IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Re: Inter-Op Hip Prosthesis Product Liability Litigation	:	**MDL DOCKET NO. 01-CV-9000 Judge Kathleen O'Malley**
This Document Applies to:	:	**ALL CASES**

OBJECTION TO PROPOSED CLASS SETTLEMENT;
MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATION OF MARK P. ROBINSON, JR.

The Law Firm of Robinson, Calcagnie & Robinson, on behalf of all its clients, hereby objects to the Class Settlement proposed by Defendant Sulzer Orthopedics, Inc. and "lead" plaintiffs' counsel on the following grounds:

1. The opt-out proposal included in the proposed settlement agreement is a sham and is unconstitutional. By forcing opt-outs to remain a part of the class action unless and until the Claims Administrator is appointed, and until the settlement proceedings are essentially concluded, the proposed settlement unjustifiably impairs the opt-out plaintiffs' constitutional right to jury trial and to have their actions proceed in either state or federal court, in violation of controlling Supreme Court authority.

2. The proposed settlement agreement is further improper and unconstitutional because it subsumes and consumes all of the available assets of the American-based defendants, thus essentially leaving no assets available for payment of opt-out claims.

3. Lastly, the proposed release of the European parent corporation, Sulzer AG, is unjustified and unwarranted in light of the fact that there has been no jurisdictional or alter ego discovery conducted in this MDL proceeding in order to determine whether the assets of the parent are or should be available for payment of claims against its subsidiaries in this action.

Accordingly, these plaintiffs hereby object to the proposed class settlement and request that it be rejected by this Court.

Dated: August 23, 2001

ROBINSON, CALCAGNIE & ROBINSON

By: Mark P. Robinson, Jr.

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MEMORANDUM OF POINTS AND AUTHORITIES

1.

INTRODUCTION

Defendant Sulzer Orthopedics, Inc. has moved for an order approving a proposed class settlement in this action. The reality is, however, that the proposed settlement is irremediably defective and unconstitutional. Although the settlement was facially agreed to by the plaintiffs' executive committee, the committee's agreement to these inappropriate terms was obviously inadvertent and unintentional. Nevertheless, the agreement impacts numerous state court plaintiffs and violates their due process and constitutional rights. Those rights must be protected by this Court and the proposed settlement should be rejected.

There are several defects in the proposed settlement agreement. First, the agreement improperly forces opt-out plaintiffs to put their cases on hold by delaying submission of opt-out claims until the actual settlement administration process is under way rather than providing for immediate opt-outs. Second, the agreement improperly subsumes all the assets which defendants claims are available for settlement of claims, without any assurance that there are no other assets available. Indeed, no discovery has been conducted by the MDL to determine the nature or extent of the available assets or the potential liability of the American corporation's parent company, Sulzer AG And that leads to the third basis for objection: The proposed settlement releases

the parent company without requiring any contribution of assets on its part. Again, no discovery has been done by the MDL with regard to the potential that Sulzer AG may be subject to liability and personal jurisdiction in this action with regard to these claims. Since Sulzer AG is a large, multi-national corporation with significant assets, dismissal of that entity without exploring its potential liability is nothing short of irresponsible.

Since the proposed settlement is both unconstitutional and unwise, it should be rejected by this Court.

2.

THE PROPONENTS HAVE THE BURDEN OF ESTABLISHING THE FAIRNESS OF THE PROPOSED SETTLEMENT WHICH - IN LIGHT OF THE TOTAL ABSENCE OF DISCOVERY - THEY CANNOT DO

It is fundamental that, as the party proposing the settlement, defendants bear the burden of establishing the fairness of the proposed settlement. (*In re General Motors Corp. Engine Interchange Litig,* 594 F.2D 1106 (7th Cir.), *cert. den.*, 444 U.S. 870 (1979).) Indeed, this burden is especially heavy where the proposed settlement comes early in the process and where there has been little or no discovery. (*In re Jiffy Lube Sec. Litig.* [1989-1990 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 94,859 (D. Md. Jan. 2, 1990.)

In this case, the proposed settlement is based on the assertion by defendants

that there is an extremely limited fund available for settlement of the claims for injuries caused by these defective products - a defect which has been admitted by defendants. (See Motion for Preliminary Approval, p. 1.) Despite this admission of liability, this proposed settlement has been presented as a *fait accompli* at the first MDL status conference and before ***any*** discovery has been conducted by the MDL. There has been no evidence conclusively establishing the nature and extent of the actual assets of Sulzer Orthopedics, Inc. or the other American subsidiaries and related corporations who are all being released under this agreement. There has been no discovery conducted with regard to the nature and extent of the potential misconduct by those other, related corporations. Most importantly, there has been no discovery or evidence establishing that there is no potential for liability against the parent corporation, Sulzer AG, yet that entity is also being released in the proposed settlement agreement - an entity which reportedly has millions of dollars in excess assets which could be accessible for use in payment of the personal injury claims of the injured plaintiffs.

Simply put, the early stage of the proceedings in this case, and the total absence of clear and convincing evidence regarding the assets available for payment of the injury claims, strips this Court of any ability to assess, let alone determine, the fairness of the proposed settlement.

3.

THE PROPOSED OPT-OUT PROVISIONS ARE UNCONSTITUTIONAL AND UNDULY PREJUDICIAL TO THE OPT-OUT PLAINTIFFS

The structure of the proposed class settlement is itself unconstitutional.

First, the proposed agreement segregates all available assets to the class, essentially leaving any opt-out plaintiffs without any assets to recover against. (Proposed Settlement Agreement, Article 2, section 2.9; Motion for Preliminary Approval, p. 2.) Although defendants assert that it is appropriate to segregate and reserve all the assets for the benefit of the class, that assertion is based on a complete absence of independent evidence or discovery on the issue of the assets available from both the American-based defendants and the European parent.

Second, the proposed settlement exacerbates that segregation and assures that opt-out plaintiffs will be hamstrung in recovering any damages by delaying the opt-out until the class claims are themselves being administered - long after any available assets have been subsumed in the class proceeding. (Proposed Settlement Agreement, Article 3, section 3.6(a) [providing that opt-out rights must be submitted to the Claims Administrator].) The ultimate effect of this device is to prohibit class members from exercising their opt-out rights until after the settlement has been approved, both by this Court and the appellate court, and after a Claims Administrator has been appointed. Moreover, under the provision drafted by defendants, unless and until the Claims Administrator decides to tender the opt-outs to the Court, the opt-out

plaintiffs will essentially be bound to the settlement and will be kept in limbo, awaiting the exercise of their constitutional right to opt out. Nowhere does F.R.C.P. 23(b)(3) contemplate such a procedure. Moreover, such a procedure would do violence to the courts' analysis in the controlling cases, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); O*rtiz v. Fiberboard Paper* ,527 U.S. 815 (1999) and *In Re: Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000.), that an individual cannot be forced to participate in a Rule 23(b)(3) class. Indeed, Rule 23(c)(2) expressly contemplates that the court will notify the class members of the right to opt-out, and that "the court will exclude the members from the class." Obviously, if the entire class process is administered before the opt-outs are permitted to actually opt-out, the order will violate both the spirit and the letter of the class procedures by improperly forcing the opt-out class members to participate in the class process itself before their opt-out rights are acknowledged or vindicated.

Third, the proposed settlement assures that any opt-out plaintiffs who go through the work, expense and effort of obtaining relief against the parent company, Sulzer AG, will still be limited to the defined class benefits despite the fact that the assets of Sulzer AG may well be more than sufficient to provide adequate compensation to all the claimants. (Proposed Settlement Agreement, Article 11, p. 24.) Although Article 11 of the Proposed Agreement provides that if any plaintiff obtains a settlement against Sulzer AG that is better than the class settlement, Sulzer AG will provide an equivalent settlement to all class members, that provision in no way assists the opt-out plaintiffs. It, in fact, assures that no opt-out plaintiff will ever be able to obtain a reasonable settlement with Sulzer AG because that, in turn, would force Sulzer AG to provide the

same relief to all class members. As such, it disincentivizes Sulzer AG from ever entering into a settlement with any opt-out plaintiff, thereby undermining the public policy favoring settlement agreements and will force all of the opt-out plaintiffs to actually proceed to trial against Sulzer AG. This, therefore, yet another provision of the Proposed Agreement that coerces and manipulates the plaintiff class into remaining in the class action and foregoing their opt-out rights.

By orchestrating this settlement procedure as they have, defendants have effectively compelled all state court litigants to participate in the class action and have thereby stayed all jury trials, at least pending the claims administration - which would likely take years.

4.

AT THE VERY LEAST, THE PROPOSED SETTLEMENT SHOULD NOT BE APPROVED UNTIL THE OBJECTING PLAINTIFFS HAVE HAD AN OPPORTUNITY TO CONDUCT DISCOVERY AND TO HAVE THE ISSUES REGARDING LIABILITY OF THE PARENT COMPANY TO BE HEARD

Liability in this action has been conceded. (Motion for Preliminary Approval, page 1.) The only question, therefore, is whether the assertion that there are only limited assets available for payment of claims is true. But as to that issue, this proposed settlement agreement was negotiated and presented in a complete vacuum:

No discovery has been conducted by the MDL with respect to the assets available from the defendants; no discovery has been conducted by the MDL with respect to the issue of whether the parent corporation, Sulzer AG, controls the activities of the American corporation and should, therefore, be liable for the damages under either an alter ego or enterprise liability theory; no discovery has been conducted by the MDL with respect to the issue of whether the parent corporation, Sulzer AG has otherwise assumed liability for the operations of the American companies and is therefore subject to liability for these claims; no discovery has been conducted by the MDL with respect to the issue of whether the parent corporation, Sulzer AG, has assets sufficient to provide adequate compensation for all the class members rather than the limited fund proposed by defendants; and this proposed settlement has been presented at an extraordinarily early stage of the MDL proceedings.

The discovery regarding this funding issue is narrow and limited. But it is critical and absolutely necessary in order to assure that the proposed settlement is, in fact, fair. That being the case, the fairness hearing should be postponed or continued in order to allow the objecting plaintiffs to conduct discovery on these critically-important financial issues. (*Saylor v. Lindsley*, 456 F.2d 896, 904 (2nd Cir. 1972); Newberg & Conti, Newberg On Class Actions 3rd Ed., section 11.57.)

5.

CONCLUSION

Because the proposed settlement is both unconstitutional and unfair, it cannot be approved. Instead, two things should happen: First, the fairness hearing should be postponed in order to permit the objecting plaintiffs to conduct discovery regarding the financial issues; and, Second, in any event, the opt-out provisions must be modified to provide an immediate opt-out procedure. These proposals are the only means this Court has of assuring that all plaintiffs' rights are adequately protected.

Dated: August 23, 2001

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DECLARATION OF MARK P. ROBINSON, JR.

I, MARK P. ROBINSON, JR., DECLARE:

1. I am an attorney admitted to practice before the state and federal courts of California and am a member of the firm of Robinson, Calcagnie & Robinson, counsel for objecting plaintiffs in this action. I make this declaration in objection to the proposed class settlement in this action.

2. My firm represents approximately 60 plaintiffs who were implanted with the defective hip joints at issue in this case. It is my understanding that other prominent plaintiffs' law firms will also be objecting to the proposed settlement and that, collectively, these objecting parties represent a significant percentage of the total claims involved in this litigation.

3. I believe that there are valid legal and factual grounds for imposing liability on the American defendants' parent corporation, Sulzer AG, for the injuries caused by these admittedly-defective devices and that it would be unreasonable and unfair to permit Sulzer AG to be dismissed as a defendant in this action without a full exploration of its assets and potential for liability in this case, especially in light of the meager and clearly inadequate damages proposed under the agreement.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on August 23, 2001 at Newport Beach, California.

Mark P. Robinson, Jr.

MARK P. ROBINSON, JR.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2001, a true and correct copy of the foregoing OBJECTION TO PROPOSED CLASS SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES and DECLARATION OF MARK P. ROBINSON, JR. have been duly served upon the following parties by Federal Express:

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