

### Litigating Mass Tort Cases § 9:39.80

Litigating Mass Tort Cases | January 2018 Update  
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Part One. Law and Practice of Mass Tort Litigation  
Chapter 9. Settlement of Mass Tort Litigation  
IV. Case Histories of Use of Matrix and Category  
D. Arising Out of a Fund, from Which Payments Were Made in Individual Cases

#### § 9:39.80. DePuy ASR metal hips settlement

##### References

In November 2013 DePuy Orthopaedics, Inc., a division of Johnson & Johnson, reached an agreement to settle more than 8000 suits pending against it arising out use of a particular type of metal-on-metal hips, known as ASR Acetabular and Resurfacing Systems. Approximately \$2.5 billion was put into the plan by the defendant.

This plan was only for those users who had had a revision, that is removal of the prosthesis. The product had been recalled due to the development of a condition known as “metallosis,” rubbing of metal on metal parts, leading to small amounts of metal being released. Often secondary infections occurred.

The actual plan is of great interest, potentially as a model for future mass settlements. Cases were pending in the In re DePuy Orthopaedics, Inc., ASR Hip Implant Products Litigation, MDL 2197, and in various state courts. The settlement was approved by the judge supervising the MDL for the ASR litigation, David A. Katz, N.D. Oh. MDL no. 2197.

This is a private plan entered into between the defendant and a team of plaintiff firms, mostly the ones on the steering committee for this MDL. It expressly has avoided judicial approval or oversight (similar to the Vioxx plan, § 9:39.50). A plaintiff had to opt into the plan (by enrollment). If the plaintiff did not, the lawsuit is carried on. And people without revisions or later revisions were not covered by this particular plan.

As has become common in mass settlements, there was a “walkaway” clause which allows the defendant to not effectuate the plan if 94% of the potential claimants did not opt into it. Of course, the defendant need not exercise this option, and can operate it with a lesser number.

There were two parts to the plan: Part A: for persons with removal but not extra injuries; and Part B: for those who had extraordinary injuries, mainly related to the removal and replacement surgery. This is similar to the other device settlement plans, such as in Sulzer hip implants (§ 9:20).

Part A: created a base sum, from which there are a large number of reductions (in that sense, it is not a “base” but a top). This is \$250,000. Factors that reduce the sum included:

- age: 70 and over: reducing the sum 4–15%
- body weight: obesity reducing the sum 10–20%
- smoking: 5%
- length of time in before removed: the longer the time, the greater the reduction: this could bring the claimant down to \$150,000
- death within five years revision but not due to it: 25%.

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There was no capped sum for Plan A payments. While it was estimated that there would be some 8000 qualified cases, whatever the number was, Johnson and Johnson was to pay them all.

Part B paid a sum in addition to the “base” sum, if various types of serious complications occurred as a consequence of the revision surgery. (Details of the Part B plan are set forth in § 17:29.) This was funded by a set amount of money from the defendant, and was to be managed by the plaintiffs lawyers. The amount was \$485 million.

Events which constituted the extraordinary event (each minutely defined), included:

- blot clot (pulmonary embolism or deep vein thrombosis)
- infection
- foot drop
- stroke or heart attack
- death
- a re-revision (that is, the replaced hip prosthesis had to be revised once again).

Plan B also provided additional payments for the not uncommon occurrence that a claimant had revisions of both hips. Generally, for the second hip \$250,000 would be paid. If Plan B was involved, spouses who were making loss of consortium claims received \$1500.

The plan offered **as a major inducement to participate an agreement by the defendant to be responsible for most liens which existed for covering medical expenses in the revision.** This removed uncertainties about how much a claimant would actually net, and could become a model for future settlement plans.

The administration of the complex plan, since it was not court supervised, was established in various layers. The management of claims was assigned to Brown-Greer, a company which had performed similar functions in previous mass settlements. **Special masters were set up to handle “appeals” from decisions as to whether one qualified for Part B payments or not.**

Fortunately, the plan did not contain the questionably unethical requirement of “all or nothing” settlement of a firm’s inventory. A firm could have some clients participate in the plan and others not. **The plan has a detailed section protecting attorneys’ fees, as in the event of a client who discharged counsel.** Official information on the plan is at <http://www.usasrhipsettlement.com>.

If one did not opt into the plan, the person could continue to litigate. In such instances, only time would tell which was the better deal.

The plan under review applied only to those who had had a revision before a set date. For persons who have a revision thereafter, obviously some additional provisions will have to be made. The plan also had no provisions for persons who still had the ASR prosthesis in, even if they were having problems which could well lead to the removal of the device.

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**About the Author**

Paul D. Rheingold is the founding partner of Rheingold, Valet, Rheingold, McCartney & Giuffra LLP, a law firm based in New York City. He has long been active in mass tort work, including leadership and educational roles in over 20 drug and medical device mass torts. These have included litigations involving NuvaRing, Bextra, Vioxx, ephedra, PPA (phenylpropanolamine), diet pills, MER-29, Albuterol, L-tryptophan, Dalkon Shield, and others. A cum laude graduate of Harvard Law School, Mr. Rheingold is the former national secretary of the American Association for Justice; he has been a faculty member at Harvard Law School, a visiting scholar at Stanford Law School and the RAND Institute; and he has lectured at many other law schools. He is a member of the New York, Massachusetts, and District of Columbia Bars.

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