

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

**FILED**  
U.S. DISTRICT COURT  
EASTERN DISTRICT ARKANSAS

In re: : MDL Docket No. 4:03CV1507 WRW-005

PREMPRO PRODUCTS  
LIABILITY LITIGATION :

ALL CASES  
By: JAMES W. McCORMACK, CLERK  
DEP CLERK

**PLAINTIFFS' REPLY 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**

Defendants do not object to the entry of Plaintiffs' PPO No. 5 (Guidelines for Time and Expense Reporting for Common Benefit Fees and Related Costs); therefore Plaintiffs request that PPO No. 5 be entered forthwith.

Defendants do object to selected provisions and selected language in Plaintiffs' Proposed 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), although Defendants do not object to the basic establishment of MDL 1507 Fee and Cost Trust Account to be established to collect assessments from resolved cases for the purpose of establishing a fund for the eventual reimbursement of common benefit costs and the payment of common benefit attorneys fees.

Defendants' objections are set out below and Plaintiffs' responses are set out below. As explained below, Plaintiffs believe that only Objection #1 represents a *bona fide* dispute.

Objection #1: Defendants want to shift the responsibility of tendering the assessment payments from themselves to individual Plaintiff's attorneys. See Plaintiffs' PPO No. 6 ¶ 3(d).

Defendants do not press this objection with much force, because their own proposed order, Defendants' Proposal B ¶ 3(c)(i) abandons the objection and concedes that it is the Defendant that must withhold the assessment and tender it to the MDL 1507 Fee and Cost Trust Account, not the individual Plaintiff attorney. Defendants make this concession because *every other prior and ongoing MDL Mass Tort proceeding places the responsibility on the Defendant*, as does the Manual For Complex Litigation (see Plaintiffs' Revised Motion And Memorandum ... For Common Benefit (February 18, 2005) at p. 3). This is demonstrated by the four MDL assessment orders cited by Plaintiffs and attached to Plaintiffs' Motion (PPA, Propulsid, Diet Drugs, Breast Implants), and by each MDL assessment order relied on, cited, and attached to Defendants' Response (PPA, Rezulin, Protegen Sling and Vesica System) as well as several other MDL assessment orders not attached to either side's papers. Since the Defendant is the source of the payment, it is no doubt more efficient and more amendable to accounting, if the Defendant tenders the assessment to the MDL 1507 Cost and Fees Trust Account. The PSC is not aware of a single MDL mass tort case where the Court has ever decided not to place this responsibility on the Defendant and the Defendants here have cited none. Defendants further argue that Plaintiffs' PPO No. 6 will place undue burdens on them that relate exclusively to an

agreement between the PSC and individual Plaintiff's attorneys. This is incorrect, because under Plaintiffs' PPO No. 6, Defendant's responsibility ends when they tender the assessment to the MDL 1507 Cost and Fee Trust Account. See Plaintiffs' PPO No. 6 ¶ 4 ("Payment by Defendant to MDL 1507 Fee and Cost Account of the assessment amount shall fully discharge the defendant's obligation under this Order.").

Objection #2: Defendants object to the PSC personal injury counsel preserving their right to seek an assessment from an individual Plaintiff's attorney obtaining the PSC's Common Benefit Resource Materials without entering into the agreement to pay an assessment. See Plaintiffs' PPO No. 6 ¶ 7(e).

There is no real dispute here. Plaintiffs' PPO No. 6 ¶ 7(e) is designed to provide notice to the PSC that a state court attorney has requested some or all of the Common Benefit Resource Materials, so the PSC can take appropriate steps to confer with the Plaintiffs' attorney or seek relief from a Court where necessary. The language suggested by Defendants in Defendants' Proposal B ¶ 6(e) and (f) is acceptable to Plaintiffs for this purpose. Therefore, Plaintiffs will substitute the language from Defendants' Proposal B ¶ 6(e) and (f) for the language in Plaintiffs' PPO No. 6 ¶ 7(e).

Objection #3 Defendants want the PSC to report to them the identity of each Plaintiff represented by an associated state court counsel. See Plaintiffs' PPO No. 6 ¶ 3(b).

There is no real dispute here. Plaintiffs agree to provide to Defense liaison counsel an updated list of associated state court counsel to whom this Order applies each month. See Plaintiffs' PPO No. 6 ¶ 3(b).

Defendants also want the PSC to provide the names "of the plaintiffs to whose claim this Order may apply." The PSC will do that to the best of its ability, with the understanding that the withholding of the assessment by the Defendant is based on the identity of the associated state court counsel, not the plaintiff. Plaintiffs will amend Plaintiffs' PPO No. 6 to include this requirement.

**Objection #4** Defendants want the report of settlements and judgments by associated state court personal injury counsel to be initiated based on the *fact* of settlement and judgment. See Plaintiffs' PPO No. 6, Ex. 1, Agreement ¶ 4.

There is no dispute here. Plaintiffs agree with Defendants' position. The language in Plaintiffs' PPO No. 6, Ex. 1, Agreement ¶ 4, set out in the footnote below<sup>1</sup> only requires notification based on the *fact* of settlement or judgment.

**Objection # 5:** Defendants object to the source of the fees to be paid to common benefit attorneys. See Plaintiffs' PPO No. 6 ¶ 12.

There is no present dispute here. Defendants argue that the yet to be determined common benefit attorneys fee should be deducted from the individual Plaintiff attorney's fee portion of the award. The Defendants go on to point out that this issue is premature and should be resolved at a later date in an Order establishing the specific procedures for the set-aside payments. Plaintiffs agree that this issue should be resolved at a

<sup>1</sup> "The undersigned Associated State-Court Personal Injury Counsel, shall notify Plaintiff's Liaison Counsel in writing of any recovery obtained or to be obtained based on a claim for which such counsel has a right to fee recovery (including an unfiled case) within ten (10) days of the date a settlement is made or a judgment is reached."

later date based on a proposed order for set aside payments procedures. (Some MDL Courts have required that the common benefit attorneys' fee portion of the assessment comes from the individual attorney's fee, and other MDL Courts have not).

In sum, the only real disagreement between Plaintiffs' counsel and Defendants' counsel is whether it should be the Defendant, not the Plaintiff, who tenders the assessment amount to the MDL 1507 Fee and Cost Trust Account. Every single MDL Court who has ever addressed this issue has determined that the Defendant is the better party to tender the payment. Defendants concede this point in Defendant's Proposal B. Plaintiffs respectfully submit that there is no good reason to reverse more than a decade of this MDL precedent.

Plaintiffs request that the Court enter Plaintiffs' PPO No. 6 with the amendments noted herein. Plaintiffs will submit a revised PPO No. 6 for this purpose.

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 3<sup>rd</sup> day of March, 2005.



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