UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: DOW CORNING CORPORATION

Case No. 00-CV-00005-DT
(Settlement Facility Matters)

DOW CORNING CORPORATION,

Debtor. **Hon. Denise Page Hood**

MOTION FOR EQUITABLE RELIEF

Nancy Forehand,[1] a claimant in the Settlement Facility – Dow Corning Trust, moves this Court to use its equitable powers and direct the Claims Administrator to approve her rupture claim. Ms. Forehand acknowledges that the operative report from her explantation surgery, technically, does not document a rupture. But, the totality of the circumstances, including multiple mammograms, doctors' notes and questions that David Bernick and other counsel for Dow Corning asked at her three days of depositions, demands that she be compensated for the rupture of her Dow Corning breast implant.

[1] Given Ms. Forehand's status as one of the original MDL trial cases and the publication of her name in that context, counsel are not redacting her identifying information here.

I. Ms. Forehand's Litigation History

Ms. Forehand's history in the breast implant litigation is a long and tortured one. In late 1993 and early 1994, Hon. Sam C. Pointer, Jr., the Multidistrict Judge, directed the parties to identify three cases that could proceed to trial against then-MDL Defendant, Dow Corning Corporation. (Bryan Declaration, Exhibit 1). The trial was initially set to begin March 28, 1994 and was intended to serve as a model for future MDL litigation. (Id.). In January, 1994, the Plaintiffs' Steering Committee nominated three cases for the model trial. (Id.). In selecting the cases for trial, one of the critical considerations for the Steering Committee was whether the plaintiff could prove a rupture of her Dow Corning breast implant. (Id.). The plaintiffs in the cases were Lynn Sultanik, Mickii Carter, and Nancy Forehand. (Id.). The parties began the trial preparation process and Dow Corning's trial counsel, David Bernick, took a short deposition of each of the nominated plaintiffs in February, 1994. (Id.). A lengthier deposition followed the next month. (Id.).

Ultimately, the Sultanik case settled before the scheduled March 28 trial date and the trial date was extended by a week. (Id.). In the interim, the original Global Settlement was announced and the Court and counsel turned their attention to the implementation of the settlement. (Id.). Later, Ms. Forehand

decided to "opt-in" to the global settlement and Ms. Carter decided to opt-out. (Id.).[2] Ms. Forehand, to this day, remains a claimant in the SF-DCT. (Id.).[3]

II. Ms. Forehand's Experience in the SF-DCT

Leaving aside the issue of her approved disease claim (albeit approved at a lower level than submitted), Ms. Forehand's interest here is in securing approval of her rupture claim. After trying for sometime to have her claim approved, Ms. Forehand ultimately submitted an appeal to the Appeal Judge. He issued an opinion, dated August 11, 2005, denying the appeal. (Exhibit 2).

Ms. Forehand, through counsel, submitted her rupture claim to the SF-DCT on May 23, 2003. (Exhibit 3). The submission acknowledged that the operative report did not mention rupture – or anything else about the condition of the implants but argued that other evidence was sufficient to support the claim. The submission, through the medical records, did contain evidence of some trauma to both breasts: (1) she was struck in the left breast with a ball (note of 8/8/79); (2)

[2] After the opt-out period for the global settlement, and the fairness hearing, and the claims submission deadlines, the Court and counsel again focused on preparing a case for trial. (Id.). The next case set for trial, in January 1995, in the multidistrict proceedings was the *Toole* case against Baxter Healthcare. That case resulted in a verdict for the plaintiff. The MDL Court then set the last of the original Dow Corning cases, Mickii Carter, for trial in May, 1995. (Id.). The *Carter* case settled days before Dow Corning entered bankruptcy and Ms. Carter remained a judgment creditor for a portion of her settlement during the pendency of those proceedings. (Id.).

[3] Ms. Forehand submitted, and has been paid for, a disease claim. She also had been implanted with implants that Mentor Corporation manufactured. She did not have an explantation claim because her Dow implants were replaced with the Mentor implants prior to the cut off date for explant claims.

she was in an accident (note of [illegible], 1982); and (3) she had a "closed capsulotomy,"[4] also in 1982. In October, 1982, her physician noted "lymphangitis just under the skin of the right breast extending from the nipple to the right anterior axillary line." Some months later, he noted that "the mentioned band between the nipple and the right axilla is gone." Ms. Forehand continued, however, to have tenderness in her right breast, according to the physician's notes.

In 1986, Ms. Forehand had a mammogram. The report from that mammogram, included as part of Exhibit 3, said:

> There is bilateral mammary prostheses noted to be present. Some leakage of the silicone in the upper outer portion of the left breast best appreciated on the mediolateral view is seen and the silicone appears to be outside the package. On the right side there is a large axillary tail of silicone observed which is not obviously separated from the rest of the prosthesis.

Nearly two years later, Ms. Forehand was back at the doctor and he noted: "[T]he patient now has Baker III[5] implants bilaterally with a protrusion of the prosthesis

[4] A "closed capsulotomy" is a non-surgical procedure used to treat capsular contracture, or the hardening of the breast that occurs when the scar tissue forms. To perform the procedure, a doctor takes the patient's breast in his or her hands and, quite literally, squeezes the breast in an effort to release the scarring.

[5] The Baker scale is the scale plastic surgeons use to measure the extent of capsular contracture. The range is Baker I to Baker IV, with I reflecting a soft breast.

into the right axilla into the right tail of Spence."[6] Ms. Forehand underwent another mammogram (also included as part of Exhibit 3). That report said:

> Mammography again demonstrates prosthetic devices to be in place, with fairly extensive leakage of the silicone from the right prosthesis superiorly and laterally. . . . Some leakage is also suspected from the superior position of the left prosthesis.[7]

In seeking approval for the explantation procedure from Ms. Forehand's insurance company, the surgeon, Dr. Finger, wrote (letter included in Exhibit 3) that she had "leaky prostheses." The surgery to remove and replace the implants was performed in Dr. Finger's office, an ambulatory surgical facility, and the operative note (included in Exhibit 3) makes no mention of the condition of the implants. No pathology was examined.

In 1992, nearly three years after the removal surgery, Ms. Forehand had another mammogram. That report (in Exhibit 3) says: "[T]here is a small amount of silicone in the breast tissue near the left axilla, not significantly changed since 10-24-90, decreased since 1988, present since at least 1986. **This is due to rupture of an old implant, since removed.**" (emphasis supplied).

By letter dated November 10, 2004, SF-DCT denied Ms. Forehand's rupture claim saying "[T]he medical records you submitted do not contain

[6] The "tail of Spence" is a small part of the mammary gland that extends along the inferiolateral (bottom and on the margin) side of the pectoralis major towards the axilla (armpit).

[7] Attached as Exhibit 3A and 3B – and not included in any of the materials submitted to the SF-DCT – are photocopies of the 1986 and 1988 mammograms that **graphically** depict the axillary tail referred to in the report. The originals of the mammograms are available.

documentation of rupture as defined above."[8] (Exhibit 4). On November 22, 2004, counsel for Ms. Forehand submitted a Request for Re-review (Exhibit 5) that attached a letter from counsel arguing in favor of the rupture and pages from Ms. Forehand's deposition in which counsel for Dow Corning questioned her about the rupture. On the same day, out of an abundance of caution, counsel also submitted a form asking to participate in the Individual Review Program. (Exhibit 6). More than two months later, on January 25, 2005, SF-DCT sent a letter indicating that the file had been forwarded to Dow Corning as part of the Individual Review Program and extending the deficiency cure deadline. (Exhibit 7).[9] Ms. Forehand also attempted to employ the SF-DCT "error correction" process. (Exhibit 9). The "error correction" review resulted in a denial of the claim. (Exhibit 10). Dow Corning also rejected the claim through the Individual Review process. (Exhibit 11). Likewise, upon re-review, the SF-DCT rejected the claim. (Exhibit 12). Ms. Forehand pursued an appeal to the Claims Administrator and that, too, was denied. (Exhibit 13).

[8] The "above" reference says: "[R]upture is defined as the failure of the elastomer envelope surrounding a silicone gel implant to contain the gel (resulting in contact of the gel with the body), not solely the result of 'gel bleed,' but due to a tear or other opening in the envelope after implantation and prior to the explant procedure."

[9] A subsequent letter, dated March 7, 2005, purported to further extend the cure deadline but, in fact, retained the same June 19, 2005 deadline. (Exhibit 8).

Ms. Forehand, through counsel, took an appeal to the Appeals Judge from the SF-DCT denial of the claim (Exhibit 14)[10] and from the Dow Corning denial of the Individual Review (Exhibit 15) and from the SF-DCT Claims Administrator's denial upon re-review. (Exhibits 16 and 17). In his ruling denying the appeal, Judge Andrews acknowledged the "interesting exchange" in Ms. Forehand's deposition in which Dow Corning's counsel inquired about the rupture and noted, "[W]hile in all likelihood one or both of Ms. Forehand's implants were ruptured prior to explantation, neither the Claims Administrator nor the undersigned has any authority to waive or vary the clear requirements of Annex A [of the Settlement Facility and Fund Distribution Agreement, a Plan Document]. Accordingly, Ms. Forehand's appeal must, unfortunately, be DENIED." (Exhibit 2 – capitalization original).

III. Equity Demands That This Claim Be Paid

No one can seriously dispute that Nancy Forehand had at least one ruptured Dow Corning breast implant. Even Dow Corning acknowledged as much in Ms. Forehand's depositions:

> Q. [By Mr. Bernick] Did you consider simply taking the first implants out? I mean, you knew that the first implants had ruptured, right?
>
> A. Yes. I did.

[10] Exhibit 14 has been redacted to remove a paragraph that related to the resignation of the former Claims Administrator. Though irrelevant for these purposes, counsel will obviously supply the redacted language to the Court and the parties upon request.

(Feb. 3, 1994 Deposition p. 26-7 attached as Exhibit 18). Other counsel for Dow Corning asked similar questions at a subsequent deposition:

Q. Dr. Finger ordered a mammogram?
A. Correct.
Q. That is the mammogram that revealed the leakage?
A. To my knowledge it was.
Q. After the doctor has [sic] obtained the mammogram, what discussions took place between you and the doctor with regard to possible treatments or what would have to be done for that leakage?
A. Replacement.

* * * * *

Q. At this point in time having had two closed capsulotomies in '82 and '84 and now having learned that the implants in question had, in fact, ruptured and leaked, were you curious to understand from Dr. Finger greater information about implants and their nature and how long they would last and things like that?
A. He volunteered the fact that the newer ones were better made. They had a thicker shell. They were textured. He thought I would be much more satisfied with them.
Q. Did you inquire of the doctor as to what caused the rupture and leakage of your implants?
A. I did not.
Q. Did the doctor offer you any causes for the rupture and leakage of your implant?
A. He said nothing lasts forever.

(March 18, 1994 Deposition p. 200-01 attached as Exhibit 19).

These acknowledgements from Dow Corning suggest that the Court ought to use its equitable powers and direct the Claims Administrator to approve this claim.

Moreover, there is nothing in the Plan Documents that prohibits approval of this claim. Indeed, the Individual Review Process – the program to which Ms.

Forehand submitted her claim – mandates payment. The criteria for the IRP, set out in Annex A of the Settlement Facility and Fund Distribution Agreement at § 6.02(e)(vi)(b), is as follows:

> Claimants who meet the criteria listed below are eligible to participate in this Individual Review Process. Reorganized Dow Corning shall not unreasonably deny a Rupture Claim submitted through this Individual Review Process that includes:
>
> 1. medical documentation, created before explantation surgery or within a reasonable time after explantation of the Dow Corning single or double-lumen silicone gel Breast Implant, demonstrating visual confirmation of a breach of the elastomer envelope found upon or prior to removal of the Dow Corning silicone gel Breast Implant, or
> 2. medical documentation demonstrating migration along tissue planes distant from the site of breast implantation of a substantial mass of material confirmed by biopsy to be silicone from a ruptured Dow Corning single or double-lumen silicone gel Breast Implant.

(Annex A). The two mammograms (Exhibits 3A and 3B) clearly and graphically show what can be nothing other than a breach of the elastomer envelope. Breast implants simply do not look like those in Ms. Forehand's mammograms if they are intact.

Further, it is undisputed that Ms. Forehand does not have "unacceptable proof" as that term is used in Annex A. Such "unacceptable proof" includes, among other things, a statement from medical personnel recalling, at a later date, that the implant was ruptured or evidence that the implant ruptured during explantation. *See* Annex A, § 6.02(e)(vii). Instead, Ms. Forehand has ample and

graphic evidence – including Dow Corning admissions – that she had a ruptured implant. All she is lacking is an operative report. Equity demands that this Court not hold against Ms. Forehand the fact that, in 1989, her physician did not anticipate the right pieces of paper that would be needed to establish a rupture in 2006.

CONCLUSION

Wherefore, Ms. Forehand moves this Court to use its equitable powers and order the Claims Administrator to pay her rupture claim.

/s/ Leslie J. Bryan
Leslie J. Bryan
Ralph I. Knowles, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2006, I electronically filed a Motion for Equitable Relief with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Ernest H. Hornsby
Deborah E. Greenspan
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Dianna Pendleton-Dominguez

and by sending a copy via email to:

Francis McGovern - mcgovern@faculty.law.duke.edu
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and by sending a copy via Federal Express to

David Austern
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This 9th day of February, 2006.

/s/ Leslie J. Bryan
Leslie J. Bryan

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