

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

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

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Master File No. CV 92-P-10000-S  
This Order Applies to All Cases

**ORDER No. 31  
(Appointment of Rule 706 Expert Witnesses)**

Several federal Transferor Courts<sup>1</sup> have, after remand, indicated the desirability of designating one or more court-appointed experts under Fed. R. Evid. 706 to evaluate and critique pertinent scientific literature and studies bearing on issues in breast implant litigation pending in, or to be remanded to, such courts. It is likely that other federal courts will also wish to take advantage of Rule 706 for such purposes and that some state courts may likewise wish to utilize state-law counterparts of Rule 706.

Before this Court is a motion by the National Plaintiffs' Steering Committee ("PSC") requesting that, given the objective of coordinated pretrial proceedings under 28 U.S.C. § 1407, this Court assume responsibility for the appointment on a national basis of such Rule 706 experts as may be appropriate. Although expressing reservations about the utility and role of such experts at least at the present time, the PSC argues that, in the interest of avoiding potentially redundant or even conflicting results in potential testimony arising from multiple Rule 706 appointments by different courts, it would be preferable to have

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<sup>1</sup> In an order dated April 3, 1996, Judges Weinstein and Baer of the United States District Courts for the Eastern and Southern Districts of New York, concurred in by Judge Lobis of the state Supreme Court for New York County, appointed a three-person panel to assist those federal courts in selecting an appropriate panel of knowledgeable and neutral experts pursuant to Rule 706. Judge Jones of the United States District Court for Oregon has also begun efforts to locate appropriate experts for appointment under Rule 706.

a single set of nationally-appointed experts, whose testimony might be potentially usable in the many federal courts to which breast-implant cases have been (or in the future may be) remanded,<sup>2</sup> as well as in state courts in which there are state-law counterparts of Rule 706. There is also the potential that such appointments and resulting testimony might be of value in the bankruptcy proceedings involving Dow Corning now pending in the Bankruptcy Court for the Eastern District of Michigan. The defendants say they object to formation of a Rule 706 Panel.<sup>3</sup> Upon consideration, after reviewing the parties' written and oral submissions—and after consulting with, and receiving encouragement from, Judges Baer, Jones, and Weinstein, as well as other state and federal judges—this Court concludes that the motion should be granted, and conditionally, as indicated in paragraph 5, orders as follows:

1. Procedure. Appointments will be made on a national basis by this Court, for potential use in all federal courts and as permitted in state courts, in a two-step process patterned after the procedures adopted in the New York federal courts: first, by utilizing a "Selection Panel" to assist in the selection process, as described in paragraph 2; and second, by then appointing persons to serve under Rule 706 as court-appointed experts and as members of a "Science Panel," as described in paragraph 3.

2. Selection Panel.

(a) As an initial step, this Court, acting under Rule 706 and under the supervisory powers conferred by Fed. R. Civ. P. 16(c)(4),(8), (12), and (16), hereby designates the following to act as Special Masters under Fed. R. Civ. P. 53 and Rule 706, collectively referred to as the "Selection Panel"—

(1) the persons previously designated by the Eastern and Southern Districts of New York; namely,

Professor Margaret A. Berger (Chair), Brooklyn, New York,  
Dr. Joel E. Cohen, New York, New York, and  
Dr. Alan Wolf, New York, New York; and,

(2) as additional members, suggested by federal or state judges in other parts of the country, the following—

Dr. Judith L. Craven, Houston, Texas,  
Dr. Richard Jones, Portland, Oregon, and  
Dr. Keith Marton, San Francisco, California.

(b) This Court requests that the Selection Panel provide it with names of neutral, impartial persons who have the indicated expertise, who would be able to communicate effectively with judges and jurors, and who, if selected, would be willing to serve under Rule 706 on the Science

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2 Over 21,000 cases have been transferred to this Court under 28 U.S.C. § 1407 from 92 of the 94 federal districts, no cases having yet been transferred from Guam or the Northern Marianas. Over 300 cases have already been remanded by this Court to 45 separate district courts.

3 It is unclear whether the defendants are mimicking Br'er Rabbit or are concerned about courts receiving testimony from impartial experts.

Panel as outlined in paragraph 3. The Selection Panel should not solicit, or receive, suggestions from the parties regarding the names of potential nominees for appointment to the Science Panel, but may receive general suggestions from the parties respecting criteria, qualifications, and possible areas affecting bias or conflicts.

(1) The Selection Panel should recommend to this Court one to three neutral persons with appropriate expertise in each of the following four fields (and, to the extent needed, in statistics): epidemiology, immunology, rheumatology, and toxicology. After receiving the advice of the Selection Panel and hearing from the parties, the Court will determine whether to accept from the parties “challenges for cause” or, if three such persons are recommended by the Selection Panel for such a position, to allow each side a “peremptory challenge.”

(2) The Selection Panel need not wait to communicate its recommendations until its nominees for all four fields have been determined. As the Selection Panel determines the person(s) whom it will nominate for appointment as an expert in any of the indicated fields, it should submit such recommendation(s) to this Court so that, upon appointment, the expert may receive additional instructions as indicated in paragraph 3(b) and then commence his or her work under Rule 706 even if the full Science Panel has not been appointed.

(3) The Selection Panel may also recommend one or more persons with special expertise in the interrelationship between the forensic sciences and legal processes and procedures, for appointment as Chair of the Science Panel and to be of assistance to other members of the Panel in performing their responsibilities. The Court anticipates that such a person, if appointed, would not be called upon to submit findings, be deposed, or present testimony as indicated in paragraph 3, but would rather perform administrative, coordinating, and consultative services for the Science Panel.

(4) As an interim measure, the Court directs the plaintiffs (acting jointly through the PSC) and the defendants (acting jointly) to each provide to this Court by June 17, 1996, the designation of a rheumatologist who has not been retained (and will not be) retained by any parties to provide testimony in this litigation. These party-designated rheumatologists are to be available to members of the Selection Panel for joint consultation in identifying neutral rheumatologists for possible appointment to the Science Panel. While the parties are not precluded from designating for this purpose a rheumatologist with known and strong views concerning potential issues or with whom they may have previously consulted, they are cautioned that the members of the Selection Panel are likely to give less attention and weight to suggestions expressed by rheumatologists who themselves appear to be partisan or lacking in objectivity. The Court hopes that, with the special assistance of these party-designated rheumatologists, the Selection Panel will be able to identify, for potential court-appointment under Rule 706, one or more rheumatologists whose credentials, objectivity, and impartiality could not be reasonably questioned by plaintiffs or defendants.

(5) The Court will welcome suggestions from the Selection Panel regarding the composition, responsibilities, compensation, operation, procedures, and utilization of the Science Panel, including appropriate modifications or additions to this Order.

(c) Members of the Selection Panel may, from time to time, be assigned additional duties by this Court, such as providing guidance to the Science Panel with respect to preparation of reports and preparation for providing testimony that would be acceptable under Rules 702, 703, 705, and 706.

(d) Although the Court has no plans to appoint any members of the Selection Panel to the Science Panel, membership on the Selection Panel does not automatically disqualify a person from such appointment.

### 3. Science Panel.

(a) It is anticipated that on the Science Panel there will be one person whose principal area of expertise is in epidemiology, one whose principal area of expertise is in immunology, one whose principal area of expertise is in rheumatology, and one whose principal area of expertise is in toxicology—each having also such familiarity with statistics as may be needed or desirable to perform their functions and responsibilities—and perhaps an additional person to serve as Chair of the Panel, whose primary field of expertise would be the interrelationship between forensic sciences and legal procedures and processes. This Court reserves the right to appoint additional persons with special expertise in the same disciplines or in other fields and disciplines if that appears appropriate in the future.

(b) After this Court has appointed an expert in a field under Rule 706, the parties will be afforded the opportunity under Rule 706(a) to participate at a conference in which this Court will delineate the duties of the expert and indicate any topics on which the expert should, at least initially, commence reviews of the existing scientific research. Subject to further modification as may be appropriate, the following principles will serve as preliminary guidelines under Rule 706(a) for such duties.

(1) The primary function of the court-appointed experts, as presently contemplated, will be to review, critique, and evaluate existing scientific literature, research, and publications—addressing such matters as the meaning, utility, significance, and limitations of such studies—on topics as, from time to time, may be identified by the Court as relevant in breast-implant litigation, particularly on issues of “general causation.” The parties may submit to the Court requests for reviews by the Science Panel relating to particular issues, indicating and describing the literature and research relied upon—or criticized—by the parties’ experts when testifying on such issues.

(2) At the present time, and subject to further directions, these court-appointed experts will not be asked to conduct any independent research, to evaluate the credentials or expertise of persons who may be called by the parties to provide expert testimony, or to assess the particular claims of individual plaintiffs.

(3) The present contemplation is that—

(A) each of the Rule 706 court-appointed experts will, as appropriate to such expert’s areas of expertise, individually conduct such reviews, critiques, and evaluations, and will then, after consultation with other members of the Science Panel, present written findings pursuant to Rule 706(a),<sup>4</sup> drawing upon other panelists’ expertise in related disciplines as appropriate and to the extent permitted under Rule 703;

(B) these findings would be made and presented on particular topics and issues as they are completed (*i.e.*, without delaying until findings are

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<sup>4</sup> Subject to further modification, it is anticipated that the written report would contain a relatively complete statement of the opinions to be expressed by the expert; the basis and reasons therefor; the data or other information relied on in forming such opinions, and any exhibits to be used as a summary of or support for such opinions. Additionally, the first report submitted by a court-appointed expert should summarize the expert’s qualifications, including a list of all publications authored within the preceding ten years and a list of any other cases in which the expert has testified at trial or by deposition within the preceding four years.

completed on all topics and issues that may be referred to the Panel);

(C) a particular issue presented to the Science Panel may be reviewed (with findings made) by only one of the court-appointed experts, or the issue may be reviewed by more than one such expert, with findings made by each as appropriate to that expert's discipline and expertise; and

(D) the Science Panel may conclude that, because of the insufficiency of reported research<sup>5</sup> or because of research in progress, they should decline to review, or postpone review of, research with respect to particular issues or topics. It is further anticipated that the Science Panel would, through a preliminary and informal report to the Court, indicate the general nature of the expected findings by the court-appointed experts so that the Court could determine whether such findings would have sufficient probative value to justify preparation of a formal report, triggering the provisions of paragraph 3(c) and 3(d) below.

(4) Until such time that the Court appoints a rheumatologist to the Science Panel, panel members, when needing special help on rheumatological subjects, may consult on a joint basis with the rheumatologists designated by the parties under paragraph 2(b)(4) above. They may also utilize the services of other persons with special expertise in related fields and disciplines as, from time to time, may be appropriate and permissible under Rule 703, such as applied mathematics, biology, biomedicine, polymer chemistry, hematology, internal medicine, neurology, oncology, plastic and reconstructive surgery, radiology, and statistics.

(c) After receiving the report of findings of a court-appointed expert, the parties will, as provided in Rule 706, be afforded the opportunity to conduct a "discovery-type" non-videotaped deposition of the expert, subject to appropriate guidelines and limitations imposed by this Court, which may include direct supervision of the conduct of the deposition by this Court or by another judicial officer designated by this Court and which would, taking into account the details provided in the written report, limit examination to that needed by the parties to fairly prepare for the trial-perpetuation deposition described in paragraph 3(d) below. The Court hopes that the parties may agree that, before such a trial-perpetuation deposition commences, they engage in an informal discussion with the expert regarding his or her potential testimony, rather than take a formal discovery-type deposition.

(d) It is anticipated that, after the opportunity for a discovery-type deposition or informal discussion, the trial testimony of the court-appointed expert will be perpetuated by means of a videotaped deposition at which this Court (or another judicial officer designated by this Court) will preside. It is further anticipated that this Court (or the judicial officer designated by this Court) may conduct the initial direct examination of such expert, with the plaintiffs and defendants then being allowed to cross-examine the expert. Experts retained by the parties may attend the deposition in order to assist counsel in examining the court-appointed expert.

(e) Except for good cause shown to this Court, plaintiffs and defendants will not be permitted to depose a court-appointed expert except as provided in paragraph 3(c) and 3(d) above or to subpoena a court-appointed expert to testify in person at a trial. These restrictions are essential to protect court-appointed experts from potential demands for attendance at depositions or trials in the hundreds or perhaps thousands of cases in which their testimony might be deemed desirable by the trial judge presiding over such cases or by one of the parties.

(f) This Court finds that, by analogy to Fed. R. Civ. P. 32(a)(3)(D) and (E), the videotaped

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<sup>5</sup> Insufficiency of research on an issue should not necessarily, however, result in the Panel's declining to approve issuance of findings, since, on some topics, a determination that no pertinent research exists could itself be a significant finding.

trial-perpetuation deposition (or an edited version of such deposition) will be usable in all federal courts (and in all state courts to the extent permitted by applicable state law) as determined to be relevant by the judge presiding over such trial. As provided in Rule 706(a), the expert may be called to testify (by means of the deposition) either by the trial court or by a party. As provided in Rule 706(c), the trial court will determine, in the exercise of its discretion, whether or not the fact that the deponent is a court-appointed expert should be disclosed to the jury (and, as needed, to direct appropriate editing of the deposition consistent with that determination).

(g) As provided in Rule 706(d), neither the appointment of the Science Panel nor the findings by members of the Science Panel will preclude the parties from calling expert witnesses of their own selection.<sup>6</sup> This Court does not view entry of this Order as calling for the delay or rescheduling of any trials that may have been set by other courts; it will be for the trial judge before whom a case is pending to determine whether the pendency of any review by the Science Panel should affect the trial setting of that case.

#### 4. Compensation and Funding.

(a) As provided in Rule 706, the persons appointed to the Selection Panel and to the Science Panel will be entitled to reasonable compensation for their services, together with reimbursement for reasonable expenses, as this Court may from time to time allow. This will include compensation and reimbursement for services already undertaken by the persons named in paragraph 2(a)(1) under appointment from the Eastern and Southern Districts of New York. The fees and reimbursement of the consulting rheumatologists named under paragraph 2(b)(4) shall be borne by the parties designating such persons.

(b) This Court will seek at least partial funding of these costs from the Administrative Office of the United States Courts. To the extent these costs exceed any funds so available, they shall be paid (1) one-half by the plaintiffs, through a charge against the National PSC and against the Common Benefit Fund established under Order No. 13, and (2) one-half by the national defendants in a manner to be agreed upon by them.

5. Effect. Under Rule 706, the parties in MDL 926 are directed to show cause to this Court by June 10, 1996, why this order should not take effect on June 12, 1996. Although, pending consideration of any such responses, this order is conditional and, based on such responses, might be vacated or modified prior to June 12, 1996, the persons appointed in paragraph 2(a) to the Selection Panel may, and are encouraged to, proceed with preliminary efforts to identify appropriate persons for possible nomination as members of the Science Panel.

This the 30th day of May, 1996.

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

Service on: National Liaison Counsel  
Members of Selection Panel

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<sup>6</sup> Findings by the court-appointed experts may, however, be relevant to, and be considered by trial courts in ruling on, issues raised under Rules 104, 403, 702, 703, and 803(18) regarding admissibility of expert testimony and published research offered by the parties.