UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

In re:	)	Master File No. CV 92-P-10000-S
	)	
SILICONE GEL BREAST IMPLANTS	)	
PRODUCTS LIABILITY LITIGATION	)	
(MDL-926)	)	

OPINION and ORDER

Before the court are two motions for "relief" from the six percent common benefit assessment mandated under Order No. 13, an order which was entered in July 1993 and which automatically applied to all subsequent cases upon their filing in or transfer to this court.

One of the motions was filed on April 22, 1998, by Wilentz, Goldman & Spitzer with respect to pending or potential settlements of the claims of certain of the firm's clients. A virtually identical motion was filed on June 1, 1998, by Levinson, Axelrod, Wheaton & Grayzel, Caulfield, Marcolus & Dunn with respect to pending or potential settlements of the claims of certain of its clients. After considering the written submissions and oral arguments of the movants, of the Plaintiffs' National Steering Committee, and of representatives of the "Common Benefit" fund, the court concludes that the motions should be denied on their merits even if they had been—which they were not—timely filed.

These motions are made with respect to certain clients who are plaintiffs in cases which were remanded by this court to the New York Supreme Court or the New Jersey Superior Court (or in cases still pending in this court which movants hope will soon be remanded to federal or state courts in New York or New Jersey). Each of these plaintiffs had been a participating class member in the original global settlement of the Lindsey case but later, when the terms of the Revised Settlement Program were announced, had exercised a "second-round" election to opt out of the class.

The letter and spirit of Order No. 13, as well as principles of equity, call for this assessment to be imposed if these claims and suits are settled. There is no need to recite the many benefits that these plaintiffs have received, and which have contributed to or may contribute to any efforts to settle their cases, from the substantial "common benefit" efforts made nationwide over the course of six years by hundreds of attorneys acting on behalf of plaintiffs—including the Wilentz firm, which has filed one of the two motions though it has received almost $300,000 in fees and expense reimbursement from the common benefit fund. Contrary to the allegations contained in these motions, this assessment has consistently been imposed when claims of other plaintiffs in the same or similar circumstances were settled.

The court rejects movants' arguments that it lacks the power to impose this assessment with respect to settlement of these plaintiffs' cases. It is true that jurisdictional concerns—though not principles of equity—led this court to exclude from the assessment (unless approved by the appropriate state court) the settlement of state court actions where the plaintiff exercised her "first round" opt-out election and was never a party or class member in any federal action (except perhaps for a removal based solely on related-to-bankruptcy jurisdiction). The plaintiffs whose claims are at issue in these motions were, however, voluntary members of the Lindsey class action in this court and registered with this court's Claims Office. The court does not in any way fault these plaintiffs for their decision in the second round to opt out. That, indeed, was their right —but the court does hold that, given their voluntary participation for many months in the federal class action, they cannot challenge the power of this court to treat them, when later opting out, as subject to appropriate conditions regarding their responsibility to share equitably in the cost of common benefit efforts that would enable them to pursue separate prosecution of their claims.

Moreover, with respect to those cases involved in these motions that are no longer pending in this court but have been remanded to state court, this court, before exercising its discretion whether to order such remands, had entered show cause orders (Order 39 and Order 41) in which the plaintiffs and defendants were explicitly directed to respond whether they objected to any of the conditions under which the cases would be remanded, one of which conditions was that (unless the plaintiffs had exercised a "first-round" opt-out and their state court cases had been removed to federal court solely on the basis of related-to-bankruptcy jurisdiction) the remanded cases would be subject to Order No. 13, *i.e.*, the order imposing a 6% assessment on subsequent

recoveries by plaintiffs as a means to equitably share the cost of professional services and expenses provided for the common benefit of plaintiffs. By not objecting to that condition, the plaintiffs involved in this motion whose cases have been so remanded have accepted that provision and should not now be heard to complain that this condition either was beyond the court's power or was inequitable. As to those plaintiffs involved in this motion whose cases are still pending in this court, this court would, as a matter of equity, expect to similarly condition its exercise of its discretion to enter any such remand or suggestion of remand upon an agreement to accept Order No. 13.

Finally, movants argue that, by imposing an assessment of 6% of the *gross* recovery and by allowing 1/2 of that amount to be treated as an expense of litigation, Order No. 13 violates state law provisions in New York and New Jersey that govern contingent fee contracts.

To the extent movants are complaining that treating 1/2 of the assessment as an expense of litigation is impermissible under state law for lack of specific, identifiable expenses, the answer is simply that, if this is so, the attorneys should treat the entire 6% assessment as chargeable against their share of the recovery rather than treating any portion of that as an amount that "comes off the top" before calculating their fee. Under Order No. 13 and the conditions on which remand were ordered, attorneys are not required to treat 1/2 of the assessment as litigation expenses, but merely are permitted to do so if consistent with their agreement with their clients and with applicable state law.

Nor do the laws of New York and New Jersey prohibit a contingent fee contract that sets a fee based on the gross amount of recovery. Rather these laws prohibit a fee—however calculated—that is in excess of statutorily-prescribed percentages of the net recovery. It is certainly possible that in some circumstances the imposition of a 6% assessment on the gross recovery might, in whole or part, have to yield because of inconsistency with state law—though movants have not shown this to be the situation with respect to any of their clients. For example, if in New York a client's case was settled for $1,000 after the attorney had spent $900 for investigative services, the maximum amount (without special application to the state court) that could be charged for attorney's fees under a contingent fee contract would be $50 (i.e., 50% of the net sum recovered), which would be less than 6% of the gross recovery ($60). While in theory the common fund assessment might be asserted as to this $50, the court would certainly

expect to receive and grant an application under paragraph 2(f) of Order No. 13 waiving any assessment because of these exceptional circumstances.

These motions are hereby DENIED. As the "Ness Motley" appeal was dismissed today by the Eleventh Circuit, there is no need to consider whether to direct that amounts paid into the common benefit fund with respect to the settlement of the claims identified in these two motions be placed in the "Undetermined Case Sinking Fund."

This the 7th day of October, 1998.

/s/ Sam C. Pointer, Jr.

United States District Judge