UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: KUGEL MESH HERNIA PATCH PRODUCT LIABILITY LITIGATION	)	MDL Docket No. 07-1842-ML

MEMORANDUM IN PARTIAL OPPOSITION TO PROPOSED ORDER REQUIRING PARTIES TO ATTEND SETTLEMENT CONFERENCE, ETC. FILED ON NOVEMBER 14, 2012

The plaintiffs in this Court's multidistrict litigation ("MDL") represented by Steven M. Johnson, Esq. ("the Johnson MDL Plaintiffs") submit this Memorandum in partial opposition to the proposed Order filed by Defendants Davol and C.R. Bard, Inc. in this action.

As argued in further detail below, the Johnson Plaintiffs assent to the scheduling of meetings by counsel in Rhode Island during November 27-30 to discuss resolution of their cases (referred to below as the "Johnson MDL cases"). On the other hand, the Johnson Plaintiffs object to some specifications of the conferences proposed in the Order, based (A) concerns about the proper limits of this Court's jurisdiction, (B) the wisdom of limiting the Court's current Order to the matters ripe for decision, (C) specific scheduling issues and (D) the potential of wasted resources and a mistreatment of the individual Plaintiffs before this Honorable Court.

I. Background

The Johnson MDL Plaintiffs have brought claims against Bard and other companies in connection with injuries resulting from their having been implanted with a Kugel mesh hernia patch. Mr. Johnson has entered appearances to represent another group of plaintiffs who have

brought cases in St. Clair County Circuit Court in Illinois ("the Illinois cases") alleging injuries from Kugel mesh hernia patches. Mr. Johnson also has clients who have brought cases in Providence County Superior Court alleging similar injuries. Mr. Johnson has not entered an appearance in the Providence County Superior Court cases, but he is working with John Deaton, Esq., who has entered appearances on behalf of all of these individuals.[1]

This Court has managed its MDL docket with the goal of facilitating the speedy and just resolution of the docket as a whole, scheduling "bellwether trials" to guide settlement negotiations. One some occasions, the parties have negotiated settlements that resolve cases both on the MDL docket and on state court dockets. On other occasions, cases have settled on a "one at a time" basis. For example, the parties to the *Patton* case (Case No. 07-4421) plan to meet in late November to discuss settlement in isolation from the other JLF Plaintiffs.

At a telephone conference conducted on November 1 in the *Patton* case, the Court instructed the parties to arrange mediations before Magistrate Judge Lovegreen. The Court directed Mr. Zurier to speak with counsel and to report back to the Court within a week. He submitted a letter to the Court on November 8, a copy of which is attached as Exhibit B. In the letter, Mr. Zurier observed that counsel share the goal of mediating Johnson MDL cases, but they disagree about the overall scope of the mediation. Defendants seek to mediate the Johnson MDL cases in conjunction with the other cases Mr. Johnson has filed in the St. Clair County Circuit Court in Illinois and the cases Mr. Deaton has filed on behalf of Mr. Johnson's clients in

[1] Mr. Zurier previously entered a limited appearance in this action on behalf of the Johnson Plaintiffs on the issue of the "common benefit fee." He is assisting Mr. Johnson with this Objection, Memorandum and proposed Order because of his participation in the November 1 and November 9 conferences, but he is not entering a general appearance.

Providence County Superior Court, with all of these dockets of cases negotiated and settled at the same time. Exhibit B. In contrast, Plaintiffs seek to focus the mediations before the Magistrate Judge on all of the Johnson MDL cases currently on file in this Court, but to mediate the other cases in the fora in which they were filed. *Id.* Mr. Zurier reported in his letter that opposing counsel were are at an impasse on this issue. *Id.*

At Mr. Hooper's request, the Court held an in-chambers conference on November 9 to discuss settlement procedures. The Court decided to order Mr. Johnson to come to Rhode Island during the week of November 27-30 to discuss the issue of settlement more specifically, including the issue of "global settlement." Mr. Zurier represented that Mr. Johnson was ready and willing to come to Rhode Island at that time.

Bard's counsel also suggested that if this effort at developing a "global settlement" framework fails, the Court could order Mr. Johnson to return in January for mandatory settlement conferences with the Johnson MDL Plaintiffs present, in a setting in which they would be informed of the parties' impasse, and that their settlements are being held up because of Mr. Johnson's unwillingness to participate in a "global resolution." It was not clear at the time (at least to this participant) whether the Court intended to include the second component in the Order it planned to issue at this time.

Based on this meeting, defense counsel submitted a proposed Order to the Court on November 14, 2012. The Court informed Johnson MDL Plaintiffs' counsel that they had until 12:00 noon on November 15 to file any objections.

II. Argument

Mr. Johnson assents to many aspects of the Proposed Order. As stated in Exhibit B, Mr.

Johnson is agreeable, under the auspices of this Honorable Court, to engage in settlement negotiations with or without a mediator in an effort to resolve the entire MDL docket of JLF cases in a fair and efficient manner. He plans to work with Judge Gibney and the parties to arrange a similar process, under the umbrella of the Providence County Superior Court, to mediate and negotiate the settlement of all cases filed in that jurisdiction. He is ready and willing to work with Bard to engage the St. Clair County Circuit Court to arrange a mediation process for all of the Johnson Law Firm cases within that jurisdiction. Mr. Johnson plans to be in Rhode Island during November 27-30, and he will be available to attend all meetings the Court may schedule at that time. He requests that Magistrate Judge Lovegreen be involved from the beginning of the meetings (on Tuesday, November 27) so that he is best able to assist the parties move towards settlement.

Mr. Johnson objects to other aspects of the Order. With regard to Section 1, he objects to this Court's assuming jurisdiction over the settlement of the cases in Providence County Superior Court and/or St. Clair County Circuit Court. He objects to Section 2 of the order in its entirety. As argued in further detail below, he bases his objection on (A) concerns about the proper limits of this Court's jurisdiction, (B) the wisdom of limiting the Court's current Order to the matters ripe for decision, (C) specific scheduling issues and (D) the potential of wasted resources and a mistreatment of the individual Plaintiffs before this Honorable Court.

We consider each in turn.

A. This Court lacks jurisdiction to regulate the settlement of cases filed in other jurisdictions.

The Johnson MDL Plaintiffs object to the Proposed Order because it would combine their

cases with others that are not subject to this Court's jurisdiction.[2]

This MDL is organized under the auspices of 28 U.S.C. §1407, which permits the transfer and consolidation of federal cases pending in different districts when those cases "involv[e] one or more common questions of fact" and such a transfer and consolidation "will promote the just and efficient conduct of such actions." *Id.* In order for a case to be considered for transfer and consolidation, it must be a federal case, either through the original filing or valid removal from state court. The Johnson Law Firm cases pending in Providence County Superior Court and St. Clair County Circuit Court were not removed to federal court; therefore, those parties and cases not subject to consolidation and transfer under 28 U.S.C. §1407.

Federal courts acts must act cautiously when contemplating actions that will interfere with state court proceedings outside of their jurisdiction. For example, in *In re General Motors Corporation Pick-up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133 (3d Cir. 1998), the Third Circuit Court of Appeals reviewed the interactions between a Louisiana state court class action and a federal MDL in the Eastern District of Pennsylvania involving the similar product liability claims stemming from allegedly defective General Motors pick-up truck fuel tanks. As was true here, many lawyers had entered appearances on behalf of clients in both courts. The litigants in the MDL agreed to a settlement which the district court approved; however, the Third Circuit Court of Appeals reversed the judgment. The litigants then modified the settlement slightly and filed it in the Louisiana state court, where it was approved. At that point, some parties in the Eastern District of Pennsylvania sought an order from that Court to

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[2] The proposed Order would harm the interests of plaintiffs represented by Mr. Johnson in the Rhode Island and Illinois state courts, but they are not properly before this Court to argue their position.

enjoin the Louisiana state court settlement. The district court refused on the ground of lack of jurisdiction and the Third Circuit affirmed, stating the following:

> Appellees assert that the district court had no jurisdiction to enjoin the Louisiana court in the first instance (had it chosen to do so), and thus we can have no jurisdiction to enjoin that court on appeal. This contention is grounded upon the appellees' submission that any injunction issued by this Court would affect the nationwide group of 5.7 million people who already settled their claims . . . and would require this Court to exercise personal jurisdiction over them. We agree.
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> . . .
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> To be more precise, the Louisiana class members are not parties before us; they have not constructively or affirmatively consented to personal jurisdiction; and they do not, as far has been demonstrated, have minimum contacts with Pennsylvania. Therefore, due process deprives us of personal jurisdiction and prevents us from issuing the injunction prayed for by appellants.

See also Sygenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 32, 123 S.Ct. 366, 370, 154 L.Ed. 2d 368 (2002) (federal court lacks authority under the All Writs Act to vacate state court products liability class action settlement because "due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined" (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525, 52 S.Ct. 217 (1932)); *Smith v. Bayer Corp.*, ____ U.S. ____, 131 S.Ct. 2368, 2375, 180 L.Ed 2d 341 (2011) (federal court lacks authority under the Anti-Injunction Act to vacate state court class action settlement because that Act's "core message is one of respect for state courts" and it "broadly commands that those tribunals 'shall be free of interference by federal courts.'"

In all of these cases, the same attorneys represented clients in both state and federal courts; however, all of these decisions held that the federal court lacked the authority to assume jurisdiction over parties to parallel state court cases who happened to be represented by the same attorney. These federal courts declined to bootstrap their jurisdiction in such a manner because it

would violate the due process rights of the state court litigants and a longstanding policy of the federal courts to avoid interference in state court proceedings absent clear statutory authorization.

Mr. Johnson has a good faith basis to believe that the "global settlement" that Bard seeks to impose, under the auspices of the federal court, upon Mr. Johnson's clients in Providence County Superior Court and St. Clair County Circuit Court would be detrimental to their interests. The three jurisdictions have different legal frameworks that affect the litigants' prospects in court and the "settlement value" of their cases. (For example, Rhode Island Rule of Evidence 407 permits the introduction of evidence of subsequent remedial measures to prove liability.) These considerations complicate the possibility of a "global resolution" within this Court that is fair to Mr. Johnson's clients who have cases pending in other courts. Instead, Mr. Johnson believes that the interests of each group of clients are best served by separate settlements in each court.

For these reasons, the Johnson MDL Plaintiffs object to those portions of the Proposed Order that link the settlement of the MDL cases with those that are not part of the MDL.

B. Section 2 of the Proposed Order is premature.

At the November 9 conference, Bard's counsel expressed his hope that the parties could resolve issues related to the scope of settlement negotiations when they met during November 27-30. He suggested that the Court consider follow-up procedures in the event that November's conference failed to achieve the desired result. More specifically, Bard's counsel proposed that the Court schedule individual settlement conferences for the Johnson MDL Plaintiffs to appear in person in Rhode Island in January if, and only if, efforts at a "global settlement" failed in November. Plaintiffs read Section 2 of the Proposed Order to implement that suggestion.

Plaintiffs submit that it is premature to press this issue, which raises jurisdictional issues (*see* Section A, pp. 4-7, *supra*), scheduling issues (*see* Section C, p. 8, *infra*) and the potential of

frustration and waste of resources (*see* Section D, pp. 8-9, *infra*). Because there is no reason to impose this "solution" on Mr. Johnson and his clients at this time, and because Mr. Johnson will be present in this Court in three weeks to address these issues, Plaintiffs request that the Court at least defer any consideration of Section 2 of the proposed Order at this time.

C. Mr. Johnson is currently scheduled to be on trial in January.

The parties to the November 9 conference were not aware of Mr. Johnson's schedule for the month of January. Mr. Johnson has a case before the St. Clair County Circuit Court (involving a different product liability claim) that is scheduled for trial beginning on January 7, 2013. Exhibit C.[3] The trial is expected to last for three to five weeks. *Id.* This presents a scheduling conflict for the specific dates set forth in the proposed Order.

D. Under the circumstances currently anticipated, the proposed conferences in January could be a waste of the Court's and the parties' time, as well as a source of frustration and anger.

As noted in Exhibit B, opposing counsel share the desire to settle the Johnson Law Firm MDL cases under the auspices of this Honorable Court, as well as the desire to settle the remaining Johnson Law Firm cases filed in other courts. On the other hand, counsel disagree about the process for resolving the non-MDL cases. Mr. Johnson seeks to focus this Court''s settlement efforts on the cases before it, and to advance settlement for cases filed in other jurisdictions under the auspices of the court in which they have been filed. In contrast, Bard

[3] At the bottom of page 1, Mr. Zurier's November 13 letter to Mr. Hooper contains a typographical error, indicating mistakenly that Mr. Johnson will be in Rhode Island during January 27-30. Mr. Zurier meant to write that Mr. Johnson would be in Rhode Island during November 27-30. *See* Exhibit D (letter with correction).

articulates an "all or nothing" position, refusing (with one exception)[4] to negotiate the settlement of any MDL cases in isolation from a settlement of all of Mr. Johnson's cases in all courts.

If the parties cannot bridge their differences during November 27-30, the conferences that Section 2 of the Proposed Order contemplates will be a pointless exercise. Proposed Section 2 would require the Johnson Law Firm plaintiffs, who reside across the country, to incur the expense, inconvenience and in some cases personal or family health issues to attend a settlement conference that is "programmed to fail" due to counsels' disagreement over scope. Instead of achieving closure, each of these individuals will receive conflicting messages. One the one hand, they will be told that Mr. Johnson is ready to settle their cases once Bard agrees to focus on their cases only. On the other hand, they will be told that Bard is ready to settle their cases once Mr. Johnson agrees to settle other cases in other courts at the same time. They will hear that the lawyers cannot resolve their disagreement, but that the Court insisted (at Bard's request and over Mr. Johnson's objection) that the parties travel in Providence to witness this stalemate in person. One would not blame these poor individuals if they felt that such a proceeding added insult to their medical injuries.

III. Conclusion

For these reasons, Plaintiffs respectfully request that the Court enter the alternative proposed Order submitted as Exhibit A, rather than the one proposed by Bard.

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[4] Bard has agreed to negotiate a separate settlement for the *Patton* case. *See* p. 2, *supra*.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 15th day of November, 2012, this document has been filed through the Court's electronic filing system, which provides for the service of copies to the parties.

/s/ Samuel D. Zurier