IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

	:	**MDL DOCKET NO. 4:03-CV-1507-BRW**
IN RE:	:	
PREMPRO PRODUCTS LIABILITY	:	
LITIGATION	:	**ALL CASES**

ORDER

Pending is Plaintiffs' Motion to Enforce Practice and Procedure Order No. 6 and Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction (Doc. No. 3302). Defendants and counsel representing the State of Nevada ("Nevada") have responded.[1] Plaintiffs replied.[2] For the reasons set out below, Plaintiffs' Motion is GRANTED.

I. BACKGROUND

A. Time Line

On November 18, 2008, the State of Nevada (through its Attorney Generals' Office and privately retained counsel Peter Wetherall, Zoe Littlepage, and Rainey Booth)[3] sued Wyeth under "the Nevada Deceptive Trade Practices Act . . . as well as other common law claims to protect consumers, physicians, and Defendants' competitors from unlawful, unfair, and deceptive business practices."[4] On October 30, 2014, the state court entered an order[5] approving a settlement agreement in which Wyeth agreed to make an $8 million "charitable contribution"

[1]Doc. Nos. 3305, 3306.

[2]Doc. No. 3307.

[3]Nevada hired Mr. Wetherall who associated Ms. Littlepage and Mr. Booth.

[4]Doc. No. 3302-6.

[5]Doc. No. 3302-1.

to the Nevada Attorney General to distribute and pay $1.5 million to "offset the State's investigation costs."[6]

In the settlement agreement and order, both the parties and state-court judge declared that Practice and Procedure Order Number 6 ("PPO 6") did not apply to the Nevada case. The issue of whether PPO 6 applied appears to have been brewing for some time, since it was mentioned in an October 3, 2014 letter from Ms. Littlepage to her co-counsel in Nevada. While simultaneously claiming she had a conflict of interest (since she is Lead Counsel in MDL-1507), Ms. Littlepage noted the following: "While this action is not a personal injury case and is thus not specifically identified in PPO 6, MDL common benefit work was utilized in the prosecution of this matter as well as extensive Nevada specific discovery."[7] No one from Plaintiffs' Steering Committee ("PSC") appears to have been aware of the issue -- Ms. Littlepage indicated that she would notify the PSC members. Twenty-seven days later, on October 30, 2014 -- the same day the Nevada judge approved the settlement -- Ms. Littlepage emailed her colleagues on the PSC apprising them of the potential issue.[8]

B. PPO 6

In January 2005, Plaintiffs in MDL-1507 filed a Motion for "Practice and Procedure Order No. 6: Establishment of Plaintiff's Personal Injury Litigation Expense Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for Common Benefits."[9] Plaintiffs argued PPO 6 was "necessary to establish guidelines for

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[6]Doc. No. 3301-2.

[7]Doc. No. 3301-3.

[8]*Id.*

[9]Doc. No. 465.

equitable sharing of costs and work associated with the creation and use of MDL Plaintiffs' Personal Injury Common Benefit Work Product."[10] Additionally, Plaintiffs claimed that it was "necessary to create a mechanism to obtain an assessment from each resolved personal injury case in the MDL (and any state court case where plaintiff's counsel has purchased the MDL Plaintiff's Personal Injury Common Benefit Work Product) to reimburse the MDL personal injury attorneys . . . for expenses and to establish a fund for awarding fees to Plaintiffs' personal injury counsel for creating common benefit work product."[11]

Paragraph 7, the relevant portions of PPO-6, reads:

> Any hormone therapy plaintiff counsel may obtain the PSC Personal Injury Counsel's Common Benefit Resource Materials by executing an Agreement substantially in the form attached to this order as "Exhibit 1" . . . and becoming an Associated State Court Personal Injury Counsel. No state court litigant will be subject to a tax, fee, assessment or other charge imposed by this Court except upon execution of an express written agreement with the PSC to share the PSC's Common Benefit Resource Materials as provided in this Order.

According to PPO 6, in cases where lawyers used MDL-1507 common benefit work and "obtain[ed] a personal injury recovery in any state or federal forum," the recovery was subject to an "assessment." The assessment was 5% of the gross amount in federal court cases and 3% in state court cases.

II. DISCUSSION

A. What Does "Personal Injury" Mean in MDL-1507?

The dispute over the application of PPO 6 stems from its use of the phrase "personal injury." Nevada (along with Defendants) contends that these words preclude the PSC from getting the 3% assessment.

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[10] *Id.*

[11] Doc. No. 531.

In 2004, when MDL-1507 was in its infancy, a split developed among Plaintiffs' counsel, which essentially came down to timing,[12] money,[13] and control.[14] The lawyers pursuing a nationwide class action wanted to focus on discovery related to its Rule 23 obligations and the other lawyers wanted proceed with merits-based discovery. The two groups started referring to themselves as "Class Counsel" and "Personal Injury Counsel." "Class Counsel" did not want to spend the time or money doing merits-based discovery until it made it past the class-certification stage. However, the Rule 23 hurdle was not present for "Personal Injury Counsel" and they were ready to dive into merits-based discovery, which would involve considerable time and expense. This issue came to a head at a February 12, 2004 *ex parte* hearing where Plaintiffs' counsel noted that the rift was over "control of this litigation as it relates to personal injury plaintiff, control of the money, control of the decision-making, and control of assigning work."[15] Personal Injury Counsel argued:

> Your Honor, [Class Counsel's] obligation at this point is to certify a class, and in general, the substantive allegations of a complaint are accepted as true at the class certification stage. We don't -- we as personal injury lawyers have to get to the

[12]Class Counsel: "And what was contemplated . . . originally was a focused approach on dealing with class certification issues and an effort to get at a small volume of discovery." (Doc. No. 88).

[13]Personal Injury Counsel: "Because the class action lawyers have different needs, different goals, different obligations, they as a group were not willing to initially put up [$]50,000 and be on the hook for $2 to $3 million, which is what we know is coming, and that's perfectly reasonable and we don't challenge that." (Doc. No. 130).

[14]Class Counsel: "We do have common questions that we have to work together on, and just because they have personal injury claims and just because one lawyer might have a great number of personal injury claims doesn't mean that that provides a crowbar that exerts leverage and ousts the class lawyer from the control that they need over their claims." (Doc. No. 130).

[15]*Id.*

> merits and prove our case. So I don't think that most of [Class Counsel] want to go into that work right now at this level of commitment."[16]

The crux of that statement is "go into that work right now." In fact, Class Counsel echoed that timing was the issue; he argued:

> When we get certified [under Rule 23], we still have merits we have to do, and the merits that we are going to be doing are going to be well and done by the time we get there under the structure that's being proposed right now. And that, your Honor, is the essence of the problem.[17]

Again, this was March 2004, and when PPO 6 was entered in March 2005, the divide between "Class Counsel" and "Personal Injury Counsel" persisted.[18] With Class Counsel's reluctance to ante up to finance merits-based discovery or to concede any share of a potential class action settlement, the phrase "personal injury" was used in PPO 6. But, this is a distinction without any legal substance. If anything, "Class Counsel" was a reference to Mike Mills, *et al.* and "Personal Injury Counsel" was a reference to Ms. Littlepage, *et al.* This point is bolstered by the fact that the only Plaintiffs' counsel at the June 1, 2005 class certification hearing were Mr. Mills ("Lead Class Counsel"), Russell Marlin (Local Liaison Counsel), Eileen McGeever,[19] and Todd Hilton.[20] Ms. Littlepage and the other lawyers seeking merits-based discovery were absent, because the class certification was irrelevant to their cases.

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[16]Doc. No. 130.

[17]*Id.*

[18]Doc. No. 570.

[19]Ms. McGeever's *only* case in MDL-1507 was a proposed class action -- *Krueger v. Wyeth, Inc.*, No. 4:04-CV-00406-BRW (E.D. Ark.).

[20]Todd Hilton replaced Jan Helder, who was originally active with Mr. Mills as "Class Counsel." His only case in MDL-1507 was *Massimino v. Wyeth Company*, No. 4:03-CV-00551-BRW (E.D. Ark.).

Even Defendants noted very little distinction between the two groups. When Class Counsel wanted to have a different discovery tract than Personal Injury Counsel, Defendants objected and argued:

> MDL discovery focuses on liability and causation, and those issues are essentially identical for the class action and personal injury plaintiffs. Class Counsel and [Personal Injury] Counsel are seeking to prove that Wyeth is liable for the same reasons . . . [Both] seek to hold Wyeth liable for the same reasons: that it overstated the benefits of Prempro and understated the risks . . . ."[21]

Nationwide class certification was denied on August 30, 2005.[22] Other than a few issues involving Class Counsel's pursuit of class actions in California and West Virginia, which were remanded in early 2007, Class Counsel bailed out of MDL-1507.[23] With that, the need to use, and distinction between, "Class Counsel" and "Personal Injury Counsel" dissolved.[24]

I am concerned that none of this background was ever presented to the Nevada judge, since, it seems to me, the information is keenly relevant to the issue put before him. It comes down to this, "personal injury" was a reference to those cases and lawyers who were pursing merits-based discovery.

B. Need For PPO 6

The discovery obtained by Personal Injury Counsel over the course of this MDL was essential to the pursuit of <u>any</u> HRT claim against Defendants, whether the case was called a personal injury action or a class action. It is undisputed that once a plaintiff establishes a class,

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[21]Doc. No. 156.

[22]Doc. No. 768.

[23]Doc. Nos. 1198, 1199, 1328, 1335, 1336, 1399.

[24]For example, a Master Complaint was filed on December 1, 2004 and both the docket sheet and hand written note on the document reference "Personal Injury Plaintiffs." When an Amended Master Complaint was filed on November 24, 2008, there was no reference to "Personal Injury Plaintiffs." (Doc. Nos. 423, 1917).

she must prove the merits of her claim, which, in these cases, involved general and specific causation. The accumulation of causation experts, FDA experts, Defendants' internal documents, deposition, *etc.* was the focus of the PSC's actions for nearly a decade.

As mentioned earlier, PPO 6 was "necessary to establish guidelines for equitable sharing of costs and work associate with the creation and use of MDL Plaintiffs' Personal Injury Common Benefit Work Product."[25] The term "personal injury" simply referred to the merits-based discovery being undertaken by Ms. Littlepage, *et al.*, and was intended to remove Mr. Mills, *et al.* from involvement. Even Wyeth proclaimed that it had no objection to "the concept of the steering committee receiving compensation or there being a fund or their taxing the lawyers that benefit from the PSC's work."[26]

C. Nature of the Claims

Nevada's attempt to proclaim that it is not a "personal injury case" and avoid the 3% reduction under PPO 6 is not persuasive. As set out above, the use of "personal injury" in PPO 6 has no substantive meaning other than differentiating between Mr. Mill's camp and Ms. Littlepage's camp. Everyone involved at the time is aware of this fact.

Nevada's attempt to differentiate its case from any other case is unavailing. For example, the "General Allegations" in Nevada's complaint mirror complaints Mr. Wetherall filed in other HRT cases.[27] Moreover, the Master Complaint filed by "Personal Injury Plaintiffs" on December 1, 2004,[28] alleges "Violations of State Consumer Fraud Act," just as Nevada does in

[25]Doc. No. 531.

[26]Doc. No. 560.

[27]See *Davis v. Wyeth, Inc. et al.*, No. 4:08-CV-02879 (E.D. Ark. 2008), Doc. No. 1.

[28]Doc. No. 423.

its complaint four years later. Finally, the factual background and allegations in support of Nevada's claims are the same as those alleged by the "Personal Injury Plaintiffs" in the Master Complaint.

Additionally, in November 2008, Ms. Littlepage gave a presentation to the Nevada Attorney General that relied on the same history, science, discovery, and causes of action that are well known to this Court.[29] In each of the seven cases I presided over in the Eastern District of Arkansas, Plaintiffs made "personal injury" claims for fraud and misrepresentation because of intentional misrepresentation regarding advertising, labeling, marketing, and influence over doctors. These identical issues are raised in the Nevada complaint.

Though the Nevada case references Nevada-specific statutes (as one would expect), the essence of the case is the same as those pursued across the country. More importantly, as Ms. Littlepage has conceded, "MDL common benefit work was utilized in the prosecution of this matter . . . ."[30] Ms. Littlepage's comment that there was "extensive Nevada specific discovery" is irrelevant; that's likely the case for all cases that advanced in the litigation. The fact remains, the lawyers (who, as set out below, were bound by agreements in this Court) relied on common benefit work from MDL-1507 to pursue, and ultimately settle, the Nevada case.[31]

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[29]Misrepresentation of benefits of drugs (off-label promotion); minimization of risks from drugs; over-promotion; and deceptive trade practices. Doc. No. 3308. Though all of these claims may not have been an independent cause of action in each case, the allegations supporting the causes of action were part of the evidence in each case leading up to trial, if not during trial.

[30]Doc. No. 3302-3.

[31]*Id.*

D. Peter Wetherall

The State of Nevada retained Peter Wetherall in 2008 to assist in the prosecution of HRT claims against Wyeth.[32] However, Mr. Wetherall signed a Hormone Therapy Litigation Case Assessment Agreement on June 21, 2007. It reads, in part,

> This Agreement concerns all Hormone Therapy cases prosecuted by undersigned counsel and all cases in which such counsel's law firm has a financial interest either through representation or referral . . . . The assessment percentage will be deducted from the gross recovery before any contingent fees or costs are calculated: For all state court cases: 3% of the gross recovery.[33]

Nevada asserts that this agreement could not bind Nevada in its case because Mr. Wetherall "had no relationship with the State of Nevada or its Attorney General's Office, either contractually or informally in any capacity whatsoever until the Summer of 2008 . . . ."[34] This argument is without merit. Mr. Wetherall was bound by the agreement when he took on the Nevada case. The fact that this issue was not revealed to Nevada before it hired Mr. Wetherall is not relevant to the issue before the Court. The undisputed fact remains that Mr. Wetherall agreed that all HRT cases in which he was involved would be subject to a 3% deduction on the gross recovery.

E. Ms. Littlepage

In 2005, Defendants objected to being involved in the process of holding back the PPO 6 assessment because it didn't want to be involved in disputes when "some plaintiffs' lawyers . . . try to beat the system."[35] Interestingly, Defendants predicted this exact situation years ago; what

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[32]Doc. No. 3306.

[33]Doc. No. 3302-4 (emphasis added).

[34]Doc. No. 3306.

[35]Doc. No. 545.

Defendants did not predict was that Plaintiffs' Lead Counsel would be involved directly in "try[ing] to beat the system."

In light of the information now before me, Ms. Littlepage is removed as Lead Counsel as of October 30, 2014. It is apparent that, on this date, she put her Nevada interest before those of the PSC and MDL-1507. Mr. Walker is appointed Lead Counsel and Ms. Littlepage will remain a member of the Plaintiffs' Steering Committee.

CONCLUSION

As set out above, the Nevada case is subject to PPO 6. Additionally, the contractual obligations entered into by Nevada's counsel, Mr. Wetherall and Ms. Littlepage, subjected the Nevada case to a 3% assessment A party cannot be permitted to use MDL-1507 common benefit work, and then avoid the 3% assessment.

Accordingly, Plaintiffs' Motion to Enforce Practice and Procedure Order No. 6 and Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction (Doc. No. 3302) is GRANTED. The PSC is entitled to an 3% assessment from the gross recovery amount in the Nevada case.

Accordingly, Wyeth is directed to deposit 3% of the gross recovery ($285,000) from the Nevada case into the MDL-1507 Common Benefit Fee and Cost Trust Account.

IT IS SO ORDERED this 25th day of November, 2014.

/s/ Billy Roy Wilson
UNITED STATES DISTRICT COURT