

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

In re:) Master File No. CV
92-P-10000-S)
)
SILICONE GEL BREAST IMPLANTS) This Document Relates To:
PRODUCTS LIABILITY LITIGATION) All Cases
(MDL-926))

ORDER NO. 13
(Establishing Plaintiffs' Litigation Expense Fund
to Compensate and Reimburse Attorneys
for Services Performed and Expenses
Incurred for Common Benefit)

This order is entered in order to provide for the fair and equitable sharing among plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs.

1. Plaintiffs' Litigation Expense Fund to be Established. Plaintiffs' National Liaison Counsel -- Francis H. Hare, Jr., and J. Michael Rediker -- are directed to establish an interest-bearing account to receive and disburse funds as provided in this order. They may designate an escrow agent for this purpose. These funds will be held as funds subject to the direction of the court. No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person under this order. These funds will not constitute the separate property of any party or attorney or -- except when and as directed to be disbursed as provided in this order to a specific person -- be subject to garnishment or attachment for the debts of any party or attorney. These limitations do not preclude a party or attorney from transferring, assigning, or creating a security interest in potential disbursements from the fund if permitted by applicable state laws and if subject to the conditions and contingencies of this order.

2. Assessment.

(a) All plaintiffs and their attorneys who, after this date,

either agree -- for a monetary consideration -- to settle, compromise, dismiss, or reduce the amount of a claim or, with or without a trial, recover a judgment for monetary damages or other monetary relief, including both compensatory and punitive damages, with respect to a breast implant claim are hereby assessed:

(1) 5% of the "gross monetary recovery," if the agreement is made or the judgment is entered after this date and before November 1, 1993, or

(2) 6% of the "gross monetary recovery," if the agreement is made or the judgment is entered after October 31, 1993.

Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment into the fund as a credit against the settlement or judgment. If for any reason the assessment is not so withheld, the plaintiff and her counsel are jointly responsible for paying the assessment into the fund promptly upon receipt.

(b) In measuring the "gross monetary recovery":

(1) Exclude any amounts taxed, or potentially subject to be taxed, as court costs that are to be paid by the defendant.

(2) Exclude any payments to be made by the defendant directly to unrelated third-parties, such as to physicians, hospitals, and other health-care providers.

(3) Exclude the value of any services or products that are to be provided by the defendant without charge, or at reduced charges, such those relating to removal or replacement of implants.

(4) Include the present value of any fixed and certain payments to be made in the future (except that, in lieu thereof, a plaintiff may agree to pay into the fund the appropriate percentage when and as future payments are received).

(c) This obligation:

(1) Applies to all cases now pending, or later filed in, transferred to, or removed to, this court and treated as part of the coordinated proceeding known as the Silicone Gel Breast Implants Products Liability Litigation, including

cases later remanded to a state court as a result of permitting the amendment adding a non-diverse party (but not including, however, those cases remanded to a state court on the basis that removal was improper).

(2) Applies to other federal breast-implant cases which are not transferred to this court under MDL-926 but in which plaintiff's counsel agrees to this obligation. (It is expected that, in due course, after coordinated MDL pretrial proceedings have been completed in this court and cases are being remanded back to transferor courts for further proceedings, counsel in newly filed and removed cases may agree to the terms of certain orders in this court in lieu of transfer under § 1407.)

(3) Applies to cases in a state court to the extent so ordered by the presiding judge of that court.

(d) If the plaintiff's attorney has a contingent fee agreement with the client, the amount to be paid to the fund shall be charged against, and paid from, the attorney's share of the recovery, except that, if the agreement contains special provisions regarding reimbursement for litigation expenses, one-half of that amount -- unless a different portion is stated in the court's approval of disbursement -- may be treated in like manner as for other litigation expenses.

(e) Plaintiffs and defendants, and their counsel, are jointly responsible for promptly reporting to Plaintiffs' National Liaison Counsel -- or to the escrow agent designated by them -- the terms of any settlement or judgment subject to this order. This report is to enable monitoring of compliance with this order. If so provided in a settlement agreement, the terms shall -- unless and until so ordered by this court -- be kept confidential and not be communicated by them to other litigants and their attorneys.

(f) Relief from obligation. The court reserves the right to relieve, wholly or partly, a plaintiff from the obligations of this order upon a showing of exceptional circumstances.

3. Disbursements.

(a) Payments may be made from the fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible are not limited to Plaintiffs'

National Liaison Counsel and members of Plaintiffs' National Steering Committee, but include, for example, other attorneys called upon by them to assist in performing their responsibilities, State Liaison Counsel, and other attorneys performing similar responsibilities in state court actions in which the presiding state-court judge has imposed similar obligations upon plaintiffs to contribute to the fund.

(b) Payments will be allowed only to compensate for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all plaintiffs.

(1) Payment may, for example, be made for services and expenses related to the obtaining, reviewing, indexing, and paying for hard-copies or computerized images of documents from the defendants; to conducting "national" or "state" depositions; and to activities connected with the coordination of federal and state litigation, such as assessments to pay for the services of the special master appointed by the court for that purpose. The fund will not, however, be used to pay for services and expenses primarily related to a particular case, such as the deposition of a treating physician, even if such activity results in some incidental and consequential benefit to other plaintiffs.

(2) Payments will not exceed the fair value of the services performed or the reasonable amount of the expenses incurred, and, depending upon the amount of the fund, may be limited to a part of the value of such services and expenses. No "bonus" is to be paid merely because the service or expense is undertaken for the common benefit of other litigants.

(c) No amounts will be disbursed without review and approval by a committee of federal and state judicial officers to be designated by the court. The committee may, however, utilize the services of a special master to assist in this review, and may authorize one or more of its members to act for the committee in approving particular types of applications for disbursement.

(d) If the fund exceeds the amount needed to make payments as provided in this order, the court will order an refund to those who have contributed to the fund. Any such refund will be made in proportion to the amount of the contributions.

4. Modification. The court reserves the power to modify

the terms of this order, but no changes imposing any additional burden or obligation on plaintiffs in actions in a state court that has imposed this obligation on such parties will be made without the approval of the presiding state court judge.

This the 23rd day of July, 1993.

_____/s/ Sam C. Pointer, Jr._____
United States District Judge