

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

- - -

IN RE: : CIVIL NO. C-1-92-057
 :
 BREAST IMPLANT LITIGATION : Cincinnati, Ohio
 : Fri., March 27, 1992

HEARING BEFORE
 THE HONORABLE CARL B. RUBIN, JUDGE
 AND
 THE HONORABLE SANDRA BECKWITH, JUDGE

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PROCEEDINGS

1
2 THE COURT: Good morning, counsel. This is the
3 matter of the breast implant litigation. I'm pleased to
4 have on the bench with me my colleague Judge Beckwith,
5 and I would like for you to instruct both of us.

6 Counsel, I would like to proceed in this fashion.
7 The temporary restraining order that was put on was --
8 the emphasis on that has to be temporary, because I am
9 not, at this point, as convinced as I was a week ago that
10 there is a need for such an order. There is a portion of
11 it that I am inclined to continue with. There is a
12 portion of it I'm inclined not to.

13 And what I would like to do is to ask counsel to
14 respond in the fashion of why shouldn't I do thus and so.
15 An let me start off in general terms, that I see no
16 reason to continue a restraining order that would bar Dow
17 Corning from communicating with people. I do see a
18 purpose to be served in perpetuating the removed
19 implants. I can see where they might have an evidentiary
20 value.

21 So, Mr. Chesley, let me address you first. Why
22 shouldn't Dow Corning be able to communicate with people,
23 particularly when we don't know who's a member of the
24 class and, what's more, we don't know how to find them?

25 MR. CHESLEY: Your Honor, I have no problem with

1 the communciation. I have no problem with the program.
2 My problem is preventing disinformation, and my problem
3 is disparity.

4 For example, they are saying that they will give up
5 to \$1200 to any woman who wishes to have her implants
6 removed providing that she medically needs that be done.
7 That's my one problem, because who is the arbitor of
8 medical necessity, and I filed an affidavit from a Jane
9 Doe, and, under a confidential order I understood I could
10 do it, where her insurance company says, no, she doesn't
11 need it, and her doctor says, yes, she does.

12 And the second thing is financial ability. I don't
13 believe that a potential tort feasor has the ability to
14 say it is conditional upon you not being able to afford
15 it. And the disparity is, and I don't want to visit the
16 subject of limited fund. Dow presently has 850,000 to
17 one million breast implants in the United States. If
18 they are making a sincere offer to every woman of \$1200,
19 that's one billion 200 million dollars, and they have 250
20 million worth of insurance. It's sort of a mini race to
21 the courthouse.

22 What I proposed in a stipulation that I sent to Mr.
23 Woodside, and it was not until last night that we
24 received the informational packet, which I will get into,
25 my proposal, Your Honor, is that they continue the

1 program, but it be under the auspices of this Court. I
2 have no problem with an 800 number, but I believe people
3 should be advised that there is a class action and they
4 have certain rights.

5 Likewise, while I don't want to impose this on the
6 Court, I don't know how much money they have committed to
7 this. If it's unlimited, they have to show an ability to
8 do it; otherwise, they will turn on the spigot, and if
9 they are correct and only a few women come forward, so be
10 it.

11 THE COURT: Mr. Chesley, it's their money.

12 MR. CHESLEY: Your Honor, it is their money.

13 THE COURT: And they do have a right, I think
14 it's a First Amendment right, to communicate. Mr.
15 Chesley, are you familiar with an organization known as
16 the Command Trust Network? Does that ring a bell with
17 you?

18 MR. CHESLEY: There are so many named groups of
19 individuals who are support groups and groups that are
20 proponents of particular positions.

21 THE COURT: Well, let me read to you a portion of
22 a filing that was just made within the past
23 hour-and-a-half, and this is an affidavit of Sybil Niden
24 Goldrich. I am one of the co-founders of an organization
25 called the Command Trust Network. This organization was

1 founded to disseminate, distribute and share information
2 with women who have had experiences with breast implants.
3 The Command Trust Network has now a data base of over
4 8,000 women, most of whom have subscribed to the Network
5 for information about their rights as consumers and to
6 help them understand and learn as much as they can about
7 silicone breast implants, the materials and their effects
8 upon their bodies.

9 I don't know anything about this organization either,
10 but it is my impression from this affidavit that they
11 negotiated this agreement with Dow Corning.

12 Dr. Woodside, are you in a position to assist in this
13 matter? Have you heard of this organization?

14 DR. WOODSIDE: Your Honor, I know about the
15 organization. I will tell you what limited I know about
16 this affidavit. It will take five sentences. The
17 Command Trust Network, in all candor, is an organization
18 which does not like us and is one of our adversaries.
19 Ms. Goldrich is, in fact, a plaintiff in a case in
20 California. They do have somewhere between five and
21 8,000 women. They have a newsletter which I know about.
22 It is my understanding that affidavit was sent to us last
23 night. I had nothing to do with the preparation.

24 THE COURT: I see.

25 MR. WOODSIDE: It is my understanding only that

1 she discussed this matter with Keith McKennon, who is the
2 newly elected CEO of Dow Corning Corporation. And it is
3 my understanding, although I do not have firsthand
4 knowledge about this, that, when this product removal
5 program went into effect, the \$1200 program with no
6 release, that there was input from a number of
7 organizations. I believe that Sybil Goldrich had some
8 input into it, although, since she is represented by
9 counsel, obviously I have never discussed it with her. I
10 do have an impression, although I don't know it
11 firsthand, that she discussed this with Mr. McKennon.

12 I do know the FDA discussed this matter in great
13 detail with Dow Corning, and, while it would not be fair
14 to say they approved it, because they don't approve or
15 disapprove, what they did was, they had input into the
16 information that we sent out, so the packet of material
17 that we attached to our pleadings is material and
18 information that came from a number of sources,
19 including, I believe, some women like Mrs. Goldrich and
20 the FDA.

21 THE COURT: Thank you, Dr. Woodside.

22 Mr. Chesley, I didn't mean to interrupt you, but the
23 facts as this affidavit asserts them to be are somewhat
24 more benign than the facts as asserted in the affidavit
25 last week.

1 MR. CHESLEY: Your Honor, let me make it simple.
2 I would like to give to the Court, and the Court may
3 already have a copy, for the first time we received late
4 last night the informational packet. There are -- and I
5 would ask that it be marked Exhibit, Plaintiffs' Exhibit
6 1, to be reviewed by the Court.

7 There are certain basic problems with it. Let's
8 start with the fundamental agreement that I have with
9 this Court that, yes, Dow may have a right to contact
10 people, and, yes, Dow may very well be able to do this
11 program.

12 THE COURT: Mr. Chesley, let me interrupt you
13 for just a moment, because there is a basic problem that
14 continues to trouble me. Nobody knows who's in this
15 class, and, to make matters infinitely worse, nobody
16 really knows how to find out. Now, I don't believe that,
17 under those circumstances, the Court has any right to
18 tell Dow Corning whom they may talk to and whom they may
19 not. If their lawyer talks to a person who is
20 represented, he may very well be guilty of unethical
21 practices, but Dow Corning itself has a right to talk to
22 anybody it wants to.

23 MR. CHESLEY: Your Honor, I beg to differ with
24 the Court on that point.

25 THE COURT: Okay.

1 MR. CHESLEY: As we stand here today, there is a
2 certified class, and this Court owes a duty to protect
3 that class.

4 THE COURT: Fine, Mr. Chesley. Now, you tell me
5 who constitutes that class. There are seven people who
6 have filed suit in this court. They're part of the
7 class. There are cases that have asked to be included.
8 They're part of the class. And if Dow Corning contacts
9 them, that's one thing. But there is an enormous group
10 of people, we believe, out there who isn't yet part of
11 this class, and, particularly as a (b)(3) class, they
12 have a right to opt out.

13 MR. CHESLEY: Your Honor, I totally agree. But
14 as we stand here today, the class, as I read the Court's
15 order, and I'm doing it from memory, is anyone who may
16 have an illness, an injury attributable to breast
17 implants.

18 THE COURT: All right.

19 MR. CHESLEY: All right.

20 THE COURT: But add to that, Mr. Chesley, that
21 this is -- the right to opt out has not been foreclosed.
22 And until we know who is part of this class, I have great
23 difficulty in framing an order when I don't know who it
24 applies to.

25 MR. CHESLEY: Your Honor, let me explain my

1 concerns about the informational packet. I'm talking
2 about the uninformed. Let's forget about the
3 miscommunication as we set forth in the affidavit, and
4 let me deal with what we have as undisputed facts.

5 THE COURT: Right. Mr. Chesley, it's my
6 understanding, and do correct me if I'm wrong, that Dow
7 Corning is not conditioning this payment upon a release.

8 MR. CHESLEY: That is not totally correct, Your
9 Honor. The doctor gets a release.

10 THE COURT: Well --

11 MR. CHESLEY: There is --

12 THE COURT: I don't know how this works. The
13 doctor, for all practical purposes, is a consumer. He
14 purchases from Dow Corning.

15 MR. CHESLEY: Not in this particular
16 circumstance. My problem is there is no product. They
17 are not -- let me -- Your Honor, it will take me a moment
18 to explain my concern. The requirement in the
19 information packet that goes to the uninformed person,
20 and let's assume that person believes that they may have
21 an illness associated with, they clearly have an injury
22 because, before they would be permitted to have the
23 explanation, the doctor would have to suggest that there
24 was leakage, and, when you have leakage, you have an
25 injury, and they clearly fall within the class definition

1 of a person to be protected.

2 Continuing on in that vein, in order for the woman to
3 get this relief, she must have a doctor and she must be
4 agreeable to releasing the doctor relative to that
5 surgery. I believe that that is inappropriate for this
6 person.

7 THE COURT: I could care less what her
8 relationship is with her doctor, and if he wants to
9 impose conditions upon the removal, that's up to him and
10 not before me.

11 MR. CHESLEY: Right. Your Honor, if I might
12 continue, let me read language --

13 THE COURT: Okay. There is no doctor to my
14 knowledge who is a party defendant. Dow Corning is.

15 MR. CHESLEY: That is correct.

16 THE COURT: Okay.

17 MR. CHESLEY: But Dow Corning, there is a
18 question here as to whether or not this doctor that is
19 receiving the money from Dow Corning -- the money is not
20 paid to the woman. The money is paid to the doctor. The
21 question is whether or not the doctor has become an agent
22 of Dow Corning in this process and whether or not the
23 doctor who gets this release is doing this in conjunction
24 with Dow Corning.

25 Dow Corning, additionally, Your Honor, there is a

1 place in here to check the box, and there is not two
2 boxes -- there is only one box -- permitting Dow Corning
3 to keep the material. I think you have said you're going
4 to address that.

5 THE COURT: What happens to the implant after
6 it's removed is another question, and I don't want to
7 confuse the two. But I continue to be concerned, Mr.
8 Chesley. I do not believe that certifying a class puts
9 me in the category of a godfather. I don't believe that
10 I have the responsibility of saving people from their own
11 folly. If they want to accept \$1200 in order to have the
12 implants removed, that is not a judicial matter, and I
13 don't think that my responsibilities to the class extend
14 to saving them from making a mistake. It may be that
15 somewhere down the road there might be, I don't know,
16 \$5,000, \$10,000 per person that they have now prevented
17 themselves from taking. But I don't believe that -- you
18 know, if they want to go out and buy an interest in the
19 bridge, that's not for me to stop them.

20 MR. CHESLEY: Your Honor, if I could have but
21 one moment to try and address my concerns to the
22 informational packet. I want to take your assumption and
23 agree with it, even though I may not agree. For a
24 hypothet, I agree with the Court they can have the
25 surgery. They get the \$1200. The doctor can do it. My

1 concern is the disinformation and what is contained in
2 the informational package, and I would ask the Court to
3 bear with me as I recite several items that are in the
4 packet.

5 It is one thing to say in a big headline there is to
6 be no release of liability. That's one thing to say.
7 There is another thing to say, or you are cautioned that
8 nothing in this shall act as a release. That's one
9 thing. That's not what Dow says. Dow says participation
10 in this program will not require a release of your
11 potential claims against Dow Corning.

12 Quiry: The woman who is uninformed goes in and the
13 doctor has -- I don't know what the doctor has in the
14 privacy of the medical room. He has got one form to
15 release him, and he may have another form from Dow
16 Corning, and she signs that as well. Additionally, they
17 go in to do the surgery and they find out her implants
18 are another manufacturer's product. They refuse to pay,
19 even though they have opened the woman up and go to
20 remove and remove the implants, and if they don't have a
21 Dow Corning label on them, they don't pay.

22 THE COURT: Mr. Chesley, I fail to see where
23 this is a responsibility of mine. This is a transaction
24 between a person who may or may not be part of the class
25 or, indeed, who may elect not to be and a defendant, and

1 I don't see what they have done that's wrong.

2 MR. CHESLEY: May I finish, Your Honor?

3 THE COURT: Feel free.

4 MR. CHESLEY: In the informed consent that they
5 are required to sign is the following statement: "I
6 understand" -- that would be the patient -- "there is the
7 possibility that no known problems attributable to
8 implants exist. Any medical problems I have now or in
9 the future may not be related to the implants. Currently
10 there is no good evidence that implants cause systemic or
11 chronic diseases."

12 My problem, Your Honor, is that the people who are
13 calling this 800 number are people who have a fear or who
14 have a leakage of their breast implants.

15 THE COURT: Or may think they have.

16 MR. CHESLEY: Or think they have. And the
17 doctor, before he operates, has to show that there is a
18 medical reason, otherwise he can't collect the \$1200.
19 Those people are firmly class members, and the
20 question --

21 THE COURT: Not so. No one is a class member,
22 Mr. Chesley, with the (b)(3) class and an opportunity to
23 opt out, and they have not been given that opportunity
24 because we haven't yet figured out a way to notify them.

25 Now, draw a distinction, Mr. Chesley, between an

1 unwise move and one that is violative of this Court's
2 order. It may well be, as you are pointing out, that it
3 is unwise to do this. And you may very well advise your
4 clients not to do it.

5 MR. CHESLEY: I can't advise them --

6 THE COURT: The lack of wisdom, however, is not
7 a matter that I will address. What is illegal about what
8 they're doing?

9 MR. CHESLEY: Your Honor, let me cite, for
10 example, the Amtrak Railroad litigation. If they were to
11 do the \$1200 operation and as one of the conditions of
12 the operation they were to advise people that there is in
13 fact a class action pending of which they may be a
14 member, that would be an important service, and that is
15 what was required in Amtrak.

16 THE COURT: I don't believe I have a right to
17 require Dow Corning to add to the plaintiffs' class. It
18 might be very nice if they did it, but I don't believe I
19 have a right to force them to do it.

20 MR. CHESLEY: Your Honor, my concern is that
21 they are advertising the 800 number, and they are seeking
22 information from women which is in contrast to the
23 confidentiality, and I don't want to stretch that issue.
24 They are also not giving people what their rights are,
25 and there is an assumption here by the Court that I beg

1 to differ with, which is that this Court owes no duty to
2 that class. I believe the duty is to the class to
3 protect the class from someone reaching in and
4 attempting.

5 All I'm asking is that the Court, through a special
6 master, monitor the program and monitor the information,
7 and I would ask the Court to read the informational
8 packet, which is Exhibit 1, and my concern, Your Honor,
9 is the conditions that I think are abhorrent to these
10 people and the misinformation that is communicated by the
11 800 number and what these women --

12 THE COURT: Okay. Mr. Chesley, observe. There is
13 a third condition. Let's assume you're right and I do
14 nothing about it, and now Dow Corning, in a subsequent
15 hearing, defends by saying, "Oh, no, we have a release
16 from this lady." And now you say to me that she was
17 misinformed; she was under duress; she was coerced. It
18 won't take me long to say, "Dow Corning, forget that
19 release. It's worthless. This lady is entitled." I'm
20 not foreclosing myself from that. If, in fact what
21 occurs is that these people have been misled, that
22 release isn't worth the paper it's printed on, but I
23 don't have to make that decision in advance, which is
24 what you are wanting me to do.

25 MR. CHESLEY: What I'm asking, Your Honor, is,

1 rather than fighting each release on whether or not it's
2 coercive, what I'm asking, to me, is a simple relief. I
3 want to encourage the \$1200. I want to restrict the
4 conditions, and I want to make it clear that they cannot
5 take the release and clear that they cannot keep the
6 breast implant material and not determine rich versus
7 poor or affordability versus nonaffordability, because I
8 think that is a discrimination against a group of people
9 who are members of the class.

10 THE COURT: Well, I also think, Mr. Chesley,
11 that this impinges upon First Amendment rights. I think
12 Dow Corning can speak to anybody they wish.

13 All right. I would like to see the packet. I have
14 not seen it to this point. You may give it to the
15 courtroom deputy.

16 Dr. Woodside, I will hear from you.

17 MR. CHESLEY: Thank you, Your Honor.

18 THE COURT: Thank you, Mr. Chesley.

19 DR. WOODSIDE: Good morning, Your Honor.

20 Good morning, Your Honor. Several comments. First of
21 all, the packet of material is, in fact, I believe
22 Exhibit 3 to the brief that we filed late yesterday
23 afternoon. Second of all, let me make a number of things
24 abundantly clear.

25 With regard to the removal program which we recently

1 implemented, there is absolutely no release required,
2 mentioned or whatever. The only thing that someone may
3 put in that same category, there is an informed consent
4 form which the doctor could use to inform the patient
5 about the surgery, and it's in there, but there is no
6 release. We haven't asked for a release. I mean, in all
7 candor, given the present climate and given the FDA and
8 everything else, we determined we would not ask for a
9 release. There was an old program called the PREP
10 program, which is the Product Removal Express Program,
11 where in fact, -- that's, for lack of a better
12 terminology, we'll call that the \$600 program. There has
13 been a release in that program, which, as Mr. McKennon
14 has indicated on national TV and press releases, et
15 cetera, we are presently revisiting that. That's been in
16 effect since 1986. It's a totally different program.
17 And although I cannot make any representations to the
18 Court, it wouldn't surprise me if, in that regard, there
19 was no release either, but that's something different
20 than Mr. Chesley is talking about.

21 THE COURT: Dr. Woodside, is it a condition of
22 this payment that the implants be preserved?

23 DR. WOODSIDE: No, but I think you meant to ask
24 a different question. They don't have to send them back
25 to us. There is a box where, if they want to send them

1 back to us, then we will take them, and, in all candor,
2 Your Honor, I have been involved in this litigation about
3 three-and-a-half years. We don't dispose of those
4 implants even if they come back, because we want them for
5 the litigation, and there might be a spoliation charge if
6 they would come back, but they don't have to send them
7 back to us, and if they did, we don't throw them away.

8 THE COURT: Do you have a means of identifying
9 the persons from whom the implants came?

10 DR. WOODSIDE: If the women send implants to us
11 or if the surgeon sends implants to us, then we maintain
12 them, and they are identified as to the identity of the
13 individual who forwarded them to us.

14 THE COURT: Then if the plaintiffs during
15 discovery wanted to examine these implants, they would be
16 there, and if they wanted to trace them back to a
17 specific doctor, they could find out all the medical
18 information, could they not?

19 DR. WOODSIDE: Yes, sir. But that's because
20 it's in our best interests, too.

21 THE COURT: I can see a situation where you
22 could establish that out of a million of these only five
23 have leaked. That's, I agree, admissible evidence. This
24 is something, the one thing that does concern me, the
25 preservation of what might be evidence. And I'm relaying

1 on your representation also that these implants, if
2 returned to Dow Corning, are not destroyed; they are
3 retained. And there is a way of tracing them to specific
4 implantation; is that correct?

5 DR. WOODSIDE: Yes. The only reservation I
6 would make -- I will so represent with one reservation.
7 The information that we have relating to tracing them, of
8 course, is only as good as the information we get, but,
9 to the extent we get information about them that would
10 enable somebody to trace it, yes, we do keep that
11 information and we do keep the implants, but we don't
12 have that many.

13 THE COURT: Dr. Woodside, surely Dow Corning
14 isn't going to pay \$1200 to somebody who says, "Oh, yes,
15 I had an implant and I had it removed. Give me my
16 \$1200." You're going to want some proof, aren't you?

17 DR. WOODSIDE: Going back to what Mr. Chesley
18 said, several things would be required, none of which are
19 very difficult. If the woman certifies, and there is a
20 form, and I don't know if I can find it real quick. The
21 woman just has to say, you know -- I can't find it real
22 quickly. If the woman says --

23 MR. CHESLEY: Here it is.

24 DR. WOODSIDE: -- I can't afford to pay. Then
25 we have indicated we would pay. It has to be our

1 implant.

2 THE COURT: Okay. There has got to be some
3 inquiry made that, in fact, she does have an implant
4 removed. This isn't a broadside offer of any female who
5 wants \$1200, just pretend that you had an implant and
6 tell us.

7 DR. WOODSIDE: That's right.

8 THE COURT: Precisely. So there must be some
9 way that you verify this, and my concern is that this
10 might be evidence, and it ought to be preserved, not only
11 the implant itself, but where it came from.

12 Now, again, you can do, it seems to me, what I said.
13 You can offer \$1200 to anybody you want. But if the
14 implants are returned to you, I do want them preserved.

15 DR. WOODSIDE: Absolutely. And I now see where
16 you're going. Let me follow-up, because I think you and
17 I are on the same wavelength.

18 THE COURT: All right.

19 DR. WOODSIDE: What happened -- we need to go
20 back a little bit. A woman calls us. We can't stop them
21 from calling. You can order us not to, but we still
22 can't stop them.

23 THE COURT: I'm not about to.

24 DR. WOODSIDE: So what then happens is we then
25 talk to them. It doesn't make any difference -- I'm

1 going to be sarcastic for a minute. It doesn't make any
2 difference whether what we tell them is right or wrong.
3 What happens is they then get this packet. Okay. That
4 tells them what to do. Once they get the packet, it's
5 then up to them what they do.

6 If they want the implant out and assuming it's our
7 implant -- now I'll address that in a minute -- what they
8 do is they go to the doctor. They sign this little form
9 that says, you know, I couldn't afford it or whatever,
10 and we have agreed not to quibble with them. Then,
11 thereafter, there has to be confirmation it's our
12 implant, because we don't see why we have to pay for any
13 other implant.

14 THE COURT: How can you determine that ahead of
15 time?

16 DR. WOODSIDE: Let me put it this way. In
17 three-and-a-half years of representing Dow Corning in
18 this litigation, I have yet to see a situation where the
19 original implanting surgeon did not indicate in the
20 record with the special little stickers that come off the
21 implant what it is. Let me tell you how it works. Let's
22 assume you were going to go in and have implants.
23 Obviously, I'm being silly.

24 THE COURT: Good heavens. Go ahead.

25 DR. WOODSIDE: There are occasionally men who

1 have implants, by the way.

2 THE COURT: I understand, and I very carefully
3 drafted this class as to not exclude men.

4 DR. WOODSIDE: What happens is, when you get the
5 little container with the original implants, there is an
6 identifying sticker on it. What the surgeons do is they
7 take that off and they put it in the medical record. So
8 several years later, if you want to know, for instance,
9 if you come back to me and I'm your surgeon and you say
10 "What kind of implants did I get," I get your record out,
11 I find these stickers. They're in the operative record.
12 Every hospital or every out-patient surgeon does it this
13 way. I cannot only tell the manufacturer, but I can also
14 tell the size of the implant, and I can also tell --
15 there is a code -- when it was manufactured, et cetera.
16 So we always know.

17 So what happens is, if the woman wants her implants
18 removed, she can go to the surgeon. They can ascertain
19 ahead of time, make sure it's a Dow Corning implant, and
20 then, when it's removed, then we, to make sure we're not
21 getting held up on this so to speak, we send a check
22 which goes -- the check will be written out jointly to
23 the surgeon and the woman.

24 THE COURT: How do you deal with the situation
25 Mr. Chesley was hypothesizing, that after the surgeon

1 begins the operation and finds that the implant isn't
2 yours, you then do not pay?

3 DR. WOODSIDE: Your Honor, in all candor, I
4 don't know how that would ever occur, but, if it did
5 occur, it would be so very, very seldom that I cannot
6 believe it couldn't be worked out on an ad hoc basis,
7 because the other manufacturers do exactly the same
8 thing. Those are all identifiable.

9 Sometimes in this litigation there will be lawsuits
10 filed; a woman had one set of implants and there will be
11 a lawsuit filed against four or five manufacturers. When
12 you go get the records, you can always tell whose it was.

13 THE COURT: Is there a physical difference
14 between implants that you can look at one and tell
15 whether Dow Corning manufactured it or not?

16 THE COURT: After you took it out, you could. But
17 they have different markings on them. Some of them have
18 had foam; some have not. I have never seen a situation
19 where the folks at the various manufacturers could not
20 identify their own implants. I can't say it could never
21 happen, but, based upon my knowledge of Dow Corning
22 implants and my knowledge of the individuals at Dow
23 Corning, there has never been a situation where they
24 couldn't identify their own implants. And, quite
25 frankly, once they see them, then they know if it's

1 somebody else's implants, too, because they're
2 knowledgeable about it.

3 THE COURT: I'm aware that there is a distinction,
4 that there are some saline solutions and some
5 silicone-gel, but are you telling me that, even as
6 between different manufacturers of silicone-gel implants,
7 you can tell whose it is?

8 DR. WOODSIDE: Yes, sir. Yes, sir. And I know
9 that you aren't a baseball fan, and I will be willing to
10 bet, if you took a couple of different baseballs, I might
11 not be able to tell the difference, but the manufacturers
12 could look and say, "That's mine and that's mine." It's
13 the same deal.

14 THE COURT: Okay. All right. Anything further?

15 DR. WOODSIDE: The only other comment I would
16 make is that, also with regard to a medical reason, just
17 as though we have indicated a willingness to take the
18 woman's word for it with regard to the financial
19 considerations, we have also indicated that we would not
20 fight with the women if they indicate that, after
21 consultation with their surgeon or what, there is a
22 medical reason to take it out. We are doing our best not
23 to be confrontational with these women or to in any way
24 be at odds with them.

25 THE COURT: Well, you see, I don't care.

1 DR. WOODSIDE: I understand.

2 THE COURT: It seems to me that you have a right
3 to, assuming your shareholders agree, to do whatever you
4 want with your money. And if as a measure of goodwill
5 you want to send every woman who's ever had a Dow Corning
6 implant \$1200, I don't think it's a judicial matter. I
7 don't think it's something I should stop or even inquire
8 into. I go back where I came from. I can see a value
9 for this case of preserving as evidence removed implants.

10 DR. WOODSIDE: Yes, sir.

11 THE COURT: But I fail to see where I have any
12 obligation to limit your largess. Pay them all. I don't
13 care. Truly, I just don't understand how that becomes a
14 judicial matter.

15 DR. WOODSIDE: We're in agreement.

16 THE COURT: From what you are saying, Dr.
17 Woodside, you have no problem with an order directing you
18 to preserve these and to preserve any information as to
19 their origin, who they were implanted into.

20 DR. WOODSIDE: I have absolutely no objection to
21 any such order in that regard.

22 THE COURT: Then I think I have only a quarrel
23 perhaps with Mr. Chesley, and probably not with him
24 either.

25 Mr. Chesley, did you want to respond?

1 MR. CHESLEY: Yes, Your Honor, just on a couple
2 of points.

3 THE COURT: All right.

4 MR. CHESLEY: Let me cover the preservation. We
5 would agree with that. We would ask for two additional
6 things; that they be readily accessible to the
7 plaintiffs; in other words, it's fine to preserve them,
8 but if a plaintiff can't get them back and give them to
9 their expert, then it becomes a moot issue.

10 THE COURT: I don't see a real great problem
11 with that, Mr. Chesley. If they seek to hide these, I
12 think I can make them produce them.

13 MR. CHESLEY: The other thing is any testing
14 they do on them should be made available to the
15 plaintiffs for purposes of litigation.

16 THE COURT: That works both ways. I think any
17 testing that's done on these by either side should be
18 made available.

19 MR. CHESLEY: Agreed, Your Honor. I have no
20 problem.

21 THE COURT: You have no problem with that?

22 DR. WOODSIDE: Your Honor, I have no problem in
23 regard to Mr. Chesley's first comment about making them
24 accessible and giving them back. Over the years, on
25 numerous occasions women or their surgeons have sent us

1 implants we have looked at and sent them back if they so
2 requested.

3 MR. CHESLEY: Your Honor, I have known for a
4 long period of time what it's like to swim upstream. I
5 think salmon are the only ones I know that have been
6 successful to do it. I want to suggest, rather than in
7 an attempt to be combative or have the Court change its
8 position, I want to suggest several things that concern
9 me. I think that the proposal relative to the
10 preservation, and if there is some language to protect
11 the plaintiffs on that, I think it's fine.

12 I want to call a couple of items to the Court's
13 attention that do concern me. A largess is one thing,
14 but if it impacts on their financial ability to pay
15 litigation settlements or judgments is another issue. At
16 this juncture, I do not know their financial condition,
17 nor do I know how much is being committed to this
18 program.

19 Number two, Your Honor --

20 THE COURT: How would it be if I direct that
21 after their hundred thousandth payment they start
22 advising the Court so that they don't deplete all their
23 assets?

24 MR. CHESLEY: Your Honor, whatever a hundred
25 thousand is, I haven't done the math on it.

1 THE COURT: Well, I think that's a million two
2 hundred.

3 MR. CHESLEY: No, it's 120 million. That's my
4 problem.

5 THE COURT: Now you see why I'm a judge and not
6 a mathematician.

7 MR. CHESLEY: Your Honor, at 10,000.

8 THE COURT: 10,000 might be an appropriate.

9 MR. CHESLEY: Yes, 10,000 would be 12 million
10 dollars, I think, if my math is right. Is that right?
11 I'm sorry.

12 THE COURT: Don't worry about it.

13 MR. CHESLEY: Math is not my forte.

14 THE COURT: I have trouble with long division.

15 MR. CHESLEY: The other item, Your Honor, is I
16 would ask the Court to look at the packet.

17 THE COURT: I shall. No question about it.

18 MR. CHESLEY: And if there are things in the
19 packet that disturb you as they have disturbed us, I
20 believe that Dow Corning is in a position to make certain
21 compromises, and I think there should be input from the
22 Court, and plaintiffs' lead counsel would be more than
23 willing to assist in that regard relative to making it
24 fair.

25 My concern is -- the other issue, and I don't know

1 how to address it, and my colleague Howard Specter
2 mentioned it, and I think it's a valid point. They will
3 be obtaining information from women that might be used
4 against them at a future trial. Now, they have a right
5 to communicate, but I mention this in passing, Your
6 Honor, because I believe the class definition is such
7 persons who, as a result of the silicone-gel breast
8 implants, have sustained any adverse medical condition
9 thereby and those persons who are likely to suffer any
10 adverse condition as a result thereof in the future.
11 That is a very broad category, and my concern, and I have
12 been the worst person to ever cite cases, and I have one
13 case to cite, and that's a Fifth Circuit case, Kleiner
14 versus -- and it's a Fifth Circuit. I don't have the
15 citation. I'll get it to the Court.

16 And that's learning information and communications of
17 a potential class member that might affect their either
18 opting out or their claim. And the question that I have,
19 Your Honor, is whether or not information that they
20 obtained from these people would be made accessible to
21 them at a later time in the event that they do possess a
22 member of the class. I think, Your Honor --

23 THE COURT: I think I can deal with that in the
24 future. Mr. Chesley, let me point out to you that there
25 is a very practical problem that the Court has at this

1 time. We have had some calls, by the way, from women who
2 are very anxious to have the implants removed. Whether
3 they're correct or incorrect is immaterial. They want
4 them out of their bodies. And they are unable to pay to
5 have it done, and they expressed their concern that the
6 Court is preventing them from getting this money.

7 Now, I'm not willing that that continue. I think
8 that their interest in this \$1250 now versus five or
9 10,000 five years from now, they have made an informed
10 decision they want the money now, and I don't want to
11 prevent them.

12 MR. CHESLEY: Judge, I don't have a problem, and
13 I want to make it crystal clear that we do not object to
14 the payment plan. All I want to do is to have a fair and
15 even playing field.

16 Let me just cite the case, and then I'll get out of
17 of the way. 751 F.2d. 1193, and I don't want to argue
18 the merits of the case, because the factual part -- all I
19 want is a fair playing field. Mr. Woodside comes, and I
20 respect him, says it's going to be fair. Okay. But Mr.
21 Woodside isn't sitting on the telephone bank or in the
22 doctor's operating room, and he is not going to be there.

23 All I want to do is to have information in this
24 packet that is fair so that the woman can make a
25 judgment, a reasonable judgment based upon information.

1 I don't want to contribute to the packet. I don't want
2 it to have legalese. I just want women to be able to
3 make a judgment call based upon fair information knowing
4 what the facts are and the circumstances, and I would ask
5 you to look at this.

6 THE COURT: Mr. Chesley, this is where we part
7 company, because I do not believe it is the function of a
8 Court to prevent somebody from making a foolish decision.
9 I have spent all of 1992 so far in two cases, one
10 criminal, one civil, where people did things that I find
11 amazing. They purchased things that no person in their
12 right mind would purchase. But it's not for a Court to
13 say you must not do that. That's Big Brother, and I'm
14 not going to be Big Brother.

15 MR. CHESLEY: Judge, I don't ask you to be Big
16 Brother, but I do ask you, with a full recognition that
17 these people, as we sit here today, are or are potential
18 members of this class, and all I want to do is ask not
19 for Big Brother but the protection that this Court has
20 given to class members or potential class members in the
21 past, and I think the beginning point is this document
22 that I have introduced as Plaintiffs' Exhibit 1.

23 THE COURT: Mr. Chesley, could I impose on you
24 to respond to another question?

25 MR. CHESLEY: Surely.

1 THE COURT: Which is tied up in what we're
2 doing. The problem of identifying members of the class
3 is a really very troubling one. A suggestion was made,
4 and I would like to run it by you for your comments.
5 Would it make any sense to require the class plaintiffs
6 to have advertisements in women's magazines and perhaps
7 with a postcard in the magazine for them to respond?
8 There is a broad spectrum of them. But a notice that
9 there is a class, they can become part of it or they can
10 refuse to become part of it. And, instead of advertising
11 in the Wall Street Journal, which I would suspect is not
12 a publication of choice, whereas Cosmopolitan might be,
13 what about an advertisement in these magazines?

14 MR. CHESLEY: Your Honor, the good news is yes.
15 The bad news is the cost of those national magazines.
16 They're \$50,000 -- we have just been through it --
17 depending on the size of the ad, for example, in TV Guide
18 and in Time. I can't speak authoritatively about
19 Cosmopolitan, but I will get some figures and numbers.

20 As long as we're discussing that issue, the last item
21 on my agenda, I believe that the class is entitled to
22 have the names of all of these people who make inquiry on
23 the 800 number. For example, the position of Dow to date
24 is "We don't know who got our breast implants." And I
25 think they're right. And we would ask for lists from

1 them and cooperation from the Court. I don't think we
2 would have a problem with Mr. Woodside, but if we do we
3 would come to the Court, in which we would request lists
4 of every doctor, every lab.

5 They're sold in two places, doctors, and they're also
6 sold to hospitals, who then sell them or give them to the
7 doctors, and it's part of the cost at the hospital. They
8 know -- they have detail people and salespeople. Dow and
9 the other defendants know who were the customers. They
10 do not know the women.

11 However, they have a new data base. The 800 number
12 is a potential data base. And while we're working
13 through the issue of notice, which we would report to the
14 Court on, and I will report to the Court and get some
15 costs on these national magazines, we would ask as part
16 of the order that the 800 number recipients of calls,
17 because they take names and addresses, that the class
18 lead counsel, whoever those people might be, are given
19 that information so those people could get appropriate
20 notice. That would be fair.

21 THE COURT: All right. Thank you, Mr. Chesley.
22 Anything further, Dr. Woodside?

23 DR. WOODSIDE: Your Honor, there is only one
24 problem with the latter suggestion of Mr. Chesley. I am
25 not saying that we shouldn't do it or we should do it.

1 But as the Court has advised us as counsel here on a
2 number of occasions, there are a good many women who have
3 no interest in anyone knowing. So that, if the women
4 call us and then we're ordered to pass their names on, we
5 may have a significant problem. My only point is, as a
6 result of that, I'm not prepared to agree or disagree at
7 this point in time as to whether that's an appropriate
8 vehicle to get class members' names.

9 THE COURT: Thank you. I'm going to put an
10 order on this afternoon.

11 I'm sorry, ma'am. Did you wish to be heard?

12 MS. WIVELL: Yes, Your Honor.

13 THE COURT: Who are you?

14 MS. WIVELL: My name is Martha Wivell,
15 Robins, Kaplan, Miller and Ciresi, Minneapolis.

16 THE COURT: You may come forward. Are you an
17 attorney?

18 MS. WIVELL: Yes, Your Honor, and I have been
19 admitted.

20 THE COURT: I will hear you very briefly.

21 MS. WIVELL: I have been admitted pro hoc vice
22 in this matter previously. Your Honor, I represent a
23 client whose name I would particularly not like to
24 disclose right now who is interested in discussing with
25 Dow Corning having her breast implants removed. Because

1 of the order that the Court entered previously, she is
2 prevented from having me do that.

3 THE COURT: I was about to say that I'm
4 terminating the temporary restraining order. I will
5 issue an order this afternoon, and that order will
6 specifically permit Dow Corning to continue with what
7 they have been doing.

8 MS. WIVELL: Thank you, Your Honor.

9 THE COURT: All right. The only limitation I'm
10 going to place in the order, Dr. Woodside, is that I'm
11 going to require that the returned implants be preserved
12 and that they be available for plaintiffs' counsel for
13 examination and that there also be whatever
14 identification is possible as to the doctor who did the
15 original implants and whatever information then comes
16 from that source.

17 Gentlemen, I do thank you for your assistance in this
18 matter. This is a difficult problem, and I do appreciate
19 your help.

20 MR. CHESLEY: Your Honor will also read the --

21 THE COURT: Indeed, I shall do that.

22 COURT ADJOURNED AT 11:50 A.M.

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C E R T I F I C A T E

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I, Betty J. Schwab, the undersigned, do hereby certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

Betty J. Schwab
Betty J. Schwab, RPR
Official Court Reporter