Case No. 09-1827

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

BRIEF OF APPELLEE CLAIMANTS' ADVISORY COMMITTEE

Dianna Pendleton-Dominguez
LAW OFFICE OF DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717

Ernest Hornsby
FARMER, PRICE, HORNSBY & WEATHERFORD LLP
100 Adris Court
Dothan, AL 36303
(334) 793-2424

Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Counsel for the Claimants' Advisory Committee

STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, the Claimants' Advisory Committee makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100 (telephone)
(212) 715-8000 (fax)
jtrachtman@kramerlevin.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Oral argument will allow the attorneys for the parties to address any outstanding factual or legal issues that the Court deems relevant and will assist the Court in its decision.

STATEMENT OF THE ISSUE FOR REVIEW

Whether the District Court abused its discretion or clearly erred in determining that the broad definition of "Breast Implant" contained in Dow Corning's Amended Joint Plan of Reorganization (the "Plan") embraces tissue expander breast implants where (1) such implants meet every element of the Plan's definition; (2) such implants from other manufacturers were treated as eligible breast implants in the MDL-926 Revised Settlement Program ("RSP"), which served as the model for the Dow Corning settlement, and in other similar breast implant bankruptcies and settlements; and (3) the Plan, Disclosure Statement, and other Plan documents contained no language that would have informed personal injury claimants that the Plan would treat such implants differently.

STATEMENT OF THE CASE

Dow Corning's appeal challenges the District Court's straightforward interpretation of broad, inclusive Plan language that — consistent with claimant expectations — treats Dow Corning's tissue expander breast implants exactly as other manufacturers' similar products were treated in the RSP, which served as the template for the settlement embodied in Dow Corning's Plan.[1] In a nutshell, the definition of "Breast Implant" embraces all medical products manufactured by Dow Corning and intended for implantation in the breast consisting of a silicone elastomer filled with silicone gel or (like tissue expanders) saline solution. The products at issue meet that definition.

Dow Corning seeks to ignore the plain language of the Plan and to limit the Plan's definition to only those breast implants designed and intended for "permanent" implantation to accomplish aesthetic results. This language is not included in the definition of "Breast Implant" or anywhere else in the Plan or Disclosure Statement. Nor is this limitation inherent in the logical generic meaning of "breast implant," which is simply a medical product designed for implantation in the breast. As a matter of plain language analysis, any further limitation on the meaning of the term must come from the Plan definition itself.

---

[1] Abbreviated terms not otherwise defined have the same meanings defined in Dow Corning's opening brief ("DCC Br.").

The extrinsic evidence only confirms the meaning of the plain language. Tissue expander breast implants were, in fact, treated as eligible breast implants both in the original global settlement in which Dow Corning participated and in the RSP.[2] They were also treated as breast implants in three other contemporaneous programs of other breast implant manufacturers: the Bioplasty bankruptcy distribution; the Mentor mandatory limited fund settlement; and the Inamed mandatory limited fund settlement. Since Dow Corning claimants were told during the Plan solicitation process that the Dow Corning settlement would track the RSP criteria and processing protocols and conversely were *not* told that the tissue expander breast implants would be treated any differently under the Plan, the District Court's reading is not only the most logical one — it is also obviously the one shared by claimants in voting to support the Plan. Nor would claimants have inferred, in this context, some categorical distinction between "permanent"

---

[2] The RSP materials are entitled "Breast Implant Litigation Notice" and repeatedly refer to all eligible implants as "breast implants." Exhibit G to the RSP lists eligible breast implants and includes 15 references to tissue expander breast implants made by other manufacturers, all of which were eligible for benefits. *See* Breast Implant Settlement Notice, *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.*) *(MDL 926)*, Case No. CV 94-P-11558-S, Master File No. CV 92-P-10000-S (N.D. Ala.), *available at* http://www.claims office-926.com/pdf/mdl926_breast_implant_litigation_notice.pdf. *See also* Order No. 27, *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.*) *(MDL 926)*, Case No. CV 94-P-11558-S, Master File No. CV 92-P-10000-S (N.D. Ala. Dec. 22, 1995), *available at* http://www.fjc.gov/BREIMLIT/ ORDERS/order27.rtf.

implants and tissue expander implants. Claimants were well aware that no breast implant is "permanent" — hence, the need for and inclusion of the Rupture and Explantation Benefits in the Plan.

Dow Corning further seeks to bolster its faulty "plain language" reading with a series of circumstantial arguments that distort the structure and purpose of the Plan, mischaracterize the treatment of tissue expander breast implants under the RSP, and unfairly suggest that claimants are taking inconsistent or illogical positions. In reality, treating tissue expander implants as what they are — a type of saline breast implant — makes sense under the Plan and conforms to the expectations and understanding of the parties.

A. Statement of Facts

Dow Corning's statement that its Plan "had nothing to do with tissue expanders" (DCC Br. 10) is misleading. Dow Corning's bankruptcy was triggered by the massive liability it faced for claims in the original global settlement that collapsed in 1995, and it is undisputed that the multi-district litigation and global settlement *included* tissue expander breast implants. In any event, the purpose of Dow Corning's Plan was to resolve *all* claims against Dow Corning's Estate (including those based on implants that were part of the original global settlement, *i.e.*, silicone gel *and* saline implants like the tissue expanders at issue here); other implanted medical products; and liability based on any other ground. *See* Record

Entry No. 700, Ex. A, Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization ("Disclosure Statement"), pp. 16-19 (charts showing treatment of all classes of claims).

A key premise of the Plan, which was communicated prominently to personal injury claimants when Dow Corning solicited their support for confirmation, was that the criteria to qualify for payment and the procedures used to resolve breast implant claims were based largely on the RSP. *Id.* at 1, 2 ("The settlement process for Breast Implant Claims is based largely on the criteria and procedures used to resolve breast implant claims in the consolidated breast implant litigation pending in the United States District Court for the Northern District of Alabama (the 'MDL 926 Court')."). Indeed, the parties stated in the Settlement Facility Agreement ("SFA"): "It is expressly intended that the 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 were processed," *except as otherwise provided in the Dow Corning Plan documents*. Record Entry No. 700, Ex. C, SFA, § 4.03. Significantly, the Plan documents do not contain any provisions stating that tissue expander breast implants would be treated differently from similar claims in the RSP, and Dow Corning does not point to any such provision.

The Plan offered a menu of settlement options to personal injury claimants with implanted medical products, including those with Breast Implants in Classes 5, 6.1, and 6.2. The Plan, in turn, defines "Breast Implant" broadly: "all silicone gel and saline-filled breast implants with silicone elastomer envelopes manufactured and either sold or otherwise distributed by the Debtor." Record Entry No. 700, Ex. B, Plan, § 1.17. Within this broad definition, the Plan offered different settlement options to claimants with silicone gel versus saline-filled implants, and these different treatments largely track the treatment of corresponding claims in the RSP.

First, all Breast Implant claimants were offered a disease settlement option, with settlements ranging from $10,000 to $300,000 (including premium payments). *See* Record Entry No. 700, Ex. D, Dow Corning Settlement Program and Claims Resolution Procedures ("Annex A"), § 6.02(d)(vi). The disease settlement option was a broad, inclusive resolution of a large number of claims that did not distinguish between saline and gel-filled implants even though gel implants received greater focus in the pre-bankruptcy litigation and epidemiology. Similarly, in the RSP, the settlement on which the Plan was based, tissue expander breast implant claimants are eligible for disease payments.

Second, a rupture benefit of $25,000 (including premium) was offered *only* to silicone gel Breast Implant recipients. *See id.* at § 6.02(a)(iii)(3). As was

the case in the RSP, no rupture settlement was offered to recipients of saline-filled implants, including tissue expander implants, because such claimants did not face the medical risks and injuries caused by the leakage of silicone gel into the body.

Third, Breast Implant recipients were offered a one-time "explantation" payment of $5,000 to cover medical expenses in connection with the removal of a Dow Corning Breast Implant between January 1, 1991 and the tenth anniversary of the Effective Date of the Plan. This benefit is available to all claimants who had an implant implanted in the breast, except for those who thereafter received a replacement silicone gel implant. *See id.* at § 6.02(c). In the RSP, claimants who had a tissue expander implanted in the breast removed during the applicable time frame are eligible for the Explantation Payment.

Dow Corning manufactured more than 250 different types of tissue expander implants, but only three were designed for use in the breast, and those are the only products at issue here. *See* Record Entry No. 673, Memorandum Opinion and Order Regarding Tissue Expander Issue ("Opinion"), p. 6. It is not disputed that Dow Corning's tissue expanders, marketed under its SILASTIC brand name, consisted of silicone elastomer shells that were implanted into the body and then filled with saline solution. *See id.* at 4-5; Record Entry No. 40, Motion of Claimants' Advisory Committee to Interpret the Amended Joint Plan § 1.17 Regarding the Definition of "Breast Implant" ("CAC Motion"), Ex. 1. The Record

contains a product label for one of the three designs at issue that specifically refers to the product as a "Tissue Expander Implant, breast design." *Id.*, Ex. 2.

The "SILASTIC" brand name, which Dow Corning used both for tissue expander breast implants and for other types of breast implants, is included in Schedule I to SFA Annex A, which lists eligible Breast Implant product and brand names. Thus, assuming that tissue expanders otherwise meet the definition of a Breast Implant, they will qualify for payment under the Breast Implant Settlement Option if a claimant can demonstrate that her implant was marketed under the "SILASTIC" brand name.

As Dow Corning concedes (DCC Br. 35 n.18), other manufacturers' tissue expander implants were treated as breast implants in the RSP. *See also* Record Entry No. 40, CAC Motion, Ex. 3 (statement by RSP Claims Administrator to SF-DCT Claims Administrator that "[t]issue expanders were treated like implants for purposes of disease claims [in the RSP]"). Annex A of the SFA republishes Exhibit G to the RSP, a long list of products covered by the RSP including at least 15 implant models described as being a "tissue expander" or "expander." *See* Record Entry No. 700, Ex. D, Annex A, pp. 79-84. Since the

RSP was solely a breast implant settlement, each of these implant products was of necessity treated as a breast implant for purposes of the RSP.[3]

Three other breast implant mass tort resolutions also arising from MDL-926 and contemporaneous with the RSP similarly treated tissue expander implants as breast implants. In the first two, the MDL-926 Court entered an order on July 26, 1996 approving an attached Notice of Proposed Distribution Plan for the Mentor limited fund settlement and the separate Bioplasty bankruptcy Settlement Funds. The notice expressly provided that "[t]hroughout this Notice and on the attached Claim Form, the terms 'breast implant' and 'implant' include both silicone-gel and saline-filled breast implants, and also include 'tissue expanders.'" *See* Notice at 1 n.1, *Butler v. Mentor Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.) (MDL-926)*, Case No. 93-P-11433-S, Master File No. CV 92-P-10000-S (N.D. Ala. July 26, 1996), *available at* http://www.fjc.gov/BREIMLIT/ORDERS/notice33.rtf. The third settlement involved The INAMED Corporation, and it also expressly provided that "'Breast Implant' shall mean any breast implant device containing or consisting of saline, silicone, silicone gel and/or elastomer made of silicone, including devices designed for temporary

---

[3] Dow Corning notes that two of these listed tissue expander implants were "hybrid" products that could be converted for permanent implantation (DCC Br. 35 n.18), but cites nothing in the record to support its assertion that "many" of the included products fell into this category.

implantation in the breast (*i.e.*, tissue expanders)." *See* Order at 2, *Altrichter v. INAMED Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.) (MDL-926)*, Case No. 97-P-11441-S, Master File No. CV 92-P-10000-S (N.D. Ala. June 2, 1998), *available at* http://www.fjc.gov/BREIMLIT/ORDERS/inamed.rtf.

The Dow Corning Plan offers separate (and generally lower) settlement amounts for claimants with certain specific types of non-breast implants, including implants designed for the hip or knee joint, chin, nose, wrist, fingers, temporomandibular joint ("TMJ"), and several other parts of the body. These "Other Products" are listed in specific detail by particular brand name, product name, and size. *See id.* at 63-75. The majority of these products were made of hard plastic silicone, and claimants who received these products were offered settlements only for implant failure or inflammatory foreign body response and not systemic disease. *See id.* at 23-25.[4]

All provisions in the Plan would lead a claimant to believe that tissue expander breast implants were included in the definition of "Breast Implant" and thus eligible for benefits in Class 5 or 6. Nothing in the Plan or Plan documents communicated anything contrary or noted what would have been a major deviation

[4] A relatively small number of covered other products (*e.g.*, testicular implants) contain silicone gel and are offered a settlement benefit based on rupture. *Id*. at 29-30.

from the RSP, about which claimants were entitled to be informed before casting their ballots.[5]

In addition, the Implant Proof of Claim Form used to register personal injury claimants in the Dow Corning bankruptcy did not distinguish between "Breast implants" and "tissue expanders." *See* Record Entry No. 57, Response of Claimants' Advisory Committee to Motion of Dow Corning Corporation ("CAC Response"), Ex. 2 (Proof of Claim Form). Question 10 of the Proof of Claim Form asks claimants to check a box to identify the type of implant they have, providing the following choices:

1. Breast Implant
2. Raw Materials supplied by Dow Corning and used in Implants made by other companies
3. TMJ — Silicone Temporomandibular Joint Corrective Surgery
4. Chin/Other Facial Implant
5. Testicular/Penile Implant
6. Silicone Fluid Injection
7. Contraceptives implanted in upper arm
8. Silicone Small Joint Orthopedic — Finger, Toe, Wrist, Other
9. Metal Large Joint Orthopedic — Hip, Knee, Other
10. Unknown
11. Other

---

[5] Indeed, the only specific reference to tissue expander implants in the Dow Corning Plan documents expressly includes them as "breast implant products." *See* Record Entry No. 700, Ex. D, Annex A, p. 77 (stating that for purposes of Class 7 settlement, brand/manufacturer names listed on RSP Exhibit G, including 15 types of tissue expander implants, "shall identify a *breast implant product*") (emphasis added).

Id. The Proof of Claim Form did not distinguish between tissue expander breast implants and other types of breast implants, and it contains no other category that appears to include them. As a result, many claimants with tissue expander breast implants apparently checked the "breast implant" box, on the assumption that these implants were being treated in the same manner as such products were treated in the RSP. *Id.* at 7.

B. Proceedings Below

In connection with implementing Dow Corning's Plan, Dow Corning and the CAC stipulated to procedures for resolving disputes regarding interpretations of the Plan. *See* Record Entry No. 53, Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan, dated June 10, 2004 ("Plan Interpretation Stipulation"). Section 2.01 of the Plan Interpretation Stipulation implements SFA § 5.05 by providing that disputes over the interpretation of the SFA or Annex A be submitted, first, to the Claims Administrator and then, after the Claims Administrator either rules or declines to rule, to the District Court. The parties agreed to preserve the right to appeal from the District Court's interpretation, but expressly stipulated to limit the scope of that review: "To the extent permissible, the parties agree that the standard of review for any findings of the District Court

arising out of § 2.01 of this agreement shall be clearly erroneous." *See id.*, Ex. A, § 2.01(d)(5).

Pursuant to SFA § 5.05 and the stipulated procedures, the instant dispute was submitted first to the Claims Administrator, who held a hearing on the record but subsequently declined to rule, and then to the District Court for decision through cross-motions by Dow Corning and the CAC.

The District Court held that the Plan's broad definition of "Breast Implant" embraces tissue expander implant products designed for implantation in the breast. The court found, first, that there was no dispute as to several elements of the Breast Implant definition: the products at issue were produced by Dow Corning and have a silicone envelope. *See* Record Entry No. 673, Opinion, p. 5. The District Court further found that there was no dispute that the tissue expander implants were filled with saline. The court rejected Dow Corning's argument that this element was not satisfied because tissue expanders were filled with saline after implantation and had an externally accessible valve. *Id.* at 5-6. The court noted that certain other saline implants are also filled at the time of implantation rather than manufacture, and in any event concluded that the Plan's definition of Breast Implant "makes no mention of when the implant is filled with saline." *Id.* at 6. The court thus found tissue expander implants to satisfy all elements of the Breast Implant definition.

The District Court then considered and rejected several additional arguments by Dow Corning as to why tissue expander implants were categorically not "breast implants" and thus, by definition, could not be "Breast Implants." The court found that differences in functionality between tissue expanders and other breast implants were not relevant because "nothing in the 'Breast Implant' definition requires that an implant be implanted for a long term period." *Id.* at 7. The court also rejected Dow Corning's suggestion that tissue expanders could not satisfy the definition because they were not commonly referred to as "breast implants" by medical professionals and by Dow Corning itself — noting that "[t]here is no definition within the 'Breast Implant' definition as to the meaning of the term 'breast implant' in lower case." *Id*. at 7-8.

The District Court further rejected Dow Corning's argument that the parties' failure expressly to include tissue expander implants within the definition of "Breast Implant" indicated an intention to exclude them. The court noted that "tissue expanders" were also not expressly mentioned in the much more detailed definition of "Other Products," despite the parties' recitation in that definition of many other different types of implants used in other parts of the body. *Id.* at 8-9.

The District Court went on to discuss the parties' arguments regarding the treatment of tissue expander implants in the RSP, but ultimately concluded that it did not have to rely on such evidence because "tissue expander[s] specifically

designed for implantation in the breasts meet the definition of 'Breast Implant' under Section 1.17 of the Plan." *Id.* at 11-12. The court thus granted the CAC's motion, denied Dow Corning's motion, and ordered the SF-DCT Claims Administrator to treat as "Breast Implants" the three specific styles of tissue expanders designed to be implanted in the breast. *Id.*

SUMMARY OF ARGUMENT

The District Court did not clearly err or abuse its discretion in finding that the Plan's definition of "Breast Implant" included Dow Corning tissue expander implants intended for implantation in the breast. The Plan definition is facially broad, embracing all breast implants manufactured by Dow Corning and consisting of silicone elastomers that are filled with saline solution. Dow Corning concedes that tissue expander implants meet most elements of this definition, but argues that only "permanent" implants can be considered "breast implants" in the first place. Such limitation is neither inherent in the logical generic definition of "breast implant"— a medical product designed to be implanted in the breast — nor consistent with the understanding of the parties. Other manufacturers' tissue expander breast implants were treated as breast implants in the RSP, and claimants were told that the Dow Corning settlement and criteria would be based on that prior settlement. Differences in product design and purpose between "permanent" breast implants and tissue expander implants do not rebut the presumption that the

latter products would be treated as they were in the RSP or establish that the parties understood that tissue expanders now were excluded from the Plan definition of "Breast Implant."

The inclusion of tissue expander implants within the definition of Breast Implants is not illogical under the Plan's settlement benefit scheme. Because tissue expander implants are a type of saline implant, they are ineligible for rupture benefits, and there is nothing illogical about including them for explantation benefits if they otherwise meet the Plan criteria. Including a small number of tissue expander implant claims along with a greater number of other saline implant claims in the disease option is consistent with the Plan's purpose to bring closure to all of Dow Corning's product liability exposure.

Dow Corning's product identification criteria do not exclude tissue expander implants from being treated as Breast Implants because tissue expander implants were sold under the listed "SILASTIC" brand and otherwise meet the definition of "Breast Implant." Tissue expander implants are neither enumerated in the detailed definition of "Other Products" nor offered an "Other Products" settlement. Although the list of products covered by the definition of "Other Products" is not exhaustive, the definition does expressly exclude "Breast Implants." Read together, the Plan's definitions and settlement options support the District Court's ruling because claimants would more reasonably assume that

tissue expander implants were being treated as Breast Implants, as they were in the RSP, rather than being excluded from all settlement offers and lumped with claims such as those based on unauthorized (and illegal) injection of silicone fluid.

The lack of specific focus on tissue expander implants at Plan confirmation does not establish that they were meant to be excluded from the definition of Breast Implant and denied all recovery. Rather, it is consistent with the parties' understanding that the relatively small number of such claims would be included as Breast Implant claims as they had been in the RSP and would have a negligible impact on the $1.95 billion net present value Settlement Fund.

STANDARD OF REVIEW

As Dow Corning acknowledges, a decision interpreting a confirmed plan is reviewed under an "abuse of discretion" standard. *See In re Dow Corning Corp.*, 456 F.3d 668, 675-76 (6th Cir. 2006). Dow Corning argues, however, that this standard does not apply to appeals concerning a court's "legal conclusions" based on unambiguous plan language. DCC Br. 17. But this Court has expressly *rejected* this approach, reviewing *de novo* only decisions interpreting the Bankruptcy Code, not those that merely interpret or apply plan language (ambiguous or not): "[I]f a bankruptcy court's interpretation of a plan does not require interpretation of the Bankruptcy Code, review for abuse of discretion is

appropriate." *In re Dow Corning*, 456 F.3d at 675; *see also In re Terex*, 984 F.2d 170, 172 (6th Cir. 1993).

Dow Corning itself advocated the correct standard in a brief filed last year: "The District Court's decision here was based on the plain language of Dow Corning's Amended Joint Plan of Reorganization. It is therefore reviewed for an abuse of discretion and must be accorded 'significant deference.'" Brief of Appellee at 12, *Clark-James v. Settlement Facility Dow Corning Trust*, No. 08-1633 (6th Cir. Dec. 23, 2008) (*citing In re Dow Corning Corp*. and *Terex*).

Now that it is the appellant, Dow Corning argues that no deference is due because Bankruptcy Judge Spector, rather than Judge Hood, initially confirmed the Plan. Even if Dow Corning is not estopped from playing fast and loose with the Court on this point, Judge Hood's reading of the Plan language is entitled to deference. Judge Hood has been overseeing the Dow Corning bankruptcy since 1995. She sat on the bench with Judge Spector during the 1999 confirmation hearing and, when Judge Spector's term expired in 2001, withdrew the reference and has sat as the court of original jurisdiction ever since — presiding over Plan implementation in 2004 and overseeing operation of the Settlement Facility. Her considerable familiarity with the parties, their goals and

expectations, and the purposes of the Plan cannot be analogized to a district court sitting in an appellate capacity.[6]

Moreover, the parties themselves agreed, in the Plan Interpretation Stipulation, that the District Court's Plan interpretation "findings" be subject to review only on a "clearly erroneous" basis. *See* Record Entry No. 53, Ex. A, Plan Interpretation Stipulation, § 2.01(d)(5). Dow Corning has argued that "findings" should be limited to formal findings of fact, but that would be a nonsensical reading of the provision, since that standard of review would apply in any event. Rather, the Stipulation reflects the parties' intention to assure greater predictability by creating a broader presumption in favor of the District Court's Plan interpretations than might otherwise apply.[7]

---

[6] Dow Corning strangely suggests that the District Court is entitled to no deference because it had "applied *de novo* review to a decision of the SF-DCT Claims Administrator." DCC Br. 19 n.10. But as Dow Corning knows, the Claims Administrator *declined* to rule, so the District Court could not have decided the matter other than *de novo*. Indeed, it is precisely *because* Judge Hood considered the matter *de novo*, rather than in an appellate capacity, that her decision is entitled to ordinary deference.

[7] Dow Corning may further argue that litigation parties may not "stipulate" to the standard of review, citing *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006). But that case held only that parties may not bind a court merely by agreeing in their appellate briefs to a particular standard of review. *Id.* It does *not* bar parties structuring a comprehensive settlement from setting standards to govern future dispute resolution.

ARGUMENT

I.

THE DISTRICT COURT'S FINDING THAT THE BROAD DEFINITION OF "BREAST IMPLANT" EMBRACES TISSUE EXPANDER IMPLANTS DESIGNED FOR IMPLANTATION IN THE BREAST WAS NEITHER CLEARLY ERRONEOUS NOR AN ABUSE OF DISCRETION

The District Court correctly applied basic contract principles to determine that the Plan's definition of "Breast Implant" includes tissue expander implants. *See In re Dow Corning Corp.*, 456 F.3d at 676 (interpretation of confirmed Plan "analogous in many respects to the construction of a contract," although court's application of those principles is reviewed "with significant deference"). The court's interpretation is consistent both with the plain language of the Plan and with the understanding and purposes of the parties. *See Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009) (contract interpreted consistently with relative positions and purposes of parties) (cited by appellant).

As noted above, the definition of Breast Implant under the Plan is broad and inclusive. It includes *all* Dow Corning breast implants with silicone elastomer envelopes that are filled with either saline or silicone gel. The definition neither requires that an implant be employed for a particular purpose (*e.g.*, augmentation versus reconstruction versus tissue expansion) nor requires that an implant be implanted for any particular minimum length of time. As a result,

tissue expanders intended for implantation in the breast fit comfortably within the definition of "Breast Implant."

Dow Corning does not seriously dispute that tissue expander implants meet the elements of the Plan definition: The products in question obviously were manufactured by Dow Corning and consist of a silicone elastomer that is filled with saline. Although Dow Corning quibbled below over *when* the elastomer was filled with saline, it appears to accept on appeal that this element of the definition is met as well. *See* DCC Br. 23-24.

On appeal, Dow Corning relies principally on the argument that tissue expander implants cannot be described as "breast implants" and thus cannot be "Breast Implants" under the Plan. Dow Corning offers a lengthy exegesis on the functional differences between tissue expander implants and other breast implants, based on an affidavit by a longtime Dow Corning employee, and argues that doctors and other professionals do not refer to the former as "breast implants." DCC Br. 3-10. Relying on cases holding that undefined terms in statutes should be given their commonly understood meanings, Dow Corning argues that "breast implant" has a meaning as clear and universal as the terms "employee," "bank," and, most absurdly, "apple." *Id.* at 21-25.

But the cases Dow Corning cites do not support its attempt to impose its specific, preferred definition of "breast implant" to restrict the broad definition

provided by the Plan. Instead, those cases suggest that where a statute circularly includes a defined term as part of its own definition, that term should be given the *broadest* and most general meaning rather than a narrower meaning importing one party's desired limitations. For example, in *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009), the court rejected the argument that the term "employee" should be read to refer only to full time workers; instead, the court applied the broadest dictionary definition of "employee" as someone who works for another in return for compensation. *Id.* at 1355-56. Similarly, in *Enercon GmbH v. International Trade Commission*, 151 F.3d 1376 (Fed. Cir. 1998), the court rejected an attempt to engraft onto the definition of the term "sale" an inherent requirement that title to specific goods pass from the buyer to the seller at the time of the transaction. Again, the court applied a broader definition embracing all agreements to transfer title to property in return for a price. *Id.* at 1382.

Consistent with these cases, the District Court rejected Dow Corning's attempt to limit the lower-case term "breast implant" to only certain *types* of breast implants (*i.e.*, those intended for permanent implantation to achieve aesthetic results). Instead, the court correctly embraced the broadest generic definition of the undefined term: a medical product intended for implantation in the breast. Tissue expander implants obviously meet this definition, and any further limitation of the scope of implants included within the defined term "Breast Implant" must be

derived from the Plan definition itself. The plain language of the Plan thus supports the District Court's conclusion.

But even if the potential scope of the term "breast implant" were ambiguous, the question would not be whether the world at large commonly refers to tissue expander implants as "breast implants" (as might be the issue in a statutory construction case) but how that term was understood by the *parties to this contract* — the representatives who negotiated to base the Dow Corning settlement on the RSP, and the thousands of breast implant recipients (including tissue expander implant recipients) who voted to accept Dow Corning's Plan. It is from *their* perspective that the meaning of "breast implant" would have to be considered. *See, e.g., Winnett*, 553 F.3d at 1008 (contract must be construed consistently with the "relative positions and purposes of the parties") (citation omitted); *Bank of N.Y. v. Janowick*, 470 F.3d 264, 270-71 (6th Cir. 2006) (contract construed to effectuate intent of parties in light of circumstances and object of contract).

Here, as demonstrated above at 4-12, the parties understood the following:

- Tissue expander implants intended for implantation in the breast were treated as breast implants and were eligible for disease payments in the RSP as well as in three other contemporaneous breast implant claim programs.

- The original Dow Corning proof of claim form specifically listed breast implants and several other types of implants, but contained no separate listing for tissue expanders, leading many claimants to assume that these products were being treated as breast implants.

- When the Plan was announced, claimants were specifically told that the Dow Corning settlement was being modeled on the RSP and would offer similar benefits.

- The definition of "Breast Implant" in the Plan was facially broad and inclusive.

- Product identification eligibility for breast implants was based on a list of general brand names, including "SILASTIC" — the brand under which Dow Corning's tissue expander implants were marketed.

- Tissue expander implants were not enumerated among the long list of specific products included in the definition of "Other Products" under the Plan.

- Tissue expander implants also were not included among the detailed list of "Other Products" offered specific alternative settlements under the Plan.

- The tissue expander implants included in the RSP product list published in Annex A were specifically referred to as "breast implants" for purposes of the Class 7 settlement.

- Nothing contained in the Plan or any of the Plan documents stated or even suggested that tissue expander implants were being broken out from other breast implants for different or lesser treatment.

In these circumstances, claimants voting on the Plan would reasonably assume that tissue expander implants were included within the definition of "Breast Implants." Because tissue expanders were considered "breast implants" in the RSP, and because the only mention of tissue expanders in Annex A treats them

as breast implants (*see* above at 11), the District Court's ruling is further supported by the contract construction principle that the same term should be given the same meaning in different parts of a contract. *See State v. R.J. Reynolds Tobacco Co.*, 304 A.D.2d 379, 380 (N.Y. App. Div. 2003) (cited by appellant).

Indeed, by informing claimants that the Dow Corning settlement would follow the RSP, Dow Corning communicated an inclusive definition of "Breast Implant" based on the parties' common understanding from prior settlements. *See Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 815 (6th Cir. 2007) (meaning of contract terms established by parties' understanding from prior dealings); *see also Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 393 (6th Cir. 2007) (course of dealing may inform meaning of contract terms). And to the extent there is any uncertainty on this point, it should be charged against Dow Corning. *See Miller v. United States*, 363 F.3d 999, 1006 (9th Cir. 2004) (ambiguities in plan language construed against debtor).

In this setting, Dow Corning's lengthy discussion of the differences between "permanent" breast implants and tissue expander implants is simply irrelevant. As the District Court correctly concluded, there is nothing in the definition of "Breast Implant" limiting the term only to implants intended for permanent implantation or implantation for a particular purpose. Nor does

eligibility for benefits turn on the length of time implants were actually in the body.

Claimants certainly understood no bright line difference between "temporary" and "permanent" breast implants. "Permanent" implants regularly fail and must be removed, which is why the Dow Corning settlement has paid hundreds of millions of dollars in explant and rupture benefits. Moreover, such implants may need to be removed for medical reasons after a short period of time. There are numerous instances — both in the reported literature and in actual claimant experience — where saline and silicone gel implants were removed within days or weeks of implantation because of a problem with or reaction to the implant. *See, e.g.*, Record Entry No. 57, CAC Response, Ex. 1, Barry F. Uretsky et al., *Augmentation Mammaplasty Associated with a Severe Systemic Illness*, 3 Annals of Plastic Surgery 445, 445-47 (1979) (reporting case of woman who experienced systemic, near fatal illness within 24 hours after implantation of silicone gel breast implant resulting in its removal 11 days later). Tissue expander implants, in turn, may be implanted only for a few days or for as long as several months or longer, and indeed certain types of tissue expander implants manufactured by other companies may be converted for permanent implantation. *See* DCC Br. 5-6.

In short, given the range of products that have been treated as "breast implants" in various settlement contexts, the extrinsic evidence leads to the same conclusion as the plain language analysis: the generic term "breast implant" means a medical product intended for implantation in the breast. Because tissue expanders are clearly "breast implants" in that sense and otherwise meet the more particular definitional requirements of the defined term "Breast Implant" in Section 1.17 of the Plan, the District Court did not abuse its discretion or commit clear error in concluding that tissue expander implants intended for implantation in the breast should be treated as "Breast Implants" under the Plan.

II.

DOW CORNING'S ADDITIONAL CIRCUMSTANTIAL ARGUMENTS DO NOT ESTABLISH THAT IT IS IRRATIONAL OR ANOMOLOUS TO TREAT TISSUE EXPANDER IMPLANTS AS BREAST IMPLANTS

Dow Corning advances a series of other arguments supposedly showing that the definition of "Breast Implants" cannot include tissue expander implants, based on anomalies that it claims are thereby caused in Plan benefits and inferences that it insists must be drawn from the treatment of Other Products under the Plan and from other aspects of Dow Corning's Plan confirmation process. None of these arguments suggests — much less proves —that the District Court abused its discretion or clearly erred in its reading of the Plan definition.

A. Treating Tissue Expander Implants as Breast Implants Does Not Render the Plan's Settlement Scheme Irrational or Anomalous

Dow Corning's argument that "the settlement benefits afforded breast implant claimants would make no sense if they were applied to tissue expanders" (DCC Br. 27) is misleading. In fact, the Plan already makes rational distinctions between saline and gel-filled implants, and including tissue expander implants along with other saline-filled products does not create any irrationality.

First, Dow Corning argues that it is illogical to provide tissue expander recipients with an explantation benefit when Dow Corning's tissue expander implants were intended only for temporary implantation. This is a red herring. Tissue expander implant recipients are simply eligible for the explantation benefit on the same basis as any other breast implant recipient: if they had their implants removed after 1991 and did not thereafter receive a replacement implant with silicone gel. *See* above at 7. If, as Dow Corning alleges, most Dow Corning tissue expander implants were removed after a few months, few claimants would still have had their implants after 1991, and Dow Corning stopped selling silicone medical products by 1993. Record Entry No. 700, Ex. A, Disclosure Statement, p. 35. Moreover, any claimant who received a silicone gel implant after removal of any type of saline-filled implant (as many tissue expander implant claimants no doubt did) is ineligible for the explantation benefit. Thus, relatively few tissue

expander implant recipients will likely be eligible for this benefit, but those who are (for example, because their "temporary" implants may have been left in for a longer period of time) should be eligible to receive this benefit along with other saline breast implant recipients.

Second, Dow Corning's argument that providing a $20,000 rupture payment for tissue expander implants "makes no sense" (DCC Br. 28) is disingenuous, because *no* saline implants (including tissue expander implants) are eligible for the rupture benefit. *See* above at 6-7. By Dow Corning's logic, this would be an argument for excluding *all* saline-filled breast implants from the definition of "Breast Implant."

Third, Dow Corning argues that the disease settlement benefits represent "extraordinary settlement values" that would be irrational to offer to tissue expander implant recipients absent evidence that those products caused systemic disease. DCC Br. 28-29. Once again, there is no anomaly, because tissue expander implants are simply being included along with all other saline-filled breast implants under a settlement intended to resolve a large range of claims.

Though the focus of the pre-bankruptcy litigation and epidemiology was on gel-filled implants, based on the risk of systemic illness if silicone gel leaked from the implant and migrated through the body, the Plan's settlement option also included saline implants in order to obtain global closure of all of Dow

Corning's breast implant exposure. A claimant demonstrating product identification and meeting the criteria for a particular disease is entitled to the same disease benefit regardless of whether her implant was filled with silicone gel or saline, and regardless of whether her implant was in her body for one day or 20 years — even though these and other variables of which the settlement does not take account could affect the risk and severity of disease and the potential real-world litigation value of a particular claim.

Such grouping of claims is typical, and often necessary, to administer mass tort settlements. For example, in this case, the same $20,000 base rupture payment is offered to all silicone gel breast implant claimants, whether a claimant had only one or multiple ruptures, and whether or not serious complications and disfigurement followed the rupture. These variations did not render it improper as a matter of bankruptcy law to classify the claims together or provide a basis for rejecting the single, uniform rupture settlement option. *See In re Dow Corning Corp*., 244 B.R. 634, 655-56 (Bankr. E.D. Mich. 1999) (rejecting classification objection and noting, *inter alia*, practical difficulty of identifying claimants with single versus multiple ruptures), *aff'd*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd in relevant part and remanded on other grounds*, 280 F.3d 648 (6th Cir. 2002).

It is therefore not anomalous but perfectly logical that Dow Corning included *all* breast implants, including tissue expanders, in its settlement — just as

other manufacturers did in the RSP. Nor is it significant that the FDA moratorium did not include tissue expander implants (DCC Br. 9); it also did not include other saline breast implants, but Dow Corning does not argue that this requires excluding saline-filled implants from the Plan definition of "Breast Implant."

In any event, it is simply not true that tissue expanders were "never associated with any disease allegations" or even "theorized to cause disease." DCC Br. 16, 29. Concern over possible disease caused by breast implants included study of whether the silicone elastomers of saline-filled implants could cause or contribute to local and systemic inflammatory disease, and tissue expanders were studied along with other saline breast implants in this regard. *See* Michelle Copeland et al., *Silicone Breakdown and Capsular Synovial Metaplasia in Textured-Wall Saline Breast Prostheses*, 94 Plastic & Reconstructive Surgery 628, 629 (1994) (study of 191 implants removed from 139 patients with implants in place from six weeks to several years, including 49 saline-filled tissue expander implants, suggesting that textured-walled implants may create risk of inflammatory reaction).

Dow Corning falsely argues that claimants are somehow trying to have it both ways — arguing that tissue expanders are breast implants in order to receive certain benefits, but claiming that they are *not* breast implants in order to avoid the Multiple Manufacturer Reduction ("MMR"). DCC Br. 31-32. The plain

language of the Dow Corning settlement imposes an MMR only where a breast implant recipient has a *silicone gel* breast implant made by another manufacturer. *See* Record Entry No. 700, Ex. D, Annex A, § 6.02(d)(v). Thus, claimants have argued (and Dow Corning has agreed) that other manufacturers' tissue expander implants do not trigger the MMR — *not* because such products are "not breast implants," but because such products are *saline* breast implants. Dow Corning's further suggestion that if the District Court decision is affirmed it will be entitled to refunds from claimants (DCC Br. 32 n.17) is simply an attempt to rewrite the Plan to give itself an MMR for other manufacturers' *saline* implants — something it did not bargain for.[8]

[8] Dow Corning further notes that the RSP manufacturers chose not to impose an MMR where a breast implant claimant also had a Dow Corning tissue expander implant. DCC Br. 34-35. This does not, of course, establish that such manufacturers categorically regarded tissue expander implants not to be breast implants, since they treated their own tissue expander implants as breast implants eligible for disease payments. *See* above at 3. The record does not reflect why they chose to treat Dow Corning's tissue expanders differently. Any anomalies created by that different treatment do not change the basic definition of Breast Implant included in the Dow Corning Plan; a greater anomaly would be imposed by denying *any* settlement to implant products of the same type that were treated as breast implants under the RSP.

B. Neither the Qualifying Criteria for Breast Implants Nor the Treatment of "Other Products" Under the Plan Mandate that Tissue Expander Implants be Excluded from the Definition of "Breast Implant"

Dow Corning next argues that tissue expanders (1) are affirmatively *excluded* from the Plan's eligibility criteria to receive a breast implant settlement; (2) must be deemed *included* in the Plan's definition of "Other Products"; and (3) are excluded from receiving *any* settlement benefit, because they are not listed among "Other Products" receiving a settlement offer. Dow Corning's arguments rely on a series of inferences that are neither intuitively correct nor mandated by the language of the Plan documents.

At the outset, it is simply incorrect that the list of brand names identifying a covered Breast Implant product excludes tissue expander implants from such treatment. *See* DCC Br. 26-27. As noted above (at 8), the list of qualifying Breast Implant brand names includes "SILASTIC" — and Dow Corning admits that its tissue expander implants were marketed under that brand name. DCC Br. 27. Dow Corning argues merely that the presence of the brand name is not *sufficient* to qualify a product as a breast implant because the same brand was used to market many other types of products. Thus, Dow Corning notes that a product must not only bear the relevant brand name but also must "be[] a breast implant." *Id.* But this just restates Dow Corning's central argument that tissue expanders are, by definition, not breast implants. It does not establish that the

product identification criteria themselves affirmatively *exclude* tissue expander implants.[9]

Next, Dow Corning argues that the District Court was required to find that tissue expanders were included within the definition of "Other Products" because that definition *could* apply to tissue expanders (as a "silicone-containing product") and the list of products included within the definition was non-exclusive. DCC Br. 39-40 (quoting Plan § 1.117). However, the definition of "Other Products" is expressly limited to products "other than Breast Implants," and thus, if tissue expanders meet the definition of "Breast Implants," they are excluded from the definition of "Other Products." Faced with a broad definition of "Breast Implant" and a definition of "Other Products" that enumerated several different types of products but did not include tissue expander implants, the District Court did not clearly err or abuse its discretion in concluding that tissue expander implants better fit within the definition of Breast Implant.

This conclusion is strengthened by the fact that many Other Products were offered specific settlement benefits under the Dow Corning Plan. As noted

---

[9] Dow Corning's related argument that tissue expander implants were not included in the product ID training provided to the SF-DCT staff (DCC Br. 27 n.13) is disingenuous. By the time that training was offered in 2003, the parties knew that the tissue expander issue was contested, and it was understood that the training would be supplemented, if necessary, when the issue was resolved.

above, the majority of these products consisted of hard plastic silicone, and settlements were offered for product failure and local inflammatory response to silicone particles rather than for systemic illness. Not only do tissue expanders have more in common with other saline breast implants than they do with these "Other Products," but the absence of any specific settlement option for tissue expander implants under the Other Products settlement would relegate them to an even less likely category: Dow Corning products for which no settlement of any kind is offered. This category prominently includes illegally injected silicone fluid, which was expressly excluded from the settlement because Dow Corning never endorsed or promoted that use of its silicone. The suggestion that claimants should have understood when voting on the Plan that their tissue expander breast implants were being categorized with injected silicone and other Dow Corning products receiving no settlement offer is simply illogical.

To the contrary, once again, claimants understood that tissue expander implants were treated as breast implants under the RSP, which they were told was serving as the blueprint for the Dow Corning settlement. If, notwithstanding this background, Dow Corning intended to exclude tissue expander implants from *any* settlement benefit under the Plan, it should have communicated that anomalous result to claimants before asking them to vote on the Plan.

C. The Lack of Express Focus on Tissue Expander Implants at the Time of Plan Confirmation Does Not Support Their Exclusion from the Definition of "Breast Implant"

Finally, Dow Corning seeks to read significance into the fact that tissue expander implants were not highlighted in the confirmation of Dow Corning's Plan and were not assigned any separate identified value in the claims estimation testimony of its expert witness Frederick Dunbar — stressing that the "entire purpose" of its bankruptcy was to resolve its large-scale silicone gel breast implant liability, not its liability for tissue expanders. *See* DCC Br. 33-34. Once again, while Dow Corning's *bankruptcy* may have been caused primarily by its silicone gel breast implant claim liability, its *Plan* was crafted to provide complete closure for *all* claims. That is why Dow Corning offered settlements to recipients of saline-filled implants, Other Products, and those who had implant products from other manufacturers containing Dow Corning silicone material — to achieve total closure of all claims, including those that may not have immediately contributed to its bankruptcy filing.

Thus, although the confirmation hearing understandably focused primarily on the treatment of silicone gel implant claims, it is simply not true that "the Plan Proponents made clear that tissue expander claims would *not* receive settlement compensation under the settlement option." DCC Br. 33. As noted above, nothing in the Dow Corning Plan or Plan documents communicated to

claimants that tissue expander implant claims would be treated any differently than they had been under the RSP — namely, as breast implant claims.

The only evidence that Dow Corning cites to the contrary is a draft of a chart apparently generated by Mr. Dunbar listing "tissue expanders" as among products that were not "covered" by the "Other Products" Settlement Option. Record Entry No. 51, Dow Corning Motion, Ex. A, Dunbar Chart. But this single piece of paper proves nothing. Mr. Dunbar's testimony was prepared and presented by Dow Corning, without input from the Tort Claimants' Committee. The cited chart is expressly labeled "preliminary and unchecked" and does not indicate that it was admitted as an exhibit at the confirmation hearing. Moreover, the general statement that "tissue expanders" were not covered is true — given that all but three of the more than 250 Dow Corning tissue expander products were *not* intended for breast implantation and are not at issue here.

But that does not mean that breast design tissue expander implants were affirmatively *excluded* at confirmation. To the contrary, because the entire settlement was modeled on the RSP, they were simply presumptively included as breast implants, and because the parties relied upon the MDL claims experience to predict claims experience under the Plan (Record Entry No. 700, Ex. A, Disclosure Statement, p. 95), of necessity they took into account claims experience with other manufacturers' tissue expanders.

The confirmation hearing did not *separately* focus on tissue expanders — and Mr. Dunbar was not required to estimate the separate value of such claims — for a simple reason: there are so few potentially qualifying tissue expander breast implant claims that their quantification could have had no conceivable impact on the viability of the Plan or the adequacy of its funding. Mr. Dunbar identified 1,041 potential tissue expander claims, but discounting for non-breast tissue expanders and products produced by other manufacturers, a much smaller number of Dow Corning tissue expander breast implant claims will likely qualify for payment. Though qualification for payment will be important to these individual claimants, the potential impact on the $1.95 billion net present value Settlement Fund was and is obviously negligible. Thus, nothing can be inferred from the lack of specific focus on tissue expanders in connection with confirmation, and certainly this point provides no basis to conclude that the District Court's decision was clearly erroneous or represents an abuse of discretion.

CONCLUSION

For the foregoing reasons, the CAC respectfully requests that the Court affirm the District Court's order.

Dated: November 13, 2009

Respectfully submitted,

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Dianna Pendleton-Dominguez
LAW OFFICE OF DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717

Ernest Hornsby
FARMER, PRICE, HORNSBY & WEATHERFORD LLP
100 Adris Court
Dothan, AL 36303
(334) 793-2424

Counsel for the Claimants' Advisory Committee

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word) this brief contains 8,711 words.

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

CERTIFICATE OF SERVICE

I certify that on November 13, 2009, I electronically filed a copy of the foregoing Brief of Appellee Claimants' Advisory Committee 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.

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100 (telephone)
(212) 715-8000 (fax)
jtrachtman@kramerlevin.com

ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (00-0005)

Documents

Doc 40 7/19/04 MOTION of Claimants' Advisory Committee to Interpret the Amended Joint Plan § 1.17 Regarding the Definition of "Breast Implant"

- EXHIBIT 1 – DCC Wright Silastic Tissue Expander Pamphlet
- EXHIBIT 2 – Tissue Expander product label
- EXHIBIT 3 – E-mail from V. Willard at SF-DTC to D. Greenspan and D. Pendleton

Doc 51 7/19/04 Motion for a Determination that Tissue Expanders do not Constitute Breast Implants for Purposes of Eligibility for Settlement Benefits with Attachments by Dow Corning Corporation

- EXHIBIT A – Dunbar Chart
- EXHIBIT B – Affidavit of Gene Jakubczak
  - EXHIBIT 1 – Mentor tissue expander product pamphlet
  - EXHIBIT 2 – CUI tissue expander product pamphlet

Doc 53 06/10/04 Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan

- EXHIBIT A – Procedures for Resolution of Disputes Under Section 5.05 of the Settlement Facility Agreement and for Other Disputes Regarding the Dow Corning Plan of Reorganization

Doc 55 8/9/04 RESPONSE to Motion to Extend filed by Dow Corning Corporation

Doc 57 2/8/05 RESPONSE of Claimants' Advisory Committee to MOTION of Dow Corning Corporation

- EXHIBIT 1 – Article "Augmentation Mammaplasty Associated with a Severe Systemic Illness"
- EXHIBIT 2 – DCC Proof of Claim Form

Doc 673 6/10/09 Memorandum Opinion and Order Regarding Tissue Expander Issue

Doc 674 6/19/09 NOTICE OF APPEAL by Dow Corning Corporation re Doc 673 Order
EXHIBIT A – Memorandum and Opinion dated 6/10/09

Doc 676 6/30/09 MOTION to Stay the Court's Ruling on the Disability Level A and Tissue Expander Issues Pending Appeal by Dow Corning Corporation
EXHIBIT A – Affidavit of Deborah Greenspan

Doc 681 6/30/09 RESPONSE to Motion to Stay the Court's Rulings on the Disability Level A and Tissue Expander Issues Pending Appeal filed by Claimants' Advisory Committee

Doc 682 7/10/09 REPLY to Response re Motion to Stay the Court's Ruling on the Disability Level A and Tissue Expander Issues Pending Appeal filed by Dow Corning Corporation
EXHIBIT A – IOM Report
EXHIBIT B – FDA Notice

Doc 683 7/10/09 MOTION for Leave to File Excess Pages by Dow Corning Corporation

Doc 700 10/13/09 Expedited Stipulated MOTION to Supplement and Clarify the Record
EXHIBIT A – Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization
EXHIBIT B – Amended Joint Plan of Reorganization
EXHIBIT C – Settlement Facility and Fund Distribution Agreement
EXHIBIT D – Annex A to the Settlement Facility and Fund Distribution Agreement ("Annex A")

Hearing Transcripts

Doc 687 Hearing held on 9/9/04 before District Court

Doc 688 Hearing before Claims Administrator: June 22, 2004