Litigating Mass Tort Cases § 9:39.99

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

§ 9:39.99. NuvaRing settlement

References
In February 2014, Merck (operating through the name of its subsidiary which made the product, Organon), made a $100 million settlement offer intended to end the long run NuvaRing litigation pending against it. The plan is a private one, not involving court approval. Claimants must opt into the plan, within a deadline. The plan would only take effect if 95% of certain claimants opt in. The plan was limited only to certain injuries, mostly venous clots—DVT, pulmonary embolism and stroke.

The plan itself has few terms. It leaves it up to a committee of plaintiffs' attorneys to figure out how to distribute the money fairly. The plan uses Brown-Greer for administration, and this is being paid for by Merck. All common fund fees and expenses are paid from the settlement fund.

Soon after the plan was announced, the plaintiffs' lawyers committee put out a statement, called "Summary of NuvaRing Settlement Program," for use by counsel and their clients in evaluating the settlement. It described the proof that would be required in order to qualify for payment, such as proof of use. It also gave what it called "base settlement amounts." The amounts available per claimant are small in comparison to what payments for like injuries in other settlements, but perhaps consistent with liability difficulties which had occurred. For example, a pulmonary embolism was set at $26,000.

If after the base sums were paid, there was money available, the committee envisioned "enhanced" payments, which would work by awarding points. For example, long hospitalization would be 3 points: under the age 25 was 2 points: and death with dependants 4 points. Rather than the usual method of deducting for obesity, smoking and the like, their absence added points!

In consultation with an "ethicist," who was a law professor, the committee also prepared what they called an "informed consent" letter for a lawyer to send a client. It was a fairly coercive letter, tending to push claimants into the plan. If a woman did not opt into the plan, the federal and New Jersey judges promulgated a set of rigorous requirements for continuing on with the litigation, including provide expert reports and medical records immediately.

Unlike other recent settlement plans, this plan did not deal with liens which exist, whether governmental or private. If not reduced in some way, the lien could easily be larger than the amount the woman was to receive. Also, common fund expenses would reduce the amount a woman received; these had been set at 4.5% of the recovery. And there was a 11 point reduction of fees of attorneys to pay the common fund.

As the workout of payment of fees and expenses from the common fund, see supp § 7:62.50.

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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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