UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	§	**Case Number 00-00005-DT**
	§	**(Settlement Facility Matters)**
	§	
DOW CORNING CORPORATION	§	**Honorable Denise Page Hood**
	§	
Reorganized Debtor.	§	

CLAIMANTS' ADVISORY COMMITTEE'S BRIEF IN SUPPORT OF RESPONSE OPPOSING THE MDL 926 SETTLEMENT FUND'S MOTION FOR RESOLUTION OF CLAIMS AGAINST SETTLEMENT FACILITY-DOW CORNING TRUST PAYMENTS TO CLAIMANTS

TO THE HONORABLE DENISE PAGE HOOD:

The Claimants' Advisory Committee (the "CAC") files its Brief in Support of Response Opposing the MDL 926 Settlement Fund's Motion for Resolution of Claims Against Settlement Facility-Dow Corning Trust Payments to Claimants, and states as follows:

I. SUMMARY POSITION

1. The MDL 926 Settlement Fund (the "Settlement Fund") has no standing to assert the lien claim, given the Settlement Fund is not the aggrieved party here. The Settlement Fund is not affected by any purported overpayment claim made to a claimant in the MDL settlement; the real parties in interest with a stake in any such claim are the MDL Revised Settlement Fund Defendants, 3M Corporation, Bristol Meyers Squibb Co., and Baxter Healthcare Corp. (collectively, "RSP Defendants"). Moreover, neither Texas nor federal law will sanction what is tantamount to an extraordinary prejudgment injunction, garnishment or attachment. The Settlement Fund has no lien to secure its stated claims, and concedes as much by reference to purported rights in "equity." The CAC will also demonstrate that the Settlement Fund cannot under the Joint Plan have any lien on the fund. The operative documents governing the Joint

Plan make plain that the settlement fund is expressly immune from this type of prejudgment attachment given they remain *in custodia legis*. The Settlement Fund's Motion should accordingly be denied for failing to state a claim.

II. ARGUMENT AND AUTHORITIES

A. The Motion Ignores This Court's Order

2. The Settlement Fund's Motion ignores this Court's Order by going far beyond the scope of what this Court directed, and then not even addressing the threshold issue. The June 18, 2007 Order Pursuant to Section 3.03 of Exhibit 1 to the Stipulation and Order Approving Lien Resolution Procedures ("Order") states that a common "threshold issue" must first be addressed concerning whether the Settlement Fund has "standing or any legal basis to assert a lien against Settling Claimants in the Dow Corning case." In its effort to leap frog over the plain terms of the governing documents that directly preclude what the Settlement Fund is attempting here, the Motion goes far afield from addressing the threshold issue to drum up some alleged "equitable" basis for relief that is otherwise prohibited. Moreover, it simply presumes, without meaningful authority, that it has standing to assert the lien claim without confronting the reality that it is the RSP Defendants who are the aggrieved parties, even if an overpayment was made by them ten years ago. The facts underlying each of the Settling Claimants' circumstances and issues are, from the limited information thus far adduced by the CAC, far different from the pejorative allegations made in the Motion. But given the Order, it is simply premature to address these here.

3. A pleading which directly ignores a Court order, and then castigates Settling Claimants and their counsel as "frauds" and presumptive "double dippers," is simply improper and should be stricken. FED. R. CIV. P. 12(f); *see also Hall v. American Steamship Co.*, 688 F.2d

1062, 1066 (6th Cir. 1982). Rule 12(f) authorizes a court to strike from a pleading any "insufficient defense or any redundant, immaterial, impertinent or scandalous matter." A pleading which directly ignores the Order's mandate to address the threshold issue of standing, and proceeds to argue broader issues in a manner that was expressly rejected by the Court in pretrial proceedings, warrants being stricken as facially inadequate. In *Hall*, the Sixth Circuit affirmed striking pleading defenses in circumstances where they were insufficient. It is of course true that motions to strike under Rule 12(f) are viewed with disfavor and infrequently granted and has been characterized as "a drastic remedy to be resorted to only when required for the purposes of justice." *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953) (internal citations omitted); *Cronovich v. Dunn*, 573 F. Supp. 1330, 1338 (E.D. Mich. 1983). However, in spite of the high standard governing motions to strike, it is appropriate to strike material that are clearly deficient in order to "eliminate spurious issues before trial and streamline the litigation." *In re Crow;ey, Milner & Company,* 299 B.R. 830 (Bankr. E.D. Mich. 2003). Here the Settlement Fund's Motion simply ignores this Court's Order to instead appeal to some unfounded sense of equity to overcome its inability to respond to what the Court wanted the parties to focus upon. The only matters that should have been addressed in the Motion are (i) the Settlement Fund's standing and (ii) the legal basis for its purported lien rights. In these circumstances, striking the Settlement Fund Motion and brief is proper in view of its abject failure to respond to the Court's Order for briefing on the threshold issue.

B. The Settlement Fund Lacks Standing to Assert Any Claim Against SFDCT

4. The Order requires briefing on whether the Settlement Fund has standing to complain. "A plaintiff [here the Settlement Fund] bears the burden of demonstrating standing and must plead its components with specificity." *Coal Operators and Associates, Inc. v. Babbitt*,

291 F.3d 912, 916 (6th Cir. 2002) (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473, 102 S. Ct. 752 (1982)). On the face of its limited interest, it appears plain that only the RSP Defendants have proper standing to complain regarding any alleged overpayment of settlement amounts. The Settlement Fund nowhere attempts to demonstrate its standing. It simply ignores this issue altogether.

5. Standing is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197 (1975). "The Supreme Court has stated that the standing requirement limits federal court jurisdiction to actual controversies so that the judicial process is not transformed into 'a vehicle for the vindication of the value interests of concerned bystanders.' " *Coal Operators*, 291 F.3d at 916. "To satisfy Article III's standing requirement, a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; the injury must be 'fairly traceable' to the challenged action; and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury." *Id.*. Thus, the constitutional requirements for standing are proof of injury in fact, causation, and redressability. *Id.*

6. In addition to the constitutional requirements, a plaintiff must also satisfy three prudential standing restrictions. *Id.* First, a plaintiff must "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499, 95 S. Ct. 2197 (citations omitted). Second, a plaintiff's claim must be more than a "generalized grievance" that is pervasively shared by a large class of citizens. *Coal Operators*, 291 F.3d at 916 (citing *Valley Forge*, 454 U.S. at 474-75, 102 S. Ct. 752). Third, in statutory cases, the plaintiff's claim must fall within the "zone of interests" regulated by the statute in question. *Id.* "These additional restrictions enforce the principle that, 'as a prudential

matter, the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.' " *Coal Operators*, 291 F.3d at 916 (quoting *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991)).

7. The Settlement Fund cannot satisfy the threshold requirement. First, its Motion does not properly address and prove its standing. As a matter of law, because it failed to address the issue directed by the Court the Motion must be denied. Second, the manner in which the RSP Defendants funded their settlement ten years ago entails that the Settlement Fund itself has no real stake in the outcome. The Settlement Fund is but a administrative funding agent in the process. The alleged injury here, if any, is entirely borne by the RSP Defendants themselves, if it occurred at all. If the Settlement Fund is pursuing this argument because of a concern that its own mistakes in making payments, then it is at best premature for the Settlement Fund to invoke such concerns because no such adverse claim has yet been asserted by the RSP Defendants. Absent a direct stake in the outcome, the Settlement Fund cannot pursue this claim even though this is the correct Court upon which a lien claim must be addressed.

C. The Joint Plan and Implementation Documents Bar Any Lien Claim Relief

8. In addition to a threshold lack of standing, the Settlement Fund's equitable lien is also barred as a matter of law on several bases as detailed in the CAC's Response. The purported "lien" sought by the Settlement Fund cannot attach at the outset because no lien can be asserted against the funds that the Settlement Facility-Dow Corning Trust ("SF-DCT") administers. Section 10.09 of the SFA expressly preempts efforts to attach or garnish the funds administered by SF-DCT, such as now being attempted by the Settlement Fund:

> **10.09** ***No Execution.*** All funds in the Settlement Facility are deemed *in custodia legis* until such times as the funds have actually been paid to and received by a Claimant, and no Claimant or any other party can execute upon, garnish or attach the Settlement Facility in any manner or compel

> payment from the Settlement Facility of any Claim. Payment of Claims will be governed solely by the Plan, this Settlement Facility Agreement, the Claims Resolution Procedures, and the Funding Payment Agreement.

SFA at 10.09. In an effort to circumvent this plainly worded provision, the Settlement Fund simply ignores it altogether in its Motion. Also overlooked is that what the Settlement Fund appears to be seeking here is a form of prejudgment writ of garnishment or attachment in the guise of simply labeling it a "equitable lien". However, it does so without admitting there is an utter lack of any nexus between what the RSP Defendants paid the claimants a decade ago and what the Settling Claimants having Allowed Claims are entitled and qualified to receive from SF-DCT today. Only after payment is made could an aggrieved party then seek a recovery and only from the *claimant*.

9. The terms of the SFA elsewhere make plain that the Settlement Fund has no right to interdict the approved payments being made to Settling Claimants. As an initial matter, the fund administered by SF-DCT is expressly reserved for Settling Claimants, and there are plainly stated limitations upon any third parties to obtain relief even if recognized creditors, which the Settlement Fund is not. For example, the SFA states that the fund is solely for those identified as Claimants who comprise Settling Personal Injury Claims and all Other Claims not subject to the Litigation Fund:

> **3.02** ***Allocation of Funds.*** The funds received under the terms of the Funding Payment Agreement shall be distributed to Claimants and allocated for administrative and other expenses and costs in accordance with the terms of Articles III, V, and VII herein, the Claims Resolution Procedures, and the Plan.
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> . . .
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> **(ii)** ***The Settlement Fund.*** . . . The Settlement Fund shall be reserved for the resolution of Settling Personal Injury Claims and all Other Claims not subject to the Litigation Fund and all costs and administrative expenses of the Settlement Facility (not including costs and expenses of the Litigation

> Facility) and shall not be used or accessible for any other reason. Specifically, the Settlement Fund shall be used for payment of the Allow amount of Claims of Settling Claimants in Classes 5-10, 6A, 6B, 6C, 6D and, to the extent provided in the Litigation Facility Agreement, Litigated Shareholder Claims, and for the Allowed amount of obligations described at Section 6.16.5 of the Plan, and for payment of the Allowed amount of Claims in Classes 4A and 11-17 to the extent provided in the Plan and the Litigation Facility Agreement.

SFA at 3.02, (ii). The MDL 926 Settlement Fund is not a "claimant." The SF-DCT is not subject to equitable liens or other *quasi* prejudgment garnishment writs under the Joint Plan.

10. Under the terms of the SFA, only the Settling Claimants have a right to receive distributions on Allowed Claims with only a limited right given to setoff or withhold some amount on account of specific "derivative" claimants who are set forth in the Joint Plan:[1]

> **5.01** ***Claims Resolution Procedures/Eligibility Guidelines.***
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> **(a)** . . . Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures shall be paid as specified at Section 7.02. Only those Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures as applicable are eligible to receive payment . . . .
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> . . .
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> **(c)** ***Set-Off for Prior Payment.*** The Claims Administrator shall adjust the Allowed amount to deduct the amount of any payments previously made to the Claimant or to the Claimant's physician or other health care provider under the Dow Corning Removal Assistance Program, or any payments in prior partial settlement between Dow Corning and the Claimant not resulting in a general or full release.

SFA 5.01 and 7.02(c). Setoff is an equitable remedy otherwise limited by the Bankruptcy Code, 11 U.S.C. § 553. There is no required mutuality between what the Settlement Fund is erroneously claiming for the benefit solely of the absent RSP Defendants against the Settling Claimants, on the one hand, and what the Settling Claimants are due on Allowed Claims from

[1] It is noteworthy here that the Settlement Fund is not a "creditor" under the Joint Plan. The Settlement Fund withdrew its disputed claim in the Dow Corning bankruptcy case, and is not otherwise identified in the Joint Plan as a derivative creditor.

SF-DCT on the other hand. An otherwise unproven appeal to equity cannot override what the law provides or requires. The Settlement Fund has no lien or any basis for equitable relief here.

D. The Settlement Fund Has No Lien Rights in Any Event

11. Appeals to equity by the Settlement Fund do not give rise to any valid or recognizable lien claim here. Texas law does not grant lien rights comprising an enforceable charge on a property right of a Settling Claimant in the absence of either (i) entry into consensual lien documents under the Texas Business & Commerce Code granting a security interest in a contract right or general intangible or (ii) imposition of a statutory lien in favor of a creditor party under, for example, the Texas Property Code. *See* TEX. BUS. & COM CODE ANN, Ch. 9, § 9.101 *et seq.*; TEX. PROP. CODE, § 1.001, *et seq.* Liens are official or consensual written charges on property.[2] There is nothing here to indicate, nor is it alleged, that the Settlement Fund has any consensual lien upon a Settling Claimant's right to recover on her Dow Corning implant related claims from SF-DCT. Moreover, it appears self evident from the pejorative allegations in the Motion that the Settlement Fund has no lien, at best all it is asserting is a claim. Certainly the Settlement Fund has no lien in the traditional sense, and this is what the Lien Procedures require. Pejorative arguments attempting to create an ethereal lien based on "equity" unsupported by any law on contract do not qualify. Otherwise, chaos would result as virtually any purported creditor of a Settling Claimant could simply tender a "proof of lien" to tie up for its own account

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[2] Lien is defined in Law.com as any official claim or charge against property or funds for payment of a debt or an amount owed for services rendered. A lien is usually a formal document signed by the party to whom money is owed and sometimes by the debtor who agrees to the amount due. A lien carries with it the right to sell property, if necessary, to obtain the money. A mortgage or a deed of trust is a form of lien, and any lien against real property must be recorded with the County Recorder to be enforceable, including an abstract of judgment which turns a judgment into a lien against the judgment debtor's property. There are numerous types of liens including: a mechanic's lien against the real property upon which a workman, contractor or supplier has provided work or materials, an attorney's lien for fees to be paid from funds recovered by his/her efforts, a medical lien for medical bills to be paid from funds recovered for an injury, a landlord's lien against a tenant's property for unpaid rent or damages, a tax lien to enforce the government's claim of unpaid taxes, or the security agreement (UCC-1) authorized by the Uniform Commercial Code. Most liens are enforceable in the order in which they were recorded or filed (in the case of security agreements), except tax liens, which have priority over the private citizen's claim.

whatever it thinks the Settling Claimants might owe such alleged creditor, potentially overwhelming the administration of the Joint Plan.

E. The Relief the Settlement Fund Seeks Violates Federal and State Law

12. In the absence of a consensual or statutory lien right, the Settlement Fund is left with only judicial relief on the unsecured claim it purports to have against a previously paid claimant who was long ago paid by the RSP Defendants. The coincident status of a Settling Claimant having rights under the Joint Plan does not provide any enhanced rights in favor of the Settlement Fund, as explained in the Response. As a result, the Settlement Fund's claims for relief when properly framed are those solely available through issuance of a prejudgment writ in conjunction with a required direct formal action initiated by a proper party (in this instance the RSP Defendants) which also seeks prejudgment garnishment, sequestration or attachment of a Settling Claimant's property rights under applicable state law. Such relief is only available in extraordinary circumstances not applicable here, and would in every instance require specific evidentiary proof and posting of a bond. Indeed, where allegations of fraud are made, the Settling Claimants (and their counsel) are entitled to specificity in such allegations under the Rule 9. Fed. R. Civ. P. 9.

(a) Federal Law Prohibits the Relief the Settlement Fund is Seeking

13. What the Settlement Fund is actually seeking from this Court is a form of prejudgment asset freeze on the Settling Claimants distribution from the SFDCT. As noted above, by prior Court approval of the Joint Plan the DC-SFT is not subject to such attachment claims. This is compounded by the Settlement Fund's failure to satisfy the requirements the Federal Rules initially impose to obtain such an asset freeze. *See, e.g.,* FED. R. CIV. P. 4, 64, 65.

14. There is nothing about the Settlement Fund's conclusory allegation of fraud that renders the alleged overpayment made ten years ago by the RSP Defendants traceable to the SF-DCT funds now due to a Settling Claimant under a completely different settlement program. Certainly, the payment made ten years ago by the RSP Defendants to settle a claim was unrelated to the SF-DCT payment to settle the claim against Dow Corning. These are different settlements, involving payments on implants made by different manufacturers. There is no nexus between these funds from which equity can impose any lien. It is firmly established that if a recipient of funds from the Settlement Fund is not prohibited from using the funds as her own and the recipient is not prohibited from commingling the funds with her own monies, a debtor-creditor relationship, not a trust relationship, exists. *See Dampskibsselskabet Af 1912 Aktieselskab v. Black & Geddes, Inc. (In re Black & Geddes)*, 35 B.R. 830, 836 (Bankr. S.D. N.Y. 1984); *accord Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341, 353 (2d Cir. 1992) (stating same in discussing elements of a constructive trust); *see also Foothill Capital Corp. v. Clare's Food Mkt., Inc. (In re Coupon Clearing Serv., Inc.)*, 113 F.3d 1091, 1101 (9th Cir. 1997) (finding better guidance in a series of cases that do not find a trust where commingling of funds and payment out of general funds is sufficient); *Superintendent of Ins. v. First Cent. Fin. Corp. (In re First Cent. Fin. Corp.)*, 269 B.R. 481, 495 (Bankr. E.D. N.Y. 2001) (observing that the segregation of alleged trust funds is a factor that courts consider in distinguishing a trust and a debt in bankruptcy); *In re Einhorn*, 59 B.R. 179, 184 (Bankr. E.D. N.Y. 1986) (finding that crucial factor in determining whether a trust relationship is created is the duty to segregate funds); *Leased Pet Dep'ts, Inc. v. Cook United, Inc. (In re Cook United, Inc.)*, 50 B.R. 559, 561 (Bankr. N.D. Ohio 1985) (finding that an alleged

trustee that commingles funds does not create a trust in a department store context). There was no limitation in the RSP on how a claimant may use her payment.

15. The claimants from the MDL 926 who received payment in exchange for release of the RSP Defendants dealt at arms length with the Settlement Fund, tendering documents which under the terms of that settlement were reviewed and approved as part of closing that distinct settlement. The payments made were payable only after satisfying a rigorous settlement qualification process. There is no reason to believe that the payments made were subject to any sort of limitation or trust character, and the Settlement Fund certainly cannot establish any nexus to the payment made in that case toward establishing any inherent equitable lien right on the wholly separate payment to be made under the Joint Plan. The Settling Claimants have qualified for a settlement payment. The SF-DCT did not find any evidence of fraud under such baseline facts, and there is no reason to think that the payment by SF-DCT to the qualifying Settling Claimant should be interdicted.

16. Federal law severely limits what relief can be granted to the Settlement Fund in this context, even if the Settlement Fund observed procedural requirements. Efforts to essentially enjoin or freeze what the Settling Claimants receive from SF-DCT are not proper relief. In the federal cases in which such a prejudgment asset-freezing injunction is granted, the courts invariably have been presented with allegations and proper evidence showing that the defendants were concealing assets, were transferring them so as to place them out of the reach of postjudgment collection, or were dissipating the assets. *See, e.g., United States v. Rahman*, 198 F.3d 489 (4th Cir. 1999) at 493 (uncontradicted allegations that defendants had transferred assets to Caribbean Island and were selling main assets of the corporation); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 61 S. Ct. 229, 85 L. Ed. 189 (1940) (defendant insolvent and giving

preference to foreign creditors seeking payment); *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669 (S.D. Fla. 1988) (defendants attempting to transfer assets of national airline to illegitimate government of Panama, putting the assets outside the reach of the court); *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (upholding asset freeze based on allegations that defendants had internationally transferred personal assets and had used false identities to transfer assets to a Liechtenstein trust, using Swiss banks, for their benefit); *see also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S. Ct. 1961 (1999). There is no such proof against the 43 Settling Claimants here that satisfy this rigorous standard. Moreover, even in cases where relief might be granted, the plaintiff there diligently adhered to the due process requirements dictated by the federal rules – here, the Settlement Fund simply dispenses with such "formalities."

17. The Supreme Court's *Grupo Mexicano* opinion illustrates the flaws in granting what the Settlement Fund requests here. In *Grupo Mexicano*, an association of investors purchased notes issued by Grupo Mexicano de Desarrollo, S.A., a Mexican holding company involved in toll road construction. 527 U.S. at 310, 119 S. Ct. 1961. Grupo Mexicano experienced financial trouble and was unable to make an interest payment. *Id.* at 311, 119 S. Ct. 1961. After negotiations failed to restructure the debt, plaintiff, one of the note purchasers, accelerated the principal amount and filed suit in federal district court for breach of contract, seeking money damages as the only remedy. *Id.* Alleging that Grupo Mexicano was near or at insolvency and was giving Mexican creditors priority, plaintiff sought a preliminary injunction freezing Grupo Mexicano's assets to secure its ability to pay any future judgment. *Id.* at 312, 119 S. Ct. 1961. The district court granted the injunction and the Second Circuit Court of Appeals affirmed. On certiorari, the Supreme Court vacated the injunction. The Court framed the

question before it as "whether, in an action for money damages, a United States District Court has the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest is claimed." *Id.* at 310, 119 S. Ct. 1961. The Court held that the district court did not have the power to issue the injunction "[b]ecause such a remedy was historically unavailable from a court of equity" in a suit seeking money damages. *Id.* at 333, 119 S. Ct. 1961. The Court held that federal courts have the equity jurisdiction that was exercised by the English Court of Chancery " 'at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73).' " *Id.* at 318, 119 S. Ct. 1961 (quoting DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)). The Court further noted that regardless of the merger of the formerly separate courts of law and equity by the Federal Rules of Civil Procedure, " 'the substantive principles of Courts of Chancery remain unaffected.' " *Id.* at 322, 119 S. Ct. 1961 (quoting *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n. 26, 69 S. Ct. 606, 93 L. Ed. 741 (1949)). Based on its review of historical equity jurisprudence, the Court concluded that it must "follow the well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property." *Id.* at 321, 119 S. Ct. 1961. The district court's prejudgment asset freeze used equity for a purpose not historically available. The Supreme Court held that the district court did not have the power to issue a prejudgment preliminary injunction limiting the defendant's use of assets if the plaintiff sought only money damages. *Id.* at 333, 119 S. Ct. 1961.

18. In *Grupo Mexicano*, the Court also approved its prior holding in *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 65 S. Ct. 1130 (1945), which denied an asset-freezing injunction. In *De Beers*, the United States brought suit against several corporations seeking an

injunction to restrain future antitrust violations under the Sherman Act and the Wilson Tariff Act. The government also sought a preliminary injunction to prevent defendants from removing their assets from the country pending adjudication on the merits. The government argued that the preliminary injunction was necessary so that the assets would be available in order to enforce, in an appropriate contempt proceeding, any final injunction entered against the defendants. *Id.* at 215, 65 S. Ct. 1130. The *De Beers* Court concluded that the district court did not have the power to issue the requested injunction because it dealt "with a matter lying wholly outside the issues in the suit." *Id.* at 220, 65 S. Ct. 1130; *see also Sabratek Corp. v. LaSalle Bank, N.A.*, 257 B.R. 732 (Bankr. D. Del. 2000) ("The injunctive relief which the Committee seeks is in the nature of a prejudgment sequestration or attachment under FEDERAL RULES ... 64 and 65... . Such relief is an extraordinary remedy and should be sparingly."); *Travelers Cas. & Sur. Co. of Am. v. Beck Dev. Corp.*, 95 F. Supp.2d 549, 552 (E.D. Va. 2000) ("[A] district court lacks the power under Rule 65 ... and the court's general equitable authority to issue an injunction preventing the transfer of assets in an action solely for money damages where the party seeking the injunction has no lien or equitable interest in the property."). Here, the Settlement Fund is seeking what is tantamount to an asset freeze on the SF-DCT's settlement payments on Allowed Claims under the Joint Plan to somehow secure its disputed claims on alleged overpayments it says were made years ago on approved RSP settlements. It does this despite the existing judicially approved mandate that the SF-DCT and bankruptcy settlement fund not be subject to such asset freezes or garnishments. This is not a proper remedy here. In the absence of a consensual or statutory lien that is recognizable, the Settlement Fund has no right to interfere under the lien procedures with the due and timely payment due a Settling Claimant.

19. Boiled down, the Settlement Fund has couched its unsecured claims for equitable relief against the Settling Claimants in the form of a claim for unjust enrichment. However, nowhere does it make any case for why it should be entitled to prejudgment relief comprising an asset freeze, in effect. There is no indication made in the litany of alleged pejorative allegations provided that anywhere suggest there is not some remedy in damages available, or that the Settling Claimant at the end of a full and proper trial proceeding in a court of competent jurisdiction is incapable of paying any award. As noted above, there was nothing about the payment made by the Settlement Fund in settlement of a claim against the RSP Defendants that could support anything more than a debtor-creditor relationship if an overpayment were made. Stated simply, the Settlement Fund has no basis for the lien relief sought here.

(b) State Law Remedies Are Also Inappropriate

20. The Settlement Fund's efforts to seize or attach settlement funds payable to a Settling Claimant are similarly defective under state law, even if the SF-DCT funds were not *in custodia legis*. Texas law imposes specific requirements for obtaining prejudgment relief against a party defendant that parallel what the federal courts impose for extraordinary injunctive relief. TEX. R. CIV. P. 592, *et seq.* For prejudgment garnishment relief against a third party holding an alleged debtor in particular, the rule provides in pertinent part:

> RULE 658. APPLICATION FOR WRIT OF GARNISHMENT AND ORDER
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> . . . plaintiff may file an application for a writ of garnishment. Such application shall be supported by affidavits of the plaintiff, his agent, his attorney, or other person having knowledge of relevant facts. The application shall comply with all statutory requirements and shall state the grounds for issuing the writ and the specific facts relied upon by the plaintiff to warrant the required findings by the court. . . . The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence; provided that facts may be

> stated based upon information and belief if the grounds of such belief are specifically stated.
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> No writ shall issue before final judgment except upon written order of the court after a hearing . . . . The court in its order granting the application shall make specific findings of facts to support the statutory grounds found to exist, and shall specify the maximum value of property or indebtedness that may be garnished and the amount of bond required of plaintiff. Such bond shall be in an amount which, in the opinion of the court, shall adequately compensate defendant in the event plaintiff fails to prosecute his suit to effect, and pay all damages and costs as shall be adjudged against him for wrongfully suing out the writ of garnishment. . . .

21. On the current record it appears there is no basis at all under Texas law for the Settlement Fund to obtain prejudgment garnishment relief against SF-DCT on account of a Settling Claimant's settlement payment due from SF-DCT.

F. The Settlement Fund's Cases Are Not Applicable

22. In support of its claim that it has some form of "equitable" lien, the Settlement Fund cites to cases wherein the rather mundane legal proposition is proffered that, in the proper circumstances, imposition of an equitable lien is recognized under Texas law. However, none of the circumstances where such a doctrine is applicable have anything to do with what the Settlement Fund is seeking here. For example, while Texas law will recognize that where one party pays another consideration to purchase an asset, and the asset intended to be acquired is not then titled in the purchaser, equity will recognize a "lien" or impose a "resulting" or "constructive trust" to ensure that the purchaser's rights in the assets are recognized in the event of a later dispute between purchaser and seller, that has no relevance here. *See, e.g., In re Marriage of Scott*, 117 S.W.3d 580, 583 (Tex. App.-Amarillo 2003, no pet. h.) (citing *Nolana Dev. Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex.1984) ("It is well settled that when one party pays the purchase price of realty ... but title is placed in the name of another, a purchase money resulting trust will arise in favor of the entity providing the purchase money."). In each of these

cases, the equitable right sought to be recognized is upon the asset directly involved. Here, there is no nexus between the "res" comprising payment on an Allowed Claim by SFDCT and the allegation made by the Settlement Fund that it overpaid a claimant on behalf of the RSP Defendants many years ago.

23. There is no overarching "equitable lien" theory recognized in Texas that covers the instant circumstances. The proffered the Settlement Fund cases cited are easily distinguishable from the case at hand. *See, e.g.*, *Richards v Suckle,* 871 S.W.2d 239 (Tex. App.-Houston [14th Dist] 1994); *Williams v Greer*, 122 S.W.2d 247 (Tex. App-Dallas 1938). In summary, they involve instances where a plaintiff is suing a defendant in the context of a asset alleged to be impressed with an equitable lien that the plaintiff actually paid for, and is not an effort to obtain prejudgment remedies to seize an unrelated asset or property right.

24. The *Williams* case appears to be cited for the proposition that Texas law recognizes the theory of equitable liens, however that is hardly a novel context in circumstances where the alleged wrongdoer is being pursued by the plaintiff in a direct action they both are parties to and which involve extraordinary circumstances comprising unjust enrichment, fraud or similar allegations. Indeed, the case itself is of no persuasive authority because the ruling was made solely in response to a summary dismissal for lack of jurisdiction below, with the appellate court reversing and remanding on the premise that there was jurisdiction to decide the issue. The case does not involve any effort to obtain a prejudgment garnishment. In addition, the age of the case makes the general proposition cited suspect in view of the passage of the Uniform Commercial Code thereafter to bring forth more directly the concept of consensual liens on property in transactions. Indeed, even in this case the alleged recipient of the item to be recovered was a direct party in the case, which of course is not the case here.

25. The *Richards* case is similarly unhelpful, simply pointing out generally that Texas law accepts the concept of subrogation. However, central to subrogation, particularly in the bankruptcy context, is that (i) there be a payment that was made and (ii) the payment made entitle the payor to step into the shoes of the subrogee. In other words there must have been some joint and several liability on the part of the payor to step into the shoes of the party paid, on the theory that by paying the debt of a codebtor the payor can reduce its burden. Here, there was no joint and several coliability as between SF-DCT and the Settlement Fund to a claimant—each severally paid a claimant on account of separate and distinct claims involving differing implants. Equitable subrogation is the legal fiction through which a person or entity, the subrogee, is substituted, or subrogated, to the rights and remedies of another by virtue of having fulfilled an obligation for which the other was responsible. *National Union Fire Ins. Co. v. CNA Ins. Cos.*, 28 F.3d 29, 31 n.2. However, central to that claim is some contractual or equitable underpinning to the right asserted, and there is nothing of the sort proffered by the Settlement Fund. *Richards* does not involve any effort to obtain a prejudgment garnishment or other remedy.

26. In short, Texas law concerning the assertion of equitable liens has no application to an alleged overpayment by one settling party to another under the terms of a settlement agreement, particularly where the alleged aggrieved party is represented by counsel and highly sophisticated, and which involve different manufacturers and implants. *Schlumberger v Swanson*, 959 S.W.2d 171 (Tex. 1997) (describing the burdens imposed for setting aside a settlement between parties even in instances of alleged fraud where represented by counsel and informed of its terms). The payment to implant claimants who qualified under the MDL settlement involving manufacturers other than Dow Corning. These were made as obligated under a contract of settlement. If a mistake was made then, then the RSP Defendant presumably

has a right under the contract to seek repayment, just as the claimant may have defenses to the repayment. However, nothing about such a fact pattern gives rise to a claim for equitable title in the Dow Corning Joint Plan against a settlement fund held in *custodia legis* to resolve claims against Dow Corning, and which relates to a completely different litigation claim, unrelated to the matters for which the Settlement Fund settlement payment were made.

III. CONCLUSION

The MDL 926 Settlement Fund lacks standing to assert any claim upon which a lien could rest. Indeed, there is no lien that can be recognized in favor of the MDL 926 Settlement Fund, even if it had standing.

Respectfully submitted this 1st day of August, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2007, a true and correct copy of the foregoing has been served on the following parties via first class mail, postage prepaid and properly addressed to:

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