

Connie O’Kelley submitted a Request pursuant to Pretrial Order No. 78 challenging the MDL 6% holdback. Robert G. Dwyer represented Plaintiff O’Kelley. Leanne DeShong submitted a response on behalf of Bayer; and Ron Goldser submitted a response on behalf of the Plaintiffs’ Steering Committee.

Case Summary

In November, 2001, Plaintiff O’Kelley filed two lawsuits in the San Diego County Superior Court. She filed a medical malpractice lawsuit against her doctors; and, she filed a products liability case against Bayer and other pharmaceutical defendants. Bayer timely removed the products liability lawsuit to the United States District Court for the Southern District of California. This action was subsequently transferred to the MDL proceedings before the United States District Court for the District of Minnesota and was part of the MDL proceedings until it was dismissed on March 4, 2003, based on a Fed.R.Civ.P. 41 unopposed motion of Plaintiff O’Kelley.

Settlement discussions between Plaintiff and Defendant Bayer began soon after the removal of the case to federal court and continued throughout the time the MDL Court had jurisdiction over the case. Bayer asserts that before March 4, 2003, a settlement agreement was reached regarding the settlement amount and all other conditions, including a release of all potential parties, including pharmacies, and all parties, including doctors, who were sued in the San Diego state court medical malpractice case. Plaintiff O’Kelley asserts that no enforceable settlement agreement existed before March 4, 2003, the date of the MDL case dismissal. Bayer asserts that the only remaining issue in dispute at the time of the MDL dismissal was the applicability of the 6% holdback. On March 12, 2003, Plaintiff’s motion to join Bayer and other pharmaceutical defendants to the remaining San Diego County Superior Court action was granted. No pharmacies or any others were added as parties. Plaintiff asserts that the parties were added in one lawsuit to bring them altogether in one forum for purposes of a final, global settlement. On March 18, 2003, Plaintiff accepted the settlement offer Bayer previously made. Throughout these discussions and proceedings, Bayer advised Plaintiff that the 6% MDL withholding would apply to any settlement because Plaintiff had a case pending in the MDL and that no procedural maneuver could be used to avoid the application of Federal Court Baycol Pretrial Orders Nos. 25 and 53.

Plaintiff primarily asserts that no settlement proceeds should be withheld because there was no federal court jurisdiction over the Plaintiff at the time of the written, enforceable settlement agreement involving all parties. The PSC asserts that Plaintiff is subject to a holdback because there did exist federal jurisdiction over the Plaintiff, that

the refund request is premature, and that Plaintiff can seek a refund at the end of the MDL case. Bayer's position has been explained above.

Decision

Pretrial Order No. 25 applies "to all cases over which the Court in MDL 1431 has jurisdiction." Pretrial Order No. 53 Paragraph 2 provides that a holdback applies to: "a) all cases transferred to this MDL, except those remanded by order of the Court to state court for lack of jurisdiction." The removed case of Plaintiff O'Kelley was properly transferred to the MDL and remained an MDL case for a substantial period of time. Serious settlement discussions among the parties occurred while the federal court had jurisdiction over the case, and a final settlement was reached less than two weeks after the federal case was dismissed. While it may have been convenient to have all settling parties in one lawsuit, neither law nor rules exist requiring such joinder to achieve a global settlement. Plaintiff O'Kelley may well have benefited from the existence and work of the MDL, and there is no basis to conclude that she did not benefit. The dismissal of the federal case immediately before the final settlement does not prevent nor prohibit the 6% holdback in this case.

The Request by Plaintiff O'Kelley is denied. Plaintiff may seek a refund of this holdback at a later time when this Court determines the distribution of the holdback contributions.

Date: June 11, 2003

/S/ Roger S. Haydock
Special Master