

Bayer has submitted a Request seeking a determination regarding the application of the 6% MDL holdback to the Diane Mason Case. Stuart Emmons of Federman & Sherwood submitted responses on behalf of Diane Mason. Donald Arbitblit submitted a response on behalf of Lieff, Cabraser, Heimann & Bernstein. Ronald Goldser submitted a response on behalf of the Plaintiffs Steering Committee, and Douglas Beck submitted replies on behalf of Bayer.

Case Summary

This state court action was originally filed in Williamson County, Tennessee, and was not removed to federal court. The following lawyers and law firms appear on the complaint representing Diane Mason:

Kathryn E. Barnett and Alistair E. Newbern of Lieff, Cabraser, Heimann & Bernstein, LLP (Nashville, Tennessee Office);

Elizabeth J. Cabraser and Richard M. Franco of Lieff, Cabraser, Heimann & Bernstein, LLP (San Francisco, California Office);

William B. Federman and Stuart W. Emmons of Federman & Sherwood (Oklahoma City, Oklahoma);

A. Daniel Woska, T. David Hasbrook and John E. Barbush of Woska & Hasbrook, PLLC (Oklahoma City, Oklahoma); and

Don S. Strong and G. Stephen Martin, II of Strong, Martin & Associates, PLLC (Oklahoma City, Oklahoma)

In July, 2003, Diane Mason and Bayer entered into a settlement of this case. Lawyers from Strong, Martin & Associates and from Federman & Sherwood [collectively, Oklahoma City Lawyers] negotiated a settlement for Ms. Mason. No MDL assessment was held back as Bayer's settlement counsel was unaware of any criteria that would have subjected this settlement to the MDL withholding. Bayer paid the total settlement amount in September, 2003.

Subsequently, Bayer's settlement counsel learned that the PSC law firm of Lieff, Cabraser, Heimann & Bernstein [Lieff, Cabraser] was counsel for Ms. Mason. Bayer advised the lawyers for Ms. Mason of the \$6,000 MDL assessment, and they refused to return the funds.

Federman & Sherwood assert that the Oklahoma City Lawyers represented Diane Mason and that the Lieff, Cabraser law firm signed the Tennessee state court complaint only as a "courtesy." Lieff, Cabraser admits that its lawyers had no "involvement" in the case other than signing the complaint as a "courtesy" to the Oklahoma City Lawyers, that it did not have any written or verbal agreement to share any portion of the fee, that its lawyers did not do any work on the case, that its lawyers were not involved in the settlement, that it did not receive any fee for the settlement, and that it has no expectation of receiving a fee.

The Lieff, Cabraser law firm has and had at the time of the filing of the state court complaint an office in Tennessee. Two Lieff, Cabraser lawyers licensed to practice in Tennessee signed the complaint. None of the other law firms or lawyers listed on the complaint was or is licensed to practice in Tennessee.

At the time of the Diane Mason settlement, the Lieff, Cabraser firm was listed as one of Ms. Mason's law firms, and no notice or request to withdraw as her attorneys was ever filed. The Lieff, Cabraser is very actively engaged in this MDL, has contributed to the common benefit of all parties, and has been involved in settlements of Baycol cases.

The position of Bayer is that pursuant to PTO 53 it would have withheld the MDL 6% assessment had it known that the Lieff, Cabraser firm represented Diane Mason. The position of the Oklahoma City Lawyers is that no assessment need have been withheld and that this Court does not have jurisdiction over them because they filed a case in state court that was not removed and have never submitted to the jurisdiction of this Court. The position of the PSC is that an assessment is warranted because PTO 53 requires a withhold in these circumstances. Lieff, Cabraser did not in its submission state whether or not an assessment should have been made.

### Decision

The issue that all parties agree on is whether PTO 53 mandates a holdback in this case. Paragraph 2 of PTO 53 states that an assessment applies:

"e) in all cases of Plaintiffs lawyers and their law firms who are a member of the PSC or a member of the committee of the PSC."

The Lieff, Cabraser law firm was and is a member of the PSC, and none of the other law firms representing Ms. Mason are members or serve on a PSC committee. The Oklahoma City Lawyers argue that there was insufficient "involvement" by the Lieff, Cabraser firm in this case requiring a holdback. The PSC argues that a previous decision by this Special Master (The Betty Edwards Decision, Assessment Order No. 29) held that an assessment applies in these circumstances.

In Edwards, as in this case, Lieff, Cabraser was a law firm appearing on the state court complaint (which was not removed to federal court) and represented the plaintiff. Unlike in the Edwards case, the Lieff, Cabraser firm in this case submitted a factual summary of its representation of Diane Mason. It claims it did nothing but permit the names of its lawyers to appear on the Tennessee state court complaint as a "courtesy" to the other law firms representing Ms. Mason who were unlicensed in Tennessee.

PTO 53 explicitly states that a holdback is to be assessed in all cases of a PSC law firm member. Subdivision (e) does not establish the extent of the "involvement" of a law firm in a case, nor does it provide an exception if a law firm signs a complaint out of "courtesy." Accordingly, an assessment is warranted in this case and should have been withheld.

Further, the rules of civil procedure for both state and federal courts impose initial and continuing obligations on lawyers who sign pleadings. They are to, among other responsibilities, certify that the complaint is supported by facts and law and that it is not interposed for any improper purpose.

The rules of professional conduct also require lawyers who hold themselves out as representing a client to conduct themselves accordingly. They are to, among other obligations, assure that a plaintiff receives an appropriate settlement or a fair resolution of a claim. These rules provide that lawyers and a law firm who sign a pleading and who hold themselves out as attorneys representing a plaintiff are responsible to that plaintiff.

In this case, Lieff Cabraser lawyers cannot avoid that obligation by claiming they knew nothing about the case and were only involved as a courtesy to lawyers who were not licensed to practice in the state where the complaint was filed. Nor does a lack of involvement relieve the Lieff, Cabraser law firm of its obligations under PTO 53.

The remaining issue is which law firm is to replace the \$6,000. The Lieff, Cabraser firm is responsible for the assessment and it is to pay \$6,000 to the Common Benefit Fund. Whether or not the Oklahoma City Lawyers should return the \$6,000, it is the obligation of a PSC member law firm to comply with PTO 53.

Therefore, it is ORDERED that Lieff, Cabraser, Heimann & Bernstein pay \$6,000 to the MDL Common Benefit Fund within 15 days of the date of this Order and notify Bayer and this Special Master of the payment.

**April 29, 2004**

**/s/ Roger S. Haydock**

**Special Master**