

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: ZIMMER DUROM HIP CUP
PRODUCTS LIABILITY LITIGATION

2:09-cv-04414-SDW-MCA

MDL-2158

This Document Relates To All Cases

**DEFENDANT ZIMMER HOLDINGS, INC.'S
RESPONSE TO PLAINTIFFS' MOTION TO MODIFY CASE
MANAGEMENT ORDER NO. 3 REGARDING COMMON BENEFIT FUND**

Plaintiffs' Motion to Modify Case Management Order No. 3 (Dct. 652) to require state court plaintiffs to contribute to the federal multidistrict litigation Common Benefit Fund ("CBF") raises numerous issues. First, it is unlikely that this Court has jurisdiction to order a state court plaintiff to contribute to the CBF. Second, Plaintiffs' argument for requiring such contribution – an increase in settlement values for state court cases – is unsubstantiated and untrue. Instead, requiring such contribution likely will negatively impact many state court plaintiffs who have not, and likely never will, take advantage of Plaintiffs' discovery work in the MDL. Third, if the Court is nevertheless inclined to order state court plaintiffs to contribute to the CBF, Plaintiffs' proposed order is ambiguous, likely unworkable, and lacks essential procedural safeguards to protect both state court plaintiffs and Zimmer. Thus, while Zimmer Holdings, Inc., *et al.* (collectively, "Zimmer"), does not outright oppose Plaintiffs' Motion, Zimmer feels compelled to raise these issues for the Court's consideration.

I. Jurisdiction

Plaintiffs' Liaison Counsel request that this Court require all state court plaintiffs in all state court actions involving the Durom Cup pay a four percent (4%) fee to the CBF for any settlement or other recovery. Zimmer respectfully questions the jurisdictional authority of the Court to do that. While citing some authority suggesting that under limited circumstances a

court may have authority to compel state court plaintiffs to contribute to a federal CBF, Plaintiffs largely ignore the significant case law revealing that MDL courts lack jurisdiction (often both personal and subject matter jurisdiction) over state court plaintiffs not properly before them. *See In re: Showa Denko K.K. L-Tryptophan Prods. Liab. Litig. II*, 953 F.2d 162, 165–66 (4th Cir. 1992) (noting that where plaintiffs in state cases have not voluntarily entered the litigation before the district court and have not been brought in by process, the “district court simply has no power to extend the obligations of its order to them”); *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976) (“[T]he District Court had not even a semblance of jurisdiction original, ancillary or pendent to order anything or anybody, and least of all to compel lawyers who were not parties to the action to pay \$3,250 into a fund.”).

Significantly, district courts in the Third Circuit have approvingly cited and quoted each of these cases. For instance, the District Court of New Jersey agreed with the Fourth Circuit that “a transferee court’s jurisdiction in multi-district litigation is limited to cases and controversies between persons who are properly parties to the cases transferred, and any attempt without service of process to reach others who are unrelated is beyond the court’s power.” *In re: Pantopaque Prods. Liab. Litig.*, 938 F. Supp. 266, 275 (D.N.J. 1996) (quoting *In re: Showa Denko K.K. L-Tryptophan Prods. Liab. Litig. II*, 953 F.2d at 165–66). See also *In re: Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 664 (E.D. Pa. 2003) (Eastern District of Pennsylvania lacked jurisdiction to order contributions to a common benefit fund in cases that had not been formally transferred to it by the JPML) (citing *In re: Showa Denko K.K. L-Tryptophan Prods. Liab. Litig. II*, 953 F.2d at 165–66). Although many courts sympathize with plaintiffs’ lawyers who lead MDL cases, courts tend to acknowledge that their ability to compel parties to contribute to CBFs only extends as far as their jurisdictional reach. *See, e.g., In re*

Genetically Modified Rice Litig., No. 4:06MD1811CDP, 2010 WL 716190, at *5 (E.D. Mo. Feb. 24, 2010) (holding that because the district court lacks jurisdiction over state court cases it cannot compel state-court plaintiffs to contribute to the common benefit fund despite being in the interests of justice to do so).

Zimmer, therefore, respectfully submits that this Court may lack appropriate jurisdiction over most, if not all, of the state court plaintiffs to which Plaintiffs' Liaison Counsels' proposed order would apply.

II. Factual Basis

The stated basis for Plaintiffs' Liaison Counsel's motion to receive proceeds of state court settlements or judgments is that (a) discovery or other pre-trial materials have been obtained by state court plaintiffs, and/or (b) "each advancement in this MDL positively impacts the strength of the state court plaintiffs cases, particularly increasing their leverage and settlement negotiations." (Pl. Brief p. 2). But neither of these bases is substantiated. Indeed, Zimmer has never been told which, if any, state court plaintiffs have received any of the document productions made in the MDL. Likewise, all of the common issue depositions were cross-noticed in the state court actions and, thus, the state court plaintiffs were provided the opportunity to participate in those depositions. More to the point, however, none of the state court plaintiffs are actively pushing their cases to trial, other than state court plaintiffs represented by Waters Kraus Paul, the lead Plaintiffs' Liaison Counsel in the MDL. Moreover, none of the work done by Plaintiffs' Liaison Counsel has in any way increased state court plaintiffs' leverage in settlement negotiations. If anything, discovery collected in the MDL has revealed that plaintiffs' cases are weaker, not stronger, than originally believed, and that the value of the cases is less, not more.

Finally, as stated above, Zimmer views this issue largely as one between Plaintiffs' Liaison Counsel and the state court plaintiffs and state court plaintiffs' counsel. Although the requested payments into the CBF will not affect the amounts Zimmer is willing to pay to settle these actions, it would affect the amounts plaintiffs will receive and therefore may affect whether plaintiffs may be less willing to settle their claims. Accordingly, payment of this additional fee may chill settlements and, in any event, will affect the rights of state court plaintiffs.

III. Lack of Safeguards

If the Court were inclined to order state court plaintiffs to contribute to the CBF, Zimmer respectfully requests that specific, fair, and workable guidelines be put in place to protect both the state court plaintiffs and Zimmer. Zimmer respectfully submits that it would be fundamentally unfair for Zimmer to incur any costs related to the enhanced CBF program proposed by Plaintiffs' Liaison Counsel or be at risk with state courts and state court plaintiffs for following any such order. Thus, Zimmer submits that any order should be clear that (a) any CBF payments would apply only to future settlements, (b) plaintiffs in state court actions may challenge in this Court the appropriateness of the amount to be paid to the CBF, (c) Zimmer is not required or obligated to respond to or be involved in any such challenge, (d) notice of any order requesting payments into a CBF be provided to state court plaintiffs at Plaintiffs' Liaison Counsels' costs, and (e) Zimmer is protected from any and all costs, expenses or liability from the requested enhanced Common Benefit Fund.

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CERTIFICATE OF SERVICE

I certify that on February 17, 2015 a copy of the foregoing Defendant Zimmer Holdings, Inc.'s Response to Plaintiffs' Motion to Modify Case Management Order No. 3 Regarding Common Benefit Fund was served via United States First Class Mail and e-mail on the following Plaintiffs' Liaison Counsel:

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