

FILED  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS

FEB 18 2005

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

JAMES W. McCORMACK, CLERK  
DEP. CLERK

**In re:** : **MDL Docket No. 4:03CV1507 WRW**  
:  
**PREMPRO PRODUCTS** : **ALL CASES**  
**LIABILITY LITIGATION** :

**PLAINTIFFS' REVISED MOTION AND MEMORANDUM IN SUPPORT  
THEREOF FOR ENTRY OF PRACTICE AND PROCEDURE ORDER NO. 5 ;  
GUIDELINES FOR MDL 1507 PLAINTIFFS' PERSONAL INJURY COUNSEL  
TIME AND EXPENSE REPORTING FOR COMMON BENEFIT FEES AND  
RELATED COSTS; AND PRACTICE AND PROCEDURE ORDER NO. 6  
; ESTABLISHMENT OF PLAINTIFFS' PERSONAL INJURY LITIGATION  
EXPENSE FUND TO COMPENSATE AND REIMBURSE ATTORNEYS FOR  
SERVICES PERFORMED AND EXPENSES INCURRED FOR COMMON  
BENEFIT**

Pursuant to the MANUAL FOR COMPLEX LITIGATION (4th ed. 2004), as well as precedent from a series of case management orders issued in prior and ongoing MDL pharmaceutical mass tort litigation, the Plaintiffs' Steering Committee ("PSC") Personal Injury Counsel seek the entry of two administrative orders: (1) Practice and Procedure Order ("PPO") No. 5 - Guidelines for MDL 1507 Plaintiffs' Personal Injury Counsel Time and Expense Reporting For Common Benefit Fees and Related Costs; and (2) Practice and Procedure Order ("PPO") No. 6 - Establishment of Plaintiffs' Personal Injury Litigation Expense Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for Common Benefit. These orders are necessary to establish guidelines for equitable sharing of costs and work associated with the creation and use of MDL Plaintiffs' Personal Injury Common Benefit Work Product. A proposed PPO No. 5 and PPO No. 6 are filed simultaneously herewith.

Practice and Procedure Order No. 5 is necessary to ensure the generation and maintenance of adequate and contemporaneous time and expense records for Plaintiffs' attorneys working in the MDL and for Plaintiffs' attorneys working in state court proceedings that choose to share with the MDL Personal Injury Counsel on the common aspects of liability discovery, expert development, and case coordination. MANUAL FOR COMPLEX LITIGATION §§ 14.213 & 14.214, at 222. Defense Counsel have no objection to the entry of this order.

Practice and Procedure Order No. 6 is 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 counsel has purchased the MDL Plaintiffs' Personal Injury Common Benefit Work Product) to reimburse the MDL personal injury attorneys or associated state court attorneys for expenses<sup>1</sup> and to establish a fund for awarding fees to Plaintiffs' personal injury counsel for creating the common benefit work product.<sup>2</sup> This costs and

<sup>1</sup> PSC Personal Injury Counsel and other personal injury counsel in the MDL have paid monies to fund common benefit costs in the MDL on an ongoing basis at an (initial) \$50,000 or \$25,000 level and have been filing expense and time reports since January, 2004.

<sup>2</sup> The work product, referred to in PPO No. 6 as "PSC Personal Injury Common Benefit Resource Material," will include, *inter alia*: (a) CD-ROMs and a virtual depository containing images of the key documents selected by the personal injury counsel from the document productions of the defendants and third-parties in MDL 1507; (b) a bibliographic database providing a "coded" index of such key documents; (c) the depositions of each generally applicable fact witness taken in MDL 1507 and in any associated state-court actions in the form of transcripts, text searchable computer disks and CD-ROMs; (d) time-lines, casts of characters, and other work product relating to the facts at issue in MDL 1507; (e) expert reports on generally applicable liability and causations issues, as well as transcripts of such experts' testimony; (f) cross examination of defendants' experts on generally applicable liability and causation issues; and (g) *Daubert* briefing and argument on generally applicable liability and causation expert opinions.

fee compensation procedure, now routine in MDL pharmaceutical mass tort cases, is explained in the MANUAL FOR COMPLEX LITIGATION as follows:

MDL judges generally issue orders directing that defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.

MANUAL FOR COMPLEX LITIGATION § 20.312 & n. 701, at 265 (citing cases). The tasks of such counsel are similarly described in the Manual:

Lead counsel and committees of counsel for the plaintiffs in mass tort litigation perform a host of functions. They develop proof of liability and anticipate defenses; gather the expertise necessary to prove causation and other elements of plaintiffs' cases; trace patterns of exposure; manage discovery; coordinate the various filings; and communicate with counsel for plaintiffs, counsel for defendants, and the court.

Id, § 22.62, at 515.

Recognition that counsel who perform these tasks must receive compensation is well recognized in the case law and the Manual.

First, if lead counsel are to be an effective tool the court must have means at its disposal to order appropriate compensation for them. The court's power is illusory if it is dependant upon lead counsel's performing the duties desired of them for no additional compensation. . . . The interests to be served are too important to be left to volunteers (or draftees) who are unpaid in the sense that they get nothing additional. The limitations of relying upon unpaid lead or liaison counsel are demonstrated by the history of the application of complex litigation techniques to air disaster cases.

*In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1016 (5th Cir. 1977); see also MANUAL FOR COMPLEX LITIGATION § 265 & n. 701 at 265; § 22.62 & n. 1278, at 516 (citing cases); § 1421 & n. 81, at 207-08.

This model has been followed in all the recent pharmaceutical mass tort cases. See, e.g., *In re PPA*, MDL No. 1407, Amended CMO No. 8, (W.D. Wa. June 9, 2002) (ordering defendants to withhold a fixed portion of settlements and pay into a common fund) (attached as Exhibit 1); *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355, PTO No. 16 (E.D. La. Dec. 26, 2001) (same) (attached as Exhibit 2); *In re Diet Drugs*, MDL No. 1203, PTO No. 467 (E.D. Pa. Feb. 10, 1999) (same) (attached as Exhibit 3); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, Order No. 13 (N.D. Ala. July 23, 1993) (same) (attached as Exhibit 4). The fixed percentage requested in this case is 5% of the total award of each MDL federal court personal injury case and 3% of each state court case that consents to the assessment. These percentages are slightly less than those used in the MDL pharmaceutical mass tort cases cited above.

In this case, Plaintiffs' Personal Injury Counsel on the Plaintiffs' Steering Committee were appointed over a period of months from June, 2003 to December, 2003. Functioning under the Leadership of Ms. Zoe Littlepage this group,<sup>3</sup> along with several other plaintiffs counsel in the MDL and state court proceedings, has committed extensive financial and legal resources to discovery, expert development and case coordination to date, and will continue to do so. Although the request for an Order creating a mechanism to assess individual resolved cases is being requested at this time, Plaintiffs' Personal

<sup>3</sup> PSC Personal Injury Counsel include: Zoe Littlepage, Mike Williams, Robert K. Jenner, Richard S. Lewis, James A. Morris, Jr., Kenneth M. Suggs, Ralph M. Cloar, Jr., and Tobias Millrood.

Injury Counsel are not seeking any costs reimbursement or common benefit attorneys' fees at this time and will only do so at a later date based on a specific request to the Court under pre-established guidelines and a schedule set forth by this Court. The specific establishment of a court supervised fee and cost trust fund to hold individual case assessment monies, a mechanism for defense counsel to pay into the fund, and a mechanism for Plaintiffs' Personal Injury Counsel to apply for common benefit expense reimbursement and fees will be provided to the Court in a subsequent motion.

PSC Personal Injury Counsel have met and conferred with Defense counsel on Proposed PPO No. 6. There are three outstanding issues of disagreement: (1) the relative responsibilities of Defendants and PSC Personal Injury Counsel to assure that the assessment payments are made to the MDL 1507 Fee and Cost Trust Account (*see* PPO No. 6, ¶3); (2) procedures governing the ability of state court Plaintiff's counsel to obtain elements of the PSC Personal Injury Counsel's Common Benefit Work Product (e.g., the MDL depositions transcripts and exhibits) from defense counsel, thus bypassing the assessment provisions of PPO No. 6 (PPO No. 6, ¶7); and (3) whether the assessment is taken from the net award to the plaintiff or from the individual plaintiff's attorney's fee.

If these issues remain in dispute, Plaintiffs will provide the Court with each side's proposed language on these points prior to the March 4, 2005 hearing.

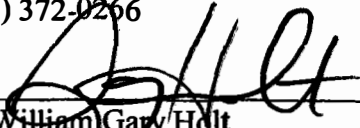
Proposed PPO No. 5 and PPO No. 6 do not address costs reimbursement or attorney's fees for any MDL class actions and do not seek authority to assess any *Prempro* MDL class action case. PSC Personal Injury Counsel believe that the appropriate mechanism to determine cost reimbursement and an award of attorneys' fees in any MDL class case is through the provisions of Fed. R. Civ. Pro. 23. *See* MANUAL

FOR COMPLEX LITIGATION § 21.7, at 448-449; *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir.1999).

Proposed PPO No. 5 and PPO No. 6 are filed simultaneously herewith and have been provided to Plaintiffs' class counsel in the MDL and MDL defense counsel for their review prior to the filing of this motion.

Respectfully submitted,

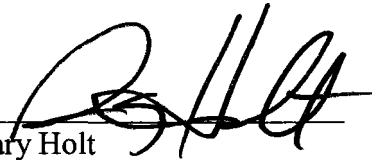
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served according to this Court's provisions for service as set forth in the pretrial orders and sent to the following counsel of record as indicated below on this 18th day of February, 2005.

  
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UNITED STATE DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS

*Exhibits Attached  
to Original  
Document in  
Courts's Case File*