

The New York Times

NEW YORK FEBRUARY 1, 2019

As Pelvic Mesh Settlements Near \$8 Billion, Women Question Lawyers' Fees

By **MATTHEW GOLDSTEIN**

When Sherise Grant filed a claim against the manufacturer of her pelvic mesh implant, she hoped to use the money from a settlement to pay for its removal.

Ms. Grant, 51, was among the millions of women around the globe whose urinary problems were treated with pelvic mesh. But not only has the surgically implanted device done little to help her, it frequently causes Ms. Grant discomfort, including pain during sex with her husband.

But the settlement wasn't enough. After lawyers' fees and other expenses, the \$12,000 payout was whittled away to only \$3,500.

Ms. Grant said she had called her lawyer's office to discuss those fees, and gotten nowhere. "They won't let me talk to the attorney," said Ms. Grant, of Hemet, Calif. "I just want everything to be fair. I think they took way more than they should have."

Litigation over pelvic mesh, also called transvaginal mesh, ranks as one of the biggest mass tort cases in United States history, in terms of claims filed, number of corporate defendants and settlement dollars. Seven medical device manufacturers, including Boston Scientific and Johnson & Johnson, are paying nearly \$8 billion to resolve the claims of more than 100,000 women.

A decade ago, doctors were quick to implant synthetic mesh to deal with health issues caused by a woman's bladder pressing against her vagina. But then women began complaining of complications like bleeding and searing pain. Lawyers aggressively advertised for women who had received mesh implants, and they signed up women by the thousands to file claims against the device manufacturers.

The result is a supersized federal court litigation that hasn't paid off as expected — the average settlement is less than \$60,000, according to documents reviewed by The New York Times and interviews with more than a dozen women. That is less than settlements reached in other mass torts, even though the jury verdicts some women have won in pelvic mesh cases suggest the figure should be higher.

And those settlements are worth a lot less after the lawyers take their shares and other fees — cuts that became unusually hefty even for the world of mass tort litigation.

Retainer agreements and confidential documents permit some lawyers to take 40 percent of each settlement, and in some cases 45 percent. And generous expense provisions allow some firms to add costs not only for meals and hotel stays but travel by private plane. Some lawyers have found yet another way to pad their bottom lines: Hire compa-

nies they have a financial interest in to review a client's medical records, a crucial part of assessing the potential value of a claim.

Now some women are considering suing their lawyers over how their cases were handled. Lawyers have begun scouting for women willing to sue, and a Dallas firm has set up a website seeking women who feel their lawyers didn't drive a hard enough bargain.

"Eight billion dollars sounds like a lot in theory, but once you start divvying it up, it's less so," said Elizabeth Burch, a professor at the University of Georgia School of Law who specializes in studying mass tort litigation and is surveying women for their views on the litigation to be used in a study.

Lawyers in the mesh litigation defended their work. They said women with more severe injuries, which required the mesh to be removed in sometimes risky procedures, received the most money.

"We did everything possible to get as many cases to trial as possible," said Clayton Clark, a partner with Clark Love & Hutson, which settled thousands of complaints and was involved in a half-dozen jury trials. "You see these giant verdicts in a number of places, and that sort of skews the thought process."

Mr. Clark, whose firm used a retainer agreement that gives it the right to "lease private aircrafts" and employ a medical records review

firm it had an ownership stake in, said the expenses charged to clients were fair. He said the fees were fully disclosed and generally reviewed by a special master working for the court.

The medical records review firm was not profitable and has since closed, Mr. Clark added. "There was no potential for double-dipping," he said.

Pelvic mesh litigation began in earnest in 2011, the year the Food and Drug Administration issued a warning about complications with some products. Studies have shown at least 15 percent of women who had mesh implants encountered problems, and more are expected to develop them in coming years. The F.D.A. is continuing to evaluate the situation and is scheduled to hold a hearing on Feb. 12 on the "risks and benefits" of pelvic mesh. Though the device has not been banned, some manufacturers have removed versions of it from the market.

Settlement details are often kept confidential by gag orders, but some women have spoken out about the offers they received.

Michelle Hedgcoth, 43, who received her settlement in 2014, said she was fortunate that her \$140,000 payout was at the higher end of the scale. But she said the implant and the surgery to remove it left her with permanent injuries and a compromised immune system because parts of the mesh are "embedded" in her body.

Ms. Hedgcoth, who lives in Manteca, Calif., with her husband and two teenage children, said that after fees and expenses, she had received about \$50,000.

"The money we are being offered is not enough for the rest of our lives," said Ms. Hedgcoth, who had to leave her job at a bill collecting

company because of her injuries. She is now on disability.

Mass tort litigations can be difficult to compare. The complications experienced by patients can vary, and so can their outcomes at trial. But the mesh settlements are notable because of their size relative to the awards granted by juries, lawyers and experts said.

To date, 32 women have gone to trial in state or federal court, and 24 have obtained verdicts against mesh manufacturers totaling \$345 million, for an average award of \$14 million, according to court filings.

Ms. Burch said a 40 percent fee — at the high end of personal injury fees — might be justified for those cases, which went to trial and yielded multimillion-dollar verdicts. But for simply settling cases, that rate is on the high side, she said.

The settlement a decade ago over complications associated with the pain medication Vioxx is a good measuring stick, Ms. Burch said. Merck, the drug's manufacturer, created a nearly \$5 billion fund, which gave an average award of \$147,000 to more than 30,000 litigants. The judge in that case capped the legal fees at 32 percent.

And higher fees are coming out of smaller settlements: Compared with other medical device settlements, the \$60,000 average for mesh cases is on the low end. In 2015, Biomet paid an average of about \$79,000 to settle just under 2,000 claims from people who had faulty hip implants, according to court filings. Six years ago, Johnson & Johnson settled claims arising from its flawed hip implant product for \$2.5 billion — or roughly \$250,000 a person.

In one pelvic mesh agreement between Boston Scientific and 3,400 women, the average payout before fees was \$53,000, documents show. Just 800 had offers of \$100,000 or

more, while roughly half received offers of \$13,000 or less. And in a \$244.7 million settlement negotiated last year between Johnson & Johnson and 4,000 women, the average offer was \$59,000, according to court documents.

Henry Garrard, a lawyer with Blasingame, Burch, Garrard & Ashley, an Athens, Ga., law firm that handled both trials and settlements and another firm that sometimes uses a private plane, said focusing on average settlements was "misleading" and ignored all the work the lawyers had done. Women who did not have the mesh removed got smaller offers because their injuries were less severe, he said.

Settlements in mesh cases have tended to be negotiated for a few thousand women at a time, as opposed to one big global deal. Most of the bulk settlements have played out in federal court under the supervision of a judge in West Virginia.

One lawyer who both took cases to trial and handled settlements said he believed many lawyers who settled cases in federal court took on too many clients to properly investigate their claims and push for adequate settlements.

"Never in the field of mass tort litigation has there been such a yawning gap between success in the courtroom and failure at the settlement table," said Shanin Specter, whose Philadelphia firm, Kline & Specter, has won more than \$140 million in jury verdicts in mesh cases.

On Thursday, Mr. Specter's firm scored one of its biggest courtroom victories yet — a \$41 million verdict against Johnson & Johnson.

Mr. Specter said he had settled about 1,500 cases at an average of \$75,000, and estimated the average settlement reached in the fed-

eral court cases was closer to \$40,000.

Given what he called the “puny” size of those settlements, Mr. Specter argued in court filings that lawyers should take less in so-called common benefit fees — up to 5 percent of the \$8 billion that will be shared among the firms that did the most work on the federal litigation. But Judge Joseph Goodwin of Federal District Court in Charleston, W.Va., rejected that argument on Wednesday and approved the 5 percent fee request.

That pool of money — roughly \$366 million — was taken out of the settlements before final checks are cut to clients, and will be split among nearly 100 firms in addition to the fees the clients paid directly.

Some law firms getting a big piece of the common benefit fund have said they will reduce the average fee they are charging individual clients to 36 percent. But that rate is still higher than the cap in the Vioxx case.

Ms. Burch, the professor surveying women involved in the cases, said some had told her that they felt pressured to accept a settlement and were not aware they could pursue their own lawsuits instead.

Barbara Shepard, 53, is considering doing just that.

She rejected a \$100,000 offer because, she said, she would have been left with almost nothing after deducting lawyers’ fees and repaying the high-interest loan she took out to cover a mesh removal operation.

Ms. Shepard, who lives in Bradenton, Fla., and drives a school bus, said that her loan carried an interest rate of about 50 percent, and that she would owe \$69,000 to the finance firm. She is considering suing the

device manufacturer and replacing her lawyers.

“The mesh didn’t do anything,” said Ms. Shepard, who had mesh implanted to treat frequent urination. “Getting the mesh out has made it worse.”