UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

	Civil Action No. 00-CV-00001
In Re:	MASTER DOCKET
DOW CORNING LITIGATION,	(Litigation Facility Matters)
Debtor	HONORABLE DENISE PAGE HOOD
Carole P. Edwards v. DCC Litigation Facility, Inc.	MIE No.: 05-CV-30142
Diane Russell v. DCC Litigation Facility, Inc.	MIE No.: 05-CV-30158 (N.D. Ga. No.: 93-CV-1687)
Loisan Thompson v. DCC Litigation Facility, Inc.	MIE No.: 05-CV-30159

PLAINTIFFS LIAISON COUNSEL'S RESPONSE TO DCC LITIGATION FACILITY, INC.'S MOTION FOR SUMMARY JUDGMENT OF PREVIOUSLY SETTLED CLAIMS

INTRODUCTION

The DCC Litigation Facility, Inc. ("Litigation Facility") has moved for summary judgment on three opt-out claims which it alleges were "fully released" prior to Dow Corning Corporations' Chapter 11 case. The motion is without merit. First, none of the releases relied upon by the Litigation Facility purports to release Dow Chemical and Corning, Inc. As the unreleased claims against Dow Chemical Co. and Corning, Inc. are channeled to the Litigation Facility pursuant to the Amended Plan of Reorganization, the Litigation Facility's motion for summary judgment must be denied. Second, the scope of the purported releases as to Dow Corning Corporation and Dow Corning Wright are ambiguous, thereby precluding entry of summary judgment for either party.[1]

STATEMENT OF FACTS

The 1992 and 1993 Releases Signed By Claimants

The purported releases executed by Claimants are substantially identical:

> [STATE AND COUNTY WHERE RELEASE EXECUTED]
>
> RECEIPT AND RELEASE
>
> I, [Claimant name], the undersigned, whose address is [Claimant's address], do acknowledge the receipt and sufficiency of $[amount] to be paid to me or on my behalf, and in consideration of that, I release and discharge Dow Corning Wright, Dow Corning Corporation, their officers, directors, employees, agents, successors and assigns, from any and all claims, now known or unknown by me, arising from the use of the breast implant product[s] and any procedure related thereto. This release is in settlement of a dispute as to the circumstances and causes of the corrective surgery on or about [date of respective corrective surgery].[2]

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[1] Moreover, as briefed by Claimants Edwards, Russell, and Thompson, respectively, the circumstances surrounding the execution of the three releases raise genuine issues of material fact concerning mistake, duress, fraud, and unconscionability, each of which precludes entry of summary judgment.

[2] Claimant Thompson's release does not identify the date of the corrective surgery and simply states "the corrective surgery which is to be scheduled."

Exhibits to the Litigation Facility's Motion, A-3 (Edwards); A-7 (Russell); A-10 (Thompson).

The Circumstances Prompting The Removal Assistance Program

In the second half of 1991 and early 1992, media reports of the dangers of the silicone gel breast implants were extensive. Jury verdicts against breast implant manufacturers and the release of some of Dow Corning's internal documents led to the FDA announcing a moratorium of the sale of silicone gel breast implants in January 1992. Thousands of implanted women desperately desired to have their implants removed. Many could not afford the costs of explantation surgery (usually several thousand dollars), either because they did not have health insurance or because insurers were denying or delaying approval of coverage for explantation procedures.

In March 1992, Dow Corning held a press conference and publicly announced its "Removal Assistance Program" ("RAP"). During 1992 and 1993, Dow Corning issued several notices publicizing the RAP, emphasizing that women would not be required to provide a release against Dow Corning, other than their claims relating to the removal operation. *See* March 17, 1992 Notice (M-690032-33), attached as Ex. A to the Affidavit of Fredric L. Ellis ("Ellis Aff.") ("March 17, 1992 Notice"). ("Participation in this program will not require a release of your potential claims against Dow Corning, other than those potential claims, if any, relating to the removal operation."); March 29, 1993 Notice, DCC-274020035-36, attached as Ex. B to Ellis Aff. ("March 29, 1993 Notice") ("Participation in this program will not require a release of your potential claims against

Dow Corning.") When the issue of the RAP was raised in the *Dante* class action[3] in March of 1992, Dow's attorney stated:

> With regard to the removal program which we recently implemented, there is absolutely no release required, mentioned or whatever... there is an informed consent form which the doctor could use to inform the patient about the surgery...but there is no release. We haven't asked for a release. I mean, in all candor, given the present climate and given the FDA and everything else, we determined we would not ask for a release.

Transcript of March 27, 1992 Hearing in *Dante v. Dow Corning Corp.*, at 16-17, attached as Ex. C to Ellis Aff.

The 1994 MDL Settlement, In Which Dow Corning Was An Original Participant

The MDL-926 proceedings were coordinated under Chief Judge Sam C. Pointer in July of 1992. Discussions between the Plaintiffs Steering Committee and the various defendants, including Dow Corning, led to a "global settlement" which was announced in early 1994. That settlement, which Dow Corning was an original signatory to, allowed claimants who had previously executed a release to participate in the settlement if: 1) they were unrepresented at the time they executed the release and 2) they had released claims for $15,000 or less. *See* MDL-926 Breast Implant Litigation Settlement Agreement, dated March 24, 1994, at 40-41, attached as Ex. D to Ellis Aff.

Dow Corning's Parallel Removal Program That Created Confusion Among Implanted Women.

In late 2004, the Settlement Facility began mailing letters to claimants informing them that Dow Corning had provided signed releases purporting to bar their right to proceed in the Settlement Facility. After these mailings, the CAC received dozens of calls and letters from claimants and attorneys objecting to the preliminary ineligibility

[3] Dante was a class action of all breast implant recipients conditionally certified in February 1992 by Judge Rubin in the Southern District of Ohio. The case was subsequently transferred to the Northern District of Alabama by the Judicial Panel on Multi District Litigation. In re Silicone Gel Breast Implants Products Liability Litigation, 793 F.Supp.1098 (J.P.M.L. 1992).

determination. As a result of further investigation, it was discovered that Dow Corning actually operated two different Removal Assistance Programs, one of which – as advertised and promoted by Dow Corning – did not involve the obtaining of a release. The second program apparently did require a release – but it was limited to claims relating to the removal surgery.[4]

Dow Corning apparently maintained one call center, staffed with Customer Relations Specialists and Supervisors, and one toll free number for claimants to call for Removal Assistance. The job description for Customer Relations Specialist, dated January 10, 1993, made it clear that the job of negotiating and resolving claims required "creative reasoning and presentation" which was designed to result in a benefit to Dow Corning:

> This position requires the application of legal theory and defense strategies to make independent judgements on appropriate resolution and/or referral of claims. Each claim must be individually evaluated in light of personalities involved, product at issue, business impact and precedent-setting value. Creative reasoning and presentation must be employed to reach a "win-win" resolution.

(DCC-242060859-860, attached as Ex. F to Ellis Aff.)(emphasis added.)

The Customer Relations Supervisor job description, dated May 27, 1992, made it even more apparent that the Customer Relations Specialists were under significant corporate pressure to obtain as many releases as possible for as little as possible – indeed,

[4] Under the case management orders in place, none of the three claimants have yet been allowed to depose the Customer Relations Specialists who secured their releases or conduct other discovery concerning internal documents Dow Corning or Dow Corning Wright may possess concerning the circumstances under which these releases were executed, the circumstances surrounding the RAP, or other similar programs (*see* CMO 1, pp. 9-10). Dow internal records documenting the circumstances of each release, as well as internal documents concerning the operation of RAP and protocols governing its daily relationship with the Customer Relations Department, have not been produced or are impossible to locate due to redactions. (Affidavit of James J. Condra, ¶¶ 6, 7, attached as Ex. E to Ellis Aff.) Other documents believed to exist include internal memoranda requesting approval of the proposed payment of expenses relating to the removal surgeries and telephone "scripts" for both the official RAP employees and the "Customer Relations Specialists." Such records are believed to exist, but are currently available, if at all, in redacted form that precludes claimants' ability to get full discovery on all of the circumstances surrounding the releases they signed. *Id.* at ¶ 8.

the Specialists' compensation was dependant on this. The Supervisors, whose responsibilities included "[r]eview[ing] all active files with each Senior Customer Relations Specialist every thirty (30) days to assure responses are consistent with corporate defense strategy," DCC 242060875, attached as Ex, G to Ellis Aff., were told that "[p]roductivity is judged by both the number of claims resolved and the dollar volume of claims on an annual basis." *Id.* (emphasis added.) Indeed the job description made it absolutely clear:

> Successful management of this role has a direct impact on the company's bottom line profits and on the cost of products liability insurance. A measurable reduction in healthcare product litigation and its associated costs is the expected result.

Id. at DCC-242060876 (emphasis added.)

When claimants presented documentation to the Customer Relations Specialist that their implant removal surgery would cost more than the $1,200 RAP payment offered by Dow Corning, claimants were apparently switched to the second removal assistance program – the one that did involve obtaining some form of a release.

Plastic surgeons and their assistants who called on behalf of their patients were informed of the existence of both programs. (*See* Letter of 8/4/92 to Dr. Barrett, DCC 096301962-63, attached as Ex. H to Ellis Aff.) Dow Corning told doctors that the doctor could only receive $1,200 if the doctor did not obtain a release from the claimant for the surgical costs; however, Dow Corning offered the doctor full payment for surgical costs if the doctor obtained a release in favor of Dow Corning Corporation and Dow Corning Wright. Claimants were complaining that removal costs were often in the range of $2,400 - $6,000, and the $1,200 offered was too low. (*See* Memo. of 4/3/92, DCC 010003366-67, attached as Ex. I to Ellis Aff.) Thus, there was a built-in incentive for

doctors to pressure patients to execute a release so that the doctor could receive full reimbursement for the removal surgery.

With claimants who were not represented by counsel, the customer relations personnel apparently made no effort whatsoever to inform them that a class action had been certified, that class counsel had been appointed to represent them and that they could contact class counsel or counsel of their own choosing before deciding whether to execute a release. For women who did not have attorneys, and the doctors who requested information, Dow Corning told them that they would pay for the "reasonable, uninsured, out-of-pocket expenses incurred by the revision surgery" (8/4/92 letter to Dr. Barrett, attached as Ex. H to Ellis Aff.). *See also* Affidavits of Carole Edwards ("Edwards Aff."), Diane Russell ("Russell Aff."), and Loisan Thompson ("Thompson Aff."), attached as Exs. J, K, and L to Ellis Aff.) However, if a woman seeking explantation funds was represented by an attorney, the attorney was informed that Dow "would also be willing to consider a claim for general damages." (Letter of 12/30/92 to Attorney Dovolis, DCC 242060917, attached as Ex. M to Ellis Aff.)

The Circumstances Attending Claimants' Execution Of Their Respective Releases.

All three claimants were unrepresented by counsel at the time they executed the release. None were informed of the then pending certified class action or informed that they could contact class counsel or counsel of their choice before executing the releases.

Claimant Edwards never communicated with anyone from Dow Corning. She understood that the form she signed, at her physician's request, "was only an acknowledgment that Dow Corning was reimbursing my surgeon for some of the expenses relating to my explantation surgery, and that I was not giving up any claim other than a claim against Dow Corning to reimburse me for the costs of the surgery."

Edward Aff. ¶ 17. In fact, her doctor and his staff "were clear that the document that [she] was signing and the payment that was being made was with regard to 'the surgery only'." *Id.* at ¶ 18.

Claimant Russell understood that the release she executed "was not a general release but only pertained to my October 1991 removal surgery." *Russell Aff.* ¶ 12. She "thought that Dow wanted [her] to sign the release so that [she] could not ask them for any more money in relation to this particular surgery in the future since they were paying the expenses of that surgery." *Id.*

Claimant Thompson did not have health insurance and could not afford to pay for the removal surgery. *Thompson Aff.* ¶ 9. Dow did not inform her about the class action lawsuit that had been filed, or her right to seek counsel regarding the class action, until after she signed the release. *Id.* ¶ 15. At the time she signed the release in March 1993, Thompson "was taking prescription pain medicines and was desperate, frightened and sick." *Id.* ¶ 11.

ARGUMENT

I. THE LITIGATION FACILITY IS NOT ENTITLED TO SUMMARY JUDGMENT WHERE NONE OF CLAIMANTS IS ALLEGED TO HAVE EXECUTED A RELEASE OF ANY BREAST IMPLANT CLAIM AGAINST DOW CORNING'S SHAREHOLDER, THE DOW CHEMICAL COMPANY.

Contrary to the Litigation Facility's assertion, Claimants' respective claims have not been "fully settled and released." This is so because, *inter alia,* the claims allegedly released pursuant to the 1992 and 1993 releases, upon which the Litigation Facility's motion is based, are not congruent with the Breast Implant Claims that may be the subject of litigation pursuant to the Reorganization Plan. More specifically, while the 1992 and 1993 releases purport to release all claims against "Dow Corning Wright, Dow Corning

Corporation, their officers, directors, employees, agents, successors and assigns," Motion Exs. A-3, A-7, A-10, none release claims against Dow Corning's shareholder, The Dow Chemical Company ("Dow Chemical"). Negligent undertaking claims against Dow Chemical are viable, *see, e.g., In re Silicone Gel Breast Implants Products Liability Litigation (MDL-926)*, 887 F. Supp. 1455, 1462 (N.D.Ala. 1995)(denying Dow Chemical's summary judgment motion on claim for negligent undertaking), and are among the Breast Implant Claims for which the Litigation Facility may be held liable after trial. *See* Reorganization Plan § 1.18 (defining "Breast Implant Claims" as including "causes of action ... now or hereafter asserted against ... any Released Parties"); *id.* § 8.3 (defining "Released Parties" as including Dow Corning's shareholders, such as Dow Chemical); § 5.4.2 (non-settling claimants "shall retain the right to adjudicate their Claim through litigation (including trial by jury)"). Indeed, this Court's Order, dated October 6, 2005 and dismissing claims against Dow Chemical, explicitly provides that these claims would be dismissed *without* prejudice because "[a]ny Non-Settling Personal Injury Claimant may continue or commence an action *against the Litigation Facility* in accordance with the Litigation Facility Agreement." Order Dismissing Cases Against Dow Chemical Co. and Corning Incorporated, dated October 6, 2005 ("Dismissal Order"), at 2.

A. The Reorganization Plan Guarantees That Claimants May "Continue Or Commence" An Action Against The Litigation Facility For Claims That Could Have Been Asserted Against "Released Parties", Including The Dow Chemical Company.

The Plan of Reorganization defines "Breast Implant Claim" as including not only claims against Dow Corning, but, as well, "all Claims ... now or hereafter asserted against ... **any Released Parties** ... based upon or in any manner arising from or related to ... the **research and development** ... of any **raw materials** ... comprising all or part

of a Breast Implant[.]" Reorganization Plan § 1.18 (emphases added).[5] Dow Chemical, as a shareholder of Dow Corning, is a Released Party. *Id.* § 8.3. Each of Claimants has a claim against Dow Chemical for direct (and not vicarious) liability based on Dow Chemical's conduct in testing and analyzing liquid silicone, which comprises up to 80% of the gel in a silicone gel breast implant. *See, e.g., In re Silicone Gel Breast Implants Products Liability Litigation (MDL-926)*, 887 F. Supp. at 1462 (acknowledging viability of negligent undertaking claim against Dow Chemical). Accordingly, each of Claimants possesses a Breast Implant Claim arising from Dow Chemical's alleged liability, separate and apart from the liability of Dow Corning for the manufacture and sale of silicone gel breast implants.

The Plan further provides that non-settling personal injury claimants such as Claimants "shall have their Claims ... resolved under the terms of the Litigation Facility Agreement and the related Case Management Order(s)" and "shall retain the right to adjudicate their Claim through litigation (including trial by jury)[.]" Reorganization Plan § 5.4.2. *See also id.* § 5.3 ("The Settlement Facility and the Litigation Facility will assume full responsibility for resolving ALL PERSONAL INJURY CLAIMS in Classes 5 through 10.2.") Moreover, the Plan expressly guarantees that "each Non-Settling Personal Injury Claimant shall be entitled to continue or commence an action against the Litigation Facility in which the Non-Settling Personal Injury Claimant shall be entitled to a jury trial for the sole purpose of obtaining a judgment as permitted by the Litigation

[5] The Plan of Reorganization's Introduction provides that capitalized terms not defined in the Plan have the same meaning as set forth in § 101 of the Bankruptcy Code. "Claim", a capitalized term not defined in the Plan, is defined in the Bankruptcy Code as including a "right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured or ... [the] right to an equitable remedy for breach of performance if the breach gives rise to a right of payment whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, secured or unsecured . . . ." Bankruptcy Code § 101(5). Thus, throughout the Plan, references to "Claims" must be understood in the broadest sense as used in the Bankruptcy Code.

Facility Agreement[.]" *Id.* § 8.4 (emphasis added). *See generally* Dismissal Order at 1-2. Accordingly, notwithstanding any purported release of claims against Dow Corning, each of Claimants is entitled to litigate against the Litigation Facility her Breast Implant Claim arising out of Dow Chemical's conduct.[6] Simply stated, the Amended Plan makes it clear that Claimants' respective Claims against Dow Chemical may be asserted against the Litigation Facility.

B. The 1992 and 1993 Releases Did Not Effect A Release Of Claimants' Claims Against Dow Chemical.

Each of the releases at issue in this matter contains the following language defining the released parties:

> ". . . I release and discharge Dow Corning Wright, Dow Corning Corporation, their officers, directors, employees, agents, successors and assigns..."

Motion Exs. A-3, A-7, A-10. Under the terms of the 1992 and 1993 releases, then, only Dow Corning and its "officers, directors, employees, agents, successors and assigns" – but not its shareholders, such as Dow Chemical – are purportedly released from liability. Moreover, the Litigation Facility (which assumed Dow Corning's liabilities) cannot seek to expand the scope of these releases beyond their express terms. *See, e.g., Hold v. Manzini*, 736 So.2d 138, 141 (Fla. 3d DCA 1999), *quoting Delgado v. Government*

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[6] Indeed, the Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization, which preceded adoption of the Plan, also makes clear that claims against Dow Chemical are among the "Claims" that may be litigated against the Litigation Facility:

> If the Plan is confirmed, DCC will be discharged and released from liability on all Claims, including Claims attributable to Breast Implants and Other Products, and other Personal Injury Claims. Dow Corning's subsidiaries, **the Shareholders**, and their respective directors, officers and employees, and those insurance companies...that have settled coverage disputes with Dow Corning, **will also be released from Claims attributable to such products**. Personal Injury Claimants **asserting such Claims** will have the rights provided under the Plan, including the right to settle their Claims under the Settlement Facility **or to litigate their Claims against the Litigation Facility**, as described more fully in section 6.6.J of this Disclosure Statement.

Amended Joint Disclosure Statement § 1.1(F)(emphases added). *See also id.* § 6.6(J)(4) ("The procedures under the Litigation Facility allow Non-Settling Personal Injury Claimants to resolve their Claims by trial if those claims are not earlier settled.")

Employees Ins. Co., 528 So. 2d 23, 24 (Fla. 3d DCA 1988)("any ambiguities must be construed against the party who chose the language used"); *Jehle-Slauson Constr. Co. v. Hood-Rich Architects and Consulting Eng'rs*, 435 So.2d 716, 720 (Ala. 1983)(ambiguous release, as with all ambiguous instruments "must be construed against the party who writes them.") Accordingly, in the absence of any evidence that Claimants previously released their respective Breast Implant Claims against Dow Chemical, the Litigation Facility is not entitled to summary judgment and its Motion should be denied.

II. THE LITIGATION FACILITY IS NOT ENTITLED TO SUMMARY JUDGMENT WHERE THE SCOPE OF THE 1992 AND 1993 RELEASES DID NOT INCLUDE ALL OF CLAIMANTS' RESPECTIVE CLAIMS AGAINST DOW CORNING.

Even with respect to Dow Corning's liability, Claimants' respective claims have not been "fully settled and released" by virtue of the 1992 and 1993 releases. This is so because none of these releases is a general release, and none unambiguously releases Dow Corning from all liability. Instead, the release language is reasonably construed to be limited in scope to claims arising out of each Claimant's explantation surgery. To the extent that the true meaning of the releases is subject to more than one reasonable interpretation, the entry of summary judgment would be improper. Moreover, with respect to Claimants Edwards and Thompson, the controlling substantive law is that of Florida and, under Florida law, even a general release cannot be construed to effect a release of claims which have not matured at the time the release was signed.

A. Federal Choice Of Law Rules Should Apply To These Actions.

The initial question is whether federal choice of law rules or Michigan choice of law rules apply where a district court overseeing bankruptcy proceedings must consider claims based upon state law and which do not implicate federal policy. This question has divided the federal courts. *Compare In re Vortex Fishing Sys., Inc.*, 277 F. 3d 1057, 1069

(9th Cir. 2002)(requiring use of federal choice-of-law principles) and *In re SMEC Inc.*, 160 B.R. 86, 89-91 (M.D. Tenn. 1993)(articulating policy reasons why federal choice-of-law rules apply) with *In re Gaston & Snow*, 243 F.3d 599, 605-607 (2nd Cir. 2001)(applying forum states choice-of-law rules) and *In re Merritt Dredging Co.*, 839 F. 2d 203, 205-06 (4th Cir. 1988)(utilizing choice-of-law rules of forum state.) *See generally* James T. Markus & Don J, Quigley, *Conflict of Laws – Which State Rules Govern?*, 18- Nov. Am. Bankr. Inst. J. 18 (1999.) Neither the Sixth nor Seventh Circuit Courts of Appeal have ruled on the issue. *See In re Dow Corning Corp.*, 419 F.3d 543, 548-549 (6th Cir. 2005); *Matter of Morris*, 30 F.3d 1578, 1581-82 (7th Cir. 1994).

This Court should hold that Federal choice of law rules apply here in recognition of a fundamental distinction: *i.e.*, in a diversity case, federal courts must apply the conflict of laws principles of the forum state, whereas in "federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules." *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995). The reason why courts apply state law choice of law rules in diversity cases – to avoid the risk of forum shopping – simply does not apply when the case can only be litigated in federal courts. *Id.*

Although not explicitly deciding the question, the Supreme Court's opinion in *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 67 S.Ct. 237, 91 L.Ed. 162 (1946), strongly suggests that Federal choice of law principles – principally, the most significant relationship test adopted by the *Second Restatement of Conflict of Laws* §§ 145, 146 – should apply in the present circumstances. In *Vanston*, the court addressed the issue of what law to apply to determine a creditors' claim for interest on unpaid interest:

> [O]bligations ... often have significant contacts in many states so that the question of which particular state's law should measure the obligation

> seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states...
>
> [i]n determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. Erie R. Co. v. Tompkins, 304 U.S. 64, [58 S.Ct. 817, 82 L. Ed. 1188][(1938)] has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it were only another state court. See Holmberg v. Armbrecht, 327 U.S. 392 [66 S.Ct. 582, 90 L. Ed. 743][(1946)]. But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles.

Vanston, 329 U.S. at 161-63 (emphases added.)

The *Vanston* opinion, as noted by one district court, makes a persuasive case in favor of the position adopted by Claimants:

> [T]he logic of *Vanston* is compelling. In a diversity case, it is presumed that the forum state has the greatest interest in seeing its laws applied. In a federal bankruptcy case incorporating state law, this presumption is untenable. There is no necessary reason to believe that the forum state is the state with the greatest interest in a bankruptcy proceeding...
>
> This rule also helps prevent forum shopping by debtors. Rather than allow debtors in the shadow of bankruptcy to restructure or relocate their business dealings in such a way as to gain the benefit of a certain forum's laws, this rule imposes on debtors the laws under which they primarily acted. Likewise, creditors and other parties are not subjected to, or given the benefit of, an unjustified quirk of legal procedure that imposes on them laws under which they rarely or never transacted.

In re SMEC, Inc., 160 B.R. 86, 90-91 (M.D. Tenn. 1993)(emphasis added.) *See also In re Elder-Beerman Stores Corp.*, 221 B.R. 404, 407-08 (Bankr. S.D. Ohio 1998.)

While there is no clear Sixth Circuit precedent, the "compelling" logic of the *Vaston* opinion, and its adoption by other courts, provides a sound basis for this Court's

application of the substantial relationship test to determine which state laws apply to the claims asserted by Claimants.

B Under Federal Choice Of Law Rules, Claimants' Cases Are Properly Decided Pursuant To The Law Of Florida And Alabama.

Applying Federal law to the choice of law issue mandates that Florida law apply to the Edwards and Thompson releases, and that Alabama law apply to the Russell release, because the injuries were incurred and the releases at issue were executed in these respective states. Where personal injuries are concerned, as here, "the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless with respect to the particular issue, some other state has a more significant relationship...to the occurrence and the parties." *Restatement (Second) of Conflict of Laws*, § 146.[7]

Moreover, as to validity and scope of releases, courts have held that the laws of the state where the release was executed should be applied. See, e.g., *Tilley v. Anixter Inc.*, 332 B.R. 501, 511 (D. Conn. 2005)("Connecticut law governs the interpretation of the Release, because the Release was executed in this state, it did not specify a different choice of law, and the application of Connecticut law would not produce arbitrary, irrational results.") (internal quotation omitted); *Cruz v. American Airlines*, 150 F. Supp. 2d 103, 112-113 (D.D.C. 2001)(using federal choice of law rule, court looks to law of state wherein plaintiff resides and executed release, as that state has most significant relationship to transaction.); *Faloona v. Hustler Magazine, Inc.*, 799 F.2d 1000, 1003 (5th

[7] *See also Muncie Power Products, Inc, v. United Technologies Automotive, Inc.*, 328 F.3d 870, 874 (6th Cir. 2003)(presumption that law of the place where the injury occurs will be applied to a tort action); *Smith v. Daimlerchrysler Corp.*, 2002 WL 31814534 * 1 (Del. Sup. Ct. Nov. 20, 2002)("[I]n personal injury actions, there is a rebuttable presumption in favor of the law of the state where the injury occurred, unless another state has a more significant relationship to the action."); *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980)(a Court looks to the law of the state where the injury occurred unless some other state has a more significant relationship to the occurrence and the parties.)

Cir. 1986)(California law applied to determine validity of release executed in California).[8]

While the Litigation Facility states that no different result will be obtained if the releases are analyzed under Florida or Alabama law, it offers no explanation as to why Michigan law should apply to residents of Florida and Alabama, respectively, who incurred injuries in Florida and Alabama, respectively, who executed the releases in Florida and Alabama, respectively, and whose "corrective surgery" took place in Florida and Alabama, respectively. Indeed, both the Russell and Thompson releases were mailed from Tennessee, *see* Motion Exs. A-6, A-9), and not from Michigan. Finally, although not containing a specific choice of law clause, each release is captioned by reference to counties in Florida and Alabama, respectively, thereby indicating the parties' intent that those respective state laws should apply.

C. Because The 1992 And 1993 Releases Are Ambiguous As To The Scope Of The Released Claims Against Dow Corning, This Court Must Deny The Litigation Facility's Motion For Summary Judgment.

Under the substantive law of Florida and Alabama, the construction and enforcement of a release are governed by principles of contract law. *Mulhern v. Rogers*, 636 F.Supp. 323, 325 (S.D.Fla. 1986). *See also Poarch v. Alfa Mut. Ins. Co.*, 799 So.2d 949, 955 (Ala.Civ.App. 2000)("A release is a contract and is governed by contract law.") As with other contracts, an enforceable release requires mutual agreement, "and there can be no such mutuality when there is no common intention." *Gaines v. Nortrust Realty Mgmt., Inc.*, 422 So.2d 1037, 1039 (Fla.App.3d 1982). Where the language used in a release is unambiguous, the intent of the parties shall be determined solely by reference

[8] *See also Cheatham v. Thurston Motor Lines*, 654 F. Supp. 211, 214 (S.D. Ohio 1986)("In product liability claims, the primary interest of a state is to deter the sale and/or manufacture of negligently or defectively manufactured goods to that state's citizens."); *Hamilton v. Accu-Tek*, 47 F. Supp. 2d 330, 336 (E.D.N.Y. 1999)("[W]hen a plaintiff is injured in his own domicile, and the law of that state would permit him to recover, the defendant should not be allowed to interpose his own state's law.")

to the document itself. *See, e.g., Mulhern*, 636 F.Supp. at 325 ("Where the intent can be ascertained from the unambiguous language of the instrument, construction of the document is a question of law for the Court."); *Conley v. Harry J. Whelchel Co.*, 410 So.2d 14, 15 (Ala. 1982)("In the absence of fraud, a release supported by a valuable consideration, unambiguous in meaning, will be given effect according to the intention of the parties to be judged from what appears within the four corners of the instrument itself and parol evidence is not admissible to impeach it or vary its terms.") But an ambiguous release cannot be the basis for entry of summary judgment, since "the determination of the true meaning of the contract is a question of fact to be resolved by a jury." *McDonald v. U.S. Die Casting and Development Co.*, 585 So.2d 853, 855 (Ala. 1991). *See also Wayne J. Griffin Elec., Inc. v. Dunn Const. Co.*, 622 So.2d 314, 317 (Ala. 1993)("[I]f the Court determines that the terms of the document are ambiguous in any respect, then the true meaning of the document becomes a question for the factfinder.")(emphasis added); *Yardum v. Scalese*, 799 So.2d 382, 383 (Fla. App. 2001)("Where a written instrument lends itself to more than one reasonable interpretation, it is ambiguous and therefore summary judgment is improper for either party.")

To determine whether the 1992 and 1993 releases were intended to effect a general release of claims against Dow Corning, or a more limited release of claims arising out of each Claimant's explantation surgery, the Court must first examine the whole of each written instrument. *See Aetna Life Ins. Co. v. White*, 242 So.2d 771, 773 (Fla.App.4th 1970)("The cardinal rule in this regard is that the intention of the parties will be ascertained from a consideration of the whole agreement."); *Homes of Legend, Inc. v. McCollough*, 776 So.2d 741, 746 (Ala. 2000)("Under general Alabama rules of contract interpretation, the intent of the contracting parties is discerned from the whole of the

contract.") By their terms, none of the 1992 and 1993 releases effects a general release in favor of Dow Corning.[9] *Contrast Mulholland v. USAA Ins. Co.*, 771 So.2d 567, 568 (Fla.App. 2000)(construing as general release language releasing defendants from all "claims and demands whatsoever, in law or in equity, which said first party ever had ... against said second party, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of these presents.") Instead, each of the releases is limited to claims against Dow Corning "now known or unknown by me, arising from the use of the breast implant products and any procedure related thereto." Motion Exs. A-3 (Edwards); A-7 (Russell); A-10 (Thompson).[10]

None of the releases identifies precisely which "breast implant products" and which "procedure related thereto" are the subject of the released claims. However, the immediately following sentence – "This release is in settlement of a dispute as to the circumstances and cause of the corrective surgery on or about [date,]" *id.* – certainly suggests that the "breast implant product[s]" and the "procedure related thereto" are those employed in the "corrective surgery." It is, after all, the plastic surgeon performing the "corrective surgery" who may fairly be considered to have "use[d] .. the breast implant products" and to have performed the "procedure related thereto[,]" and no other surgeries (for example, the original implantation surgery) or injuries (for example, symptoms cause by migrating silicone gel) are mentioned. Moreover, the consideration amounts reflected

[9] Even if Claimants Edwards and Thompson had executed general releases, the Litigation Facility would not be entitled to summary judgment on some of their respective claims, as Florida courts have strictly construed general releases as not barring claims later maturing claims. *See, e.g., Hold v. Manzini*, 736 So. 2d 138, 141 (Fla. App. 1999)(release of claims party "ever had, now has, or ... hereafter can, shall or may have..." held not to bar claims accruing after release executed); *Mulhern v. Rogers*, 636 F.Supp. 323, 325 (S.D.Fla. 1986)("A review of Florida Law reveals that a general release will ordinarily be regarded as embracing all claims that have matured at the time of its execution.")

[10] As found in the 1992 and 1993 releases, the words "product" and "procedure" are sometimes pluralized, and sometimes not.

in the respective releases, *e.g.*, $7,216.00 (Edwards, A-3), $ 1,142.06 (Russell, A-7), $ 5,531.00 (Thompson, A-10) were for the costs of the explantation surgery only, indicating they were received in return for a release of claims arising out of a single surgery, and not a general release of all claims.[11] In the absence of any other description of the claims subject to release, Claimants' interpretation is both reasonable and persuasive.

Confronted with written releases that are ambiguous with respect to the scope of the released claims, this Court must deny the Litigation facility's motion for summary judgment. *See Howard v. Savitsky*, 813 So.2d 978, 980-81 (Fla.App. 2002)(reversing entry of summary judgment where release language ambiguous "as to future damages and what injuries were released."); *Wayne J. Griffin Elec., Inc.*, 622 So.2d at 317 ("true meaning" of ambiguous release "becomes a question for the factfinder.")

D. The Available Parol Evidence Is Further Supportive Of Claimants' Interpretation That The 1992 and 1993 Releases Were Limited To Claims Arising Out Of Their Respective Explantation Surgeries.

Where release language is ambiguous, "then the intention of the parties is to be determined as a question of fact, and parol evidence is admissible on that question." *Nix v. Henry C. Beck Co.*, 572 So.2d 1214, 1217 (Ala. 1990). *See also Luciano v. Franchino*, 730 So.2d 410, 411-12 (Fla.App. 1999)(parol evidence admissible to show parties' intent where release language ambiguous). "Use of parol evidence to determine either the intent of the parties or the terms of a contract precludes summary judgment." *Montealegre v. Banco de Credito Centro-Americano*, 895 So.2d 1097, 1099 n.7 (Fla. App. 2004).

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[11] To be sure, the Litigation Facility will argue that Dow Corning did not intend the releases to be so limited. But of course that alone is insufficient to warrant summary judgment. *See, e.g., Gaines*, 422 So.2d at 1040 (reversing entry of summary judgment; "[w]hile the trial judge may have logically concluded that Nortrust would not have agreed to accept anything less than a release of all claims arising under the lease, his logic is not a substitute for the missing ingredient, that is, a mutual understanding between the parties.")

Here, the available parol evidence supports Claimants' assertion that they and Dow Corning intended that the 1992 and 1993 releases be limited in scope to claims arising out of the Claimants' respective explantation surgeries. Certainly, Claimants understood and intended as such. *See, e.g., Edwards Aff.* ¶ 17 ("At the time that I signed the release, it was my understanding that ... the form was only an acknowledgement that Dow Corning was reimbursing my surgeon for some of the expenses related to my explantation surgery, and that I was not giving up any claim other than a claim against Dow Corning to reimburse me for the costs of the surgery."); *Russell Aff.* ¶ 12 ("I also understood that the release was not a general release but only pertained to my October 1991 removal surgery.") In fact, Claimant Edwards "never had any direct contact with Dow Corning." *Edwards Aff.* ¶ 18. Rather, she was asked by her surgeon or surgeon's staff to sign the release, and "Dr. Halpern and his staff were clear that the document I was signing and the payment that was being made was with regard to 'the surgery only.'" *Id.* Claimants' understanding and intent is consistent with those of Dow Corning as expressed in the March 17, 1992 and March 29, 1993 Notices issued in connection with its Removal Assistance Program. *See Ellis Aff. Exs. A, B.*

Moreover, familiar principles of contract construction also favor Claimants' interpretation of the 1992 and 1993 releases. First, Dow Corning drafted the subject releases and, therefore, "any ambiguities must be construed against the party who chose the language used." *Hold v. Manzini*, 736 So. 2d at 141 (construing Florida law; "any ambiguities must be construed against the party who chose the language used"); *Jehle-Slauson Constr. Co. v. Hood-Rich Architects and Consulting Eng'rs*, 435 So. 2d at 720 (construing Alabama law; ambiguous instruments "must be construed against the party who writes them.") Second, where there is ambiguity, "specific provisions in a contract

will govern in its construction over matters stated in general terms." *Mulhern*, 636 F.Supp. at 325, citing *Raines v. Palm Beach Leisureville Community Assoc.*, 317 So.2d 814 (Fla. App. 1975). *See also ERA Commander Realty, Inc.*, 514 So.2d 1329, 1335 (Ala. 1987) ("When there is a conflict in a contract, the specific substantive provisions control over general provisions.") Here, the more specific provisions (*i.e.*, "This release is in settlement of a dispute as to the circumstances and cause of the corrective surgery on or about [date]") control over the more general provisions (*i.e.*, claims "now known or unknown by me, arising from the use of the breast implant products and any procedure related thereto"). *See, e.g., Aetna Life Ins. Co.*, 242 So.2d at 773 (construing general release language in divorce agreement as being limited by specific release language).[12]

CONCLUSION

For all of the above stated reasons, the Litigation Facility's motion for Summary Judgment should be denied.

Respectfully submitted
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[12] Moreover, the Litigation Facility's assertion that the claimants must first return the consideration given in connection with the releases is without merit. *See Standard Tilton Milling Co. v. Nixon*, 9 So. 2d 911, 913 (Ala. 1942)(rule not applicable where impractical to return consideration); *Taylor v. Dorough*, 547 So. 2d 536, 541 (Ala. 1989)(where money paid in connection with release used to pay medical providers, no duty to return.)

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2006, I electronically filed the foregoing document, along with the accompanying Affidavit of Fredric L. Ellis, with the Clerk of the court using the ECF System which will send notification of such filing to the following: Lamont E. Buffington and Timothy J. Jordon and I certify that I have mailed by U.S. Mail the documents to the following non-ECF participant: Brenda S. Fulmer, Alley, Clark, Greiwe & Fulmer, 701 E. Washington Street, P.O. Box 3127, Tampa, FL 33601-3127

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