IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: Testosterone Replacement Therapy Products Liability Litigation Coordinated Pretrial Proceedings	)	**No. 14 C 1748**
	)	**MDL No. 2545**
This Document Relates to:	)	
***Konrad v. AbbVie, Inc.*, Case No. 15 C 966**	)	

CASE MANAGEMENT ORDER NO. 55
(defenses of statutes of limitations and repose
in *Konrad v. AbbVie, Inc.*, Case No. 15 C 966)

On August 4, 2016, the Court selected plaintiff Jeffrey Konrad's suit against defendant AbbVie Inc. (Case No. 15-cv-966) to be one of the eight AbbVie bellwether trials in this multidistrict litigation (MDL) proceeding. This followed a period of case-specific discovery involving a much larger number of bellwether candidates during which the depositions of, among others, the plaintiffs and their primary prescribing physicians were taken. Following this case-specific discovery, the parties made detailed written proposals to the Court regarding which cases should be selected to be tried, and why. Both sides' submissions focused on including cases that presented common or "cross-cutting" issues and excluding cases that included significant case-specific or unusual issues. The reasons are obvious: a key purpose of the bellwether trial process is to provide significant information regarding the entire pool of cases that are part of the MDL. The Court selected Konrad's case as one of the eight bellwether trial cases because it was represented as *not* presenting unusual or significant unique issues.

At a later date, the Court put the bellwether trial cases in a sequence for purposes of trial (the number was down to seven at that point). This followed further detailed submissions by the parties regarding how the cases should be sequenced. Both plaintiffs and AbbVie proposed to try Konrad's case first, in significant part because it was considered representative of cases involving cardiovascular injuries and did not present unusual or significant unique issues. The trial in Konrad's case is scheduled to begin on June 5, 2017.

At a conference held on May 11, 2017, AbbVie informed the Court and plaintiffs that it intended to assert at Konrad's trial a statute of limitations defense under Tennessee law. AbbVie had not asserted this defense in the extensive summary judgment motions it had filed. Those motions included not only issues common to all seven bellwether trial cases but also case-specific issues, including in one other case a statute of limitations issue.

At the conference on May 11, the Court expressed its concern that a trial with a significant unique defense like the statute of limitations likely would not be a good bellwether trial case. In order to get a better sense of the defense, the Court directed AbbVie to provide a written proffer of its limitations defense. In that proffer, filed on May 15, 2017, AbbVie asserted both a statute of limitations defense and a statute of repose defense. The statute of repose defense had not been referenced by AbbVie at the May 11 conference; AbbVie had referred only to a statute of limitations defense.

Prior to May 11, the only indication that AbbVie would assert defenses along these lines came from the following statement, which the Court quotes in its entirety, from AbbVie's notice of affirmative defenses filed in Konrad's case on November 2,

2016: "Plaintiff's claims may be barred, in whole or in part, by applicable statutes of limitations and/or repose." The Court notes that this was the *eighteenth* affirmative defense listed by AbbVie in its filing. The Court also notes that, in contrast to certain other defenses listed in the same filing, AbbVie did not cite any particular statute in support of this affirmative defense.

In response to AbbVie's proffer regarding the limitations and repose defenses, plaintiffs argue that AbbVie should be barred from asserting these defenses because it failed to raise them with any specificity until far too late in the bellwether trial process. Plaintiffs' response amounts to a request to strike the defenses with prejudice.

As an initial matter, AbbVie did not plead the limitations or repose affirmative defenses with the required specificity. Federal Rule of Civil Procedure 8(c) requires a defendant to "affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8(c). The purpose of that rule is to "put plaintiff on notice well in advance of trial that defendant intends to present a defense." *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1377 (7th Cir. 1990). "[B]are bones conclusory allegations" are insufficient under Rule 8(c). *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1295 (7th Cir. 1989).

Other courts have been especially critical of the pleading practice AbbVie employed in this case, in which it listed eighteen affirmative defenses, many of which are conclusory and many of which say only that a defense "may" bar plaintiff's claims, without specifying the applicable statute or factual basis underlying the defense. *See, e.g.*, *Manley v. Boat/U.S. Inc.*, No. 13-CV-5551, 2016 WL 1213731, at *5 (N.D. Ill. Mar. 29, 2016) (Dow, J.) ("Merely stringing together a long list of legal defenses is insufficient

. . . . 'It is unacceptable for a party's attorney simply to mouth affirmative defenses in a formula-like fashion ("laches," "estoppel," "statute of limitations" or what have you), for that does not do the job of apprising opposing counsel and this Court of the predicate for the claimed defense—which after all is the goal of notice pleading.'") (quoting *State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 279 (N.D. Ill. 2001) (Shadur, J.)). As Judge Dow explained in *Manley*, "[w]ere it acceptable to allege boilerplate affirmative defenses in this fashion, a party could simply cut and paste Rule 8(c)'s list of affirmative defenses (along with any other recognizable affirmative defenses) into its answer so as to preserve each defense should a plausible argument arise at some point down the road." *Id.*

This inappropriate practice is the one that AbbVie appears to have followed here. It is extraordinarily unlikely that *any* case includes eighteen legitimate and actually applicable affirmative defenses that can be appropriately asserted after undertaking the inquiry required by Federal Rule of Civil Procedure 11(b). The Court appreciates that some allowances are appropriately made and that some leeway is appropriately given in view of the fact that AbbVie is dealing with upwards of 4,000 cases that have been consolidated before the Court for pretrial purposes. But that does not excuse AbbVie's conduct in this particular case. AbbVie maintained its eighteen originally-asserted affirmative defenses, without amending or withdrawing any of them, even after it conducted case-specific discovery in Konrad's case and even after the case was designated as a bellwether trial case. The Court would like to believe that this was due to inattention rather than a plan to wait in ambush, but one way or the other, AbbVie's boilerplate pleading of these affirmative defenses and its inaction even after it zeroed in

on this case as a bellwether candidate and later a bellwether trial case was completely inappropriate and unjustifiable.

To make matters worse, it appears, based on admissions made by AbbVie's counsel at a hearing held on May 18, 2017 after it had submitted its proffer in support of the defenses, that AbbVie first realized that the defenses actually applied in Konrad's case only two weeks or so before that. In other words—and to put it charitably—the actual application of these defenses in Konrad's case appears to have been an afterthought on AbbVie's part.

With this background in mind, the Court returns to the bare-bones manner in which AbbVie has asserted the limitations and repose defenses in this case. AbbVie's failure to include any details about its statute of repose defense in this case is especially problematic because (1) there is a colorable legal dispute about which state's statute of repose applies to Konrad's claims and (2) Tennessee's statute of repose for products liability claims is unusual in its severity, in that it requires suits to be filed within one year of a product's expiration date, and can thus lead to unusually "harsh" results. *Montgomery v. Wyeth*, 580 F.3d 455, 466 (6th Cir. 2009). Stating, as one of eighteen defenses, that plaintiff's claims "may be barred, in whole or in part, by applicable statutes of limitations and/or repose" fails to notify a plaintiff that the defendant intends to rely on one state's unusual statute of repose.

AbbVie's failure to provide timely notice of the statute of limitations defense is arguably a bit less problematic. AbbVie contends in its proffer filed on May 15 that applicable Tennessee statutes of limitation govern Konrad's claims. But in fact it appears that Illinois law supplies the applicable limitations periods. For reasons the

Court has discussed previously, the Court treats Konrad's case as having been filed in this district. *In re Testosterone Replacement Therapy Prod. Liab. Litig. Coordinated Pretrial Proceedings*, No. 14 C 1748, 2017 WL 1836435, at *21 (N.D. Ill. May 8, 2017). "A federal court sitting in diversity must follow the statute of limitations that the state in which it is sitting would use." *Thomas v. Guardsmark, Inc.*, 381 F.3d 701, 707 (7th Cir. 2004). Illinois applies its own law to matters it considers procedural, which includes the statute of limitations. *See Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 351, 770 N.E.2d 177, 194 (2002). (By contrast, Illinois considers a statute of repose to be a matter of substantive law, *see Freeman v. Williamson*, 383 Ill. App. 3d 933, 939, 890 N.E.2d 1127, 1133 (2008), and thus an Illinois court would apply Tennessee's statute of repose to Konrad's claim.)

With regard to the statute of limitations, AbbVie cited Tennessee's one-year limitations period for products liability claims and argued that under Tennessee law, it runs from the date the plaintiff's injury occurs or is discovered. Illinois law, which as just indicated is what governs, is more generous on products liability claims: the limitations period is two years, and it starts to run from the "when a person knows or reasonably should know of his injury and also knows or reasonable should know that it was wrongfully caused. *Witherell v. Weimer*, 85 Ill. 2d 146, 156, 421 N.E.2d 869, 874 (1981); 735 Ill. Comp. Stat. 5/13-202.[1]

But even though Illinois's statute of limitations is less stringent than Tennessee's, significant unfair prejudice exists nonetheless. The Court would not have designated the case as a bellwether trial case had it known that AbbVie had what it contended was

[1] Longer limitations periods apply to breach of warranty and fraud claims. *See* 810 Ill. Comp. Stat. 2-725 (four-year period for warranty claims); 735 Ill. Comp. Stat. 5/13-205 (five-year period for fraud claims).

a meritorious limitations defense. And if the case had not been designated as a trial case, the more intensive case-specific discovery applicable only in trial cases would not have been done, and the parties and their counsel—particularly on Konrad's side—would not have spent an intense period of preparation for the final pretrial order, motion *in limine*, and trial. This harm cannot be removed or remedied simply by taking Konrad off the bellwether trial list.

In many circumstances, a party's failure to comply with Rule 8(c), either by failing to raise an affirmative defense at all or by failing to assert a defense with sufficient particularity, is an error that can be remedied without undue disruption. Where little or no prejudice will result for the plaintiff, courts may be willing to excuse inartfully pled defenses or to allow re-pleading. In other contexts, however, a court cannot merely "overlook the failure to comply with Rule 8(c)." *Venters v. City of Delphi*, 123 F.3d 956, 969 (7th Cir. 1997). "[I]f Rule 8(c) is not to become a nullity, [a court] must not countenance attempts to invoke [limitations] defenses at the eleventh hour, without excuse and without adequate notice to the plaintiff." *Id.*

Allowing AbbVie to pursue its statute of repose and statute of limitations defenses in Konrad's case would unfairly prejudice Konrad. As indicated, though the defense was asserted in boilerplate fashion at a relatively early stage, AbbVie first identified it as an issue it would raise at trial less than two weeks ago, on May 11, which was just over three weeks before the long-established trial date.[2] The Court had identified Konrad's case as the first one up for trial on June 5 nearly two months earlier, on March 15, 2017. And case-specific motions *in limine* for Konrad's case were due on

[2] AbbVie does not contend that it discussed this with Konrad's counsel or that it otherwise put Konrad on notice during the pretrial order preparation process that it would be pressing a limitations or repose defense.

May 11. Thus in the period preceding May 11, Konrad's attorneys, like those for AbbVie no doubt, had spent an enormous amount of time preparing the case for trial. All of this would be for naught if the case is removed from the bellwether trial list because of its late-identified unique issues, and a good deal of it would have to be repeated even if the case were simply moved further down the list.

In addition, allowing AbbVie to pursue its statute of repose defense would, under the circumstances, undermine the efficient operation of the bellwether process in this MDL proceeding. A key goal of the bellwether trial process is "to select particular plaintiffs' cases whose trials will furnish data that may facilitate settlement of the remaining cases." *In re FEMA Trailer Formaldahyde Prod. Liab. Litig.*, 628 F.3d 157, 161 (5th Cir. 2010). This Court and AbbVie itself have emphasized the importance of selecting "representative" cases for bellwether trials. *See, e.g.*, Bellwether Proposal of AbbVie, dkt. no. 1038, at 5 (stressing importance of selecting cases that reflect "cross-cutting issues" to allow Court to exercise "important pretrial function of evaluating claims . . . and issuing rulings that may more broadly apply to the litigation," as well as need to "curb strategic gamesmanship and waste"). Indeed, AbbVie has repeatedly and consistently urged upon the Court the need to select representative cases presenting cross-cutting issues, and the Court has adopted this very approach.

Konrad's case was selected first as a bellwether candidate, then as a bellwether trial case, and finally as the first bellwether trial case with these same goals in mind. In proposing cases for bellwether selection, AbbVie specifically stated that Konrad "does not have any prominent individual or demographic characteristics that would make his case unrepresentative." AbbVie's Proposal for Selection of Bellwether Cases for Trial,

dkt. no. 1406, at 14. In its discussion of cases that it considered unrepresentative "outliers," AbbVie noted that some of the cases possessed novel or unique issues of state law, including potential limitations issues, that would limit the cases' value as bellwether selections. *See id.* at 17–18 (case would "require litigation of novel questions of West Virginia law"); *id.* at 21 (case presents "discrete statute of limitations risk"); *see also id.* (not proposing case that "presents novel issues of West Virginia law"); *id.* at 23 (not proposing case that presented "statute of limitations issue under California law unique to Mr. Ennis's case and potentially dispositive at the pre-trial stage"). AbbVie identified no such unique issues regarding Konrad's case; indeed, it said there were none.

In addition, the Court selected Konrad's case as the first bellwether case to go to trial based in part on AbbVie's assertion that Konrad's case had no idiosyncratic features that would render it unrepresentative. In fact, AbbVie itself proposed (jointly with plaintiffs) to try Konrad's case first—presumably for this same reason. As indicated earlier, after the case was selected as a bellwether trial case, the parties devoted considerable time and resources toward completing fact and expert discovery in the case, and the Court has ruled on AbbVie's motions for summary judgment, which did not raise either the statute of limitations or statute of repose defense. In addition, as discussed earlier, the parties have also exchanged information for weeks in order to prepare a final pre-trial order and facilitate the filings of motions *in limine*. The Court notes in this regard that the documents that AbbVie attached to its May 15, 2017 proffer in support of the application of the Tennessee statute of repose were not listed as exhibits in the final pretrial order. This, in addition to serving as an independent basis

for waiver or forfeiture of the repose defense, illustrates just what an afterthought it was: AbbVie did not even identify the records needed to establish the defense until *after* the parties filed the final pretrial order.

AbbVie's only excuse for failing to identify these defenses in any way specific to Konrad's case until this very late date is its counsel's admission that they only recently realized that AbbVie had potentially meritorious defenses under the applicable statute of repose and statute of limitations. Given the above history, the Court concludes that allowing AbbVie to assert these defenses at this late date would unfairly "bushwack[]" plaintiffs, *Venters*, 123 F.3d at 969, and create undue disruption of the MDL's bellwether process, which the Court and the parties have already devoted enormous time and resources to establish.

The Court strikes AbbVie's statute of repose and statute of limitations defense from its affirmative defense submission in Konrad's case, with prejudice, and deems the defenses to have been waived. *See id.* (concluding limitations defense waived where defendant failed to raise the defense in accordance with Rule 8(c) even though "defense may have been meritorious").

MATTHEW F. KENNELLY
United States District Judge

Date: May 22, 2017