

Judge Tosses Atty Dispute Over Bayer MDL Settlement Fund

By **Daniel Wilson**

Law360, New York (May 13, 2013, 8:18 PM ET) -- A Missouri federal judge on Monday dismissed a dispute between several groups of plaintiffs' attorneys over payments into a common benefit fund in a multidistrict litigation related to crop contamination by [Bayer AG's](#) genetically modified rice, ruling the court lacked jurisdiction over the suit.

According to U.S. District Judge Catherine D. Perry, the court lacked personal jurisdiction over claims brought by MDL co-lead counsel Don M. Downing and Adam J. Levitt that the so-called Phipps and Murray Groups of attorneys had unfairly used other attorneys' work in the MDL in state court cases without paying a percentage of their recoveries into a common benefit fund for attorneys' fees, because those state cases had all occurred outside of Missouri.

Nor did the defendants — Goldman Phipps PLLC; Goldman Pennebaker & Phipps PC; Mikal C. Watts PC; Keller Stolarczyk PLLC; The Banks Law Firm PLLC; and the Murray Law Firm; as well as individual attorneys from those firms — have an office or employees in Missouri, or a registration to do business in the state, the judge ruled.

"For that reason, none of the defendants has a systematic and continuous presence in Missouri, so this court does not have general jurisdiction over any of the defendants," Judge Perry said.

While Missouri does allow for "long-arm" jurisdiction, there still had to be some sort of purposeful minimum conduct within the state, according to the judge. The defendants had traveled to Missouri for the MDL and conducted business related to the litigation in the state, but they had objected to their cases being removed to federal court and did not voluntarily join the MDL, and thus had not come to the state willingly, the order said.

The plaintiffs had also argued that the defendants had waived their right to move for jurisdictional dismissal by filing an earlier dismissal motion, but that motion was quickly withdrawn in an effort to preserve the jurisdictional defense, the judge ruled. The Phipps and Murray Groups' appearance in the case to file those motions was thus not a waiver either, as it did not involve arguing any merits of the case, according to the order.

Judge Perry further dismissed the plaintiffs' interpleader claim for \$1.4 million in common benefit cost collections due to be returned to the Phipps Group's MDL clients, which they had alleged the Phipps Group had laid claims to, ruling it was effectively a pre-judgment attachment motion and no longer relevant with the other claims disposed of.

In addition, she issued a separate order defending her impartiality in the case, after the defendants

had [argued in April](#) that she should recuse herself due to an alleged bias towards the plaintiffs.

Representatives for both parties weren't immediately available for comment Monday.

The suit, a putative class action [filed in January](#), stems from investigation, discovery, deposition and other work done by attorneys in the MDL, which involved claims that Bayer and its corporate predecessors had developed and tested a genetically modified strain of rice that contaminated the U.S. commercial rice crop before it was approved for human consumption.

Bayer, which agreed in July 2011 to pay \$750 million to settle the claims of thousands of rice growers, had been ordered to hold back in a common benefit trust fund 11 percent of any federal court recovery by the plaintiffs for attorneys' fees and costs.

Jurisdictional issues, however, meant state court litigants were not compulsorily required to pay into the fund, and the defendants had been unjustly enriched by using the MDL work in their own cases without paying into the trust fund, according to the suit.

The plaintiffs are represented by [Gray Ritter & Graham PC](#) and [Grant & Eisenhofer PA](#), among others.

The defendants are represented by Peter W. Herzog and Michael A. Vitale of [Herzog Crebs LLP](#).

The case is Downing et al. v. Goldman Phipps PLLC, case number [4:13-cv-00206](#), in the U.S. District Court for the Eastern District of Missouri.

The MDL is In re: Genetically Modified Rice Litigation, case number [4:06-md-01811](#), in the same court.

--Additional reporting by Gavin Broady. Editing by Katherine Rautenberg.