UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MDL-926 PLAINTIFFS' STEERING COMMITTEE'S OPPOSITION TO MDL SETTLEMENT FUND'S MOTION FOR RESOLUTION OF LIEN CLAIMS AGAINST SETTLEMENT FACILITY

Plaintiffs' Steering Committee in MDL-926 hereby opposes the motion of the MDL-Settlement Fund ("MDL Fund") for resolution of lien claims against the Settlement Facility-Dow Corning Trust (the "SF-DCT").

I. INTRODUCTION

In a motion filled with hyperbole, unsupported factual assertions and vexatious attacks, the MDL Fund[1] has filed a motion seeking, inter alia, to "recognize the validity" of asserted "liens" that the MDL Fund has asserted against the settlement checks of 43 claimants in the SF-DCT. Stripped of its rhetorical excesses, the motion raises two issues: 1) does the MDL Fund have a claim against the 43 Dow Corning claimants and 2) even if the MDL Fund does have a claim against the claimants, is it entitled to assert a lien on the SF-DCT settlement checks. The Court need not dwell on the first issue, as it is clear that the MDL Fund may not assert liens, due

[1] While the MDL "Fund" filed the motion, the real parties in interest are the MDL Revised Settlement Fund Defendants ("RSP Defendants"), as they are the parties that actually fund the MDL Fund and would be the ones benefiting from allowance of the MDL Fund's lien motion.

to the fact that there was no implied or express agreement to create a lien on the SF-DCT settlement checks.

II. STATEMENT OF FACTS

A. The Revised Settlement Program in MDL 926

In September 1994, a 4.2 billion dollar Global Settlement designed to encompass all of the major silicone breast implant manufacturers received the approval of the United States District Court in the Northern District of Alabama. MDL 926 Settlement Fund Memorandum in Support of Motion for Resolution of Lien Claims (hereinafter "MDL Fund Memo."), pp. 1-2. This framework was called "Global," in part, because it included not only Baxter Healthcare Corporation, Bristol-Myers and 3M (today's RSP defendants), but also Dow Corning Corporation ("Dow Corning"). It was designed to achieve a dispositive resolution of as many claims against as many silicone implant breast manufacturers as possible. See Exhibit 1 attached hereto, Breast Implant Litigation Settlement Notice attached to Order No. 22 (hereinafter "Global Settlement") at¶5 and exhibits A and B thereto. Settling defendants could withdraw from the Global Settlement if they determined that their potential exposure from opt out cases was excessive. Ex.1 at¶32. After the Court's approval and the expiration of the opt out period, it appeared that the volume of opt outs would lead defendants to walk away. Similarly, the volume of women who submitted claims within the settlement also threatened the workability of the Global Settlement since the amounts they were to receive would have been severely "ratcheted." See Exhibit 2 attached hereto, Breast Implant Litigation Notice attached to Order No. 27 (hereinafter the "RSP Notice") at¶5 and 6. Once the parties understood the data on the number of opt outs and on the projected value of the submitted claims, Dow Corning further complicated

the issues and filed a petition for Chapter 11 bankruptcy reorganization on May 15, 1995. The Global Settlement collapsed. The failure of the Global Settlement meant that MDL resolution of claims would have to proceed along two main, but separate, tracks: one track for the RSP Defendants and a separate track for Dow Corning.

The first settlement to actually pay out money to breast implant claimants, a Revised Settlement Program (hereinafter "RSP"), was approved by Judge Pointer on December 22, 1995, roughly six months after Dow Corning initiated bankruptcy proceedings. See Ex. 2. The RSP inherited the Houston, Texas Claims Office and its staff that had been recently set up to administer the Global Settlement. See Ex. 1 at¶25 and 26 and Ex. 2 at¶30 and 31. It provided disease benefits to settling current claimants under two different schedules, one for Long-Term Benefits and one for Fixed Amount Benefits. See Ex. G to MDL Fund Memo at Tables for¶ 12(b) and 12(c). Claimants participating in the RSP "waive[d] and release[d]" their claims against the RSP defendants and other parties on that settlement's list of Settling Defendants and Released Parties. See Ex. 2 at¶23(a) and Exhibit B1 thereto. The RSP recognized that claims against Dow Corning, as a non-participant in the RSP, were "not released or dismissed" by participating claimants. See Ex. 2 at¶23(b).

In the second half of 1995, when the RSP was negotiated, its treatment of qualifying claimants who had also received breast implants from Dow Corning posed a special problem: Should the RSP defendants pay 100% of benefits to those women when Dow Corning also bore responsibility for their disease conditions? On the other hand, it would be unfair to exclude these women simply because they had received an implant made by Dow Corning. The framers of the

RSP dealt with these issues in paragraph 17 of the Notice. See Ex. G to MDL Fund Memo. First, they provided a general principle:

> **17. Status of Recipients of Dow Corning Implants.**
> Implant recipients who have had one or more Dow Corning implants in addition to Bristol, Baxter, or 3M implants may participate in the revised settlement, but will have reduced benefits under the revised settlement in view of their right to present claims related to their Dow Corning implants.

The problem of how these benefits were to be reduced was easily resolvable with events like explantation and rupture. Subparagraph 17(b) provides that "[t]here are no special benefits based on explantation or rupture of a Dow Corning implant." Current claimants and other registrants could qualify for the $3,000 explantation benefit only if they could prove that the device which had been explanted was made by Bristol, Baxter, or 3M. Id. at¶12(a). Likewise, current claimants who could show that they had a ruptured Bristol, Baxter, or 3M implant could get an increase in their payments if they chose to be compensated for their diseases under the Fixed Amount Benefit Schedule. Id. at¶12(c)(2).

But with regard to compensable disease conditions which Dow Corning implants potentially contributed to or caused, the RSP could only do one thing: reduce the benefit levels for which its participating defendants would be liable.

> (a) Benefits for such participants under 12(b) [i.e., the Long-Term Benefit Schedule] and 12(c) [i.e., the Fixed Amount Benefit Schedule] are 50% of the benefits for those without Dow Corning implants. Id. at¶17(a).

In other words, women eligible to receive disease benefits in the RSP who had also

received Dow Corning implants would have their **disease** benefits cut by 50%[2]. This reduction was "in view of their right to present claims related to their Dow Corning implants." Id. The remainder of subparagraph 17(a) deals with this subject.

> Participants in the revised settlement do not, however, waive any claims against Dow Corning, though they should understand that any claims against Dow Corning are subject to certain automatic stays and other orders that may issue from the Bankruptcy Court for the Eastern District of Michigan and, to be preserved, may require presentation of a proof of claim in that court.

The RSP's approach to its eligible participants' claims against Dow Corning reflects the fact that in the second half of 1995, when the RSP was announced, no one knew what would become of the womens' claims against Dow Corning. Indeed, it would be years before a consensual plan was submitted to claimants for approval and more years before that plan received court approval and became "effective." All the framers of the RSP knew was that Dow Corning was in bankruptcy court in Michigan, not in Alabama. Judge Pointer and those who drafted the RSP had a reasonably well-founded belief that women with claims against Dow Corning would be regarded as creditors who would be afforded the opportunity to present their claims in the Michigan bankruptcy court.

Dow Corning was not a participant in the RSP. Thus, the Court and the parties could reduce the payments of the RSP defendants to eligible claimants who had also received Dow Corning implants, but they could not bind Dow Corning. For all they knew, Dow Corning claimants might eventually receive more than RSP claimants – or they might receive less. The

[2] Thus, if a woman had Bristol implants which did not rupture and Dow implants which did rupture, there would be no compensation in the RSP for the rupture, and, thus, no corresponding 50% reduction.

RSP merely states that the affected women will only receive 50% of the RSP disease benefit levels available to eligible women who did not receive Dow Corning implants. It does not provide, nor does it predict, that these affected women have a right to receive the remaining 50% of their benefits from Dow Corning. The MDL Fund as much as concedes this when it acknowledges that if "there never was to be a Dow Settlement Plan…[the claimant] was still not allowed to return to MDL 926 and receive the remaining 50% portion of her claim." MDL Fund Memo. at p. 11. While the RSP held out hope that these women would be given the opportunity to proceed against Dow Corning in bankruptcy, there was no assurance that Dow Corning would emerge from bankruptcy with a settlement program mirroring the RSP that makes these women whole with "one" recovery. To underscore this fact, there is no provision in the RSP requiring women who recover full benefits but who eventually also receive compensation from Dow Corning to return to the RSP a portion of their recovery. In its motion, the MDL Fund purports to fill holes it sees in the two settlements based on its assertion that the RSP and the Dow Corning Settlement are interlocking programs produced by conscious coordination undertaken from the very formulation of the RSP. This is more than wishful hindsight – it is simply wrong.

B. The Dow Corning Settlement

To state the obvious, the Dow Corning settlement is a separate program. When a claimant accepts benefits from SF-DCT, she releases all of her claims against Dow Corning, not the RSP defendants. See the Amended Joint Plan of Reorganization, attached hereto as Exhibit 3, at §1.149 and 8.3. The Dow Corning settlement is under the jurisdiction of the United States District Court for the Eastern District of Michigan, not the Northern District of Alabama. The Eastern District of Michigan has authority to supervise and interpret this plan. See the

Settlement Facility and Fund Distribution Agreement (hereinafter "SF Agreement"), attached hereto as Exhibit 4, at§4.01. The Settlement Facility was established by Dow Corning pursuant to its duties as a debtor in bankruptcy. See Ex. 3 at§6.11.3. It is given a separate Claims Administrator, approved by the Michigan Court with no input or veto by the RSP defendants. See Ex. 4 at§4.02.

In its brief, the MDL Fund notes that during the pending bankruptcy, the Claims Administrator of the putative Dow Corning settlement shared an office with Judge Ann Cochran, the initial RSP Claims Administrator. MDL Fund Memo., pp. 3, 12. As the MDL Fund concedes, "SF-DCT eventually maintained office space and personnel separate from the MDL 926 Claims Office." Id. at p. 3. This is interesting; but this arrangement, whenever it was, or however long it lasted, was no more than the product of what the MDL Fund admits were "numerous discussions" and "initial plans," discussions and plans that went nowhere because they were not incorporated into the settlement plan as finalized or implemented. Id. at p. 12.

Under the plan, the Claims Administrator is given the power to hire staff and retain such agents "as necessary" to carry out the functions required by the plan. See Ex. 4 at§4.02(e). This requires the establishment of a separate Claims Office, to which the Settlement Facility Agreement devotes an entire section. Id. at§4.03. As finalized, the plan makes no provision for sharing office space and staff with the MDL 926 Claims Administrator.[3] What the plan does envision is a significant measure of cooperation between its Claims Administration and the RSP,

[3] The Settlement Facility Agreement requires the Claims Administrator to employ a Quality Control Supervisor and permits this individual to be "simultaneously…employed" by the MDL Claims Office. See Ex. 4 at§5.04(c). This provision, however, merely contemplates that this individual will maintain separate employment arrangements with each claims office.

which entails learning and using the RSP's claims-processing and quality control procedures and protocols, resort to "MDL 926 Claims Office materials," resources, experience, and expertise. Id. at §§4.03(a), 4.06, 5.04(a), (c) and (d), 5.05, and 7.01(d)(i).

While the Dow Corning settlement certainly contemplated the SF-DCT learning from the RSP experience, it was clear that the SF-DCT would be a distinctly separate entity. Thus, the SF-DCT Claims Administrator's authority to modify claims-processing procedures to conform to those procedures and interpretations of the RSP is a matter of "discretion." Id., § 4.03(a). SF-DCT claims processing is intended to be like that of the MDL 926 Claims Office, "except to the extent criteria or processing guidelines are modified by" the Dow Corning Settlement. Id. The SF-DCT's operations should be conducted like those of the RSP "to the extent feasible." Id. It is desirous to interpret similar provisions in the two settlements consistently, "as appropriate." Id.

Moreover, cooperation between SF-DCT and the RSP Claims Office is not to be informal. The Dow Corning Claims Administrator, with the Claimants' Advisory Committee and the Debtor's Representatives, are instructed to apply to the MDL Court in the Northern District of Alabama for "all necessary orders" authorizing use of MDL 926 Claims Office resources and consulting. Id. at §§4.03(a) and 4.06.

The similarities between the substantive benefits afforded by the two settlements do not "essentially mirror[]" each other, as the MDL Fund alleges, even with respect to disease benefits. See MDL Fund Memo. at p. 4. While Dow Corning disease benefit Options 1 and 2 are based, respectively, on the RSP's Fixed Amount Benefit and Long-Term Benefit Schedules, there are important differences. For example, participants in Dow Corning's Option 1 can increase their

awards if their qualifying condition worsens, a prospect that is unavailable to RSP Fixed Benefit recipients. See Ex. G to MDL Fund Memo. at¶12(c) and Annex A to Settlement Facility and Fund Distribution Agreement (hereinafter "Annex A"), attached as Exhibit 5 hereto, at§ 6.02(d)(viii). While current claimants and other registrants in the RSP could qualify for an "advanced payment," this does not exist in the Dow Corning program. See Ex. G to MDL Fund Memo. at¶12(d). Dow Corning claimants must elect between taking an expedited release payment or pursuing disease benefits for which, if they qualify, they may subsequently obtain a premium payment at their qualifying level of disability. See Ex. 5 at§6.02(a)(ii) and Ex. G to MDL Fund Memo. at Annex B. A claimant's registration status in the RSP dictates whether the claimant can choose between Fixed Amount and Long-Term Benefits, whereas a disease claimant in the Dow Corning Settlement, once permitted to participate, can choose between Option 1 and Option 2. See Ex. G to MDL Fund Memo. at¶12(b), 12(c), 14 and Ex. 5 at§ 6.02(d).

In addition, there are the major differences between how the two settlements deal with benefits for explantation and rupture. Payments for rupture are not even a discrete benefit in the RSP, being an enhanced amount (from $15,000 to $50,000) available only to current claimants who must also qualify for disease benefits and elect the Fixed Schedule. See Ex. G to MDL Fund Memo. at¶12(c). In the Dow Corning settlement, a claimant does not have to qualify for a compensable disease in order to receive the $20,000 rupture benefit. See Ex. 5 at§6.02(e)(ii). The explantation benefit in the RSP is $3,000 as opposed to $5,000 in the Dow Corning Settlement. See Ex. G to MDL Fund Memo. at¶12(a) and Ex. 5 at§6.02(c).

The resolution of claims against Dow Corning indeed proceeded on a track separate from that of claims against the RSP defendants, such that there was an eight-year-interval between implementation of the RSP in 1996 and Dow Corning's Settlement in 2004. The fact that there are features in the Dow Corning plan that are similar to those of the RSP is therefore a result of a post hoc recognition by those who formulated the Dow Corning Settlement that it would be convenient to have provisions that are similar to those in the RSP. Thus, the Dow Corning settlement endeavors to limit its disease benefit level to 50% for qualifying claimants who had their disease benefits from the RSP already reduced by 50%. See Ex. 5 at§6.02(d)(v). Contrary to the MDL Fund's assertions, the two settlements were never "intended to work as complementary facilities in the treatment of claims" (MDL Fund Memo at pp. 12-13) because the circumstances in which the RSP was instituted—a time when no one knew if there would ever be a Dow Corning settlement—did not permit this.

C. Claimant's Entitlement to Benefits in the MDL Settlement When They Had One Implant Covered In The MDL Settlement And Another Implant Which Was "Unknown" At The Time.

In order to receive compensation, each claimant in the MDL Fund had to have a "covered" implant – one manufactured by one of the RSP Defendants or their corporate predecessors. See Ex. G to MDL Fund Memo. at¶10(a)(3)(A). But many women had received more that one sets of implants. If the claimant also had received Dow Corning implants in the past, her disease benefits were reduced by 50%. Thus, if, for example, a woman had received Dow Corning implants in 1974 and those implants were ruptured and removed in 1980, and she subsequently received Bristol implants in 1980 and had them removed, unruptured, in 1990, she would receive 50% of $10,000 from the MDL Fund if she qualified for ACTD – Disability

Rating C, along with a $3,000.00 explantation payment.[4] See Ex. G to MDL Fund Memo. at¶ 12(c).

If a claimant in the MDL Settlement had received an implant manufactured by the RSP Defendants and another implant which was unknown at the time she made her MDL Settlement claim, she was entitled to 100% of the benefits available from the MDL Settlement Fund. See Ex. D to MDL Fund Memo. at¶5. There is no provision in the RSP which requires a claimant who subsequently learns that Dow Corning manufactured the other implant to repay the MDL Fund 50% of the compensation she received.

Thus, a claimant who filed a claim with the MDL Fund in 1996, stating that she had Bristol implants which had been inserted in 1974 and removed and replaced with unknown implants in 1980 (which were still implanted) was entitled under the terms of the RSP to 100% of the benefits available from the MDL Fund.

D. A Claimant's Entitlement to Benefits Under The Dow Corning Settlement Where One Implant Was Covered In The MDL Settlement And One Implant Was Manufactured By Dow Corning.

[4] In such a case, the claimant was not entitled to a rupture "enhancement" from the MDL Settlement because the ruptured implants were Dow Corning's and not one of the RSP Defendants' implants. See Ex. G to MDL Fund Memo. at¶12(c)(2). She would be entitled to receive a $20,000 rupture benefit from the SF-DCT, a $5,000.00 explantation benefit, and also $5,000 for 50% of the $10,000 base SF-DCT disease benefit. As this example makes clear, a claimant could permissibly receive more than 350% of the MDL benefits (here $8,000.00) by claiming in both plans as opposed to simply the MDL Fund. Thus, the MDL Fund's portrayal of a "windfall" because "[p]ayment of full benefits to these Lien Claimants by SF-DCT could cause the Lien Claimants to receive benefits totaling 150% from MDL 926 and SF-DCT" (MDL Fund Memo. at p. 15) is unfounded. Moreover, if the Bristol implants in this example were salines, there would be no 50% reduction of the SF-DCT disease payment, and the claimant would receive more than 400% of the MDL benefit. See Ex. 5 at§6.02(d)(v). As both of these examples illustrate, far from "double dipping," the terms of both plans allow for total compensation of far more than 100%.

If the claimant described immediately above had her second set of implants removed in 2004 and they were then identified as Dow Corning implants, she could file a claim in the Dow Corning Settlement and, under the Terms of the Dow Settlement Program, could receive 50% of the benefits available under the Amended Plan. See Ex. 5 at§6.01(d)(v). Sixty claimants have apparently filed a claim with the Dow Corning Settlement after filing a claim with the MDL-926 and being paid 100% of their compensation due under the MDL Settlement.[5]

E. The Current Status Of The Liens Asserted By The MDL Settlement Fund.

While the PSC has not been provided with the underlying claims materials, the MDL Fund represents in its motion that the sixty liens it has asserted fall into the following three categories:

i. "20 represent claimants who listed only RSP manufacturers on their POM [filed with the MDL Fund] and the medical records currently in the claimant files show no evidence of Dow implants, but who have now also filed claims with the SF-DCT"[6] (MDL Fund Memo. at p. 8);

[5] Apparently, the MDL-926 Claims Office had access to the claims filed in the Dow Corning Settlement Facility and ran a computer program to determine who had filed a claim in both facilities. See MDL Fund Memo. at p. 4.

[6] While the MDL Fund portrays all sixty claimants as "gaming the system," again it is important to note that there is nothing in either settlement plan which prohibits a claimant from receiving 100% of benefits in one plan and 50% or more of the benefits in the second. For this group of 20, at the time the POM was filed with the MDL Fund, the claimants may have only had evidence of implants manufactured by RSP Defendants, and subsequently learned that one of their implants was manufactured by Dow. As conceded by the MDL Fund in its memorandum, it may be that this situation "resulted from the claimant's inability to ascertain the true facts due to errors in medical records (e.g. medical records showed that RSP implants inserted, explant records show Dow implants removed.)" (MDL Fund Memo. at p. 15.)

ii. "10 represent claimants whose POM or the medical records currently in their files evidence a Dow implant," including 5 whose POM [filed with the MDL Fund] explicitly identified a Dow implant.[7] Id.; and

iii. "30 represent claimants who indicated on their POM that the manufacturer of one or more of their implants was unknown; no evidence was ever presented to the MDL 926 Claims Office identifying any of these unknown implants as Dow…"[8] Id.

III. ARGUMENT

A. Before This Court Is A Common Issue For All Of The Liens Asserted - Does the MDL Settlement Fund Have Standing Or A Legal Basis To Assert The Liens.

Pursuant to this Court's order of June 18, 2007, the issue presented at this time is a simple and straightforward one: Does the Escrow Agent have standing or a legal basis to assert the liens. Despite this, and as if name-calling were a respected rhetorical device in settings other than a schoolyard, the MDL Fund devotes virtually its entire memorandum to repeatedly accusing the 43 SF-DCT claimants of "gaming" the system and potentially receiving "windfall"

[7] As the MDL Fund eventually concedes, these claimants were paid 100% of their MDL Settlement entitlement, instead of 50%, as a "result of apparent error by MDL 926." (MDL Fund Memo. at p. 15.)

[8] Again, this group apparently includes cases where the claimant did not know that the "unknown" implant was manufactured by Dow Corning at the time she submitted her MDL claim back in the mid-1990s, but either an error in the medical records or subsequent explantation established that Dow Corning was the manufacturer of the "unknown" implant. The MDL Fund concedes as much. (See MDL Fund Memo. at p. 15.) To the extent any possible misrepresentation was involved, 17 of the 60 claims where liens have been asserted have been placed on administrative hold and have not been paid by the SF-DCT. The instant motion concerns only the 43 liens remaining.

payments from the SF-DCT. The MDL Fund even goes as far as to accuse the 43 claimants' attorneys of fraud.[9] As noted previously, the 17 other claims have been placed on administrative hold by the SF-DCT, and the 43 liens at issue here do not involve these. Moreover, the MDL Fund's characterization of the claimants as "gaming the system" or receiving a "windfall" are unfounded as the plain terms of both settlement plans entitle claimants to make a claim in both facilities and the MDL Settlement Plan has no provision requiring the "payback" of monies to the MDL Fund. Simply put, the Escrow Agent's argument that it has any claim at all against the 43 claimants rests upon two deeply flawed premises: first, that the terms of the MDL Settlement Program and of the Dow Settlement Program create a single, zero-sum compensation scheme for all silicone implant claimants, and, second, that if the terms of the two settlement programs did not provide for such a single, zero-sum compensations scheme, then equity may be involved to create such a scheme nunc pro tunc. Thus, it is doubtful that the MDL Fund has any claim at all against these 43 claimants. However, assuming it does have a claim--once the MDL Fund

[9] The MDL Fund does recognize that its fraud accusation "would not apply to any claimant (or her counsel) whose medical records showed an RSP implant, but upon explantation, the implant was determined to be a Dow implant, except to the extent that a claim was made to Dow without agreeing to a refund to MDL 926." (MDL Fund Memo. at p. 19, n.3.) The MDL Fund fails to explain the basis for why such an attorney has a duty to refund the MDL-926 before making a claim to the SF-DCT and fails to inform this Court that neither settlement plan imposes any "refund" requirement.

Moreover, the MDL Fund's fraud accusation apparently includes attorneys for claimants whose clients truthfully informed the MDL Fund that one of the claimant's implants were manufactured by Dow Corning and the MDL Fund mistakenly failed to reduce the RSP settlement benefit by 50%. Moreover, the MDL Fund's fraud accusation apparently includes attorneys whose clients truthfully informed the MDL Fund in the mid-1990s that the claimant had one "unknown" implant, and subsequently learned that the "unknown" implant was manufactured by Dow Corning. As noted above, there is nothing in the terms of the RSP Settlement that requires such a disclosure to the MDL Fund.

vitriolic rhetoric is set aside--the issue presented is simply this: Does the MDL Fund have any legal right to assert a "lien" against the settlement check due a claimant in the SF-DCT or is it, at most, a general creditor, who may have other remedies against a particular claimant?

B. Even if MDL Fund May Have Claims Against Certain Claimants That Does Not Entitle It To Assert A Lien Against A Claimant's SF-DCT Settlement Check.

While the MDL Fund may have "overpaid" some claimants – in the sense that it paid the claimant more than she was entitled to in the MDL Settlement – such an overpayment gives the MDL Fund, at most,[10] a claim to recover against such claimants. Such claim does not give a right to an equitable lien.[11]

A "lien" under Texas law[12] "requires more than an obligation to repay a debt. Rather, it requires some instrument, agreement, or act giving one creditor superior rights to collateral over all other unsecured creditors or creditors with a subsequently obtained judicial lien." Nelson v. Nelson, 193 S.W. 3d 624, 628 (Tex. App.—Eastland 2006)(emphasis added). " A lien…is the right to have satisfaction out of property to secure the payment of a debt." Svacina v. Gardner, 905 S.W. 2d 780, 783 (Tex. App.—Texarkana 1995).

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[10] Again, it must be noted that the MDL Fund may have such a claim. For example, in a case where the MDL Fund mistakenly overpaid a claim in 1996, such claim may be barred by the statute of limitations or for other reasons.

[11] The MDL Fund does not, nor could it, argue that it has any statutory or common law lien against the SF-DCT settlement checks.

[12] Given that Houston, Texas is the location of both the MDL Fund and the SF-DCT, Texas law should control. The MDL Fund does not address the choice of law issue but its memorandum contains two pages of argument addressing the law of equitable liens and those two pages cite Texas law.

The MDL Fund asserts that here an equitable lien may be imposed. However, it is clear under Texas law that an equitable lien must be based on an express or implied contract. Such a contract, whether express or implied, must indicate that the parties to the transaction "intended that certain property would secure the payment of a debt." Bray v. Curtis, 544 S.W. 2d 816, 819 (Tex. Civ. App.—Corpus Christi 1976)(emphasis added).[13] In other words, "the transaction [must] resolve[] itself into a security." Barfield v. Henderson, 471 S.W. 2d 633, 638 (Tex. Civ. App.—Corpus Christi 1971).

Here, the MDL Fund relies on the existence of an alleged written agreement between the MDL Fund and claimants to establish it has an equitable lien. See MDL Fund Memo. at p. 15. ("The RSP Notice informed MDL 926 claimants that the benefits due the claimants from the RSP would be reduced by 50% if they had both RSP and Dow implants, and the RSP POM required the claimant to agree, under written oath, that this was not the case. Here a written agreement, and not merely an implied agreement, was created.") But, as is obvious, even if there was such an agreement, it may create only an underlying debt; it is certainly not an agreement that certain property (here the SF-DCT settlement check) would secure payment of that debt. See Bray, 544 S.W. 2d at 819.

Thus, even if the RSP Settlement documents could be found to create an agreement on the part of a claimant to repay the MDL Fund an overpayment (which appears doubtful due to an absence of any language to this effect), at most, such an agreement would create a debt and not

[13] Thus, an example of an equitable lien would be as follows: A claimant needs $500 for a doctor's report to make a claim in the SF-DCT. She agrees with her brother that if he will lend her the $500, she will pay him back from the SF-DCT settlement check.

be an agreement intending that certain specific property was to secure payment of a debt. The distinction between the two types of agreements is simple: I will pay you [the creditor] money vs. you [the creditor] can have a portion of money I owe you from my Dow Corning settlement check to satisfy my debt. Thus, while the MDL Fund may be a general creditor of a claimant (similar to VISA or Mastercard or others the claimant may owe money to), it is not a valid lienholder.[14] Even if fraud was involved, no equitable lien could arise against the SF-DCT settlement checks absent an agreement by a claimant to repay the debt out of the claimants SF-DCT settlement check. The MDL Fund points to no such agreement with any claimant which existed prior to the MDL Fund asserting its liens.

Perhaps recognizing the absence of such an agreement, the MDL Fund resorts to an alternative argument: "[i]n the alternative, the Court may allow MDL 926 to be equitably subrogated to the Lien Claimants with respect to the proceeds due them from SF-DCT under Richards v. Suckle, 871 S.W. 2d 239 (Tex. App.--Houston 1994). See MDL Fund Memo. at p. 17. As the absence of any quoted language or even a page cite to the portion of Richards the MDL Fund is relying on may indicate, such reliance is seriously misplaced. Richards involved two brothers who inherited land as undivided tenants-in-common from their deceased brother

[14] The MDL Fund quotes Williams v. Greer, 122 S.W. 2d 247, 248 (Tex. App. 1938), for the unremarkable proposition that when "one [is] deprived of the possession of real or personal property by artifice or fraud of another, equity implies and declares out of general consideration of right and justice, as between parties, a lien on the property to secure the charge…" (emphasis added). Williams involved a defendant who bought a car and paid for it, in part, with a check. After driving it away, the defendant stopped payment on the check, and the seller applied for a writ to recover the vehicle. The Court concluded the seller had an equitable lien against the vehicle, because the transaction "resolve[d] itself into a security." Here, there can be no argument made that the MDL Fund has any type of security interest in the claimants SF-DCT settlement check.

who had assumed the original mortgage obligation of some joint venturers who had financed the original purchase of the property from the mortgagor. One brother refused to help the other make payments on the note, so the other brother paid off the entire amount. The Court held that the brother who paid off the note did not have an equitable lien on the property, but he was equitably subrogated to the original mortgagor since he paid off the mortgage. "The equitable doctrine of subrogation holds that where a person, other than the principal obligor, pays a mortgage indebtedness on land which he has an interest, equity will substitute him in place of the original mortgagee, and vest that mortgage's rights in him." Id. at 241. The doctrine clearly has no application here.[15]

[15] Although not clear, to the extent that the MDL Fund claims that some type of equitable subrogation may apply, because there was some type of "implied agreement by one facility to repay the other for an overpayment to prevent injustice" (MDL Fund Memo. at p. 17), the record is devoid of any evidence of such an implied agreement.

Finally, the MDL Fund argues that "[i]t's like a Chevy dealership with a repair shop and a body shop for a wrecked vehicle needing repairs and bodywork. If the customer overpaid for repairs, the body shop should credit the overcharge on its bill, in Equity and good conscience." (Id.) Here we have two difference settlement plans, overseen by two different Federal courts with no provisions in either settlement plan providing for repayments. The two settlement plans are not at all like a single Chevy dealer, the MDL Fund is not a repair shop and the SF-DCT is certainly not a body shop.

The MDL Fund's attempt to portray the two settlement funds as one "complementary payment program" (MDL Fund Memo. at pp. 12-13), thus somehow entitling the MDL Fund to a "set-off," not only mischaracterizes the nature of the two settlements, but also exhibits a fundamental misunderstanding of the law of set-off. A set-off "is a form of counterclaim which a defendant may urge by way of defense." Trueheart v. Braselton, 875 S.W.2d 412, 415 (Tex. App.—Corpus Christi 1994). It is offered by a party in a defensive posture to set off a claim for money by another party. E.E. Farrow Co. v. United States National Bank of Omaha, 358 S.W.2d 934, 935 (Tex. Civ. App. —Waco 1962). As such, there must be a "mutuality of demand" where debts are owing between two disputing parties. FDIC v. Projects American Corp., 828 S.W.2d 771, 772-773 (Tex. App.—Texarkana 1992). Here, no party is asserting claims against the MDL

CONCLUSION

For all of the above-stated reasons, this Court should issue an order declaring that the asserted MDL liens have no legal basis and direct the SF-DCT Claims Administrator to issue the settlement checks to the 43 affected SF-DCT claimants.

Respectfully submitted,
The MDL-926 Plaintiffs Steering Committee

s/Leslie J. Bryan
Leslie J. Bryan (GA Bar No. 091175)
DOFFERMYRE, SHIELDS, CANFIELD,
KNOWLES & DEVINE, LLC
1355 Peachtree Street, Suite 1600
Atlanta, GA 30309
Telephone: (404) 881-8900
Facsimile: (404) 881-3007
E-mail: lbryan@dsckd.com

s/Fredric L. Ellis
Fredric L. Ellis (Mass. BBO # 542075)
ELLIS & RAPACKI LLP
85 Merrimac Street, Suite 500
Boston, MA 02114
Telephone: (617) 523-4800
Facsimile: (617) 523-6901
E-mail: rellis@ellisrapacki.com

Date: August 1, 2007

Fund such that the MDL Fund could supposedly use the amounts it alleges are owed to it by the claimants to offset those claims. The set-off doctrine simply has no applicability here.

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2007, I electronically filed the foregoing MDL-926 Plaintiffs' Steering Committee's Opposition to MDL Settlement Fund's Motion for Resolution of Lien Claims Against Settlement Facility with the Clerk of the court using the ECF System which will send notification of such filing to the parties. I also certify that I have mailed by U.S. Mail the document to the following:

Edgar C. Gentle, III
Gentle, Pickens & Turner
2 North 20th Street, Suite 1200
Two North Twentieth Bldg.
Birmingham, AL 35203

David T. Austern
Claims Resolution Management Corp.
3110 Fairview Park Drive, Suite 200
Falls Church, VA 22042

The Honorable Frank Andrews
P.O. Box 410
Hunt, TX 78024

/s/ Leslie J. Bryan
Leslie J. Bryan
Doffermyre, Shields, Canfield,
Knowles & Devine, LLC
1355 Peachtree Street
Suite 1600
Atlanta, Georgia 30309
Telephone: (404)881-8900
Facsimile: (404)881-3007
E-mail: lbryan@dsckd.com