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## Heard, Robins, Cloud & Lubel, LLP

### First Hip Implant Verdict: \$15.5 Million

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Future of Mass Tort Unclear After Manufacturer Wins Preliminary Approval of Class Action Settlement  
It's a race too close to call.

In a mass tort that affects thousands of potential plaintiffs, the two sides in Sulzer hip implant litigation have jockeyed back and forth in recent weeks, each scoring major victories.

On Aug. 28, in Corpus Christi, Texas, plaintiffs' attorneys Denman Heard and Mikal Watts began dosing arguments in the nation's first hip implant case. Meanwhile attorneys for the corporate defendant were negotiating a precedent-setting class action settlement in federal court in Cleveland that would effectively bar individual lawsuits like the ones Heard and Watts were litigating by reserving all the assets of the defendant for those in the class.

The two parallel tracks had been closely watched by attorneys involved in the emerging mass tort. But given that Sulzer "won" in Cleveland and Heard "won" in Corpus Chnsti, the future of hip implant litigation is unclear.

On Aug. 30, the six-member Texas jury unanimously awarded \$15.5 million to three elderly women whose hip implants were contaminated by a machine lubricant, forcing all of them to undergo repeat surgery.

But the day before the verdict, a federal judge in Cleveland granted Sulzer Medica approval for a preliminary settlement of \$780 million in a class action covering more than a thousand potential lawsuits involving the faulty implants.

"What the Corpus Christi verdict means, nobody yet knows," says Heard. "It an depends on what happens in Cleveland."

"The verdict means nothing," says Darrell Barger, defense attorney for Sulzer. "Not that it was a meaningless trial, either for the company or the ladies [affected], but at the end of the day, it will be up to a federal appellate court."

If the Cleveland settlement wins final approval within the next six to eight months, it could bar lawsuits by individuals - both those already in the pipeline and future ones as well - since all the company's assets are pledged to members of the class. Even if members opt out, pursue and win their claims in state court, collection may not be possible for years, if ever.

However, some plaintiffs' attorneys are going ahead with plans to sue in state court. They are advising their clients to opt out of the class, arguing that the terms of the settlement are unfair, the compensation inadequate and that liability can possibly be expanded to include Sulzer AG, majority owner of the defendant, Sulzer Medica.

They are also outraged that one of their own-plaintiffs' attorney Richard Scruggs, who led the charge against asbestos and Big Tobacco - engineered the settlement. He stands to gain a \$20 million "success fee" if Judge Kathleen O'Malley gives final approval to the preliminary settlement, on top of a "low seven-figure" fee for legal services. Scruggs defends his involvement.

"This isn't the tobacco industry or the asbestos companies," he says. "This a medical device company, with a limited pool of assets. We are determined to spread it equally - the first hogs at the trough are not going to get it all. I think the trial lawyers who think that they have a right to a disproportionate share of a limited asset company are not doing the system a service. I think they're hurting plaintiffs generally."

Regardless of Judge O'Malley's final decision, plaintiffs' attorneys are proceeding with cases scheduled to be heard in Texas and California this month and next. And for those cases, Heard says the Corpus Christi verdict "sets the standard that Sulzer was wrong, that it had actual knowledge that the device was faulty, and that the company hid that knowledge from doctors around the country and from the public in

general."

The plaintiffs' case hung on critical documents from the medical professionals involved in the design of the hip implant as well as internal memos at Sulzer demonstrating that the company had knowledge of problems with the device months before it issued a recall or even began to investigate.

"What the jury wondered in our case was why didn't the company tell anybody?" says Heard. "Instead of telling people, they set about to prevent doctors and the FDA from finding out about the problem." Sulzer's stratagem apparently worked: Lillian Sallinger, one of Heard's clients had the hip implant surgery just one day before the company issued the recall on Dec. 5, 2000. By then, the company had received more than 100 reports of the problem from around the country and knew of more than 60 revision surgeries, according to Heard, but "doctors were the last to know."

#### Sulzer Suppresses Safety Information

Sulzer Orthopedics- the world's fourth largest manufacturer of artificial joints-began manufacturing the implant known as the Inter-Op acetabular shell in 1997. Unlike other implants that are secured to the bone with cement, the Sulzer shell bonds directly with the bone.

But residues of an industrial lubricant that remained on the shells caused them to loosen. More than 2,300 patients who underwent the initial hip replacement surgery suffered intense pain and immobility and eventually required corrective surgery. At the time of the recall, the company had made 39,000 of the devices and 26,000 had been implanted.

Most of the claims filed against Sulzer are in state courts in Texas, California, New York and Florida; Heard's case has been closely watched as a harbinger of how the mass tort might fare.

Sulzer readily admitted the manufacturing defect of the Inter-Op shell. But the key for the plaintiffs' side was to establish that Sulzer "knowingly caused injury to elderly persons," a segment of the Texas Penal Code which, if violated, would preempt the cap on punitive damages. That was fairly easy to do, according to Heard.

"Our strategy was simply to show that the company was aware that this product was not working right, yet they continued to just gin out these things like there was no tomorrow," he says. "October 2000 was their banner month, with top sales in the company's history of these products. That was the same month they sold the shell that was implanted in (my client) Ms. Bonorden."

It was also three months after the company had been informed by a member of its own design team that problems were surfacing with the device.

In July 2000, Dr. Lawrence Don; one of the doctors who helped design the Inter-Op shell, alerted Sulzer that there were problems and that he was concerned about four patients who might need corrective surgery. A steady stream of reports poured in from doctors over the next few months-doctors who had previously implanted the artificial hip joints with great success and were stunned by the suddenly high failure rate. But the company did not launch its own investigation until September, according to Heard.

Prior to 1999, Sulzer had outsourced the cleaning and assembly of the devices to another company, Cycam. Sulzer then decided to bring the process in-house to save money, a point Heard's team highlighted to buttress their theme that Sulzer was more concerned about the bottom line and beating the competition than about public safety.

We were trying to establish that in this type of industry, the number one reason why decisions are made should be patient safety, not profit," says Heard. "Cycam did this process for years and not one shell came loose. When [Sulzer Orthopedics] brought it in-house, they had a shoddy manufacturing process that left oil all over the place -that was the source of the problem. There were no reports until Sulzer started doing the process in-house."

Internal company documents produced during discovery indicated that as the critical reports started

coming in, Sulzer's primary concern was "how to prevent other doctors from finding out and how to prevent the public from obtaining this knowledge," says Heard. And that, he says, rankled the jury.

#### Hurdles

Still, Texas jurors are often reluctant to punish companies, Heard says. While he had clearly established malice on Sulzer's part, the biggest hurdle was to convey the extent of mental anguish and suffering of the plaintiffs.

Sulzer's own video of the corrective surgery - sent to doctors after the recall - provided just the graphic evidence Heard needed.

"When the local treating physician was on the stand, we used the video to show that this is a tremendously invasive surgery. The doctor has to chisel around the shell, pop it out, increase the size of the socket with a reamer and put a new shell in. It's a horrendous operation," says Heard. Heard also used the video to argue that nobody should have to go through that kind of operation twice.

"It gave the jury some perspective about the fear and anxiety of having to re-do the operation and also the long difficult physical recovery," he says.

In closing arguments, Heard emphasized that each day free from pain and worry is important to anyone, but especially to the elderly with so little time left to live.

He used the comparison of two people crossing a desert, one of them carrying a huge jug of water, the other just a small cup.

If a stranger comes by and steals a sip of water from both people, who suffers more? Heard asked the jurors.

The jurors awarded \$11 million in punitive damages. Heard had asked for \$30 million.

"My personal feeling is that punitives weren't higher because I had to stick with Sulzer Orthopedic [as the defendant]," says Heard.

Sulzer Orthopedic, the Austin, Texas based US subsidiary of Sulzer Medica, had put into evidence a net worth of \$32 million and Heard believes that jurors were reluctant to award punitives that would wipe the local subsidiary out. Plaintiffs' attorneys working on other cases are investigating to what extent Sulzer AG, majority owner of Sulzer Medica, had knowledge of the defect in the hip implant and when it became involved in the decision to investigate and, eventually, recall the product.

#### Verdict Hangs in the Balance

Co-counsel on the case, Graham Hill, expresses disgust at the shield thrown over Sulzer in the preliminary settlement approved in Cleveland.

"If Dickie Scruggs and his cohorts have their way, (the settlement) will provide a disincentive for plaintiffs to remain in the state court system, where the bulk of claims have been filed," says Hill. "What Scruggs is trying to do is tie up all the corporate assets of Sulzer Medica and Sulzer Orthopedics for the benefit of the people in the federal court system."

The settlement awards members of the class compensation in two-thirds cash and one-third stock in Sulzer Medica for an operation that is known to be highly invasive and require months of rehabilitation and recovery. A patient who required one corrective surgery will receive cash and equity for a total value of \$57,000, plus reimbursements for medical and legal costs. Those who had multiple surgeries will receive \$97,500, on top of costs. A \$30 million extraordinary injury fund will compensate patients in special cases and a \$20 million monitoring fund will pay for tracking of patients for five years.

Scruggs has conceded that individual claimants could win half a million dollars per judgment, but argues that the settlement is fair.

"This is a medical device company. They made a mistake, they admitted it, and they want to pay the patients as much as they possibly can," he says. "We have a plan to do that. Putting the company out of business with 20 or 30 judgments like the one in Corpus Christi does nobody any good except for those 20 or 30 people. It's not good for society or for the practice of law generally," he says.

But plaintiffs' attorneys predict a battle if the preliminary settlement is approved. Andres Pereira, who currently has 25 cases filed in Texas, filed an appeal of the preliminary settlement a day after its announcement.

"The settlement is fundamentally flawed and unfair, because the opt-out rights are illusory," he says. Graham Hill agrees.

"What Sulzer is doing is basically putting a gun to people's heads, saying sure, you can opt out, but if you do so, you're going to opt out into an arena where there's no money," he says. "This has never been done before. There will be hundreds, if not thousands, who are going to oppose this. I'm not throwing in the towel. We're going to fight them tooth and nail."