UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	§	
	§	**CASE NO. 00-CV-00005-DPH**
DOW CORNING CORPORATION,	§	**(Settlement Facility Matters)**
	§	
REORGANIZED DEBTOR	§	**Hon. Denise Page Hood**

MEMORANDUM OF CLAIMANTS' ADVISORY COMMITTEE REGARDING EXTRINSIC EVIDENCE OF THE PARTIES' INTENDED MEANING OF "BREAST IMPLANT"

This Court has already ruled, after hearing all of Dow Corning's arguments, that the Plan's definition of "Breast Implant" includes tissue expander implants specifically designed for implantation in the breast.[1] The Court of Appeals agreed that the generic term "breast implant," an element of the defined term "Breast Implant," "can reasonably be read to refer to any device specifically designed for implantation in the breast." *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 773 (6th Cir. 2010). The court rejected as "circular" Dow Corning's structural and plain-language arguments for supplanting this "ordinary sense" reading with a "technical meaning" limiting the term to implants intended for permanent use. *Id.*

The Court of Appeals remanded only for a narrow purpose: to permit this Court to assess the extrinsic evidence and determine if the parties, in fact, *intended* to impose the more "technical meaning" of "breast implant" when they used that broad, generic language in the definition of "Breast Implant." However, having already rejected most of Dow Corning's arguments — and having agreed that this Court's basic reading of the language was reasonable

[1] This memorandum adopts the abbreviations used in Dow Corning's memorandum ("DCC Mem.").

— the court stressed that, once this Court evaluates the extrinsic evidence, "we expect to defer to its decision." *Id*.

Now, relying principally on arguments advanced in dissent by Judge Batchelder — who otherwise recognized that the majority opinion came "close to directing" this Court to affirm its prior ruling (*id.* at 779 (Batchelder, C. J., concurring in part and dissenting in part)) — Dow Corning urges the Court to adopt its preferred reading of the language based on how doctors, Dow Corning marketers, and certain others most commonly use the phrase "breast implant." But Dow Corning largely ignores the question actually at issue: whether *the parties to the Plan* understood and intended that tissue expander implants designed for implantation in the breast would be covered under the settlement as "Breast Implants" — as they had been in the RSP and several other recent settlements — or, rather, whether it was clear that these products were being carved out for different treatment and excluded from *any* settlement offer under the Plan.

As to *that* question, the record is clear: Dow Corning told Claimants voting on the Plan that benefits would parallel those offered in the RSP unless the Plan documents specified different treatment. And Claimants were *not* told that tissue expander breast implants were receiving different treatment under the Dow Corning Plan. They therefore reasonably understood that, as in the RSP, qualifying tissue expander implants would be considered "Breast Implants" for purposes of basic benefits, but not for the multiple manufacturer reduction ("MMR"). Dow Corning identifies no evidence establishing that the parties to the Settlement (including Claimants voting on the Plan) in fact had any different understanding about the structure of the Plan.

DISCUSSION

I. THE EXTRINSIC EVIDENCE CONFIRMS THAT THE PLAN PARTIES, INCLUDING CLAIMANTS VOTING ON THE PLAN, REASONABLY READ THE DEFINITION OF "BREAST IMPLANT" TO INCLUDE TISSUE EXPANDER IMPLANTS SPECIFICALLY INTENDED FOR IMPLANTATION IN THE BREAST

The question on remand is not, as Dow Corning would have it, whether the term "breast implant" is commonly understood in the world at large to embrace tissue expander implants, but rather how that term was actually understood by the *parties to this contract* — the representatives who negotiated to model the Dow Corning settlement on the RSP and the thousands of breast implant recipients (including those with tissue expander implants) who voted to accept Dow Corning's Plan and settle their claims. The relevant extrinsic evidence is what was known to *these parties* at the time the Plan was adopted. *See, e.g.*, *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009) (contract construed consistently with "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).[2]

Here, all of the extrinsic evidence must be viewed through one lens: the parties' agreement that the criteria to qualify for payment under the Dow Corning settlement were to be based on the RSP. *See* JI-20, Disclosure Statement, at 1, 2. Indeed, the Settlement Facility Agreement ("SFA") specifically told Claimants: "It is expressly intended that the Settling Breast

[2] The cases cited by Dow Corning are consistent with this rule. *Constr. Interior Sys., Inc. v. Marriott Family Rests., Inc.*, 984 F.2d 749, 756 (6th Cir. 1993), instructs that the "plain, ordinary" meaning of contract language controls absent evidence of a different intent — and here, as the Court of Appeals recognized (*see* 628 F.3d at 773), the "ordinary sense" of the phrase "breast implant" as a generic element in the defined term "Breast Implant" is simply a medical product designed to be implanted in the breast. Dow Corning's attempt to portray this reading as "hyper-technical" (DCC Mem. at 6) ignores the Court of Appeals' ruling. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005), was not even a contract case — it simply adopted the most "commonly accepted" meaning of the term "digital sampling" for purposes of copyright analysis.

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*. JI-22, SFA, § 4.03. Crucially, the Plan Documents do not contain any provisions stating that claims based on tissue expander breast implants would be treated differently from similar claims in the RSP, and Dow Corning does not point to any such provision.[3]

Against this backdrop, the universe of information available to Claimants voting on the Plan strongly suggested a common understanding that breast-design tissue expander implants *would* be included as Breast Implants:

- 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 (Mentor, Bioplasty, and INAMED). *See* CAC COA 6 Br. at 8-10.[4]

- 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 expander implants, giving rise to a reasonable inference that these products were being treated as breast implants. *Id.* at 11-12.

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[3] Dow Corning tries to confuse the issue by stressing that *Dow Corning* tissue expander implants were not themselves treated as breast implants in the RSP for purposes of the MMR. DCC Mem. at 10. But this misses the point: The manufacturers participating in the RSP treated their *own* saline-filled tissue expander implants as breast implants for purposes of offering settlements. That created a presumption that, unless the Dow Corning Plan documents provided to the contrary, the Dow Corning Plan would offer mirror-image benefits: treating Dow Corning's own tissue expander implants as Breast Implants for purposes of basic settlement offers, but *not* including other manufacturers' similar products among those triggering the Dow Corning MMR.

[4] Dow Corning's objection that documents describing the other three settlements "are not part of the record" (DCC Mem. at 9 n.7) ignores that (i) the details of these settlements are a matter of public record and (ii) Dow Corning itself advances arguments based on these documents (*see id.* at 9).

- 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. *Id.* at 5.

- The definition of "Breast Implant" in the Plan was facially broad and inclusive: "all silicone gel and saline-filled breast implants with silicone elastomer envelopes manufactured and either sold or otherwise distributed by the Debtor." JI-21, Plan, § 1.17.[5]

- Product identification eligibility for breast implants was based not on an exhaustive index of specific products (as in the RSP and other settlements) but on a list of general brand names, including "SILASTIC" — the brand under which Dow Corning's tissue expander breast implants were marketed. *See* CAC COA 6 Br. at 8; JI-2, CAC Motion, Ex. 1.

- Tissue expander implants were not enumerated among the long list of products included in the definition of "Other Products" under the Plan. *See* CAC COA 6 Br. at 10.

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

- The tissue expander implants included in the RSP product list published in Annex A to the SFA were specifically referred to as "breast implants" for purposes of the Class 7 settlement. *See id.* at 11 n.5.

- 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 medical products designed for implantation in the breast to receive different or lesser treatment.

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[5] Under this broad definition, Claimants were offered the same disease benefits whether they had silicone gel implants (which had received the greatest attention in pre-bankruptcy litigation and epidemiology) or saline implants, including the sub-category of tissue expander implants (which had received less focus). And benefits were identical whether the products remained implanted for one day or 20 years. Such leveling of disparate claims is typical of global settlements aimed at resolving a wide range of potential liabilities under a simplified grid. Dow Corning's suggestion that differences in the histories of the products made it illogical to provide a disease settlement offer for tissue expander implants (*see* DCC Mem. at 2) ignores this reality.

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 expander implants were considered breast implants in the RSP, and because the only mention of these products in Annex A treats them as breast implants, the inclusive reading of the definition is further supported by the contract construction principle that the same term should given the same meaning in different parts of a contract. *See State v. R.J. Reynolds Tobacco Co.*, 761 N.Y.S.2d 596, 597 (N.Y. App. Div. 2003).

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, which communicated through the Plan documents directly with thousands of unrepresented individual claimants. *See Miller v. United States*, 363 F.3d 999, 1006 (9th Cir. 2004) (ambiguities in plan language construed against debtor).

II. DOW CORNING'S OTHER ARGUMENTS FAIL TO ESTABLISH THAT THE PARTIES UNDERSTOOD THAT THE DOW CORNING PLAN, UNLIKE THE RSP, DENIED ANY SETTLEMENT OFFER FOR TISSUE EXPANDER IMPLANTS DESIGNED FOR IMPLANTATION IN THE BREAST

Dow Corning fails to acknowledge until a footnote on the last page of its brief the key fact that the RSP treated tissue expander implants produced by settling manufacturers as breast implants. Instead, Dow Corning tries to shift the focus to extrinsic evidence that is either irrelevant to the actual understanding of *these parties* or otherwise insufficient to show a

common understanding contrary to the presumption created by modeling the Dow Corning Plan on the RSP.

First, Dow Corning argues at length, based on an affidavit by its own employee, that doctors, government regulators, and others generally view the term "breast implant" as referring to implants designed for permanent placement in the breast, while tissue expander implants are viewed as a different class of products with a different purpose. *See* DCC Mem. at 3-6. But here, the relevant question is not what understanding of the term "breast implant" is most widely shared generally, but rather what *the parties* actually understood and intended in fashioning and voting on the Plan. And the crucial knowledge shared by these parties was that tissue expander implants designed for use in the breast *were* in fact, considered "breast implants" in the RSP and other recent settlements.

Moreover, Dow Corning's suggestion of a clear, bright-line distinction between "permanent" breast implants and "temporary" tissue expander implants ignores the actual experience of claimants, of which this Court may take judicial notice. "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.*, JI-14, 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 COA 6 Br. at 5-6.

Second, Dow Corning places undue emphasis on a single page from the report of its witness Frederick Dunbar listing "tissue expanders" generally as uncovered Other Products. *See* DCC Mem. at 7-8.[6] Dr. Dunbar's general characterization was correct: All but three of the more than 250 Dow Corning tissue expander products were not intended for breast implantation; were not offered any settlement; and are not at issue here. But this single, general reference does not establish that the parties intended to sweep into the uncovered Other Products category the limited universe of *breast design* tissue expander implants that had generally been treated as breast implants in other settlements — much less that such an intention was communicated to Claimants voting on the Plan.

Indeed, while Dr. Dunbar did not specifically estimate the cost of paying tissue expander implant claims, it does not follow that his analysis completely excluded their impact. Because the parties relied upon the MDL claims experience to predict claims experience under the Plan (JI-20, Disclosure Statement, at 95), of necessity they took into account claims experience with other manufacturers' tissue expander implants.

The confirmation hearing did not separately focus on tissue expander implants — and Dr. 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

[6] Dow Corning stresses that Dr. Dunbar was formally presented as a witness for both Plan Proponents, but the Tort Claimants' Committee had no role in the preparation and presentation of his analysis.

of its funding. Dr. 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 — refuting Dow Corning's unsubstantiated suggestion (DCC Mem. at 8) that allowing these claims would create "a threat that legitimate breast implant claimants' recoveries could be curtailed."

Finally, Dow Corning adopts an argument made by Judge Batchelder *in dissent* and thus implicitly *rejected* by the Court of Appeals: that the *inclusion* of tissue expander implants in other contemporaneous breast implant settlements somehow establishes that Dow Corning Claimants understood that *their* tissue expander breast implants would *not* be covered. Dow Corning suggests that, because these other settlements specifically referred to tissue expander implants (and, indeed, listed specific product models that qualified for benefits), the absence of such specific references in the Dow Corning Plan documents reflects an intent to exclude tissue expander implants from the settlement.

But Dow Corning's argument ignores two crucial facts. First, Dow Corning Claimants were specifically told that the Plan's offers would be *the same* as those in the RSP, except where the Dow Corning Plan documents specified different treatment. Thus, it was not necessary for the Plan documents to recite that tissue expander breast implants were included; since they were included in the RSP, they were presumptively included under the Dow Corning Plan.

Second, Dow Corning ignores a crucial difference in how the Dow Corning Plan, as opposed to the other settlements at issue, was structured: The Dow Corning Plan did not recite each specific product model that qualified for coverage, but rather included only a general list of

qualifying brand names. And it is undisputed that the SILASTIC brand under which Dow Corning marketed its breast design tissue expander implants was expressly *included* as a qualifying brand. Thus, the failure to list specific products by name reveals nothing about the parties' intent.

In short, since tissue expander breast implants were not expressly listed as Other Products, or offered a settlement in that category, any ambiguity in the presentation to tort claimants may be resolved in only one of two ways: either breast design tissue expander implants were intended to be treated as Breast Implants (as they had been in the RSP and other recent settlements), or they were to be excluded entirely from receiving any settlement offer under the Dow Corning Plan. The latter treatment would be unexpected and unusual in light of recent history of which the parties were aware, and thus not the logical inference that Claimants would have drawn in reviewing the Dow Corning Plan materials and deciding how to vote on the Plan or whether to elect to settle their claims. The only reasonable conclusion is that tissue expander implants intended for use in the breast were meant to be treated as Breast Implants.

CONCLUSION

For the foregoing reasons the CAC respectfully requests that the Court adhere to its earlier ruling that tissue expander implants designed for implantation in the breast are "Breast Implants" under the Plan.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF System, which will send notification of such filing to all counsel of record.

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