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**JUDGE GRANTS PRELIMINARY APPROVAL TO SULZER
SETTLEMENT PLAN; OBJECTORS APPEAL
In re Inter-Op Hip Prosthesis Liab. Litig.**

Briefs and Other Related Documents
For Opinion See 2001 WL 34131990

The judge presiding over the coordinated federal Sulzer Orthopedics hip implant lawsuits has granted preliminary approval to the company's proposed settlement plan, which would give plaintiffs up to \$97,000 in cash and stock in Sulzer's Swiss parent corporation. *In re Inter-Op Hip Prosthesis Liability Litigation*, No. 01-9000 (N.D. Ohio, Aug. 29, 2001); see Drug Recall LR, September 2001, P. 6.

In other developments:

- A Texas jury on Aug. 30 returned a verdict of \$15.5 million in the first hip implant case to go to trial. The suit was brought by three elderly women whose hips were replaced with defective Sulzer products. Sulzer vowed an immediate appeal; and

- A group of plaintiffs represented by Fleming & Associates in Houston filed a notice of appeal of the Northern District of Ohio's preliminary approval of the settlement proposal in the U.S. Court of Appeals for the Sixth Circuit. *Glasscock et al. v. Sulzer Orthopedics Inc. et al.*, No. 01-303, notice of appeal filed (6th Cir., Aug. 31, 2001).

In her order granting preliminary approval of a nationwide settlement class, U.S. District Judge Kathleen M. O'Malley ordered the creation of two subclasses: individuals (and their spouses) who undergo revision (replacement) surgery prior to the final judicial approval date (if any) to replace any defective implants, and individuals who may need to undergo replacement surgery after the settlement receives final judicial approval.

Judge O'Malley's order excluded plaintiffs who have undergone or will need to undergo surgery to replace defective knee implants. Both the hip implants and knee implants were affected by the same manufacturing defect and Sulzer has taken responsibility for both kinds of implants. An oily residue left on the implants preventing them from bonding with the plaintiffs' hip or shinbones. To date, however, only two federal lawsuits involving the knee implants are known to have been

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filed and those suits have not been combined with the hip implant litigation.

She ordered Sulzer and the settling plaintiffs to submit an amended settlement agreement that incorporates certain revisions that were submitted to the court after the initial settlement offer and to explain how subrogation claims from health insurers will be treated.

Judge O'Malley issued the three-page order Aug. 29, but promised to set forth her reasoning in an opinion to be issued in the near future. She said she would also establish a timeline for notifying class members, allow discovery of issues relating to the propriety and fairness of the proposed settlement, suggest aspects of the settlement proposal that need to be addressed more fully, and receive additional objections to the proposal. The next step will be to set a date for a fairness hearing.

The court was inundated with objections to the proposed settlement plan from 14 groups of plaintiffs and health-insurance providers following Sulzer's announcement of the settlement Aug. 15. Sulzer and the settling plaintiffs had sought a court order staying all state and federal suits pending adjudication of the settlement, but withdrew it after a group of plaintiffs objected.

The Texas Trial

A six-person jury in Nueces County, Texas, took only 10 hours to deliberate before returning a verdict for each of the Corpus Christi plaintiffs: Lillian Sallinger, 79, Naomi Bonorden, 68, and Helen Rupp, 73. Sallinger was awarded \$1.5 million in economic damages and \$7.15 million in punitive damages, Bonorden was awarded \$1 million actual damages and \$3.85 million in punitives, and Rupp was awarded \$1.75 million in actual damages. She received no punitive damages because her surgery took place before Sulzer learned of the problem with its hip implants and therefore it could not be held liable for having concealed any knowledge of the problem from her.

Sulzer vowed an immediate appeal, saying the verdict was unreasonable and unfair. In any case, punitive damages are capped at \$750,000 per count under Texas law, making it likely that the punitive damage awards will be reduced.

The Nationwide Settlement Offer

Sulzer Orthopedics Inc. offered to settle some 1,300 state and federal hip and knee implant lawsuits by compensating patients who received the defective implants up to \$97,500 in cash and stock in Sulzer's parent company, Sulzer Medica Ltd.

Last December Sulzer Orthopedics, headquartered in Austin, Texas, recalled 40,000 Inter-Op hip implants after the company discovered that an oily residue left on the shell of the implant during the manufacturing process prevented it from bonding with patients' pelvic bones. It also withdrew several hundred Natural Knee II tibial baseplates, a component of its knee implant prosthesis, from the market in March for the same reason.

As of the beginning of August more than 2,371 revision surgeries had been performed to replace defective hip implants and 280 surgeries had been performed to replace defective knee implants. Sulzer says it made the settlement offer because if it is forced to continue defending itself in the litigation, all of the related Sulzer companies will be forced out of business and their total estimated liquidation value of \$120 million would not be enough to compensate all the plaintiffs.

The Plaintiffs' Objections

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Most of the plaintiff objectors claim the settlement does not meet one or more of the requirements of Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure for establishing a settlement class. The common issues of law and fact do not predominate over individual issues and Sulzer has failed to prove a class action would be superior to individual litigation, they said.

Some of the plaintiffs argued that by offering both cash and company stock, Sulzer creates an unfair lien on its assets that would discourage plaintiffs from opting out of the settlement if they want to take a chance on pursuing their own actions against the company.

Recent U.S. Supreme Court opinions have clearly established that class members have a right to opt out, but the opt-out right is meaningless if there are no assets available to satisfy any resulting judgments, according to the Fleming plaintiffs. In addition, the amounts of money and stock offered by Sulzer fall far short of what plaintiffs may expect to recover in litigation, they said.

Insurance companies representing health-care providers filed three separate objections. They argued that the proposed settlement is unconstitutional and unfair because insurers and other third-party payors are shut out from obtaining reimbursement for the medical costs they have incurred to replace the defective implants.

“The settlement agreement is nothing more than a blatant attempt to deprive every health benefit provider in the country of the 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,” according to an objection filed by several health insurers.

The insurers said the representative plaintiffs named in the proposed settlement class have no standing to represent them and that as nonparties, they would not be bound by the settlement.

Blue Cross Blue Shield of Louisiana revealed in its objection to the settlement plan that the day after the plan was announced, it filed a class action complaint on behalf of health-care providers to assert their subrogation rights for expenses they have paid or will pay in the future stemming from the defective implants.

Briefs and Other Related Documents (Back to Top)

2001 WL 34131979 (Aetna, Inc.’s and Cobalt Corporation’s Memorandum on Behalf of Themselves and a Proposed Class of Third Party Payers in Opposition to Preliminary Approval of the Proposed Settlement, or to Defer Preliminary Approval), Trial Motion and Memorandum (August 24, 2001)

2001 WL 34132021 (Objection to Preliminary Approval of the Proposed Class Action Settlement Agreement), Trial Pleading (August 24, 2001)

2001 WL 34132005 (Opposition of Barry Glasscock to Conditionally Certifying a Rule(b)(2) and (b)(3) Class Action and Preliminarily Approving Settlement), Trial Pleading (August 23, 2001)

2001 WL 34131980 (Supplemental Memorandum in Support of Plaintiffs’ Motion for Order Conditionally Certifying A Rule 23(b)(2) and (b)(3) Class Action, Preliminarily Approving Settlement and in Response to Objections to the Proposed Settlement), Trial Motion and Memorandum (August 29, 2001)

2001 WL 34132006 (Objections to Proposed Class and Class Action Settlement), Trial Pleading (August 29, 2001)

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