

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

**IN RE: ORTHO EVRA PRODUCTS
LIABILITY LITIGATION**

N.D. Ohio Case No. 1:06-40000

MDL Docket No. 1742

This Document Relates To:

ALL CASES.

**Plaintiffs' Reply Memorandum in Support of
Plaintiffs' Motion for Third Amendment to
CMO No. 9**

I. Defendants lack standing to object to an increase in the assessment.

Plaintiffs respectfully submit that, at best, Defendants lack standing to object to the motion of Plaintiffs' Executive Committee to increase the assessment for common benefit attorneys' fees and expenses in the Ortho Evra Products Liability Litigation. At worst, Defendants have a strong interest in preventing the Plaintiffs from having adequate funding for common benefit expenses and fees, inasmuch as a disorganized and underfunded Plaintiffs' Steering Committee inures to the benefit of Defendants.¹ As such, Defendants' objection to Plaintiffs' motion to amend CMO 9 should be disregarded.

II. Significant work has been conducted by the PSC to obtain successful results, and significant work remains to resolve the pending cases.

Defendants' premise that they have happily and timely paid claims from anyone who submitted them is contrary to fact. As early as the first MDL status conference, Executive Committee members informed the Court that their submissions to Defendants

¹ As the Court will recall, Defendants opposed the initial assessment order also.

were being ignored.² Indeed, during the first year of the MDL, Defendants resolved cases almost exclusively with an attorney from Texas who had conducted significant discovery in state court prior to the MDL formation. Obviously, this decision represented a deliberate strategy by Defendants to remove a knowledgeable attorney from the Plaintiffs' group. Later, Defendants advised Plaintiff attorneys that they would not negotiate with any attorneys active in MDL discovery, apparently in an effort to discourage Plaintiffs' counsel from becoming knowledgeable about the facts of the case. Due to Defendants' refusal to discuss settlement with MDL attorneys, this Court ultimately had to instruct Defendants to negotiate with MDL Plaintiffs' Counsel.

But as this Court noted during the conference held on October 20, 2008, "settlement is not achieved by either plaintiffs or defendants in cases like this without a tremendous amount of effort beforehand in the -- in this case a lot of scientific study was undertaken, a lot of deposition work was completed, and it has borne fruit. The old saying that you get what you pay for certainly has borne fruit here and borne itself out that the effort put forth by the PSC and by the defendants has gotten us to this juncture." (October 20, 2008 Hearing Transcript at 7-8.) Clearly the results obtained by Plaintiffs to date, and the results they will obtain in the future, are directly related to the competence and dedication of Plaintiffs' counsel. Therefore, adequate funding of the Plaintiffs' Steering Committee is crucial to the continued success of this litigation.

III. The litigants whose cases remain must undertake the burden of financing their own cases.

At present, despite the hard work and best efforts of attorneys for both Plaintiffs and Defendants, work remains to be done to conclude this litigation. However, to the

² Mr. Parker advised the court as follows: "I have submitted packages of records approximately two months ago and haven't heard a word." (May 2, 2006 Hearing Transcript at 30.)

extent that work is conducted by Plaintiffs' counsel, it must be funded by the smaller group of litigants that remain. It is simply not equitable to Plaintiffs in settled cases to use money that the Court has allocated for payment of their own attorneys' fees and expenses as a resource to finance another person's litigation.³ Therefore Defendants' suggestion that the current CMO 9 deposits be considered as the source for financing future fees and costs should be rejected.

IV. Resolution of future Ortho Evra cases should not be tied to the United States Supreme Court opinion in *Levine v. Wyeth*.

Plaintiffs respectfully submit that some deadlines must be imposed to conclude this litigation. An indefinite date tied to a Supreme Court ruling provides no closure and no direction to this case. Over the past year, Plaintiffs have cooperated with Defendants and agreed to a "stand-down" on discovery and trial preparation in order to permit Defendants to focus their full resources on negotiations. Yet the "pre-label" change cases still are not concluded and all of the "post-label" change cases remain pending. In fact, since the status conference held on October 20, 2008, it appears that Defendants have not made significant progress in resolving cases. At that time, Defendants estimated that 80% of MDL cases were resolved, and 80-85% of the state court cases. (October 20, 2008 Hearing Transcript at 4-5.) Now as of January 5, 2009, Defendants estimate that 85% of the cases are resolved, a number virtually unchanged since October. Clearly,

³ The fact that money has been assessed does not automatically mean that the Court will award it to counsel. While Plaintiffs' believe that the very modest assessment of 3% will probably be less than the expenses and lodestar actually expended by Plaintiff Counsel to date, each claimant has the right to a refund if the assessment is not awarded. Therefore, Defendants' suggestion that clients in settled cases should be burdened with financing future litigation appears inappropriate. Particularly when defendants have excluded "post label" cases from consideration and where some "pre-label" cases potentially could be acting as hold-outs, no basis exists to burden settling claimants with these costs. Similarly, Defendants' suggestion that Plaintiffs' counsel should be required to use past earnings to pay for future work also appears inappropriate. The attorneys' fees to be paid by past assessments have been earned by past work, and should not be considered as a source of payment for future efforts by Plaintiffs' Counsel.

something must be done to bring the final cases to conclusion, and that something will inevitably involve conducting trials in a significant number of the remaining cases. As such, a calendar must be set and decisions must be made to move this litigation forward, including decisions about increasing the assessment.

Further, while Defendants claim that selection of a date certain for increasing the assessment will stymie negotiations, Plaintiffs submit to the contrary that it will provide an incentive to Plaintiffs in cases under negotiation to reach an agreement. It should also be noted that all members of Plaintiffs' Executive Committee have "pre-label" and/or "post-label" cases that remain unresolved. Therefore, the increase in the assessment is not being proposed by the Executive Committee as a trap for the unwary. Instead, it will apply to every firm with pending cases, and is simply a necessity to secure the future success of the litigation.

The PSC, however, has no interest in imposing an increased burden on individual claimants without justification. If discussions in the remaining pre-label cases can be concluded by February 15 or February 28, for example, then the PSC has no objection to postponing the deadline for an increase in the assessment accordingly. On the other hand, if some pre-label cases have reached impasse and therefore must be prepared for trial, then the work needs to begin and the assessment in those cases needs to be increased now. The PSC proposes that pre-label cases that remain pending as of a date certain, such as February 1 or February 15, be identified. If direct negotiations or mediation with the Court cannot conclude these cases within a reasonable time frame, such as 30 to 45 days from the designation date, (or some other time period agreed to by the individual Plaintiffs' counsel and the Executive Committee), then they should be

subject to the increased assessment. In addition, all post-label cases should be subject to the increased assessment because Defendants refuse to negotiate those cases and they must be prepared for trial.

V. Conclusion

The Executive Committee of the PSC takes its responsibilities to this Court and to the MDL plaintiffs seriously. In order to represent each claimant most effectively, it is necessary to put in place an orderly procedure to increase the MDL assessment. Such an increase will protect the remaining plaintiffs by providing adequate resources to litigate their claims. Moreover, deadlines based upon dates certain, rather than deadlines based upon contingent events, must be established to secure efficient case resolution. While the efforts of Defendants to negotiate cases have been made in good faith and have been highly successful, the Plaintiffs' Executive Committee respectfully submits that finality will be more quickly achieved by implementation of definite procedures for identification of unresolved cases, a process for increasing the case assessments, and a detailed case calendar for trial.

PLAINTIFFS' EXECUTIVE COMMITTEE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this motion and memorandum of law has been served upon all counsel of record via the court's electronic filing service.

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