Case No. 09-1830

In The United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION,

Interested Party - Appellant,

v.

CLAIMANTS' ADVISORY COMMITTEE,

Interested Party - Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan

APPELLEE'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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MISCELLANEOUS

Rodney Huddleston & Geoffrey K. Pullum, *Cambridge Grammar of the English Language* (2002) 10, 11

Pursuant to Fed. R. App. P. 35 and 40, Appellee Claimants' Advisory Committee (the "CAC") respectfully submits this Petition for Rehearing and Rehearing *En Banc* of this Court's December 17, 2010 decision (the "Decision"). *See Dow Corning Corp. v. Claimants' Advisory Committee* (*In re Settlement Facility Dow Corning Trust*), Nos. 09-1827/1830 (6th Cir. Dec. 17, 2010) (copy attached as Ex. A).

PRELIMINARY STATEMENT

The Decision conflicts with both Sixth Circuit authority and controlling New York law by applying technical rules of grammar to isolated words and phrases of a contract without any apparent consideration of the overall purpose of the agreement or the intent of the parties. New York law has long cautioned against rigid reliance on isolated rules to impose interpretations that may be at odds with the parties' intended meaning: "Strict grammatical construction may at times defeat actual intent." *In re Gallien*, 160 N.E. 8, 16 (N.Y. 1928).

This case also presents a matter of exceptional importance because it affects literally thousands of injured women who voted more than a decade ago to accept relatively modest settlements from Dow Corning and have waited for years to receive the full amounts promised. The Decision cuts off what would likely be more than $40 million in benefits for those claimants.

The Decision reversed the District Court's holding that claimants seeking settlement benefits under Dow Corning's bankruptcy plan (the "Plan") may qualify for "Disability A" disease payments by demonstrating that they are 100% disabled in "vocation" *or* "self care," as the governing Plan language provides, but need not demonstrate 100% disability in both areas. For "technical grammatical reasons" – *i.e.*, the supposed rule that "[t]he word 'or' is normally conjunctive when introduced by 'none' or 'not'" – a panel of this Court rejected the common-sense conclusion that "or" means "or." Decision at 2, 7. The panel imposed its contrary reading based on a single citation to *Cambridge Grammar of the English Language* ("*Cambridge Grammar*"), without analyzing the more complex structure of the sentence at issue and apparently failing to consider that reading "or" as "and" conflicts with the overall structure of the disease criteria; would lead to absurd results; and would defeat a core bargain embodied in the Plan: that claims in the Settlement Facility-Dow Corning Trust ("SF-DCT") be processed under the same standards as were applied in the Revised Settlement Program ("RSP") offered by other breast implant manufacturers.

Appellee submits that, in light of these factors, the disputed language is susceptible to only one reasonable reading – the one adopted by the District Court. At best for Dow Corning, reliance on technical grammatical rules creates some uncertainty but cannot establish, as a matter of law, that the parties intended

to impose upon SF-DCT claimants a standard dramatically more rigorous than was required of virtually all RSP claimants. At most, then, the panel should have done what it did in the companion appeal, Case No. 09-1827: found the Plan's language ambiguous and remanded to the District Court for consideration of extrinsic evidence as to the parties' intent.

We respectfully suggest that the panel overstepped its institutional role by imposing its own preferred reading, based on a grammar text, rather than considering the full range of criteria that New York law deems relevant in construing a contract. New York law strongly disfavors interpreting contracts by assigning rigid meanings to words or expressions in isolation without considering the overall purpose and intent of the parties; it views grammatical construction as a potentially useful signpost, but not the be all and end all. If this Court does not conclude that New York law clearly requires a broader analysis than that applied by the panel, Appellee respectfully suggests that the Court should certify to the New York Court of Appeals the following question: whether New York law permits construction of a potentially ambiguous contract provision based solely on rules of grammar without consideration of the parties' intent as reflected in the contract as a whole and the surrounding circumstances.[1]

[1] *See* N.Y. Comp. Code R. & Regs. tit. 22, § 500.27(a) (2008) ("Whenever it appears to . . . any United States Court of Appeals . . . that determinative questions

STATEMENT OF FACTS

The Disability A standard at issue in this appeal was part of the disease criteria in the Original Global Settlement offered by breast implant manufacturers (including Dow Corning) in MDL-926. That settlement collapsed in 1995 after the MDL-926 court determined that the settlement was oversubscribed and could not pay the amounts promised. In 1996, the original settlement was replaced by the RSP, which adopted verbatim the same disease standards but offered substantially lower benefits – reducing the top payment for a Disability A claim from $1.05 million to $50,000. The RSP introduced a second, higher payment grid based on more stringent criteria. *See* Brief of Appellee Claimants' Advisory Committee ("CAC Br.") at 6-7.

The Dow Corning Plan adopted the RSP's two disease options, with medical criteria for "Disease Option I" mirroring exactly those of the original settlement. Indeed, claimants were told that, since the same criteria would apply, they could simply rely on their existing 1994 claims and medical documentation from the Original Global Settlement without having to update or supplement their submissions. *See id.* at 7-8.

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of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.").

Not only did claimants understand that the words of the criteria remained the same, they understood that claim *outcomes* in the SF-DCT would be the same as those in the RSP – a settlement with which many claimants and attorneys were familiar. *Id.* at 20. The Dow Corning Settlement Facility Agreement ("SFA") specifically stated that: "it is expressly intended that settling Breast Implant Claims shall be processed in substantially the same manner in which claims filed in the MDL-926 claims office under the Revised Settlement Program where processed," except as otherwise provided in the Dow Corning plan documents. Record Entry No. 701, Ex. C, SFA, § 4.03(a), p. 9.

The lower level disease grid adopted from the RSP and the Original Global Settlement offered three compensation levels based on degree of disability. Disability "C" and "B" were based on 20% and 35% disability, respectively, caused by a compensable condition and measured by a claimant's inability to perform "some of her usual activities of vocation, avocation, *and* self-care." *See* Record Entry No. 76, Motion of CAC for the Disclosure of Substantive Criteria, Ex. 1, p. 13 (emphasis added). In contrast, Disability "A" required a showing of 100% disability, based on a claimant's ability to perform "only a few or none of the usual duties or activities of vocation *or* self-care. *Id.* (emphasis added).

Consistent with the distinction built into the plain language, the RSP processed Disability A claims from its inception in January 1996 to at least

sometime in 1998 and perhaps as late as 2000 under the "or" standard – *i.e.*, the claimant would be found disabled by demonstrating 100% disability as to either vocation *or* self-care. Both were not required. This fact is established by overwhelming, uncontradicted record evidence, summarized in the CAC Brief at pages 11 to 18. While Dow Corning disputes some of the particulars of that evidence, it has never offered evidence establishing, to the contrary, that the vast majority of RSP Disability A claims were not decided under the "or" standard. Indeed, *in its own reply brief*, Dow Corning referred to the "or" standard as being "the MDL definition": "By the CAC's own admission, there are individuals who suffer total disability under the MDL definition who are nonetheless able to work." Dow Corning Reply Br. at 20.

The widely understood reading of the Disability A standard as requiring 100% disability in either vocation *or* self-care was eventually changed to reflect a September 1997 ruling in an individual claimant appeal – but not until at least several months later, after virtually all claims had already been processed under the old standard. Judge Sam Pointer, the MDL-926 judge, issued the ruling in his administrative appeals capacity. He wrote a brief, opaque decision that appears to require a showing of 100% disability in both vocation and self-care, based in part on a mistaken understanding that claims had always been processed under that standard. The decision was issued without briefing or argument and

was not widely circulated. So ingrained was the "or" definition that the MDL-926 Claims Office did not change its processing to reflect the new standard until virtually all Disability A claims had been processed. *See* CAC Br. at 11-13.

The change from an "or" standard to an "and" standard at the tail end of the RSP was never specifically publicized to Dow Corning claimants. Indeed, claimants were not notified of *any* material change to the RSP criteria and thus voted for the Plan with the understanding that claim outcomes would be the same in both settlements. However, it is undisputed that, in contrast to the RSP, the SF-DCT has consistently applied the "and" standard since the Effective Date in June 2004. *See* CAC Br. at 18-21.

This change has led to a dramatic drop in approval rates for Disability A claims, because now, in addition to meeting the traditional disability definition of being 100% unable to work, a claimant must demonstrate that she is virtually helpless. Among other anomalies, the SF-DCT's imposition of the "and" standard has resulted in stark inequities: Disability A claimants with implants manufactured by both Dow Corning and another manufacturer whose claims were approved in the RSP under the "or" standard were passed through for automatic payment in the SF-DCT, without having to satisfy the more rigorous "and" standard. However, claimants who have only Dow Corning implants or otherwise did not apply for benefits in the RSP are held to the new, higher standard. *See* CAC Br. at 22.

Following motion practice, the District Court held that the original "or" interpretation should govern. CAC Br. at 22-24. The court based its holding on the Plan's plain language, confirmed by the overall structure of the disability standards and the fact that the RSP had processed virtually all Disability A claims before the standard changed. *Id.* at 25-26, 50-51.

In a decision that devoted a scant page to discussing the $40 million Disability A issue, a panel of this Court reversed. The panel did not consider the structure of the other disability criteria; the fact that virtually all claims in the RSP were decided under a different standard; or the anomalous results flowing from imposition of the "and" standard. The panel simply declared, based on a lone citation to *Cambridge Grammar*, that the word "or" is "normally" viewed as conjunctive when it follows "'none' or 'not.'" Decision at 7. The panel recognized that its holding was based solely on "technical grammatical reasons" (*id.* at 2) and that the language it was construing was not "well-drafted" (*id.* at 8). However, the panel did not discuss whether the "normal" usage according to its chosen grammar manual was consistent with the intent of the parties and the purpose of the contract viewed as a whole. It merely pronounced that Dow Corning's reading of the disputed language was "correct." *Id.*

ARGUMENT

SIXTH CIRCUIT AND NEW YORK PRECEDENT REQUIRES CONTRACTS TO BE INTERPRETED BASED ON THE PARTIES' INTENT AS REFLECTED IN THE CONTRACT AS A WHOLE AND THE SURROUNDING CIRCUMSTANCES, NOT ON APPLICATION OF GRAMMAR RULES TO ISOLATED WORDS AND PHRASES

This Court has recognized several contract construction principles that should have led the panel here to engage in a more nuanced analysis rather than to use a single grammar text to fix the meaning of the Disability A standard. *See, e.g.*, *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009) (contract interpreted consistently with relative positions and purposes of parties); *Kellogg Co. v. Sablok*, 471 F.3d 629, 636 (6th Cir. 2006) (contract read to avoid absurd results); *Diversified Energy, Inc. v. TVA*, 223 F.3d 328, 339 (6th Cir. 2000) (contract read as coherent and consistent whole that gives meaning to all terms).

More specifically, there is a deep strain in New York contract law (which applies here, *see* Record Entry No. 701, Ex. B, Plan, § 6.13) that disfavors reading words and phrases in isolation, divorced from consideration of context and intention. "The entire contract must be reviewed and '[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.'" *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 920 N.E.2d 359, 363 (N.Y. 2009) (quoting *Atwater & Co. v. Pan. R.R.*, 159 N.E. 418 (N.Y. 1928)). As the New

York Court of Appeals explained further in *Atwater*: "Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish." 159 N.E. at 419 (citation omitted).

New York's highest court has also cautioned against rigid reliance on rules of grammar. In *Wirth & Hamid Fair Booking v. Wirth*, 192 N.E. 297 (N.Y. 1934), the court explained that "punctuation and grammatical construction" may often be "reliable signposts in the search" for a contract's true intended meaning. *Id*. at 299. But when "the language of a contract, read as a whole and in the light of the circumstances surrounding its execution" reflects "an intention which would be thwarted by a strict grammatical construction," rigid rules must yield: "*We refuse to follow a signpost when it appears that it points in the wrong direction.*" *Id*. (emphasis added). In short, "[s]trict grammatical construction may at times defeat actual intent." *In re Gallien*, 160 N.E. 8, 16 (N.Y. 1928).

The panel violated these cardinal principles of New York contract law by deciding the meaning of the Disability A standard based on a strict, rigid application of a general rule stated in one grammar text – which even its own authors view as an attempt to "describe" common usage rather than to "prescribe" binding rules. Rodney Huddleston & Geoffrey K. Pullum, *Cambridge Grammar of the English Language* 2 (2002).

The sum and substance of the panel's analysis was its statement that "[t]he word 'or' is *normally* conjunctive when introduced by 'none' or 'not.'" Decision at 7 (emphasis added). Even on its own terms, this analysis is incomplete. The language at issue is not as simple as the one example the Court gives: "'None of the teachers or students will be at the school on July 4.'" *Id.* Rather, the relevant language is embedded in a more complex sentence: "An individual will be considered totally disabled if she demonstrates a functional capacity adequate to consistently perform none or only a few of the usual duties or activities of vocation or self care." Application of the grammar rule cited by the panel would suggest that "none or only a few" renders the *first* "or" in the sentence ("usual duties *or* activities") conjunctive. But the "or" that matters here ("vocation *or* self care") comes later in the sentence, as part of a second, distinct prepositional phrase. There is no reason to assume, even viewing the language in isolation, that the second phrase was intended to be rendered conjunctive as well. As *Cambridge Grammar* itself acknowledges, "a negative does not always have scope over a following subclausal coordination." *Id*. at 1298.

Moreover, even a rule that "normally" applies may or may not control if consideration of the larger contractual context suggests a different meaning. Here, a number of factors point decisively towards the reading advanced by the CAC – namely that the parties intended "or" to mean "or":

- *First*, the non-parallel structure of the overall disability standard suggests that the parties deliberately selected "or" for Disability A to contrast Disability B and C, which both use the word "and" to indicate a requirement of impairment in *both* spheres. *See* CAC Br. at 33.

- *Second*, the "or" standard comports with the parties' expressed intent – on which claimants relied in voting on the Plan – that claim outcomes be the same in the SF-DCT as they were in the RSP. *See* CAC Br. at 18-21.

- *Third*, the parties could not have intended the stark anomaly of paying thousands of multiple manufacturer pass-through claims based on one standard while holding Dow Corning-only claimants to a much stricter standard. *See* CAC Br. at 35-36.

- *Fourth*, the panel's reading would essentially write the vocation test out of the guidelines, because a claimant unable to dress, feed, bathe, groom, or toilet without help is highly unlikely to be able to work. *See* CAC Br. at 35.

- *Finally*, the Court's holding that the "and" reading is the *only* possible one is most remarkable in light of the undisputed fact that the parties to the RSP embraced a *contrary* reading until Judge Pointer belatedly changed it – a change that was not yet generally known when the Plan documents were drafted. CAC Br. at 40-41. This is a powerful indicator of intended meaning that commands consideration under New York law: "[E]ven where the writing is not

ambiguous on its face, the circumstances under which the parties contract may be looked to . . . to indicate the proper choice of possible meanings; and the common knowledge and the understanding of the parties is sometimes such a circumstance." *Rasmussen v. N.Y. Life Ins. Co.*, 195 N.E. 821, 822 (N.Y. 1935) (quoting Restatement (First) of Contracts § 242).

The CAC respectfully submits that the factors discussed above render the disputed language unambiguous *in favor* of the "or" construction. But, at minimum, these factors raise a serious question as to whether the meaning derived by the panel from its isolated application of a grammatical rule reflects or frustrates the parties' intent. The meaning of the Disability A standard is thus at least ambiguous, and, if the panel was not prepared to affirm the District Court's interpretation, the matter should have been remanded on the same terms as the accompanying appeal regarding the definition of "Breast Implant."

This conclusion is strengthened by the panel's own observation that the relevant language is not "well-drafted." Decision at 8. New York courts have recognized that poorly drafted language may be ambiguous as a matter of law. *See Francois v. Sulney*, No. 2004-254 K C, 2005 WL 911405, at *1 (N.Y. App. Term Apr. 18, 2005) (purported agreement "written in poor English" and "ambiguous as a matter law"). While this factor alone may not be dispositive here, the panel's recognition that the Disability A language is less than a model of clarity undercuts

its conclusion that the intended meaning may be discerned through mechanical application of a grammatical standard. If the language in question is drafted as poorly as the panel believes it is, then the parties may, in essence, have triggered application of the supposed "rule" converting "or" to "and" entirely by accident and without intending to convey that meaning.

The panel's truncated, technical analysis is inconsistent both with this Court's own contract construction cases and New York law's deep skepticism of rigid reliance on technical rules and definitions in seeking to discern the true meaning of contract language. As Judge Learned Hand famously observed in the context of statutory construction, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945); *see also Spencer v. Childs*, 134 N.E.2d 60, 61 (N.Y. 1956) (quoting Judge Hand's "fortress" observation in context of construing will).

Respectfully, even if *Cambridge Grammar* is a valid source for discerning what the parties intended in drafting the Disability A standard, it is far from the only source, and New York law cautions specifically against undue reliance on abstract, technical rules. By imposing its preferred reading of disputed

Plan language based on a single text, the panel overstepped its role. Appellee respectfully suggests that, if the Court does not agree that the New York authorities cited above require either affirmance or remand for further proceedings, the Court should certify a question to the New York Court of Appeals pursuant to § 500.27 of that court's rules: whether New York law permits construction of a potentially ambiguous contract term based solely on a grammar manual without consideration of whether the suggested reading is consistent with the parties' intent as reflected in the contract as a whole and the surrounding circumstances.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court order rehearing or rehearing *en banc*.

Dated: December 31, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 31, 2010, I electronically filed a copy of the foregoing Petition for Rehearing and Rehearing *En Banc* with the Clerk of the Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

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