FILED
01 AUG 24 PM 4:21
CLEVELAND OHIO

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

IN RE: INTER-OP™ HIP PROSTHESIS PRODUCT LIABILITY LITIGATION	HON. KATHLEEN MCDONALD O'MALLEY MDL DOCKET NO. 01-CV-9000 (MDL No. 1401)
THIS DOCUMENT RELATES TO ALL ACTIONS	

OBJECTION TO PRELIMINARY APPROVAL OF THE PROPOSED CLASS ACTION SETTLEMENT AGREEMENT BY VARIOUS HEALTH BENEFIT PLANS

Comes now Health Care Service Corporation, a Mutual Legal Reserve Company (d/b/a BlueCross BlueShield of Texas, BlueCross BlueShield of Illinois, and BlueCross BlueShield of New Mexico); Humana Health Plan of Texas, Inc.; Humana Insurance Company; Humana Medical Plan, Inc.; Humana Health Plan of Ohio, Inc.; Humana Health Insurance Company of Florida, Inc.; Humana Health Plan, Inc.; Humana Health Insurance Company of Nevada, Inc.; Humana Wisconsin Health Organization Insurance Corporation; Humana HMO Texas, Inc.; Humana HealthChicago, Inc.; Humana HealthChicago Insurance Company; Humana Kansas City, Inc.; Humana Employers Health Plan of Georgia; Humana Health Plans of Puerto Rico, Inc.; Humana Insurance of Puerto Rico, Inc. ("collectively "HBPs"), by counsel, and for its objections to preliminary approval of the proposed class action settlement agreement with Sulzer Orthopedics, Inc., and affiliated entities, including Sulzer Medica Ltd., states as follows:

I. INTRODUCTION

On August 15, 2001, a settlement agreement was entered into by and among Sulzer Orthopedics, Inc., a Delaware Corporation, and its affiliated entities, including Sulzer Medica Ltd., a Limited Company organized under the laws of Switzerland and each of the other Sulzer Medica Ltd., and direct subsidiaries (hereinafter collectively referred to as "Sulzer"), and the class representatives. The Settlement seeks to resolve all claims by individuals who were implanted with the defective Sulzer hip prosthetic. The Settlement also seeks to bar, release and settle the subrogation claims of HBPs even though HBPs were in no way parties to the action through which the settlement will pass.

The proposed settlement agreement cannot and must not be approved by this Honorable Court. It is an illegal and unconstitutional attempt to destroy the rights of an absent and unrepresented non-party. The settlement agreement is nothing more than a blatant attempt to deprive every health benefit provider in this country of important substantive and procedural rights to pursue Sulzer for the considerable damages third party payors have suffered as a result of Sulzer's defective product. The settlement represents an attempt to sacrifice the interest of the entire healthcare industry by parties who have absolutely no right to compromise those interest and can only be viewed as a blatant attempt to unjustly enrich and protect Sulzer and the class at the expense of unrepresented non-parties. As such, it cannot be allowed to stand.

The settlement agreement purports to dispose of all subrogation claims held by *all* self-funded employer plans, *all* state and federal government plans, *all* health insurance companies, *all* health maintenance organizations, and every other health benefit provider in the nation, by attempting to bar all subrogation claims against Sulzer. In exchange for abolishing the subrogation

rights of all HBPs and abrogating the constitutional rights of due process and the Seventh Amendment rights to a jury trial held by the HBPs, the settlement gives the HBPs nothing.

It is nearly impossible to imagine another settlement which so blatantly and intentionally attempts to abolish the rights of vast numbers of absent and unrepresented non-parties without their consent or participation. As such, HBPs make the following objections to the preliminary Settlement agreement:

A. HBPs are not parties to the settlement agreement and, therefore, they cannot be bound by any provision contained therein.

B. The representative plaintiffs lack Article 3 standing to adjudicate subrogated medical expense claims paid by HBPs and are inadequate representatives for HBPs.

C. By its terms the settlement agreement violates substantive and procedural constitutional rights of HBPs.

D. The settlement agreement gives the Trustee/Claims Administrator impermissibly vague and unchecked authority over the subrogation claims.

As demonstrated below, this Court should not preliminarily approve this settlement.

II. STANDARD OF REVIEW

When a class action settlement is submitted for approval, a court must perform an independent and objective analysis to determine whether the settlement is in the best interest of those whose claims will be adjudicated. *See. Airline Stewards v. American Airlines*, 763 F.2d 875 (7th Cir. 1985). In performing an objective analysis in the present settlement agreement, this Court must decide whether its fair, reasonable and adequate under the circumstances. *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956 (3rd Cir. 1983); *Manual for Complex Litigation, 3rd Ed.* §30.42 at 264.

Typically, there is an initial presumption of fairness involved if the settlement is recommended by class counsel after arm's length negotiations. *Wellman v. Dickinson*, 497 F.Supp 824 (S.D.N.Y. 1980), *aff'd*, 682 F.2d 355 (2nd Cir. 1982). However, as the Third Circuit has admonished, when lawyers for both sides have agreed on terms of settlement, the typical adversarial setting is distorted and the court must be aware of the potential for collusion between class counsel and defense counsel. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3rd Cir. 1995). To that end, "proponents [of a class action settlement] who improperly negotiate a settlement should bear the heavier burden of establishing fairness by clear and convincing evidence." *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1126 (7th Cir. 1978).

Here, it will be impossible for either Class Counsel or Sulzer to bring forth any evidence whatsoever that this Settlement Agreement is fair, reasonable, or adequate as it pertains to HBPs. As discussed below, the provisions of the Settlement Agreement relating to all HBPs were reached in a manner that fails to comply with nearly every substantive and procedural due process requirement and the constitutional safeguards inherent in Rule 23. Because the Court may not rewrite the Settlement agreement and must accept or reject it as a whole, the Preliminary Settlement should not be approved. *See, Evans v. Jeff D.*, 475 U.S. 717, 727 (1985).

III. OBJECTIONS AND ARGUMENTS

A. HBPs are not parties to the Settlement Agreement and, therefore, cannot be bound by any provision contained therein.

Perhaps the most fundamental requirement which must be met to bind any party to the provisions of a class action settlement is that the individual or entity sought to be bound must be a party to the suit and have had its interests adequately represented. *Amchem Products, Inc. v.*

Windsor, 521 U.S.591, 117 S.Ct. 2231, 138 L.Bd.2d 689 (1997) (In order to bind absent members, the class representative must be part of the same class, possess the same interests, and suffer the same injury as those sought to be bound); *General Telephone Co. v. Falcon*, 457 U.S.147, 102 S.Ct. 2364, 7 L.Ed.2d 740 (1982); *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). If a settlement purports to bind the interests of third parties, those parties are not bound by the terms of the settlement *unless* their interests were adequately represented by the parties to the settlement. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987) (concerning consent decrees).

HBPs are not parties to this Settlement and none of its interests were represented at any time by the Representative Plaintiffs in this case. As such, the provisions of this Settlement Agreement which purport to bar subrogation claims cannot bind any HBP and must be rejected as unenforceable.

The present Settlement Agreement does not even purport to include a plaintiff representing the interests any HBP. In fact, no HBP is included as a party of any kind. It is impossible to understand how Sulzer and class counsel expect to bind totally absent and unrepresented non-parties to the terms of their settlement without even pretending to afford them minimum due process protections.

There can be little doubt that health insurers are not parties to the Settlement, yet the Settlement Agreement defines the Settlement Class as:

> [A]ll persons or entities wherever located, who have or may in the future have any unsatisfied claim (whether filed or unfiled, pending or reduced to judgment, existing or contingent, and specifically including claims for alleged injuries and damages not yet known or manifest, **including assigned claims (e.g. subrogation claims by workers' compensation insurers, employers and\or health care**

Case 1:01-cv-12257-PBS Document #: 1742 Filed: 08/24/01 Page 6 of 16 PageID #: 900

> **insurers or providers)**, against any or all of Sulzer and the other released parties and arising out of, based upon, related to, or involving Affected Products, including (1) all Affected Product Recipients (whether or not such Affected Product has been or may be removed), (2) all Derivative Claimants and (3) all Representative Claimants. The Settlement Class specifically includes persons who have or may have claims with respect to injuries not yet manifested. The Settlement Class shall expressly exclude any person or entity that entered into a settlement with Sulzer (which included a release) related to claims arising out of the implantation of an affected product.

Settlement Agreement, Article 1, §(fff).

The Settlement then provides the following bar of subrogated claims:

> Section 8.1 To the extent that any person has rights of subrogation by virtue of a payment or payments made to or for the benefit of any specific Class Member who has not properly and timely exercised an Opt-Out Right, such rights of subrogation may be asserted (other than by Medicare, third-party insurers and other subrogees with respect to claims for payments to health care providers) with respect to the Trustee's obligation to make payments to that Class Member from the applicable Fund but shall not be asserted directly against Sulzer and/or the Released Parties except to the extent required by applicable Federal or State law. Sulzer will promptly notify the Trustee and/or Claims Administrator(s), and the affected Class Member of the assertion of such a subrogation claim against Sulzer. The Parties shall move the Court, upon granting Trial Court Approval, to enter a bar order to preclude the assertion of such subrogation claims against Sulzer and/or the Released Parties, except to the extent that it would be impermissible to bar such claims under provisions of applicable law.

Settlement Agreement, Article 8, § 8.1.

As demonstrated below, merely including subrogated claimants within the class definition does nothing to obviate the fact that no HBP is a party to the Settlement and cannot be bound by any provisions thereof.

B. The Representative Plaintiffs lack Constitutional standing to adjudicate or otherwise settle subrogated claims held by HBPs.

Because none of the Representative Plaintiffs have constitutional standing to assert a claim for subrogated medical expenses, no provision of the Settlement Agreement purporting to compromise subrogation claims can be approved by this Court. Article III of the Constitution imposes the threshold requirement that those who seek to invoke the powers of the federal courts must allege an actual case or controversy. *Flast v. Cohen*, 392 U.S. 83, 94 (1968). Within the context of class actions, the Supreme Court has held that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the Defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed 2d 674 (1974).

A representative plaintiff seeking to obtain relief must have a justiciable case or controversy with the defendant relating to the relief sought. Here, none of the Representatives Plaintiffs had or could have constitutional standing to adjudicate a claim for subrogated medical expenses. By definition this item of damage was neither incurred nor paid by any insured member of the class and, therefore, none of the Representative Plaintiffs have or could make the requisite showing of having a "personal stake in the outcome" related to subrogated expenses. *See, Baker v. Carr*, 369 U.S. 186, 204 (1973).

Because no Representative Plaintiff has the requisite Article III standing to adjudicate any medical expense claim paid by a health benefit provider, every provision of the Settlement Agreement which purports to include interests related to subrogated claims as "settled claims" and every provision which otherwise attempts to dispose of or impede the claims of any HBP must be disregarded and the Settlement Agreement rejected as written.

1. The Settlement fails analysis under the Rule 23(a)(4) adequacy of representation requirement.

"Due process is that which comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950)(Frankfurter, J. dissenting). It is well settled that adequacy of representation is the quintessence of due process in class actions. *See, Hansberry v. Lee, subra*. Even if the Article III threshold standing requirement was met by the Representative Plaintiffs, the concept of Article III standing is interwoven into the Rule 23(a)(4) adequacy of representation prerequisites which focus on notions of substantive and procedural due process rather than the existence of a justiciable case or controversy. As noted above, the Representative Plaintiff's did not and do not have Article III standing to claim, recover, or dispose of claims held by any HBPs through the class mechanism.

2. The Representative Plaintiffs are not adequate to adjudicate or settle the claims of HBPs.

Rule 23(a)(4) provides that a class action may be prosecuted only "if the representative parties will fairly and adequately protect the interests of the class." Two clear guidelines exist to assure that the Rule 23(a)(4) prerequisite has been met.

First, there must be no material conflicts between class representatives and members of the class. Second, there must be some assurance that the claims of the parties which the Settlement seeks to extinguish will be vigorously prosecuted. *See, Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2nd Cir. 1968), *class upheld on remand*, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd* 479 F.2d 1005 (2nd Cir. 1973), *vacated*, 417 U.S. 156 (1974). It is impossible for this Settlement to meet either requirement.

Article 8, §8.2 of the Settlement Agreement provides that subrogation claimants must submit their claims to the Trustees. The individual insured claimant is then notified and is given the opportunity to challenge the claim of the HBP. Therefore, the Settlement Agreement pits Class Members against the HBPs and awards the HBPs money directly from the funds established to compensate Class Members settlement. No greater material conflict can be imagined than requiring one purported party to obtain monetary relief only from the settlement received by another party. It is inconceivable to expect the individual Class Members to adequately protect interests which the Settlement pits against their own self-interests. This conflict immediately eliminates all of the Representatives on adequacy grounds.

Based on the foregoing, it is clear that the Settlement Agreement must be rejected as the Representative Plaintiffs do not adequately represent the interests of HBPs whose interests are included and compromised in the Settlement.

C. The Settlement Agreement violates HBPs' Substantive and Procedural Constitutional rights.

Article 8 of the Settlement Agreement would prevent HBPs from pursuing that subrogation claims against Sulzer and would force them to submit to an artificial recovery procedure that would arbitrarily cap its damages. Under Article 8, §8.2, all subrogation claims must be adjudicated by the Trustee. This procedure poses numerous violations of the constitutionally protected rights of every self-funded employer and HBP in the nation. Infringing on even one of these rights is grounds for this Court to deny preliminary approval of the Settlement Agreement.

1. The Settlement Agreement abolishes HBPs' Constitutional right to a jury trial.

One of the most egregious provisions of the Settlement Agreement seeks take away Seventh Amendment jury trial rights and the due process guarantee of having a "day in court," for the entire health benefits industry. Every employer who provides health coverage, every health insurance company, every health maintenance organization, every state and local government, and even the federal government, will have their constitutional right to go into court and bring a claim against Sulzer taken away if this Settlement is approved.

This sweeping Constitutional revision was undertaken not by Congress, but in secret by class counsel and Sulzer. It is hard to imagine how these private parties thought they could bar the constitutional rights of thousands of absent third parties through a secretly negotiated, private settlement. There is absolutely no justification for this overreaching.

All HBPs are vested with the right to directly pursue subrogation claims against Sulzer and any Released Party. This right is so fundamental that not even a release from an insured member will bar an action directly against the tortfeasor under subrogation theory in most instances. *See, Home Insurance Co. v. Hurts Corp.* 375 N.E.2d 115 (Ill. 1978); *Hospital Service Corp. of Rhode Island v. Pennsylvania Insurance Co.*, 227 A.2d 105 (R.I. 1967); *Ortega v. Motors Insurance Company*, 552 F.2d 1127 (Fla. App. 1989), *citing, Couch on Insurance*, § 61.201 (2nd Ed. 1983) *and cases cited therein.* When a release is entered into by an insured and a tortfeasor, the insurer is still entitled to proceed directly against the tortfeasor. *See, e.g., ICC Industries, Inc. v. Gatex Terminals Corp.*, 690 F.Supp 1282 (S.D.N.Y. 1988); *Alamo Chemical Corp. v. MV Overseas Valdes*, 469 F.Supp. 203, 212 (E.D. La. 1979).

The Supreme Court has made it clear that "Seventh Amendment jury trial rights and the due process principle of the 'day in court' ideal are implicated in aggregating ...claims sounding in tort." *Ortiz v. Fiberboard, Inc.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). As has been noted by the Supreme Court, it is a "deep-rooted historic tradition that everyone should have his day in Court." *Martin v. Wilkes*, 490 U.S. 755, 762 104 L.Ed. 2d 835, 109 S.Ct. 2180 (1989).

This Court should not grant preliminary approval of the settlement.

D. The Settlement Agreement gives Trustee\Claims Administrator vague and unchecked authority

The Settlement Agreement grants the Trustee\Claims Administrator ("Trustee") with unchecked authority to "adjudicate" subrogation claims and offers absolutely no guidance on how that incredible authority is to be exercised.

Under the terms of the Settlement Agreement, the Trustee is the sole decision maker charged with determining the ultimate fate of every subrogation claim to be made by the entire national health benefits industry. The claims of all HBPs in every state and federal jurisdiction would be forced away from their proper courts and into a process totally controlled by one Trustee. Class Counsel alone has created the administration process and defined the over broad guidelines which outline the Trustee's powers over the health insurance industry. The applicable provision states:

> Section 8.2. The Trustee and/or Claims Administrator(s) shall provide notice of subrogation claims received by the Trustee to affected Class Members and afford them an opportunity to contest, otherwise object to or compromise any such claims. In making distribution of any amounts to which Class Members are entitled from any applicable Fund, the Trustee shall recognize and pay subrogation claims (other than Medicare, third-party insurers and other subrogees with respect to payments to health care providers), but only to the extent that the subrogation claim is recognized by applicable law. Unless the law clearly sets forth different principles, the Trustee shall not recognize a subrogation claim unless: (a) it is affirmatively brought to their

> attention prior to distribution of funds to a Class Member: (b) it is based on a positive provision of law or a valid enforceable contract; (c) the putative subrogee clearly establishes that the subrogee actually made a payment or payments to or for the benefit of the Class Member which is of a type that the putative subrogee would be entitled to recover against Sulzer and/or the Released Parties, and then (d) only to the extent of the lessor of the actual payment made and the amount otherwise payable to such Class Member less an equitable debit for attorneys' fees, and any other allowable or appropriate charges against the putative subrogee. No benefits for medical expense reimbursement of any Class Member pursuant to this Settlement Agreement shall be reduced by any payment to a subrogee.

Remarkably, these few instructions start with the presumption that a subrogation claim is not to be recognized. The Settlement provides the "Trustees shall not recognize a subrogation claim unless...," and then it sets out the hoops subrogated carriers must jump through to even have a claim considered. These presumptions and requirements are contrary to the contracts controlling HBP subrogation rights and the law governing these contracts.

The Trustee's proposed powers apparently include the authority to dictate the procedures all HBPs must follow in order to perfect a subrogation claim and the power to rule on all matters adjunct to adjudicating those claims. The Trustee has these powers in addition to the ultimate authority to determine what every HBP will recover, if anything from the Fund. In addition to the Trustee's boundless discretion to approve or disapprove claims, there is no procedural mechanism for appealing any decision of the Trustee and absolutely no Court supervision provided for with respect to the subrogation claims.

IV. CONCLUSION

Based of the foregoing, this Court should withhold preliminary approval of the Settlement Agreement.

Respectfully submitted,

SUSMAN GODFREY L.L.P.

Michael A. Lee
State Bar No. 12074620
J. Hoke Peacock III
State Bar No. 15673980
1000 Louisiana, Suite 5100
Houston, Texas 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666

COUNSEL FOR HEALTH CARE SERVICE CORPORATION, A MUTUAL LEGAL RESERVE COMPANY (D/B/A BLUECROSS BLUESHIELD OF TEXAS, BLUECROSS BLUESHIELD OF ILLINOIS, AN BLUECROSS BLUESHIELD OF NEW MEXICO); HUMANA HEALTH PLAN OF TEXAS, INC.; HUMANA INSURANCE COMPANY; HUMANA MEDICAL PLAN, INC.; HUMANA HEALTH PLAN OF OHIO, INC.; HUMANA HEALTH INSURANCE COMPANY OF FLORIDA, INC.; HUMANA HEALTH PLAN, INC.; HUMANA HEALTH INSURANCE COMPANY OF NEVADA, INC.; HUMANA WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION; HUMANA HMO TEXAS, INC.; HUMANA HEALTH CHICAGO, INC.; HUMANA HEALTH CHICAGO INSURANCE COMPANY; HUMANA KANSAS CITY, INC.; HUMANA EMPLOYERS HEALTH PLAN OF GEORGIA; HUMANA HEALTH PLANS OF PUERTO RICO, INC.; HUMANA INSURANCE OF PUERTO RICO, INC.

Case: 1:01-cv-09000 Doc #: 142 Filed: 08/24/01 15 of 17. PageID #: 909

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was this the 24th day of August, 2001 mailed to:

Mark D. Fischer
Mark M. Sandmann
Rawlings & Associates PLLC
1700 Waterfront Plaza
325 W. Main Street
Louisville, KY 40202

Stanley M. Chesley, Esq.
Waite, Schneider, Bayless & Chesley Co., L.P.A.
1513 Central Trust Tower
Fourth & Vine Street
Cincinnati, OH 45202

John R. Climaco, Esq.
Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., L.P.A.
Ninth Floor, The Halle Building
1228 Euclid Avenue
Cleveland OH 44115

Don Barrett, Esq.
Barrett Law Office, P.A.
404 Court Square North
P.O. Box 987
Lexington, Mississippi 39095

R. Eric Kennedy, Esq.
Weisman, Goldberg & Weisman Co., L.P.A.
1600 Midland Building
Landmark Office Towers
Cleveland, OH 44115

Keith M. Fleischman, Esq.
Milberg, Weis, Bershad, Hynes & Lerach LLP
One Pennsylvania Plaza
New York, NY 10119

Received Aug-24-2001 04:20pm From-713 653 7897 To-JUDGE KATHLEEN M OMA Page 016

Richard S. Wayne, Esq.
Strauss & Troy
The Federal Reserve Building
150 East 4th
Cincinnati, OH 45202-4018

Kenneth M. Seeger, Esq.
Two Embarcadero Center, Ste. 2000
San Francisco, CA 94111

J. Hoke Peacock III

Received Aug-24-2001 04:20pm From-713 653 7897 To-JUDGE KATHLEEN M OMA Page 017