IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Re: Inter-Op Hip Prosthesis Product Liability Litigation

MDL DOCKET NO. 01-CV-9000

Judge Kathleen O'Malley

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR ORDER ENJOINING RELATED LITIGATION PENDING FINAL APPROVAL OF CLASS SETTLEMENT

COMES NOW, STEVE LEONARD, CHARLES T. SILVEY, JOAN M. RHODAS, FRANCES P. DILLENBECK, JEAN JAMES, JACK P. WACHTEL, FRANCIS VANDERVEER, BETTY L. RUMPEL, THERESA WORKMAN, MARY M. LOUDEN, SIDNEY STEPHENS, JAMES DEAN SR., GERALD TOME SR., MARIE HEDGEPETH, DOMINIC DIROSA, ANNE KRIEGER, and ANNE FELICE, by and through their undersigned attorney, STEVEN C. RUTH of BELTZ RUTH MAGAZINE & NEWMAN, P.A., hereby file this Plaintiffs Opposition to Defendant's Motion for Order Enjoining Related Litigation Pending Final Approval of Class Settlement, and state:

Plaintiffs herein are Florida citizens who previously filed individual claims for personal injury against Defendants in state court in Florida, alleging injuries suffered from surgical implantation of defective hip replacements manufactured by Defendants. Plaintiffs appear herein for the limited purpose of objecting to Defendant's motion to stay their state court cases. Under the laws and public policy of Florida, which protect the rights of persons who suffer serious ill health or advanced age, each of the Plaintiffs are entitled to receive an expedited trial setting.

Defendants seek to halt these cases before trial begins, by requesting this Honorable Court to interfere with the jurisdiction of the state courts in Florida. In making this request, Defendants invite this Honorable Court to commit plain error. Indeed, Defendants cite only in a footnote the controlling federal statute, the Anti-Injunction Act, which prohibits the exact remedy they request. See, 28 U.S.C Sec. 2283. Defendants' attempt to bury in a footnote the controlling law which expressly prohibits the remedy they seek, raises suspicion not only as to the validity of the motion to enjoin all state court proceedings, but also as to the settlement as a whole. Clearly, caution mandates that this entire settlement proposal, presented as a fait accompli at the first scheduled multidistrict status conference, receive detailed scrutiny. See, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997) (settlement only class requires "heightened attention" by district court to the justifications for binding absent class members.) Particularly before this Court considers any order to stay previously filed state court proceedings, caution must be exercised to avoid a jurisdictional crisis.

I. Defendants' Request to Enjoin All State Court Proceedings Violates the Anti-Injunction Act.

Pursuant to the terms of the Anti-Injunction Act:

A court of the United States may not grant an injunction to stay proceedings in a State court expect as expressly authorized

by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C.S. 2283.

Because all federal court cases concerning defective Sulzer hip replacements have already been consolidated before this Honorable Court, Defendants' motion for injunction of "related litigation" necessarily applies only to state court claims. Notwithstanding Defendant's careful word choice, the Anti-Injunction is necessarily invoked by Defendants' motion.

The Sixth Circuit Court of Appeals clearly acknowledges the significance of the language and the principles underlying the Anti-Injunction Act. In Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978), the Sixth Circuit reversed an order entered by the United States District Court for the Eastern District of Michigan which purported to enjoin state court proceedings. The Court analyzed United States Supreme Court precedent interpreting the Anti-Injunction Act, and noted that: "The Supreme Court has repeatedly ruled that the ban [on staying state court proceedings] is absolute and that the language is to be taken literally." Id. at 533. The Sixth Circuit continued: "In no uncertain terms the Supreme Court in Atlantic Coast Line R.R. Co. v. Locomotive Engineers, 398 U.S. 281, 286-87, 90 S. Ct. 1739, 1743, 26 L. Ed. 2d 234 (1970) recognized the absolute character of the Anti-Injunction Act." Id. The Sixth Circuit quoted at length from the Atlantic Coast Line opinion, wherein Justice Black concluded:

Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion. Roth, 583 F.2d at 533, quoting Atlantic Coast, 398 U.S. at 296-97, 90 S. Ct. at 1748.

Similarly, the Sixth Circuit quoted the United States Supreme Court opinion in Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977):

Suffice it to say that the Act is an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act. The Act's purpose is to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court. Id. at 630-31, 97 S. Ct. at 2886.

A. An Injunction of State Court Personal Injury Claims is Not Expressly Authorized By Act of Congress.

Defendants appear to make no argument that an Act of Congress expressly authorizes this Court to enjoin state court personal injury claims regarding Sulzer Hips. As such, the first exception of the Anti-Injunction Act has no applicability herein. See, Roth, 583 F.2d at 534-35.

B. An Injunction of State Court Personal Injury Claims Is Not Necessary in Aid of This Court's Jurisdiction.

1. Protection of Plaintiffs ability to opt-out is required by the Seventh Amendment to the United States Constitution.

The second exception to the Anti-Injunction Act permits a federal court to enjoin previously filed stated court actions "when necessary in aid of its jurisdiction." This exception clearly does not apply herein. The class action presented to this Honorable Court, at what was to be its first multidistrict status conference, is an opt-out, or Rule 23(b)(3), class action. Thus potential members of the class have the option to choose not to participate, and may instead litigate their own claims. As such, this Court can not and will not assert jurisdiction over all claims of all plaintiffs who allege damages due to Sulzer hips. Individual actions in state court, or even individual claims in federal court, may proceed on behalf of any plaintiff who does not want to participate in the class action settlement.

All Plaintiffs have a procedural right to opt out pursuant to Rule 23(b)(3), as well as a Seventh Amendment right to trial by jury, which they cannot be compelled to sacrifice in a Rule 23(b)(3) opt out class settlement. Indeed, even in the context of a non-opt-out class action, the United States Supreme Court recognizes that the "certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent

class members." Ortiz, 527 U.S. at 845-46. Here, that concern for unconstitutional interference with Plaintiffs' right to trial by jury must only be heightened when Defendants seek to stay litigation in state court by Plaintiffs who have a clear right to opt-out of the federal court proceeding.

What Defendants are doing is obvious. They are fully aware that under the binding United States Supreme Court precedent in Ortiz, they cannot prevail in obtaining mandatory class certification under Rule 23(b)(1)(B) based on an alleged limited fund. Defendants therefore seek to achieve the same disruption of the absent class members' Seventh Amendment rights to a jury trial, by stipulating to a Rule 23(b)(3) opt-out class, and moving to simultaneously stay all pending state court cases. Such a scheme satisfies Defendants desire to avoid facing trial by jury, and suppresses evidence of the true value of Sulzer hip personal injury cases while this Honorable Court is considering the fairness, reasonableness and adequacy of the settlement. This strategy may promote the interests of Defendants stock holders, but it offends the United States Constitution, the law of the United States as reflected in the Anti-Injunction Act, and notions of comity. Defendants' scheme cannot be permitted to prevail.

2. The "in aid of its jurisdiction" exception is strictly construed.

Because Plaintiffs are free to opt out of this class action, this court has no need to protect its jurisdiction by staying state court claims. These claims are not within this court's jurisdiction, do not interfere with this court's jurisdiction, and need not be enjoined to aid this court's jurisdiction. The Sixth Circuit has carefully analyzed controlling United States Supreme Court analysis to hold that: "The Supreme Court has narrowly interpreted the "in aid of jurisdiction" exception, and a pending state suit must truly interfere with the federal court's jurisdiction." Roth, 583 F. 2d at 535. A pending personal injury suit in state court does not truly interfere with the personal injury suit of another plaintiff, or a class of plaintiffs, in federal court.

In Vendo, the United States Supreme Court relied upon its prior holding in Toucey v. New York Life Ins. Co., 314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 2d 100 (1945), to reject the contention that simultaneous in personam state actions interfere with the jurisdiction of a federal court in a suit involving the same subject matter. The Court reiterated that its holding from in Toucey, wherein:

we acknowledged the existence of a historical exception to the Anti-Injunction Act in cases where the federal court has obtained jurisdiction over res, prior to the state-court action. Although the "necessary in aid of" exception to §2283 may be

fairly read as incorporating this historical in rem exception, [citations omitted], the federal and state actions here are simply in personam. The traditional notion is that in personam actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to Sec. 2283 was intended to alter this balance. We have never viewed parallel in personam actions as interfering with the jurisdiction of either court; as we stated in Kline v. Burke Construction Co., 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226 (1922): "(A)n action brought to enforce (a personal liability) does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of principles of res judicata . . ."

3. Defendants' alleged "limited fund" for payment of personal injury claims does not constitute a res over which this Court exercises jurisdiction.

In their footnote analysis, Defendants attempt to whitewash the well established Supreme Court precedent that federal courts cannot enjoin state law personal injury claims, by claiming that the settlement proposal is akin to an in rem settlement. Unfortunately for Defendants, the United States Supreme Court has

clearly rejected this claim, in yet another case that Defendant fails to cite where relevant. Instead, Defendant buries in another footnote a disassociated citation to Ortiz v. Fibreboard Paper, 527 U.S. 815, 119 S. Ct. 2295 (1999), failing to point out to this Honorable Court that the Supreme Court squarely held in Ortiz that limited fund settlements do not qualify under the traditional, historic definition of an in rem action. The Supreme Court therefore rejected the attempt by the settling parties in Ortiz to certify a non opt-out, or Rule 23(b)(1)(B), limited fund class certification, because it held that the Defendants' alleged lack of sufficient funds to pay all potential claims did not constitute a res in the traditional sense sufficient to justify certification of a class action to protect the self defined limited fund.

As the United States Supreme Court recognized, "Classic limited fund class actions 'include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others." Ortiz, 527 U.S. at 834, quoting Newberg on Class Actions. The Supreme Court outlined many distinctive characteristics of classic limited funds, including: 1) that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all claims;" 2) "the whole of the inadequate fund was to be devoted to the overwhelming claims;" 3) "the claimants identified by a common

theory of recovery were treated equitably among themselves." Ortiz, 527 U.S. at 838-841.

Based on this analysis, the United States Supreme Court held that the alleged limited fund for payment of asbestos personal injury claims was insufficient to justify a mandatory class certification, because it did not qualify as a traditional res, and indeed the parties failed to demonstrate that the fund "was limited except by agreement of the parties." Obviously, if alleged limited funds do not qualify under Supreme Court precedent as traditional in rem proceedings sufficient to permit non-opt-out class certification, then logically a claim of limited funds cannot qualify as a basis to stay state court in persona proceedings when an opt out class settlement is negotiated.

The Sixth Circuit Court of Appeals, in In Re: Telectronics Pacing Systems, Inc., followed the Supreme Court's holding in Ortiz to overturn a mandatory class action settlement of personal injury claims in a multidistrict action pending in the United States District Court for the Southern District of Ohio. The Sixth Circuit relied upon Ortiz to hold:

applicants for certification of a limited fund theory under Rule 23(b)(1)(B) "must show that the fund is limited by more than the agreement of the parties." Ortiz, 119 S. Ct. at 2302. The Court reached this conclusion because such a mandatory class-action settlement runs head long into long-established principles of due process, the Seventh Amendment right to try by

jury and the 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not a designated party or to which he has not been made a party by service of process.

The Sixth Circuit rejected the parties contention that the settlement agreement proceeds constituted a limited fund, particularly where the foreign parent company was released from liability "without close scrutiny by the parties as to whether they might be liable." Obviously, this Court faces that exact situation herein, where the parent company has been fully released, without making any contribution by means of its assets, insurance or otherwise, to the settlement fund. Furthermore, no discovery has been taken by multidistrict counsel on any topic by any witness, much less discovery specifically aimed at determining liability of the foreign parent holding company. In Telectronics, the Sixth Circuit observed:

There seems to be no dispute that the parent corporations have sufficient funds to undertake individual litigation and to pay claims that might result. Their release, therefore, undermines the appropriateness of the settlement even more than the settlement in Orriz. Like the settlement in Orriz, the funds available are limited only agreement of the parties, not because the funds do not exist as a factual matter, and the amount contributed by the parents is small compared to their potential liability. Telectronics at 874.

In finding that the alleged limited assets available to pay claims did not constitute a limited fund, the Sixth Circuit held: Ortiz instructed the lower courts to look to the "traditional" or historical nature of certification under Rule 23(b)(1)(B) and stated that court's should not stray too far from these traditional models in determining if certification is suitable under Rule 23(b)(1)(B). Ortiz, 119 S. Ct. at 2311. ("The greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse. . . .") As emphasized in Ortiz, the limited fund concept in subsection (b)(1)(B) contemplates a fixed fund in the traditional sense: a fixed resource, such as a mineral deposit, or a fixed amount of money, such as a trust. The traditional and most common use of subsection (b)(1)(B) class actions is in "limited fund' cases where claims are aggregated against a res or preexisting fund insufficient to satisfy all claims. The Supreme Court noted that classic examples of such actions include actions by shareholders to declare a dividend or otherwise to declare their rights and actions charging a breach of trust by an indenture trustee or other fiduciary that requires an accounting or similar procedure to restore the subject of the trust. Ortiz, 119 S. Ct. at 2308-09. Id. at 877.

Defendants assert no basis to disregard this reasoning when the certification is sought under Rule 23(b)(3), as opposed to Rule 23(b)(1)(B), particularly when Defendants are attempting to achieve a stay of pending state opt-out cases. Moreover,

Defendants cannot distinguish the Sixth Circuit's holding that a purported limited fund personal injury settlement which excludes the assets of the parent corporation in the calculation of available assets, "fails to meet the first 'traditional characteristic set out by the Court in Ortiz." As held by the Sixth Circuit, "there are serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale." Id. at 878.

4. A Stay of Pending State Court Actions to Effectuate a Federal Class Action Violates the Anti-Injunction Act.

In addition to omitting any reference to the Sixth Circuit's opinion in Telectronics, Defendants also fail to bring to this Honorable Court's attention the holding of the United States Court of Appeals for the Eighth Circuit in In Re: Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982.) Following the exact Supreme Court precedents relied upon by the Sixth Circuit Court of Appeals in Roth, the Eighth Circuit held that a federal court order certifying a non-opt-out class action for persons injured in the collapse of the Kansas City Skywalk and prohibiting individual state court claims to proceed constituted an unlawful stay of previously filed state court claims. The Eighth Circuit rejected the settling parties' argument that the alleged limited assets of the Defendant to pay compensatory and punitive damages necessitated the stay "in aid of the court's jurisdiction." The Court held:

The class reasons that here, as in the interpleader situation, there is a limited fund and the class action is necessary to protect all claimants. We disagree. * * * The claim does not qualify as a limited fund which is a jurisdictional prerequisite for federal interpleader. Without the limited fund there is no analogy to an interpleader and no reason to treat the class action as an interpleader for purposes of the Anti-Injunction Act. Id., at 1182.

Indeed, consistent with the United States Supreme Court holding in Vendo, and consistent with the Sixth Circuit's analysis in Roth, the Eighth Circuit held: "In the present case the federal and state actions are in personam claims for compensatory and punitive damages. Therefore, based on the foregoing principles, we are compelled to hold that despite Judge Wright's legitimate concern for the efficient management of mass tort litigation, the class certification order must be vacated." Id. at 1183. This analysis anticipated by 17 years the United States Supreme Court holding in Ortiz, and squarely defeats Defendants' claim that this Court may properly stay previously scheduled state court trials.

C. An Injunction of Pending State Court Actions is Not Necessary to Protect or Effectuate this Court's Judgments.

Any order to certify a class is necessarily conditional and interlocutory, and does not constitute a final appealable order. (See, Rule 23(f), permitting discretionary appeals.) This

exception to the Anti-Injunction Act applies only to afford "federal courts the power to 'enjoin the relitigation in state court of issues that federal courts have fully and finally adjudicated.'" Roth, 583 F.2d at 536, quoting Lamb Enterprises, Inc. v. Kiroff, 549 F. 2d 1052, 1061 (6th Cir. 1977). Interlocutory procedural decisions do not constitute final appealable orders, because they resolve nothing on the merits. Id. As such, the Anti-Injunction Act prohibits federal courts from entering orders staying state court cases for the purpose of enforcing interlocutory, procedural orders. (See, e.g. Romstadt v. Apple Computer, Inc., 948 F. Supp. 701, 707 at n.8 (N.D. Ohio, 1996) (Judge Carr refused to enter stay of state court proceeding despite entry of conditional order of class certification, on the basis that the stay would violate the Anti-Injunction Act.)

II. Defendants' authorities under the All Writs Act are irrelevant.

Defendants disregard the well developed, controlling law under the Anti-Injunction Act to argue under that the All Writs Act permits this Court to take the unprecedented step of staying all pending state court personal injury actions concerning Sulzer hips. The cases relied upon by Defendants for this proposition are easily distinguishable.

First, Defendants place great reliance upon the district court opinion in Joint Eastern & Southern District Asbestos Litigation, 134 F.R.D. 32 (S.D.N.Y. 1990). That holding, however,

can only be considered bad law in light of the United States Supreme Court decision in Ortiz, and stands directly contrary to the Sixth Circuit's opinion in Telectronics, (which Defendants fail to cite.) Without doubt, the holding in Joint Eastern & Southern District Asbestos is based upon analogizing alleged limited funds of the Defendant to satisfy personal injury claims to a "res" over which the court asserts in rem jurisdiction. This analysis cannot withstand the holdings in Ortiz and Telectronics.

Similarly, Defendants rely extensively upon In Re Baldwin-United Corp., 770 F.2d 328 (2nd Cir. 1985.) In that opinion, the Second Circuit expressly held that "the Anti-Injunction Act is inapplicable here since the injunction below issued before any suits were commenced in state court." Id. at 335, citing Dombrowski v. Pfister, 380 U.S. 479, 484 n.2, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965). Because the injunction issued in Baldwin concerned only the filing of future claims in state court, the Anti-Injunction Act did not apply. Obviously, that logic does not apply herein, wherein the responding Florida plaintiffs, as well as hundreds of other plaintiffs across the United States, have already filed their state court claims. Moreover, not only did the state court litigation herein precede that which has occurred in this multidistrict forum, but also the only discovery conducted of Defendants to date has occurred in state court. This situation before the Court, therefore, is the total opposite of that presented in Baldwin, where the court observed that: "the states waited until the eve of settlement

approval to take any significant actions" against the Defendants. Id. at 337. To the contrary, Defendants have waited about a year, to dash to their first federal court hearing with a global plan designed to disrupt pending state court cases.

Finally, the litigation which the district court sought to stay in the Baldwin action was strictly redundant. Various states were asserting causes of action for state citizens who were already included in the class action settlement which had been approved in federal court. Thus the future state filings would be duplicative of the claims already resolved by the class action settlement. Id. at 336-37. No such risk exists here, where the persons whose cases the Defendants seek to stay have their own individual personal injury actions, which they seek to resolve through state court litigation, and assert their right to opt-out of the proposed settlement. Similarly, In Re Corrugated Container Antitrust Litigation, 659 F.2d 1332, 1333 (5th Cir. 1981), concerns duplicative actions filed by the same plaintiffs in state court.

III. Defendants cannot constitutionally compel Plaintiffs to participate in this class action settlement.

Because Defendants' main goal in this settlement is to insulate its parent company from liability, extinguish individual claims and avoid trial by jury, Defendants have orchestrated a settlement procedure which would, if approved, effectively compel all state court litigants to participate in the class action, and

thus stay all jury trials. Defendants have negotiated a provision of the Settlement, which states:

> Each Class Member wishing to exercise an Opt-Out Right must sign and submit timely written notice to the Claims Administrator. The Claims Administrator shall then submit all such notices to the Court . . .

Settlement Agreement at ¶ 3.6(a). The effect of this device is to prohibit class members from exercising their opt-out rights until after the settlement has been approved, and after a Claims Administrator has been appointed. Moreover, unless and until the Claims Administrator decides to tender the opt-outs to the Court, Defendants' proposal would cause Plaintiffs to be bound in limbo awaiting their exercise of their constitutional right to opt-out. No where does Rule 23(b)(3) contemplate such a procedure, nor does the analysis of Amchem, Ortiz or Telectronics support the concept that an individual can be forced to participate in that class action settlement structure in order to opt-out. To the contrary, Rule 23(c)(2) expressly contemplates that the court will notify the class member of the right to opt-out, and that "the court will exclude the member from the class." Forcing a plaintiff to tender an opt-out to the Court Administrator does the opposite; it compels the class member to participate in the class in order to even effectuate his or her right to opt-out. Obviously, this is but one more means by which Defendants seek to interfere with state court jurisdiction and delay jury trials. As such, this procedure is another affront to the Anti-Injunction

Act, and to the plaintiffs' constitutional right to trial by jury.

V. CONCLUSION

Plaintiffs respectfully request that this Honorable Court deny Defendants' motion to stay pending state court actions.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via FAX Machine this 24th day of August, 2001, to:

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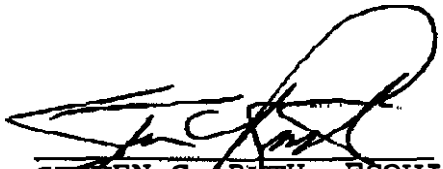

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