Lessons Learned from Implementing a Class Action Settlement

By Cullen D. Seltzer


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Mass torts are famous for their legal battlegrounds. Fights over class certification, controlling law, discovery, bell weather trials, multidistrict litigation (MDL) transfers, preemption, and removal can happily occupy 100 lawyers for a decade or more in a single case. The lessons this article discusses are those learned after these fights are over. How do you implement a mass tort settlement?

In February 2002, Judge Kathleen McDonald O'Malley of the United States District Court for the Northern District of Ohio preliminarily approved a class action settlement in *In re Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation*, MDL No. 1401.[1] The case turned on a medical device (hip and knee prosthetics) manufacturer's liability for allegedly improperly manufactured devices that required surgical replacement. The settlement contemplated resolving the claims of approximately 40,000 class members and a settlement trust of more than $1 billion dollars. In the intervening eight years, the settlement trust has paid out essentially all its money, paid eligible class members up to 110 percent of their prescribed awards, limited transaction costs associated with implementing the settlement to about 1 percent of the trust, and processed to conclusion more than 23,000 benefit claims.

Since February 2002, I have represented James McMonagle, the claims administrator for the class action settlement in Sulzer. While it may seem like handing out a billion of other people's dollars should be easy enough, I can attest that it is far easier said than done. What follows are the lessons worth noting from the settlement.[2]

Be Fanatical about Data

Keeping track of information is important in every case, but class actions magnify problems, and nowhere more than in the task of keeping track of information. How many class members are there, where do they live, and what are their birthdays and social security numbers? Who are their heirs, doctors, authorized and emergency contacts, and lawyers? Is Mary Smith-Jones from Wilmington the same person as Mary Smith from Wilmington? If you have claims from both of those people, are they duplicate claims from one person or two separate claims?

There are at least two strategies for dealing with this problem. The first is to use the best technology you can afford to build a robust database that many people can simultaneously access. Take care to limit who can make certain types of entries in your database. Claims processors should have ascending levels of responsibility; your least-tested folks should have limited areas of responsibility that can be quickly checked for quality control. We asked junior claims processors to do ministerial data entry tasks. We asked more senior supervisors to review reports of those workers' overall performance and work product.

When confronted with a question of identity, as in the hypothetical case of Mary Smith-Jones, we reviewed claims carefully to check for similar addresses, phone numbers, or signatures. If the question could not be resolved on that basis, we put in calls to the plaintiffs' lawyers involved or the claimants directly if they were unrepresented.

In the Sulzer settlement, like in most settlements, a claimant's eligibility for benefits was a function of his or her presentation of a written claim form and accompanying documents. The claim process did not contemplate a hearing at which direct and cross-examination might clarify questions left ambiguous. So, to guard against the possibility of benefits being denied to someone entitled to them, or paid to someone who is not entitled, be fanatical about the data.

Being fanatical about data is also essential to reliably anticipating problems in the settlement. One of the main settlement benefits in the Sulzer settlement was a $160,000 payment for a qualifying hip or knee replacement surgery plus an attorney fee subsidy for represented claimants of up to $46,000. That means each qualifying surgery reduced the corpus of the trust by about $200,000. Even with a $1 billion dollar trust, claims with a value of $200,000 leave precious little margin for error. If the data regarding pending, valid, invalid, and potentially curable claims is unreliable, the claims administrator's ability to project the fund's adequacy is corrupted.

Think about Claim Processing Before the Settlement Is Final

The Sulzer settlement was preliminarily approved in February 2002 and then set for a fairness hearing in May 2002. Judge O'Malley had approved engaging Judge James McMonagle (former judge of the Ohio Common Pleas Court) as claims administrator months before the scheduled fairness hearing. Judge McMonagle's appointment was instrumental to successful implementation of the settlement. First, he has many years experience in complex mass tort cases, including work in settlement facilities. Second, he enjoys the respect of the court and class counsel from their long association with him in other contexts. Third, because of his extensive experience working in tort claim facilities, he has exceptional insight into the best practices of a successful administration effort. Additionally, the time between his appointment and the approval of the settlement gave Judge McMonagle

a few precious months to engage counsel and a claims processing facility.[3] During that window, the claims administrator had the opportunity to engage necessary insurance providers as well. Most importantly, there was time to review the administration procedures the settlement contemplated. These were largely well put together, but we identified a handful of changes we thought were important.

Significantly, the agreement was modified to permit the claims administrator to promulgate claims administration procedures after consulting with class counsel, to aid in processing claims, and to clarify ambiguities should they arise.[4] That idea that ambiguities in the interpretation of a 100-page settlement agreement would arise was inevitable.[5] For example, if a surgeon removed a prosthetic covered by the settlement from a patient and then test-fit a replacement during the same surgery, but ultimately decided a larger prosthetic was appropriate, did that removal, reinsertion, re-removal, and re-reinsertion count as a single revision surgery or two?

To resolve the question, the claims administrator promulgated a procedure clarifying that to get two surgery benefits, a patient had to undergo two separate surgeries on two separate occasions, and test-fitting a single joint with multiple prosthetics during a single surgery only entitled a claimant to a single revision surgery benefit.[6] Was this question weighted with enormous policy implications that shook the foundations of the settlement and western judicial thinking? Of course not. The claims administrator's ability to resolve the question quickly with the consent of class counsel meant implementation of the settlement was not delayed by lengthy motions briefing, argument, and proceeding in federal court. Additionally, the published claims administrator procedure made the resolution and administration process transparent for the entire settlement class.

Over the course of the settlement, the claims administrator adopted more than 30 claims administrator procedures. These touched on a range of subjects, including how to make out payment checks for certain benefit awards,[7] how to make claims for certain subrogation indemnification claims,[8] how to award attorney fee subsidies for attorneys who accepted clients after the settlement was approved,[9] and how to prosecute an appeal from an adverse benefit determination by the claims administrator to the party-approved special master.[10] If the class action settlement agreement was the statute authorizing implementation of the settlement, the claims administrator procedures were the regulatory scheme that announced the particulars of how the settlement would work.

Making the Process More Fair Is Also More Expensive

American jury trials provide robust protections for litigants' substantive and procedural rights. Opportunities to confront evidence, call for evidence, have questions reviewed on appeal, and have questions considered not only by a judge, nominated by the president, and confirmed by the Senate, but also by a jury of one's peers, are all procedures our laws extend, in part, because we recognize that important interests ought to be safeguarded by careful and strong procedural mechanisms.

The administration process must also provide claimants procedures that provide fair mechanisms for deciding which class members will receive settlement benefits. That concern was heightened in the Sulzer settlement because a class member who participates in the settlement executes a full release even if he receives no award inside the settlement. But the administration process cannot be as robust as that contemplated by the Seventh Amendment. If it were, the costs of administering the settlement for 20,000 claims would have quickly exhausted the trust's assets.

The Sulzer settlement attempted to balance those competing considerations by providing claimants no less than five opportunities to have their claim perfected and considered for a settlement award.[11] After each review, the claims administrator, or the party-approved special master, was required to explain in writing the reason for any benefit denial. Given the large stakes for each individual claimant, these protections for claimants were reasonable, but they were also labor intensive.

A banker's box of medical records and physicians' declarations may support any given claim. All of that information had to be measured for relevance and probative value against the settlement agreement's very specific eligibility requirements. In the Sulzer settlement, claimants did not have to prove their prosthetic's defect in design or manufacture as they might have been required to do at trial, but they did have to prove they were implanted with a covered prosthetic and that the product caused the injury for which they sought a monetary award. They also had to prove the severity of the injury to establish the value of their claim.

Balancing burdens of proof in this way was abundantly fair. It relieved claimants of complex, class-wide liability proof questions, but required claimants to prove their damages by tendering documents specifically required by the settlement's drafters. That fairness, though, came at a price. While we were pleased that so little of the trust's assets went to administration costs, at least as a proportion of the trust's assets, all who were concerned understood that the cheapest way to administer the settlement would be to take the total fund, divide by the total number of class members, press play on a laser printer, and be done with it in 60 days.

That would have been efficient, but it would have been unfair and possibly unconstitutional.[12] It would have treated dissimilarly injured claimants similarly, and it would have deprived class members of the opportunity to make the case why their claim merited special compensation. A simple pro rata distribution to all class members, without a concurrent review of claimant medical records, would have deprived the claims administrator of the opportunity to identify wrongful, duplicate, and even fraudulent claims.

Have a Plan for Late Claims

Late claim submissions are the bane of every administrator's existence. A late submission, the late filer argues, ought not to be penalized given the beneficent purposes of the settlement. A small delay with regard to an administrative deadline ought not to disqualify someone from eligibility for a significant settlement benefit. On the other hand, granting short extensions for any reason only has the effect of creating a new unwritten deadline with the potential for harsh disqualifying results. Moreover, paying late claims would have made it impossible for the claims administrator to know when the claims processing effort should conclude and when any residue of the trust might be distributed.

In the Sulzer settlement in particular, some claimants were entitled to discretionary awards, the amount of which was, in part, a function of available money after base claims were paid. Honoring late claim submissions would make these discretionary awards difficult to make.

We resolved early on, with the agreement of class counsel, to adopt a claims administrator procedure that used Rule 60, in its essence, as the measure of whether an untimely submission might otherwise be permissible.[13] Ignorance of a published deadline or negligence by a claimant's attorney could not constitute excusable neglect. While that rule in practice disqualified many late claims, it also ensured that the settlement trust would be used to pay valid, timely claims, and not as an indemnity for attorney malpractice.

The important lesson to draw here is to assess the economic and practical implications for late claims for a settlement and to quickly and publicly set a policy for responding to late claims.

Get Money Out the Door Quickly

Class members in the Sulzer settlement were seriously injured. The surgeries many underwent were grueling and painful. Many of their lives were forever changed by the treatment they underwent. While many stood to receive $200,000 awards, early trial verdicts before the settlement were much higher than that. Settlement participants, in short, were angry about what happened to them and came to the settlement knowing they would likely receive only a fraction of what they might win at trial if the defendants could afford to pay.

The settlement drafters sought to allay those concerns first by getting payment out the door quickly in the form of a Guaranteed Payment Option (GPO).[14] Participants in this process committed to the settlement terms even if the settlement was ultimately derailed for any reason, including appeal from any trial court approval or ultimate decertification of the class. In exchange, GPO participants were given the defendant's binding commitment to pay the class action settlement benefits as well as a quick payment of $40,000.

> The defendents, by operation of the settlement agreement, had no financial incentive to tinker with administration except to aid in the overall success of the settlement.

The notice campaign for the settlement was underway by March 2002, and the settlement was approved in May 2002. By August 2002, the first GPO checks were being mailed. In the weeks before Christmas, the claims administrator sent checks to class members totaling just under $300 million dollars. The quick, early processing bought the settlement enormous good will. Early calls and letters to the claims administrator's office were often long on anger and short on support. Subsequent callers were often quick to express gratitude or relief and to say that the settlement was a lone bright spot in a process that had been distinctive, until then, only for its figurative and literal pain.

Those nods of appreciation didn't just make all parties feel good, but they also represented a reservoir of goodwill. Later in the settlement when new appeals would delay payment of some benefits, we would draw on that reservoir. When the claims administrator explained that we were pressing for the appeals to conclude as quickly as feasible so that we could continue working to pay people fairly in the manner required by the settlement agreement, callers believed us, in part, because we had demonstrably worked so hard early on to do just that. While some appeals in 2003 and 2004 did delay some payments, not a single class member, by motion or otherwise, initiated a single proceeding collaterally attacking the settlement or its implementation during what amounted to a year-long delay in processing the most serious claims.

Make Sure the Relevant Constituencies are Well-Informed

Careful administration requires vigilance for a wide range of circumstances that could upset the settlement cart. For example, we encountered complications associated with late claims, some class members seeking de novo review of their benefit determinations in the district court and outside settlement's administrative process, greater than expected (and budgeted) claims in certain benefit categories, and lower than expected numbers of claims in other categories. Each of these required investigation, revised planning, and either a publicly announced Claims Administrator Procedure or an order from the court.

Although the claims administrator was empowered by the settlement agreement to adopt processing procedures after consulting with class counsel, as a practical matter, he never did so without class counsel's affirmative agreement. That was made easy by regular discussion with class counsel as administration issues arose.

Class counsel was Eric Kennedy from Weisman, Kennedy & Berris in Cleveland, Ohio. Also from Kennedy's firm, David Landever and Dan Goetz were engaged intently on the settlement not just before the deal was concluded, but for years afterwards. Together, they took the lead in coordinating policy positions

among the plaintiffs' bar as a whole. Similarly, David Brooks and Andrew Carpenter from Shook, Hardy & Bacon and Barry Alexander from Nelson Mullins remained active and engaged in the settlement as liaisons for the defendant. Glenn Zuckerman, with Weitz & Luxenberg, and Steven McCarthy, with Blizzard, McCarthy & Nabers, as lawyers who represented large numbers of class members and part of the court's Special State Counsel Committee, were constant and excellent sounding boards for possible settlement procedures.

These collaborative efforts were essential to the successful implementation of the settlement. Good lawyers hardly need to be told to collaborate with their adversaries when circumstances dictate, but many settlements regrettably do not enjoy that sort of collaborative effort.

Structure the Settlement to Incentivize Collaboration

Structurally, the Sulzer settlement encouraged major constituencies to work collaboratively with one another. Perhaps the most important feature of the settlement in this regard is the severe limitations it imposed on the role of the defendant. The Sulzer defendants were required to fund more than 90 percent of the more than $1 billion dollar settlement trust within six months of the settlement's approval. In exchange for the quick funding, and with less than a hundred class members who opted out of the settlement, the Sulzer defendants achieved the much-touted, and often elusive, goal of global peace. What the defendants did not get, though, speaks volumes.

Defendants did not get the right to provide documents to the claims administrator that might be relevant to a claim. They did not get the right to review claim submissions, see claimant records, audit benefit awards, or challenge a benefit award as improperly made or providing too great a benefit. Most importantly, if the settlement trust had money remaining after all claims were paid, the defendants had no right to any of it because the trust was non-reversionary.

All of this meant that the defendants, by operation of the settlement agreement, had no financial incentive to tinker with administration except to aid in the overall success of the settlement, including the appropriate payment of every dime of the settlement trust to eligible claimants. Of course, all defendants want their settlements to be successful. But allowing the defendant to participate in benefit determinations, particularly when its participation is tied to ongoing funding obligations, can create conflicting incentives. On the one hand, the defendant might seek to pay claimants to achieve the settlement's purpose of buying peace. On the other hand, a defendant might have an incentive to use its administration rights to minimize payments as a means to safeguarding its own purse. That kind of settlement may be successful, but it requires a claims administrator to contend with multiple constituencies who have some claim to the settlement trust.

Of course, the defendants' peace in the Sulzer settlement was imperfect. The defendant ultimately was required to make approximately $75 million in additional payments to the Trust. Most of these were anticipated by the settlement agreement itself in the event of greater-than-projected claim activity. In addition, a $25 million payment was the subject of some closely contested negotiations. The parties were not of a single mind on all questions.

One lesson worth drawing, though, is that a settlement ought to limit the areas where the parties, post settlement, may continue the adversarial process by other means. That does not necessarily mean a diminution in the defendant's role or an elevation of class counsel's. What it should mean, though, is that if a settlement is intended to achieve global peace, then the settlement's operating assumption should be that the parties will substantially lay down their arms.

Have a Strong and Engaged Supervising Judge

The settlement agreement in the Sulzer case vested the trial court with exclusive and continuing jurisdiction over questions pertaining to implementation.[15] Judge Kathleen McDonald O'Malley has proven a strong and certain leader. The court regularly provided strong guidance to the parties, including on how the agreement ought to be implemented (in careful accordance with its terms and purposes) and whether collateral attacks to the settlement might be encouraged.

The court also ruled quickly on issues as they arose. These ranged from review of insurance agreements to ruling on collateral challenges to benefit awards to resolving certain attorney fee disputes between class members and their counsel.[16]

The court's leadership gave the settlement a strong sense of direction and urgency. Whenever there was a choice between payment being made quickly or slowly, the claims administrator paid quickly. The court's ruling on whether certain claimants could challenge their benefit determinations after their settlement-prescribed administrative rights had been exhausted was careful and well-reasoned, explicitly endorsed on appeal in the U.S. Court of Appeals for the Sixth Circuit, and survived a certiorari petition to the Supreme Court.[17]

Conclusion

After eight years, 20,000 claims, and $1 billion dollars, there are surely lessons other than these that one might draw from the Sulzer settlement. And, it is true that some of the lessons from this case are those any of us might draw from litigation and law practice more generally. But, in this context and on this scale, these principles merit special consideration. ■

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Endnotes

1. *In re* Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation, 01-CV-9000 (N.D. Ohio) (O'Malley, J.).

2. The opinions expressed in this article are

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the author's and do not necessarily reflect the views of the parties, their lawyers, or the court that supervised this case.

3. Judge McMonagle engaged my former firm, Bowman and Brooke, LLP, to provide both services. Later, BrownGreer, PLC, performed those services when that firm was formed from Bowman and Brooke alumni in 2000. I continue to represent Judge McMonagle in the Sulzer matter, while BrownGreer continues to provide excellent claims administration services.

4. Class Action Settlement Agreement, § 4.6(i), http://sulzerimplantsettlement.com/article4.htm. Claims Administrator Procedure 1 set out the process for promulgating Claims Administrator Procedures. http://sulzerimplantsettlement.com/pdfs/CAP%201.pdf.

5. The Settlement Agreement is available at http://sulzerimplantsettlement.com/classactionsettlement.htm.

6. Claims Administrator Procedure 28 (APRS Fund Benefits if Revision Surgery Requires Multiple Procedures), http://sulzerimplantsettlement.com/pdfs/cap28.pdf.

7. Claims Administrator Procedure 2 (Payment of Settlement Benefit Checks to Class Members and to Attorneys Representing Class Members). The Claims Administrator Procedures are available at www.sulzerimplantsettlement.com/claimsadmin.htm.

8. Claims Administrator Procedure 6 (Claims Pursuant to Agreements Between Sulzer and Third Party Payors Against the Subrogation and Uninsured Expenses Sub-Fund).

9. Claims Administrator Procedure 9 (Contingent Fee Contracts Entered into after February 2, 2002).

10. Claims Administrator Procedure 30 (Procedures for Appealing a Final Determination).

11. Class Action Settlement Agreement, Article 4 (Claims Administration), www.sulzerimplantsettlement.com/article4.htm.

12. *See, e.g.,* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–57 (1999) (noting the requirement that dissimilarly situated class members be represented separately to ensure each subgroup's interests are adequately represented).

13. Claims Administrator Procedure 29 (Extensions from Claim Processing and Submission Deadlines for Class Members), http://sulzerimplantsettlement.com/pdfs/cap29.pdf.

14. Class Action Settlement Agreement, Article 8 (Guaranteed Payment Option), http://sulzerimplantsettlement.com/article7.htm.

15. Class Action Settlement Agreement § 9.1, http://sulzerimplantsettlement.com/article9.htm.

16. *See, e.g., In re* Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation, slip op. 1:01-cv-9000 (N.D. Ohio, Apr. 2, 2003) (MDL No. 1401) (clarifying what attorney fees plaintiffs' counsel may collect from settlement awards) (*available at* http://sulzerimplantsettlement.com/pdfs/sebastien.pdf).

17. *See In re* Sulzer Orthopedics and Knee Prosthesis Products Liability Litigation, Certified Class, et al. v. Sulzer Medica, et al., and Sulzer Settlement Trust, 398 F.3d 782 (6th Cir. 2005) (affirming district court holding regarding ineligibility of late claims and that claims administration process contractually limited to extra-judicial determinations of eligibility).

Procedural Misjoinder

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Loan of Miss., 338 F. Supp. 2d 691, 695 (N.D. Miss. 2004), Barron v. Miraglia, 2004 WL 1933225, at *2 (N.D. Tex. Aug. 30, 2004), Rudder v. Kmart Corp., 1997 WL 907916, *6 (S.D. Ala. Oct. 15, 1997), Terrebonne Parish School Board v. Texaco, Inc., 1998 WL 160919 (E.D. La. April 3, 1998), Koch v. PLM Int'l, Inc., 1997 WL 907917 (A.D. Ala. Sept. 24, 1997), *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147 S.D. N.Y. 2001)).

23. Kirkland et al. v. Wyeth et al., Eighth Circuit Court of Appeals, No. 09-1205 (consolidated with Jasperson et al. v. Wyeth et al., No. 09-1250 and Allen et al. v. Wyeth et al., No. 09-1373) (Jan. 6, 2010, slip. opinion at 19).

24. *Rutherford,* at 852–53 (*citing* Burns v. Western S. Life Ins. Co. 298 F. Supp. 2d 401 (S.D. W. Va. 2004); *In re* Rezulin, 168 F. Supp. 2d 136).

Wyeth v. Levine

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5. *Id.* at 1198.

6. *Id.* at 1204.

7. City of Joliet v. New West, L.P., 562 F.3d 830 (7th Cir. 2009).

8. 12 U.S.C.S. § 17151.

9. 42 U.S.C.S. § 1437f.

10. *Id.* at 835.

11. 71 Fed. Reg. 3934–35.

12. *Wyeth*, 129 S. Ct. at 1201–02.

13. *City of Joliet*, 562 F.3d at 835.

14. Dooner v. DiDonato, 971 A.2d 1187 (Pa. 2009).

15. *Id.* at 1190.

16. *Id.* at 1200.

17. *Id.*

18. Saleh v. Titan Corp., 580 F.3d 1, 4 (D.C. Cir. 2009).

19. Id. at *10–11.

20. Cook v. Ford Motor Co., 913 N.E.2d 311 (Ind. Ct. App. 2009).

21. *Id.* at 316

22. Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000).

23. Epstein, *supra* note 2.

