

**DANIEL R. LAPINSKI, ESQ.**

T: 732.855.6066

F: 732.726.4735

dlapinski@wilentz.com

90 Woodbridge Center Drive

Suite 900 Box 10

Woodbridge, NJ 07095-0958

732.636.8000

March 21, 2016

**VIA ELECTRONIC CASE FILING**

Honorable Susan B. Wigenton

U.S. District Court

District of New Jersey

Martin Luther King, Jr. Federal Building

& U.S. Courthouse

50 Walnut Street

Newark, New Jersey 07102

Re: *In Re: Zimmer Durom Hip Cup Prods. Liab. Litig.*  
Civil Action No. 2:09-cv-04414-DFW-SCM (MDL-2158)

Dear Judge Wigenton:

My firm currently represents forty-four (44) plaintiffs in the above-captioned multidistrict litigation. We write the Court pursuant to your Order of March 14, 2016 (Dkt. No. 844) and in opposition to the Proposed Case Management Order Regarding Settlement Agreement (“Proposed CMO”) that was submitted by counsel for Zimmer on March 11, 2016 (Dkt. No. 843). For the reasons outlined below we object to entry of the Proposed CMO.

**The Proposed CMO Was Neither Drafted Nor Agreed To By Plaintiffs’ Liaison Counsel**

Case Management Order No. 1, entered by the Court on September 23, 2010 (Dkt. No. 17), designated individuals to serve on behalf of all parties as Plaintiffs’ Liaison Counsel. The Proposed CMO that has been presented to the Court was neither drafted nor agreed to by Plaintiffs’ Liaison Counsel.<sup>1</sup> Instead, counsel for defendant and a self-appointed Claimants’ Liaison Counsel (“CLC”) have asked the Court to enter the Proposed CMO. Neither defense counsel nor the CLC has the right

<sup>1</sup> It is our understanding that Plaintiffs’ Liaison Counsel objected to the form and entry of the Proposed CMO and that defendant and the Claimants’ Liaison Counsel failed to advise the Court of this in their submission.

to act on behalf of or bind any plaintiff who has an action pending in this MDL. However, that is exactly what is sought by way of the Proposed CMO. Further, although initially represented during a January 11, 2016 Case Management Conference as a settlement that was negotiated for specific clients but that would be made available to anyone interested, the Settlement Agreement is now being positioned as a litigation-wide document that will impact every plaintiff with a pending cause of action. It is for these reasons that the Court should deny entry of the Proposed CMO.

### **Entry Of The Proposed CMO Results In Undue Prejudice To Plaintiffs**

This multidistrict litigation has been pending for nearly seven (7) years, during which time hundreds of plaintiffs have been asked to wait patiently for their day in court. Now, pursuant to the Proposed CMO, defendant and the CLC ask the Court to stay all litigation so long as the Settlement Agreement remains in effect. Significantly, pursuant to its terms, the Settlement Agreement can remain in effect until September 2017. Staying this litigation, which has already been pending for nearly seven years, would be unduly prejudicial to plaintiffs.<sup>2</sup>

In addition, staying the current litigation inures to the benefit of defendant in an unduly prejudicial way. When faced with the option of settling their individual lawsuit or having to wait an additional 18-months before continuing litigation, many plaintiffs may opt to settle. As a result, the decision to settle the lawsuit will not be based upon the merits of the case or the fairness of what is being offered via the Settlement Agreement, but on the unfortunate reality that a decision to reject the terms of the Settlement Agreement will result in further, prolonged delay. Plaintiffs should not be pressured into settling viable claims on terms they may otherwise consider unacceptable just because a failure to settle will result in unwarranted delay.

### **The Proposed CMO Creates An Ethical Conflict Of Interest For Plaintiffs' Counsel**

By way of the Proposed CMO Zimmer and the CLC ask the Court to Order that all plaintiffs:

shall participate in the process established by the Settlement Agreement, including but not limited to satisfying all deadlines established in the Settlement Agreement. If any individual plaintiff does not participate in the process established by the Settlement Agreement, including satisfying all deadlines established by the Settlement Agreement, their individual case may be subject of a dismissal motion by Zimmer.

See Proposed Order at ¶ 2 (emphasis added). The terms of the Settlement Agreement further state:

[I]f less than 90% of a Participating Counsel's Eligible Claimants complete the categorization process and accept Zimmer's offer without mediation, Zimmer has the

<sup>2</sup> At most, the Court should only stay the current litigation until May 31, 2016, the date by which those interested in participating in the settlement must complete and serve the Categorization And Award Amount Form. See Settlement Agreement at Section III(A). After May 31, 2016, both the Court and the parties will know those plaintiffs who will not be part of the settlement and whose cases should proceed to expedited pre-trial discovery.

option, in its sole discretion, ***to terminate or enforce*** the Settlement Agreement, the Settlement Program, all individual settlement offers made or accepted pursuant to this Settlement Agreement, and all Individual Settlement and Release Agreements, as to any or all of that Participating Counsel's Eligible Claimants.

*See* Settlement Agreement at §5(A) (emphasis in original). Enforcement of the aforementioned paragraphs would create an ethical conflict of interest for all plaintiffs' counsel who represent more than one plaintiff.

Pursuant to the Proposed CMO, any plaintiff who did not participate in the process established by the Settlement Agreement could face dismissal. However, participation in the process established by the Settlement Agreement, even when a plaintiff does not intend to accept the terms of the Settlement Agreement, would impact the total percentage of Participating Counsel's Eligible Claimants. These conflicting requirements would force Participating Counsel to align all clients on the same side of the Settlement Agreement, either in favor of settling or against settling. Counseling a client to accept a settlement that may not be in his best interest so that other clients can benefit from the settlement creates an ethical conflict. Similarly, forcing a client to forgo the benefits of a settlement because other clients have chosen not to settle creates an ethical conflict. In short, mandating participation as required by the Proposed CMO would create an unavoidable ethical conflict of interest.

For the foregoing reasons counsel respectfully requests the Court deny defendant's request that the Proposed CMO be entered.

Respectfully submitted,



Daniel R. Lapinski