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A NOVEL APPROACH TO MASS TORT CLASS ACTIONS: THE BILLION DOLLAR SETTLEMENT IN THE SULZER ARTIFICIAL HIP AND KNEE LITIGATION: A SYMPOSIUM

PROFESSOR LANDEVER: Welcome. My name is Professor Arthur Landever and along with Professor Susan Becker I would like to welcome you to this symposium. I know you'll find it worthwhile. I would like to call on Dean Steinglass for some introductory remarks.

DEAN STEINGLASS: Hold the applause until I'm done.

Let me just welcome everyone here. I know many of the people in the room are students, and we always welcome you here. And I'm also very pleased to see so many people wearing coats and ties and business suits, so I assume this program has reached out to the legal community as well, and that's as it should be. This law school really is very much a part of this legal community.

And when we do events like this, we are delighted at people who take a short walk or bus and come visit us. They can't come by car, of course, because parking is always at a premium, but we do welcome you here.

My only role is to talk while the tech guys get things set up, but I do want to welcome everyone here. As I say, as a recovering civil procedure teacher, I'm quite interested in finding out what is going to be said.

I do want to extend a very special thanks to Judge O'Malley and Eric Kennedy, to Sidney Backstrom appearing in person in case Mr. Scruggs says something wrong or doesn't come in on the screen, Judge McMonagle, and my colleague and former student, Susan Becker. All the good things she does, she did on her own. The bad things are things she learned in civil procedure from me. And she's done a great job. Of course, I want to thank you, Arthur Landever, for putting this together.

Have a good conference.

MS. BECKER: It is indeed an honor to be here today with Judge O'Malley and this esteemed panel of attorneys to discuss class actions.

As you know our primary focus today is on the Sulzer knee and hip replacement class action. My remarks are intended to place this fascinating and innovative case in the larger context of the many issues that we all face as participants in our modern civil justice system.

I am going to do this by briefly refreshing your recollection as to the procedural requirements for modern class actions, describing the ongoing controversy surrounding use of these procedures, and touching on reform efforts currently underway. I will then provide a short introduction to the Sulzer litigation and introduce each panelist.

1. Class Action Requirements

Modern class action involve a few plaintiffs – known as the "representative parties" stepping forward and filing suit on behalf of others who are similarly situated – that is, other persons who have allegedly be harmed through the action of a particular defendant or defendants.

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In federal courts, and many state courts as well, the prerequisites for pursing a case as a class action are spelled out in Rule 23.[1] This rule is intended to be transsubstantive, meaning that it applies regardless of whether the plaintiffs' claims are based in tort, contract, civil rights, or other theory of recovery.

Rule 23(a) lists four requirements, all of which must be met, with the burden on the parties seeking class certification. These are:

- numerosity – the class is so large that individual joinder of all members is not practicable;
- common questions – existence of questions of law OR fact common to everyone in the class;
- typicality – a showing that the claims or defenses of a representative parties are typical of the class; and
- adequacy – a showing that the representative parties will adequately represent the class interests.

In addition to satisfying all of those elements, the proposed class action has to meet at least one of the three criteria, or types, of class actions spelled out in 23(b) – the most common being a 23(b)(3) class action. It provides that a "class action is appropriate if the court finds there are questions of law or fact common to the class that predominate over individual member's unique situations, and that a class action is a superior means to achieve a fair and efficient adjudication of the controversy."

Rule 23 also allows a judge to certify subclasses based on specific issues of law or fact, and Judge O'Malley did exactly that in the Sulzer case. Judge O'Malley's Memorandum and Order in the Sulzer case that explains how this case meets all the Rule 23(a) and 23(b)(3) criteria is included in the CLE packet handed out today.[2]

Rule 23 has a number of additional requirements that place specific responsibilities on the judge, the parties, and their respective counsel to make sure that the decision on class certification is made expediently and that proper notice is provided to class members who will later be bound by the decision. And, of course, one of the most important requirements is class actions cannot, according to the rules, be dismissed or compromised without the court's approval.

2. Controversy Surrounding Class Actions

The intent of the class action device is to provide fair and efficient remedies to large number of persons harmed though the wrongful act of a defendant. Class actions increasingly have come under fire for not meeting these intended objectives.

Critics argue that the process has become increasingly complex and burdensome for would-be class members. Some also claim that class actions have evolved into a procedure that optimizes revenues for plaintiffs' and defense lawyers, limits liability and accountability of defendants, and entices judges to certify questionable class actions as a means of managing otherwise unwieldy dockets.

In short, critics contend, modern class actions all too frequently benefit everyone in the litigation process except the class members whom class actions were designed to protect. They frequently support their criticism by citing class actions that result

[1] FED. R. CIV. P. 23.

[2] *See* Appendix 4.

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in a "fistful of coupons" for class members and substantial cash awards to the attorneys.

Defenders of modern class actions counter that this device has been used fairly and efficiently in a wide variety of cases, and has proven especially helpful to people who would otherwise lack the resources to pursue individual lawsuits. Proponents claim that class actions help level the playing field in the classic David and Goliath battles common to modern litigation.

In addition to benefiting individual claimants, proponents argue, class actions serve the common good by alerting putative class members and the public to injustices and injuries of which they might not have been aware and by developing creative, comprehensive settlements that preserve continued economic viability of defendants.

These ongoing debates over class actions have filled volumes of legal periodicals and resulted in significant reform activities at the state and federal levels. And keep in mind that proposals to change class action practices are part of much larger efforts to reform many aspects of our civil justice system – not just as to procedure but in terms of tort law reforms as well.

As to class actions specifically, Federal Rule Civil Procedure 23 and its state counterparts have been intensely scrutinized over the past decade, but until recently, changes in the actual text of these rules governing class actions have been relatively minimal. Congress has enacted extensive legislation in 1995 and 1997 reforming class actions based on claims of federal securities law violations, but to date, has resisted additional efforts to "federalize" class actions in other controversial areas such as mass tort and products liability. It now appears that extensive changes to class action procedures are just around the corner.

3. Proposed Reforms

In March of this year the U.S. Supreme Court approved substantial changes to Rule 23 and, pursuant to standard federal rule making procedures, forwarded them on to Congress. These changes are explained in detail in the CLE program materials and I won't belabor them here. But it is clear from even a cursory reading that these amendments are intended to address the recurring criticisms of class action practice by requiring heightened judicial scrutiny of proposed class actions and additional safeguards for ensuring the fairness of the settlement to all class members.

The changes have been forwarded to Congress for its approval. The way the process works is that if Congress does NOT take action on such recommendations, and they changes become law on December 1 of this year.

However, Congress has the power to reject or modify the provisions. And that is a possibility in this case. Legislation is pending in both the House and the Senate that would substantially change class action practice.

The Class Action Fairness Act of 2003 (H.R. 1115) for example would greatly extend federal court jurisdiction over class actions that previously could only have been litigated in state courts.[3] The legislation would also require requirement "plain English" notices to class members and increased scrutiny by courts regarding settlements, especially those involving "coupons" or other non-cash awards to class members.

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[3]H.R. 1115 108th Cong. (2003).

So it is unclear at this juncture what type of class action reforms will emerge from Congress – or what its actual impact will be on class action practice.

4. The Sulzer Litigation

Even if these proposed reforms come to fruition, debate over class actions will no doubt continue for many years. Obviously we cannot resolve all these issues in the context of this two-hour symposium. Today we reflect upon some of these recurring issues – not just related to class actions but also in the area of mass tort claims–in the context of the somewhat unique approach taken in the Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation, which as you know, culminated in a $1 billion dollar settlement last spring in the U.S. District Court for the N.D. Ohio.

I emphasize here that we are focusing upon the Sulzer case NOT because it demonstrates the need for reforms; rather, it appears to us unique and creative approach to resolving a mass tort class action.

Defendants are Sulzer AG, a Switzerland based precision manufacturing conglomerate; Sulzer Medica AG, and Sulzer's U.S. subsidiary, Sulzer Orthopedics Inc., based in Austin, Texas. Plaintiffs are individuals who received either an artificial hip or knee joint manufactured by Sulzer. Patients who received these implants experienced serious difficulties with them, necessitating some to have replacement surgery. By August 2001, for example, more than 2,400 people had undergone operations to replace the defective hip or knee implants and it appeared that perhaps as many as 4,000 total replacements surgeries would ultimately be performed.

Also in August 2001, a $15 million judgment was entered against Sulzer on behalf of three Corpus Christi women who prevailed in a Texas state court. Sulzer aggressively sought class action treatment of the claims stemming from its defective joints. In a novel move, Sulzer agreed to open its books to an independent review firm to determine how much the firm could pay without going bankrupt. The number was $1 billion.

As negotiated by the parties and approved by the court, the final settlement provides compensation for each member of the class based on a variety of factors, such as whether the member has undergone – or is likely to undergo – a revision to replace the defective part. The details of the settlement are included in the "Class Member and Attorney Guide" included at the end of your CLE program materials.[4] I will end my remarks here for fear of stealing the thunder of any of our panelists.

5. Introduction of Panelists

Each of our panelists possesses an outstanding resume. In the interest of time, I am only going to introduce them briefly in the order in which they will speak.

R. Eric Kennedy served as lead plaintiffs' counsel in the Sulzer case. Mr. Kennedy is the managing partner of Weisman, Goldberg & Weisman, L.P.A. and his areas of expertise include medical malpractice, product liability, and class actions. He sat on the National Settlement Committee of the Breast Implant litigation and served as class counsel in the $4.8 billion diet drug settlement.

[4]*See* Appendix 3.

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