



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: CARBON MONOXIDE EXPOSURE LITIGATION Civil Action No. 14-C-8000

**ORDER REGARDING CERTAIN PLAINTIFFS' MOTION
TO ENJOIN SETTLEMENT PAYMENT TO ANY PLAINTIFF
UNTIL AN AGGREGATE SETTLEMENT IS REACHED**

THIS DOCUMENT APPLIES TO ALL CASES

FACTS AND PROCEDURAL HISTORY

1. On May 8, 2014, Twenty-three (23) civil actions were referred to the Mass Litigation Panel by then Acting Chief Justice Margaret L. Workman. *Administrative Order of the Supreme Court of Appeals of West Virginia* entered May 8, 2014.

2. The actions (hereinafter "Carbon Monoxide Exposure Litigation") arise from numerous injuries allegedly caused by exposure to carbon monoxide originating from a pool heater and vent flue pipe at the Holiday Inn Express Hotel & Suites, located at 95 RHL Boulevard, South Charleston, West Virginia ("the Hotel"). The actions were filed against the owner of the Hotel, Pike's Inc. d/b/a Holiday Inn Express Hotel & Suites, and its manager, Manisha Patel, as well as Parbhubhai Patel and Kanu Patel; HVAC contractors Steve Combs, Karen Combs and Premier Pools, LLC, and John Providenti and JP Mechanical, Inc.; and Hotel Defendants, Holiday Hospitality Franchising, LLC, Intercontinental Hotel Group Resources, Inc., Six Continents Hotels, Inc., and Intercontinental Hotels Group, PLC.

3. Because four (4) of the twenty-three (23) actions were settled and dismissed prior to referral to the Panel they were removed from the docket of the Carbon Monoxide Exposure Litigation. *Order Removing Previously Dismissed Cases from the Carbon Monoxide Litigation Docket* (Transaction ID 55673979). Presently, there are nineteen (19) civil actions pending

before the Panel. Two (2) of the actions, *Edmondson* and *Agnatovech*, have settled, leaving seventeen (17) actions to be resolved in this litigation.

4. To date, the Resolution Judges assigned to the Carbon Monoxide Exposure Litigation have conducted mediation on three separate occasions: July 22, 23 and 24, 2014; September 18 and 19, 2014; and September 29, 2014. *Order Regarding Mediation and Mediation Statements*, entered June 4, 2014; *Order Reconvening Mediation*, entered August 8, 2014 (Transaction ID 55860452); and *Second Order Reconvening Mediation*, entered September 24, 2014 (Transaction ID 56081633).

5. As a result of these mediations, Defendant JP Mechanical, Inc. has tendered an aggregate amount for the settlement of all cases. December 18, 2014 Motions Hearing Transcript, p. 29. Additionally, although the wrongful death case of *Moran v. Patel*, Kanawha County Civil Action No. 12-C-469, was not referred to the Panel and was never part of the Carbon Monoxide Exposure Litigation, the Resolution Judges encouraged and assisted the parties in resolving *Moran* in order to facilitate resolution of the nineteen (19) actions referred to the Panel.

6. At the conclusion of the September 29, 2014 mediation the Resolution Judges gave the parties almost four (4) months to gather and exchange enough medical and damages information to meaningfully discuss the value of their cases when mediation is reconvened on January 22 and 23, 2015. *Third Order Reconvening Mediation* (Transaction ID 56159131); and December 18, 2014 Motions Hearing Transcript, pp. 176-178.

7. A *Notice of Mediation* of the *Agnatovech* case was e-filed on October 22, 2014. (Transaction ID 56228478), and a *Notice of Mediation* of the *Edmondson* case was e-filed on October 21, 2014 (Transaction ID 56223218). Thereafter, the *Agnatovech* Plaintiffs and the

Edmondson Plaintiffs resolved their respective cases with all Defendants during private and confidential mediation.

8. On October 30, 2014, six (6) Plaintiffs¹ filed a *Motion to Enjoin Settlement Payment to Any Plaintiff Until an Aggregate Settlement is Reached* (Transaction ID 56266323).

9. On October 31, 2014, Lead Presiding Judge John A. Hutchison entered an order enjoining all parties in the Carbon Monoxide Exposure Litigation from making any settlement payment until further order of the Court, and setting a hearing to address the motion. *Temporary Injunction and Notice of Hearing* (Transaction ID 56273851).

10. The parties filed the following pleadings in response to the *Motion to Enjoin Settlement Payment to Any Plaintiff Until an Aggregate Settlement is Reached* and the Court's October 31, 2014 Order:

(a) *Defendants' Joint Response in Opposition to Plaintiffs' Motion to Enjoin Settlement Payment to any Plaintiff Until an Aggregate Settlement can be Reached*, filed November 13, 2014 (Transaction ID 56335517);

(b) *Plaintiffs' Combined Motion for (1) an Emergency Hearing on the Dissolution of the Temporary Restraining Order Granted on October 31, 2014; and (2) Motion for Bond Regarding Same* filed November 4, 2014 (Transaction I.D. 56288375);

(c) *Plaintiffs' Memorandum in Opposition to Temporary Injunction* filed on November 12, 2014 (Transaction ID 56328481);

(d) *Plaintiffs' Memorandum in Opposition to Temporary Injunction* filed on November 18, 2014 (Transaction ID 56351889); and

¹ Plaintiffs Brittni J. Doerfer, Civil Action No. 14-C-229 KAN; William Jason Flocker, Civil Action No. 14-C-230 KAN; David Keith Whitt, Civil Action No. 14-C-231 KAN; Brent F. Walker, Civil Action No. 14-C-232 KAN; James Kyle Ross, Civil Action No. 14-C-233 KAN; and Michael Moore, Civil Action No. 14-C-234 KAN. Because this Order affects all cases in the Carbon Monoxide Litigation it is filed in the Master Case File.

(e) *Response and Motion of Plaintiffs that any Partial or Full Settlement must be Approved Before any Payment Made and Responses Regarding Temporary Injunction* filed on December 9, 2014 (Transaction ID 56447061).

11. A hearing on the instant motion was conducted on December 18, 2014, during which the parties presented extensive oral argument. With leave of Court, the *Edmondson* and *Agnatovech* Plaintiffs filed the following post-hearing briefs:

(a) *Plaintiffs, Bain Edmondson & Dawn Edmondson's Response and Opposition to Plaintiffs, Brittini J. Doefer, William J. Flocker, Michael Moore, James K. Ross, Brent F. Walker and David K. Whitt's Motion That Any Partial or Full Settlement Must be Approved Before Any Payment Made* filed on December 22, 2014 (Transaction ID 56509926); and

(b) *Plaintiffs' Proffer of Evidence* filed on December 23, 2014 (Transaction ID 56516891).

ORDER

The Presiding Judges have reviewed and considered the *Motion to Enjoin Settlement Payment to any Plaintiff Until an Aggregate Settlement is Reached*, the aforementioned responsive pleadings, and the oral argument presented by the parties. Having conferred with one another to ensure uniformity of their decisions, as contemplated by West Virginia Trial Court Rule 26.07(a), the Presiding Judges unanimously FIND that:

1. Pursuant to Administrative Order entered on May 8, 2014, then Acting Chief Justice Margaret L. Workman referred the Carbon Monoxide Exposure Litigation to the Mass Litigation Panel. "An order from the Chief Justice granting a Motion to Refer to the Mass Litigation Panel is a transfer of Mass Litigation to the Panel." Trial Court Rule 26.07(a).

2. The Supreme Court has adopted “a process for efficiently managing and resolving mass litigation which includes the establishment of a Mass Litigation Panel.” Trial Court Rule 26.01.

3. Pursuant to Trial Court Rule 26.05(a), the Panel has a duty to “develop and implement case management and trial methodologies to fairly and expeditiously resolve Mass Litigation referred to the Panel by the Chief Justice.” The Panel shall “take such action as is reasonably necessary and incidental to the powers and responsibilities conferred by this rule or by the specific directive of the Chief Justice.” Trial Court Rule 26.05 (f).

4. After considering the due process rights of the parties, the Presiding Judge assigned to Mass Litigation is authorized “to adopt any procedures deemed appropriate to fairly and efficiently manage and resolve Mass Litigation.” Trial Court Rule 26.08(d).

5. Pursuant to the Mass Litigation Panel’s inherent authority and duty under Trial Court Rule 26 to fairly and efficiently manage and expeditiously resolve Mass Litigation, the Panel is obligated to protect all Plaintiffs in Mass Litigation referred to the Panel where the amount of damages may exceed the funds available to settle all cases, and to ensure that Mass Litigation proceedings do not put one Plaintiff or action in a better position in terms of resolution than any other Plaintiff or action referred to the Panel.

6. As recommended by the Supreme Court², the Panel has reviewed the Federal Judicial Center’s *Manual for Complex Litigation*, Fourth (2004) (“hereinafter the Manual”) on this issue and finds Section 13.14 of the Manual instructive. Although settlement does not usually require judicial review and approval, “[m]any of the exceptions to this rule . . . are of particular relevance to complex litigation.” Manual, Section 13.14. “Common law may call for

²See *State ex. rel. J.C. Cook v. Mazzone*, 233 W.Va. 457, 759 S.E.2d 200, 217- 218 (2014).

review and approval [of settlements] in a variety of contexts where the settlement requires court action, *particularly if it affects the rights of non-parties or nonsettling parties*, or where the settlement is executed by a party acting in a representative capacity.” *Id.* (emphasis added)

7. The judge reviewing a settlement “is required to scrutinize the proposed settlement to ensure that it is fair to the persons whose interests the court is to protect.” *Id.* “The judge must have information sufficient to consider the proposed settlement fully and fairly. All terms must be disclosed, so that the judge can understand the agreement’s effect on those not party to the settlement and prevent collusion and favoritism.” *Id.*

8. Judicial review of the fairness, reasonableness and adequacy of proposed settlements of class actions is addressed in Section 21.61 of the Manual, and Section 22.92 addresses judicial review of settlements in mass tort class actions. Moreover, Federal Rule of Civil Procedure 23(e) states that, [t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”

9. Recognizing the potential for conflicts of interests and the risk of unfairness to individual litigants, the Panel instituted a procedure for conducting fairness hearings in Mass Litigation cases where there are aggregate settlements. *See e.g., In Re: Flood Litigation*, Civil Action No. MC Flood 7/8/2001; *In Re: Mingo County Coal Slurry Litigation*, Civil Action No. 10-C-5000; and *In Re: Float-Sink Litigation*, Civil Action No. 11-C-5000000.

10. Subsequently, the Supreme Court amended Rule 1.8 of the Rules of Professional Conduct and added a number of Comments, including Comments [13-18], which became effective on January 1, 2015. Rule 1.8(g) provides that, “A lawyer who represents two or more clients shall not participate in making an aggregate or mass tort settlement of the claims of or against the clients . . . unless each client gives informed consent, in writing signed by the client.”

Comments [13-18] to Rule 1.8 extensively discuss the potential for conflicts of interest and unfairness to individual litigants in aggregate and mass tort settlements. Significantly, Comment [13] to Rule 1.8 provides that, “[a] non-class action aggregate or mass tort settlement is a settlement of the cases of two or more individuals in which the settlement of the case *is not based solely on individual case-by-case settlement negotiations*. In such situations potential conflicts of interest exist, thus posing a risk of unfairness to individual litigants.” (emphasis added)

11. An aggregate settlement is not required in all cases assigned to the Mass Litigation Panel, and no order has been entered by the Panel in the Carbon Monoxide Exposure Litigation, or any other litigation for that matter, which requires the parties to enter into an aggregate settlement. That being said, the Panel is advised that Defendant JP Mechanical, Inc. has tendered an aggregate amount for the settlement of all actions. December 18, 2014 Motions Hearing Transcript, p. 29. Additionally, despite the stated position of some parties that there cannot be an aggregate settlement of this litigation because there have been a number of individual settlements, the Panel recognizes that an aggregate settlement of the remaining cases is a possibility.

12. The settlements of the *Edmonson* and *Agnatovech* Plaintiffs present a novel issue for determination by the Panel because they are “hybrid settlements” consisting of both individual, private settlements based solely on case-by-case settlement negotiation *and* at least one aggregate settlement.

13. Although certain Plaintiffs have served foreign Defendant Intercontinental Hotels Group, PLC (hereinafter “IHG”) the alleged alter ego of the other Hotel Defendants, IHG has moved to dismiss based upon Rule 12(b)(2) of the West Virginia Rules of Civil Procedure on the

grounds that this Court lacks personal jurisdiction over it in these proceedings. Thus, it is unclear whether the assets or insurance coverage of IHG will be available to satisfy all of the claims for damages asserted in these actions.

14. Because it is unclear whether there are sufficient resources, including insurance coverage, to satisfy all of the claims for damages asserted in this litigation, the Panel has a duty to protect the settlement fund for all litigants and to ensure that Mass Litigation proceedings do not put one Plaintiff or action in a better position in terms of resolution than any other Plaintiff or action referred to the Panel.

15. The Court's October 31, 2014, order requiring that no settlement payment be made to any party in the litigation until further order by the Court is based on the Panel's inherent authority to fairly and efficiently manage Mass Litigation where individual cases have settled and it is unclear whether or not there are sufficient resources, including insurance proceeds, to settle the remaining cases.

16. Based upon the foregoing, and notwithstanding the Proffer made by the *Agnatovech* Plaintiffs regarding the sufficiency of assets and available insurance coverage, the Court hereby **ORDERS** that no settlement funds shall be disbursed until the Panel determines that adequate resources, including available insurance coverage, are sufficient to resolve all of the Plaintiffs' alleged claims for damages.

17. The Court encourages the parties to file a Request for Certified Question so the Supreme Court of Appeals of West Virginia can provide guidance to the Panel on this issue.

18. All objections and exceptions to the Court's rulings are preserved as to each party.

ENTERED: January 16, 2015

/s/ Judge A. Hutchison
Lead Presiding Judge
Carbon Monoxide Exposure Litigation