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

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| In re: | ) | |
| SILICONE GEL BREAST IMPLANT | ) | Master File No. CV 92-P-10000-S |
| PRODUCTS LIABILITY LITIGATION | ) | |
| (MDL 926) | ) | |

# ORDER No. 31B

## (Confirming Order No. 31)

In Order No. 31 the parties were directed to show cause why the terms of that order should not be made effective. No opposition to the terms of that order has been submitted by plaintiffs. Responses have been filed by certain of the settling defendants; namely, Baxter, Bristol-Myers, and 3M.[1]

As a fundamental matter, the settling defendants question whether this court, acting under 28 U.S.C. § 1407 on pretrial matters, has authority to appoint "trial" experts under Fed. R. Evid. 706. The short, but correct, answer is that any implementation of Rule 706 procedures must be commenced during the pretrial stage of a case and that many, if not most, of the pretrial activities of a transferee judge under §1407—such as supervision of depositions and production of documents—are undertaken for the very reason that such matters may be needed at a trial. Nor, given the procedures tentatively established under Order No. 31 and the modifications that may be made at the time of assigning specific responsibilities to panel members, should there be any impermissible infringement on the powers of the trial judge before whom a particular case may be set for trial.

1 Additionally, counsel for Dow Corning has filed a response regarding the potential use in the bankruptcy proceedings involving Dow Corning of findings by members of the national Science Panel. Questions raised in that response are ones that would be presented and considered by the Bankruptcy Judge and District Judge before whom the bankruptcy is pending.

The defendants raise a series of specific concerns, which are listed below, followed by the Court's evaluation of such concerns:

(1) "The parties and the Court may have too much influence in the front end of the process" (*e.g.*, selection of experts and subjects). Court: Rule 706 contemplates, and effectively mandates, such involvement by parties and the court.

(2) "There is not enough influence from lawyers and the trial courts at the back end of the process" (*e.g.*, presentation of findings at a trial). Court: Under Order No. 30 (and further details may be developed as the process continues), trial courts will have ample powers to control how, and to what extent (if any), findings would be usable at trial.

(3) Party-designated rheumatologists should be used as consultants to the Selection Panel only as a last resort and should never be used, even jointly, as consultants to the Science Panel. Court: The order contemplates this "last resort" use by party-designated rheumatologists in helping the Selection Panel find appropriate rheumatologists who might be appointed to the Science Panel by the Court. Only if no such rheumatologist can be located would the party-designated rheumatologists be available—if needed—to consult jointly with the court-appointed experts serving on the Science Panel.

(4) The parties should have the opportunity to depose court-appointed experts on more than one occasion. Court: Should it be shown to this Court that there is a need to redepose a court-appointed expert, that could be done. However, it would not be appropriate to permit each of the potentially hundred of judges around the country to authorize such additional depositions, and, instead, if it were shown to another judge that an additional deposition was necessary, that judge could rule that, absent such additional deposition, the video-taped trial deposition could not be used.

(5) There should be no preliminary report by court-appointed experts on the basis of which the court could determine whether the expected findings would have sufficient probative value to justify preparation of a formal report (and implementation of the deposition procedures). Court: This is a matter that is more appropriately considered at the time a particular issue is to be referred to the Science Panel.

(6) The Science Panel should produce a joint report. Court: Under the rules of evidence there would be significant problems of admissibility if findings were submitted as joint findings of the panel, rather than as findings by an individual expert (albeit after consultation with other panel members and considering their views and opinions to extent permitted under Rule 703).

(7) The court should not conduct the direct examination of the court-appointed experts.

Court: The order indicates only that this "may" occur; it certainly can be reconsidered further along in the process. However, initial examination by the court has the advantage of avoiding the appearance that the court-appointed expert has, because of the content of the findings, become an expert for the plaintiffs or for the defendants.

(8) Parties should be allowed to present in camera questions of competency and bias before appointments are made by the court. Court: This is a matter that will be further explored before any appointments are made.

(9) The portion of costs chargeable against plaintiffs should not be paid from the Common Benefit/Expense Fund. Court: It appears highly unlikely that this fund will ever be sufficiently large to pay all of the common benefit expenses incurred by plaintiffs' counsel, and charging the costs of the Rule 706 process against that fund is an equitable method for assessing those costs among all plaintiffs and claimants.

(10) The court should not appoint a non-scientist Chair of the Science Panel. Court: Whether or not such an appointment may be made is problematic, and the court is seeking the advice of the Selection Panel as to whether such an appointment should be made and, if so, who should be appointed. The Court rejects the defendants' implications that knowledge of judicial processes and procedures would taint the integrity of findings by members of the Science Panel.

After considering the responses, the Court concludes that the appointment process under Rule 706 should proceed and that Order No. 30 should therefore be treated as effective, but with appropriate reserved power in the court to make appropriate changes and modifications as the process continues.

This the 13th day of June, 1996.

/s/ Sam C. Pointer, Jr.
Chief Judge Sam C. Pointer, Jr.