

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
Southern Division**

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

**ORDER**

**(Division of Opt-Out Settlement Proceeds--Attorney/Client--E.g., Wood v. O'Quinn)**

The court has received a copy of a complaint and temporary restraining order filed June 4, 1999, in the 4th Judicial District Court, Rusk County, Texas in an action brought by Martha Wood, Patricia Haynes, and Rubye Lois Freeman against John M. O'Quinn, Cause No. 99-219. This order is being entered sua sponte because of the immediate risk that the relief sought in that complaint and the terms of the temporary restraining order might interfere with earlier orders of this court such as might justify this court's taking action under the All Writs Statute, 28 U.S.C. ' 1651.

Wood, Haynes, and Freeman were plaintiffs in an earlier case transferred to this court under 28 U.S.C. ' 1407 from the Eastern District of Texas and opened in this court as CV 92-10879. Haynes elected to opt out of the original global settlement and did not elect to rejoin the RSP settlement class. Wood and Freeman elected to opt out of the revised settlement class before receiving notification of status letters. Before their claims were remanded back to TXE in late July 1996, that case, including their claims, became subject to the provisions of Order 13, which imposed a special assessment for common benefit fees and expenses (6% of the gross recovery) on subsequent recoveries by settlement or trial. Under Order 13, that assessment is chargeable against the fee otherwise payable to the attorney for the settling plaintiff, but with the provision that 1/2 of the assessment (or 3% of the gross recovery amount) is to be treated as an expense of litigation if the arrangement between the attorney and the client provides for special treatment of litigation expenses (typically by calling for payment of such expenses "off the top" before calculating any attorneys fee under a contingent percentage fee agreement).

The newly-filed state court action involves a dispute between the three plaintiffs and O'Quinn, who had represented them in breast-implant cases, respecting the proper division of proceeds received from implant manufacturers in settlement of their claims. The three individual plaintiffs are also seeking to act as representatives on behalf of a class of other past or current clients of O'Quinn with respect to division and distribution of settlement proceeds.

In part the dispute involves questions under Texas law as to what

itemsCindependently of the 6% assessment under Order 13Ccan appropriately be treated as "expenses of litigation" that under the individual contracts between attorney and client are to be repaid to the attorney before applying a contingent fee percentage to determine the amount of attorneys' fees. This is a dispute that need not present any potential conflict with this Court's earlier orders.

Another aspect of this dispute, however, relates to the 6% assessment that under Order 13 must be withheld by a settling manufacturer and paid to the Common Benefit Fund. It is unclear whether Wood et al. are attempting merely to enforce the provisions of Order 13 in calculating the proper division of settlement amounts after the 6% has been paid into the common benefit fundCwhich should not conflict with Order 13Cor whether they are challenging in whole or in part the payment by the manufacturers of that assessment to the common benefit fund. While, for the most part, the terms of the complaint and of the temporary restraining order appear to be of the first type, there are two provisions in the temporary restraining order that could be read as of the latter type; namely, the injunction for O'Quinn to cease from deducting a 3% "MDL Deduction" from any subsequent settlement proceeds and the order for O'Quinn to deposit into a registry account the 3% "MDL Deduction". If these two provisions are to be read as precluding the payment by settling manufacturers of the full 6% of gross recoveries into the common benefit fund, there would be a conflict with Order 13 that would justify this court's taking appropriate action under the All Writs Statute. On the other hand, if these provisions simply relate to the handling and division of the 94% of gross settlement recoveries that are to be paid to O'Quinn and his clients by settling manufacturers, no immediate conflict with Order 13 would arise.

This sua sponte order is being entered in the hope and expectation that, being aware of this Court's concerns, the parties in the Texas state court action can take appropriate steps to avoid conflict with this court's orders, and particularly Order 13.

The court takes this occasion, however, to provide some guidance that may be of help to the litigants and the court in Wood v. O'Quinn. This court expresses no views as to the merit or lack of merit of the claims in the Wood v. O'Quinn case, and from the bare allegations of the complaint cannot determine whether there has been an overpayment or underpayment of settlement proceeds as between the O'Quinn firm and their clients arising from the Order 13 assessments. This court would not, however, be surprised if there have been errorsCindeed, quite innocent errorsCin properly calculating the division of settlement proceeds between O'Quinn and his clients, for there has been frequent confusion and misunderstandings on the part of plaintiffs' counsel and individual plaintiffs in how to apply Order 13 in their settled cases (even though this court views the provisions of Order 13 as clear and unambiguous). This court hopes that this guidance, which can be best expressed through an example, will also be of help, via posting on the webpage, to other plaintiffs and their counsel who may, from time to time, have disputes regarding the proper division of settlement proceeds of opt-out cases and claims subject to Order 13.

Suppose (A) there is a contingency fee contract that would be enforceable under state law which provides for a 40% fee to be calculated after first deducting expenses of litigation; (B) there is a settlement for the gross amount of \$40,000 of an opt-out claim subject to Order 13; and (C) the attorney has incurred \$5,000 in litigation expenses that state law would recognize as "coming off the top." The proper division in such circumstances, taking into account both the assumed state law and Order 13, would be as follows:

		To CBF:	To Atty:	To
Client:				
1. Gross Settlement Recovery	40,000			
2. Litigation Expenses:				
a. CBF litigation expenses (3% of #1)	1,200	1,200		
b. Allowable atty litigation expenses	5,000		5,000	
c. Total (#2a + #2b)	<u>6,200</u>			
3. Net Settlement Recovery (#1 - #2c)	33,800			
4. Contingency fee percentage (40% of #3)		<u>13,520</u>		
a. CBF litigation fees (3% of #1)	1,200	1,200		
b. Attorney fee balance (#4 - #4a)	12,320		12,320	
5. Balance to client (#3 - #4)	20,280	<u>          </u>	<u>          </u>	<u>20,280</u>
Total distributions		2,400	17,320	20,280

Another way of illustrating this same distribution is as follows:

		To CBF:	To Atty:	To
Client:				
<u>Distribution to CBF:</u>				
1. Gross Settlement Recovery	40,000			
2. Payment to CBF (6% of #1)	<u>2,400</u>	2,400		
3. Payment to attorney/client (#1 - #2)	37,600	<u>          </u>		
TOTAL TO CBF:		2,400		

Distribution to plaintiff's attorney:

4. Allowable atty litigation expenses	5,000		5,000	
5. Fees:				
a. Gross Settlement Recovery	40,000			
b. Litigation Expenses:				
1 CBF (3% of #1)	1,200			
2 Atty litigation expenses	<u>5,000</u>			
3 Total expenses (#5b1 + #5b2)	<u>6,200</u>			
c. Net settlement recovery (#5a - #5b3)	33,800			
d. Contingency fee (40% of #5c)	13,520			
e. Reduction for CBF fees (3% of #1)	<u>1,200</u>			
f. Fees to atty (#5d - #5e)	12,230		<u>12,230</u>	
TOTAL TO PLAINTIFF'S ATTY			17,230	

Distribution to client:

6. Gross Settlement Recovery	40,000	
7. Litigation Expenses:		
a. CBF (3% of #1)	1,200	
b. Atty litigation expenses	<u>5,000</u>	
c. Total (#7a + #7b)	<u>6,200</u>	
8. Net Settlement Recovery	33,800	
9. Attys fees (40% of #8)	<u>13,520</u>	
TOTAL TO CLIENT	20,280	20,280

Counsel for the parties in Wood v. O'Quinn are requested to provide a copy of this order to The Honorable J. Clay Gosselt, the presiding judge in that case.

This the 11th day of June, 1999.

/s/ Sam C. Pointer, Jr.  
United States District Judge

Serve: Terry L. Scarborough (atty for plaintiffs Wood et al)  
John M. O'Quinn  
Francis G. Harmon, III (probable atty for defendant O'Quinn)  
Plaintiffs Liaison Counsel  
Defendants Liaison Counsel