

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS
LIABILITY LITIGATION

: Case No. 1:01-CV-9000
:
: (MDL Docket No. 1401)
:
: JUDGE O'MALLEY
:
: MEMORANDUM AND ORDER
:

Class member Joseph S. Sebastien has sent a letter to the Court, asking for an explanation regarding how contingent attorneys fees are calculated in this case. Because Mr. Sebastien's question is fairly common and the answer is not straightforward, the Court takes this opportunity to issue an Order explaining the calculation. The following explanation was also provided, in somewhat different fashion, to all class members and their attorneys in the "Class Member and Attorney Guide to the Sulzer Hip/Knee Class Action Settlement" ("Settlement Guide"). See docket no. 243, Exhibit 4, at §IV.F, pp. 12-13.¹

Also, **the Court has arranged for the creation of an internet calculator**, which class members and attorneys can use to ensure the accuracy of their accounting regarding contingency fees. See

¹ The Settlement Guide may also be viewed on the internet at the Claims Administrator's website, <http://www.sulzerimplantsettlement.com>.

<http://www.sulzerimplantsettlement.com/feecalculator>.²

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Mr. Sebastien filed two Orange Forms, explaining that he underwent two Affected Product Revision Surgeries. He also indicated that he had hired an attorney, Paul Kidd, pursuant to a 33a % contingency fee contract signed before February 2, 2002.³ The Claims Administrator determined that Mr. Sebastien was entitled to immediately receive payments from the Affected Product Revision Surgery (“APRS”) Fund of \$130,000.00 per APRS, or \$260,000.00.⁴

The Claims Administrator also determined that Mr. Sebastien was entitled to receive a subsidy payment for a portion of the contingent attorneys fees he owed to Mr. Kidd. As explained in the Settlement Guide, “[t]he Sulzer Settlement Trust will pay a portion of the attorney fees owed by Class Members to their attorneys under [their] private [contingency] fee agreements.” Settlement Guide at 12. Specifically, “[a]s a benefit to the Class Member, the Sulzer Settlement Trust shall pay a portion of the

² This calculator is meant only to assist Class Members and Attorneys in understanding and implementing the terms of the Settlement Agreement. The amount of fees and expenses owed by Class Members to their attorneys, and the amount of Settlement benefits that Class Members may receive, is governed by the Settlement Agreement and any private agreement between Class Members and their attorneys.

³ Mr. Sebastien has apparently terminated his relationship with Mr. Kidd within the last several weeks.

⁴ The \$130,000 amount per APRS is the “first installment” under §3.4 of the Settlement Agreement. In some cases, including one of Mr. Sebastien’s claims, this amount is sometimes partly comprised of a \$40,000 payment made under the Guaranteed Payment Option (“GPO”). The Claims Administrator expects that there will also be a second installment per APRS, but the timing and amount of any such payment is not yet established. See Settlement Agreement §§3.4(b&c). Pursuant to standard claims administration procedures, of the \$260,000.00 paid to Mr. Sebastien so far, \$40,000.00 (the GPO payment) was made payable to Mr. Sebastien alone and mailed to Mr. Kidd; the remaining \$220,000.00 was made payable jointly to Mr. Sebastien and Mr. Kidd.

Class Member's attorney fees. This contribution to the attorney fees shall be equal to 23% of the stated benefit x 1.25." Id. at 13.⁵ Because Mr. Sebastien received a stated benefit of \$260,000.00, the Claims Administrator determined that Mr. Sebastien was also entitled to the benefit of a contribution toward his attorney fee obligations in the amount of \$74,750.00 (equal to \$260,000.00 x 1.25 x 23%).⁶

Given that Mr. Sebastien received a total of \$334,750.00 in direct cash benefits, with some of those benefits in the form of payment of contingent attorney fees subsidies, it is not obvious how to calculate what additional amount of attorney fees Mr. Sebastien might owe Mr. Kidd. The Settlement Guide, however, provides an explanation: "To calculate the [total] fee [owed] pursuant to a contingency fee contract, the Class Member's attorney shall apply the contingency percentage to the product reached by multiplying the stated benefit . . . amount by 1.25." Id. at 12; see also Settlement Agreement at §5.1 ("Payments made to Plaintiffs' Counsel for attorney fees pursuant to Sections 3.4(a), 3.5(b), 3.5(c) and 3.7 shall be set off against the total contingent fee [owed by Class Members to Plaintiffs' Counsel], and thus the obligation of any such Class Member to his or her Plaintiffs' Counsel will be offset by such amount."). Thus, the total contingency fee owed by Mr. Sebastien to Mr. Kidd, pursuant to their particular contract – ignoring, for the moment, the question of expenses – is 33.3% x \$260,000.00 x 1.25, or \$108,333.33.

Mr. Kidd has also informed Mr. Sebastien that he owes an additional \$2,484.57 for expenses,

⁵ This contribution toward a class member's attorney fee obligations is available only when the class member entered into the contingency fee contract on or before February 2, 2002. If the class member entered into the contingency fee contract after February 2, 2002, the attorney fee benefits available to that class member are as described in Claims Administrator Procedure 9, which may be viewed on the internet at the Claims Administrator's website.

⁶ The checks for \$74,750.00 in contingent attorneys fees that the Claims Administrator sent was made payable to Mr. Kidd, alone.

which Mr. Sebastien does not dispute. Because Mr. Kidd takes his expenses before applying his contingency percentage,⁷ the total contingency fee owed by Mr. Sebastien to Mr. Kidd, pursuant to their contract is actually $33\frac{1}{3}\% \times (\$260,000.00 - \$2,484.57) \times 1.25$, or \$107,298.10. In sum, pursuant to their contract, Mr. Sebastien owes Mr. Kidd \$107,298.10 in contingent attorney fees, plus \$2,484.57 in expenses, for a total of \$109,782.67.

As noted, the Claims Administrator determined that Mr. Sebastien was entitled to receive from the Settlement Trust a contribution of \$74,750.00 toward his contingency fee obligation. This means that Mr. Sebastien remains obligated, pursuant to his contract with Mr. Kidd, to pay him: (a) contingent fees of \$32,548.10 (equal to the difference of \$107,298.10 owed minus \$74,750.00 already paid); plus (b) \$2,484.57 in expenses. These two amounts total \$35,032.67.

Mr. Kidd has stated to Mr. Sebastien that he does want Mr. Sebastien to pay him the full amount of contingent attorney fees and expenses owed under their contract.⁸ This means that Mr. Kidd can legitimately demand from Mr. Sebastien, and Mr. Sebastien legitimately owes Mr. Kidd, \$32,548.10 in additional contingent attorney fees, plus \$2,484.57 for expenses, for a total of \$35,032.67. Put differently, of the \$334,750.00 in total payments from the Settlement Trust sent by the Claims Administrator to Mr.

⁷ See footnote 9 for an example of how these calculations work in circumstances where the attorney takes his expenses after applying his contingency percentage.

⁸ Many attorneys, even though they had contingency fee contracts with class members obligating the class member to pay more than the contingency fee benefits provided by the Settlement Trust, simply accepted the payments from the Settlement Trust as payment in full. These attorneys did so in recognition of two key facts: (1) in most instances, at least a portion of the work leading to the receipt of damage payments by their clients was not theirs; and (2) given the total funds available to pay damages to the entire class, their clients were not receiving full reimbursement for their injuries. To the extent counsel was retained prior to February 2, 2002, however, the willingness of an attorney to forego recovery of additional contingency fee payments from their injured clients is voluntary.

Sebastien and Mr. Kidd, Mr. Kidd can legitimately retain \$107,298.10 for contingent attorney fees, plus \$2,484.57 for expenses, for a total of \$109,782.67. The remaining \$224,967.33 belongs to Mr. Sebastien.⁹

Mr. Sebastien states that Mr. Kidd has retained in excess of the appropriate amount. Specifically, it appears that Mr. Kidd miscalculated the amount of contingency fees he is entitled to receive, applying his 33a % contingency to the entire amount of Mr. Sebastien's benefits, including the partial payment of his attorney fees ($33a \% \times (\$334,750.00 - \$2,484.57) \times 1.25$, or \$138,443.91), rather than calculating his contingency fee as directed by the Court in the Settlement Guide and §5.1 of the Settlement Agreement ($33a \% \times (\$260,000.00 - \$2,484.57) \times 1.25$, or \$107,297.99). Essentially, Mr. Kidd has mistakenly

⁹ Whether an attorney takes his expenses before applying his contingency percentage, as does Mr. Kidd, or after applying his contingency percentage, as do some other attorneys, depends on the contract between the parties and also on state law. In a hypothetical case where the attorney takes his expenses after applying the contingency percentage, and using the same figures as in Mr. Sebastien's case, the calculations would be as follows: (a) stated benefit paid by Settlement Trust is \$260,000.00; (b) contribution toward contingency fee paid by Settlement Trust is \$74,750.00; (c) total benefits paid by Settlement Trust is \$334,750.00 (\$260,000.00 + \$74,750.00); (d) total contingency fees owed to attorney under the contract is \$108,333.33 ($33a \% \times \$260,000.00 \times 1.25$); (e) amount of contingency fees still owed to the attorney under the contract is \$33,583.33 ($\$108,333.33 - \$74,750.00$); (f) expenses owed to attorney is \$2,484.57; (g) total owed to attorney under the contract is \$110,817.90 ($\$108,333.33 + \$2,484.57$); (h) total the client will receive after all contractual payments to attorney is \$223,932.10 ($\$334,750.00 - \$110,817.90$). A chart showing the formulae used to derive these figures is attached. The "internet calculator" provides for both types of contingency fee contracts (those where expenses are taken before applying the contingency percentage, and those where expenses are taken after).

taken a contingency attorney fee award on his own contingency attorney fee award.^{10,11}

As noted, the calculations here are neither simple nor intuitive, so it is not surprising that errors have occurred. Attorneys and class members should be especially careful to ensure the accuracy of their calculations and their adherence to their contracts and the Settlement Guide. To assist class members and their attorneys, a chart showing the formulae used to derive these figures is attached. Furthermore, the Court has arranged for the creation of an internet calculator, which class members and attorneys can use to ensure the accuracy of their accounting regarding contingency fees. See <http://www.sulzerimplantsettlement.com/feecalculator>.

In light of the continued confusion surrounding the calculation of contingency fees in this case, the Court **ORDERS** Mr. Kidd, and all other attorneys representing all other class members, to act promptly to ensure their accounting and disbursement of Settlement Trust payments is consistent with this Order.¹² The Court further **ORDERS** Plaintiff's Liaison Counsel and the Claims Administrator to take reasonable efforts to publish and/or distribute copies of this Order to all class

¹⁰ That Mr. Sebastien signed an "acknowledgment" of an incorrect "settlement statement" prepared by Mr. Kidd does not cure the error, nor does it waive Mr. Sebastien's entitlement to a correct accounting and payment.

¹¹ Mr. Kidd's contract with Mr. Sebastien does not provide that his contingent fee applies to all amounts recovered including any award of attorney fees. Even if it did, however, any such provision **would not be enforceable**.

¹² The Court further **ORDERS** Mr. Kidd to provide to the Court, within 14 days of the date of this Order, a statement indicating that all disbursements due Mr. Sebastien, as explained in this Order, have been made.

members who have contingency fee contracts with their own attorneys.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

CALCULATION OF CONTINGENCY FEES OWED BY CLASS MEMBERS TO THEIR ATTORNEYS

Expenses taken **BEFORE** the contingency percentage is applied.

Line	Amount	Calculation	Example
A	Amount of benefits paid by the Claims Administrator to the class member, <u>not</u> including any payments of contingent attorney fees.	Provided by the Claims Administrator.	\$160,000.00
B	Contingency percentage owed by the class member to his attorney.	Provided in the written contract between the class member and his attorney.	33a %
C	Expenses owed by the class member to his attorney.	Provided in the written contract between the class member and his attorney.	\$5,000.00
D	Amount of contingency fee benefits paid to the class member's attorney by the Claims Administrator.	$A \times 1.25 \times 23\%$	\$46,000.00
E	Amount of contingent fees contractually owed by the class member to his attorney.	$1.25 \times B \times (A - C)$ [<u>not</u> $1.25 \times B \times (A + D - C)$]	\$64,583.33
F	Amount of contingent fees the class member still owes to his attorney under their contract.	$E - D$	\$18,583.33
G	Total amount of benefits paid out to the class member, including contingent attorney fees.	$A + D$	\$206,000.00
H	Total amount contractually owed by the class member to his attorney.	$C + E$	\$69,583.33
I	Total amount of all benefits paid out by the Claims Administrator that the class member will receive, after payment of all sums contractually owed to his attorney.	$A - C - F$ or $G - D - C - F$	\$136,416.67
J	Total amount of all benefits paid out by the Claims Administrator that the attorney may retain under his contract with the class member.	$C + E$ or $G - A + F + C$	\$69,583.33

See <http://www.sulzerimplantsettlement.com/feecalculator>.

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B	Contingency percentage owed by the class member to his attorney.	Provided in the written contract between the class member and his attorney.	33a %
C	Expenses owed by the class member to his attorney.	Provided in the written contract between the class member and his attorney.	\$5,000.00
D	Amount of contingency fee benefits paid to the class member's attorney by the Claims Administrator.	$A \times 1.25 \times 23\%$	\$46,000.00
E	Amount of contingent fees contractually owed by the class member to his attorney.	$1.25 \times B \times A$ [<u>not</u> $1.25 \times B \times (A + D)$]	\$66,666.67
F	Amount of contingent fees the class member still owes to his attorney under their contract.	$E - D$	\$20,666.67
G	Total amount of benefits paid out to the class member, including contingent attorney fees.	$A + D$	\$206,000.00
H	Total amount contractually owed by the class member to his attorney.	$C + E$	\$71,666.67
I	Total amount of all benefits paid out by the Claims Administrator that the class member will receive, after payment of all sums contractually owed to his attorney.	$A - C - F$ or $G - D - C - F$	\$134,333.33
J	Total amount of all benefits paid out by the Claims Administrator that the attorney may retain under his contract with the class member.	$C + E$ or $G - A + F + C$	\$71,666.67

See <http://www.sulzerimplantsettlement.com/feecalculator>.