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CONFLICT MANAGEMENT

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Inside This Issue

MEDIATION AS A TOOL FOR SETTLING MASS TORT CLASS ACTIONS

Robert Gary

The mediation of mass tort class actions presents real opportunities to achieve settlement, while also presenting issues particular to an attorney's obligations to multiple plaintiffs in the class action context.

ECONOMIC ISSUES

The scope of this article is the mediation of mass tort claims. Addressing the issues of damages is critical to the settlement of any class action, and mediation provides the ideal mechanism in the mass tort area. Valuation of these claims, where the damages are indeterminate, must be approached very differently from a class case where the claims can be computed with precision by mathematical formula. A pension class action, for example, may hinge on the selection of interest rates when converting an annuity to a lump sum, or the effect of a lump-sum payment calculation in a cash balance plan. In such instances, the parties can determine the number of eligible class members

Continued on page 3

DYNAMICS OF A GLOBAL CLASS ACTION SETTLEMENT: THE SULZER HIP IMPLANT CASES

Harvey Kaplan and Andrew Carpenter

On May 8, 2002, Judge Kathleen O'Malley of the United States District Court for the Northern District of Ohio certified a settlement class under Federal Rule of Evidence 23(b)(2) and granted final approval to a class settlement that provided over $1.03 billion to resolve the claims of the approximately 30,000 class members. The settlement class consisted of all persons who had been surgically implanted with a hip prosthesis (the Sulzer Inter-Op™ Acetabular Shell) or knee prosthesis (the Sulzer Natural Knee® II Tibial Baseplate) manufactured by Sulzer Orthopedics, Inc. ("SOI") from an "affected lot" and their derivative claimants.

The settlement has been as an effective, efficient resolution of the class claims. As of February 20, 2004, the Settlement Trust had received 4,772 claims for benefits for patients who had undergone revision surgery, 5,924 claims for benefits under the Extraordinary Injury Fund ("EIF"), and 3,450 claims for benefits by unrevised class members. While the Trust continues to process claims, approximately $710 million has been paid out to claimants. Over $30,232,300.00 in common benefit attorneys' fees have been approved by the Court. The settlement also served the interest of the defendant. Instead of having been forced into bankruptcy, SOI, subsequently re-named Centerpulse Orthopedics, Inc. ("COI"), has emerged from its litigation crisis and has been acquired by Zimmer Holdings, Inc. ("Zimmer"), a worldwide leader in the design, development, manufacture, and marketing of reconstructive orthopedic implants and trauma products. This Article describes how the parties achieved the settlement in the Sulzer class action.

A. The Parties & the Product. SOI was an Austin, Texas-based manufacturer of orthopedic devices, including knee, hip, and shoulder replacement systems. SOI's Inter-Op™ Acetabular Shell ("Inter-Op Shell") and

Continued on page 7

Message From the Editor

This issue features three articles about the settlement of class actions. The number of claimants, varying circumstances, attorneys and jurisdictions involved in many mass tort matters present perhaps the greatest challenge for "conflict management". Our feature authors offer three different perspectives, providing lessons and examples for us all, regardless of the type of cases we may be handling. Harvey Kaplan describes how a defendant's early and thoughtful case assessment, key court rulings, astute case management and vigorous negotiations combined to produce a win-win resolution for over 30,000 plaintiff class members, and the defendant, in the Sulzer hip implant litigation. Bob Gary describes how a mediator can assist in resolving critical interlocking issues in class actions. And Deana Peck and Kathleen Biesterveld discuss the array of legal obstacles, and tools for overcoming them, in the multi-jurisdictional enforcement of class action settlements.

In addition to the feature articles, you'll also find news on changes in arbitrator ethics rules, case notes, and a new section, ADR Basics, which will provide key information for those new to dispute resolution processes. In this month's ADR Basics, ADR Committee Co-Chair Richard Kennedy addresses the bases for court review of arbitration awards under the Federal Arbitration Act.

Our next issue will focus on Conflict Management Systems, which are of particular interest to labor and employment lawyers, but which can be useful to clients regardless of the type of disputes that are most common in their organizations. Future issues will focus on other themes, as guided by Committee leadership and suggestions and submissions from you, our readers. . . .So let's hear from you!

Deborah A. Coleman, Editor in Chief

Message From the Chairs

As we approach the midpoint of this Bar year, we are extremely pleased at the state of the Committee. We have recently appointed new co-Chairs for subcommittees and have enlisted interested members to join the subcommittees, although additional members are always welcome. We co-sponsored three (3) Programs at the Section of Litigation Annual Meeting in Phoenix, Arizona this month.

A wide range of subjects falls within the scope of the Section's ADR Committee, including strategies for settling court litigation (featured in this issue), conflict management systems (to be featured in the summer issue, mediation, negotiation and arbitration. Each approach to dispute resolution has unique characteristics within a particular field of law, and hence we have subcommittees that are subject-specific, such as securities, as well as method specific, such as mediation. Consider what area is of greatest interest to you and join a subcommittee, offer program ideas for upcoming Section of Litigation Meetings, or submit an article for publication in *Conflict Management*.

Issues at the intersection of two areas are also of interest to us. We note that last year, a focus of court decisions was determining the boundary between the jurisdiction of the court and the charge of the arbitrator. The U.S. Supreme Court in *Bazzle* directed us to look to the arbitrator to make the class action arbitrability decision. Nevertheless, various Federal and State courts, ignoring the standard adopted by the U.S. Supreme Court in Bazzle, have proceeded to decide gateway issues on motions to compel, confirm or vacate without restraint. The focus of these Courts is the question of whether the arbitration agreement is unconscionable. It does appear, however, that the unconscionability question involves the interpretation of the underlying contract, which is exactly what the U.S. Supreme Court has now said is for the neutral to decide.

In this era, it seems that the only certainties are tension and change. As lawyers, our charge is to do our best to interpret these developments to our clients, and to assist them in achieving their goals in spite of new and changing obstacles.

E. Richard Kennedy
Paul A. Sandars, III

as well as the exact value of their claims. Armed with this data and assisted by a mediator, the parties then can arrive, through a traditional risk-benefit analysis, at a dollar value that is acceptable to plaintiff and defendant and is likely to be approved by the court at a fairness hearing.

A mass tort or environmental event such as an explosion, pipeline break or superfund site does not present such mathematically precise damage calculations. The number of class members only can be estimated, and the value of any one claim or a number of aggregate claims for personal injury, evacuation or property diminution is subjective. Nor can it be determined with precision how many of the unnamed class members will fit into various damage categories, even where categorization is a point on which the named litigants can agree.

Although parties negotiating any settlement conventionally regard the total value and the per client value of a settlement as the key issues, in class settlements, the protocols for administration of the settlement, as well as the identity of the administrator, may be as important to the actual recovery by class members as the aggregate dollar value. At the point of resolution of a gross settlement figure by mediation, neither the parties nor the mediator can know with certainty the number of claims that will be made, and who will qualify. Regardless of the total stated value of the settlement, the real cost to the defendant, and the actual recovery by the plaintiff class, will depend on details that are subject to negotiation—for example, the settlement claim criteria, which may limit realistic participation, or the claim form, whose complexity may deter claimants.

A class action mediation should not proceed with the expectation that all administrative issues will be resolved in the mediation in order to be deemed successful or to be able to move forward. Participants to a mediated resolution should recognize that, once the economic framework is established, counsel can resolve by themselves matters such as class notice, claims forms, and criteria for payment. Mediation sets the foundation for addressing these "administrative details" by facilitating agreement on the underlying economic issues.

TRUST AND TIMING

The potential for resolution of a class action by mediation begins the day that class counsel first interacts with defense counsel. As in any litigation, there will be discovery issues, as well as unique class issues such as the size and definition of the class. If, at the outset, the attorneys are able to build trust, rather than suspicion and distrust, an important foundation will have been set for a successful mediation. Beyond trust, the second most important factor in any successful mediation is timing. As a practical matter, mediation would generally not take place until the class is certified so that class members have had a chance to opt out and discovery is well under way, so that the parties can accurately assess liability, if not damages.

INHERENT PROBLEMS AND COST

Some of the dilemmas presented by class action mediation are obvious. For example, even if a mediator were able to resolve the dispute among the named litigants, neither side can be sure that the unnamed class members will be willing to participate or that the court will approve the proposed settlement, particularly since a mass tort class action frequently features multiple subjective damage components for a large and diverse group of potential plaintiffs represented by multiple class counsel. Less obvious are the problems surrounding the determination of attorney fees in class actions, which for the most part are awarded by the court rather than paid pursuant to client contract.

To address these issues effectively, the mediation of a class action may consume many more hours than the mediation of a traditional suit and may be more expensive to mediate, but is generally worth the expense. Participants generally know full well that trial of a class action presents difficulties that go beyond those of the submission of even a complex non-class matter to a jury, and can be enormously expensive for all the litigants. Establishing both the uniformity of damages within the class, and the variety of damages flowing from a common source, frequently involves computer modeling and expensive experts running into the hundreds of thousands of dollars. Thus, neither the number of mediation sessions, which may extend over several weeks or even months, nor the total cost expended on mediation, should be an impediment to pursuing mediation as an option, as long as settlement appears realistic and in the interests of all sides participating in good faith.

FAIRNESS HEARING

In a class action mediation, the parties must keep foremost in mind, throughout the negotiations, that it is not up to the parties alone to settle on their own terms. They can only fashion a settlement which is acceptable to those at the table and is designed to pass muster with the court at a fairness hearing. The unnamed class members, sometimes numbering in the thousands, by definition cannot participate in the mediation, and thus the plaintiff class speaks through class counsel. A court-supervised fiduciary relationship exists between the class and class counsel, who has no unilateral authority to settle on behalf of the class. Rather, the court must approve any settlement after notice provided to all of the class members as to the terms of the settlement agreement. In order to be approved as a binding agreement of the parties, the results of the mediation will be examined by the court for fairness at a hearing at which the class members, who have their own expectations of fairness, may appear and be heard. Therefore, the mediation should in many respects address the very issues which will be presented to the court at the fairness hearing, i.e., adequacy of the economic resolution for the class, attorney fees, and, if necessary, administrative details, causing the mediation to serve the dual purpose of settlement of the case and preparation for the fairness hearing.

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SELECTION OF THE MEDIATOR

Because of the uniqueness of the issues to class actions, the mediator must be someone who is intimately familiar with, and has had hands-on experience in, class action litigation. If the mediator focuses exclusively on the dollar value without a fundamental awareness of how other issues ultimately will affect the total final cash distribution, an apparently reasonable settlement may be headed for a lop-sided result. The mediator must understand several dynamics, including the interplay between the power of administrator over the implementation of the settlement, the language of the opt-out notice, and the format and complexity of the claim form, as well as the required showing at the fairness hearing. The imperative of the mediator's familiarity and facility with these issues may limit the field of potential mediators to those prepared to make the commitment to mastering the class issues, class action attorneys and judges experienced in class actions.

CASE STUDIES

The successful mediation of two complex mass tort class actions illustrates the potential effectiveness of mediation in class action litigation, despite an indeterminate number of class members and subjective and widely varying damages for classes numbering in the thousands.

White v. Aztec

The *White* case arose out of an explosion of a chemical facility in Elyria, Ohio. As a result of the explosion, approximately 9,000 people were evacuated from their homes, creating evacuation claims in addition to claims for property damage, property value diminution, a variety of physical symptoms and medical bills, and a potential punitive damage claim.

Extensive document production and discovery resulted in a reasonably clear picture of the causes of the explosion. Nevertheless, and not surprisingly, the parties had vastly different opinions regarding the effect of the explosion on the community. After extensive but unsuccessful face-to-face negotiations, by agreement of the parties the case was submitted to mediation with a former United States District Court judge. The stature, credibility and skill of the mediator are important elements to the success of any mediation, and class actions are no exception. The mediator in this instance brought to the table these necessary assets.

Prior to mediation, during almost a year of attorney-to-attorney negotiation, neither side was willing to commit to a specific dollar settlement without first reaching agreement on the methodology for distribution. Without the dollar amount agreed upon, neither side was willing to address the methodology for distribution. Only a third party could simultaneously shape these two interrelated elements, thereby obviating the necessity of plaintiff and defense counsel making face-to-face concessions to the detriment of one or the other as they worked through the myriad of details required to effectuate a class action settlement.

The defendants in *White* wanted to put the case behind them and settle for a fixed amount with all cash, expenses and attorney fees coming out of the settlement fund. The dilemma for class counsel was how to divide equitably a fixed sum among an unknown number of claimants who suffered a mixed bag of damages. Some individuals were evacuated but had no medical injuries; some had medical injuries but were renters, not owners, of real estate, and so forth.

The solution was reached in mediation. The defendants would pay a fixed amount, out of which would be paid all costs of administration, expenses, attorney fees and distribution to the class. Class members would receive a fixed amount for each damage category for which they qualified, including payments up to $65,000 for a severe injury, if corroborated in a specified manner.

Class counsel always fears that, after publicizing the terms of a settlement, the fund will run dry, or, because of the number of applicants, the actual payments will fall far short of the estimated compensation to each participant. If every class member sent in a valid claim, the settlement fund would be insufficient to pay all claim categories at a hundred cents on the dollar, and the claims would have to be reduced pro-rata across the board. While plaintiffs' counsel in *White* wanted a substantial dollar amount per category (i.e., evacuation, personal injury), with a capped settlement fund, they ran the risk that there would be insufficient funds at the end of the distribution process. The defendants were of the belief that, even if all claims by category were paid one hundred cents on the dollar, there would be large amounts of money left over. The mediator's solution was to convince the defendants to agree to both a generous payment per category and to a two stage payout, in order to avoid the danger of exhausting the fund. The claims for punitive damages, evacuation and pollution symptoms were set at a fixed amount for the initial payout. After the initial payout,

when the total number of all claimants was known, eligible class members would receive up to an additional 200% for punitive damages and 100% for the other categories if sufficient funds were available after the expiration of the claims period. The defendants' concern about overpayment was resolved by the plaintiffs' agreement to return any portion of the funds not expended through the claims process. At the conclusion of the administration of the settlement, approximately a million dollars was available for refund to the defendants.

Lowe v. Sun Refining and Marketing Co.

In *Lowe*, through mediation, a similar class action reached a very different result. *Lowe* involved a spill from a pipeline break of hundreds of thousands of gallons of toluene, resulting in claims for evacuation, property damage, physical injury and punitive damages on behalf of a class of thirty thousand. After 14 years of vigorously contested litigation, three mediation sessions over a several month period yielded a financial resolution. Subsequent to the financial resolution, the administrative details consumed almost an additional year and were resolved through additional face-to-face discussions between counsel, without resort to further mediation except to resolve the attorney fee question.

Defendants in *Lowe* were convinced that individual class members would have little or no interest in submitting a claim after the passage of 14 years. As a result, the defendants were reluctant to settle on a lump-sum basis. The solution that arose from mediation was that all qualifying claims would be paid regardless of the number of claims filed. Damage categories were again enumerated with each class member submitting a claim form specifying which of the damage categories he or she fell into, but not to exceed a maximum dollar amount per class member. Depending on whether 300 or 30,000 of the class members submitted claims, the defendants' exposure could be modest or enormous. The defendants also agreed to separately pay attorney fees, expenses, and all costs of administration. Despite the passage of time there were 20 thousand claims submitted. As in any mediation, the motivation of the parties and the ability of the mediator to shape a creative solution around that motivation was the difference between success and failure.

> Neither side was willing to commit to a specific dollar settlement without first reaching agreement on the methodology for distribution. Without the dollar amount agreed upon, neither side was willing to address the methodology for distribution. Only a third party could simultaneously shape these two interrelated elements.

ATTORNEY FEES

The determination of attorney fees presents a unique problem in mass tort class action settlements. To avoid the potential for conflict, the class claim must be settled before there is any discussion about the magnitude of attorney's fees. Although any award of attorney fees must be approved by the court, plaintiffs' class counsel wants some assurance from the defendants that they will not object to the fees at the fairness hearing. The defendants have both a tactical and economic interest in early disclosure of class counsel's fee. If class counsel disclose their fee and the mediation is unsuccessful, then defense counsel can use it to portray class counsel as putting their own interests above that of the class. For this reason, seasoned class counsel prefer to withhold their fee request as long as possible. Of course, defense counsel will not settle the case without knowing the size and source of plaintiff counsel's fee, since the defendant in a class action settlement is, as a practical matter, ultimately the source of payment of class counsels' fees. Thus the fee is an integral part of any resolution by mediation.

In a mass tort case, there are a variety of ways to compensate class counsel. Class counsel can petition the court for a percentage of the fund created or request a lode star to be paid from the fund including a multiplier. Alternatively, defendants can agree to pay a fixed amount, separate and apart from the settlement fund. Regardless of the methodology of payment it must be approved by the court.

In *Lowe*, the importance of the resolution of class counsel's fee at the mediation cannot be overstated. The defendants had agreed to pay all claimants who qualified, but they refused to agree to any common fund fee, arguing that there was no predetermined and liquidated common fund amount from which a percentage could be computed. In fact, defense counsels' analysis was correct in that total payout could range from zero to $48,000,000, based on 30,000 potential claimants with claims up to $1,600.00 per claimant.

At the mediation, plaintiffs' counsel agreed to negotiate a settlement for the class independent of any agreement as to attorney fees. The parties then agreed to mediate the question of attorney fees independently of the settlement for the class, so long as defendants were willing to pay the attorney fees once determined, separate and apart from a common fund approach. Thus, each side was at risk in a disputed attorney fee application before the court. In the subsequent mediation, defendants agreed to a fixed amount of attorney fees to class counsel to be paid directly by the defendants, which sum was ultimately approved by the court.

In *White*, the solution was simple. A common fund of $21.5 million was created. The defendants agreed that they would not object to a fee request of up to one-third of the fund, and the court, after a thorough analysis, approved the one-third fee request at the fairness hearing.

In every settlement of a class action, the class is sent a notice advising them of the terms of the settlement and the fees requested by class counsel. Thus, the mediation does not operate to deny the rights of unnamed class

members to object to attorney fees. The settlement notice usually will set out class counsel's fee request and provide the class an opportunity to object to these fees at the fairness hearing.

EXPENSES

As with attorney fees, the defendants want all the expenses determined before they agree to settle. Again, *White* and *Lowe* demonstrated two solutions to this problem. In *White*, the expenses were submitted to the court for approval and were deducted from the common fund. In *Lowe*, the defendants agreed to pay the expenses without reducing the payment to the class, but they capped the expenses at $550,000. Same issue – two different solutions.

IMPLEMENTATION

Only after the parties in White and *Lowe* had set the range of their financial exposure were they able to begin to build the framework for implementation. It wasn't until the plaintiffs in both cases were satisfied with the total dollar value and/or payout structure that they were willing to concede on claim form language and issues related to the rules of administration. Conversely, only when the defendants believed the settlements were reasonable could they be more flexible on issues such as the time period for claim forms to be submitted and the criteria for review.

The mediations in these two cases demonstrate different mind sets. In *White* the defendant wanted his expenses fixed and after the signing of the settlement wanted to walk away without looking back. In *Lowe* the defendants were willing to gamble that very few class members would submit claims and the actual payout would be low. As a result, the *Lowe* defendants continued to be involved until the last class member claim was processed. Different solutions, but in each example, mediation brought about a settlement for the class and a determination of attorney fees and expenses, and set the stage for the parties to be able to build the structure necessary to carry out the settlement.

CONCLUSION

In both *White* and *Lowe*, the mediation resolved only the core economic issues. However, in both cases, the breaking of that logjam through mediation allowed the parties then to resolve the details that accompany the resolution of any class action. Even if the mediation does not or cannot settle all mechanical and ministerial questions, or even attorney fees, these matters can be determined by a follow-up mediation if they are not resolved through direct discussions between counsel.

In class action mediation, the parties need to recognize that the goal and the resolution may be very different than that of a traditional mediation. The hallmark of any class action settlement is flexibility, creativity, and the ability of both class counsel and defense counsel to work together. This is particularly important since, unlike the resolution of most litigation, a class action lives on long after final judgment or even the distribution of the funds to class members. A member of the class usually can appeal any award by the administrator to a special master, excess funds may need to be redistributed, missing class members located, or even motion practice regarding the procedures employed by the administrator to qualify claimants. The administration of a class action settlement can proceed for years. Because a mediated resolution involves parties who have succeeded in working together to solve problems, this model can be expected to continue during the course of the administration, distribution and final wrap-up stages of the settlement. Thus, class action mediation is a process that continues to generate benefits well beyond the hammering out of the terms of the settlement.

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Dynamics of a Global Class Action Settlement: The Sulzer Hip Implant Cases
Continued from page 1

Natural Knee II® Tibial Baseplate ("Tibial Baseplate") became the focus of the Sulzer class action litigation. The Inter-Op™ Shell is a socket-like device that is surgically inserted into the patient's acetabulum, which is part of the pelvis. The shell was designed to receive a separate ball-like device with a stem, which is inserted into the femur, or thigh bone. The two components thereby replace the articulating ball and socket structure of the hip joint. The Sulzer Natural Knee® Tibial Baseplate is a component used for complete knee replacement system. It consists of a device which is inserted into the tibia (or shin bone) designed to replicate the hinge structure of the knee joint.

A litigation crisis developed following initial reports that several patients who had received Inter-Ops™ shells had experienced a problem identified as aseptic loosening, *i.e.*, the loosening of the device from the joint in the absence of infection. Scientific evidence showed that aseptic loosening, in most cases, was caused by a failure of the patient's bone to integrate, or grow into, the porous coated surface of the implanted device. This problem was determined to be the result of some excessive residual material on the porous coating portion of the Inter-Op™ shell. In some instances, revision surgery was required; the original prosthesis was removed and another inserted.

While all surgical implants have a background failure rate, SOI immediately began investigating several possible mechanisms. SOI's investigation indicated that a change in its manufacturing processes that employed machining and cooling oils after the application of the porous coating to the Inter-Op™ shells (post-porous coating machine processing) was the likely cause of the premature aseptic loosenings.

By December, 2000, SOI was able to isolate the problem to certain lots. Not all implants in the affected lots failed to bond, but product failures were correlated with these "affected lots." By December 8, 2000, SOI had gathered sufficient information to initiate a voluntary recall of approximately 40,000 Inter-Op™ Shells. Approximately 24,000 of these implants from affected lots had already been implanted. To date, over 3,500 patients implanted with affected hip devices have undergone hip revision surgery.

Later, similar failures were reported in SOI's Natural Knee® II Tibial Baseplates. On May 17, 2001, SOI issued a Special Notification and Voluntary Exchange Program for all affected lots, but 1,343 knee implants from affected lots had been implanted before the Special Notification and Voluntary Exchange Program had been implemented. To date, over 600 patients implanted with affected knee devices have undergone knee revision surgery.

B. Litigation Surges. Within weeks of the Inter-Op™ Shell recall and shortly after the Natural Knee® Tibial Baseplate Voluntary Exchange Program, lawsuits were filed across the country. By September 16, 2001, more than 1,580 lawsuits, 1,360 in state courts, had been filed against SOI in many jurisdictions throughout the country based on failed Inter-Op™ Shells and Natural Knee® Tibial Baseplates. Several of these cases were filed as putative class actions, involving thousands of individual claims. As more products failed, the lawsuits continued. By April 19, 2002, approximately, 1,812 state court cases and 399 federal court cases were pending against SOI.

On August 30, 2001, a jury in Nueces County (Corpus Christi) Texas awarded four million dollars in actual damages and eleven million dollars in punitive damages for the consolidated claims of three elderly women who had undergone revision surgery in a case called Rupp v. Sulzer Orthopedics. The Rupp verdict made it clear that SOI could not afford to defend each of the cases pending against it. At this point, SOI made a critical decision to seek a global class action settlement. Defending and litigating every case would not only likely drive SOI into bankruptcy, but divert precious resources away from those in need of compensation. Bankruptcy and protracted litigation would also threaten to delay any recovery to the primarily elderly plaintiffs by subordinating their interests to those of secured creditors.

C. Consolidation & Certification. On June 20, 2001, the Judicial Panel on Multi-District Litigation consolidated and transferred all pending federal litigation relating to the Inter-Op™ Shell to the Judge Kathleen M. O'Malley in the United States District Court for the Northern District of Ohio. On August 15, 2002, SOI and plaintiff's interim lead class counsel moved for preliminary approval of class settlement and conditional certification of a Rule 23(b)(2) and 23(b)(3) class. On August 17, 2002, Judge O' Malley held a pretrial conference at which she established procedures for submission of objections to the motions for preliminary settlement approval and conditional class certification. Following a hearing on the pending motions for preliminary approval of class settlement and conditional class certification, Judge O'Malley issued a fifty-two page Memorandum and Order on August 31, 2001, conditionally certifying a settlement class consisting of "All citizens or residents of the United States who have had Affected Inter-Op acetabular shell hip implants placed in their bodies, together with their associated consortium claimants," and preliminarily approving the Class Settlement pursuant to Fed. R. Civ.P. 23(e). On October 19, 2001, Judge O'Malley conditionally certified an amended class that also included recipients of both the Inter-Op™ Shells and Natural Knee® Tibial Baseplates as well as their related derivative claimants.

D. The Class Settlement. At this stage, the Class Settlement had less than unanimous support. One of the more controversial aspects of the early versions of the Class Settlements were the "six year liens." These liens financed the proposed settlement fund, but also encumbered substantially all of Sulzer's assets, creating serious disincentives to opting out of the class settlement and pursuing independent litigation. The lien provision was eventually dropped during negotiations. Vigorous