

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Baycol Products Liability Litigation

MDL No. 1431

This Document Relates to: All Actions

Pretrial Order No. 31

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Peter Sipkins, Dorsey & Whitney LLP, Philip S. Beck, Adam L. Hoeflich and Tarek Ismail, Bartlit Beck Herman Palenchar and Scott, Susan A. Weber, Steven Ellison and Amy McBride, Sidley Austin Brown and Wood, and Richard K. Dandrea, Eckert Seamans Cherin & Mellott, LLC, for and on behalf of Bayer Corporation.

Scott A. Smith and Tracy J. Van Steenburgh, Hallelund Lewis Nilan Sipkins & Johnson, P.A. and Fred T. Magaziner, Dechert Price & Rhoads, for and on behalf of SmithKline Beecham Corp. d/b/a GlaxoSmithKline.

Plaintiffs move the Court, pursuant to Fed. R. Civ. P. 42, for an Order allowing consolidation of up to fifty plaintiffs in a single complaint. For the reasons stated below, this motion is denied.

Plaintiffs seek to file complaints that each contain fifty plaintiffs. Plaintiffs refer to this procedure as bundling, and argue that bundling is permitted pursuant to Fed. R. Civ. P. 42(a). Plaintiffs argue that an Order allowing the bundling of fifty plaintiffs per complaint will facilitate plaintiff participation in the MDL, will save filing fees and will be easier for plaintiffs' counsel to administer. Rule 42(a)¹, however, does not grant the

¹Rule 42(a) provides: "Consolidation: When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order the actions consolidated; and it may make such orders concerning proceedings therein as may tend

Court the authority to grant Plaintiffs' motion. Rather, Rule 42(a) allows the Court to consolidate actions that are pending - it does not provide for the initial filing of a complaint with fifty plaintiffs.²

Fed. R. Civ. P. 20, which provides for permissive joinder, governs this motion. Joinder of plaintiffs in a single action is appropriate "if they assert any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action."

Defendants ask the Court to follow the line of cases that have held that permissive joinder under Rule 20 is proper only where "the central facts of each plaintiff's claim arise on a somewhat individualized basis out of the same set of circumstances." In re: Orthopedic Bone Screw Products Liability Litigation, 1995 WL 428683, at *2 (E.D. Pa. 1995); see also, In re: Rezulin Products Liability Litigation, 168 F. Supp.2d 136, 145 (S.D.N.Y. 2001); In re Diet Drugs, 1999 WL 554584, at *4 (E.D. Pa. 1999); Simmons v. Wyeth Laboratories, Inc., 1996 WL 617492, at *3 (E.D. Pa. 1996). The fact that defendants' conduct is common to all of plaintiffs' claims and that the legal issues of duty, breach of duty and proximate cause and resulting harm are common do not satisfy Rule 20's requirements. Diet Drugs, at *4. Instead, joinder may be proper only where the plaintiffs' claims arise from the same basic set of facts. In the Diet Drugs

to avoid unnecessary costs or delay."

²That common questions of law and fact exist in this case is not disputed, and was the basis for these cases being transferred to this Court by the Judicial Panel on Multidistrict Litigation. In addition, in PTO No. 1, this Court has already ordered that cases transferred to this Court by the JPMDL shall be consolidated for pretrial purposes.

case, the district court determined that joinder may be appropriate if plaintiffs purchased the alleged defective drug at issue from an identical source, such as from the same doctor or hospital. See, Id.

Plaintiffs' cite to the decision In re: Norplant Contraceptive Products Liability Litigation, 168 F.R.D. 579 (E.D. Texas) in support of their motion. In Norplant, the district court determined that Rule 20's requirements are met if plaintiffs' claims arise out of the same acts and omissions of the defendant. However, Norplant has not been followed by any other federal district court, and has been criticized by others. See eg., Insolia v. Phillip Morris, Inc., 186 F.R.D. 547, 551 (W.D. Wis. 1999); Simmons, 1996 WL 617492, at *4.

Although none of the cases cited by the parties are controlling in this case, the Court finds that the analysis of the courts in the Bone Screw, Diet Drugs and Rezulin cases to be persuasive. As noted by the court in Bone Screw,

there are many differences between the unique histories of each plaintiff. This case is not one where all of the plaintiffs were harmed at the same location or worked for the same company and allegedly suffered employment discrimination at the hands of one employer. In this case, plaintiffs from many states went to different doctors or teams of doctors and medical facilities and providers . . . for different reasons, and underwent surgery at different times in what could likely be surgery at different times in what could likely be over one thousand different medical providers locations staffed by different personnel. To simply group the plaintiffs by judicial district or to simply group them primarily for filing convenience, would not satisfy the terms required in Rule 20 nor the purpose for which Rule 20 seeks to ease the burden of litigation in groups of similarly situated persons.

Id. at *2. The same considerations exist in this case. Accordingly, joinder of plaintiffs in this litigation will not be proper, unless the plaintiffs' claims arise from the same basic

set of facts.

IT IS HEREBY ORDERED that Plaintiffs' Motion for an Order Allowing the Consolidation of up to Fifty Plaintiffs in any One Case is DENIED.

Date:

Michael J. Davis
United States District Court