UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:15-cv-00393-SVW-PJW	Date	July 25, 2016
Title	*Federal Insurance Company v. Caldera Medical, Inc. et al*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER DENYING MOTION FOR FINAL SETTLEMENT APPROVAL AND CLASS CERTIFICATION [239]; DENYING MOTION FOR ATTORNEYS' FEES [224].

I. Introduction and Background

The underlying allegations stem from injuries caused by Claimant-Defendant Caldera Medical, Inc.'s ("Caldera") transvaginal mesh ("TVM") devices. There are currently no fewer than 2,710 individuals asserting claims against Caldera for injuries caused by its TVM products. Dkt. 209-6, Declaration of Beth Rose ("Rose Decl.") ¶ 3. The majority of the lawsuits are currently being litigated within a joint coordinated proceeding pending in the California Superior Court for the County of Los Angeles and entitled *In Re Transvaginal Mesh Litigation*, Case No. JCCP 4733. *Id.* ¶ 6.

Claimant-Plaintiff Federal Insurance Company ("Federal") issued various insurance policies to Caldera between 2008 and 2011. Dkt. 209-2, Declaration of Richard R. Johnson ("Johnson Decl.") ¶ 3. The policies have "burning-limits" provisions, meaning all sums paid by Federal to defend Caldera or other insureds liable for injuries caused by Caldera's TVM products erode the limits available to pay judgments or settlements on the TVM claims. *Id.* In light of the multiple and competing demands for the proceeds of the insurance policies, on January 20, 2015, Federal initiated the present interpleader action. *Id.* ¶ 4. Although the policies collectively have a total of $35,000,000 in limits of liability, all parties agree that the maximum that might potentially be available is $25,000,000. *Id.* Federal contends that there is a maximum of only $20,000,000 in limits potentially responsive to TVM claims, of which Federal has already paid approximately $7,275,000 in defense costs and settlements. *Id.*

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On May 6, 2015, Federal filed a motion for summary judgment asserting various coverage defenses, which, if successful, could reduce available coverage even further. *Id.* ¶ 5. On August 7, 2015, the Court granted the parties' request to stay and enjoin proceedings pending settlement discussions. Dkt. 182. On January 25, 2016, the Court granted the parties' motion for preliminary settlement approval, preliminary class certification, and class notice. Dkt. 209.

Presently before the Court is a joint motion for final class settlement approval brought by Federal, Caldera, and all individuals asserting claims against Caldera who have been named as Claimant-Defendants in this action. Dkt. 239. On June 13, 2016, the Court held a hearing on the motion. For the reasons stated below, the Court DENIES the motion for final settlement approval and class certification. Dkt. 239. The Court DENIES the motion for attorneys' fees as moot. Dkt. 224.

II. The Settlement

A. Class

The class definition is as follows:

> "(A) . . . any and all persons who have asserted, are asserting, or shall have asserted (or who have entered or shall have entered into any tolling agreement preserving), up until and including the TVM Claim Cutoff Date (as defined in Paragraph 4.9, below), any claim(s) against Caldera, and/or any other Insured(s) and/or Contractual Indemnitee(s), arising out of any actual or alleged Caldera Pelvic Product-Related Injuries that occurred as a result (directly or indirectly, in whole or in part) of any Caldera Pelvic Product(s), each of which claim(s) and Caldera Pelvic Product-Related Injuries shall be deemed, for purposes of this Settlement, covered under one of the respective Policies; and (B) includes, without limitation, the 2,710 TVM Claimants in the TVM Litigation and the Tolled TVM Claims.

Johnson Decl. ¶ 6, Ex. 1, Class Action Settlement Agreement ("Settlement") ¶ 1.5.

The settlement is intended to resolve all known TVM claims relating to Caldera's TVM products and is conditioned on approval of a mandatory, non-opt-out, Rule 23(b)(1)(B) settlement class including all claims filed prior to a May 2, 2016 cutoff date.

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B. Settlement Sum

Federal, which contends that a maximum of $20,000,000 in limits is potentially responsive to the TVM claims (prior to any additional coverage defenses asserted in its pending motion for summary judgment), will pay approximately that amount, in the form of defense costs and indemnity payments under the insurance policies (which have already exceeded $7,275,000), and in a $12,250,000 settlement sum. Settlement ¶ 4.1.

Of the $12,250,000 settlement sum, $1 million has been set aside as a "Holdback," out of which $500,000 is reserved to cover fees and costs related to class notice and settlement administration; and $500,000 is reserved for Caldera to use in paying defense costs, settlements, and/or judgments on future claims. *Id.* ¶ 4.2.a.

C. Bar Order

Approval of the final settlement will bar (1) any person who has actual or alleged injuries relating to Caldera TVM products as of the TVM Claim Cutoff Date from subsequently asserting any claims relating to such injuries, and (2) any joint tortfeasor(s) or co-obligor(s) from any further claims against Federal, Caldera, or any Insureds and/or Contractual Indemnitees for contribution or indemnity. *Id.* ¶¶ 5.1-5.6. Furthermore, the final settlement will deem the insurance policies fully exhausted and completely terminated.

III. Claimants and Objectors

After distribution of notice, approximately 4,000 members of the settlement class submitted claims forms to the settlement administrator. Dkt. 239-3, Declaration of David Bricker ("Bricker Decl.") ¶ 5.

Forty-six (46) class members (1.15% of the class) have objected to the settlement. Dkt. 239-1, Declaration of Gordon W. Renneisen ("Renneisen Decl.") ¶ 4. The settlement administrator received ten (10) objections submitted by individual claimants or their attorneys, and the law firm Kline & Specter has filed objections on behalf of 36 claimants. *Id.* American Medical Systems, Inc. ("AMS") also filed an objection to the settlement.

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IV. Final Class Settlement Approval

A. Legal Standard

Federal Rule of Civil Procedure 23 provides that the "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Rule 23(e) further states: "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

In considering final approval of a proposed settlement, the Court's discretion is guided by the following factors: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the proposed settlement. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). The Court's role in evaluating the proposed settlement "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned." *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

B. The Class Cannot be Properly Certified

1. Legal Standard for Rule 23(b)(1)(B) Class

Under Rule 23(b)(1)(B), a class is properly certified if "prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999). Therefore, a class in this context must also be mandatory: if a class member could opt out of a limited fund class action, pursue her claim, and collect her purse, the entire point of the aggregate proceeding would be undermined.

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The paradigm suit encompassed by Rule 23(b)(1)(B) is the limited fund class action, where many litigants have claims against a single asset and the asset's total value is unlikely to satisfy all of the claims. Newberg on Class Actions § 4:16 (5th ed.). "Classic illustrations of limited fund class actions include claims to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others." *Id.*

A mandatory Rule 23(b)(1)(B) class may be certified if: (1) the fund has a definitely ascertained limit, (2) all of the fund is put into the litigation, and (3) the judgment distributes the full amount of the fund on a pro rata basis among all available claimants. *Ortiz*, 527 U.S. at 841. These requirements are "presumptively necessary, and not merely sufficient." *Id.* at 842. The Supreme Court has counseled against "adventurous application of Rule 23(b)(1)(B)." *Id.* at 845.

2. Discussion

The requirements of a Rule 23(b)(1)(B) class have not been satisfied because there is no "definitely ascertained" limited fund that has been entirely placed into the settlement sum. Although the Court agrees that a $20 million valuation is a fair calculation of the value of the Policies discounted by the risk attached to the pending motion for summary judgment, the Supreme Court's narrow construction of Rule 23(b)(1)(B) classes in *Ortiz* does not permit certification for an estimated fund, however fairly or reasonably calculated. The parties have not pointed to any authority interpreting *Ortiz* in a broader fashion.

In addition, given that Caldera remains a solvent, operational business, without evidence regarding Caldera's potential liquidated value, it is not clear that the Policies are the only available funds to contribute to the settlement. The Court recognizes that Caldera's records demonstrate that it only has enough cash on hand and net income to cover payroll and operating expenses, that it has no net profits and no liquid funds to contribute to a settlement, and that it has significant debt secured by its assets preventing it from borrowing additional funds. Dkt. 239-6, Declaration of Bryon Merade ("Merade Decl.") ¶¶ 2-6. Moreover, the Supreme Court expressly declined to decide "how close to insolvency a limited fund defendant must be as a condition of class certification." *See Ortiz*, 527 U.S. at 860 n.34. Nevertheless, without evidence regarding Caldera's potential liquidated value, the Court cannot determine whether the settlement sum includes the maximum amount of funds possible. *See In re N. Dist. of California, Dalkon Shield IUD Products Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982), as amended (July 15, 1982) (requiring evidence of defendant's actual assets for Rule 23(b)(1)(B) class

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certification); *In re Phenylpropanolamine (PPA) Products Liab. Litig.*, 208 F.R.D. 625, 634 (W.D. Wash. 2002) ("[I]n order to certify . . . a class in the context of a limited fund claim, the court must have before it, at a minimum, evidence as to the assets and potential insolvency of the defendants[.]").

Accordingly, at this stage of the litigation, the Court finds that certification of a Rule 23(b)(1)(B) class is improper.[1]

V. Order

For the foregoing reasons, the Court DENIES the motion for final settlement approval and class certification. The Court DENIES the motion for attorneys' fees as moot. Dkt. 224.

The Court will issue an order on the pending motion for summary judgment. Following the ruling, the parties shall meet and confer to discuss whether a revised class settlement is viable.

[1] Given the Court's ruling on the impropriety of a Rule 23(b)(1)(B) class, it does not address the remaining Rule 23 factors and *Torrisi* requirements.

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