

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

IN RE MEDTRONIC, INC.
IMPLANTABLE DEFIBRILLATORS
PRODUCTS LIABILITY LITIGATION

MDL NO. 05-1726 (JMR/AJB)

**REPORT AND RECOMMENDATION
REGARDING DISBURSEMENT OF
SETTLEMENT PROCEEDS**

This documents relates to:
All Cases

Now before the Court is Plaintiffs' motion for disbursement of settlement proceeds

BACKGROUND

After months of negotiations, with the assistance of the Court, the parties executed a Master Settlement Agreement ("MSA") on June 4, 2007. Under the terms of the MSA, Medtronic agreed to pay \$93,750,000, which included a separate fund for eligible participating claimants (\$75,000,000) and a separate fund for common benefit attorneys' fees (\$18,750,000).

The proposed settlement was favorably received resulting in an over subscription of potential claimants. As a result, the parties started discussions to secure additional funding. Those negotiations, again with the Court's assistance, resulted in the parties executing an Amended Master Settlement Agreement ("AMSA") on September 14, 2007. The AMSA reaffirmed the basic agreements memorialized in the MSA, provided for additional funding for claimants and provided for a separate renegotiation of the common benefit attorneys' fees (not to exceed \$18,750,000) subsequent to the execution of the AMSA. Those

negotiations resulted in an agreement, subject to court approval, for the defendant to fund a separate common benefit attorneys' fees payment of \$18,250,000.

In January 2008, the Court adopted an Allocation and Resolution Plan. *See Order for Approval of Allocation and Resolution Process, In re Medtronic, Inc. Implantable Defibrillators Products Liability Litig.*, MDL No. 05-1726 (JMR/AJB)(D. Minn., January 14, 2008). The Allocation and Resolution Plan established a system, subject to the jurisdiction of this MDL Court, whereby the claims of the Participating Claimants could be quickly, consistently, and fairly reviewed and resolved by the MDL Court.

The Allocation and Resolution Plan has three components: (a) Individual Awards; (b) Enhanced Awards; and (c) a Subrogation Process. Only those Participating Claimants who were eligible for an Individual Award were eligible to submit claims for an Enhanced Award. Eligibility for payment was based on the Recommendation Form that Claimants submitted and required the completion of a Claim Form (collectively referred to herein as "Claim Materials"), together with submission of medical records and other documentation.

a. Individual Awards

Participation in, and eligibility for, an award from the Individual Award Fund was based on objective criteria supported by Claim Materials and accompanying medical records. Factors considered included: (1) the implant of one or more Recalled Device(s); (2) the explant of one or more Recalled Device(s); (3) the duration of time between the implant and explant of the

Recalled Device(s); and (4) the duration of time between the applicable Recall (i.e., the April 2004 or February 2005 Field Actions as set forth in the Scope Report) and the explant(s). Individual Awards were grouped into two categories: Category I (non-explant claims) and Category II (explant claims).

An Individual Award Fund was established to fund the Individual Awards. The proposed Individual Award Fund, as well as the base Individual Award amounts, by Category, was set forth in the Summary Sheet which was attached as Exhibit B to the Court's January 14, 2008 Order adopting the Allocation Plan.

b. Enhanced Awards

Participating Claimants who suffered documented emotional distress, additional and/or extensive hospitalizations, complications, death, extensive unreimbursed economic losses, or other casualty related catastrophic injuries could seek additional compensation through an Enhanced Award Fund. Participating Claimants could apply, and may have been eligible, for additional compensation through the Enhanced Award Fund if: (1) they satisfied the criteria for participation in the Individual Award Fund; and (2) they had a documented catastrophic or enhanced injury related to the Recall or explant of a Recalled Device. The amount for the proposed Enhanced Award Fund was set forth in the Summary Sheet which was attached as Exhibit B to the Court's January 14, 2008 Order adopting the Allocation Plan.

c. Subrogation Process - Medicare

The PSC retained The Garretson Law Firm to determine which Participating Claimants had Medicare obligations related to their Recalled Device and to facilitate reimbursement and resolution of Medicare's interests in the recoveries of Medicare-entitled participating Claimants. The amount set aside for the Medicare Fund is set forth in the Summary Sheet which was attached as Exhibit B to the Court's January 14, 2008 Order adopting this Plan.

d. Subrogation Process – Medicaid

To streamline the resolution of individual Medicaid liens for Participating Claimants, the Garretson Law Firm has utilized a Medicaid-specific “Reimbursement Model” to determine the likely course of treatment associated with each compensable injury category. For those Participating Claimants verified as Medicaid beneficiaries, claims histories are being secured from the appropriate agency and each claims history is being audited against the Reimbursement Model checklist. The Garretson firm has negotiated terms which limit the maximum lien recovery and which will serve as a preliminary set aside while the liens are individually resolved. The final lien amount (which shall not exceed the set aside amount) will be deducted from each respective Medicaid-entitled Participating Claimant's final award. If the set aside exceeds the lien, the difference will be paid to the claimant. The Garretson law firm will coordinate direct reimbursement to each Medicaid agency.

e. Subrogation Process – Private Third Party Payor Liens

Each Participating Claimant and his or her individual counsel are required to identify and determine whether any non-participating private third party payor subrogation interest exists and, to the extent such subrogation interest exists, whether those issues have been resolved. Prior to the release of Participating Claimants' total award amount, the Participating Claimant and his or her individual counsel must: (1) certify to the Special Master that subrogation liens have been satisfied; or (2) certify to the Special Master that the Garretson Law Firm has been engaged to resolve the outstanding subrogation liens; or (3) certify to the Special Master that the Participating Claimant's counsel has reviewed the contents of the Participating Claimant's file, conferred with Participating Claimant, and confirmed that no Notice of Lien or subrogation liens exist.

On February 11, 2008, the Court issued an Order appointing a Claims Review Committee to review the claim forms submitted by Claimants and make recommendations as to base allocations and Enhanced Injury Fund ("EIF") awards. The Claims Review Committee carefully reviewed the Claim Forms along with whatever supporting documentation was provided. The Claims Review Committee then submitted the recommendations to the Claimants as well as to the Court. Claimants were provided an opportunity to object to those recommendations. Seventy-nine Claimants objected to their EIF recommendation and seventeen Claimants objected to their Non-EIF recommendations.

The Claims Review Committee then filed responses to the objections. In some instances, the Claims Review Committee amended their recommendations. The Participating Claimants had the opportunity to file a reply with the Court. Several Participating Claimants agreed with the Claims Review Committee's amended recommendation and so indicated to Co-Lead Counsel.

The Court then reviewed each of the recommended allocations and each of the Objections filed by Participating Claimants, along with the Claims Review Committee's Response and the Reply.

The Court issued Report and Recommendations for the allocation of the Settlement Sums in this litigation. The Court issued a single Report and Recommendation for all Claimants that did not object to the Claims Review Committee's recommendations and a separate Report and Recommendation for each of the Claimants that objected to the Claims Review Committee's Recommendations. Of the more than 2500 claimants, only two filed objections to the Special Master's Report and Recommendations.

On July 9, 2008, the District Court adopted the Report and Recommendations [docket no. 1025] for each of the Claimants participating in the settlement that did not object to the Claims Review Committee's Recommendations. On July 30, 2008, the District Court adopted the Report and Recommendations [docket nos. 1028 through 1122 inclusive] for the claimants that objected to the Claims Review Committee's Recommendations but did not object to the Special Master's Report and Recommendations. The two claimants that

objected to the Special Master's Report and Recommendations [docket nos. 1046 and 1065] remain pending in the District Court. *See* July 30, 2008 Order at p. 1 & n. 2.

Claimants have been required to sign and submit original releases to Co-Lead Counsel who in turn has submitted these releases to Medtronic. Medtronic has approved the releases. Individual Plaintiffs' counsel have been notified if a Claimant has not submitted a release or if a release has been rejected by Medtronic. Claimants were also required to sign and submit lien certificates to Lead Counsel that certify that either no private third party payor liens exist or that counsel for the Claimant have resolved or agreed to resolve these private third party payor liens.

CURRENT MOTION

Movants have requested that the Court approve distributions of a portion of the settlement proceeds awarded by the Court to each non-objecting Claimant that has submitted a valid release and lien certificate. At this time, only a portion of the awarded amounts can be distributed in light of currently unresolved issues associated with attorneys' fees and Medicare/Medicaid set asides. Based upon all the files, pleadings, and the proceedings herein, the Court recommends the following:

1. The PSC has a pending motion for approval of the common benefit attorneys' fees. The Court's ultimate resolution of this motion may impact the private attorneys' fees. The hearing on the motion relating to attorneys' fees is set

for August 20, 2008. The Court recommends that until the Court rules on the issue of attorneys' fees (both common benefit and private) no attorneys' fees should be taken from the individual claimant's disbursements.

2. On February 27, 2008, this Court appointed Matthew L. Garretson and The Garretson Law Firm, LLC to act as a "Medicare / Medicaid Lien Administrator" ("MLA") for the Medtronic Settlement. In that Order, the Court authorized MLA to facilitate a "global" resolution to federal Medicare's (Parts A and B) interest in the recoveries of Medicare-entitled Claimants, subject to approval by the Court. Because that global resolution is not yet final, the Court hereby recommends that five percent (5%) of the total settlement be segregated and held back to ensure that proper funds are available to satisfy the global Medicare resolution.

3. With regard to potential Medicaid liens, MLA has verified directly with the Medicaid agency for each state and U.S. territory which Claimants currently are or have been entitled to Medicaid in each state/territory between the dates of implant through the date of settlement. On March 14, 2008, the MLA sent a memorandum to each respective Medicaid agency requesting that they adopt voluntary protocols to affirmatively verify and satisfy Medicaid's interest in a cost-effective, uniform basis nationwide in a manner that best serves public policy. These protocols include a "holdback" provision. That is, setting a maximum amount or "cap" in which each individual Medicaid lien can be

finalized. The Court hereby recommends a holdback of 15% of the funds awarded to those claimants to ensure that proper funds are available to satisfy the Medicaid liens.

4. The Court hereby recommends the disbursement of forty percent (40%) of the settlement proceeds allocated to each Individual Settling Claimant that has submitted a valid release and lien certification. The amounts to be distributed at this time to each individual Claimant are set forth on Exhibit A to this Order (claimants identified by claim number only).

5. The disbursements shall be made from the Settlement Fund under the terms of the Escrow Agreement. Because the individual lawyers are fiduciaries for their clients, disbursements shall be made by issuing separate checks to the individual law firm with reference to the Claimant's individual claim number on the check. The Court recommends that no attorneys' fees or expenses shall be permitted to be taken from these initial distributions.

6. By participating in this settlement, the parties agreed that all disputes would be resolved by this Court. Pursuant to Local Rule 72.2(b), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection. Written objections must be filed with the Court before August 8, 2008.

Dated: July 31, 2008

s/Arthur J. Boylan
Arthur J. Boylan
United States Magistrate Judge