

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

FILED

APR 15 2002

JUDGE JOHN F. GRADY  
UNITED STATES DISTRICT COURT

IN RE:

FACTOR VIII OR IX CONCENTRATE  
BLOOD PRODUCTS LITIGATION

X

MDL No. 986

Civil Action No. 93-C7452

THIS DOCUMENT RELATES TO

ALL CASES

X

DOCKETED

APR 17 2002

**MEMORANDUM IN RESPONSE TO  
NEW MATTER RAISED BY MR. WEINBERG**

This memorandum is submitted on behalf of Plaintiffs' Steering Committee members, the majority of whom oppose Mr. Weinberg's proposal. The Steering Committee agreed to the division of fees as requested by Lead Counsel. The PSC work product has had and continues to have value to Mr. Weinberg's opt-out cases. The Plaintiffs' Steering Committee has not and will not be overcompensated if the holdback fees are distributed according to the formula advocated by Lead Counsel for the PSC. It is noteworthy that of the sixty-one attorneys served by Lead Counsel with its request for distribution of the Pretrial Order No. 57 Fund, only one objection was presented. It is also interesting that it is Mr. Weinberg who is objecting, since Mr. Weinberg has already recovered some of the largest private fees received by any PSC member in this litigation.

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A. *The Plaintiffs' Steering Committee Agreed on How to Divide Fees for Cases Handled by its Members.*

When the PSC was formed almost ten years ago, its members agreed to internal guidelines that included a 10% assessment of cases handled by its members. The members further agreed that they would engage in a good faith attempt to reach a fair division of those assessments internally and only go to the Court as a last resort. While Mr. Weinberg was not appointed initially to the PSC, he later was appointed with the understanding that he had accepted the guidelines. The first time he repudiated the guidelines was in his recent filing with the Court. Notwithstanding the PSC 10% guideline or PTO 57's 7% amount, the Committee has recommended a modification of the original 10% assessment, reducing it well below the 7% assessment earlier approved by the Court. The PSC did so by agreeing that post-settlement opt out fees would be divided 20% according to the percentage awarded for the MDL work, 40% for post-settlement MDL work under a separate schedule, and 40% to be returned to the attorney responsible for the cases that were assessed. That resulted in an effective assessment of 4.2%, less than one half of the assessment agreed to by the Steering Committee in its guidelines.

Some Steering Committee members, including Mr. Weinberg, benefited by this reduced assessment. Others did not. Mr. Weinberg argued strenuously for the modification that resulted in 40% being returned to the originating attorney. The agreement to return 40% to the originating attorney was a compromise with Mr. Weinberg. As part of the compromise, Mr. Weinberg agreed to support the PSC recommendation on division of fees, including the assessment on opt-out cases.

In Mr. Weinberg's brief of March 19, 2002, he makes a representation that he has maintained an objection to the assessments from the beginning. However, on page seven of his January 29, 2002, brief, he states that he "did not object to the distribution of the New Jersey holdback fees in June of 2000, and does not object now." At the hearing in June 2000, the Court inquired of Mr. Shrager and Ms. Nast whether each PSC member agreed to the 40/40/20 proposal. At that time, the response was "yes," with the exception of Dr. Laufman and Messrs. Mull and Kozak. TR p. 206. Mr. Weinberg's statement that he has objected to the assessment from the beginning ignores the fact that he did not object to the June 2000 division recommended by the PSC and approved by the Court in June 2000. The transcript shows that he was present but did not speak. Query, what has happened since June 2000 that made 40/40/20 fair then, but not now? Truly, nothing. There were payments from New Jersey settlements in the June 2000 distribution, just as there are now.

B. *There is Insufficient Evidence in the Record for the Court to Make A Determination.*

Mr. Weinberg wants to set a limit on the assessment of \$500,000. He does not say if the \$500,000 is at the 7% holdback rate, of which he will get 40% or \$200,000 back, or if it is at the 4.2% rate. He refers to some non-record information that he has "surmised" or "heard" or was "anecdotal," but that cannot be verified, as to the amounts others either have paid by way of assessment or have earned as

attorneys fees. The information is confidential and has not been revealed to members of the PSC. And what is also not revealed, is the amount of fees Mr. Weinberg has privately received.

The revised assessment of 4.2% is quite modest by any standard. It is much less than any referral fee with which tort lawyers are familiar and use on a regular basis. The standard referral fee is 25-33 1/3% of the total fee, or about 10% of the value of the case (where contingent attorneys fees may range from 33 1/3 to 40%). These referral fees are often paid to a lawyer who does not work on the case or provide any advance of client costs. Tort lawyers are glad to pay such referral fees because referrals keep lawyers busy with good cases. Such referral fees are not capped at an arbitrary number. The reason is simple. The larger the referral fee, the larger the fee for the lawyer handling the tort case. For example, where the tort lawyer has a 40% fee contract and has to pay the referring lawyer a 25% referral fee, a \$1 million settlement results in a \$400,000 fee with \$100,000 going to the referring lawyer and \$300,000 to the tort lawyer. If the settlement increases to \$2 million, the referral fee is \$200,000 but the tort lawyer gets \$600,000.

C. *The MDL Work Product continued to be of Value to Mr. Weinberg in All of His Opt-Out Cases.*

It is undisputed that the MDL work product continued to be of value to Mr. Weinberg in settling his cases. As the Court observed at the fee hearing: "...without the MDL work you're nowhere." TR p. 44 and 45 The Court also observed "that [the MDL work product] is work that really as a practical matter could not be done

in an individual case.” TR p. 48 L 11/12. And finally, at page 11 of Mr. Weinberg’s brief of January 29, 2002 in his conclusion he acknowledged the value of the MDL work product saying “...the work product of the Plaintiff Steering Committee in MDL-986 was beneficial...”

D. *The Agreement with Mull and Kozak is Not Controlling.*

The issue about the terms of the agreement made with Mull and Kozak is simply a red herring. The Steering Committee members, including Mr. Weinberg, were polled to see if anyone objected to settling with Mull and Kozak for \$1 million. PSC members were not told what the Mull and Kozak total fees were or what the settlements were. Mull and Kozak acted as renegades for a long time and only shared in the cost and fee fund to the extent of the value of their opt-in cases. Mr. Weinberg on the other hand, was one of us. We compromised the division of the holdback fees, at his urging and at his insistence, by refunding 40% to the attorney who generated the fee. Now Mr. Weinberg seeks further to improve his position at the expense of other members of the Steering Committee. He wants to benefit from the value of the PSC work product without paying his fair share of the freight.

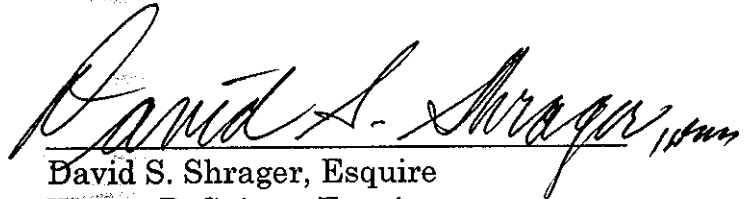
Finally, the logic underlying the *Erickson* decision applies to Mr. Weinberg's motion, regardless of at what point assessments are challenged. Irrespective of the procedural distinction Mr. Weinberg attempts to make, he does not refute that the Court said that "it is too late to begin an assessment of the extent to which the Steering Committee work contributed to the settlement of each case to which the holdback requirement applies." October 22, 2001 Order of Clarification Regarding Continued Applicability of MDL-986 Pretrial Order No. 57. (Emphasis supplied.)

CONCLUSION

It is respectfully requested that the Court grant the PSC's Motion for Distribution of Additional Funds From Opt-Out Escrow Account according to the formula previously agreed to by the Steering Committee.

Respectfully submitted,

Dated: April 9, 2002



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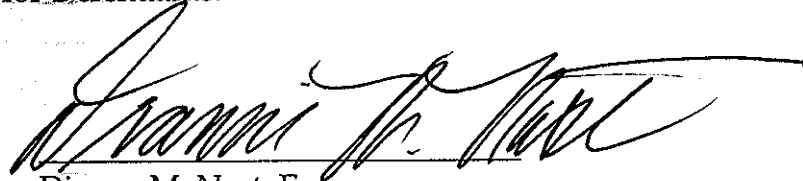
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On Behalf of the PSC



CERTIFICATE OF SERVICE

I hereby certify that I have this 9<sup>th</sup> day of April 2002, caused to be served a true and correct copy of the foregoing Memorandum in Response to New Matter Raised by Mr. Weinberg via First Class Mail upon the Plaintiffs' Steering Committee and the following counsel for Defendants:



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