

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: BIOMET M2a MAGNUM)
HIP IMPLANT PRODUCT)
LIABILITY LITIGATION)
(MDL2391))
)
)
)
This Document Relates to All Cases)

CAUSE NO. 3:12-MD-2391-RLM-CAN
Judge Robert L. Miller, Jr.

PLAINTIFFS’ MOTION FOR AN ORDER ESTABLISHING A TIME AND EXPENSE REPORTING PROTOCOL AND ESTABLISHING A COMMON BENEFIT FUND

1. Plaintiffs, by and through Plaintiffs’ Steering Committee (“PSC”), hereby respectfully move the Court for entry of an Order establishing a Time and Expense Reporting Protocol and to ensure that any fees and expenses for common-benefit work for which counsel may later seek reimbursement from a Common Benefit Fund, if any such fund is established by this Court, are reasonable and necessary and non-duplicative.

2. The PSC seeks entry of this Order to satisfy their duties to the plaintiffs in this matter to ensure the efficient and effective pre-trial prosecution of their claims, ensure that time and resources expended by counsel in this matter inure to the common benefit of the plaintiffs, and protect against unreasonable and unnecessary fees and costs, reimbursement for which may be sought from a Common Benefit Fund established by this Court.

3. On October 2, 2012 pursuant to 29 U.S.C. § 1407 the Judicial Panel on Multidistrict Litigation (“JPML”) transferred for consolidated and coordinated pretrial proceedings cases involving claims by Plaintiffs injured as a result of alleged defective Biomet M2a Hip implants. Transfer Order, Oct., 2, 2012, MDL No. 2391; Doc. 124.

4. After this MDL was established by the JPML, this Court thereafter appointed certain plaintiffs' counsel to serve as Co-Lead Counsel, Plaintiffs' Liaison Counsel, Executive Committee Counsel and as members of the Steering Committee (hereafter collectively "PSC"). See Order Concerning Counsel Organizational Structure; Dec., 5, 2012.

5. Since their appointment, members of the PSC, and other plaintiffs counsel as directed by the PSC, have conducted common-benefit work including, but not limited to, engaging in regular meet and confers on discovery issues, meet and confers with Defendants on proposed case management orders, discovery issues, scheduling of 30(b)(6) depositions, conducting depositions, and drafting and filing Plaintiff and Defendant Fact Sheet. The PSC has conducted coordinated and related administrative functions and provided plaintiffs' attorneys representing plaintiffs in this litigation with regular updates regarding this Court's Orders and guidance regarding procedural issues. The PSC expects to continue to invest many resources in common-benefit work.

6. While the common benefit doctrine reflects the inherent right of every federal district judge to ensure equity in a variety of procedural circumstances, it has become a staple of effective case management in modern complex litigation, especially contemporary multidistrict litigation. The court in *Florida Everglades* gave practical implementation to court-appointed lead/liaison counsel and PSC structures by holding that because "lead counsel's services are in part for all parties with like interests and their lawyers," a multidistrict litigation transferee court is obligated to compensate counsel who developed and prosecuted a case from the recovery of others who reaped the benefit of that work and followed on its coat-tails.

In re Air Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006, 1019-21 at 1017 (5th Cir. 1977). Thus, under the common benefit doctrine, multidistrict transferee courts

are empowered to require that fees be equitably shared in complex civil litigation. See, e.g. *Id.* at 1016 (“We hold that the district court had the power to direct that the Committee and its counsel be compensated and that requiring the payment come from other [non-member] attorneys was permissible.”); *Smiley v. Sincoff*, 958 F.2d 498, 501 (2d Cir. 1992) (“District courts have exercised this power to establish fee structures designed to compensate committee members for their work on behalf of all plaintiffs involved in consolidated litigation.”).

7. The Manual for Complex Litigation (4th ed. 2004) (the “Manual 4th”), emphasizes that, together with an MDL court’s power and obligation to appoint responsible counsel, comes the power and obligation to ensure that counsel who have undertaken core work on the litigation, particularly court-appointed counsel, receive compensation, including from later-filed (or unfiled) cases and settlements that take advantage of and piggy-back on their work. The *Manual 4th* recognizes and endorses the hold back mechanism as follows: “Class counsel generally have the benefit of the common fund doctrine to support payment for their efforts on behalf of the class or consolidated litigants. MDL judges generally issue orders directing that defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.” *Id.* § 20.312; see also *id.* §§ 11.211, 14.211, 14.215, 22.927.

8. Entry now of an Order establishing a protocol governing permissible common benefit time and expenses invested in this matter and requiring periodic reporting by plaintiffs’ counsel conducting such common-benefit work will help ensure only reasonable and necessary fees and costs inuring to the benefit of all plaintiffs are incurred. Establishing such guidelines early in the course of this litigation will help ensure that staffing levels for common-benefit work are appropriate and common-benefit time and expenses are reasonable, and will reduce the risk

of later conflict over fees and expenses. See *Manuel for Complex Litigation (Fourth)* §§ 14.242, 14.213 (2004). Further, imposing record-keeping procedures and requiring the submission of periodic reports “encourages lawyers to maintain records adequate for the Court’s purposes,” and facilitates Court review of later-submitted fee petitions, if any. See *id.* §§ 14.212-214.

9. Accordingly, the Proposed Order requires all counsel conducting common-benefit work to maintain contemporaneous and detailed time and expense records in a specific electronic format. See *id.* § 14.213. (recommending that time keeping be addressed early in the case and that contemporaneous records identifying the activity and nature of work be required, along with the use of computer programs to facilitate analysis and agreed-on forms of summaries). Such records must be submitted quarterly to the PSC-designated attorney and shall be subject to further review by a Court-appointed auditor (to be proposed in a later order) for compliance with guidelines of the time and expense reporting protocol.

10. The Proposed Order delineates compensable common benefit time categories, such as time spent conducting discovery, in motions practice, pursuing organizational functions, preparing for and conducting trial, and related litigation functions. To ensure common benefit fees are reasonable, compensable categories exclude, inter alia, time spent not authorized by the PSC, time spent on individual client cases, time spent reading and reviewing court documents unless necessary to conduct a compensable function and any duplicative time. Similarly, the Proposed Order limits compensable expenses to those necessary to carry out legitimate compensable work, and imposes limitations on both travel and non-travel expenses, such as limiting reimbursement for coach-class fare only and excluding most secretarial functions, to ensure only reasonable costs are reimbursed.

11. Such time and expense limitations are appropriate to ensure the appropriate level of staffing and expenses. See *id.*, § 14.212. (discussing guidelines regarding who may charge for discovery, court and trial time); § 14.216 (discussing limitations on expense categories).

12. Accordingly, other MDL courts have entered orders establishing similar time keeping and expense reporting protocols at early stages of the litigation. See e.g. Pretrial Order No. 9, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, No. 10-md-02179 (E.D. La. Oct. 8, 2010), ECF No. 508 (entered three months after transfer by the MDL panel); Mem. & Order, *In re: Oral Sodium Phosphate Solution-Based Prods. Liab. Action*, No. 1:09-SP-80000, MDL No. 2066 (N.D. Ohio Sept. 30, 2009), ECF No. 34 (entered three months after transfer and setting forth guidelines "in anticipation of the possibility that, at some time in the future, there may be applications . . . for payment of common benefit fees or expenses"); Pretrial Order No. 6, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-01657 (E.D. La. Apr. 8, 2005), ECF No. 245 (entered two months after transfer).

13. For the foregoing reasons, Plaintiffs respectfully request entry of the Proposed Order establishing a time and expense reporting protocol.

Dated: June 14, 2013

Respectfully Submitted,

/s/Robert T. Dassow

Robert T. Dassow, #15145-64
HOVDE DASSOW + DEETS, LLC
201 W. 103rd Street, Suite 500
Indianapolis, IN 46290
Tel: (317) 818-3100
Fax: (317) 818-3111

Liaison Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on June 14, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which provided electronic service upon all counsel of record.

/s/Robert T. Dassow
Robert T. Dassow, #15145-64