UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

In Re:	)	Master File No. 01-CV-9000
	)	MDL No. 1401
INTER-OP HIP PROSTHESIS	)	
PRODUCT LIABILITY LITIGATION	)	JUDGE KATHLEEN O'MALLEY
	)	This Document Applies to - ALL CASES
	)	

OBJECTIONS TO FINAL APPROVAL OF CLASS ACTION SETTLEMENT BY AETNA, INC. AND COBALT CORPORATION

In August 2001, at the hearing before this Court on the motion for preliminary approval of the proposed class action settlement, in response to the objections of third party payers (TPPs) to provisions in the proposed settlement agreement that would have released TPPs' claims, the parties to the settlement agreement represented that they would "negotiate with subrogees and work out payment on their subrogation claims." *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 386 (N.D. Ohio 2001). However, Sulzer and counsel for the class have refused to negotiate any form of global settlement of TPP subrogation claims with respect to Sulzer hip and knee prostheses. Instead, counsel for Sulzer and the class have (1) negotiated into individual settlements with certain TPPs, which provide no assurance of finality for class members or Sulzer; and (2) entered into a revised Settlement Agreement, which provides that individual class members ("APRs") will release all assigned claims, including but not limited to subrogation claims of TPPs, with or without such assignees' or subrogees' consent.[1]

[1] In an abundance of caution, Aetna and Sulzer have moved to intervene and to consolidate their related lawsuit (*Aetna, Inc. et al. v. Sulzer AG, et al.*, (N.D. Ohio) Case No. -01-CV-2148) with this action. However, in view of the clear and substantial impact of the proposed settlement on their interests, Aetna and Cobalt have standing to

The Settlement Agreement defines "settled claims" as including "assigned claims." Section 1.1(*zzz*). Subrogation claims and claims of any class member that have been assigned by contract to his or her TPP would appear to be swept under this definition of "assigned claims."

Subrogation claims, and other claims which settling class members have assigned to their TPPs, do not belong to settling class members, and they cannot release such claims. "[I]f the insured brings suit, the insurer who is partially subrogated may intervene in the action to protect its pro rata share of the potential recovery." Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2ND § 1546; *Standard Marine Ins. Co. v. Scottish Metropolitan Assurance Co.*, 283 U.S. 284, 287 (1931) ("Co-insurers, on payment of the loss of the insured, are subrogated to the right of the insured to recover from one who causes the loss, and participate pro rata in the recovery"); *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 381 (1949) ("in cases of partial subrogation, since both insured and insurer 'own' portions of the substantive right [they] should appear in the litigation in their own names").[2]

An order approving the class action settlement which would release such claims would violate the due process rights of class members' assignees and subrogees. *Martin v. Wilks*, 490 U.S. 755, 768, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) ("A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement."); *Local No. 93 v. City of Cleveland*, 476 U.S. 501, 529, 106 S. Ct. 3063, 3079,

object, even without intervention. *See* Affidavit of Myrna Goodrich and Declaration of Mary Nash, Esq. submitted in support hereof.

[2] S*ee also Carpetland U.S.A. v. J.L. Adler Roofing, Inc.*, 107 F.R.D. 357, 358 (N.D. Ill. 1985); *Virginia Elec. and Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973) ("Where there is partial subrogation, there

92 L. Ed. 2d 405 (1986) ("A court's approval of a consent decree between some of the parties ... cannot dispose of the valid claims of nonconsenting [parties]; if properly raised, these claims remain and may be litigated by the [nonconsenting parties]"); *Class Five Nev. Claimants v. Dow Corning Corp.*, 280 F.3d 648, 660 (6th Cir. 2002) (reversing approval and remanding bankruptcy plan of reorganization for failure to adequately protect United States' subrogated claims for its health care payments made on behalf of breast implant recipients).

If, on the other hand, Sulzer and the APR Class take the position that, despite its language, the Settlement does not purport to release subrogation claims or other assigned claims, then one of the key factors which this Court previously determined favored the settlement has vanished. In its Memorandum and Order granting preliminary approval, the Court stated:

> The Court finds that the key provision in the proposed settlement agreement regarding subrogation claims ... ensures that any amounts received by class members will not later be taken from them by, for example, medical insurers who paid for revision surgery."

204 F.R.D. at 385. This salutary result (assurance that individual class members would be free from all remaining claims of their medical insurers) can be obtained only, as a practical matter, through a settlement with TPPs as a class. Under such a settlement, the TPP class members would release all claims against the class members who are or become parties to the current settlement and the Settlement Trust, in exchange for TPP class members' acceptance of the benefits to be provided to them under such a settlement.

are two real parties in interest").

The Settlement Agreement Between Sulzer and the APR Class Has Not Extinguished Either's Exposure to TPP Claims

The Settlement Agreement establishes a "Professional Services Fund" into which $244 million is deposited, $184 million of which is allocated to pay fees to APR class members' lawyers, and $60 million of which is allocated to a "Subrogation and Uninsured Expenses Sub-Fund," which is intended to pay medical expense claims of TPPs, the United States Government and uninsured individuals. Section 2.2(e); Section 3.9. The Settlement Agreement defines "Third Party Payer" as "any insurer or other party that makes payments on behalf of Class Members for medical expenses and would have a subrogated claim with respect to payment of such expenses or provides goods and services to a Class Member and who has a valid subrogation right or lien with respect to the cost of such goods and services." Section 1.1 (rrrr).

The Settlement Agreement caps the amount payable to settle a third party payer's subrogation claims at $15,000 for each "Affected Product Revision Surgery," for which the TPP was a "primary payor." Separately, objectors are informed, Sulzer, the APR class and certain TPPs have entered into a "most favored nation" agreement which caps the amount payable from the Settlement Trust at $5,000 if the TPP was a secondary payor. The availability of the Professional Services Fund to relieve class members of reimbursement liability is further limited by an aggregate cap of $60 million for all TPP claims, including claims of Medicare claims and uninsured individuals, unless Sulzer volunteers to pay more. Section 3.9(a). The "Parties" (Sulzer and counsel for the class) reserve to themselves the ability to "settle all claims with respect to unpaid medical expenses paid by Third Party Payors on behalf of Class Members...." *Id.* The Settlement Trust and Sulzer then requires releases from class members (of their TPPs' subrogation and assigned claims) prior to any payments being made to such class members. *Id.*

Sulzer's counsel's and the APR's counsel's categorical refusal to consider a TPP class settlement does not achieve the finality which the parties seek. Such a TPP class settlement would present TPPs with the same decision which the Settlement Agreement presently before the Court for approval presents APR class member; *i.e.*, either (A) remain in the class and accept the substantial, but limited, monetary benefits provided within the Settlement Agreement, with the corresponding ease of claiming them, and release all claims associated therewith; or (B) opt out and retain your claims in hopes of a higher recovery but with the corresponding risk of a smaller recovery or no recovery. While Sulzer and the APR Class counsel argue in favor of the obvious benefits of certainty and finality which they recognize can only be provided by the class settlement mechanism for individuals' APR claims against Sulzer, they have stubbornly refused to consider the very same mechanism to achieve final resolution of TPP claims, thereby leaving individual class members and Sulzer at risk. The obvious efficacy of a separate third party payer class settlement has been recognized by courts in at least two recent settlements of complex class action cases. *In Re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001); *In Re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 388-398 (D.D.C. 2002).

Even if Sulzer were willing, and able (a significant question given Sulzer's financial condition), to pay every APR class member's reimbursement liability to TPPs under Section 3.9 of the Settlement Agreement, on a claim-by-claim basis, absent a TPP *class* settlement on these terms, both Sulzer and APR Class members remain at risk in every instance in which a revision surgery resulted in TPP primary coverage expenses in excess of $15,000 or secondary coverage in excess of $5,000. Indeed, to limit the Settlement Trust's exposure to their "most favored nation" settlement with individual TPPs, Sulzer could be required to defend such claims at great

expense. Instead, Sulzer and counsel for the APR Class claim to have "resolved" these claims themselves by setting up a limited fund, which *they* and a minority of TPPs have agreed to and which *they* will administer, when a TPP class settlement could provide such assurance of finality. By eschewing the class mechanism, the Subrogation Fund raises more questions than it answers. Which claimants, if any, will have priority to the $60 million? Will the Fund's money be paid on a pro-rata basis, or a first-claimed, first-paid basis (which risks depletion before all claims are paid). Absent a class settlement, non-settling TPPs will pursue reimbursement and subrogation claims against APR class members and Sulzer. Moreover, any APR class member which has assigned a claim to a non-settling TPP may discover, too late, that he or she does not qualify to recover under the settlement. Thus, neither Sulzer nor the TPPs obtain the benefit of peace from future claims which the settlement purports to achieve. Sulzer's agreement to indemnify class members to the extent that their assigned claims exceed $15,000 per Affected Product Revision surgery is illusory.

An example of "assigned claims" that the Settlement Agreement would purport to release are the claims of Cobalt and Aetna in connection for payments made to medical providers for their members for Sulzer hip revision surgeries. Cobalt and Aetna reserve their rights to pursue reimbursement claims against insureds who breach their obligations under their plan provisions to preserve their subrogation claims.[3] *Id.*

[3] The subrogation provisions of the plans of Aetna and Cobalt members, who are members of the APR Class, require members to cooperate with Aetna and Cobalt in recovering their subrogation claims against a tortfeasor, in this case, the Sulzer defendants. However, the Settlement Agreement makes these members' breach of those contracts a prerequisite to participation in the class settlement by requiring the class member to "cooperate with Sulzer, Sulzer AG and any other Released Party to cause the dismissal ... of any action against Sulzer, Sulzer AG or any Released Party asserting a Settled Claim brought by or on behalf of any Class Member...." Section 13.2(d).

No disclosure was made to APR class members concerning the risk that they remain liable to third party payers to the extent that the Settlement Agreement does not resolve claims that exceed $15,000 individually, or $60 million in the aggregate.

Class counsel attempted once before (over objection by Aetna and Cobalt) to bar third party payer claims against Sulzer. *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. at 386. Counsel who seeks extinguishment of a party's claims cannot, of course, adequately represent their interests consistent with due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985) (due process requires "that the named plaintiff at all times adequately represent the interests of the absent class members") (citation omitted); *see also* 1 NEWBERG ON CLASS ACTIONS, § 4.46 at 4-185 ("It is settled that adequacy of representation is the quintessence of due process in class actions").

The procedure employed in the Settlement Agreement to dispose of the assigned and subrogated claims of TPPs is deficient and cannot be approved. Although Sulzer and the consumer class counsel have crafted what they believe to be a fair method of administering the claims of all TPPs in the form of a de facto TPP class (through § 3.9 and individual TPP settlements), they do not provide the TPPs the protections built into a Rule 23 settlement of their own claims; including the protections of proper notice and a claims administration process consented to by TPP counsel and approved by the court. Without these protections, TPPs are deprived of the due process rights accorded them in a proper Rule 23 settlement procedure.

CONCLUSION

The Settlement Agreement cannot be approved in its present form.

Dated: Cleveland, Ohio
April 29, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2002, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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