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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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3 In Re: METHYL TERTIARY BUTYL
ETHER ("MTBE") PRODUCTS
4 LIABILITY LITIGATION

00 MDL 1358 (SAS)
00 CV 1898 (SAS)

Telephone Conference

5 -----x

New York, N.Y.
March 29, 2016
2:35 p.m.

8 Before:

9 HON. SHIRA A. SCHEINDLIN

District Judge

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1 (In open court)

2 THE COURT: Good afternoon, Mr. Walsh.

3 MR. WALSH: Good afternoon, your Honor.

4 THE COURT: Mr. Miller, Mr. Axline, Mr. Kaufman,
5 Mr. Gilmour.

6 Mr. Pardo.

7 MR. PARDO: Good afternoon, your Honor.

8 THE COURT: Ms. Meyer, Mr. Condrón.

9 MR. CONDRON: Good afternoon, your Honor.

10 THE COURT: Mr. Harris.

11 MR. HARRIS: Good afternoon, your Honor.

12 THE COURT: Mr. Langan, there you are.

13 MR. LANGAN: Good afternoon, your Honor.

14 THE COURT: Mr. Anderson?

15 MR. ANDERSON: Good afternoon, your Honor.

16 THE COURT: Ms. Hanebutt.

17 MS. HANE BUTT: Good afternoon.

18 THE COURT: Mr. Krainin.

19 MR. KRAININ: Good afternoon, your Honor.

20 THE COURT: I have your agenda.

21 Oops, the phone. Who's on the phone?

22 Good afternoon. This is Judge Scheindlin. There are
23 eleven of you on this phone call, so I won't be greeting you by
24 name, but I will give this list to the court reporter so she
25 will know who has been on the phone. And I should say that to

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1 the other folks who I didn't greet, but your names are on the
2 appearance sheet and will be on the record.

3 So if you don't have too long an agenda for today.
4 It's primarily New Jersey and Puerto Rico. And in some sense
5 it's much the same issue in both.

6 Starting with New Jersey, I was told I would get an
7 update, if there is any update, on the phase one remand. And
8 then we should talk about structuring phase two.

9 So, Mr. Kaufman, did you want to start?

10 MR. KAUFMAN: Your Honor, if I might give you an
11 update. Literally as I was leaving my office this afternoon to
12 come here, I got a call from Judge Wilson's chambers. She's
13 the judge in New Jersey to whom this has been assigned. To
14 make a long story short, the upshot is that the case is being
15 referred to magistrates. And there will be a case management
16 conference scheduled sometime sooner, rather than later, so
17 that we can set a schedule for everything that needs to be done
18 in order to try the case. So I've informed defendants about
19 that as well when I arrived here today.

20 So that's the status on phase one. It looks like it
21 is starting to move and hopefully will get to a trial sooner,
22 rather than later, in that matter.

23 THE COURT: What is the structure of the phase one
24 trial as you understand it? What will be tried in phase one?

25 MR. KAUFMAN: We will try all issues of liability and

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1 damages for the trial sites.

2 THE COURT: All issues. So it's an all-issues trial?

3 MR. KAUFMAN: That's my understanding, yes.

4 THE COURT: Okay. So that's the update. Does anybody
5 have anything to add about the update that Mr. Kaufman just
6 gave? No? Of course.

7 So let's talk a little bit about phase two. You have
8 written letters back and forth as to how you think it should be
9 structured. The plaintiffs' letter starts with two alternative
10 ideas. One is what they call a statistical extrapolation
11 approach, which was pretty much used in New Hampshire. And as
12 I understand it, it did reach the highest court of
13 New Hampshire. And the verdict stood, so to speak. So that's
14 one possibility.

15 The second proposal from the plaintiff is that the
16 phase two proceeding be a bifurcated trial that first
17 determines liability and punitive damages, and then after that
18 verdict would take up compensatory damages. But I didn't
19 understand the details in this second alternative as to how
20 many or which sites would be tried. I understand bifurcation.
21 I understand trying liability and punitive damages first and
22 compensatory damages second. But I don't understand what the
23 sites are that you're pointing out.

24 So the plaintiffs also go on in their submissions to
25 suggest that defendants should stipulate to certain facts about

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1 ownerships of sites and suppliers to those sites and who paid
2 for remediation of those sites. And then the plaintiffs ask
3 this Court to direct the parties to draft a case management
4 order for how to resolve all the remaining claims in a single
5 additional trial.

6 Defendants were not entirely clear as to what approach
7 they would take, but they said we shouldn't even be talking
8 about phase two until after phase one is completed. But if
9 they're forced to talk about it, they're leaning towards
10 something called an enhanced focus site approach. And this is
11 the idea of putting sites into three categories, or buckets.
12 And so you'd have these three subcategories where the sites
13 would be separated by fact patterns or other criteria. And
14 they say that doing that, we can try more than the 20 sites in
15 phase one. But more would not get us anywhere near, I assume,
16 5,000. So there really has to be a way to do this.

17 So my thought is that, of course, plaintiffs have the
18 better of it in the sense of we can't have endless trials. It
19 is certainly better to structure phase two in some way that
20 makes it not only the second trial but the last trial, if
21 there's a way to do that; because trials, if they occur, are
22 expensive and long for the Court. They're an imposition on the
23 Court when they're very long; three months, six months, nine
24 months. They're very difficult things. You can't keep trying
25 them. Even 50 at a time won't get you there when you're

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1 talking about 5,000 sites. So it's not realistic to have a
2 second trial, a third, and then 20th and 50th trial. It just
3 can't be done. The Court really can't accommodate that. The
4 Court's system can't accommodate that.

5 So there has to be some way to do less than all but
6 more than you do in phase one. And it wouldn't be a bad idea
7 to understand now to some extent what approach is taken so that
8 the discovery, which remains in the purview of the MDL Court,
9 can be organized toward that goal of a meaningful phase two
10 trial.

11 Now, while the Court can't and won't order anybody to
12 stipulate to things -- people aren't ordered to stipulate;
13 that's a voluntary act, so I can't order people to stipulate --
14 but a master list, sites where there is knowledge, should be
15 created that names the site and the ownership and the supplier
16 and remediator per site for all known locations. That at least
17 would be a start.

18 But how to really structure a phase two trial is a big
19 topic. The statistical extrapolation approach is something
20 that I think not only New Hampshire has proved, but there was a
21 recent Supreme Court decision this week in a very different
22 context, *Tyson Foods* -- you saw that. *Tyson Foods* had to do
23 with overtime hours and donning and doffing uniforms. But the
24 point was the Supreme Court accepted the notion that you could
25 do it by statistical extrapolation. And it was the only

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1 realistic way to do it. Every worker and every location is
2 going to have different uniforms to take on and off and is
3 going to take a different amount of time. And the Court
4 recognized that that was not a feasible way to proceed.

5 So there is some now Supreme Court authority, albeit
6 distinguishable and different contexts. I'm sure defendants
7 will want to write long briefs telling me that it's totally
8 different. I get that. But the concept of statistical
9 extrapolation was addressed. So that's certainly one thought.

10 I don't mind the defense notion of enhanced focus
11 sites by subcategories, if they would agree that if you tried
12 the -- let's say three or four buckets' worth of categories,
13 you would agree to that, extrapolate those findings, the
14 remaining sites that could fall into those buckets. That's
15 okay, too, but there would have to be an agreement in advance.
16 The parties would negotiate how many categories, how many sites
17 they want to try per category. Then they would agree that
18 whatever findings come out of that jury trial, they would agree
19 in advance to apply to the remainder that fall into that
20 category. Even over time, even if the site turns up later but
21 can then be assigned to one of the categories, the findings
22 would apply. And we've done that here in the Southern District
23 of New York in big cases, agreed in advance to apply findings
24 to futures cases.

25 But that is an approach, too. It's not really the

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1 same as statistical extrapolation. It's a common sense
2 approach, where the parties negotiate and agree that certain
3 findings can be applied going forward, once they figure out the
4 categories.

5 So those are probably the two approaches that make the
6 most sense to me. I don't agree with the defendants that I or
7 my successor shouldn't even be discussing this until after
8 phase one is done. Why put it off? I mean, we need to proceed
9 with discovery, even as you're getting ready to try this big
10 phase one case.

11 And so I turn briefly -- and of course I'll hear from
12 you in a minute, but I might as well cover Puerto Rico, because
13 it's not all that different. Puerto Rico has the same issue,
14 too, in a way. We don't know anything about a phase one trial,
15 because the remand was just issued. So it's probably much too
16 early to even expect a report on phase one.

17 But would you agree, Mr. Axline, with what Mr. Kaufman
18 said, that phase one is meant to be an all-issues trial for the
19 focus sites?

20 MR. AXLINE: Yes.

21 THE COURT: So in that sense it's the same. And so,
22 again, you said you've been having some meet and confers on
23 that particular case. And your letter states that you will
24 update the Court on the status of your discussions at the
25 conference. So I think I should pause from speaking and ask if

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1 you have any update as to the results of your meet and confer
2 as to how to structure phase two.

3 MR. AXLINE: All I can tell you is that we're
4 continuing to meet and confer. We haven't reached a
5 resolution, but I think --

6 THE COURT: What ideas are you kicking around?

7 Ms. Meyer, if you want to confer, the usual approach
8 here is to say, may I have a moment, then confer, so I was not
9 talking over you.

10 So what are some of the thoughts that are being kicked
11 around as to how to conduct a phase two trial?

12 MR. AXLINE: With respect to a phase two trial and
13 discovery, we've discussed getting together to draft CMOs,
14 potentially conflicting CMOs, but trying to identify areas of
15 commonality.

16 You will recall that in December there was a meeting
17 with some of the readed defendants who came back into the
18 case. And your Honor ordered us to provide some information to
19 the defendants. We're in the process of doing that. But in
20 terms of anything specific that I could say on behalf of my
21 client in Puerto Rico or the defendants with respect to phase
22 two, we don't have --

23 THE COURT: What is your notion of the best approach
24 for phase two? Do you, again, agree with Mr. Kaufman that
25 so-called phase two should be the last trial?

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1 MR. AXLINE: Yes. That is the position the
2 Commonwealth is taking.

3 THE COURT: So assuming that, how do you try the vast
4 number of sites that there are? I don't know if the number is
5 as big as New Jersey or smaller, but whatever the number is,
6 what is your approach as to how you try that?

7 MR. AXLINE: Well, it's quite a bit smaller than
8 New Jersey. But nevertheless, I think it's large enough to
9 warrant using a statistical approach or a bifurcation. I think
10 those are the two --

11 THE COURT: Or a bifurcation. What does that mean?

12 MR. AXLINE: Where you try liability first and then
13 damages. So the --

14 THE COURT: For what sites?

15 MR. AXLINE: Well, you would try liability in terms of
16 the defendants' liability for delivering MTBE to sites that are
17 not questionable whether the defendants delivered to sites in
18 Puerto Rico, and then the number of sites I think and the
19 extent of the damage at sites would determine the damages.
20 So --

21 THE COURT: So when it becomes site specific would not
22 be until the damages part of the bifurcation, is that what
23 you're saying?

24 MR. AXLINE: Correct. Yes.

25 THE COURT: So in the first part of the bifurcation in

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1 phase two, it's not site specific?

2 MR. AXLINE: Right. You'd get a special verdict on
3 product liability and have the jury try that.

4 THE COURT: And so the only time -- I'm sure I'm
5 repeating that you get -- site specific is on the damages phase
6 of the second trial?

7 MR. AXLINE: Correct.

8 THE COURT: So then you'd have to have full discovery
9 on every site in Puerto Rico?

10 MR. AXLINE: Not if you took a statistical approach.
11 So you could --

12 THE COURT: But in the bifurcated approach that you
13 just described --

14 MR. AXLINE: Yes.

15 THE COURT: -- you would have to?

16 MR. AXLINE: No. No. These the not mutually
17 exclusive, your Honor.

18 THE COURT: I see.

19 MR. AXLINE: So you can try on liability. Assuming
20 liability was found, and the special verdict form would look a
21 lot like the New Hampshire form that we submitted as an
22 exhibit, then you would present the statistical evidence to the
23 jury on the likely number of wells impacted, release sites and
24 so on.

25 THE COURT: What are the numbers in New Jersey -- in

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1 Puerto Rico?

2 MR. AXLINE: They're roughly 400.

3 THE COURT: Okay. Thank you, Mr. Axline.

4 Who wants to be heard from the defense side about the
5 phase two in either of these jurisdictions, either or both?

6 MR. PARDO: I'll begin, your Honor.

7 THE COURT: Okay.

8 MR. PARDO: With respect to the statewide statistical
9 extrapolation approach, my colleagues, Ms. Meyer, Mr. Condron,
10 may also have items to add. But I'll begin.

11 THE COURT: Okay.

12 MR. PARDO: Can I just step us back, though, for one
13 second about the focus site approach; because not only do I
14 want to explain why the defendants are going towards an
15 enhanced focus site idea, but I want you to understand that the
16 approach that you put in place -- because this was your idea
17 ten years ago -- has worked, okay? Has worked. More
18 importantly, it has not come to fruition yet.

19 THE COURT: Well, that's true.

20 MR. PARDO: We're not saying that it's premature to be
21 talking about phase two case structuring. Obviously we're
22 talking about it now, and we've had meet and confers with
23 plaintiffs. What we're saying is that it's premature to commit
24 ourselves to taking the focus site approach, declaring it a
25 failure, which I think is what the plaintiffs are doing, and

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1 putting it into the trash can, just as --

2 THE COURT: I don't think so at all. I thought
3 it's -- that's phase one. They're not putting it in the trash
4 can. They're ready to try the focus site approach, I thought.

5 MR. PARDO: They will. But what they're saying is it
6 hasn't and it won't work for phase two. And what I want to
7 tell you is that I think it will, okay. When you think about
8 what you've accomplished, what your idea has done here in the
9 New Jersey case, one of the biggest cases the State of
10 New Jersey has probably ever seen, ever will see, okay, you
11 haven't even had your first focus trial yet. You have not even
12 had a trial yet. And more than half your defendants are out.

13 THE COURT: That's true. Out -- they've settled.

14 MR. PARDO: They've settled. There's 107 million
15 plus --

16 THE COURT: Yes, indeed.

17 MR. PARDO: -- that's been paid to the state.

18 THE COURT: Right.

19 MR. PARDO: It's a lot of money. It's a lot of
20 parties.

21 THE COURT: Yes.

22 MR. PARDO: The whole point of the approach was to get
23 this case -- not up to trial, but through trial, and then to
24 see where we're at.

25 THE COURT: That's true.

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1 MR. PARDO: That process needs to play itself out, I
2 think, before we commit ourselves to doing a 180 and
3 throwing -- it is a 180. What they're proposing is completely
4 different from anything that we've ever done in this MDL, that
5 really has been done almost anywhere.

6 THE COURT: I don't agree with that. What they're
7 saying is phase one is the approach that we've taken, as you've
8 said, for ten years. It will go to trial. If that does not
9 resolve in a global settlement, we need to be ready to proceed
10 to wrap this case up. That's a good idea. Cases should not be
11 permanent, like permanent revolution, permanent litigation.
12 I'm sure Chairman Mao would agree it shouldn't be forever in
13 litigation.

14 So the question is: How do you wrap it up if, at the
15 end of phase one, there is not a settlement, global settlement?
16 And they say you don't want to address that that day because
17 then you lose another two years waiting to be ready. So all
18 they're saying is the approach should be thought about now so
19 that you're on two tracks: One, some team is getting ready for
20 trial; but another team is moving forward to be ready to deal
21 with the remainder, if there's not a global settlement.

22 MR. PARDO: And we agree. We agree. We don't
23 disagree. That's, again, why we're having the conversation.

24 What I'm saying is our approach says, we believe the
25 focus site approach has worked. Let's not throw it away.

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1 THE COURT: We're not throwing it away.

2 MR. PARDO: Let's take it, let's enhance it. Let's
3 make it more efficient. Let's make it more focused. And let's
4 do the next phase --

5 THE COURT: That's fine, if you took my additional
6 idea on top of it. And if you said, in phase two we will use
7 the categories approach, we'll use these buckets. We'll put a
8 lot more sites in because we're going to have not just 20 from
9 one trial; we'll have buckets of 20, buckets of 30. So maybe
10 we're not going to try as much as 90, but that leaves 4,500.
11 So unless we are willing to agree up front that after we try
12 these categories with common fact patterns and we have
13 verdicts, we will agree to apply those verdicts and wrap this
14 thing up.

15 MR. PARDO: I appreciate the ideas, yes. It's not a
16 bad one. It's one we haven't talked about, of course, as a
17 defense group. Certainly haven't talked about it with
18 plaintiffs.

19 But let me be clear: No one on either side of the
20 table here is suggesting to you or to the next judge or to
21 anyone that 5,250 sites are going to be tried. You're right,
22 there has to be a way to do it, get resolution on all of those
23 without actually trying them all.

24 THE COURT: That's right.

25 MR. PARDO: But there has to be a way to do it that

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1 respects what you have said for 15 years in this case, 15
2 years.

3 THE COURT: Which is?

4 MR. PARDO: That sites matter. That every site is
5 different. That there are individual issues, okay.

6 THE COURT: But that would be the benefit of your
7 suggestion about the buckets. Every site is different, but
8 they're not that different. In other words, the detail is
9 different, but the categories can be made to be similar. And
10 if you pick enough buckets -- not limited to three, it could be
11 five -- I think every site can be in one of those buckets. I
12 really do. They have common characteristics that puts them in
13 the bucket. Then you try those common buckets, and maybe
14 that's not one trial but four. Let's say you pick four
15 buckets. The Court could live with four more trials. But if
16 at the end of those four -- they could be simultaneous. They
17 could be parceled out to different judges in the building. Who
18 knows? But when they're tried, that's it. Then it's just a
19 matter of assigning the remaining sites to one of the buckets
20 and agreeing to apply the findings. That's my view.

21 Anyway, you said it's new, so it's something to think
22 about at least.

23 MR. PARDO: It's something to think about. But even
24 under that approach, that approach would be a significant
25 change from what we've done. And from what you've said again

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1 and again and again, going all the way back -- I'll give you a
2 name of a case that maybe you'll remember: Lasouza.

3 THE COURT: What's the name?

4 MR. PARDO: Lasouza, remember? Parisha, Berry and
5 Lasouza (phonetic), 2001, and initial class actions.

6 THE COURT: I don't.

7 MR. PARDO: I think I was an associate.

8 THE COURT: Okay.

9 MR. PARDO: I had a lot more hair, too. These were
10 the New York private wells. They were a class. They were a
11 putative class. And the problem was they couldn't tell the
12 Court, they couldn't tell us if their wells had ever been
13 actually impacted. They couldn't tell if there was any injury
14 or any damage.

15 THE COURT: That would be down the road, because this
16 is a quasi focus site effort. When you create these buckets or
17 categories, those wells, you will know. Those are known wells.
18 It's only after that with the remainder, when you're trying to
19 put them in buckets, that you could then say, this well doesn't
20 belong in any bucket, because you haven't given us any proof
21 that it's ever been impacted. That's like a claims resolution
22 procedure. It's been used and used. You know, it was used in
23 Dalkon Shields, used in asbestos, used in big settlements all
24 the time. People know what to do after the first few trials.
25 It's just a matter of applying it in a claims resolution type

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1 process. There's minimum proof needed. And if the proof isn't
2 there, that site falls out. If the proof is there, it goes in
3 one of the four buckets or five or three, whatever the number
4 is. And you apply the findings from the trial to that bucket.

5 So it's just a matter of being creative and thinking
6 it through. But you're probably right that some sites will be
7 essentially no-pay sites. That's fine. It will work itself
8 out.

9 MR. PARDO: Right. in fact, I think there will be many
10 sites that are --

11 THE COURT: Maybe there will be some disputes. I have
12 that in securities fraud cases, where, when the claims process
13 starts, there are challenges to reliance, for some investors
14 probably didn't rely they should get anything. We work it out.
15 We have a process. But there's no more trials.

16 The liability trials you call them, Mr. Axline, up
17 front that's determined that now we're essentially in the
18 second site-by-site damages phase. But we shouldn't do it by
19 trial in New Jersey, once we try a focus group in the bucket.
20 So I think it's a good idea, but we're not going to solve it
21 today, anyway; is putting out there a good process, a
22 suggestion based on your letters and my experience and
23 thinking. And I want you to take it under advisement. And
24 we'll see what we can do.

25 Now, whether we can do anything in the remaining 30

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1 days that I happen to be the judge, I don't know. It would be
2 nice, nice legacy for MTBE cases to have some kind of a thought
3 for how to resolve it. And if not, such is life. But I would
4 like to try to see where we could go.

5 MR. PARDO: This issue is important enough, I think,
6 that it's safe to say, speaking for the defendants, we think it
7 would require a fair amount of time on briefing and argument,
8 your Honor.

9 THE COURT: I'm not sure you want to do that.
10 Briefing? What's there to brief? You're going to say the
11 statistical approach denies us due process? I'm not even
12 proposing a statistical approach. But I think you'd have a
13 little trouble anyway between the Supreme Court and
14 New Hampshire.

15 But putting that aside, I'm not even proposing that.
16 Don't reject what might be the right way to go reflexively.
17 Obviously, whoever you are lucky enough to get next is never
18 going to have the 15 years of experience that we just spoke
19 about on knowledge of these cases. So if we could have some
20 intensive discussions in the remaining time, that would be
21 good. The more we know where we're heading with the remaining
22 discovery, the more efficient it is. And efficiency should be
23 prized.

24 And it's really not to defend -- I don't think it's
25 really to defendants' advantage to delay and delay and delay.

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1 I don't see how that's particularly good for your companies.
2 If you can wrap this long-running litigation up, there is
3 advantages to that, too. So don't reflexively reject ideas and
4 put us on an organized track to someday conclude these
5 litigations. That should be the plaintiffs' goal and the
6 defendants' goal. I'm sure it is the plaintiffs' goal. That's
7 obvious. But it should be your goal, too, Mr. Pardo.

8 MR. PARDO: It is my goal, your Honor.

9 THE COURT: Good. Then in that case, as far as I'm
10 concerned, we can meet again in two weeks to discuss this idea
11 further. I'm serious.

12 Anyway, it would be so nice to see you again.

13 MR. PARDO: It would be nice to see you, too, again,
14 your Honor.

15 THE COURT: I hope that will be the case.

16 MR. AXLINE: It's hard to say good-bye.

17 THE COURT: Yes, indeed.

18 But in any event, so who else wants to be heard? You
19 implied that Ms. Meyer might want to be heard?

20 MR. PARDO: It really depended on where the
21 conversation between us went. I don't know if my colleagues --

22 THE COURT: Somebody might want to comment as to why
23 you think there's a need for briefing. I mean, briefing would
24 come in if you were going to challenge, I think, the
25 statistical extrapolation approach, because the other approach

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1 is not a matter of challenging. It's a matter of whether it's
2 a structure that makes sense. There's nothing about it that
3 can work without some agreement, those approaches.

4 But the statistical approach could be imposed on you.
5 And that's why briefing would be required; if somebody was
6 going to try to impose that on you, the statistical
7 extrapolation approach. But this approach is quite different.
8 And maybe it's thoughtful. And maybe, as I said, some defense
9 company out here might actually make their clients happy by
10 trying to wrap this up.

11 MR. PARDO: And I want to be clear --

12 THE COURT: Someday.

13 MR. PARDO: -- I'm not rejecting that. I hope I
14 didn't say something to suggest to you that I was knee-jerk
15 rejecting your idea. I'm not. It's just one we haven't
16 discussed as a defense group.

17 THE COURT: I understand.

18 So does anybody else wish to be heard?

19 MR. CONDRON: Your Honor, Peter Condron.

20 The approach you've outlined today, I think, merits
21 some serious consideration on our part. I will say we would
22 reject the statistical extrapolation.

23 THE COURT: I kind of thought you would like that the
24 least. I have some understanding of why.

25 MR. CONDRON: Yes. But I think we do need to talk to

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1 our clients. We need to talk to each other and take it under
2 advisement.

3 THE COURT: For sure. I appreciate that, Mr. Condron.
4 Anybody else wish to be heard?

5 MS. MEYER: I would echo that, your Honor. And I
6 think if you would like to hear more about the problems that we
7 see with the statistical extrapolation approach --

8 THE COURT: Sure.

9 MS. MEYER: -- I'm happy to go into that. But we can
10 also save that for briefing down the line.

11 THE COURT: Then I probably won't get to hear it, so
12 I'd like a little preview.

13 MS. MEYER: I think the number one problem is the due
14 process clause. As these cases have been tried over the last
15 10 to 15 years, the defendants have had the opportunity to put
16 on site-specific defenses that range from statute of
17 limitations, lack of injury, lack of causation, sometimes lack
18 of failure to warn at a site like you just found in the Puerto
19 Rico sites. And those defenses disappear in any kind of
20 statistical extrapolation approach, because the defendants
21 simply do not have a chance to make those arguments.

22 THE COURT: Those site-specific arguments.

23 But in Mr. Axline's proposal, he said the second half
24 of the second phase would be a site-specific damages approach.
25 It would just be bifurcated. So liability would be out of the

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1 way. Earlier letters had said liability and punitive damages,
2 but, okay, would be out of the way. And then phase two of
3 the -- not phase two; the second half, the bifurcation in phase
4 two would be a site-specific damages approach. That's possible
5 for Puerto Rico, where there's no more than 400 sites. It's
6 probably impossible in New Jersey, where there's 5,000, because
7 if they're contested, you really are asking the courts, in this
8 case the federal courts, to somehow have 5,000 minitrials.

9 And that can't be. Courts have an obligation to
10 manage their dockets. And that's well established in the law,
11 too. So while you have rights to due process, of course, the
12 courts have to survive a mass tort case. And they've worked
13 out creative ways over the years to survive mass tort type
14 cases. And I think the higher courts are going to be pretty
15 elastic, pretty reasonable in accepting whatever approach it
16 has worked out, because the Court has to manage its docket.
17 And that's important, too. We serve many clients.

18 MS. MEYER: I agree with that, your Honor. And I
19 think that's -- my client is no longer in the New Jersey
20 matter. But what I've heard the defendants suggest as an
21 alternative is something that would lead to a conclusion of the
22 case in advance of having to try 5,000 sites.

23 THE COURT: That's what I was picking up on in what I
24 spoke about as a combination of the ideas.

25 MS. MEYER: I would submit, your Honor, there are many

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1 other legal challenges that we would make to a statistical
2 extrapolation approach that, even under this bifurcated
3 proposal, I don't see how plaintiffs would be proving causation
4 and injury to key elements to any claim proving product
5 liability or failure to warn in the abstract, without
6 discussing actual causation and injury, with respect to any
7 sites and --

8 THE COURT: Mr. Axline, I think, needs to answer that.

9 She is saying that in the first half of the second
10 phase of the bifurcation, if it's general and not
11 site-specific, how do you deal with such things as causation
12 and injury? When you talk about liability, you can't have
13 liability without it.

14 MR. AXLINE: Understood, your Honor. And I do need to
15 correct the record slightly.

16 I believe when you asked me about the second phase in
17 the Puerto Rico example, I did say that we would want to look
18 at using statistical evidence on damages. So there may be some
19 site-specific evidence, but there may also be some use of
20 statistical evidence. So --

21 THE COURT: On the second half.

22 MR. AXLINE: On the second half.

23 THE COURT: But in the first half, what Ms. Meyer is
24 saying is, how do you even try liability, the generality, when
25 there are site-specific elements that you have to prove

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1 affirmatively, or that they have to defend by site? And she
2 mentions in terms of your burden of proof causation and injury.

3 MR. AXLINE: Well, it's a matter of degree, your
4 Honor. I think the problem she's pointing out would -- the
5 argument she's making would be made in the case of the bucket
6 approach as well. At some point you have to --

7 THE COURT: Well, not necessarily, because in that
8 approach, it's site-specific for every site in the bucket,
9 right? That is site specific. So whether it's 30 cases per
10 bucket or 40 or 20, they're specific. All I, then, propose is
11 that you do have to agree in advance that you apply the
12 findings to anything -- any other site that can fairly be put
13 in that bucket. That should have assured Mr. Pardo that some
14 sites won't be in any bucket, because they will defend those
15 sites by saying there's no damage at all. Respond. That's
16 happened in all these claims, big claims cases. Some claims
17 are full out. There's no proof of an injury. So there is a
18 chance to prove no injury or a statute of limitations has run.

19 MR. AXLINE: Understood. So that I think of as almost
20 an administrative matter, your Honor, frankly.

21 But in the New Jersey case they were able to try the
22 case to a jury.

23 THE COURT: New Hampshire.

24 MR. AXLINE: I'm sorry, New Hampshire. Try the case
25 to a jury with a special verdict that looked -- that didn't

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1 have any individual sites but, rather, looked at the degree of
2 culpability of the defendants for the failure to warn. And
3 that was common to all the defendants. You don't go site by
4 site and say, did you fail to warn at the site, because they
5 didn't issue warnings to anybody at any time. And then you
6 take a look at their market share, the commingling of products
7 going into the relevant geographic area, the market share that
8 each of them had, and you assign responsibility for the total
9 damages --

10 THE COURT: No, I understand --

11 MR. AXLINE: -- based upon market share.

12 THE COURT: I understand that. But that doesn't deal
13 with causation and injury individually. It deals with failure
14 to warn. I get that. But it has to have caused the
15 contamination and injury to the site.

16 MR. AXLINE: But I think it does deal with causation
17 and injury, because it is the state that is the plaintiff.
18 There's no question, as the New Hampshire court pointed out,
19 that the state has been injured. In fact, it's been injured in
20 a very big way. And the injury which these defendants caused,
21 assuming that's the verdict, is so large that it's difficult
22 for the plaintiff to use anything other than statistical
23 evidence to get its arms around the entire damages.

24 So I think that's the sort of thing we'd like to talk
25 to you more about and maybe do another letter brief before a

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1 two-week meeting on. Because the reality is when you have a
2 state as a plaintiff -- especially Pennsylvania, New Jersey, to
3 some extent Puerto Rico -- the damage caused by these
4 defendants is so massive that you've got to find a creative
5 way, once you've found liability, to allow a jury to consider
6 what is an appropriate amount to award as damages. And that
7 may not involve --

8 THE COURT: Wait. Are you saying that it's not site
9 by site, because the owner of all the sites is the same owner,
10 so it almost doesn't matter if 50 out of the 400 sites are not
11 actually contaminated? It doesn't matter, is that what you're
12 saying, because the other 350 are damaged and they're all owned
13 by the same owner, namely the state? You work out one big
14 damages figure; it's not a site-by-site payment?

15 MR. AXLINE: Yes. Yes. And as with any injury, you
16 use statistics to do that, particularly when you're talking
17 about what is going to be the impact on the state in the
18 future. That was the category of damages in the New Hampshire
19 case. Because one of the elements of the damage is that the
20 state doesn't have the money to spend to find out what the full
21 impacts are. It's got to sit back and wait for it to reveal
22 itself over the years. So that's something that the jury
23 awarded a specific category of damages for. And the other
24 states face that as well.

25 So the other aspect of this is that --

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1 THE COURT: What did you think of my sort of qualified
2 bucket approach; in other words, starting with that idea and
3 then applying it to the remainder?

4 MR. AXLINE: Do you mind if Mr. Miller responds?
5 Because he has some thoughts on that.

6 THE COURT: I don't mind at all.

7 MR. MILLER: Thank you, your Honor.

8 New Jersey is a little different. You haven't heard
9 much about the statistics that go beyond the 5,000 sites. I'm
10 going to explain this very briefly to illustrate why the
11 defendants' approach is less workable.

12 There are 440,000 private wells in New Jersey. When
13 any home is sold, it is required that they test for MTBE, among
14 other things. We now have data on testing 118,000 out of the
15 440,000 wells. Out of that about 12 percent were contaminated,
16 which, if extrapolated to the larger population, is 55,000
17 wells.

18 So it's not just a claim that's related to what's
19 going on at the gasoline station? What do we have to do to
20 clean it up? How much has been done to clean it up? Is there
21 anything left, so therefore there's no injury? It's not that.
22 And when you talk about a bucket, it only makes sense to try a
23 bucket if you assume that a relatively small group is
24 representative of the whole.

25 THE COURT: That's right.

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1 MR. MILLER: And that's exactly --

2 THE COURT: By characteristics.

3 MR. MILLER: That's right. Otherwise --

4 THE COURT: Common characteristics.

5 MR. MILLER: Otherwise, the bucket approach totally
6 fails.

7 THE COURT: Oh, well, no. I said that. That's why I
8 called it the modified bucket approach, is that you would be
9 able to do that. You would have common characteristics -- that
10 is the bucket -- and you put focus sites into that bucket where
11 there is 20, 30 or 40 per bucket. But then you have to apply
12 it to whatever is common to that group of characteristics. So
13 it's a combination of both approaches.

14 MR. MILLER: Right. But there are several claims that
15 aren't as directly tied to the gas station itself. And I gave
16 you an example, which means that at the end of the day, if
17 you're trying to get a representative, manageable group to try
18 and to apply it to project a much larger number that applies to
19 the whole universe, which would you rather use: What I call
20 outdated bucket technology, or mathematics that predict
21 accurately that if you take a sample randomly, you're going to
22 pick up a known injury site; you're going to pick up a statute
23 of limitations site? And you can use that to make the best
24 estimate you can.

25 At the end of the day, with the size of this case, all

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1 we will ever have is an estimate. There will never be a
2 number.

3 THE COURT: No, I realize that.

4 MR. MILLER: And my client would prefer to have the
5 most accurate tool that can be used, which is scientifically
6 supported, to make that projection and still have something
7 that's manageable and triable.

8 THE COURT: So what would you try, a selective sample
9 that -- a mathematically selected sample, a predictive sample?

10 MR. MILLER: Well, let's say that for each claim you
11 might -- it depends.

12 THE COURT: Each claim? Are you using "claim" now to
13 be synonymous with bucket; in other words, each common
14 characteristic type claim, is that what you mean?

15 MR. MILLER: Let me give you an example of public
16 wells.

17 THE COURT: Okay.

18 MR. MILLER: There are hundreds of public wells in
19 New Jersey with MTBE. We could scientifically select among the
20 wells and project that to the well claim and select among the
21 sites and project that to the site claim. Now, I'm not
22 suggesting which one should be done with which tool. Depending
23 on the claim, it may make more sense to vary it from a
24 statistical approach even. But if you want an accurate measure
25 that fits the claim being made -- and what is heartening to me

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1 is they finished the New Hampshire case in three months.

2 THE COURT: I know.

3 MR. MILLER: So I don't think you can get a better
4 tool. And I think buckets ultimately don't work unless they're
5 representative. So it's based on the same conceptual premise.

6 I think the parties need to sit down, discuss the
7 claims and the tools that would be used to resolve each of them
8 individually, as opposed to saying one size fits all. But if
9 you're going to say any measure, any tool is most likely to be
10 usable as applied to everything, statistics work. I mean, you
11 can predict the probability that you will be within 5 percent
12 or 10 percent by selecting very carefully the sample size.

13 THE COURT: But that approach standing alone, to me,
14 doesn't account for different characteristics by category.
15 It's the best way I can put it. It's the same idea, but you do
16 it four times. That's all I'm saying.

17 MR. MILLER: Yes.

18 THE COURT: You do what you're proposing, but you
19 divide it into groups with common characteristics; because if
20 you do it across everything, I think you'd have too many
21 confounding factors in the mathematical analysis. But if you
22 separate out -- I don't know whether the categories are private
23 wells, public wells, gas stations. I don't know that. That's
24 beyond my knowledge. But if you do it that way, which is why I
25 called it the combined approach, or my approach, then it begins

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1 to make some sense to me that we can extrapolate.

2 But if you just put it all in one enormous bucket,
3 there's some unfairness about that, because they have such
4 different characteristics. Now --

5 MR. MILLER: I think you'll find more commonality if
6 you focus on groups of claims than you will if you focus on gas
7 stations, which is all --

8 THE COURT: I wasn't recommending how to create the
9 buckets, because I don't have that knowledge. But I still like
10 that approach that isn't a "one size fits all," but it still
11 uses the same tools and concepts you're talking about but does
12 it by category, which I think sounds fair, more fair.

13 MR. MILLER: Yes, your Honor.

14 THE COURT: That's why I'd like you to think about
15 what I was saying. At least, again, as I said to the
16 defendants, don't reject it out of hand. Think about it.

17 MR. MILLER: Yes. I encourage that, and I would also
18 encourage a meeting in two weeks.

19 THE COURT: I'd like to do that.

20 MR. AXLINE: If I might add to that, your Honor, I
21 think what happened in the New Hampshire case, if you look at
22 the verdict that's attached as Exhibit C to our reply letter,
23 is that the plaintiffs, in order to get a quicker trial, made
24 some cuts on the damages that they were claiming. I'm not
25 suggesting that that would necessarily happen with New Jersey.

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1 And we are talking right now mostly about the discovery leading
2 to a trial, so --

3 THE COURT: Yes, we are.

4 MR. AXLINE: We want to have the trial in mind when we
5 consider the best approach to discovery, but the categories of
6 damages here are ones that lended themselves to a state-wide
7 either complete approach, which is -- for example, past
8 clean-up costs is on page two of the special verdict form, part
9 two. So the state was able to put in --

10 THE COURT: Wait. Where is this? I'm on page two, I
11 thought.

12 MR. AXLINE: There are two parts to the verdict form.
13 The first one was the causation part. And that --

14 THE COURT: There it is.

15 MR. AXLINE: That, by the way, has some answers to the
16 defendants' causation arguments.

17 THE COURT: Now I'm on page two. Damages. You said
18 past --

19 MR. AXLINE: Past clean-up costs, put on evidence of
20 what it actually costs the state so far. Cost to characterize
21 and clean up the highest-risk sites, which was, I think, a
22 strategic choice that New Hampshire made about what damages it
23 was going to claim there. Then sampling drinking water wells.
24 That's a number that you can put together statewide based on
25 the number of wells and what it would cost to conduct a sample

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1 at each well. And then testing drinking water wells
2 contaminated with MTBE at or above the MCL.

3 THE COURT: You meant treating, not testing. That's
4 okay. You said testing.

5 MR. AXLINE: Yes.

6 THE COURT: You said testing. You meant treating,
7 according to the verdict sheet. Treating?

8 MR. AXLINE: Yes. I'm sorry. Treating. Yes.

9 THE COURT: Thank you.

10 MR. AXLINE: Those were two separate categories, but
11 they were based upon the numbers that could be obtained pretty
12 easily. And so that's another option -- I just wanted to point
13 that out -- that avoids the -- this is something that the
14 plaintiffs would have to think about one by one, of course.

15 But I do want to point out that there are ways to
16 slice the onion that, in fact, avoid the site-specific issues
17 altogether, or at least are able to give the jury site-specific
18 information in volume that is relevant to the damages.

19 THE COURT: I would still personally feel that the
20 combined focus site approach with the statistical approach has
21 greater fairness to both sides, so they are hearing as an
22 example some site-specific type of evidence and defenses. But
23 then if the verdict is in favor of the plaintiff, so to speak,
24 it's agreed to be applied through statistics to the remainder
25 that fall in that category.

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1 Well, I think we've probably gone as far today, since
2 there won't be an order today. But the reason an order is
3 important is to have the appropriate discovery begin. That's
4 the goal, is to have the appropriate discovery begin as to the
5 remaining parts of this case. The nonremanded portion are in
6 the MDL. And it's this Court, and not the remand court, at
7 this point that will figure out the discovery for the remaining
8 sites.

9 Yes.

10 MR. PARDO: And to that point, your Honor, that has
11 started, as you know. We have discovery that's going on in
12 New Jersey. We have discovery that's going on in Puerto Rico.
13 The discovery in Puerto Rico is focused on --

14 THE COURT: Do you remember I mentioned the master
15 list during this conversation?

16 MR. PARDO: I do remember.

17 THE COURT: So that's something that can be done and
18 can be begun sooner, rather than later. So there are things
19 that can and should be done by the MDL court. And it helps if
20 we structure how phase two would play out, because it helps to
21 focus the discovery.

22 So if we go with this combination approach that I've
23 been talking about for the last close to an hour, we would know
24 how many buckets, what defines the buckets and how many sites
25 per bucket. So we would know things that would focus the

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1 discovery, so to speak.

2 Again, I don't know that we should do any more today.
3 We've had a good, fruitful conversation, as they say in
4 diplomatic circles when they've accomplished nothing. They
5 said, we're very fruitful. That's what they say, because it
6 means people at least began to talk. And then come back --
7 even though it's fast, there's a reason for it to be fast
8 here -- in a couple weeks to see if we've refined our views,
9 any of the three of us; that is, the plaintiffs, the
10 defendants, the Court. And that's all I can do. And then it
11 goes to someone who's had no experience at all with the MDL
12 that you've all been living in for so many years.

13 And most of you, by the way, don't change, which is
14 good. Most of you are players who have been playing for many,
15 many years. So you do have a wealth of knowledge, the lawyers
16 do. But the Court won't.

17 Okay. Anything else we should take up today?

18 I understand that Pennsylvania was originally on the
19 agenda, but you worked out the dispute on that issue. So that
20 isn't for the Court today.

21 Is there anything else, then, for the Court today?

22 MR. PARDO: No.

23 MR. KAUFMAN: Just, your Honor, are you going to set a
24 time for us to get back?

25 THE COURT: I think that's not a bad idea. I know

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1 Mr. Pardo doesn't seem to want to come back and see me.

2 MR. PARDO: That is not accurate, your Honor. I'm
3 happy to come back.

4 MR. KAUFMAN: We would like to see you at least one
5 more time.

6 THE COURT: The reason I thought he didn't is because
7 it's so soon, he feels, to come to any real consensus as to how
8 to proceed. But it can only do good to advance the
9 conversation. And the shorter the time, the better. So it
10 could also be three weeks. I'm still here. It doesn't really
11 matter. If that helps, there's a little more time. They have
12 a bigger group, much bigger than yours.

13 So let me glance at the calendar and see how it looks.
14 After all, today is not even April. So April. How about
15 Tuesday, April 26th? That's as late as I can go. And it gives
16 you the most time for a conversation.

17 MR. PARDO: That's fine for us, your Honor.

18 THE COURT: But I don't want -- what time did we meet
19 today? 2:30. That's what I want again, 2:30. 2:30 on the
20 26th of April.

21 Okay. Anything else? All right. It's good to see
22 you all.

23 Folks on the phone, the conference has just ended.
24 Thank you.

25 (Adjourned)