

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

**IN RE: GUIDANT CORP. IMPLANTABLE
DEFIBRILLATORS PRODUCT LIABILITY
LITIGATION**

MDL NO. 05-1708 (DWF/AJB)

REPORT AND RECOMMENDATION OF SPECIAL MASTERS

In the Court's Memorandum Opinion and Amended Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees [Docket No. 2636] filed March 7, 2008, the District Court pursuant to its general equitable powers, inherent authority to exercise ethical supervision over the global settlement, and inherent authority to review contingency fee contracts for fairness, capped all individual contingency fees at 20%. In that same Order the Court stated that in order to assure that all attorneys receive fair, but not excessive compensation, the attorneys could petition the Special Masters to have the 20% limit increased upward to a maximum of either (1) 33.33%, (2) the percentage previously agreed to in the individual cases contingent fee agreement between the attorney and client, or (3) the limit imposed by state law, whichever of the three is less. Upon review of any submissions for increase in said awards, the Special Masters were to make recommendations to the Court as to what contingency fee percentage was reasonable under the circumstances of the particular case and the work completed by the individual attorney/firm on the case.

Pursuant to the directive of the Court, the Special Masters received and reviewed the numerous submissions for increases in the contingency fees. The analysis of those submissions clearly demonstrated that there was a common and necessary level of work that was performed in

all of those cases. While the extent of work may have differed in each case, the differences were not to an extent that would allow the Special Masters to make a fair and equitable recommendation as to different percentages between the various cases. The Special Masters did conclude that the common and necessary work performed in each of these cases demonstrated that an individual case contingency fee of 25% would be fair, equitable, and justified. Accordingly, the Special Masters recommend that the Court set all individual contingency fees at 25%. Furthermore, any written objections to the Special Masters' Report and Recommendation must be filed with the District Court by no later than July 15, 2008.

Dated: June 30, 2008

s/ Arthur J. Boylan
ARTHUR J. BOYLAN
United States Magistrate Judge
Special Master

Dated: June 30, 2008

Patrick A. Juneau
PATRICK A. JUNEAU, La. Bar #07594
Assistant Special Master

MEMORANDUM

Contingent fee agreements are generally valid, since sound public policy favors the contingent fee as a method for those less financially advantaged to vindicate their legal rights. Williston on Contracts § 62:4 (4th ed. 2008)(hereinafter "WOC"). As one court noted, "There is no question that contingent fee agreements constitute a valid and vital legal resource which enable plaintiffs with meritorious causes of action, but lack funds to pay a lawyer, to obtain justice for themselves, and, in many cases, for others similarly situated." Id.

However, the right to contract for a contingent fee is subject to certain restraints. Due to the special nature of a contingent fee contract, which gives an attorney an interest in the outcome of the litigation and is most susceptible to improper influence and duress, the courts will closely review them. Id.; Blanchard v. Bergeron, 489 U.S. 87, 96-97 (1989)(the court should not treat a contingency fee agreement as an automatic cap on the recovery of attorney's fees). In particular, they will scrutinize the agreement for reasonableness, paying special attention to the reasonableness of the amount of the fee. WOC, at § 62:4; see also Int'l Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1277 (8th Cir. 1980)(court has responsibility to monitor contingency fee agreements for reasonableness). No one except the trial judge, assisted by special masters, can exercise control of fees effectively in multi-district litigation matters. See In re Zyprexa Liability Litigation, 424 F.Supp.2d 488, 491 (E.D.N.Y. 2006).

In determining the reasonableness of the fee, the courts will usually give special consideration to the fact that the compensation of an attorney is conditioned upon the attorney's success. WOC, at § 62:9. Thus, it is often the case that a larger fee will be authorized when its payments depends on the attorney's success, whereas it is less likely that a larger fee will be authorized when the attorney is to be paid regardless of the outcome of the litigation. Id. While there is no fixed or exact formula for determining a proper fee award, some other factors for consideration by the Special Masters were: (1) the experience and ability of the attorney; (2) the time and labor required to perform the service properly; (3) the amount in controversy and the result obtained in the case; (4) the nature of the litigation and the novelty and difficulty of the issues involved; (5) the fee customarily charged for similar services in the local area; (6) the nature and length of the professional relationship with the client; and (7) the undesirability of the

case. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974) abrogated on other grounds by Blanchard v. Bergeron, 489 U.S. at 90; see also Model Rules of Prof'l Conduct R. 1.5 (2007).

Applying said factors to this case, the Special Masters find that the aforementioned adjustment to the individual contingency fees is fair, equitable, and justified. The Special Masters find upon review of the submissions that the contingency fee adjustment is commensurate with the experience and abilities of the respective attorneys. All of the attorneys are highly skilled and knowledgeable in the area of multi-district litigation and have achieved an exceptional result for their respective clients thereby justifying in part the contingency fee increase.

With respect to the time and labor performed by the attorneys, the Special Masters agree with the Court that “many of the fee arrangements are likely not fair now because of the common benefit work and economies of scale...” See Order 43-44 [Docket No. 2636]. Although time and labor spent on a case should not be the sole basis for determining a fee,¹ the Special Masters in their own knowledge, experience, and expertise of the time required to complete similar activities find that an upward adjustment to a 25% contingent fee is warranted.

The mere fact that the client received a large recovery will not necessarily show that the attorney’s fee was reasonable and should thereby justify a large fee. Accordingly, the mere fact that the settlement fund in this MDL is \$240,000,000.00 (see Order 9) does not necessarily justify a large contingency fee. However, the Special Masters find that this is an important factor to consider that further supports the increase in the contingency fee cap.

¹ Elecs. Capital Corp. v. Sheperd, 439 F.2d 692, 693 (5th Cir. 1971).

The Special Masters decision is also reasonable considering the nature of the litigation and the difficulty of the issues involved. This MDL applies to over 8,000 individual claimants concerning alleged injuries caused by certain defective implantable defibrillator devices and pacemakers manufactured by Guidant. These facts clearly demonstrate the complex nature of the litigation. Moreover, the Court's and the Special Masters' duties to determine a reasonable fee for the individual plaintiffs alone evidence the difficulty of the issues involved in this case.

The Special Masters find that the 25% contingency fee for each individual case is in conformity with contingency fees rates charged for similar services throughout the country. They also find said fee to be appropriate based on the nature and length of the professional relationship between the attorneys and their respective clients.

Finally, the Special Masters find it to be appropriate to depart from the original award of attorney's fees in light of the undesirability of the case. As previously stated, this case is very complex, costly, and time-consuming and the attorneys in this matter should be adequately compensated for accepting the challenge. Additionally, in light of the looming preemption issues that may have precluded the individual plaintiffs from any recovery, the Special Masters commend the parties for reaching a settlement and believe that the attorneys for the plaintiffs should be further compensated for their efforts and the risks involved in pursuing this litigation.