

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: Guidant Corp. Implantable
Defibrillators Products Liability
Litigation

MDL No. 05-1708 (DWF/AJB)

This document relates to all actions.

**ORDER REGARDING THE NAMED
TPP PLAINTIFFS' MOTION FOR
ENTRY OF JUDGMENT UNDER
FED. R. CIV. P. 54(B)
OR, IN THE ALTERNATIVE,
FOR CERTIFICATION UNDER
28 U.S.C. § 1292(B)**

This matter is before the Court pursuant to the Named TPP Plaintiffs' Motion for Entry of Judgment Under Fed. R. Civ. P. 54(b) or, in the Alternative, for Certification Under 28 U.S.C. § 1292(b). (*See* MDL No. 05-1708 (DWF/AJB), Doc. No. 2200.) For the reasons set forth below, the Court denies the motion.

BACKGROUND

Plaintiffs UFCW Local 1776 and Participating Employers Health and Welfare Fund and the City of Bethlehem (collectively, the "named TPP Plaintiffs") filed the current motion in response to the Court's April 16, 2007 Order and the May 9, 2007 Amended Order (collectively, "the Amended Order"). In the Amended Order, the Court

dismissed without prejudice seven of the named TPP Plaintiffs' claims¹ against Guidant after concluding that the named TPP Plaintiffs lack standing to pursue those claims and noting that such claims were not ripe. In a second Order dated May 9, 2007, the Court also denied the named TPP Plaintiffs' request to amend the seven claims in the Master Complaint because, in part, they were not ripe given that they were dependent on finding that Guidant was first liable to the named TPP Plaintiffs' insureds.

The named TPP Plaintiffs now request permission to appeal the Amended Order through two separate procedural avenues. First, they assert that the Court should direct entry of judgment on their seven claims because there is no just reason for delaying judgment under Federal Rule of Civil Procedure 54(b). Second, they assert that the Court should certify its Amended Order regarding the seven claims for interlocutory appeal under 28 U.S.C. § 1292(b).

DISCUSSION

I. Entry of Judgment Under Fed. R. Civ. P. 54(b)

Federal Rule of Civil Procedure 54(b) allows a court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction

¹ The seven claims-at-issue are (1) violation of the Minnesota Deceptive Trade Practices Act; (2) violation of the Minnesota Prevention of Consumer Fraud Act; (3) violation of the Minnesota False Statements in Advertising Statute; (4) unfair and deceptive trade practices under state law; (5) breach of implied warranty; (6) breach of assumed contractual warranty obligations; and (7) misrepresentation by omission. In the Master Complaint, the named TPP Plaintiffs also allege claims for Subrogation Liability
(Footnote Continued on Next Page)

for the entry of judgment.” Fed. R. Civ. P. 54(b). Certifications under Rule 54(b) “should neither be granted routinely nor as an accommodation to counsel.” *Hardie v. Cotter & Co.*, 819 F.2d 181, 182 (8th Cir. 1987). Instead, a court should grant Rule 54(b) orders only if there exists “some danger of hardship or injustice through delay which could be alleviated by immediate appeal.” *Burlington N. R.R. Co. v. Bair*, 754 F.2d 799, 800 (8th Cir. 1985) (quotations omitted).

The named TPP Plaintiffs assert that there is no just reason for delay of entry of judgment on the seven claims because those claims are separate and distinct and easily severable from the other claims in the Master Complaint. They assert that the Amended Order effectively operates as a final judgment because the Court denied their request to amend the Master Complaint. In response, Guidant contends that a Rule 54(b) certification would result in piecemeal litigation and judicial inefficiency. Specifically, Guidant argues against certification because an appeal at this stage of the litigation would require an appellate court to rule on claims that depend on an underlying liability determination, which may be rendered moot by a settlement or, at a minimum, will not be determined until the individual plaintiffs’ claims are decided.

The Court agrees with Guidant. In the Amended Order, the Court dismissed the named TPP Plaintiffs’ seven claims for lack of standing based on two reasons—no direct injury and no causal connection. (May 9, 2007 Order at 17-18.) In passing, the Court

(Footnote Continued From Previous Page)
Determination and Unjust Enrichment, but those claims are not part of the present motion.

also noted that if the named TPP Plaintiffs had standing, their claims would nonetheless fail because they were not ripe. (*Id.* at 18, n.6). Ripeness, which is distinct from standing, is intended to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements. *Neb. Pub. Power Dist. v. MidAm. Energy Co.*, 234 F.3d 1032, 1037 (8th Cir. 2000). Therefore, even assuming the Eighth Circuit Court of Appeals could or should properly consider the Amended Order’s conclusion on standing, presently, the ends of justice do not require the Court to direct entry of judgment under Rule 54(b) because the seven claims will not be ripe until Guidant’s liability to the named TPP Plaintiffs’ insureds is determined. In this way, the named TPP Plaintiffs’ seven claims are not separate or distinct from the other claims in the Master Compliant, and a Rule 54(b) certification would not result in final adjudication of the seven claims. Accordingly, the Court respectfully denies the named TPP Plaintiffs’ request for a Rule 54(b) certification.

II. Certification Under 28 U.S.C. § 1292(b)

Courts of appeals have jurisdiction over “all final decisions of the district courts.” 28 U.S.C. § 1291. In addition, a district court may designate an otherwise non-final order as certified for interlocutory appeal under 28 U.S.C. § 1292(b). That statute provides, in relevant part:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he

shall so state in writing in such order.

28 U.S.C. § 1292(b). Thus, under this provision, there are three criteria for certification: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) certification will materially advance the ultimate termination of the litigation. *White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994). Motions for certification should be “granted sparingly and with discrimination” due to the additional burdens that such appeals place on both the court and the litigants. *Id.* at 376. The movant bears a heavy burden to prove that the case is “an exceptional one in which immediate appeal is warranted.” *Id.*

A. Controlling Question of Law

Section 1292(b) refers to a legal question that contrasts with a “matter for the discretion of the trial court.” *Id.* at 377; *see also McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1258 (11th Cir. 2004) (stating that under § 1292(b), a “controlling question of law” means “a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine”). The named TPP Plaintiffs assert that their appeal concerns a controlling question of law because the Amended Order involved an application of the constitutional doctrine of standing and because the issue of ripeness is purely a question of law that can be “decided quickly and cleanly without close scrutiny of the record.” (TPP Pls.’ Mem. at 8.) In response, Guidant asserts that the named TPP Plaintiffs’ claims involve mere questions of law, as opposed to controlling questions of law.

The Court agrees with Guidant. A controlling question of law generally involves a claim that establishes precedent or is novel in some other way. *See, e.g., W. Tenn.*

Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis, 138 F. Supp. 2d 1015, 1018 (W.D. Tenn. 2000) (stating that “an issue may be considered controlling” for purposes of § 1292(b) “if its resolution has precedential value”). While the seven claims at issue do involve questions of law, they are not novel; rather, they involve the application of well-established law. Given this, the Court concludes that the first § 1292(b) requirement has not been established.

B. Substantial Ground for Difference of Opinion

Substantial grounds for a difference of opinion exist when (1) the issue is difficult and of first impression; (2) a difference of opinion exists within the controlling circuit; or (3) the circuits are split on the issue. *Id.* at 1019 (citations omitted). The named TPP Plaintiffs assert that they have met their burden with respect to this criteria because, as the Court recognized in the Amended Order, Chief Judge Rosenbaum in the Medtronic MDL recently denied a motion by Medtronic to dismiss the third-party payor claims in that MDL for lack of standing. In response, Guidant asserts that there is no basis for the Court to decide if there is a substantial ground for difference of opinion within the District of Minnesota because Chief Judge Rosenbaum issued no written opinion when he denied Medtronic’s motion to dismiss the third-party payor claims and because the law on standing and ripeness is clearly established.

After comparing the third-party payor claims in the Medtronic MDL to the seven claims in the Master Complaint in this MDL, and recognizing Chief Judge Rosenbaum’s decision, the Court concludes that the second § 1292(b) requirement has been established.

C. Materially Advance the Ultimate Termination of the Litigation

Expectedly, the named TPP Plaintiffs and Guidant do not agree on whether a § 1292(b) certification would materially advance the ultimate termination of the litigation. The Court finds that an appeal would not materially advance the ultimate termination of the litigation because, as discussed above with respect to the Rule 54(b) motion, the seven claims cannot be resolved until Guidant's liability with respect to the named TPP Plaintiffs' insureds is determined. Given this, the Court concludes that the third § 1292(b) requirement has not been established.

Because the named TPP Plaintiffs have not met their heavy burden with respect to establishing two of the three § 1292(b) requirements, the Court respectfully denies their request for interlocutory appeal under § 1292(b).

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

1. The Named TPP Plaintiffs' Motion for Entry of Judgment Under Fed. R. Civ. P. 54(b) or, in the Alternative, for Certification Under 28 U.S.C. § 1292(b) (MDL No. 05-1708 (DWF/AJB), Doc. No. 2200) is **DENIED**.

Dated: November 16, 2007

s/Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court