

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: TYLENOL (ACETAMINOPHEN))	2:13-md-02436
MARKETING, SALES)	
PRACTICES AND PRODUCTS LIABILITY)	MDL No. 2436
LITIGATION)	
<hr/>		HON. LAWRENCE F. STENGEL

This Document Relates to: All Cases

CASE MANAGEMENT ORDER NUMBER 19
Requirements for Preservation of Records and *Prima Facie*
Evidence of Usage, Injury and Causation
(Implementation Order)

This Order applies to all Plaintiffs with personal injury claims pending in this MDL as of the entry of this Order who elect not to participate in the voluntary Settlement Program, and all Plaintiffs with personal injury claims later filed in, removed to, or transferred to this MDL after the entry of this Order who elect not to participate in the voluntary Settlement Program within the Opt In deadline. This Order requires all such Plaintiffs to comply with certain preservation obligations and to produce certain specified information regarding their claims. Plaintiffs who are acting *pro se* shall be bound by the requirements of this Order and shall comply with all obligations imposed by this Order that are imposed on counsel, unless otherwise stated or ordered.

I. PRESERVATION NOTICE REQUIREMENT

A. For all cases pending in this MDL as of the entry of this Order or filed prior to the Opt In deadline in which the Plaintiff has elected not to participate in the voluntary Settlement Program, counsel for Plaintiff shall, no later than ten (10) days from the Opt In deadline send a written notice (the "Notice") by registered mail (with return receipt) to the following individuals or entities, advising that the individual or entity may have records relevant to the Plaintiff's claim

(“Claim”) and that any records relating to the Plaintiff must be preserved pending collection by Plaintiff:

1. All pharmacies that dispensed any medication to the Plaintiff for the period from five (5) years prior to the date of the alleged injury in the case to the present;
2. All physicians, medical facilities, other healthcare providers and/or other persons (“other providers”) who provided any care and treatment to Plaintiff for injuries alleged in the case to be the result of ingesting Tylenol;
3. All physicians and/or other healthcare providers who treated Plaintiff for any condition for the period from five (5) years prior to the date of the injury alleged in the case to the present; and
4. All employers of the Plaintiff for a period from five (5) years prior to the date of the alleged injury to the present, to the extent any claim is asserted for lost past or future wages.

B. For all cases filed on or after the date of entry of this Order, after the case is docketed in this Court, counsel for Defendants shall serve a copy of this Order upon counsel for Plaintiff (or upon the Plaintiff, if proceeding *pro se*). Within fourteen (14) days of the transmittal of this Order, counsel for Plaintiff shall send the Notice described in Paragraph A above.

C. Counsel for Plaintiff shall serve a signed certification verifying that Notices were sent as required by this Order, listing the date(s) the Notices were sent, the names and addresses of all individuals or entities to which Notices were sent, and providing copies of the Notices, in accordance with the following schedule:

1. For all cases pending in this MDL as of the entry of this Order or filed prior to the Opt In deadline, counsel for the Plaintiffs shall serve the certification required by this Paragraph no later than thirty (30) days from the Opt In deadline.
2. For all cases filed on or after the opt-in deadline, counsel for the Plaintiffs shall serve the certification required by this Paragraph within thirty (30) days of receipt of notice of this Order from counsel for the Defendants.

D. Any Plaintiff who fails to fully comply with any of the applicable requirements of Paragraphs A, B, or C of Section I above shall be provided notice of such failure by email, fax or letter from Defendants' counsel and shall be provided twenty (20) additional days to cure such deficiency ("Cure Period") to be calculated from the service of such notice of deficiency. No other extensions will be granted unless agreed to by all parties. If a Plaintiff fails to cure the deficiency within the Cure Period, Defendants may file a Motion to Show Cause why the case should not be dismissed with prejudice, with each party to bear its own costs. Plaintiff shall thereupon have twenty (20) days to respond to the Motion and show good cause why the case should not be dismissed, with each party to bear its own costs. Defendants may file a reply within ten (10) days after Plaintiff's response is filed. The failure of a Plaintiff to respond to the Motion within the specified period shall result in the dismissal of the case, with prejudice, with each party to bear its own costs.

E. A Plaintiff who fails to comply with the applicable Notice and certification provisions set forth in Paragraphs A, B, and C above (and who has not cured all deficiencies within the "Cure Period" as set forth in Paragraph D above) may not seek to introduce into evidence at trial any document asserting use of Tylenol or asserting that Tylenol caused or contributed to the Plaintiff's alleged injury, absent good cause shown, and excepting documents produced by the Plaintiff prior to the date of this Order. A Plaintiff who fails to act in good faith in compliance with this Order may also be subject to other sanctions or orders.

II. DISCOVERY REQUIREMENTS

The following discovery requirements will apply to any Plaintiff who elects not to participate in the voluntary Settlement Program or who files suit after the date of this Order.

A. Each Plaintiff shall produce the following:

1. A Plaintiff Fact Sheet (“PFS”) in the form previously approved by the Court, unless Plaintiff has already served a PFS that complies with the requirements of Case Management Order No. 10, and all amendments thereto,
2. A valid and current authorization in the form approved by the court in Case Management Order No. 10);
3. All pharmacy records regarding the dispensation of medication to the Plaintiff for the period from five (5) years prior to the date of the alleged injury to the present;
4. All medical records relating to the Plaintiff from all healthcare providers listed in the PFS for the period from five (5) years prior to the date of the alleged injury to the present;
5. If a claim for lost past or future wages is being asserted, all employment records relating to Plaintiff and federal and state income tax returns for the period from five (5) years prior to the date of the alleged injury to the present; and
6. An Affidavit signed by Plaintiff’s counsel attesting that all the records described in this paragraph have been requested, collected and produced to Defendants. To the extent Plaintiff’s counsel attempted to collect records described in Section II. A. 3-5 above, and received a “No Records” statement in response to the records request, Plaintiff’s counsel shall provide a copy of any such “No Records” statement received.

B. The items required in Section II.A above shall be produced in accordance with the following schedule:

1. For Plaintiffs with cases pending in this MDL as of the entry of this Order or filed prior to the Opt In deadline, the items required above shall be produced no later than forty-five (45) days from the Opt In deadline.
2. For Plaintiffs with cases filed in or transferred to this MDL on or after the Opt In deadline, the items required above shall be produced within forty five (45) days of service of this Order.

C. Each Plaintiff shall produce an expert report or reports complying in all respects with Federal Rule of Civil Procedure 26. The report(s) shall address general causation and shall address case specific causation of the Plaintiff’s alleged injury. In addition to all other required components, the case-specific portion of the report must include an opinion as to the dosage and

usage of Tylenol by the Plaintiff and the nature of Plaintiff's injury allegedly caused by the ingestion of Tylenol.

D. Plaintiffs shall serve expert reports required in Section II.C. above in accordance with the following schedule:

1. For Plaintiffs with cases pending in this MDL as of the entry of this Order or filed prior to the Opt In deadline, the generic expert report(s) described above shall be served no later than sixty (60) days of the Opt In deadline, and the case-specific expert report(s) described above shall be served no later than one hundred and twenty (120) days of the Opt-In deadline.
2. For Plaintiffs with cases filed in or transferred to this MDL on or after the Opt In deadline, the generic expert report(s) described above shall be served within sixty (60) days of service of this Order, and the case-specific expert report(s) described above shall be served no later than one hundred and twenty (120) days of the service of this Order.

E. Any expert who does not provide a timely report as set forth herein shall be precluded from testifying at trial, absent further order of the Court upon good cause shown.

F. Plaintiff shall not be permitted to engage in any further discovery of the Defendants relating to generic issues, absent a motion and good cause shown. Plaintiff shall be permitted to engage in case-specific discovery up until the date on which the case-specific expert report(s) described above are due to be served.

G. Plaintiff shall be made available for deposition by the Defendants no later than thirty (30) days of the Opt In deadline (or, for newly filed or transferred cases, within thirty (30) days of being served with this Order), although Defendants may elect to take the deposition at a later date.

H. Plaintiff shall not be entitled to take additional discovery of Defendant's expert witnesses regarding general causation absent leave of Court for good cause shown. The Court shall meet with counsel for the parties to establish a discovery schedule as appropriate to address Defendant's service of expert reports regarding specific causation and discovery related to same.

I. Any Plaintiff who fails to comply with the requirements of Section II shall be given notice of such failure by email, fax or letter from Defendants' counsel and shall be provided twenty (20) days to cure such deficiency ("Cure Period") to be calculated from the service of the notice of deficiency. No other extensions will be granted. If Plaintiff fails to cure the deficiency within the Cure Period, Defendants may file a Motion to Show Cause why the case should not be dismissed with prejudice, with each party to bear its own costs. Plaintiff shall thereupon have twenty (20) days to respond to the Motion and show good cause why the case should not be dismissed, with each party to bear its own costs. Defendants may file a Reply within ten (10) days of the filing of Plaintiff's response. Failure to respond to the Motion within the specified period shall result in dismissal of the case with prejudice, with each party to bear its own costs.

J. To the extent that this Order conflicts with any deadlines or provisions in other Case Management Orders, this Order shall govern.

III. CERTIFICATION FOR CASES FILED AFTER THE OPT-IN DEADLINE

A. For all cases filed in or transferred to this MDL after the Opt In deadline, to the extent such cases were not identified in response to the Claim Census Order, counsel for Plaintiff must certify that counsel was retained after the date of the Claim Census Order and must further certify that counsel did not intentionally delay being retained by the Plaintiff for any reason, including but not limited to attempting to avoid participation in the Settlement Program. The Certification required by this Section must be served within seven (7) business days of receipt of notice of this Order from counsel for the Defendants:

B. Any counsel who fails to comply with the requirements of this Section shall be given notice of such failure by e-mail, letter, or fax from Defendants' counsel and shall be provided ten (10) days to cure such deficiency ("Cure Period") to be calculated from the service

of such notice of deficiency from counsel for the Defendants. No other extensions will be granted. If counsel fails to cure the deficiency within the Cure Period, Defendants may file a Motion to Show Cause why sanctions should not be imposed for failure to comply with this Order. Counsel shall thereupon have twenty (20) days to respond to the Motion and show good cause why sanctions should not be imposed.

IV. REMAND OR TRANSFER OF CASES AND SCHEDULING FOR TRIAL

A. Upon completion of the discovery authorized in Section II of this Order (and any discovery authorized pursuant to Section II. H), the Defendants shall file a Notice of Completion of MDL Pretrial Proceedings (“Notice of Completion”), stating that the pretrial proceedings as contemplated in 28 U.S.C.1407 have been completed.

B. Upon receipt of the Notice of Completion, for cases that were transferred to the U.S. District Court for the Eastern District of Pennsylvania (“Transferee Court”) by the Judicial Panel on Multidistrict Litigation (“JPML”), this Court shall submit a Suggestion of Remand to the JPML in accordance with JPML Rule 10.1(b).

C. For cases that were direct-filed in the U.S. District Court for the Eastern District of Pennsylvania pursuant to Case Management Order No. 7 (Doc. 31) (“CMO-7”), upon receipt of the Notice of Completion, this Court shall transfer such action to the District Court identified in Paragraph 6 of Plaintiff’s Short Form Complaint, or the District Court of proper venue, in accordance with the terms provided in CMO-7, Paragraph 10.

D. For cases that were removed to the U.S. District Court for the Eastern District of Pennsylvania and assigned to this Court, upon receipt of the Notice of Completion, this Court shall transfer such action to the District Court identified in Paragraph 6 of Plaintiff’s Short Form

Complaint, or the District Court of proper venue, consistent with the terms provided in CMO-7, Paragraph 10.

E. For any case subject to transfer by this Court, if the parties disagree as to the proper District Court for purposes of jurisdiction and/or venue, the parties shall submit briefing consistent with the terms provided in Case Management Order No. 7, Paragraph 10. Such disputes shall be referred to the Court.

F. Any *Lexecon* waiver executed pursuant to the Bellwether Case Selection Plan, *see* Case Management Order No. 15, is hereby revoked and such cases shall be subject to Suggestion of Remand or transfer consistent with the terms provided in this Section.

G. Any cases remanded by the JPML to the originating transferor Court or transferred by this Court to the appropriate District Court pursuant to CMO-7, Paragraph 10, shall remain subject to the terms and conditions of this Order.

H. For any cases that are properly retained in the Eastern District of Pennsylvania for trial, the parties are ordered to confer with Magistrate Judge Timothy Rice about scheduling a trial date. The parties will have the option of consenting to a trial before a Magistrate Judge or the case will be randomly assigned to a new U.S. District Judge. To assure an expeditious resolution, parties are strongly encouraged to consent to trial by a Magistrate Judge.

V. PENALTIES FOR FRAUD AND DECEPTION

All submissions required by this Order are subject to Federal Rule of Civil Procedure 11. Any party and/or counsel who submits false or misleading information, or otherwise attempts to avoid the requirements of this Order through any form of deception, dishonesty or fraud, may be subject to appropriate sanctions, including monetary sanctions and costs, and/or dismissal with prejudice pursuant to Federal Rule of Civil Procedure 37.

VI. SERVICE PURSUANT TO THIS ORDER

Whenever this Order requires service by Plaintiffs, Plaintiffs shall effect such service on all counsel of record in the case, as required by the applicable Rules, and also by one of the following methods:

A. By Email to MDLTylenol@butlersnow.com, copying catherine.mason@butlersnow.com and on Plaintiff's Liaison counsel Laurence S. Berman at lberman@lfsblaw.com and copying Patricia D'Andrea at pdandrea@lfsblaw.com and TylenolClaims@lfsblaw.com and on Moshe Horn at mhorn@seegerweiss.com;

B. By United States Mail or other carrier, post-marked on or before the deadlines set forth in this Paragraph (with return receipt) to the following: Brian Jackson, Butler Snow LLP, 150 Third Avenue South, Suite 1600, Nashville, TN, 3720; and copying Laurence S. Berman, Levin, Fishbein, Sedran & Berman, 510 Walnut Street, Suite 500, Philadelphia, PA 19106 and Moshe Horn, Seeger Weiss LLP, 77 Water Street, New York, NY 10005.

BY THE COURT:

 February 21, 2017
LAWRENCE F. STENDEL, J.