. No. 285, at 4. None of this is true.

Defendants do not propose any limits on the subject matter of discovery that Plaintiffs can take of Defendants in the first phase of a bifurcated schedule, other than the general limits of the Federal Rules of Civil Procedure, the Local Rules, and the orders of this Court. While Defendants propose to move for summary judgment on the threshold issue of an alleged unlawful agreement, Defendants do not intend to limit Plaintiffs' questions at deposition or their own document productions to that discrete topic. In fact, Plaintiffs have already taken depositions of several Defendants without subject matter limits, and most Defendants have completed document productions of *all* relevant materials (*i.e.*, not limited to the agreement issue). As stated in Defendants' Motion, any Defendant that has not already completed its full document production

of relevant and responsive material will do so by the end of the month or as soon thereafter as the Court orders, again without limitation to this discrete topic.

Defendants' actual proposal is straightforward. In the first phase of discovery, Defendants that have not already done so will provide complete document productions to Plaintiffs, and Plaintiffs will finish deposing all Defendant witnesses to which they are entitled, without subject matter limits.¹ The point is to permit the Plaintiffs to take the discovery to which they are entitled to defend Defendants' anticipated early motion for summary judgment on the agreement allegations, not to limit the discovery that Plaintiffs can take. Despite Plaintiffs' misleading statements otherwise, Defendants are not asking the Court to issue a protective order to prevent discovery into matters separate from the agreement issue but otherwise relevant to this case. Defendants will produce in phase one all materials and testimony relevant to Plaintiffs' discovery requests; indeed, many Defendants have already done so.²

The second phase of a bifurcated schedule, if necessary, would comprise (1) discovery of plaintiffs; (2) the IMEs of up to sixteen Plaintiffs; (3) discovery of non-parties unrelated to the issue of an alleged unlawful agreement (such as depositions of each Plaintiff's treating physician(s)); and (4) document and deposition discovery of up to ten expert witnesses. If the Court grants Defendants' summary judgment motion as to an unlawful agreement, the parties will have avoided unnecessary and wasteful discovery involving these individuals. If the Court grants bifurcation but denies Defendants' summary judgment motion, discovery of these parties would

¹ To date, Plaintiffs have noticed depositions of the defendant doctors and Rule 30(b)(6) representatives for the Insurance Defendants; Plaintiffs have also indicated they may take depositions of individuals. Expert discovery would be included in phase one only if a party chooses to designate an expert on the issue of an alleged unlawful agreement.

² And, it should be noted, Plaintiffs do not argue that such discovery has in any way supported Plaintiffs' claims. Plaintiffs provide no support for their statement that Defendants' forthcoming summary judgment motion does not have merit.

proceed promptly. In no way, however, will such discovery be costlier or less convenient for these witnesses—a bifurcated schedule adds no additional burden to these groups but rather potentially avoids the time, expense, and inconvenience of discovery altogether.

Therefore, Plaintiffs' concerns regarding potentially repetitive discovery are unfounded. And there is no reason to think that the Court would face duplicative discovery disputes—if the parties have a dispute about discovery that requires the Court's intervention, that dispute will be addressed whenever it is ripe, regardless of whether the dispute arises in the first or second phase of discovery. The significant advantage of Defendants' proposal is that the parties and Court may actually avoid some of these disputes if Defendants' motion is successful. Even if it is not, there would be no duplication of work for the Court or the parties.

We reiterate: the requested bifurcated schedule simply stages the work that all parties must do to prepare for a trial in a way that might resolve this case promptly and efficiently. Defendants' proposed plan would conserve significant judicial resources and potentially avoid unnecessary and expensive discovery. It does *not* create additional or repetitive work.

B. This is a complex case, and a bifurcated schedule is within the Court's discretion and is favored in multi-party cases with similar complexity.

Plaintiffs next take issue with the case law supporting Defendants' argument that a bifurcated schedule is favored in complex, multi-party cases. (Notably, Plaintiffs offer no relevant case law to counter Defendants' argument.) Plaintiffs apparently contend that this case—which must sort through 21 individual plaintiffs who are unique factually, geographically, and temporally—is *less* complex than a class action. Plaintiffs focus almost exclusively on the number of individuals involved in each case.

But that misses the point: because this case is *not* a putative class action, it is actually *more* complex than many situations in which a court has granted a bifurcated schedule to deal first with

a threshold, dispositive issue. In a class action, the class representative stands in for the individual plaintiffs so that a trial does not need to evaluate dozens or hundreds of individual circumstances. The number of individual plaintiffs is thus beside the point if the proposed class can achieve class certification. Courts thus may choose to bifurcate the schedule to first resolve the threshold, dispositive issue of whether to certify the class, thereby potentially avoiding costly discovery.

Here, Plaintiffs sued as 21 separate individuals, meaning the case is actually *more* complicated than the situations cited by Defendants. Any discovery of Plaintiffs—and *the subsequent motion practice or trial*—must consider 21 distinct circumstances. Plaintiffs share no common factual nexus and certainly do not have a class representative to simplify or focus any aspect of discovery or trial. Plaintiffs are bound loosely only by the common allegation of an unlawful agreement among Defendants: the very issue that Defendants propose to resolve first.

Compared with the cases cited by Defendants, discovery and a trial in this case may well be lengthier and *more* costly and complicated. The considerations that prompt courts in multi-district litigations to bifurcate a case schedule to resolve first dispositive issues thus apply with greater force here. The Court can grant Defendants' motion and bifurcate the schedule to resolve first a singular, discrete threshold issue: the alleged unlawful agreement. If Defendants succeed on this issue, the case will be over, and the parties and the Court will have avoided what essentially amounts to 21 motions for summary judgment or trials into individual facts and circumstances, as set forth in greater detail in Defendants' Motion. If Defendants do not succeed on the agreement issue, the parties and the Court have expended zero resources that would not otherwise be required, and this outweighs the minor delay to a trial date compared with a standard pre-trial schedule.

C. Defendants' request for alternative relief is appropriate and ripe, and the Court has discretion to rule without further briefing.

In their Motion, Defendants ask this Court, if the Court chooses not to bifurcate discovery, for alternative relief: defer setting a trial date until after the Court has had an opportunity to consider and rule on the summary judgment motions Defendants anticipate filing at the close of discovery. "The district court has broad discretion in controlling its own docket. This includes the ambit of scheduling orders and the like." *Edwards v. Cass County, Tex.*, 919 F.2d 273, 275 (5th Cir. 1990). Defendants have requested the relief in a formal motion to the Court, and Plaintiffs have enjoyed an adequate time for response. Therefore, the issue is ripe for decision by this Court. For the reasons set forth in the Motion, Defendants request that the Court, if it chooses not to bifurcate the schedule, exercise its discretion to set a case schedule that allows for the resolution of dispositive motions prior to the setting of a trial date.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' Motion and enter an order staying all discovery in this case not related to the threshold issue of an unlawful agreement until resolution of such threshold issue.

Respectfully submitted,

/s/ Jennifer H. Doan
Jennifer H. Doan
Texas Bar No. 08809050
J. Randy Roeser
Texas Bar No. 24089377
HALTOM & DOAN
6500 Summerhill Road, Suite 100
Texarkana, TX 75503
Telephone: 903.255.1000
Facsimile: 903.255.0800
Email: jdoan@haltomdoan.com
Email: rroeser@haltomdoan.com

BAKER BOTTS L.L.P.

Earl B. Austin - *Lead Attorney*
Texas Bar No. 01437300
30 Rockefeller Plaza
New York, New York 10112
Phone: (212) 408-2564
Fax: (212) 259-2564
Email: earl.austin@bakerbotts.com

John B. Lawrence
Texas Bar No. 24055825
2001 Ross Avenue, Suite 600
Dallas, Texas 75201
Phone: (214) 953-6873
Fax: (214) 661-6873
Email: john.lawrence@bakerbotts.com

Matthew G. Sheridan
Texas Bar No. 24088404
910 Louisiana Street
Houston, Texas 77002
Phone: (713) 229-1568
Fax: (713) 229-7968
Email: matthew.sheridan@bakerbotts.com

**ATTORNEYS FOR DEFENDANT
AETNA INC.**

PILLSBURY WINTHROP SHAW
PITTMAN LLP

BY: /s/ Ronald Casey Low
RONALD CASEY LOW

Ronald Casey Low
State Bar No. 24041363
401 Congress Avenue, Suite 1700
Austin, TX 78701
Phone: (512) 580-9616
Fax: (512) 580-9601
Email: casey.low@pillsburylaw.com

Alvin Dunn – *Lead Attorney*
(*pro hac vice*)
Robert C. K. Boyd
(*pro hac vice*)
1200 Seventeenth St. NW
Washington, D.C. 20036
Tel: (202) 663-8000
Fax: (202) 663-8007
Email: alvin.dunn@pillsburylaw.com
Email: robert.boyd@pillsburylaw.com

**ATTORNEYS FOR DEFENDANTS
INFECTIOUS DISEASES SOCIETY OF
AMERICA, DR. GARY P. WORMSER, DR.
RAYMOND J. DATTWYLER, DR.
EUGENE SHAPIRO, DR. JOHN J.
HALPERIN, DR. LEONARD SIGAL, AND
DR. ALLEN STEERE**

HOGAN LOVELLS US LLP

By: /s/ Benjamin F. Holt
BENJAMIN F. HOLT
Admitted pro hac vice
Virginia Bar No. 48388
D.C. Bar No. 483122
Benjamin.Holt@HoganLovells.com
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, D.C. 20004
Phone: (202) 637-5600
Fax: (202) 637-5910

Matthew J. Piehl
Admitted pro hac vice
Virginia Bar No. 82518
D.C. Bar No. 1008726
Minnesota Bar No. 395942
Matthew.Piehl@HoganLovells.com
HOGAN LOVELLS US LLP
80 South Eighth Street
Suite 1225
Minneapolis, MN 55402
Phone: (612) 402-3000
Fax: (612) 339-5167

Michael E. Jones
Texas SBN 10929400
mikejones@potterminton.com
POTTER MINTON, P.C.
110 North College, Ste. 500
Tyler, Texas 75702
Phone: (903) 597-8311
Fax: (903) 593-0846

***ATTORNEYS FOR DEFENDANTS
UNITED HEALTHCARE SERVICES INC.
AND
UNITEDHEALTH GROUP
INCORPORATED***

KIRKLAND & ELLIS LLP

BY: /s/ Daniel E. Laytin
DANIEL E. LAYTIN
(Admitted pro hac vice)

BY: /s/ Sarah J. Donnell
SARAH J. DONNELL
(Admitted pro hac vice)
300 N. LaSalle
Chicago, IL 6065
Phone: (312) 862-2000
Fax: (312) 862-2200
Email: dlaytin@kirkland.com

***ATTORNEYS FOR DEFENDANT
BLUE CROSS AND BLUE SHIELD
ASSOCIATION***

CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 26th day of February, 2020.

/s/ Jennifer H. Doan
Jennifer H. Doan