

**IN THE UNITED STATES DISTRICT COURT
FOR THE 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

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

The Plaintiffs’ Steering Committee (“PSC”) files this response in opposition to the objection raised in the August 18, 2008 filing from Defendants. As Defendants correctly stated in their submission, since the PSC’s filing of its Motion to Establish a Common Benefit Fund, the parties have resolved all disagreements on this issue with the exception of one. The remaining disagreement involves Part A(1)(e) of the revised PSC’s Proposed Order for Common Benefit Fund (“Proposed Order”) filed on August 8, 2008. This full text of this portion of the Proposed Order is below:

- (e) 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 Co-Lead Counsel the names of all lawyers whose cases are subject to withholding that quarter. Defendants shall also provide to Plaintiffs Co-Lead Counsel, each month, a certification that this Order does not apply to a particular case prior to payment of any

amount to a plaintiff and her counsel in any such case. Plaintiffs' Co-Lead Counsel shall have five (5) business days to object to the certification in writing to defendants, at which time defendant shall be 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.

Defendants' only remaining objection to the current form of the Proposed Order involves the underlined portion above referred to in their August 18, 2008 submission as the "certification requirement." Defendants object to the "certification requirement" to the extent that it requires them to "provid[e] information to the PSC regarding settlements with plaintiffs (if any) whose cases are not subject to common benefit fund assessments ("non-withholding cases")." See Defendants' Response and Objection to Plaintiffs' Motion to Establish Common Benefit Fund at page 1. Defendants insist that the certification requirement in the Proposed Order would extend this Court's power beyond the limits of federal jurisdiction and that it would create a "strong potential for settlement delays and ancillary Common Benefit Fund-related litigation." *Id.* at 4.

PSC'S PROPOSAL ENSURES FAIRNESS

The certification provision outlined in the PSC's Proposed Order is an essential tracking mechanism to ensure all plaintiffs who take advantage of common work product pay their fair share. First, the reporting requirements placed on Defendants are minimal and will not impose any undue hardship as they are likely tracking all filed cases in the first instance. Moreover, the challenge provision allows each objecting plaintiff an opportunity to argue why they may not be subject to the common benefit fund order. Finally, the certification requirement ensures that the PSC will be able to adequately monitor all settled cases to ensure that each case which benefits from common work product pays an appropriate assessment.

If a disagreement arises as to the applicability of the common benefit order to a particular settling plaintiff, then the Court would be left to determine whether or not the case is subject to assessment upon motion by any party. The Court will have two courses of action in the event of receiving such a motion by any party: 1) making a determination that the settling plaintiff's case is subject to the common benefit order; or 2) determining that the settling plaintiff's case is not subject to the common benefit order. There is little or no prejudice to settling plaintiffs or Bayer under this Proposed Order. The five (5) day objection period provided in the Proposed Order would not cause any significant settlement delays and, if anything, the Proposed Order seeks to avoid ancillary Common Benefit Fund-related litigation. The ultimate determination of whether the common benefit assessment applies lies with the Court.

However, significant prejudice will result if this "certification provision" is not approved by the Court. First, omitting the provision would permit Defendants and settling plaintiffs an opportunity to unilaterally make a determination as to whether the settling plaintiff's claim is subject to the withholding of funds under the common benefit order. Moreover, there would be no incentive for settling plaintiffs to subject themselves to the provisions of the common benefit order voluntarily when the order would reduce their recovery in the case. Similarly, there is no incentive for Defendants to establish whether a settling plaintiffs are subject to the common benefit order since the assessment of common benefit fees has no effect (or only an adverse effect) on the amount of settlement funds they pay in a particular case. The certification provision ensures that the PSC and other MDL plaintiffs, as the interested parties, will have an opportunity to monitor whether settling plaintiffs are attempting to circumvent the provisions of the common benefit order.

DEFENDANT'S PROPOSAL IS UNWORKABLE

Defendants offer a proposed solution to this problem in their August 18, 2008 submission to the Court. Their solution is to eliminate the certification provision in favor of "neutral party verification that withholding is occurring in appropriate cases." The Defendants propose changing the current certification provision language Part A(1)(e) of the Proposed Common Benefit Fund Order to the following:

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 of the names of plaintiffs or claimants and their lawyers who have settled cases in that quarter that are not subject to withholding.

Id. at pp. 4-5.

However, this proposal is unworkable for several reasons. First, this proposal again leaves the determination of what cases are eligible for withholding for the common benefit fund to the sole discretion of the Defendants and the settling plaintiffs. As a result, the PSC is prevented from making arguments that a given settling plaintiff should be subject to assessment by the common benefit fund. Similarly, the PSC would be precluded from investigating whether the settling plaintiff's counsel availed his or herself of the work product of the PSC in reaching settlement with Defendants.

In addition, under the Defendants' proposed solution, by the time a neutral party would have chance to view the names of settling plaintiffs, the settlement would already be finalized and funds would have been exchanged between the parties. From the perspective of the PSC, the damage already will have been done. If at some point it was later determined that one of the settling plaintiffs should have paid into the common benefit fund, then the PSC would be forced

to engage in the costly process of attempting to recover the common benefit contributions that it was due. Such a series of events would be far more prejudicial to the PSC and all MDL plaintiffs than any potential prejudice that could result from having settling plaintiffs and Defendants submit to the certification process outlined in the language Part A(1)(e) of the current form of the Proposed Common Benefit Fund Order.

Conclusion

As an interested party, the PSC is entitled know when plaintiffs who claim that they are not subject to common benefit assessment reach settlements with the Defendants. There is no incentive for settling plaintiffs to voluntarily submit themselves to the common benefit assessment. Similarly, there is more of an incentive for Defendants to err on the side of under-inclusion rather than over-inclusion into the common benefit assessment because they may be able to settle cases at a discount if plaintiffs do not have to subject themselves to the assessment. As a result, the PSC contends that best method for ensuring that the common benefit assessment applies to all appropriate cases is to keep the current formulation of the Proposed Order specifically with regard to the certification provision endorsed by the PSC.

DATED: August 28th, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 28th, 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 or records 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 Filing.

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