

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: : Case No. 01-CV-9000
: :
SULZER HIP PROSTHESIS AND : MDL Docket No.: 1401
KNEE PROSTHESIS PRODUCT :
LIABILITY LITIGATION : Judge Kathleen M. O'Malley
: :
This Document Relates to All Cases :

FIRST AMENDMENT TO CLASS ACTION SETTLEMENT AGREEMENT

It is hereby stipulated and agreed between the parties to the Class Action Settlement Agreement dated March 13, 2002 (“Settlement Agreement”) and the Claims Administrator that the Settlement Agreement shall be amended as follows:

1. Section 1.1 (zzz) is amended to add the following provision at the end of the first sentence:

“; provided, however, that “*Settled Claims*” shall not include claims held by Third-Party Payors in respect of subrogation or other claims for medical expenses paid on behalf of Class Members. Further, the term ‘assigned claims’ in the release to be signed by Affected Product Recipients shall have the same meaning as ‘*Settled Claims*’.”
2. Article 5 is amended to add the following Section 5.7:

“Section 5.7 Notwithstanding the foregoing, in the event that a class Member is paid benefits pursuant to Section 8.4 hereof, no attorneys’ fees or expenses shall

be deducted from such amount at the time payment is made to such Class Member, rather any such applicable attorneys' fees or expenses owed in respect of such payment shall be deducted from the amount of any additional benefits paid to such Class Member."

3. Section 3.7(b) is amended to delete the last sentence in its entirety and replaced with the following:

"To the extent a Class Member qualifies for payment under Matrix Level IV and then subsequently qualifies for payment under Matrix Level V because the Major Surgical Complication has resulted in a permanent impairment, any payment made pursuant to Matrix Level V shall be less the amount allocated under Matrix Level IV. By way of example, where a Class Member qualifies for benefits under Matrix Level IV due to an infection and subsequently suffers from a permanent impairment as a result of that infection, the Class Member shall receive benefits under Matrix Level V for the permanent impairment, less any benefits previously received by the Class Member under Matrix Level IV as a result of the infection."
4. Section 2.2(d) is amended to replace the heading "Extraordinary Fund" with the heading "Extraordinary Injury Fund".
5. Section 3.9(b) is amended to replace the reference to "Subrogation and Uninsured Expenses Fund" with "Subrogation and Uninsured Expenses Sub-Fund."
6. Section 5.1 is amended to add the following after the last sentence:

"In no event shall attorneys' fees or expenses be deducted from the amount of any benefits received by a Class Member pursuant to Section 3.3 and 3.5(a)."
7. Annex IV is amended to replace "VII. MATRIX LEVEL VI (Myocardial Infarction)" with "VI. MATRIX LEVEL VI (Myocardial Infarction)" in both the Hip and Knee Matrices.
8. Annex IV, Hip Matrix Level IV (8) is amended to replace "ninety (90) days" with "one hundred eighty (180) days."
9. Annex IV, Matrix Level IX in both the Hip and Knee Matrices is amended to add the following sentence after the first sentence under "Benefits":

"A Class Member's eligibility to receive benefits pursuant to Matrix Levels I-VIII in no way precludes such Class Member from receiving benefits pursuant to this Matrix Level IX."
10. The first sentence of Section 8.4 is deleted in its entirety and replaced with the following:

“Class Members who elect the GPO and execute the GPO Agreement shall receive a minimum of \$40,000 of the payments provided in Section 3.4(a) and a minimum of \$400 of the payments provided in Section 3.5(b), as applicable on the date that is the later of (a) sixty (60) days after the Insurance Proceeds Delivery Date or (b) forty-five (45) days after the Claims Administrator reviews such Class Members’ completed Orange Form.”

11. The first sentence of Section 3.5(b) is deleted in its entirety and replaced with the following:

“Subject to Section 3.6(b), Derivative Claimants of Class Members who are entitled to payment under Section 3.4(a) are entitled to receive a cash payment of \$1,600 (less any amounts paid to such Derivative Claimants pursuant to Article 8, if applicable), to be paid no later than the date on which payments are made to Class Members pursuant to Sections 3.4(b) or 3.4(c) as applicable.”

12. Section 3.6(d) is amended to add the following after the last sentence:

“Notwithstanding the foregoing, (i) any benefits payable to a Class Member pursuant to Section 3.3 will not be offset from the amount of any payment received by such Class Member prior to the Insurance Proceeds Delivery Date; and (ii) to the extent a Class Member receives any payment of benefits prior to the Insurance Proceeds Delivery Date, such amounts shall be deducted from amount of benefits that such Class Member is entitled to pursuant to Sections 3.4(b), 3.4(c) and 3.7; provided, that, any such amounts, if possible, shall be deducted from the final payment made to such Class Member hereunder.”

13. The last sentence of Section 5.2 is deleted in its entirety and replaced with the following:

“In the event there are any amounts remaining in the Plaintiffs’ Counsel Sub-Fund after all applicable amounts have been paid to Plaintiffs’ Counsel, such remaining amount shall be distributed *pro rata* among all Class Members who received benefits pursuant to Sections 3.4(a), 3.5(b), 3.5(c) and 3.7(a).”

14. The first sentence of Section 3.9(a) is deleted in its entirety and replaced by the following:

“The Sulzer Settlement Trust or, if prior to the Insurance Proceeds Delivery Date, Sulzer shall pay to the United States on behalf of the Centers for Medicare and Medicaid Services (formerly known as the Health Care Finance Administration) and other Third-Party Payors in respect of subrogation or other claims for medical expenses paid on or behalf of Class Members and shall pay reasonable and necessary expenses incurred by Uninsured Affected Product Recipients in respect

of each Affected Product Revision Surgery; provided, however, that any such amount paid by the Sulzer or the Sulzer Settlement Trust shall not exceed (i) \$15,000 in the aggregate for any and all claims made in respect of a single Affected Product Revisions Surgery (unless approved by Sulzer as set forth below) and (ii) \$60.0 million, in the aggregate.”

15. Section 3.3(a) is deleted in its entirety and replaced with the following:

“(a) Class Members (other than Subclass V) who have not undergone Affected Product Revision Surgery on or before the Final Judicial Approval Date shall be entitled to receive an aggregate cash payment of \$1,000, payable in cash by the date that is the later of the 45th day following the Funding Date and the 45th day following the date the Claims Administrator makes a Final Determination with respect to such Class Member (or if such Final Determination is appealed in accordance with Section 4.6, the date on which all such appeals are exhausted).”

16. Section 3.4(b)(x) is deleted in its entirety and replaced with the following:

“(x) at least 55% shall be payable in cash (less any amounts paid to such Class member pursuant to Article 8, if applicable) by the date that is the later of the 45th day following the Funding Date and the 45th day following the date the Claims Administrator makes a Final Determination with respect to such Class Member (or if such Final Determination is appealed in accordance with Section 4.6, the date on which all such appeals are exhausted) and”

17. Section 3.4(b)(y) is deleted in its entirety and replaced with the following:

“(y) at least 45% shall be payable in either cash or ADRs or Shares (valued as set forth in Article 6), or a combination of both, no later than the date that is the later of 20 months from the CCI Issue Date and the 45th day following the date the Claims Administrator makes a Final Determination with respect to such Class member (or if such Final Determination is appealed in accordance with Section 4.6, the date on which all such appeals are exhausted)”

18. Section 3.4(c)(x) is deleted in its entirety and replaced with the following:

“(x) approximately 55% shall be payable in cash by the date that is the later of the 45th day following the date of such Affected Product Revision Surgery and the 45th day following the date the Claims Administrator makes a Final Determination with respect to such Class Member (or if such Final Determination is appealed in accordance with Section 4.6, the date on which all such appeals are exhausted) and”

19. Section 3.4(c)(y) is deleted in its entirety and replaced with the following:

“(y) approximately 45% shall be payable in either cash or ADRs or Shares (valued as set forth in Article 6), or a combination of both, no later than the date that is the later of 20 months from the CCI Issue Date and the 45th day following the date the Claims Administrator makes a Final Determination with respect to such Class Member (or if such Final Determination is appealed in accordance with Section 4.6, the date on which all such appeals are exhausted)”

20. Section 4.3(a) is amended to add the following:

(iv) “one hundred eighty (180) days after a Non-Removal Surgery.”

21. Section 4.5(a) is deleted in its entirety and replaced with the following:

“(a) Each Class Member claiming benefits as an Uninsured Affected Product Recipient must submit a claim form for payment of benefits out of the Subrogation and Uninsured Expenses Fund (the “*Uninsured Medical Expenses Claim Form*” or “*Red Form*”), attached hereto as Exhibit G, on or before the date that is the later of (i) one hundred eighty (180) days after the date such Class Member receives the medical care for which he or she seeks medical expense reimbursement and (ii) one hundred eighty (180) days after Trial Court Approval.”

22. The second sentence of Section 5.1 deleted in its entirety and replaced with the following:

“Payments made to Plaintiffs’ Counsel for attorney fees pursuant to Sections 3.4(a), 3.5(b), 3.5(c) and 3.7 shall be set off against the total contingent fee, and thus the obligation of any such Class Member to his or her Plaintiffs’ Counsel will be offset by such amount.”

23. Section 3.5(c) is deleted in its entirety and replaced with the following:

“(c) Derivative Claimants may also be eligible to receive additional benefits pursuant to Section 3.7, as provided for in Annex IV hereof, in an amount equal to 1% of the benefit payable to the associated Affected product Recipient. In the event that the contingent fee contract provides for a rate that is less than 23%, the applicable attorney fee payment under this Section 3.5(c) will be calculated using the lower rate.”

24. The third sentence of Section 2.5(c) is deleted in its entirety and replaced with the following:

“The Insurance Proceeds shall not be used for any purposes other than (i) paying Class Member benefits pursuant to Section 3.4, Section 3.5(b), and Section 3.5(c), in accordance with Article 8 or otherwise, (ii) paying Extraordinary Injury Fund

Benefits to Class Members pursuant to Section 3.7 hereof, (iii) paying attorneys' fees pursuant to Article 5 hereof with respect to Class Member payments payable under Sections 3.4, 3.5, and 3.7 hereof and expenses pursuant to Section 5.4 hereof and (iv) paying medical expenses to Medicare, other Third-Party Payors and Uninsured Class Members pursuant to Section 3.9 hereof."

The Settlement Agreement shall remain the same in all other respects.

IN WITNESS WHEREOF, the Parties, through their counsel, have duly executed this First Amendment to Class Action Settlement Agreement dated as of March 13, 2002 on this ____ day of May, 2002.

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