



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 19-C-9000

THIS DOCUMENT APPLIES TO ALL CASES

ORDER REGARDING ATTORNEY FEES

On November 4, 2021, the Mass Litigation Panel ordered me, as Common Benefit Fund Commissioner, to “determine what general guidelines all attorneys should follow in contemporaneously reporting the work done to ultimately form a portion of the information needed by the Panel in reaching fair and equitable fee determination.” *Order Establishing Common Benefit Fee Fund* (Transaction ID 67071292). The Panel further ordered me to recommend “an allocation of the amount of the gross attorneys’ fees award to provide for both Common Benefit work performed by Plaintiffs’ counsel as well as work Plaintiffs’ counsel have undertaken to represent their own clients pursuant to contingency fee agreements, while recognizing that an individual attorney or law firm may be eligible for fees both for Common Benefit Work and for work done in furtherance of representing a specific client under a contingency fee agreement.” *Id.*

The Panel appointed Time Manager John Jenkins of Smith, Cochran, and Hicks PLLC to assist the Common Benefit Fund Commissioner. As Common Benefit Fund Commissioner, I find the following are necessary elements of any reported time:

Time must be contemporaneously reported in a uniform fashion to Time Manager John Jenkins at the following electronic mail address: John.Jenkins@schcpa.com. Sufficient detail must be provided when time is reported to determine whether the work described therein is authorized Common Benefit Work, with the Time Manager’s determination subject to further review by the Common Benefit Fund Commissioner.

Recognizing the considerable expense of prosecuting the cases in this Mass Litigation, the Panel has ordered the establishment of an Expense Assessment Fund as determined by the Common Benefit Fund Commissioner. An attorney's participation in the Expense Assessment Fund will be viewed as a positive relevant factor for the Common Benefit Fund Commissioner to consider in awarding Common Benefit attorneys' fees.

The Panel has ordered that "all Plaintiffs' attorneys and firms participating in this Mass Litigation shall pay a Common Benefit Fee to the MDL Plaintiffs' Executive Committee for use of the MDL work product, in accordance with the Form Participation Agreement acknowledged or executed by counsel for all Plaintiffs." *Id.* The Panel recognizes the existence of the MDL Participation Agreements, which have been executed by most if not all attorneys involved in the West Virginia MLP Opioid Litigation. Having access to such work product makes it feasible for the West Virginia MLP to maintain its trial schedule in an orderly and efficient fashion while relieving West Virginia attorneys from thousands of hours of necessary work in discovery.

As Common Benefit Fund Commissioner, I have reviewed the Case Management Order #5 regarding Protocol for Work Performed and Expenses Incurred entered in MDL 2804 by The Honorable Dan Aaron Polster filed on June 19th, 2018 (*Docket #636*). I find that the provisions set forth by Judge Polster in his order, which provide participating counsel guidelines about what is and is not compensable work, are sound principles that not only should apply in the MDL but should also be applied in the West Virginia MLP.

I find that creation of a West Virginia Litigation Fund that will be managed jointly by the designees of Attorney General Morrissey, the Coordinator of the Manufacturer and Pharmacy Litigation, and Co-Lead Counsel in the Distributor Litigation, Paul Farrell, and Robert Fitzsimmons, is appropriate. The timing and amount of each assessment will be determined jointly

by those parties and shall need to be paid within 14 days of the assessment. Such assessment shall be available to pay shared expenses incurred for the common interest of all Plaintiffs in the West Virginia MLP. All shared expenses must be approved by the designee of Attorney General Morrissey for the Manufacturers and Pharmacy Trial track and by Paul Farrell and Robert Fitzsimmons for the Distributors' Trial track. Any disagreements will be submitted to the Common Benefit Fund Commissioner to resolve.

I find that the shared costs and expense guidelines that were deemed appropriate in the MDL appear to be appropriate in West Virginia as well, and I hereby adopt them. I further find that the designation of non-shared expenses also appears to be appropriate and will be adopted in these cases.

The MDL Court addressed travel limitations, and they are certainly reasonable travel limitations in a National MDL. However, for the West Virginia MLP, we are faced with different situations, and therefore I caution all counsel to maintain their travel costs. For any travel costs to be subject to reimbursement, they will have to be determined at the appropriate time to be reasonable and necessarily incurred, and the hotel bills and daily meal expenses must be reasonable under West Virginia Practice.

The MDL Order establishes protocols for submission of Time and Expenses. I adopt generally the format and deadlines set forth therein. However, time submissions will be maintained by Time Manager John Jenkins in a format that will allow them to be sortable and searchable at the appropriate time. All time submissions and expense submissions shall be submitted in the format approved by Time Manager John Jenkins, and failure to comply will be reason to exclude the time and expenses for consideration of payment or reimbursement. After consultation with the Coordinator of the Manufacturer and Pharmacy Litigation, and Co-Lead

Counsel in the Distributor Litigation, I find that the format established in the MDL, including the category of monthly expenses to be reported, is a fair and reasonable format, and I hereby adopt it in the West Virginia MLP. I further adopt the deadlines and the cautions provided in the MDL 2804 orders of May 1st, 2018 (*Docket #358*), and June 19th, 2018 (*Docket #636*), and urge West Virginia counsel to abide by the same.

Just setting guidelines going forward is not adequate under the circumstances of the West Virginia MLP. While many of these actions have been pending for several years, with significant work performed by counsel in some of the actions, in other actions counsel have not engaged in any discovery or taken any active litigation steps. For the work of all attorneys to be fairly evaluated and reviewed before any determination of common benefit or contingency fee entitlement is made, counsel must have an opportunity to present evidence and provide documentation of the work they have performed to date. I find that this can be done in one of the following ways, or a combination of all.

- 1) If an attorney has contemporaneous time records, they can be submitted to Time Manager John Jenkins by the deadline set forth below.
- 2) If the attorney does not have contemporaneous time records, they may create, to the best of their ability, a summary of the work they have done in as much detail as possible and submit it in a narrative format to Time Manager John Jenkins. Upon receipt, Mr. Jenkins will attempt to coordinate with the attorneys to try to get further information that can go into a database, or if a database is not possible, those narratives will be considered by the Common Benefit Fund Commissioner at the appropriate time.
- 3) For attorneys working in MDL 2804, they may rely upon what they have submitted in the MDL, as it relates to work performed in West Virginia. They may re-submit that time to

Time Manager John Jenkins indicating it has been submitted for consideration by the MDL Common Benefit. How that time will be evaluated and treated will be subject to further ruling by the Common Benefit Fund Commissioner and/or the Panel.

To give everyone a fair opportunity to complete these tasks, the submissions shall be provided to Time Manager John Jenkins *on or before February 1, 2022*. Any submission that is made by way of narrative must include a supporting affidavit signed by the responsible or supervising member of the law firm making the submission.

A copy of this Order has this day been electronically served on all counsel of record via File & ServeXpress.

ENTERED: January 7, 2022.

/s/ Christopher C. Wilkes
Common Benefit Fund Commissioner