

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division**

In re:
SILICONE GEL BREAST IMPLANT
PRODUCTS LIABILITY LITIGATION
(MDL 926)

HEIDI LINDSEY, et al.,
Plaintiffs,

-vs.-

DOW CORNING CORP., et al.,
Defendants.

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Master File No. CV 92-P-10000-S

Civil Action No. CV 94-P-11558-S

**ORDER No. 26
(Declaring Opt-out Rights and Establishing Procedures)**

The court has concluded (1) that the total amount of current claims that would qualify for approval under the Disease Compensation Program of the existing settlement would exceed the \$1,200,000,000 to be set aside for such claims, (2) that the negotiations conducted during the Spring and Summer were not successful in eliminating the need for reductions in benefits under the Program, and (3) that, accordingly, all class members would be accorded a "Second Opt-out" right.

Moreover, because of the very substantial reduction or "ratcheting" — probably reducing the amounts payable for current claims by almost 95% of the grid amounts (with similar or greater reductions under the Ongoing Claims portion of the Program) even if Dow Corning's contribution to the fund were permitted in its bankruptcy proceedings — the court has concluded, and few would question, (1) that very large numbers of class members would, when so notified, elect to opt out of the settlement and, in turn, (2) that the defendants would not be willing to make contributions of over \$4,200,000,000 to a settlement leaving so many potential claims unresolved and would withdraw from the settlement. To send "Second Opt Out" notices under the existing settlement after all processing of current claims was completed would be a futile and illusory process, creating false hopes by those class members who might be willing to accept a 5% payment, unreasonably delaying the time when those who would be opting out could proceed, if they chose to do so, with litigation or other individual resolution of their claims, and wasting the parties' time on an meaningless appeal relating to the existing settlement.

Acting under its general supervisory powers retained under the September 1, 1994, order, the court now formally declares that class members do have new opt-out rights and that class members and their counsel should not expect to receive any benefits under the existing settlement (except for the very small benefits that might be payable to recipients of Bioplasty or Mentor implants). Class members will have an option to pursue existing litigation (or institute new litigation) if they wish to do so, subject of course to any bars created by bankruptcy proceedings involving Dow Corning and Bioplasty (and by the mandatory non-opt out class settlement with Mentor).

It would not, however, be in the best interest of class members to simply vacate the certification of the Lindsey class. Those class members who would be interested in instituting litigation but who had been unable to do so because of the existing settlement and its injunction against litigation by class members might be required to take immediate and precipitate action lest their claims be barred by statutes of limitations, which would start to run again following decertification. The number of new actions that would be filed, most perhaps within a period of a few weeks, is problematic, but certainly could be in the tens of thousands. Such an infusion of new litigation in state and federal courts would create substantial problems for the courts, for these new litigants and their attorneys, for implant recipients already having cases pending, and for the defendants.

It is preferable to establish a mechanism by which class members wanting to opt out can do so (and thereby become free to pursue or institute litigation if they wish to do so), but allowing the Lindsey class certification to remain in effect, with its bar against litigation (and consequent suspension of statutes of limitation) likewise remaining in effect until a class member opts out.

A complicating factor relates to the potential for a revised settlement program that may be offered by Bristol, Baxter, and 3M to domestic class members who have or have had their implants. The program, if approved by the boards of directors of those companies, would utilize the Claims Office and many of the structures and procedures of the existing settlement, but with quite different provisions relating to eligibility and benefits. It will be mid-November before all details of this program, and action by the defendants' boards of directors, can be completed. The notice that will be individually mailed to all identified class members not only should explain their opt-out rights but also, for those who would be eligible to participate under a settlement program from Bristol, Baxter, and 3M, should explain benefits available under that program.

In implementing a procedure for new opt-outs, it is also necessary that appropriate forms be designed, prepared, and made available, and that the Claims Office make plans for processing those opt-outs. This function will be in addition to the processing and reviewing of registrations and claims that were filed under the existing settlement, which will continue.

For the above reasons, the court is now directing that class members in the Lindsey class will be allowed to opt out of the class by filing with the Claims Office after November 30, 1995, an appropriate form to be prescribed by the court in the coming weeks. Opt-out forms should not be filed before December 1, 1995. There is no deadline for filing an opt-out—the period for filing opt-outs is of indefinite duration, though at some future date the court may prescribe an ending date or might vacate the Lindsey class certification. Notices explaining their rights and options will be mailed to all known class members and their attorneys, probably during the latter half of November or the first half of December; class members will have more than ample time after receiving the Notices to make any elections and need not be concerned about an inadequate time in which to make those decisions. Updated information regarding opt-out rights and procedures (and the status of a new settlement program from Bristol, Baxter, and 3M) will periodically be put on the Claims Office's computer bulletin board and on its "800" number voice information telephone line. Class members are requested not to seek additional information from the Claims Office regarding these matters before the Notices are sent.

The existing proscription against class members instituting or pursuing litigation against the settling defendants under the existing settlement remains in effect until (after November 30, 1995) a class member opts out from the class. If the person opting out does not then have a lawsuit pending, the running of any statutes of limitation will remain suspended for a period of 30 days after filing the opt-out. For persons not opting out, statutes of limitation remain suspended and the proscription against instituting or pursuing litigation against the settling defendants remains in effect.

This the 7th day of October, 1995.

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