

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE KUGEL MESH HERNIA PATCH
PRODUCTS LIABILITY LITIGATION

No. 07-md-1842-ML
This document relates to
all actions.

MEMORANDUM AND ORDER

This matter is before the Court as part of a multi-district litigation concerning alleged defective medical hernia repair patches manufactured, sold, and distributed by Defendants. The members of the Plaintiffs' Steering Committee move this Court for entry of an assessment order. The proposed assessment order will establish a common benefit fund ("fund") to compensate and reimburse attorneys for the services performed and expenses incurred for the common benefit of all plaintiffs.

The order proposes to establish the fund by levying a 12% assessment (8% for attorney fees and 4% for costs) on plaintiffs who obtain a (1) monetary recovery, (2) separately negotiated payment, or, (3) a combination of both. See Proposed Amended Order § 1 A. Defendants have not objected to the entry of the proposed assessment order. **A group of forty-three individual plaintiffs, represented by the Johnson Law Firm of Fort Worth, Texas, ("Johnson Plaintiffs")** object, in part, to the entry of the proposed assessment order.

I. Background

As part of the multi-district litigation, there are approximately 1,300 individual cases

pending before this Court. Similarly, there are approximately 1,000 cases pending in the Rhode Island Superior Court. See *In re All Individual Kugel Mesh Cases*, Master Docket No. PC-2008-9999 (Rhode Island Superior Court August 11, 2009). Those cases have been assigned to one Rhode Island Superior Court Judge for state multi-case management. To ensure consistency and coordination where appropriate, this Court and the State Court have communicated concerning common issues. In that vein, the Plaintiffs' Steering Committees in both forums have proposed substantially similar assessment orders. **On August 11, 2009, the Rhode Island Superior Court granted the Plaintiffs' Steering Committee's motion to enter the assessment order.**¹

II. Analysis

The Johnson Plaintiffs object to entry of the proposed assessment order on two grounds.² The Johnson Plaintiffs first argue that the 12% proposed assessment is excessive. In addition, they argue that certain provisions of the proposed order are beyond this Court's authority.

The Johnson Plaintiffs contend that the proposed 12% assessment is excessive and that an assessment in the 4-6% range is a more reasonable assessment. The Johnson Plaintiffs made a similar argument in state court. This Court need not duplicate the work of the Rhode Island Superior Court. It is within this Court's discretion "whether to award attorney's fees under an equitable doctrine such as the common fund doctrine." *Byrtus v. Spang & Co.*, 203 F.3d 238,

¹The Johnson Law Firm represents approximately sixty individual plaintiffs in the state court action. In re *All Individual Kugel Mesh Cases*, Master Docket No. PC-2008-9999 (Rhode Island Superior Court August 11, 2009). The Johnson Law Firm Plaintiffs also objected to the entry of the assessment order in state court. *Id.*

²The Johnson Plaintiffs initially objected to the proposed assessment order on three grounds, however, during oral argument, counsel for the Johnson Plaintiffs waived the argument that certain sections of the proposed order violated ethical standards.

244 (3rd Cir. 2000). In a well-reasoned decision, the Rhode Island Superior Court rejected the argument that the 12% withholding was unreasonable and this Court incorporates by reference the Superior Court's rationale supporting its decision. See *In re All Individual Kugel Mesh Cases*, Master Docket No. PC-2008-9999 (Rhode Island Superior Court August 11, 2009). This Court, like the Rhode Island Superior Court, notes that the 12% assessment, at this stage, is merely "a holdback, [or withholding] not a levy." *In re Zyprexa Products Liability Litigation*, 467 F. Supp. 2d 256, 266 (E.D.N.Y. 2006). This Court retains the authority to control disbursements from the fund. See § 4 D Proposed Amended Order ("[n]o amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may deem just and proper under the circumstances"). In addition, if the fund exceeds the total of all court-approved costs and fees, the Court may order a refund to all those who have contributed to the fund. *Id.*, at § 4 E. This Court concludes that a 12% assessment is reasonable under the circumstances.

The proposed order also provides that for

all cases in which a settlement was or is entered into, or a judgement was or is paid, defendants are directed to withhold this assessment from any amounts paid to a plaintiff and [his or] her counsel in the following cases:

- i. any case pending in the MDL, including cases remanded from this MDL to transferor court for purposes of trial;
- ii. any state court or unfiled case where the plaintiff's attorney and/or his or her firm has executed an agreement to cooperate with the MDL and to pay the assessment;
- iii. any case in which a member of the MDL [Plaintiffs' Steering Committee] has a fee interest, whether or not that case is filed or unfiled in state or federal court; and

- iv. any case in which counsel receives a substantial benefit from the work of the [Plaintiffs' Steering Committee] or receives assistance from the [Plaintiffs' Steering Committee] which provided a direct benefit to counsel, whether or not the case is filed or unfiled in state or federal court.

Proposed Amended Order § 2 C i - iv. The Johnson Plaintiffs object to subsections ii and iv as beyond this Court's jurisdiction to the extent the sections apply to cases that are not filed in this multi district litigation.³ Section 2 C ii of the proposed order applies to any state court case or any unfiled case where the plaintiff's attorney or firm "has executed an agreement . . . to pay the assessment[.]" Id. Thus, this provision applies to those individuals and firms that have voluntarily entered into a contractual agreement to contribute to the fund. See generally *Durfee v. Ocean State Steel, Inc.*, 636 A.2d 698, 703 (R.I. 1994) (contracting parties can make "as good a deal or as bad a deal as they see fit") (internal quotation marks and citation omitted). The provision of the proposed order is predicated on agreements voluntarily negotiated between plaintiffs, their attorneys and the Plaintiffs' Steering Committee. This Court's involvement is limited to ordering Defendants in such cases to withhold the 12% assessment agreed to by the parties. As such, this Court may well exercise its jurisdiction over the multi-district Defendants.

The Johnson Plaintiffs' challenge to § 2 C iv, however, does raise a concern. As noted, § 2 C iv directs the Defendants to withhold the assessment from "any case in which counsel receives a substantial benefit from the work of the [Plaintiffs' Steering Committee] or receives assistance from the [Plaintiffs' Steering Committee] which provided a direct benefit to counsel

³This argument was not raised in the state court matter. See *In re All Individual Kugel Mesh Cases*, Master Docket No. PC-2008-9999 slip op. at 4-5 (Rhode Island Superior Court August 11, 2009).

whether or not the case is filed or unfiled in state or federal court.” Proposed Amended Order § 2 C vi (emphasis added). This provision raises a question concerning the power of this Court to enter an order reaching nonparties who have not otherwise voluntarily agreed to contribute to the fund. See generally *In re Showa Denko K.K. L-Tryptophan Products Liability Litigation - II*, 953 F.2d 162 (4th Cir. 1992). “As in any other case, a transferee court’s jurisdiction in multi-district litigation 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.” *Id.* at 165-66. The proposed order would compel Defendants to withhold 12% of any settlement or award from individuals who are not before this Court. “Claimants who have not sued and plaintiffs in state and untransferred federal cases have not voluntarily entered [this] litigation . . . nor have they been brought in by process. [This Court] simply has no power to extend the obligations of its order to them.” *Id.*, at 166. This Court finds that § 2 C vi of the proposed order would be an impermissible exercise of the Court’s jurisdictional authority in this multi-district litigation.

For these reasons, Plaintiffs’ motion for entry of the assessment order is granted in part and denied in part. Plaintiffs shall submit to the Court an assessment order for signature that is consistent with this order.

SO ORDERED


Mary M. Liu
Chief United States District Judge
November 19, 2009