

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

Case No. 1:08-MD-01928-MIDDLEBROOKS/JOHNSON

IN RE TRASYLOL PRODUCTS)
LIABILITY LITIGATION – MDL-1928)

THIS DOCUMENT RELATES TO:)

ALL ACTIONS)

**DEFENDANTS’ RESPONSE AND OBJECTION TO
PLAINTIFFS’ MOTION TO ESTABLISH COMMON BENEFIT FUND**

As Defendants noted in their August 4, 2008, response to the Plaintiffs’ Steering Committee’s (“PSC”) motion, Defendants do not object to Plaintiffs’ proposed common benefit fund but have concerns about some of the details of the proposed Order. Since that filing the PSC and Defendants have resolved all of their disagreements about the fund except for one, namely, the certification requirement included in Part A(1)(e) of the revised PSC’s Proposed Order for Common Benefit Fund (“Proposed Order”), filed August 8, 2008. Specifically, Defendants object to providing information to the PSC regarding settlements with plaintiffs (if any) whose cases are not subject to common benefit fund assessments (“non-withholding cases”).

BACKGROUND

Plaintiffs’ proposed certification requirement interposes a cumbersome and confusing requirement on Defendants that creates a risk of interference with settlements of un-filed cases or those brought in state courts by lawyers not associated with this MDL, over which this Court would have no jurisdiction. Part A(1)(e) of Plaintiffs’ Proposed Order provides that, for cases being settled, “each month”—and prior to paying any settlement—Defendants must provide

Plaintiffs' Co-Lead Counsel with a "certification" that the common benefit fund order does *not* apply to the settling plaintiff and her counsel. If Plaintiffs' Co-Lead Counsel objects to the certification on any grounds within five business days, Defendants are prohibited from "making any payment to the plaintiff or her counsel until the parties resolve the objection or the matter is disposed of by the Court upon motion of any party." In sum, Defendants would be required to notify the PSC of each settlement of a non-MDL, non-withholding case, "certify" that it is a non-withholding case, and wait a week before consummating the settlement. If the PSC objects, Defendants may not pay any settlement funds to the settling plaintiff for an indefinite period until the PSC's objection is finally resolved.

Defendants do not object to providing the PSC with information about cases in which they *are* withholding funds pursuant to a common benefit fund order, even if those cases are non-MDL cases. But for non-MDL, *non-withholding* cases, Defendants' notice obligations should be limited to providing a report to a neutral party – for example, to the Court, under seal, for in camera inspection.¹

THE PROBLEM

Defendants do not dispute that the PSC may be entitled to be paid by state or federal court plaintiffs (or perhaps even plaintiffs who have not filed in any court) and who use the PSC's work product. But that does not empower this Court to extend its jurisdiction over parties not before it to enforce the PSC's claim. The certification procedure proposed by the PSC would do exactly that and creates the possibility of a substantial burden on this Court's docket while also prejudicing Defendants' ability to resolve cases.

¹ As set forth in more detail below, Defendants would be willing to provide such an in camera report to the Court on a quarterly basis, listing for each settled non-withholding case the names of plaintiffs and/or persons alleged to have received Trasyolol®, as well as their lawyers.

A compulsory holding period for settlements in non-withholding cases presumes that Defendants will not abide by the common benefit fund order and could chill and delay settlement in non-withholding cases. As Part A(1)(e) of the proposed common benefit fund order acknowledges, details related to settlements are “highly confidential”—yet the “certification” proposed by the PSC would disclose the fact of settlement and may lead to further disclosure of confidential and sensitive information to the PSC that competitor lawyers may deem inappropriate to disclose. That alone could discourage and delay settlements.

The proposed certification requirement would also burden this Court with disputes involving plaintiffs who are otherwise not before it. The Proposed Order provides that this Court would be required to resolve the PSC’s objections to any non-withholding settlements, regardless of the matter’s original forum. Defendants would be prohibited from making “any payment”—holding back not just the withholding percentage, but the entire settlement amount—until the PSC objection is resolved. If Defendants have an enforceable settlement agreement with a non-MDL, non-withholding plaintiff, they effectively would be forced to interplead the PSC and the settling counsel and plaintiff in the non-withholding case.

In addition to the practical issues that Part A(1)(e) may pose for the Court and Defendants, the provision also purports to extend the limited federal court jurisdiction. While the Defendants and the PSC are subject to this Court’s jurisdiction and to whatever common benefit fund order is entered, non-MDL, non-withholding plaintiffs are not. “Claimants who have not sued and plaintiffs in state and untransferred federal cases have not voluntarily entered the litigation before the district court nor have they been brought in by process. The district court simply has no power to extend the obligations of its order to them.” *In re Showa Denko K.K. L-Tryptophan Prod. Liab. Litig.*, 953 F.2d 162, 166 (4th Cir. 1992) (striking provisions of

MDL common benefit fund order applicable to such claimants and non-MDL plaintiffs). *See also In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 664 (E.D. Pa. 2003) (“As in any other case, a transferee court’s jurisdiction is limited to cases and controversies between persons who are properly parties to the cases transferred, and any attempt without service of process to reach others who are unrelated is beyond the court’s power.”); *In re Baycol Prods. Litig.*, 2004 WL 1058105, *2-3 (D. Minn. May 3, 2004) (adopting *Showa Denko* and *Linerboard* on this issue).

THE SOLUTION

Defendants suggest that, if the Court creates any tracking mechanism for Common Benefit Fund withholding, it should mirror the approach used in the *Baycol* MDL. There, defendants submitted periodic reports to the Court for in camera inspection. *See In re Baycol Prods. Litig.*, MDL No. 1431, PTO 53 ¶ 11 (D. Minn. Nov. 25, 2002) (attached hereto as Ex. A). Such an approach allows for neutral party verification that withholding is occurring in appropriate cases, but would avoid creating the strong potential for settlement delays and ancillary Common Benefit Fund-related litigation inherent in the current draft Proposed Order.

Accordingly, Defendants propose the following language for Part A(1)(e) (revisions from the current Proposed Order are underlined):

Defendants shall maintain detailed records which identify the plaintiffs and plaintiffs’ lawyers names, current address, e-mail address, and telephone numbers, civil actions or other identifying numbers, amount of deposit, date of deposit, identification of the parties contributing to the amount deposited (and any allocation if more than one contribution is being made) and other information that may be required by the circumstances for all cases within the categories in paragraph 1. All such records shall be maintained as highly confidential material and the only persons with access to such records shall be the Court, the CPA, the defendants and any other person this Court orders should be given access. Defendants shall provide quarterly to Plaintiffs Lead Counsel the names of all lawyers whose cases are subject to withholding that quarter. Defendants shall

also provide quarterly under seal to the Court, or any magistrate judge, Special Master, or other Court personnel the Court may designate to act in its place, for in camera inspection the names of the plaintiffs or claimants and their lawyers who have settled cases in that quarter that are not subject to withholding.

CONCLUSION

The Court should revise Part A(1)(e) of the PSC's motion for a Common Benefit Fund Order to include the proposed text above, or, alternatively, the Court should deny without prejudice the PSC's motion for a Common Benefit Fund Order and direct the PSC to submit a revised draft order that responds to the issues raised in this response.

DATED: August 18, 2008

Respectfully submitted,

/s/ Barbara Bolton Litten

Patricia E. Lowry (Florida Bar No. 332569)

Email: plowry@ssd.com

Barbara Bolton Litten (Florida Bar No. 91642)

Email: blitten@ssd.com

SQUIRE, SANDERS & DEMPSEY L.L.P.

1900 Phillips Point West

777 South Flagler Drive

West Palm Beach, FL 33401-6198

Telephone: 561-650-7120

Facsimile: 561-655-1509

*Attorneys for Defendants Bayer HealthCare
Pharmaceuticals, Inc., Bayer Corporation,
Bayer HealthCare LLC, Bayer AG, and Bayer
HealthCare AG*

CERTIFICATE OF SERVICE

I certify that on August 18, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ *Barbara Bolton Litten*
Barbara Bolton Litten

SERVICE LIST

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Attorneys for Plaintiffs:

James R. Ronca
Anapol, Schwartz, Weiss, Cohan, Feldman &
Smalley, PC
1710 Spruce Street
Philadelphia, PA 19103
Email: jronca@anapolschwartz.com

Scott Love
Fleming & Associates, LLP
1330 Post Oak Blvd., Suite 3030
Houston, TX 77056
Email: scott_love@flaming-law.com

Theodore Babbitt
Joseph Osborne
Babbitt, Johnson, Osborne & LeClainche, P.A.
1450 Centrepark Blvd., Suite 100
West Palm Beach, FL 33401
Email: tedbabbitt@babbitt-johnson.com
JAOsborne@Babbitt-Johnson.com