UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

In re:	)	
	)	
SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION (MDL 926)	)	Master File No. CV 92-P-10000-S
SANDY ALTRICHTER, et al., on behalf of Themselves and All Others Similarly Situated, Plaintiffs;	)	
vs.	)	Civil Action No. CV 97-P-11441-S
INAMED CORPORATION, et al., Defendants.	)	

ORDER No. 47B
(ORDER DETERMINING INAMED DISTRIBUTION PLAN)

By Order 47A entered on February 1, 1999, this court approved as a final judgment a "limited fund" settlement of approximately $32 million on behalf of a mandatory, non-optout class, resolving claims by all class members against the "INAMED" defendants. No appeals were taken from that final judgment.

Questions regarding division and distribution of this limited fund among class members were, however, under Order 47A left subject to further post-judgment orders of the court as a matter of enforcing this final judgment. After hearing from class counsel, who represented plaintiffs in varying situations, the court in May 1999 indicated its preliminary approval of a plan for division and distributionCnamely, by an equal pro rata division and prompt distribution among all eligible class members returning a satisfactory claim form in time to be received by the Claims Office by October 1, 1999, without any differences in benefits based on citizenship or residence, or on the extent of demonstrable injuries or expenses, or on the presentation or recognition of claims under the Revised Settlement Program or Foreign Settlement Program, or on the potential for claims against other implant manufacturers.

The terms of this tentative division/distribution plan were posted on the web page and were disseminated to some 350,000 implant-recipients on file with the Claims Office through mailings to such persons or to their previously-designated attorneys.[1] Through these mailings, the Court indicated the tentative plan for division/distribution, set a date of July 6, 1999, for a hearing to consider whether that (or some other division/distribution plan) should be approved, and directed that any objections, comments, or alternative suggestions regarding this tentative division/distribution plan should be mailed by June 21, 1999.

The undersigned has personally reviewed each of the responses submitted by or on behalf of implant recipients that might be understood as an objection or alternative division/distribution

1. It was anticipated that perhaps less than 15% of the persons to whom the notice was sent would have received "INAMED" implants and thus be affected by the settlement. The more extensive notice was authorized because the court could not be sure which persons might be eligible to participate. Regrettably, this expanded notice also generated objections or responses from persons who were not INAMED class members.

proposalCnot only those submitted by the stated June 21, 1999, deadline, but also those submitted after that date.

As indicated, the best estimate was that, of the 350,000 persons to whom (or to whose attorneys) such notices were sent, some 45,000 were likely to be INAMED class members and hence affected by the potential distribution method. Only 62 responses have been receivedCwhether timely or untimelyCthat can be read as indicating an objection or alternative proposal to the tentative "pro rata" distribution plan,[2] and more than 20 of these are from persons who probably are not INAMED class members. At the hearing on July 6, 1999, there were no class members present in person or by counsel to object to the distribution plan.[3]

The nature of these responses is summarized in the following paragraphs, indicating the identification of the implant claimants (except where anonymity was requested or where an attorney filed a response on behalf of one or more unidentified clients). The court has concluded that, except in a couple of situations in which anonymity was specifically requested, it should not attempt in this order to mask the identity of a person who filed an objection or alternative proposal with the court relating to the proposed plan.

Fifteen[4] of the 62 respondents have indicated simply a general objection or have objected that the amount provided under the INAMED settlement is inadequate to reasonably compensate them or other IMAMED implant recipients[5]. This is an issue that has already been considered and decided in Order 47A, which became final on February 1, 1999, and was not appealed, and cannot be revisited in deciding what should be the provisions for division and distribution of this very limited fund.[6] The court certainly recognizes and appreciates that the amount of the settlement fund is quite small in relation to the number of potential distributees; this fact is, indeed, the principal reason for considering a plan for pro rata division, with minimal administrative costs, with little additional expenses to the claimants, and with prompt distribution of the proceeds.

Four[7] of the 62 respondents have objected on the basis that they have thus far been unable to identify the manufacturer of their implants and hence may be unable to provide the necessary information for eligibility within the stated deadline. Whether any of these four is in fact a member of the INAMED plaintiff class is problematic, and, in any event, given potential barriers to claims arising from statutes of limitations and the implicit prospect of deferring division until they have (at some undetermined point in the future) been able (if ever) to obtain such information, their objection does not call for any change in the plan.

Nine[8] of the 62 respondents have objected on the basis that, having received "McGhan" implants before August 2, 1984, or after May 31, 1993, they are not eligible to participate in division and

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2. Charles Wright, as attorney for class members in an action in the Superior Court of Justice in the Province of Ontario, Canada, has written not to object to the plan, but rather to note that, as the plan provides, there should be no differentiation in benefits as between claimants from different countries.

3. The failure to attend the hearing is not viewed by the court as in any way an abandonment or withdrawal of a person's written objection or alternative proposal. The court has reviewed each of the responses just as seriously as if the respondent had been present in person.

4. Nancy Badger (apparently not an INAMED implant recipient); Jennifer Bath; Ann Margaret (Tammy) Battaglia ; Benpen Coleman; Sandra Davey; Catherine L. Gras (apparently not an INAMED implant recipient); Christina Hurnyak, as attorney for several unnamed clients; Rosemarie Johnston; Mitzy Long (apparently not an INAMED implant recipient); Lauri Mayberry (apparently not an INAMED implant recipient before June 1993); J. R. (identification withheld on request) ; Jamie Rolando; Brenda Vicars; Ella Wittington (deceased) (apparently not an INAMED implant recipient); and Noemi Cruz Yates.

5. It should be noted that many of the other respondents have, in addition to stating specific concerns, also complained about the size of the settlement fund.

6. Unlike the situation in *Ortiz v. Fibreboard Corp.*, ___ U. S. ___ (June 23, 1999), there cannot be any serious dispute about this being a "limited" fund caseCindeed an extremely "limited" fund case to the extent of providing what most claimants would view as only "de minimis" distributions.

7. Lois Clay; Dolores Doll; Alice Lonergan; and Sherry Van Pelt.

8. Carolyn Burnham; Linda Crawley; Brenda Dickson; Ramona Hartnett; Barbara Maiers; L. Nolan; Dorothy Petritus; Elizabeth Urban; and Deann Wilson.

distribution of INAMED settlement funds with respect to such implants. The problem here arises from a failure to explain in the notices why such implant recipients will not participate in this particular settlement fund. First, it should be noted that the settling parties in the INAMED settlementCCUI, McGhan Medical Corp. (a California corporation) and INAMEDCwere not involved in (and have no legal responsibility for claims arising from) the manufacture or distribution of "McGhan" implants before 8/2/84. Second, it should be noted that Minnesota Mining & Manufacturing Co. ("3M") is the company responsible for any claims arising from the manufacture or distribution of implants under the "McGhan" name prior to August 1984, and that claims arising from such implants have been and are being processed under the Revised Settlement Program and Foreign Settlement Program against 3M (or as opt-out claims against 3M) without the substantial limitations as to potential benefits under the INAMED settlement program. Third, it should be noted with respect to post-May 31, 1993, INAMED implants, the settlement does not bar claims against the INAMED defendants with respect to such implants. In short, recipients of such implants should appreciate, not criticize, their exclusion from the relatively meager distributions under the INAMED settlement program.

Seven of the 62 respondents have filed some form of objection that can be addressed only by individual attention:

> Bonnie Suttles and Christine Benn (from England) are objecting because the manufacturer of their implants are not in this settlement. (The manufacturers of their implants were settling defendants in the Revised Settlement Program and the Foreign Settlement Program.) These are objections by non-members of the class that need not be further addressed.
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> V. Vicki Essay, Ann McGettigan (apparently not an INAMED implant recipient), and Rozanne Salmonsen have responded that the plan is vague or that they don't have enough information. It is true that the actual amount to be ultimately distributed under the distribution plan to any individual recipient is not, and indeed could not be, stated in the noticeCthis is because one cannot know in advance how many persons will, by October 1, 1999, file claim forms showing their eligibility or know what the actual amount of administrative costs will be. It should be emphasized, however, that every effort will be made to keep administrative costs to the minimum and that, given the relatively small amount to be divided among so many persons, class counsel have waived any fees for their services in connection with this settlement.
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> Ruthann Fleener did not object to the plan for division but expressed the view that the administrative costs should not be paid out of the settlement amount. This is not an appropriate objection since expenses of administration must obviously be paid by someone and the only funds available are those provided through the settlement fund.[9]
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> Anne Perunich complained that her Cox Uphoff implants in the early 80s were not covered. She apparently misread the notice and form; the 8/2/84 date applies only to "McGhan" and "Intrashiel" implants, not to Cox Uphoff implants.

Finally, there are 26 responses that directly address the plan for division and distribution, objecting to a plan for equal pro rata division and asserting that they (and perhaps others similarly situated) should receive a larger share of the fund. This is the critical issue before the court at this timeCone that is particularly troublesome in the light of *Ortiz v. Fibreboard Corp.*, ___ U. S. ___ (June 23, 1999).

While sharing the viewpoint that a pro rata division is not equitable, these respondents vary in suggesting what would be a more appropriate method for dividing this very limited fund.[10]

> One (Thai Dau) has asked, in essence, for some adjustment that takes into account the expenses she has incurred in gathering or presenting documentation for a claim under the Revised Settlement

9. A few other respondents also complained about charging administrative costs against the settlement fund.
10. Most of these also complain about the size of the settlement fund.

Program. Another (Frances Kachman) has asked for an additional payment premised on her special family needs (care of a handicapped child) even though she apparently is not an INAMED implant recipient. A change in the plan to consider such matters would clearly be unworkable administratively and hardly justified as a matter of equity.

Six respondents[11] have asked that additional funds be provided to those who have had, or who now believe they need, explantation of an implant. There is some rationale for this proposal inasmuch as the Revised Settlement Program provides special funds for certain past or future explantations of implants covered under that settlement program. In the context of the INAMED limited fund, limited duration settlement program, such provisions would be totally unworkable—requiring all divisions to be postponed until expiration of any period for having such explantations and resulting in substantial administrative costs in the Claims Office for reviewing past or prospective claims for such expenses that would reduce the limited funds available for division and distribution to INAMED implant recipients.

Nine respondents[12] have objected on the basis that (like some 3,000 others) they have already been approved for benefits under the RSP based on post-8/2/84 McGhan implants but, because of McGhan's default under the RSP, have received or been eligible to receive only 80% of those benefits (*i. e.*, the portion of those benefits payable by 3M and Union Carbide). This position has two attractive features: (A) since their claims have already been reviewed by the Claims Office, there would be no additional administrative costs involved in reviewing their disease/disability claims; and (B) their claims have been, at least conditionally, liquidated in amount under the RSP. Nevertheless there are other considerations that argue against, and persuade the court not to grant, any such special adjustments:

(1) These amounts were not liquidated in the sense of any judicial determination of an amount that should be paid to those claimants based on the merits of their claims. Rather, these were amounts to be paid under terms of a settlement agreement, and, when McGhan defaulted, its obligations (and responsibilities for payment of claims) under that agreement were voided.

(2) If the McGhan 20% share of these benefit determinations that have already been reviewed and approved under the RSP were to be paid in full from the limited fund, this would consume almost 40% of the $32 million in the total settlement fund, with a distribution to only some 3,000 of the estimated 45,000 persons eligible for INAMED payments, even before considering an additional 2,000 persons with post 8/84 McGhan current claims under the RSP that are still in the process of review because of some deficiencies in documentation. Even if not paid in full but provided only some enhancement in the divisional formula, equity would also require, in any such formula, that time be allowed (and also resulting in substantial administrative expenses incurred by the Claims Office that would be deducted from the amount available for distribution to claimants) in considering similar disability/disease claim presentations and documentation by those who are subject to the INAMED plan but who either have not submitted claims under the RSP, or who were not eligible under the RSP (*e. g.*, persons with only CUI implants) or who, presumably because of serious illnesses, had opted out of the RSP There would be very little left for division and distribution to other class members.

(3) These persons have received, or have been determined as eligible to receive, from 3M and Union Carbide settlement distributions of as much as $40,000, whereas other INAMED claimants may have an opportunity to participate only in a distribution that, even if the proposed distribution formula is retained, could result in a very small distribution, with

11. Carol Arnone; Ann De Santis; Debra Johnson; Mary Ranow; Marcia Majowski; Dayna Wells (suggests also that might differentiate based on number of implants or cost of surgery)

12. Betty Asherman; Rhonda Garrett; Joann Jordan; Sylvia Lindsey; Debra Monroe; April Newberry; Patti Plumb, and Janice Snyder

essentially little or no chance of any further recovery from other implant manufacturers.

Finally, there are 11 respondents[13] who simply and directly have asserted that more of the settlement fund should be distributed to those (like themselves) who allegedly have had (or perhaps in the future may have) medical problems, expenses, suffering, etc. If the amount of the funds available for distribution were substantially greater and/or the potential distributees not so numerous, the court would agree that such a distribution plan would be preferable notwithstanding the several years delay in receiving and reviewing additional claims and documentation of such criteria. This fund is, however, so severely limited in relation to the number of potential claimants that such a planCwith its substantially increased administrative costsCwould not greatly increase the amount of distribution to those determined to be eligible for enhanced benefits and would, of course, decrease even more the meager distributions to other class members. Class counselCsome of whom represent clients with existing medical problems and others of whom represent clients without presently documented problemsChave, with the Court, struggled with this problem and have reluctantly come to the conclusion that a pro rata division remains the betterCand indeed only workableCsolution under the facts of this case. The court concurs in this recommendation, which, as noted, includes a waiver of any claims by class counsel for fees in connection with this settlement.

Accordingly, the court approves as the distribution plan for the INAMED Settlement Fund an equal pro rata division of the net settlement funds (enhanced by any income earned on the proceeds but reduced by the approved administrative costs) and prompt distribution among all eligible class members returning a satisfactory claim form by October 1, 1999, without any differences in benefits based on citizenship or residence, or on the extent of demonstrable injuries or expenses, or on the presentation or recognition of claims under the Revised Settlement Program or Foreign Settlement Program, or on the potential for claims against other implant manufacturers, and without any reduction for fees of class counsel.

The court anticipates that it will impose limitations on the fees and expenses that privately-retained attorneys may charge against INAMED distributions to their clients, somewhat similar to those previously imposed in connection with the earlier distribution of the Mentor limited fund settlement. Any such limitations will be imposed through a subsequent order of the court after information becomes available as to the projected amount of distributions to INAMED class members.

Under Fed. R. Civ. P. 54(b), the court determines that there is no just reason for delay and expressly directs that this judgment shall, upon filing in Master File No. CV 92-P-10000-S and CV 97-P-11441-S, be deemed entered as a final judgment with respect to the plan for division and distribution of funds to members of the INAMED Settlement Class, and shall be deemed entered as a final judgment with respect to such distribution plan.

DATED: July 7, 1999

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

Serve: Counsel of Record in CV97-P-11441-S
Plaintiffs Liaison Counsel (for redistribution to indicated objecting persons)
Defendants Liaison Counsel

13. Anonymous (more for ruptures); Ann Colley; Annie Downs; Janice Floyd; Nora French (more for ruptures and for those who received an implant after mastectomy); Allison Jo Hahn (Golden); Joanne Kopelman; Bonnie Lincoln; Mary-Lee Reeld; Shirley Schulmon; and Mary Wantroba.