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# Novel Approach to Mass Tort Class Actions: The Billion Dollar Settlement in the Sulzer Artificial Hip and Knee Litigation: A Symposium

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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.

In federal courts, and many state courts as well, the prerequisites for pursuing a case as a class action are spelled out in Rule 23.<sup>1</sup> 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.<sup>2</sup>

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

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<sup>1</sup>FED. R. CIV. P. 23.

<sup>2</sup>See Appendix 4.

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.<sup>3</sup> 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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<sup>3</sup>H.R. 1115 108<sup>th</sup> 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.<sup>4</sup> 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.

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<sup>4</sup>See Appendix 3.

**The Honorable Kathleen McDonald O'Malley** of the U.S. District Court for the Northern District of Ohio presided over the Sulzer class action litigation and settlement. Upon completing a judicial clerkship with Honorable Nathaniel R. Jones of the Sixth Circuit Court of Appeals, she entered private practice, where she focused on complex corporate and commercial litigation. She subsequently worked for the Ohio Attorney General, providing oversight of the office's 350 attorneys and acting as Counsel of Record in the state's more sensitive and complex legal battles. President William J. Clinton appointed Judge O'Malley to the federal bench in 1994.

**Sidney A. Backstrom** of The Scruggs Law Firm in Pascagoula, Mississippi played a key role in the Scruggs Firm's representation of Defendant Sulzer. Mr. Backstrom's legal career has focused primarily in plaintiffs work, and he has served as member of the Mississippi Trial Lawyers' Association Board of Governors and is currently the section head of the same organizations' Premise Liability Practice Group. Mr. Backstrom has served with Mr. Scruggs as lead plaintiffs' counsel in a number of class action cases.

**Richard F. Scruggs**, who is sharing his insights with us via videotape today, served as lead defense counsel for Sulzer. This was a somewhat unusual role for Mr. Scruggs, as he—along with Mr. Backstrom—frequently works as counsel for plaintiffs. Since 1994, for example, Mr. Scruggs' firm has been lead private counsel to the Attorney General of Mississippi in that State's litigation seeking reimbursement from the tobacco industry for public health costs associated with smoking. He also played an integral role as part of the litigation teams in similar cases pursued by New York, Michigan, Oklahoma, Oregon, Ohio and numerous other states. Much of this litigation resolved favorably for the plaintiff states as reflected in the Master Settlement Agreement of 1998.

**James J. McMonagle** is serving as the Claims Administrator overseeing distribution of the Sulzer class action settlement funds. Mr. McMonagle is currently of counsel with Vorys, Sater, Seymour and Pease, L.L.P., practicing corporate law. He also serves as a trustee for the Eagle-Picher Industries Inc. Personal Injury Settlement Trust and had served as a trustee and vice chairman for the UNR Asbestos Disease Claim Trust. Mr. McMonagle was elected to the Cuyahoga Common Pleas Bench for three consecutive terms (1976, 1982, and 1988) and presided by designation in a number of other Ohio common pleas and appeals courts.

Our first speaker today is Eric Kennedy.

**MR. KENNEDY:** Thank you very much. Free CLEs, I suppose, and requiring some civil procedure class tends to do a great thing to bring out the crowd. It's a little bit like the trial lawyer who halfway through closing arguments begins to believe that the jury is actually interested in what he has to say, forgetting that at the door there are Federal Marshals making sure the jury doesn't leave. I'm going to start out and kind of go through the Sulzer story and then involve Judge O'Malley and Sid Backstrom. And I'm going to be followed by Jim McMonagle, who is going to talk about the claims administration process.

I suppose, starting at the beginning you start with Sulzer, the corporation. Sulzer was and is Sulzer Orthopedics, a Texas-based manufacturing company. Their parent is Sulzer Medica, which is a Swiss company which is publicly traded on the New York Stock Exchange. And the grandparent is Sulzer AG.

Sulzer Orthopedics manufactures orthopedic devices. One of the products they manufactured was a total hip replacement system utilized in hip replacement surgery.

Hip replacement surgery involves the femur, that being the bone that runs from the knee to the hip. In hip replacement surgery, the top half of the femur is cut off and is replaced by a rod with a steel ball on the end of it. That steel ball then fits into the hip socket, or acetabula.

The problem is, if you put that steel ball into the hip socket and let it move around with the hip, it will ultimately wear away the bone on the inside of the hip socket. So what manufacturers created, all manufacturers, was a shell.

They created a steel shell that fits inside of the acetabular socket. And then that steel ball fits inside the shell and then can move around without destroying the bone inside of the acetabula.

Now, many manufactures created a shell whereby the shell is screwed into the hip socket. Some created a shell whereby it's cemented into the socket.

Sulzer created their shell, as you can see, with a porous coating on the exterior of the shell. It's a mesh, roughened surface. The purpose of that roughened surface was so that bone would grow into the surface and, therefore, hold the shell tightly into the acetabular hip socket.

If the bone doesn't grow into the exterior of the shell, then the shell remains loose, the patient remains in pain, and they ultimately will need a hip revision surgery to take the shell out and put a new device in.

In the fall of the year 2000, Sulzer began to get calls from orthopedic surgeons around the country reporting to them that the bone wasn't growing into the shell, the patients were staying in pain, and that they were having to do hip replacement surgeries.

Well, these calls continued to come in at an increasing rate throughout the fall of 2000, until we got to December 8th, 2000, when Sulzer issued a recall of all of their total hip shells in the country. In fact, worldwide. The problem was that by December 8 of 2000, orthopedic surgeons had already implanted 26,000 shells into patients in the United States.

At this point we see the entrance of the Plaintiffs' Mass Tort Bar. The Plaintiffs' Mass Tort Bar, interestingly enough, is made up of no more than 15 to 20 lawyers throughout the U.S. And they basically have been involved in every mass tort dating back to Agent Orange, Bendectin, leading into breast implant, Teletronics,<sup>5</sup> Propulsid, Rezulin, tobacco, asbestos.

It's a group of 15 to 20 lawyers that have worked together in these cases, have worked against each other in these cases. Lawyers that like each other, lawyers that dislike each other. Good lawyers and not so good lawyers. But lawyers that are all well-funded.

Collectively, the Plaintiffs Mass Tort Bar can go toe-to-toe with any major corporation; for that matter, any major industry in the world. They are not going to be outspent in a mass tort.

So on December 8, 2000, with the cry of a recall, this sleeping bear, the Plaintiffs' Mass Tort Bar, was once again awakened. Not dissimilar, frankly, to the call of road trip by John Belushi in "Animal House."<sup>6</sup> It creates an instant frenzy of activity.

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<sup>5</sup>*In re* Teletronics Pacing Sys., Inc., 222 F.3d 870 (6<sup>th</sup> Cir. 2000).

<sup>6</sup>NATIONAL LAMPOON'S ANIMAL HOUSE (Universal Studios 1978).

Within sixty days there were a dozen law firms advertising these cases around the country. In that sixty days a New York-based law firm had launched a \$3 million advertising campaign. Websites sprung up every week. Sophisticated websites, with streaming video, photographs, copies of letters that had been sent to the orthopedic surgeons. A client or an individual recipient of an implant could sign up to become a law firm's client online. If you typed in "Sulzer" or "recall" or "defective implant, hip," you went to a legal website. Every major search engine sent you to a legal website.

Sulzer had their own website, but you couldn't get near it on the web. The patients were being educated by the law firms and not the orthopedic surgeons, and certainly not the company that had manufactured the product.

Within sixty days there were one hundred lawsuits filed. By the spring of 2001, less than five months later, there were one thousand lawsuits that had been filed in the country.

As the lawsuits were coming in on one line of Sulzer, on the other line the phone was ringing and it was the orthopedic surgeons again. And they were telling Sulzer they were now having the same problem with the Sulzer's prosthetic knee device.

By May 15, Sulzer issued a modified recall with respect to their prosthetic knee device, the tibial baseplate. So in May of 2001, there sat David Wise, the General Counsel for Sulzer, and he knew that he already had a thousand lawsuits filed against his company. He knew there was a thousand more hip lawsuits coming. He knew that the knee litigation had just begun.

He already knew that his liabilities exceeded his assets and insurance coverage. He knew, also, that given the *Amchem*<sup>7</sup> and *Ortiz*<sup>8</sup> Supreme Court decisions and the Sixth Circuit decision in *Telectronics*, he probably did not have available to him a 23(b)(1)(b) non-opt-out limited fund class action, where a court determines that a company's liabilities exceed their assets and the company can then formulate a class action whereby the recipients of the product have no choice, they must participate. They must participate.

He knew then that under these circumstances, historically, no company avoided bankruptcy. And the ironic part about it was that he was general counsel for a company that had, essentially, no debt. And despite these two recalls, their sales were still strong.

What David Wise, General Counsel, needed at that point was to understand the mentality and the thought process of the bear which he had woken up on two occasions in the last six months with the cry of recall. He needed a relationship with the Plaintiffs' Mass Tort Bar. He needed to begin to think "outside-the-box."

Enter Dick Scruggs. Dick Scruggs at that point in time and still is a Plaintiffs' lawyer from Pascagoula, Mississippi. A Plaintiffs' lawyer who led the charge on behalf of the Attorney Generals against the tobacco companies and achieved a \$265 billion resolution.

He was truly the "rock star" of the Plaintiffs' bar. And David Wise hired this plaintiffs' lawyer from Pascagoula, Mississippi to represent his company.

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<sup>7</sup>Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).

<sup>8</sup>Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).



Sid Backstrom is Mr. Scruggs' partner. And, Sid, can you tell us how that came about that you folks from Pascagoula, Mississippi came to represent corporate America.

**MR. BACKSTROM:** It was really fortuitous, obviously. We had a doctor friend named Joe Cunningham, who lived in Crawford, Texas. And he was taking some MBA coursework. In one of his classes was a marketing vice president at Sulzer Orthopedics, the subsidiary of Sulzer who had created this product.

They began talking about the situation the company was in. And Joe said, "Well, you might want to talk to some friends of mine that are in this business and that maybe they can help you out."

So Joe called me and asked if we would be interested in talking to these guys about their problem. And I said, "Well, let me go talk to Dick (Scruggs) and see if he's interested."

So I went into Dick's office and started explaining the problem to him, and he got this weird look in his eyes and said, "They don't want us to defend them, do they?" And I said, "No, it would be just to see about resolving the problem." And he said, "I don't know if I really want to do that." And so I walked off and he probably began to question why he ever hired me.

But nonetheless, I told my friend Joe, I said, "Why don't you tell him we're going to meet with him in a couple weeks." We had a trial in California. On the way back from California, I told Dick, "We're going to have to make a stop in Texas to see some people." Then I broke the news to him that I committed him to a meeting. He probably again questioned why he hired me.

And we had the meeting. And the one thing that struck us when we met with the General Counsel, David Wise, and the President of Orthopedics, was that they were worried more than anything about the patients that had been implanted with this product, and they wanted to do the right thing. And that struck Dick and he instantly wanted to help them.

So we began the process at that point about trying to figure out what we could do. And some months later, after going from Orthopedics to Medica to Medica in Switzerland, we were hired to save them from bankruptcy. That was our job, get them out of the litigation without them having to file bankruptcy.

**MR. KENNEDY:** Well, with that as Sid and Mr. Scruggs's sole mission to save the company, there was only one way to save the company. That was to settle the case with all 26,000 patients represented by hundreds of different lawyers.

If they settled the case with 95 percent of the people, that 5 percent would have the opportunity to opt-out, go get jury verdicts and bankrupt the company. And, again, remember, they couldn't put together a class action settlement that forced everyone into the settlement. They had to resolve this case with 26,000 people, probably more significantly, hundreds of different lawyers, on a voluntary basis.

The first question, I suppose, would have been who do we negotiate with? There are already a thousand state court cases filed and there are 300 federal cases filed. Well, the 300 federal cases that had been filed were consolidated into the Northern District of Ohio in front of Judge O'Malley in federal court here by the MDL Panel, a panel of seven judges, which sometimes sits in Washington, D.C., depending on the season.

Pursuant to federal statute § 1407, all 300 federal cases were consolidated here in front of Judge O'Malley.<sup>9</sup> They chose to negotiate with the leadership appointed by Judge O'Malley of the federal cases.

Their second problem, though, and second immediate issue was that of timing. The litigation was simply moving too fast. There were going to be enough jury verdicts to bankrupt the company before they ever had an opportunity to resolve the case and attempt to settle it and sell it to 26,000 people.

The litigation was moving so fast because the Plaintiffs' Bar, which has become very sophisticated in these cases, had done a financial analysis of Sulzer, had looked at their potential exposure. And the Plaintiffs' Bar knew that Sulzer was going bankrupt.

So the Plaintiffs' Bar was moving as fast as they could into courthouses to get jury verdicts, to get paid before the bankruptcy. And nobody moves into the courthouse and faster to a jury trial than the Texans. In Texas, when a mass tort arises, the Texas lawyers informally organize. They throw money into a pot to cover discovery. Then they file lawsuits all around Texas, decide which court, which judge will move the case the fastest, and they do their discovery in that court.

Now, the folks that move the second fastest in the country, oddly enough, are the Californians. You don't usually think of them moving fast, but in this context they move the second fastest. They have the ability to move rapidly in this context, because they have a state consolidating statute. Where we have a federal MDL consolidating statute 1407, they have the same type of state statute in California.<sup>10</sup> And judges in California will lobby to have the cases consolidated in front of them. It's prestigious.

So the case gets consolidated in front of a judge in California, they're not going to take it and put it on the back burner. They're going to put it in the front burner and push the case.

In addition to that, California has a preference statute. If you file a lawsuit in California and you can establish with the trial judge you have a limited life expectancy, you are guaranteed a trial within 180 days.

To compound this problem, the majority of the cases were in Texas and California, the two states that could move into the courthouse faster than anywhere else in the country.

So with no time to waste, Mr. Scruggs and Sid began to negotiate with the leadership in the federal case. Within thirty days or forty-five days, depending on where we actually started the negotiation, we had reached a relatively complex settlement that involved the payment of \$600 million over a seven-year period.

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<sup>9</sup>28 U.S.C. § 1407; *see also, In re Inter-op Hip Prosthesis Liability Litigation*, 204 F.R.D. 330, 336 (N.D. Ohio 2001). Pursuant to 28 U.S.C. § 1407, three different federal plaintiffs filed motions with the Federal Judicial Panel on Multi-District Litigation ("MDL Panel"), seeking to consolidate and centralize 30 of the federal lawsuits. MDL docket no. 1401. On June 19, 2001, the MDL Panel granted these motions, consolidating and transferring all related pending federal litigation to the Northern District of Ohio and assigning oversight of the MDL proceedings to the undersigned. Thus, virtually all of the federal cases involving the Inter-Op acetabular shell have either been transferred to this Court or are in the process of being transferred to this Court.

<sup>10</sup>CA. R. USDCTCD Civ. Rule 83-1.

But the question still remained: How are we going to get 26,000 people to voluntarily participate in this resolution? Well, the settlement agreement had, this original settlement agreement had a provision, a lien provision, which required Sulzer to put a lien on all of its assets, including its insurance proceeds. A lien in favor of everyone who chose to participate in the resolution.

This meant if you opted out of the settlement, went and got a jury verdict, you were going to have to wait seven years to get paid on your jury verdict, because you were going to have to wait until the last penny got paid to the last person who participated in the resolution.

Now, this was a very controversial provision. And under Rule 23, this resolution needed to receive preliminary approval, along with this lien provision, from the trial court. So Sulzer and the federal Plaintiffs' lawyer filed a motion in front of Judge O'Malley for preliminary approval of this settlement with its lien provision.

And, Judge, if you can tell us how that happened.

**HONORABLE O'MALLEY:** All right. The irony of this is all this stuff was going on in the background and, you know, I felt like one of those people that was the last to know. I would run into Eric Kennedy at the court meeting and he said, "Oh, I think this MDL is coming to you." I said, what are you talking about? He said, "You know, the hip case." I had no idea.

There had apparently been a case filed, there was immediately a judicial order of transfer. It was sitting in front of the MDL. I never looked at it. Federal judges don't. We wait until the MDL Panel makes their decision. I had no idea they were even considering sending it to the Northern District of Ohio.

I then the next day got a phone call from a friend of mine who was the Attorney General of Mississippi, who said, you know, and I would love to be able to imitate his accent, but I can't, but he said, there's some good old boys from Mississippi coming up to be in front of you. And I'm not here to lobby for one side or the other, because the good old boys are on both sides, but I just want you to know that treat them nicely and they're not bad guys.

And I hung up the phone and I said to my law clerk, I said, David, I think there's something going on that we don't know about. Next thing we know, we get an order saying that 300 cases had been transferred to us. And so we set the process in motion.

We set down an initial status conference. We issued an order based on the complex litigation, which we were kind of learning as we would go, to get the process rolling. And we scheduled a very first meeting.

Eric calls David and, before the very first meeting says, "Just wanted to give you a heads-up that instead of this being a case management conference, we're also going to ask you to give preliminary approval to a settlement and to conditionally certify a class in this case."

Now, I have not met a single lawyer, I haven't seen anyone, and they're telling me before they even get here, forget about scheduling depositions or interrogatories, we're going to settle this case.

Partially because I felt like things had been going on behind my back before this point, and partially because I didn't really know fully what I was doing, I decided to do all of this in a lot more than the open-end preliminary approval that normally occurs.

Normally the preliminary approval for a settlement or preliminary or conditional class certification, it's one of those things where four or five lawyers come into the

judge's chambers and say, "Judge, this is a really good deal." And the judge says, "Well, it may or may not be, but I'll give you the preliminary nod that you need and we'll have a full fairness hearing later and figure it out."

In this case, the lawyer showed up thinking that that might happen, but it didn't. I, instead, had an open court hearing with respect to the issue, where the lawyers had to air the provisions of what they were proposing. And, in fact, allowed a sort of mini-objection process right up front.

So within the first two weeks of having the case really before us, we had two different hearings where hundreds of lawyers attended these hearings.

We were in the Old Courthouse and the doors were open and people were spread out into the hallway. Two different hearings where we also received daily fax-after-fax from various parties objecting to some of what was being proposed.

Ultimately, despite the objections, we issued a preliminary approval and conditional certification, but again, instead of it being, you know, behind closed doors, we issued a fifty-plus-page opinion setting forth at least our explanation as to why we were, at this stage, rejecting the objections.

The biggest objection was to the lien provision. The irony of it is that there were many Plaintiffs' lawyers in state court who didn't like the lien provision because they basically said it discouraged people from opting out. They used all kinds of words like saying, the opt-out provision became illusory, they threw around due process. I always love that. Lawyers love to throw due process around when they're not sure what else to argue. They kept saying, "You can't do this, because then we're basically making it less palatable to opt-out."

Well, as I pointed out in my order, isn't that the point of a class action settlement? It is supposed to be good. It is supposed to be something you want to participate in. And that just because the opt-out wasn't better than participating in class settlement didn't mean it was completely illusory.

So I spent a fair amount of time categorically rejecting the notion that the liens on their face rendered the proposed settlement inadequate, but left open a lot of room for the expression of concern about the settlement, generally, and about the fact, I at least thought, and I think I flagged this pretty well to Counsel on both sides, that the settlement wasn't quite sweet enough in terms of the amount of money that was going to the class and the benefits that were flowing to the class.

**MR. KENNEDY:** Judge, let me just ask you, even at that stage of the proceedings, and we are in a law school with law school professors that are present, Arthur Miller, I think, law professor formerly from Harvard presented on behalf of the proponents of the resolution. And throughout the proceedings, over the next several months, Professor Issacharoff from Columbia wrote various briefs.

From the bench, what is your thought about lawyers standing aside in certain circumstances and bringing in law professors to argue as relates to certain points of law?

**HONORABLE O'MALLEY:** I have to tell you that dialogue that I had with Arthur Miller was one of the most fun times I have had as a lawyer or a judge.

Arthur Miller comes in and he wants to argue—the issue that he wanted to argue was whether or not the liens really did render the opt-out illusory, whether there was a due process issue, and he also was going to talk about the All Writs Act.<sup>11</sup>

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<sup>11</sup>28 U.S.C. § 1651 (2003).

He came to speak, and I had a very long dialogue with him from the bench where we went back and forth on a series of questions. One of my other law clerks, that was his first day, his very first day, and this is what he hears.

He hears Eric Kennedy versus Dick Scruggs and all these prominent state court lawyers, but then this dialog with Arthur Miller. And at the end of the day he says, "Is this what it's always like?" I said, "Oh, yeah, sure." Two years later he's still wishing we could go back to that very first day.

But I have to say that I think that any one of you all are capable of making the same argument. And I'm not—if your question was, was I very impressed with the fact that it was Arthur Miller, did that change my view of the substance? I think probably not. I think you're sort of underselling the ability of any one of you to make the very same arguments and to make the same impression on a federal judge.

So having said that I enjoyed it, I'm not sure it was really a necessary thing. I wasn't offended by it, if that is part of your question.

**MR. KENNEDY:** Part of my question. I'll continue on with the story.

Judge O'Malley granted preliminary approval. What we had hoped was this lien provision would force voluntary participation. That concept of a voluntary participation became rather interesting. Like my parents used to have voluntary participation; you don't have to clean your room, but if you don't, you'll be grounded for the rest of your life.

It had the opposite effect. It made the state court lawyers, number one, they got angry. Number two, they immediately appealed under 23(f) to the Sixth Circuit Judge O'Malley's preliminary approval of the resolution.<sup>12</sup>

And finally, the state court lawyers embarked upon a campaign of vindictive discovery. They noticed depositions of Sulzer employees from Maine to New Mexico. They managed for the next ninety days to get forty-one cases scheduled for trial. Understand, we were eight months post recall and they've got forty-one cases scheduled for trial.

This had two effects. Number one, Sulzer couldn't carry on business as an orthopedic device manufacturer. I mean their CEO was in one courtroom, he was in another courtroom the next day, deposition in another state. They had manufacturers across the country. They couldn't carry on business.

The second problem this created was that Judge O'Malley had approved a preliminary settlement. We needed to take this preliminary settlement and take it from that point to a final settlement. And three major issues had been left open.

Number one, we hadn't done discovery yet with respect to Sulzer AG, the grandparent, so we didn't understand their liability picture and whether or not they should be contributing money to the resolution.

Number two, there was an issue with respect to a \$165 million policy and its application to this resolution. And third, we needed to do more discovery so we could gain a better understanding of the Sulzer Company's true ability to finance this resolution.

We simply couldn't do that discovery to take this case from preliminary settlement to a final settlement. Couldn't be done.

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<sup>12</sup>FED. R. CIV. P. 23(f).

Enter at that point now the All Writs Act.<sup>13</sup> A motion to stay all state court litigation was filed by Sulzer asking Judge O'Malley from the federal system to stop 1,500 state court proceedings.

Judge?

**HONORABLE O'MALLEY:** This is the one that I keep getting grief over—originally there was a request to stay all the state court litigation. And it was before the preliminary approval on conditional certification, they asked me to do it all at once.

I pretty much had signaled to the lawyers that it probably was not a wise decision, and that it was probably premature. There also had not been any state court verdicts. So as much as they could cry and scream that the sky was going to fall if we let any of these state court cases go to trial and that the companies were going to be put out of business, I didn't have anything other than their estimate that—you know, other than their claim that Texans always give big verdicts, so therefore, we're going to have this terrible series of verdicts out there.

So they smartly withdrew that request, which took a lot of the wind out of some of the state court lawyers' sails during the preliminary approval process, and then came back later.

They came back after the preliminary approval had already been issued by me and I had made all the determinations I needed to make under Rule 23, after I put in place an aggressive case management order that required amazing amounts of discovery all over the world, at the same time.

After they had obtained the agreement of Sulzer AG, the Swiss parent, to voluntarily participate in discovery, despite the fact that they had huge defenses to jurisdiction and really didn't arguably even need to participate in discovery, because none of us really appeared to have jurisdiction over them, one of the Texas cases went to trial.

So they walked into a Texas court and they basically let the chips fall where they may. They admitted liability and lost a \$15 million verdict. And then they came to me and said, "That's one case, Judge. There are forty-one set for trial between September and December." Forty-one cases to be tried by December.

And they said, "We can't do what you want us to do. And your preliminary approval and conditional certification are meaningless, unless you issue this order."

The All Writs Act, this is a classic, you know, civil procedure issue, but the All Writs Act and the Anti-Injunction Act play together.<sup>14</sup> The Anti-Injunction Act says federal courts may not enjoin state court litigation, except, and there are three exceptions, only one of which really applies.

But the one that applied here was in aid of the court's jurisdiction for its own judgments. And then the All Writs Act gives the court affirmative authority to issue a writ and issue an injunction if you fall within the exceptions to the Anti-Injunction Act.<sup>15</sup> So the two parallel, they work together. There have been a lot of cases that have discouraged the overuse of the All Writs Act by Federal Courts.

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<sup>13</sup>28 U.S.C. § 1651 (2003).

<sup>14</sup>*Id.*; 28 U.S.C. § 2283 (2003).

<sup>15</sup>*Id.*

In this case, I found that in the context of the preliminarily approved settlement, facing the forty-one trials that would have destroyed any possibility of even assessing the settlement, as well as the fact they were only talking about a matter of months.

Again, it's important, as Eric says, we're only eight months past recall. And my theory is there's virtually no harm to these Plaintiffs' lawyers if they have to sit back, or to the Plaintiffs, for a matter of months before the final fairness hearing, especially when they were being handed discovery done very aggressively by very competent lawyers, including discovery that they never would have obtained in that time frame.

So in those circumstances, I did issue a writ enjoining all the state court litigation. And, of course, was immediately appealed. The writ was immediately appealed. And this, again, is a civil procedure teacher's dream, but what happened is the writ was appealed. And at the same time, remember, the conditional approval is also appealed at the same time. So both of them are up there.

The Defendants make a huge tactical mistake. They moved to dismiss the appeal. They moved to dismiss the appeal on grounds that the writ is not really an injunction; therefore, it's not immediately appealable.

So they tried to argue on purely procedural grounds that it was not appealable. Because they thought they had this purely procedural argument, the Defendants chose not to join issue on the merits at all. The Defendants refused to talk about the settlement and how wonderful it was. They refused to talk about the basis for the writ.

So the Court of Appeals was faced on a motion day, so you had three judges who get the pleadings in the morning and decide that afternoon whether to dismiss the appeal. And they have before them this amazing brief that's this thick from the state court lawyers saying that I had issued preliminary approval for a settlement that was completely violative of every decision ever issued in the Sixth Circuit, especially *Telectronics*, and everything I had done was horrible.

Then we have this little brief from the Defendants saying, this writ is really not an injunction. They drew the *Telectronics* judge. The *Telectronics* judge says, "Well, since they're not disputing this, everything the state lawyers are saying is correct."

So they vacated the writ and then said, "Besides, we don't think we're going to like this settlement. There's been no briefing on either issue. They've never read any of my opinions." And they said, "We don't think we're going to like this."

Well, the Defendants then got smart, as I understand it, having realized what they did, they filed a motion for reconsideration, this time asking the Court of Appeals to at least read the two opinions I had issued, and to at least read their version of what happened.

And the Sixth Circuit, almost as quickly as it vacated the writ, reinstated the writ and set the matter down for briefing, combining the issue on the writ and the preliminary certification at the same time.

So having had a real scare there for a few days, the Plaintiffs and Defendants lawyers in the federal case were at least relieved a little to have the Sixth Circuit reverse itself, and as was I, after all the work that we had done.

**MR. BACKSTROM:** We weren't in charge of briefing on this case.

**MR. KENNEDY:** To step back a minute, when Judge O'Malley issued the stay, stopping the 1,500 state cases, that meant no more document production, no more interrogatories, no more depositions, no more pretrials, no more trials in 1,500 cases.

Tom Schultz and Luke Lesellis, California lawyers, were in the process of empanelling a jury in a Sulzer hip case when the Sulzer lawyer raised his hand and walked up to the bench and put on the judge's bench Judge O'Malley's order that had been signed moments before staying every state court case in the country, and the judge dismissed the jury.

So what went from a angry group of state court lawyers, now became a riotous mob. The e-mails, the letters, the name calling were very interesting.

But at that point in time we were probably at our greatest odds between the state court lawyers and the federal lawyers. Judge O'Malley did something that, in retrospect, and I'll talk about it later, in retrospect, was probably one of the critical turning points of the case.

In October what Judge O'Malley did was create a state court discovery committee to act in conjunction with the Plaintiffs lawyers in the federal case; to do discovery together and to take this from a preliminary settlement to a final settlement.

Judge, your thoughts on the creation of that state court discovery committee?

**HONORABLE O'MALLEY:** As I said, I felt one of the things that justified the extraordinary remedy of the writ was the fact that we were allowing this discovery to be shared with anyone. So any discovery in the federal MDL, I ruled, would be completely open and available for all the state court claimants.

And my hope was that, they would have less argument that they were prejudiced by the stay, knowing full well that the Sixth Circuit has already looked a little askance at the writ and that there needed to be a basis for some of what I was saying.

I thought that if I also invited the state court lawyers to help decide what discovery would be done, they would then have less argument with respect to their ability to say that they were prejudiced by the stay, because really they weren't being stayed. They were participating.

The other reason, frankly, and it's sort of a classic, you know, that notion that if someone invests in you, they become invested in you forever. My thought was if the state court lawyers became involved and started dictating the manner in which this MDL was proceeding, or at least participated in dictating and worked with the lawyers here, that they would become co-opted. I don't mean co-opted in a bad way. I mean co-opted in beginning to understand what these lawyers, both the Plaintiff lawyers and Defense lawyers, or the settlement lawyers, Mr. Scruggs and Mr. Backstrom, were attempting to accomplish.

And would see that the course they were on would likely put the company in bankruptcy and likely render many of these claimants penniless in terms of their ability to recover anything.

And there was a dance a little bit between the state court lawyers and I for a while. I proposed this, I said they could ask to be on the committee. And, they all were calling each other saying, "Well, we could all not and then she won't have any committee, but then again, I don't want somebody else to ask and then I don't get on."

And they did a dance. And on the very last day that I had allotted for this, all of a sudden I get these series of requests to be on the committee.

And ultimately, I needed to—it served all of those purposes. Even to the extent that once they got into the discovery and started participating in it, they stipulated to a continuation of the stay. And they asked the Sixth Circuit to stay its consideration of the writ.



So in other words, they saw the wisdom of the writ going forward, and they got very involved, ultimately, not only in the discovery process, but, as I hoped, in the settlement process as well.

**MR. KENNEDY:** And our view of what transpired thereafter with respect to the court's writ. The court put together this committee, the state court committee. And we began to go about our business working together.

The court did make it very clear that we would play nice together. And if we didn't, that we would be in front of the court answering to any complaints that either side had.

But then, as the court said, the very bad thing happened. And that was out of nowhere to us the Sixth Circuit issued the order lifting the stay pending their determination as to whether or not the stay was appropriate.

What that sparked was the very next day, Don Barrett from Mississippi and myself went out to Las Vegas where, fortuitously, there was a mass tort seminar. And there was hundreds of state court lawyers that had gathered. And we had a meeting with those lawyers out there.

And ironically enough, the meeting that we had with about a hundred state court lawyers was in a room right next to the wedding chapel in the Las Vegas casino. Tom Tirtle from Texas commented, he wondered which group was going to entertain more broken promises on that afternoon.

But the state court lawyers at that meeting agreed to voluntarily, at least these hundred lawyers agreed to voluntarily not proceed with any trials, even though the Sixth Circuit had lifted the stay. The problem was that there were still hundreds of other plaintiffs lawyers throughout the country that hadn't made that agreement.

I think that the Sixth Circuit issued this order on a Tuesday, and by Friday, there was already a case scheduled for trial the following week. And it was just a matter of weeks before we had the other cases put back on the trial schedule.

As the court said, the Sixth Circuit motion to reconsider, which is usually not worth much more than the paper you write it on, miraculously reversed its decision of eight days before. And we were back in the ball game.

We proceeded to do what the court ordered, we proceeded to do our discovery so we could take this preliminary resolution and turn it into a final settlement. As the court said, we were on a very aggressive schedule.

Within sixty days Sulzer produced 300,000 pages of documents. The problem was 100,000 of them were in German. We had 12 interpreters working seven days a week translating documents. We took depositions in London, Vienna, in Toronto, Canada, in Austin, Corpus Christi, and Houston, Texas.

We hired a myriad of different experts, financial experts to educate us with respect to the financial abilities and pitfalls and just understand how sound Sulzer was and all the Sulzer companies was with respect to their ability to fund the resolution.

By the beginning of February we were ready, once again, to sit down with Sulzer and try to negotiate this from a preliminary resolution to a final resolution.

We negotiated in Vienna, Washington, D.C., New York, but most of the negotiation was done in Cleveland. During one stint of negotiation in Cleveland, the Plaintiffs' lawyers, or the Plaintiff negotiating group, we would sit and meet at 7:00 a.m. at the coffee shop at the Ritz every morning at the same table and, you know, a couple tables down the Defense negotiating team would meet at 7 every morning.

At 8:00 o'clock we would go to our office and we would negotiate from 8 until noon. At noon Dick Scruggs and I would meet with Judge O'Malley to report the status of negotiation. We would come back at 1 and negotiate from 1 to 6. We had happy hour from 6 to 7, we went to dinner and we went to bed.

The next day we were up at the same tables at the Ritz. And then noon to Judge O'Malley, 6 having dinner, day-after-day-after-day. And about the eighth day Ed Liss from Houston, Texas, looked at me and said, Eric, "I'm starting to think that maybe I'm caught in that movie 'Groundhog Day,'<sup>16</sup> where Bill Murray has got to repeat the same day over and over and over again until he gets it right."

Finally, on March 8th, at 8:30 at night in Judge O'Malley's chambers we presented to her a memorandum of understanding outlining the final settlement; a \$1 billion resolution that did not contain any provision as it related to liens.

Now, I remember handing Judge O'Malley the memoranda of understanding, it was kind of handwritten out, and saying, "Judge, other than a few details, we have reached a final settlement."

Judge O'Malley read it for about five minutes and looked at us, I'm not sure she remembers, but she said, "A few details? The holes in this agreement are big enough to drive a truck through."

The judge was right. It took us thirty more days of discussion to close those few details, but finally we did. We closed the details. We had a final resolution, about a hundred-page document.

But the challenge really at this point had just begun, because now we had to get 26,000 class members and a hundred different lawyers, hundreds of different lawyers, all at different levels of understanding and sophistication of this mechanism, we had to get them all to participate.

Because, understand, if ten percent opted out, if fifty Plaintiffs opted out, we already let one case escape to the trial process and it amounted in a \$15 million verdict with three Plaintiffs over seventy-years-of-age. So any significant number of opt-outs would have destroyed the resolution.

And the resolution had a "walk-away" provision, which was common. The walk-away provision says that Sulzer, if they at their discretion do not like the number of opt-outs, they can walk away from the resolution, because why would Sulzer put a billion dollars into a resolution and then have a handful of opt-outs go to trial and cause them into bankruptcy? So we had to essentially bring everyone into this resolution.

Now, Judge O'Malley's creation of that state court committee had taken us a long way down that road, because the major players in the state court system that had the largest inventory of cases had been sitting next to us at the negotiating table.

So this was no longer a federal court resolution or a state court resolution. This was our resolution on the Plaintiffs' side. So we had gone a long way down that road.

To get the rest of the way down that road, we created a website to explain the resolution and answer questions. We created an 800 number. We had three conference calls with an excess of 200 lawyers on the conference calls where we explained the resolution. We answered questions.

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<sup>16</sup>GROUNDHOG DAY (Columbia 1993).

If any lawyer was thinking about opting out his or her clients, somebody was on a plane and sitting in their office talking to them about their choice of whether or not to stay in the resolution, or to opt-out and potentially cause the whole thing to sink into bankruptcy.

The fact that Dow Corning, the breast implant litigation, was still in bankruptcy court without the payment of a dime to any woman after seven years was a strong selling point for us with respect to the bankruptcy potential.<sup>17</sup>

As we were working towards getting all 26,000 folks in, we were also working in preparation for the fairness hearing. Because under Rule 26, or Rule 23, any final resolution has to go to a fairness hearing for the trial court to determine that this is a fair and reasonable resolution.<sup>18</sup>

So in May we had a two day fairness hearing in front of Judge O'Malley requesting that she determine that this resolution was fair and reasonable.

Judge and Sid, your views of the fairness hearing?

**MR. BACKSTROM:** The fairness hearing was quite a challenge. There had been a significant amount of discovery that had gone into it. And there was just a lot to tell in terms of the product defect and the insurance picture and the structure of the companies, and so it was just a real challenge to figure out how we were going to do that.

But it was a cooperative effort at that point, because we had not only the MDL lawyers working with us, but the state court lawyers as well.

So at the end of the day, I think we put forth a pretty good showing that this was the best deal for everybody involved, including patients and their lawyers and the company as well.

So at the end of the day, we felt pretty good about it. And we went into the fairness hearing with maybe a half-dozen objections, who maintained their objections through the fairness hearing, which was indicative in a class action of 40,000 participants of how good the deal was.

**HONORABLE O'MALLEY:** After having an entire year of every single proceeding ending up with someone yelling at someone else, and at times, I admit, it was me sometimes yelling, but not very often, but it was usually the lawyers yelling at each other or yelling at me.

This was, as David and I commented afterward, it was like a "love fest." It was the strangest fairness hearing I ever imagined. Usually you have objections from all over the place. Usually you have a lot of battles. By the point of the fairness hearing, not only had we co-opted most of the real lawyers who had cases in state court, but Eric and his crew had put together an amazing show.

I mean they already had Judge McMonagle involved with his experience with running trusts. He was able to say, "This is doable, we can do this. Even though we're talking about 26,000 Plaintiffs, even though we're talking about a billion dollars, we can figure out a way to handle this settlement structure."

They had Vic Goldberg from University Hospitals who came in and did an amazing presentation on exactly what the science was and how you determine scope of the class. It was fascinating.

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<sup>17</sup>*In re Dow Corning Corp.*, 270 B.R. 393 (Bankr. E.D. Mich. 2001).

<sup>18</sup>Fed. R. Civ. P. 23 (amended, April 18, 2003); Fed. R. Civ. P. 26.

And one of the most important pieces was they had one of the state court lawyers, one of the ones who was most vocal objecting in the beginning, come in and take the stand and explain to the world how bad bankruptcy court can be in a mass tort contest and why putting this company out of business would be a huge mistake.

There also was a big piece of the settlement monies coming from certain of the Swiss entities that I'm fairly convinced nobody would have been able to get to from the U.S., that were so protected in terms of their ability to fight about piercing the corporate veil or fight about jurisdiction. There was a large cash infusion from those entities that was partially borne out of the desire to have the U.S. company stay in business, but also partially borne out of this desire that Sid referred to before; they really wanted to have this money for these claimants, which is—you shouldn't be so surprised, Sid, that corporate America sometimes feels that way.

So the fairness hearing was so perfectly put together by the time they got there and there were so few objections that it really was—I think a “love fest” is a fair description of it. There were even claimants, people, you know, hip claimants were in the room telling me how thrilled they were that this was going to happen. And that's kind of an emotional piece of it.

**MR. KENNEDY:** Judge O'Malley did provide final approval to the resolution at the end of the day on 26,000 class members. There were less than ten opt-outs. As Sid said, at the end of the day there were seven people that objected to any aspect of the resolution. And unheard of in a mass tort class action, there were no appeals.

Sulzer, I think, today remains a model to the Plaintiffs' Bar, to the Defense Bar, to the judiciary with respect to the resolution of this type of case. I think it's something that we are all proud of. It represented a situation where the most amount of compensation was able to go to the greatest numbers of victims.

It represented a resolution whereby this company was allowed to stay in business, that provided valuable jobs to the various communities where they did business across the country. It allowed the corporation to continue to make valuable medical products.

I think in a sense, it represents a bit of a nullification of the law, because under the circumstances of this case, where liabilities exceeds assets, I think the law tells you to go to bankruptcy court. That you go to bankruptcy court, even though the Plaintiffs don't want to go there and even though the Defendants don't want to go there.

So I think that it represents a situation where the Plaintiffs' Mass Tort Bar came together with a corporation, with the great patience and wisdom of a court, and formed a resolution that provided the greatest benefits for everybody involved.

By November 3rd, two years early, the entire \$1 billion was deposited into the settlement trust. The movement of that \$1 billion out to 26,000 class members is the job of the Honorable Judge Jim McMonagle.

**HONORABLE McMONAGLE:** I actually just felt like stretching. I was wondering, Eric is very quick on his feet, because I was trying to figure out what kind of segue is he going to use to make the job of a claims administrator sound interesting.

You know, a number of people have asked me, “How did I become a claims administrator?” Let me tell you, digress very quickly, because I didn't know what a claims administrator was, never heard of that term before I heard of Sulzer.

A number of years ago there was young lawyer trying a case in front of me when I was a judge. And Judge O'Malley back there was representing a clothing store.

And the clothing store—it was a commercial free speech case. And her client was advertising in the papers that their clothes were sold at approximately half of every other clothing store in Cleveland.

And so, therefore, they came in and her defense was the truth, they were selling at about half. She brought in exhibits. There were about ten suits. I live in Chagrin Falls. And the evidence started coming out slowly.

I never met her before in my life, didn't know her. She knew a lot about me, because all of a sudden, I get this pattern that there are suits bought out Chagrin Boulevard, all the way down into the Village of Chagrin Falls. Back then I was a size 38 regular, and they were all 38 regular.

So the reason I tell that story is from that period of time, there isn't anything that she ever does without some serious thought beforehand as to what's going on in strategic planning.

But I also point out that how do you become a claims administrator? That's part of it. You know, everybody, the vast majority of the folks here are students. You know, Cleveland is a very, very small collegial town, particularly when it comes to the legal community. From that point on, Judge O'Malley and I had a significant amount of professional interaction.

As a matter of fact, at one point I had been nominated to be on the Federal bench, that Bill Clinton was able to beat George Bush, and basically Kate has taken over the spot I had.

But the other point is Eric Kennedy, and these folks have to basically decide who will be the claims administrator. Eric Kennedy, I knew him before he was famous for all the things he has done. He was a rugby player where we butted heads together. And he was also a house painter.

So Cleveland is a small, small town. And over the years, what you finally do is you do things with people who you trust. So that's a long way to say, you know, when you have interrelationships with any of your professional people that you deal with, make sure you conduct yourselves at all times in the highest of ethical ways in your personal and professional manners, because people come back and hopefully— and put people in some positions of which they need someone who is going to trust.

What do I do? Well, you know what, they told me what to do. They have a settlement agreement and the settlement agreement says, what you are supposed to do is pay out a specific amount of money to a number of people. There's basically three or four categories. The largest category are the people who have had defective hips and the other ones who have received defective knees, that they can get up to \$160,000 in a fairly quick process.

And then we also have another process whereby people who are claiming that they are extraordinarily injured, and there is a fund of—really a limited fund of one hundred million dollars of which it will be within my discretion to try and determine how much any individual claimant will be entitled to receive out of that.

The claims administrator does four things. Again, this is laid out in the settlement agreement itself, because, you know, as Yogi Berra said one time, "If you don't know where you're going, you're going to be lost when you get there."

The settlement agreement tells you where you're going and it tells you what you do when you get there. That's all we're trying to do here. Because I have been involved in a number of these trusts in the past, and that all well-intentioned people have described very excellent plans by which they are going to indemnify people

who have been injured by a product at one time or another. But if you don't get the money to the claimants as soon as possible, the trust funds have some difficulty.

In this case we have expended, really, in excess of fifty percent of the monies, really over \$600 million to the various claimants already. Now, as far as my job, I have hired a firm in Richmond, Virginia that does the day-to-day work. Their name is Brown Greer. And to tell you the truth, it's a law firm. They have an actuary business by which they do claims processing.

This is a big business throughout the country with the increase in mass torts, with the increase in the bankruptcies, that there has been a cottage business of law firms around the country which have been created, which is used for the processing of claims.

But all I really do is look at each one of the claim forms that comes in. And the settlement agreement says, look and see whether or not there's been an implantation of a defective product, look and see whether or not there has been, by medical evidence, appropriate medical evidence proven to your satisfaction that there has been a revision of that. Make sure that there wasn't a trauma that caused the defectiveness, somebody didn't fall off a ladder or something like that. And make sure they filled out the claim forms. And so, that's really what my function is.

Now, the other intricacy regarding these types of funds, not just Sulzer, but all the other funds, is that there always has to be a little bit of a crystal ball. And to the best of everyone's ability, they try and identify how many claims there will be filed in the future.

And Sulzer has been probably the best I've ever seen, but there has still never been in the history of any type of resolution of mass torts a situation where any epidemiologist or forecasters or economists, or whatever they want to call themselves, has ever overestimated the number of claims which are going to be filed.

You know, people do very interesting things and behaviors do change and claims rates do increase when all of a sudden there is a pot of money which is put out there.

But all and all, it's been a very exciting thing to do. And luckily enough—and I'll take that back. Luck, you know, obviously is defined as when opportunity meets preparedness. That's happened. I think if I use that definition, luckily enough, this Sulzer resolution of the mass tort under these circumstances has been one which can be an example to the legal community, an example to the corporate community that we can have situations whereby people, because of negligence or because of not willful acts, they get themselves into a situation where people can actually be paid a significant amount of money to indemnify them for their injuries, but also that the company itself is able to have some extended economic viability and go on to preserve the jobs and preserve the corporation itself.

**HONORABLE O'MALLEY:** I do want to say that I think Judge McMonagle is a little too modest. There have been a lot of these cases that have gone to settlement and have fallen apart after-the-fact of approval because either the budget analysis were so far off or their mishandling of the settlement is unbelievable.

I mean some of these, and I won't name them, but some of these settlements really have blown up after the fact. And it's largely due to Judge McMonagle that that has not happened. And that the level of effort that he has put in with Brown Greer has been outstanding.

**MR. KENNEDY:** I would say it's the majority of them that don't work during the claims administration process.

**MS. BECKER:** Mr. Scruggs did want to be here in person. He, obviously, sent a representative. We're very glad to have Sidney Backstrom with us today. He was very kind enough to also prepare a videotape, which he did on Monday. And so this videotape contains Mr. Scruggs' view of this litigation.

**MR. SCRUGGS:** Thanks for allowing me to appear in the symposium by videoconference, or some form of modern technology. I want to thank Professor Landever and Professor Becker for inviting me to appear before the Cleveland-Marshall School of Law. And thanks to all the faculty and students who are there.

I want to tell you how much I appreciate being on a symposium in a program with people like Judge Kate O'Malley and Judge McMonagle, and my partner, Sid Backstrom, and my close friend and colleague, Eric Kennedy, to discuss some of the aspects of the Sulzer class action settlement.

I'm just going—others can tell you, perhaps, in more detail who are there actually in person in front of you about the predicament that Sulzer Orthopedics found themselves in a couple of years ago, having manufactured artificial hips and knees that through an industrial accident were defective, had to be recalled. Some tens of thousands of them had to be recalled after they had been implanted in patients.

It put Sulzer in a very, a very unfortunate position, having been a medical device manufacturer for many decades, having made life-enhancing and life-saving medical devices to have had an accident like this. And found themselves in the crosshairs of the American mass tort system.

You probably know that Sulzer was a Swiss-based company with various subsidiaries, including Sulzer Orthopedics U.S.A., which manufactured the hips and the knees that were recalled.

But their corporate structure did not lend itself to compartmentalizing, such that the entire corporate structure was ostensibly vulnerable to judgments and piercing the corporate veil, because of the way it was set up by the European lawyers that set up the corporate structure.

So they found themselves being sued in various locales, what we call—many of them were what we call magic jurisdictions. That is, venues where they are well-known for coming in with high plaintiff verdicts. And there was essentially the race to the courthouse for Sulzer's assets.

The company, while it made close to a hundred million dollars a year in profit, its assets were not worth a whole lot more than that. Its value was mostly as a going concern.

The company had only about—I say only, sounds like a lot, but it wasn't given the liability they faced—250 or so million dollars in insurance. Some of which was contested. And had very little in the way of assets to make up any difference in what the insurance might pay.

The company had a lot of goodwill. Its sales remained strong. Its reputation among the orthopedic surgeons and others who used its products remained strong, notwithstanding the recall.

But it appeared that Sulzer, if it stayed the course in the litigation, in these various magic jurisdictions around the country, would have to file bankruptcy.

Before I was called into it—for those of you who don't know me, I probably should have introduced myself, I'm Richard Scruggs and I'm a trial lawyer. I did defense work when I was right out of law school, but over the last twenty-some-odd-years I've done nothing but plaintiffs work, and mostly mass tort.

I was involved in tobacco litigation, and before that the asbestos litigation, various other mass tort cases.

Before I was contacted about this case, Sulzer had gone through amounts of its potential liability and its assets and insurance with which to respond to that potential liability, and had come to the conclusion that the bankruptcy was inevitable.

I was contacted by an expert witness, a physician who lived in Texas where the Sulzer manufacturing plant was located. The principal plant was located in Austin, Texas. This expert witness, Dr. Joe Cunningham, who is the president, or former president of the Texas Medical Association, was an expert for us in litigation, and suggested to one of the executives, who was his neighbor, that they consider retaining a trial lawyer to give them some advice about how to extricate themselves from this mass tort dilemma.

To make a long story short, I had a number of meetings with Sulzer, with their management. They had defense counsel. They had good defense counsel who were, naturally, resistant to the idea of a trial lawyer coming in and sort of directing the defense of the company.

But that's not what we were asked to do. We were asked to come in and give them some, perhaps, "outside-of-the-box" thought about how they could extricate the company from mass tort, from this mass tort, and at the same time compensate the victims, while keeping the company in business.

That was the real challenge here. How do you stave off stampeding in the race to the courthouse, what legal device is available to do that, short of bankruptcy, to prevent the few assets of the company from being consumed by the very first plaintiffs who were able to get judgments and execute those judgments against the company's assets; wherein, a few lucky plaintiffs would get virtually all of the assets and most would get nothing, because the company would be out of business in bankruptcy.

So we set about to try to convince the management of Sulzer, we went to Switzerland on a number of occasions to meet first with their insurers and then with the same management of the company that we thought we had a plan that would work.

And the plan that we ultimately came up with was a settlement, was a class action settlement.

Now, to set the scene, a company that faced what Sulzer faced has very few options, other than what I'll call "trench warfare," to try every case, win some, lose some, delay the inevitable until the insurance is consumed. Or file bankruptcy.

The class action model has not proven very successful as a settlement vehicle. As those of you who have studied class action law in recent years know, the Rule 23 big class action device, which is the limited fund, no opt-out class action device, which has been tried in a number of similar instances where a company has a limited number of assets, it's only valuable as a going concern, and tries to capture all of the plaintiffs in the class action settlement, have not, that I know of, survived appeal.

Some of them have proved at the trial court level and some settlements under 23(b)(1)(b), but to not, to my knowledge, have they survived appeal for various reasons.

The other class action settlement device is the 23(b)(3), or opt-out settlement device, where anyone who wants to can opt-out of a settlement. Those who stay in get the settlement money.



The problem with that type of settlement, historically, is that the plaintiffs lawyers will settle the average or medium or minimally injured cases and opt-out their more serious cases. And so that the company spends most of its money settling through the class action vehicle cases that are not that compelling, but having to then respond in court, again, with trials of the opt-out cases, which are usually the more serious.

Those settlements really, I think, in a situation like Sulzer's, are a bit of a fool's game, because it will buy them time, but it won't buy them peace, because they will ultimately be facing the same race to the courthouse with these more serious cases.

In Sulzer what we decided to do was a 23(b)(3) opt-out settlement. Similar to the one I just described, but with one wrinkle. That is, to give a lien on all of the company's assets, income, revenues, work in process, inventory, cash. You name it.

Give a lien on the company, lock, stock and barrel, to the class to secure the payments to the class plaintiffs. That presented a dilemma to anyone who opted out. They could certainly opt out and get a judgment, but if they got a judgment, their judgment lien would be subordinate and be behind the lien of the class.

So it would pay at least half of its income and issue stock to the class, to actually give a preference to the class in favor of those who opted out.

The settlement on those terms was approved preliminarily by Judge O'Malley. Some of the opposing trial lawyers appealed that. And the appeal was at least temporarily granted and the All Writs Act injunction that stopped the opt out lawsuits from going forward was lifted.

We got an expedited hearing in the Court of Appeals. And on the morning of the hearing ended up with a settlement with those who had taken the appeal such that the injunction remained in place long enough to sort of renegotiate the terms of the settlement.

The terms of the settlement were renegotiated such that the class was given all of the insurance of the company, an issuance of stock, other cash, and virtually all of the free assets the company had. The sum total of all that was slightly in excess of \$1 billion.

But the company had the right to walk away from the settlement if opt-outs exceeded a subjective number that the company thought it could live with.

It turned out that initially I think there were fifty or sixty opt-outs out of some 30,000 potential claims. Those were ultimately negotiated down to, I think, fewer than ten.

And at last count, the settlement has been—it's been successful, it's been funded, and the class members are starting to get paid now. And I think the model for the Sulzer settlement is one that can be used for other companies that are facing the same sort of predicament that Sulzer did.

One of the things that militates against a settlement like this, I think, though, is the business model of the both plaintiff and the defense bar. The defense bar, obviously, wants to prolong litigation, and it's the way they defend cases. They take depositions, they conduct hearings, and anything they can do to generally outbill. Quick resolution of the case is not the typical business model of the large defense firms. So they're generally antagonistic toward a quick resolution like this.

The Plaintiffs' Bar, on the other hand, doesn't like to have a settlement crammed down like this was. They like to—at least some think they can get there first and get their clients all the assets of the company.

But on balance, there needs to be some sort of a resolution, maybe even reinvigoration of 23(b)(1)(b), so a settlement like we were able to negotiate with Sulzer can come to pass, or at least be readily available for a company that's willing to put its assets on the line, to make up for its own mistakes.

Thank you very much for having me. And I hope this has been a bit enlightening. It's been a great pleasure. Thank you very much.

**MS. BECKER:** I would like to open it up for questions and a panel discussion, but since I have the microphone, I'm taking the prerogative of asking the first question. And what I would like to ask is this:

When you look at the history of this litigation, you compare it to other similar litigation, class actions, you see there's a lot of potential here where things could have gone wrong. So my question is: What made this case work?

**HONORABLE O'MALLEY:** You know, I've thought about that a lot. I mean there's always, you know, one piece that you can say, well, that was great, that really was critical or this was critical, that was critical.

I actually think that in this case one of the things that really made this case work goes all the way back to the very beginning. And that is, David Wise, General Counsel of Sulzer, waking up and realizing that he can't litigate these cases. And that's a realization that, while in hindsight a lot of people say, well, in many cases someone should realize sooner, he realized it early on.

And it's hard for companies. I mean they had some defenses, they had causation defenses, they had other defenses. He at some point said to himself, "This company is going to go out of business and all these people," and you have to understand, this claimant class was particularly sympathetic, because think about who gets hip replacements. We're talking about usually an elderly class, or a class of people, if not elderly, had other physical problems to begin with. They would have been a very sympathetic class of claimants. And he said, we're going to all end up losing.

And I think a lot of it was the decision to get the Scruggs Law Firm involved and made the decision early on that there had to be another way. So that piece, I think, was critical. While I think there are a lot of other things along the road that stopped it from derailing, I think the mere fact that that realization occurred so early on was critical.

**AUDIENCE:** Generally why couldn't the company just file bankruptcy to force the settlement and then get out of bankruptcy later and that would have caused the Plaintiffs to sort of have more incentive to settle quickly?

**MR. BACKSTROM:** In short, it would have ruined the business. Sulzer wouldn't have any credibility in the marketplace, and ultimately they would have had to shut the doors.

**HONORABLE O'MALLEY:** Remember that bankruptcy process is a much longer process. I mean by the time you get all of the claimants, you wouldn't have just your hip claimants, you would have every other possible claimant.

**AUDIENCE:** Couldn't they just negotiate a class action settlement in bankruptcy and then get out of bankruptcy after that was funded?

**MR. BACKSTROM:** Yeah. I mean, again, they could have gone that route, but they felt from a business standpoint that would have killed them. Doctors would have moved on to other products, because doctors train on one type of product when they do these surgeries, and they don't want to have to wonder if this company is going to be around in two, three years from now when they are going through an extensive training on a product. Instead, they're going to jump ship and go to the

next product. So, because of that reality, bankruptcy was not an option for an orthopedic implant maker like Sulzer.

**HONORABLE O'MALLEY:** From the Claimants' standpoint, many of the Plaintiffs might not have still been alive by the time they came out of the bankruptcy.

**AUDIENCE:** I'm wondering what the basis was of the insurance company, because of the strategies of the lien, which was genius, they thought possibly that that would exempt them from paying claims, or did you imply that, or was that not—

**MR. KENNEDY:** No. The insurance company's proceeds were subject to the lien. The insurance company agreed up front to throw all their monies in and have it be subject to the lien.

I talked about two different policies. There was a \$250 million policy that was not at issue whatsoever. There was a second policy at \$165 million, and there were various issues as to whether or not that was applicable to these cases. So that was more of a coverage issue.

**HONORABLE O'MALLEY:** There's a very important issue that I thought of when Dick Scruggs was talking that no one mentioned. The insurance policy was a "wasting policy." So that the litigation costs were eating the policy up, which was another reason why the writ under the All Writs Act was arguably justified, because the primary asset that was available to pay off these claimants was disappearing.

**AUDIENCE:** How did they get FDA approval in the first place?

**MR. KENNEDY:** The problem with this product, we didn't get into it in great detail, it was not a design problem. It was that along the lines they changed the manufacturing process.

And what ultimately occurred was—oil is used during the manufacturing process. When they changed the process, you're allowed to have some small amount of oil on the exterior portion of the shell, but that amount of oil increased in amount.

And in addition to that, there were an excessive amount of endotoxins on that shell also. Endotoxins are skeletons of bacteria that's been killed. So they would sterilize it, leaving endotoxins behind. And probably the rinse water was dirtier than it should have been, so there was excessive of amounts of endotoxins and excessive oil in certain batches.

So it was not a design problem the FDA would have picked up. It was a change in the manufacturing process they would not have picked up. It took various batches and made them defective. Made the tissue not grow into the exterior of the implant.

**HONORABLE O'MALLEY:** Most doctors would tell you this is probably one of the best hip implants on the market, and that but for the fact that it wasn't cleaned properly, they would tomorrow put this in, if it wasn't for this controversy. That was part of it.

This company made incredibly good products. It just made a mistake in making this particular one.

**AUDIENCE:** With respect to the problems associated with the state court cases initially proceeding and the danger that posed for the federal court cases and the MDL, couldn't Sulzer have sought removal of the state court cases and had them shipped along as tag-along cases under the statute?

**HONORABLE O'MALLEY:** Many of them were. Many of the 300 cases that were in federal court had originally been in state court and they were removed. The problem is that Sulzer Orthopedics was in Texas, so you could not remove many of the state court cases in Texas.

In California they sued all the doctors, so while Sulzer was arguing, Sulzer tried to remove and argued that the doctors had been improperly joined, in many cases they had some legitimate argument that the doctors knew about this sooner than the recall, and that the doctors might legitimately have been claimants.

The doctors were released in our summary for that reason, but as many cases as could be removed, were removed. And then there was an effort to remove a bunch of cases because of the All Writs Act, which the Supreme Court has recently said that that doesn't work. And, in fact, I didn't like it very much when they tried to do it.

But they did try to create removal jurisdiction under the All Writs Act later for some of the Texas cases, but I ended up sending them back.

**AUDIENCE:** I have two questions, actually. That's not cheating. The first one is it's my understanding that both Plaintiffs and the Defendants in the MDL wanted the writ; is that correct?

**MR. KENNEDY:** Yes.

**AUDIENCE:** So who appealed?

**HONORABLE O'MALLEY:** The state court lawyers. The state court Plaintiffs' lawyers.

**AUDIENCE:** And they have standing to appeal your decision because their clients are members of the class?

**HONORABLE O'MALLEY:** Their cases were the ones being stayed.

**AUDIENCE:** I see. The second one is to what extent, if any, was there coordination between the settlement counsel, for lack of a better term, and Defense counsel in the MDL and the Defense counsel in the state court cases, or were they the same people?

**MS. BECKER:** The question is: Was there coordination among the Plaintiffs counsel in the state court actions, as well as in the coordination with the federal court attorneys.

**AUDIENCE:** That was the first question. The second was the same question, only flip side. Was there coordination between the Defense counsel in the state court cases and the Defense counsel in the MDL?

**MR. BACKSTROM:** From the defense side of things, there was a lot of coordination. Sulzer had initially a firm in the west coast called Crosby Heafey, that was their national coordinating counsel. And then during the process, Sulzer switched over to Shook, Hardy & Bacon.

And I was in daily contact with both of those firms, when they were defending the cases. Really, because we were trying to do certain things with the settlement. Every little thing that came up, like, for example, in Maryland these Plaintiff lawyers had garnished our bank accounts in Maryland, so that was a situation we had to deal with.

Situations like that from local counsel level to national counsel to us because at all times during our involvement the company was teetering on the edge of bankruptcy and any one insignificant upset after the recall could have killed the company. So there was an extreme amount of coordination on a daily basis with those firms.

**AUDIENCE:** My question is directed to the entire panel. As each of you play a unique role in this litigation, what was the most singular problem each of you faced?

**MR. KENNEDY:** Staying afloat long enough to resolve the case and sell it to everybody in the country. I mean it was just staying alive.

**AUDIENCE:** Persistence.

**HONORABLE O'MALLEY:** You know, I was going to joke and say, which day in terms of the problems.

Part of our biggest problem, I mean think about it, I didn't have a whole law firm. I had one law clerk working with me and my courtroom deputy trying to keep track of this.

Probably our biggest problem was to make sure that we continued to send the message that we were in control. That we understood there was a lot going on, there was a lot of negotiation back and forth, but that ultimately they weren't going to do anything without me knowing it and without me approving of it.

And in order to do that, we had to at least stay up with them and their movements, you know, preferably one step ahead. So the pace that we had to keep while still running our other docket was pretty extreme. I mean it left one law clerk to do the whole rest of the docket in many instances.

So it was—I would say that attempting to stay in control and to—these guys all knew each other. Think about it. Well, Scruggs and Backstrom want to call themselves settlement counsel. They sort of warped into defense counsel, but they don't want to admit that, because they had to all work together. But these guys knew each other, they knew who the players were. They knew everything that was going on a nationwide basis, and we were playing catch-up in many instances.

**MR. BACKSTROM:** For us, the biggest challenge was one of our biggest assets that we brought to the table—our relationships with the Plaintiffs' Bar. We had worked and continue to work with a lot of these guys.

And so that was good, because it gave us instant credibility and allowed us to cut through a lot of the posturing that often occurs in complex litigation settlements discussions. But at the same time as we were negotiating the deals, people would come to us just ranting, people who had cases, and say, well, we can't have this term because my client, who has got this issue.

And so, you know, we would get, I mean, literally hundreds of calls a day from good friends of ours who had legitimate concerns. And we just had to tell them in many instances, "We can't help you. You've got to go to class counsel. You've got to run it through them, and then we'll deal with it through them." But we can't just continue to handle all these individual inquiries, because it frustrates the entire process.

**HONORABLE McMONAGLE:** I'm in a little unique position in that we can only pay out to valid claimants. If we would ever pay one dollar out to a claimant who is not valid, that's a dollar less that a valid claimant gets.

Basically I'm in a situation while where people's claims are pending, that I owe my fiduciary relationship to those people who are adverse to me. And that's sort of a funny situation to be in. But it goes on on a daily basis.

The other thing, as I said before, the biggest thing that we had to do is recognize the key to these things is when people read about a settlement of a class action or emergence of a bankruptcy or something like that, they think the money should be in the mail the next day.

In order to make these things successful, to pay out, the money should be in the mail as soon as you can get to it and as soon as the next day as possible.

**AUDIENCE:** I was wondering what your thoughts were on the—before Congress right now, the House and Senate, the idea that these cases should be folded, and most

should go to the federal court system. Would that alleviate some of the problems you faced in this case, and do you just generally think it's a good idea?

**MR. KENNEDY:** It certainly would take away from the need to issue an All Writs Act. I mean if they were all federalized, they would all be pushed to the MDL Panel, all would have been consolidated in front of Judge O'Malley, so we wouldn't have had that issue.

I mean it's a tremendous issue, you know, between constitutional state rights versus the federal system.

The other side of it, on the Plaintiffs' side of it, if you want, from one aspect it made things difficult, because you needed to use the All Writs Act to stop the state court litigation.

There's a whole lot of lawyers who believe this whole thing worked and happened because we did have a state court system where litigants were able to move fast in their home courts and put pressure on Sulzer.

So it certainly alleviated one situation, that being a control issue. And the absolute inevitable, frankly, all of these issues have a state versus federal problem. There's a whole lot of lawyers in this country. Sid and I agree from the defense side, one of the real driving factors was the fact that you had a hoard of people out in the state court system driving towards trial dates.

I think most of them, particularly significant cases, until you have the threat of a trial case or the threshold of a trial case, you don't settle cases. So it would solve some problems. It would create others.

**HONORABLE O'MALLEY:** There clearly needs to be some fixes with respect to both the MDL system and the authority of federal courts to address cases like this. The problem is that in this case, for instance, removing the state court class actions into the federal system wouldn't have really changed much, because it was the individual cases, the people with three and four surgeries, because some of them had the hip implants and then they put another bad one put in when they realized the first one didn't work. Before the recall, the surgeons put second bad ones in and they had them on both sides. So it was these clearly injured parties that had those individual cases that were really driving the threat of bankruptcy.

So I don't know that saying that as soon as you call something a class action it goes into federal court would change this kind of dynamic. And I'm not sure whether it would change much.

The state court lawyers really don't like class actions, you know, the ones—the Plaintiffs' lawyers, like Dick Scruggs, generally don't like class actions.

**AUDIENCE:** What about further clogging the federal courts?

**HONORABLE O'MALLEY:** You always hear about that. I've got to tell you, the federal courts are doing pretty well right now. Our dockets are pretty under control. The dockets, especially in this district, are particularly good. But I think in most districts in the federal court system we're a lot better off than the state court judges. We can move things probably more efficiently than a lot of the state court systems.

**AUDIENCE:** I wonder if you could talk to the viability of the model of the first settlement. That is, with the liens, whether that would work in another case.

**MR. KENNEDY:** Well, the opponents of the lien basically said that they have a Constitutional right to a jury trial, and that if you put liens in effect, which basically said go get a jury verdict, but you can't collect for seven years, they maintain that that was a denial of the right to a jury trial.

Professor Miller maintains that the Constitution guaranties you the right to a jury trial, but it doesn't guarantee you the right to win your jury trial, and it certainly doesn't guarantee the right to collect on a jury verdict.

So I think you've got—and, frankly, I didn't see the case law stating that on either side, but a lot of people use the *Telectronics* decision to say it really says this, it really says that. I'm not sure *Telectronics* in this case really speaks to the issue.

So I think that you'll see it attempted again, but it creates a whole lot of big policy issues and problems. I'm not sure—legally, I kind of buy the argument to the Constitution only guaranties you a right to a trial, not to win and not to collect. But you could—

**HONORABLE O'MALLEY:** I thought the mechanism was fairly ingenious. While it's true, as Eric said, that it caused an outcry, it also caused a lot of people to come to the table to discuss that outcry.

And so in some ways, it forced everybody into the same room, if for no other reason than to complain. At that point, that's where you begin to start the dialogue. I actually think, for the reasons that I said, that it's not unconstitutional, and that it can be workable.

And perhaps it's a question of how long the delay would be, but I thought it—I thought it was extremely clever on the part of the Sulzer Defendant.

**MR. BACKSTROM:** You know, in looking at the way that deal was structured, it had to be that way, because the company was going to pay off that settlement over six years. Well, if they're getting rung up for judgments along the way, you'll quickly go bankrupt and then a payout settlement agreement isn't worth the paper it's written on. So it kind of had to be that way. For the deal class counsel initially negotiated, having liens in place was the only way to make sure the class was protected against future judgments. And I think it has to be viable as a result. We may try it again.

**MS. BECKER:** My final question, because we're almost out of time, is whether the panelists know what happened to the opt-outs, because I think there would be a potential, even if there's less than ten, you get several multi-million dollar verdicts, that might damage the viability of the company.

**MR. KENNEDY:** Sid?

**MR. BACKSTROM:** We've got, I think, one revised opt-out that still rattles around out there. There's no trial date in that case. We've got some unrevised opt-outs with no trial date on the horizon. We're just going to have to deal with it.

Our position has always been, if we have to try them, we'll just go in and do the best we can under the circumstances and hope that we get a reasonable verdict.

**MS. BECKER:** You will be Defense Counsel in those cases?

**MR. BACKSTROM:** No. But we will continue in our role as special counsel if the Company wishes.

**MS. BECKER:** On that note, I would like to thank our panelists, Mr. Kennedy, Judge O'Malley, Sidney Backstrom, Judge McMonagle.