

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

No. 08-MD-1928-MIDDLEBROOKS/JOHNSON

IN RE: TRASYLOL PRODUCTS
LIABILITY LITIGATION

This document applies to all actions

**RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION TO ESTABLISH COMMON BENEFIT FUND**

Plaintiff, Melissa Morrill, as Personal Representative of the Estate of William Cyrus Morrill ("Plaintiff Morrill"), on behalf of herself and other interested Plaintiffs, hereby files her Response in Opposition to Plaintiffs' Motion to Establish Common Benefit Fund (Dkt. No. 171) and states as follows:

1. On April 28, 2008, a group of law firms who represent numerous plaintiffs in this Multi-District Litigation (the "MDL") filed a Joint Application For Appointment of Plaintiff's Steering Committee (the "Joint Application"). (Dkt. No. 31).

2. Prior to the institution of this MDL, this group of law firms entered into a private agreement among themselves (the "Joint Prosecution Agreement"), pursuant to which they would engage in cooperative action to review documents, retain experts on generic issues, and coordinate discovery and other aspects of the litigation, among other purposes. (Dkt. No. 31, p. 3).

3. To participate in the joint prosecution group, each law firm was to contribute an amount of money as an assessment for costs. This assessment was based largely upon each law firm and not based on each particular case. For example,

a law firm with one Trasylol case was required to pay the same assessment amount as a law firm that had nine Trasylol cases.

4. The Court subsequently granted the Joint Application and established the Plaintiff's Steering Committee (the "PSC"). The members of the PSC all were part of the original joint prosecution group. (Dkt. No. 51).

5. On July 18, 2008, the PSC filed a Motion to Establish Common Benefit Fund, seeking to establish a fund to compensate and reimburse attorneys for services performed and expenses incurred in the administration of this MDL. (Dkt. No. 171). The PSC's motion does not address the assessment fund and Joint Prosecution Agreement originally established to cover joint prosecution costs.

6. The proposed order that the PSC attaches to the Motion to Establish Common Benefit Fund provides for a common benefit fund to be established with assessments as follows:

(a) All personal injury plaintiffs and their attorneys . . . who have agreed or agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, with respect to any Trasylol (also known as Aprotinin) personal injury claims will be subject to an assessment of up to six percent (6%) of the gross monetary recovery, said assessment to be withheld by defendant and paid into the Common Benefit Fund This assessment will be for the payment of attorneys' fees and expenses as set forth in this order or any subsequent order of the court. The six percent assessment will be divided proportionally, three percent (3%) coming from the plaintiffs' share of any recovery and three percent (3%) coming from the share of any recovery payable to plaintiffs' attorney as attorneys' fees. For example, on a recovery of \$1,000 with an attorney's fee of forty percent (40%), and without any consideration of case specific out of pocket costs paid or advanced by the individual attorney (for

purposes of this example only), three percent (3%) or \$30 would come from the plaintiffs' sixty (60%) share and three percent (3%) or \$30 from the attorneys' forty percent (40%) share. . . .

b) All economic loss plaintiffs . . . who have agreed or agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, with respect to any Trasylol (Aprotinin) economic loss claims are subject to an assessment of no less than four percent (4%) and up to six percent (6%) of the gross monetary recovery to be withheld by defendant and paid into the Common Benefit Fund by defendant.

(Dkt. No. 171-2, pp. 2-5).

7. "Gross monetary recovery" is defined to include the present value of any fixed and certain payments to be made in the future, but excludes court costs that are to be paid by a defendant. (Dkt. No. 171-2, p. 6).

ARGUMENT

Although Plaintiff Morrill agrees that a common benefit fund should be established and that the members of the PSC are entitled to reasonable compensation for the work that they perform and the resources that they expend for their work in this MDL, the Court should consider an alternative formula for determining the assessment to be paid to the Common Benefit Fund. Further, any assessment for the common benefit fund should include both attorneys' fees and the costs which are now part of a private agreement among the members of the PSC. Specifically, any assessment for costs should be the same amount for each case, and should not be (as presently set up in the private agreement) on a per law firm basis.

A. The Common Benefit Fund Should be Calculated by a Different Formula.

The PSC seeks an assessment from all plaintiffs, as defined in the proposed order, of up to six percent (6%) of the gross monetary recovery for each plaintiff. The assessment is to be for the payment of attorneys' fees and expenses and is to be divided proportionately, three percent (3%) coming from the plaintiff's share of any recovery, and three percent (3%) coming from the plaintiff's share of any recovery payable to the plaintiff's attorneys as attorneys' fees.

First and foremost, depending upon the fee structure of each individual case, the percentages are not proportionate. Thus, if the Court allows an assessment of six percent (6%) of the gross monetary recovery, it should be divided as four percent (4%) from each Plaintiff's individual recovery and two percent (2%) from the Plaintiff's attorneys' recovery. See *In re Bausch & Lomb Contact Lens Solution Products Liability Litigation*, 2008 WL 2330571 (S.D.C. 2008) (where the common benefit fund is comprised of an assessment of six percent (6%) of the gross monetary recovery, and four percent (4%) of the six percent (6%) is considered as payment of attorneys' fees and the remaining two percent (2%) is for the payment of expenses).

The correct formula should be a lower percentage, based on formulas approved in other cases. In other current pharmaceutical MDLs across the country, courts have established the common benefit fund at a lower percentage. For example, in the pharmaceutical litigation, *In re Zyprexa Product Liability Litigation*, pending in the Eastern District of New York, the court entered an order establishing a common benefit fund assessment consisting of three percent (3%) of the gross monetary recovery. 2007 WL 2340790 (E.D.N.Y. 2007); see also *In re Zyprexa Product Liability Litigation*,

MDL No. 1596, Dkt. No. 1348). This assessment is to be divided one and one-half percent (1.5%) from the plaintiff's share of the gross recovery and one and one-half percent (1.5%) from the attorneys' fee portion of the gross recovery. Also, in *In Re Bextra and Celebrex Market Sales Practices and Products Liability Litigation*, the court entered a pretrial order establishing the common benefit fund assessment as four percent (4%) of the gross monetary recovery, with two percent (2%) to be deemed as costs subtracted from an individual's gross monetary recovery and two percent (2%) to be deemed fees subtracted from the individual's attorneys' fee portion of the gross monetary recovery. 2006 WL 471782 (N.D. Cal. 2006); see also *In re Vioxx Marketing Sales Practices and Products Litigation*, MDL No. 1657 (3%-6%); *In re Prempro Products Liability Litigation*, MDL No. 1507 (5%); *In re Ortho Evra Products Liability Litigation*, MDL No. 1742 (3%-5%).

Similar to these other MDLs, the assessment in this case should be a lower percentage than six percent (6%) of a plaintiff's gross monetary recovery. Instead, the Court should consider a percentage of three percent (3%) or four percent (4%), similar to some of the other current pharmaceutical MDLs.¹ This assessment fund should be used to pay both attorneys' fees and costs incurred by the PSC or other qualified attorneys who provide services in the MDL.

Accordingly, Plaintiff Morrill respectfully requests that the Court deny the PSC's motion to the extent that it requests the common benefit fund be comprised of an assessment of six percent (6%) of a plaintiff's gross monetary recovery, and further

¹ This is not a case where the Court needs to approve a higher percentage in order to attract qualified counsel to participate as lead counsel. As the Court will remember, there were numerous counsel interested in serving on the PSC, and they either voluntarily withdrew from consideration or the Court elected not to appoint counsel based on the large number of counsel seeking appointment.

requests that any percentage of recovery be divided proportionately from the Plaintiff's portion of recovery and the plaintiff's attorneys' portion of the recovery.

B. All Costs Should be Paid From the Common Benefit Fund.

The PSC's Motion to Establish a Common Benefit Fund does not mention the original Joint Prosecution Agreement or the funds collected to be used as costs under the agreement. Thus, it is unclear as to whether the PSC intends to consider the amounts collected under the Joint Prosecution Agreement as part of the common benefit fund. Plaintiff Morrill objects to the private assessment mechanism that has been imposed by the law firms that make up the PSC. Specifically, as described above, the imposed assessment is based on a per law firm basis and not on a per case basis. Thus, a law firm which has a large number of cases pays substantially less per case than a law firm which has one or two cases. The private cost assessment agreement should be subject to review and approval of this Court since the members of the PSC (who have a fiduciary duty to all plaintiffs in this MDL) are also the originators and signatories to the agreement. Further, any cost assessment should be based on a per case basis and not on a per law firm basis. (See generally, Manual for Complex Lit. § 10.2 and Ch. 14 (4th ed.)). Last, the amounts contributed pursuant to the Joint Prosecution Agreement should be part of the common benefit fund.

CONCLUSION

Based upon the foregoing, Plaintiff Morrill respectfully requests that the Court deny the PSC's motion to the extent that it requests that the common benefit fund be comprised of an assessment of six percent (6%) of a plaintiff's gross monetary recovery; order that the common benefit fund be comprised of an assessment of three

percent (3%) of a plaintiff's gross monetary recovery and that any percentage of recovery be divided proportionately from the plaintiff's portion of recovery and the plaintiff's attorneys' portion of the recovery; and order that the payment of attorneys' fees and costs be paid from the common benefit fund, along with any further relief that the Court deems just and proper.

Respectfully submitted,

/s/ Amy L. Drushal

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via CM/ECF electronic system or by regular U.S. Mail to Barbara Litten, Esquire and Patricia Lowry, Esquire, 777 S. Flagler Dr., Suite 1900 W, West Palm Beach, Florida 33401-6144, this 4th day of August, 2008.

/s/ Amy L. Drushal

Attorney