FILED

MAR 4 - 2002

JUDGE JOHN F. GRADY
UNITED STATES DISTRICT COURT

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

IN RE FACTOR VIII OR FACTOR IX CONCENTRATE BLOOD PRODUCTS LITIGATION SUSAN WALKER, Administratrix of the Estate of Steven Walker, deceased, Plaintiffs, v. BAYER CORPORATION, et als	)	MDL-986 Civil Action No. 96 C 5024 JUDGE JOHN F. GRADY

DOCKETED

MAR 6 - 2002

IN RE: FACTOR VIII OR FACTOR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	)	MDL - 986 Civil Action No. 93 C 7452 THIS DOCUMENT RELATES ALL CASES

MOTION FOR SUPPLEMENTAL
DISTRIBUTION FROM THE COST AND FEE FUND

The undersigned is a member of the Plaintiff's Steering Committee in MDL-986, and served as a member of the Executive Committee appointed by consensus of the PSC to direct the day-to-day affairs of the litigation. The undersigned has represented persons with hemophilia and their survivors in individual cases in New Jersey and in New York; served as counsel to the Walker class; developed a theory of liability in New Jersey that was first discussed with Leonard Ring in Chicago, and David Shrager and Wayne Spivey in Philadelphia, in 1992; and lectured on that theory of liability, later called the first

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generation theory, to the Association of Trial Lawyers at their annual meeting in the summer of 1993. The theory served as the basis of the class certified by this Court as a liability class action case.

In connection with representation of clients who opted out of the class action settlement in New Jersey and in New York the undersigned engaged in successful strategies that were outside of and separate from the MDL work effort, designed to effect changes to the statutes of limitation arguably pertaining to the clients' cases. In both states – the only two states in the nation where it happened – statutes of limitation were amended so as to permit persons with hemophilia to bring claims against the fractionators without bar. In New York the undersigned personally financed the legislative agenda at a cost in excess of $100,000, and retained and directed lobbyists and public relations experts to meet the opposition hired by industry to defeat the modification to the law.

In 1995, the undersigned was honored by the Hemophilia Association of New Jersey with their President's Award, and presently serves as a Trustee of HANJ. The undersigned is a Visiting Lecturer at Cook College of Rutgers University, and teaches a Senior Honors Colloquium titled "AIDS, Blood and Litigation." The course is a forum for open discussion about the tragedy of hemophilia and HIV, and broader issues of pharmaceutical research, marketing and safety. Men with hemophilia and HIV, physicians, and former FDA personnel have come to Rutgers to teach in this class.

This Motion concerns distribution of the hold back fund, which was created by Pretrial Order 57. The Plaintiff's Steering Committee agreed to a proposed division of

the existing fund in 2000 and an Order was entered that pertained to assessments deposited by defendants in the fund through June 1, 2000.

To date there exists no Order of this Court pertaining to the distribution of fees deposited in the hold back fund after June 1, 2000. Presently there are divergent views as to the distribution of those funds among the PSC. This Court's Settlement Implementation Order 13 specifically reserves decision on the manner of distribution of post June 2000 assessments.

According to Lead Counsel there is approximately $4.25 million in the hold back fund which includes $1 million from settlement of the Mull/Arceneaux assessment[1] to be distributed even if the relief requested herein is granted.

It is respectfully submitted that equity and fairness dictates a different distribution of the fund than that sought in the Motion filed by Lead Counsel, for the following reasons:

1. The PSC has already been adequately compensated from the holdback fund for the common benefit work it performed. The Court has awarded the PSC $22 million in common benefit fees; $4.25 million in settlement implementation fees; $1.8 million in fees from the hold back fund in June 2000; and will award $1 million from the settlement of the Mull Assessment, so that $2.8 million will be awarded in total from the hold back fund. In addition, the PSC was reimbursed close to $1 million of post settlement expenses from the hold back fund. The last common benefit work undertaken by any attorney was in 1998. The total fees awarded to the PSC will be close to $30 million.

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[1] See Pretrial Order 57A

2. The contribution of PSC members to the hold back fund, arising from the litigation of opt out cases, has been highly disproportionate, in that certain PSC members contributed substantially to the hold back fund while others contributed minimally or not at all. Few PSC firms aggressively litigated opt out cases and especially the most difficult early infection cases after the class settlement was approved. Most PSC firms advised most or all of their clients to accept the class action settlement. While the advice given was undoubtedly well considered, the result is an inequitably funded holdback fund. In effect, since 1998 all of the substantive work on hemophilia/HIV litigation has come from the tort lawyers. Common benefit work ceased in 1998. The effect of a further distribution of the hold back fund would be to take fees from the PSC tort lawyers (who were also the lawyers, for the most part, who did most of the work in the MDL) and give those fees to PSC firms that went on to conduct other business after 1998.

3. Certain PSC firms, including the undersigned, who continued to litigate opt out cases after June of 2000 were awarded lesser compensation then from the "discretionary" 40% distribution from the hold back fund (for post settlement substantive work) because they were expected to earn fees from opt out cases. That is, the continued litigation of opt out cases has already worked to the disadvantage of the firms that litigated them in the distribution of fees among the PSC from the hold back fund.

4. Lead Counsel suggested in June of 2000 that after the initial distribution from the holdback fund, a good argument could be made that the fund should be closed down.

5. The Steering Committee's decision to compromise the Mull/Arceneaux assessment by significantly discounting the fees Mull/Arceneaux were required to

contribute to the holdback fund established a precedent that supports the return of the remaining funds in the holdback to trial counsel. Alternatively, the compromise with Mull/Arceneaux established a cap on the cost charged for the MDL work product and the price should be significantly less for PSC members who undertook common benefit work (as opposed to Mull, who as this Court has noted sought to undermine the common benefit work effort and/or contributed nothing to the common work effort in MDL-986.) If the Court will not order a refund of the holdback fund, it should order a cap on the fees any PSC firm must pay to the holdback fund for distribution to the PSC, and the cap should be significantly less than $1 million.

It is therefore submitted that either (a) all assessments presently held in the hold back fund, with the exception of the Mull/Arceneaux settlement, should be returned to the trial counsel whose cases generated the fees; or (b) the assessment should be capped as to firms that performed common benefit work.

The undersigned represented (with co-counsel) about thirty clients in New Jersey litigation whose cases were settled and assessed prior to June 2000, and distribution of substantial fees was made to the PSC from the New Jersey settlements pursuant to the Court's Settlement Implementation Order 13.[2]

It is submitted on information and belief that the fees generated by New Jersey cases litigated by the undersigned, together with accrued interest, available for

[2] Only the defendants know precisely what was distributed, and from which cases, since they manage the hold back fund. Furthermore, only 31% of the New Jersey fees were returned to opt out counsel since the PSC was paid back for expenses out of the fund, by prior Court Orders. Thus the PSC members with fewer cases enjoyed an additional bonus thanks to efforts of PSC members who continued to litigate their opt out cases. Based on information provided by Defendants, it appears that at least a third of the $1.8 million in fees awarded to the PSC in June 2000 from the Holdback fund were generated by the New Jersey cases.

distribution to the entire PSC pursuant to Order 13 were more than in any other jurisdiction or group of cases other than the Mull/Arceneaux cases. The undersigned did not object to distribution of the New Jersey hold back fees in June of 2000, and does not object now. However, any further distributions of fees from cases represented by the undersigned would be inequitable and unfair. Enough is enough, and the assessments paid by the undersigned are fair compensation for the MDL work product.

The PSC compromised the assessment of cases represented by the Mull/Arceneaux lawyers to $1 million. Mull/Arceneaux represented approximately 127 plaintiffs, and is common knowledge that Mull/Arceneaux, by virtue of numbers of clients, settled their cases for a gross amount far in excess of the total settlements achieved by all PSC members in opt out litigation, and far in excess of the New Jersey settlements. It is further clear that Mull/Arceneaux likely earned significant fees from those cases.[3] Yet, the PSC agreed to slash their assessment, forgoing millions of dollars in fees, though the historical relationship between the PSC and Mull was anything but friendly.

It would be inequitable to require any PSC counsel who loyally and diligently performed substantial common benefit work and also litigated the most difficult opt out cases, to pay more in net assessments than the Mull/Arceneaux group, which did no common benefit work and impeded the work effort of the MDL.

A significant factor in the PSC's decision to compromise the assessment of the Mull/Arceneaux cases was the risk that this Court would hold that the PSC had already

[3] Only the defendants have some or all of this information, but rumors abound. Several million dollars in fees were returned to Mull/Arceneaux from the holdback fund after entry of Pretrial Order 57A.

been adequately compensated. In addition, the arguments made by Mull/Arceneaux that they went their own way in developing their cases for trial may have had some merit. But those arguments had no greater application to Mull/Arceneaux than they had to the undersigned in litigating cases in New York, together with two other law firms. By virtue of the compromise reached with Mull/Arceneaux, they were assessed at a far lower rate than the undersigned would be even if the relief requested herein is granted. The Court should consider that the PSC will be paid an additional $1 million by virtue of the agreement reached with Mull/Arceneaux, and that fact alone merits further relief from assessment as proposed herein.

The time and effort involved in litigating opt out cases, negotiating settlements, and implementing those settlements was extraordinary and continues to this day. This Court is only too well aware of the significant subrogation issues, for example, that complicated the class settlement; those same issues obtained in the context of individual settlements. Competent lawyers involved in prosecuting opt out cases have described the cases as the most difficult they have ever handled. While the Court has indicated that it would not consider work done in individual cases in deciding a Motion for relief from Pretrial Order 57 on a case by case basis, the plain fact is that substantial time and resources were dedicated to the torturous and high risk litigation of opt out cases for several years after the MDL work effort came to a halt.

The time and effort necessary to prepare a single case for trial is extraordinary, and involves issues not covered in the MDL. The litigation of a case entails tremendous risk and the costs of preparing a single case can exceed $100,000. The issue of product

identification required assistance of one or more experts, review of literally thousands of product infusion records, and numerous depositions, including in many cases the depositions of treating physicians who were not only hostile, but had been retained by the defendants as experts in the MDL.

In every case prepared for trial the defendants designated case specific experts. Depositions were taken of family members, physicians, witnesses, the plaintiffs, and in one case the plaintiff's former girlfriend who resided in Arizona. In one individual case, about fifteen individual depositions were conducted on issues totally apart from the MDL work effort.

The resolution of these cases was also incredibly time consuming and complicated. In many cases estates were appointed, compromises needed judicial approval, allocation of benefits among family members required time and counseling. In New York State, Medicaid liens are compromised on a county-by-county basis, unlike most other states where there is a single statewide Medicaid office. The undersigned personally traveled to Albany, Utica, Syracuse, Buffalo, and New York in connection with these cases.

The undersigned continued to allocate a majority of his professional time to the litigation of opt out cases through the end of year 2000, and through the present time has continued to allocate time to the resolution of issues in the New York opt out cases. The factors raised in prior Motions seeking relief from the assessment are equally relevant in the present Motion, and the relief proposed herein can be implemented without the need for a case-by-case analysis by the Court.

It is therefore respectfully submitted that the funds presently in the hold back fund should be returned to counsel who generated those funds by way of representation of opt out clients. Alternatively, the cost of the MDL work product should be capped as to any PSC lawyer who performed common benefit work. The cap should reasonably be in a lesser amount than the compromised assessment of the Mull/Arceneaux cases.

If every PSC firm were to be subjected to a net assessment of up to but not greater than $500,000 for opt out cases, the hold back fund would theoretically generate an additional $7 million in fees, to be added to the approximately $30 million already distributed or requested from the common benefit fund and the hold back fund.

It is submitted that a $500,000 to PSC firms is patently fair compensation for the MDL work product.

To the extent that any PSC firm contributed less than $500,000 in assessed fees, that firm would nonetheless enjoy the fruits of the fund generated primarily from opt out cases litigated by other PSC firms.

To the extent that fees in excess of $500,000 have already been distributed from any firm's group of opt out cases, this Motion does not seek a refund of those fees.[4] However, the firms whose opt out cases generated fees adequate to meet the $500,000 cap would be relieved of further responsibility for paying assessments. If any fees are presently held in the hold back fund from cases litigated by such firms, this Motion requests that those fees be repaid, with interest, to those firms.

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[4] It is believed assessments in excess of $500,000 have already been distributed from the New Jersey holdback, although defendants would know for certain. A few other PSC firms may have assessed more than $500,000 that has been distributed, including Lead Counsel's firm.

Implementation of a cap would not require the Court to engage in a case-by-case determination of whether an assessment should be made and whether it should vary from the terms of Pretrial Order 57. Rather, the cap would apply to the gross assessment paid, and limit the total amount required of counsel to pay. Such a limitation would be fair and reasonable in light of present circumstances, and the defendants could readily identify the firms that meet the cap.

Since the defendants control the accounting of the hold back fund, this Motion asks that they confer with the undersigned and Lead Counsel to determine whether any firm has reached the cap on assessments and is entitled to a return of assessed funds from the hold back account.

If a firm participated in representation of a client, either solely or as co counsel, credit towards the cap should be given for the total of fees assessed and distributed as to that firm. For example, if two PSC firms represented an opt out client whose case was settled and assessed, the assessment would not be halved in calculating whether the cap has been met as to each firm. Each firm would be given credit for the total fee assessed. This would be entirely consistent with the approach taken in compromising the Mull/Arceneaux assessment.

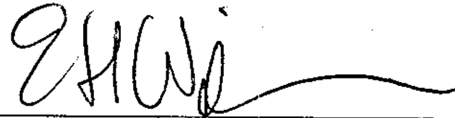
All information provided by defendants shall remain confidential if the relief requested herein is granted, and the undersigned and Lead Counsel would be ordered to maintain confidentiality as to all settlements.

CONCLUSION

It is respectfully submitted that while the work product of the Plaintiffs' Steering Committee in MDL-986 was beneficial, that work concluded in 1998, and has been adequately compensated for. Since 1998, it has been the tort lawyers who have been carrying the ball and taking the risks of this litigation. For the reasons set forth herein, it is respectfully requested that the relief sought in this Motion be granted.

Dated: January 29, 2002

Respectfully submitted,



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

IN RE FACTOR VIII OR FACTOR IX CONCENTRATE BLOOD PRODUCTS LITIGATION SUSAN WALKER, Administratrix of the Estate of Steven Walker, deceased, Plaintiffs, v. BAYER CORPORATION, et als	)	MDL-986 Civil Action No. 96 C 5024 JUDGE JOHN F. GRADY

IN RE: FACTOR VIII OR FACTOR IX CONCENTRATE BLOOD PRODUCTS LITIGATION TO:	)	MDL - 986 Civil Action No. 93 C 7452 THIS DOCUMENT RELATES ALL CASES

SETTLEMENT IMPLEMENTATION ORDER
(Re: Supplemental Distribution of PSC Attorneys' Fees)

And now, upon consideration of Eric H. Weinberg's Motion for Supplemental Distribution from the Cost and Fee Fund, and based upon the record in these consolidated multidistrict proceedings, it is ORDERED that {all funds presently held in the hold back fund, with the exception of $1 million on deposit pursuant to Pretrial Order 57A, shall be returned to the firms which represented the opt out clients from which such fees were generated} [to the extent that any PSC firm has generated fees and interest on fees by way of assessment in the amount of $500,000.00 or greater that has been distributed pursuant to Pretrial Order No. 57, such firm is hereby relieved from the continued application of Pretrial Order No. 57;] and it is further

ORDERED, that to the extent any fees assessed on cases represented by such firm are presently held in the escrow fund, those fees together with interest shall be returned to the firm immediately, and it is further

ORDERED, that lead counsel and Eric H. Weinberg, Esq., shall confer with counsel for the defendants to determine which plaintiff's counsel qualified for the relief set forth herein and that any information regarding these matter shall remain confidential.

Dated:

____
JOHN F. GRADY, United States
District Judge

CERTIFICATION OF SERVICE

This is to certify that on 1/29/02, a copy of the foregoing Statement was served by Federal Express overnight mail upon:

The Honorable John F. Grady, Judge
United State District Court
Northern District of Illinois
219 South Dearborn Street, Room 2201
Chicago, IL 60604

and by postage prepaid U.S.Mail upon the following defense counsel:

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