

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re BAYCOL PRODUCTS LITIGATION

**MDL No. 1431
(MJD/JGL)**

This Document Relates to All Actions

PRETRIAL ORDER NO. 53

IT IS HEREBY ORDERED:

1. The PSC has moved for an amendment of Pretrial Order No. 25, for the purpose of clarifying the application of that Order. This is a stipulated Order resulting from negotiations among the PSC, state lawyers on the Liaison Advisory Committee (LAC), and Defendants Bayer, Bayer AG, GSK, and GSK PLC. This Order supplements and amends Pretrial Order No. 25.

2. This Order retains the provisions of Pretrial Orders No. 25, 28 and 47 unless otherwise amended and retroactively amends Pretrial Order 25 to expressly apply to the following categories of cases and lawyers: a) all cases transferred to this MDL, except those remanded by order of the Court to state court for lack of jurisdiction; b) all cases filed in federal court not yet transferred, except those dismissed for lack of jurisdiction; c) all cases with lawyers voluntarily submitting to the jurisdiction of this Court pursuant to a written joint prosecution agreement; d) all cases with lawyers voluntarily submitting to the jurisdiction of this Court by signing a written engagement letter agreeing to participate in settlement conferences arranged by the PSC and the PSC Settlement Committee; e) all cases of Plaintiffs lawyers and their law firms who are a member of the PSC or a member of a committee of the PSC (other than LAC); and f) all cases subsequently ordered by this Court to be subject to this Order. This Order applies, in the six categories described above, to cases in which a lawyer and his or her law firm is counsel of record or otherwise has an interest. All cases of lawyers or their law

firms who are members of the PSC or a committee of the PSC (except LAC) on the date of this Order are subject to this Order. Any lawyer or his or her law firm becoming a member of the PSC or a committee of the PSC after the date of this Order is subject prospectively to the terms of this Order if the lawyer endorses a copy of this Order acknowledging the obligations under the terms of this Order.

3. Before making any claim payment to a plaintiff or claimant to whom this Order applies, defendants shall deduct from such payments an amount equal to six percent (6%) of the aggregate of the amount being paid and the present cash value of any amounts to be paid to the plaintiff/claimant in the future and shall pay such sum as hereinafter provided for deposit into the MDL 1431 Fee and Cost Account (a Court supervised trust account). Four percent (4%) shall be deemed fees to be subtracted from the attorneys' fees portions of individual fee contracts, and two percent (2%) shall be deemed costs to be subtracted from the client portions of individual fee contracts.

4. The Court is not making the determination by this Order that any attorney shall receive any specific sum as payment of counsel fees and reimbursement of litigation expenses. Such a determination is specifically reserved for an appropriate time following petitions related to such an award. Rather, this Order is merely intending to develop a mechanism for the creation of a fund from which the amount of fees and costs, once determined by appropriate legal and equitable standards by the Court, may be awarded and paid.

5. As a condition of appointment made by this Court of any counsel to any committee of the MDL or its PSC, such counsel and their law firms are deemed to have agreed to the terms of paragraph 3 for all such counsel obtaining any recovery in any forum, with the

exception provided in paragraph 6. Any counsel and their law firms not previously appointed to any MDL committee prior to the date of this Order, which counsel is appointed to any such committee after the date of this Order must first endorse a copy of this Order before that counsel's cases are subject to the terms of this Order.

6. It is expressly understood that counsel appointed by this Court to the LAC, and their state court constituents, co-counsel and associated counsel, are not obligated, merely by virtue of their appointment to the LAC, to pay any assessment or costs covered by this or any other Order of this Court unless such attorneys expressly agree to such assessment and Order.

7. Execution of the joint prosecution agreement will subject all Baycol cases of the law firm executing such agreement to the provisions of this Order regardless of whether that law firm's Baycol cases are filed or unfiled, or filed in state court or federal court. The transfer of a case to this Court by the MDL Panel does not obligate any lawyer or law firm to execute the Joint Prosecution Agreement. If a lawyer or law firm has a case transferred to this Court, and does not sign the joint prosecution agreement, only the case so transferred is subject to the jurisdiction of this Court. No State Court case will be subject to an assessment or other charge in this Court unless such State Court case comes within the jurisdiction of this Court as set forth in paragraph 1 of this Order. No PSC or PSC committee member waives any rights, if any, by the terms of this Order from seeking fees or costs for the use of MDL work product in any State Court proceeding, to the extent that MDL work product is used in any such State Court proceeding.

8. As previously set forth in Pretrial Order No. 28:

A. Depositions noticed in MDL-1431 may be cross-noticed to state

court proceedings, except where prohibited by state court order or rule. Cross-noticing of such depositions shall not alone subject state court parties to an MDL assessment or lien.

- B. Where depositions taken in MDL-1431 are used by the parties in state court proceedings, as if taken in those state court proceedings, use of such depositions and attached exhibits shall not alone subject the state court parties to an MDL assessment or lien.

9. Defendants shall have responsibility for withholding the four percent (4%) and two percent (2%) set-off of the claim payments and tendering for deposit such sums to the MDL 1431 Fee and Cost Accounts. If Defendants unreasonably fail to properly withhold the set-offs described in this Order, Defendants shall nevertheless pay a like amount into the Common Benefit Fund in the amount that Defendant failed to withhold. Defendants may seek the recovery of such amounts from a plaintiff or plaintiff's lawyer whose case was subject to withholding under the terms of Pretrial Order No. 25 and this Order. In any event, plaintiff's lawyers shall be responsible to pay to the Fees and Cost Account the amount of any set-off not withheld that should have been withheld.

10. The Court shall establish an insured, interest bearing escrow trust account to receive and disburse funds as provided in this Order. The Court will, by future order, designate an escrow trustee agent to manage the account, under the supervision of Special Master Haydock. All funds in the account will be held as funds subject to the direction and order of the Court.

11. Plaintiff Co-Lead Counsel shall periodically provide to Bayer and this Court a list of the lawyers who fall within the categories of Paragraph 2, along with appropriate documentation. Bayer shall maintain detailed records which identify the plaintiffs and plaintiffs' lawyer's names, current address, e-mail address, and telephone numbers, civil actions or other identifying number, amount of deposit, date of deposit, identification of the parties contributing to the amount deposited (and any allocation if more than one contribution is being made), and other information that may be required by the circumstances for all cases within the categories of Paragraph 2. All such records shall be maintained as highly confidential material and the only persons with access to such records shall be the Court, Special Master, the escrow trustee, and Bayer. Bayer shall provide monthly to Plaintiffs Co-Lead Counsel the names of all lawyers whose cases are subject to withholding in that month. Bayer shall also provide monthly under seal to the Court for in camera inspection the names of the plaintiffs or claimants and their lawyers who have settled cases in that month that are not subject to withholding and the individual amounts of settlements, unless the settlement amount is subject to a confidentiality agreement or order.

12. The sequestered funds shall be made available to provide for reimbursement of costs and payment of attorneys fees to the PSC and other lawyers that the Court deems worthy of such payment and reimbursement for work performed for the common benefit of plaintiffs in MDL 1431 and state court litigants, all of which is subject to a proper showing as determined by the Court and applicable law and precedent in the future.

13. In making an award of counsel fees to attorneys and in apportioning any fee award among those attorneys, appropriate consideration will be given to the experience, talent, appropriate contribution, and other factors set forth by law, of each attorney who seeks to

recover counsel fees from the MDL 1431 Fee and Cost Account, and the qualifications for entitlement to and distribution of such fees and costs will be left to the sound and fair discretion of this Court based upon appropriate and sound law and precedent.

SO ORDERED this 22nd day of November, 2002.

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Honorable Michael J. Davis
United States District Judge

which will collectively be referred to as the “PSC Work Product”; and

WHEREAS the State Attorneys are desirous of acquiring the PSC Work Product and establishing an amicable working relationship with the PSC for the mutual benefit of their clients;

NOW, THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

1. With respect to each client who they represent in connection with a Baycol-related claim, other than clients with claims filed or pending in any federal court, each of the State Attorneys shall deposit or cause to be deposited in the MDL 1431 Fee and Cost Account established by the District Court in the MDL six percent (6%) of the gross amount recovered by each such client (4% fees; 2% costs). For purposes of this Agreement, the gross amount of recovery shall include the present value of any fixed and certain payments to be made to the plaintiff or claimant in the future.

2. The State Attorneys, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PSC a lien upon and/or a security interest in any recovery by any client who they represent in connection with any Baycol-related injury, to the full extent permitted by law, in order to secure payment in accordance with the provisions of Paragraph 1 of this Agreement. The State Attorneys will undertake all actions and execute all documents which are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

3. This Agreement shall apply to each and every claim or action arising from the purchase or ingestion of Baycol in which the State Attorneys have a right to a fee recovery.

MDL NO. 1431 | PLAINTIFFS' STEERING
COMMITTEE

MDL No. 1431
Plaintiffs' Co-Lead Counsel

[State Court Attorney]