

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

**NOTICE OF PROPOSED DISTRIBUTION PLAN
FOR THE MENTOR AND BIOPLASTY SETTLEMENT FUNDS**

TO: ALL PERSONS WHO BEFORE JUNE 1, 1993, RECEIVED A MENTOR BREAST IMPLANT OR WHO AT ANY TIME RECEIVED A BIOPLASTY BREAST IMPLANT¹

1. BACKGROUND.

- A. **Mentor Mandatory Limited-Fund Class.** On September 10, 1993, after extensive briefing, evidentiary submissions, notice, and a fairness hearing, Chief Judge Sam C. Pointer, Jr., of this Court approved a mandatory limited-fund non-opt-out class action settlement under Fed.R.Civ.P. 23(b)(1)(B) with the Mentor Defendants (Mentor Corporation, Mentor Polymer Technologies, Inc.; Mentor O&O, Inc.; Mentor H/S, Inc.; Mentor Urology, Inc.; Mentor International, Inc.; and Teknar Corp.). The Order was certified as a final judgment under Fed. R. Civ. P. 54(b) in *Butler et al. v. Mentor Corp. et al.*, CV 93-P-11433-S, and there was no appeal from this judgment. Accordingly, all claims against the Mentor defendants relating to implantations occurring before June 1, 1993, are to be resolved and paid in accordance with terms of this settlement and cannot be otherwise pursued in either federal or state courts against the Mentor defendants, and Mentor-implant recipients cannot “opt out” or now object because of dissatisfaction with the amount or terms of the settlement. Class counsel for the Mentor Settlement Class have, with the court’s approval, acted as the Fund Administration Committee.

Mentor has, in accordance with terms of the settlement, paid to the Court’s escrow agent four installments totaling approximately \$20,400,000. The amount in the Mentor Settlement Fund—which, subject to further court orders, is being held by the escrow agent for potential distribution to persons who received Mentor implants before June 1, 1993—was, as of June 30, 1996, approximately \$21,000,000 (after accounting for earnings on the funds and approved disbursements). An additional and final installment of approximately \$5,250,000 is to be paid by Mentor to the escrow agent by September 30, 1996, after which Mentor will have no further direct obligation to class members with respect to implantations before June 1, 1993. These funds are subject to possible augmentation should there be any recovery on Mentor’s pending claims (which have been assigned to the Mentor Settlement Class) against Dow Corning, but the prospect of any such recovery is uncertain and should not be relied upon by Mentor-implant recipients.

- B. **Bioplasty Reorganization.** On February 4, 1994, after appropriate notices and a hearing, Judge Nancy C. Dreher, United States Bankruptcy Judge for the District of Minnesota, approved a plan of reorganization of the Bioplasty Defendants (Bioplasty, Inc.; Bio-Manufacturing, Inc.; and Uroplasty, Inc.), leading to a reorganized company, Uroplasty, Inc. Under terms of the approved plan, the Bioplasty Product Claimants Trust was established to liquidate and resolve, under a distribution plan to be approved by this court, all breast implant claims against the Bioplasty Defendants. Accordingly, all claims against the Bioplasty defendants relating to breast implants are to be resolved and paid in accordance with terms of this plan and Trust and cannot be otherwise pursued in either federal or state courts against the Bioplasty defendants (including the reorganized Uroplasty, Inc.), and Bioplasty-implant recipients cannot “opt out” or now object because of dissatisfaction with the amount or terms of the plan or Trust. The liquid assets of the Trust being held by the Trustees for potential distribution to Bioplasty implant recipients were, as of June 30, 1996, approximately \$4,480,000 (after accounting for earnings on the funds and approved disbursements). Additionally, the Trust holds a note from the reorganized Uroplasty, Inc. (with a remaining principal balance of \$544,000), and 32% of the common stock of that company. The extent, if any, to which these assets can be collected or liquidated is uncertain

1 Throughout this Notice and on the attached Claim Form, the terms “breast implant” and “implant” include both silicone-gel and saline-filled breast implants, and also include “tissue expanders.” This Notice is being sent to all persons (or their counsel) whose prior communications with the Claims Office (or whose prior filings with the Bankruptcy Court in the District of Minnesota) indicate they may have been implanted with a Mentor or Bioplasty breast implant. That a Notice is sent to an individual does not constitute a finding by the Claims Office that the person is eligible to participate in distribution of these funds. There may be additional persons who would be eligible but who have not provided that information to the Claims Office or the Bankruptcy Court, and the failure to send this Notice to such persons does not constitute a finding by the Claims Office that such persons are ineligible to participate in distribution of these funds.

and should not be relied upon by Bioplasty-implant recipients, although at least partial collection of the Uroplasty note is expected.

- C. **Effect of *Lindsey* Class Settlement.** Under terms of a “global settlement” approved by Judge Pointer on September 1, 1994, in *Lindsey, et al. v. Dow Corning Corp., et al.*, Civil Action No. CV 94-P-11558-S, recipients of Mentor and Bioplasty breast implants were generally entitled to participate as members of a broad settlement class with the same benefits as provided to class members with implants manufactured by other defendants. Accordingly, it was contemplated that the settlement funds provided by Mentor and Bioplasty would be added to and distributed as part of the global settlement funds, subject to special provisions to be approved by the Court for those relatively few Mentor-implant and Bioplasty-implant recipients who might not be eligible to participate in the global settlement. Payments from the Mentor and Bioplasty settlement funds were delayed pending review of claims under this global settlement.

On December 22, 1995, Judge Pointer, after considering the extent of claims submitted under the global settlement and the impact of Dow Corning’s intervening bankruptcy, approved a Revised Settlement Program (“RSP”) in the *Lindsey* case, which provides benefits only for domestic *Lindsey* class members with implants manufactured or distributed by Baxter, Bristol-Myers Squibb, 3M, or McGhan Medical Corp. (or certain companies then or previously affiliated with them). While many persons who had received Mentor and/or Bioplasty implants in addition to implants from those settling defendants may participate in and be eligible for benefits under the RSP, a substantial number of Mentor-implant and Bioplasty-implant recipients—including all “Foreign claimants”—are not so eligible. Accordingly, the Court has concluded that a separate plan is needed for allocating and distributing the Mentor and Bioplasty Settlement Funds.

2. PROPOSED PLAN FOR MENTOR AND BIOPLASTY SETTLEMENT FUNDS.

The Court has tentatively approved—subject to modification after hearing objections from affected class members of the Mentor Settlement Class and from beneficiaries of the Bioplasty Product Claimants Trust—the following plan for eligibility and distribution of the Mentor and Bioplasty Settlement Funds:

- A. **Eligibility to Participate.** Under the proposed plan, the attached claim form must be completed (in English), signed personally by the claimant, and submitted to the Claims Office in time to be actually received in the Claims Office on or before 5 pm, CST, December 16, 1996,² **affirming, under penalty of perjury, that—**

•the claimant has made reasonable efforts to identify the manufacturer of each breast implant (and tissue expander) with which she has been implanted.

•the claimant, if seeking benefits from the Mentor Settlement Fund, was, before June 1, 1993, implanted with one or more Mentor breast implants (or tissue expanders) and has not previously received any compensation or financial benefits from the Mentor Defendants. The names by which Mentor breast implants have been known are the following: “Mentor,” “Becker,” “Directa Span,” “Flat Span,” “Heyer-Schulte” (if implanted after March 30, 1984), “Heyer-Schulte Mentor,” “Isle,” “Radovan,” “Siltex,” “Siltex Becker,” “Spectrum,” and “Teckmar.”

•the claimant, if seeking benefits from the Bioplasty Product Claimants Trust, was implanted with one or more Bioplasty breast implants (or tissue expanders) and has not previously received any compensation or financial benefits from the Bioplasty Defendants. The names by which Bioplasty breast implants have been known are the following: “Biomanufacturing,” “Bio-oncotic,” “Bioplasty,” “Klein,” “Mammatech,” “Misty,” “Misty Gold,” “Roger Klein,” and “Uroplasty.”

The claimant must identify by approximate date and location the implantation of at least one qualifying implant, but need not and should not submit medical documentation of that or any other implant unless requested by the Claims Office.

² Prior filing with the Claims Office, with this Court, or with the Minnesota Bankruptcy Court of registration forms, claim form, election forms, proof of manufacture forms, etc., will not satisfy this requirement. Foreign Claimants are, however, reminded that, to be eligible, they must have filed a registration form with the Claims Office by March 1, 1995 (or, alternatively, for claims against Bioplasty, have filed a timely proof of claim with the Bankruptcy Court in Minnesota). The court encourages all eligible persons to file a claim form as soon as possible—not waiting until the December 16, 1996, deadline and not delaying because they want to object to the proposed plan. The fewer the claims submitted in the final days for filing, the earlier that apportionment and distribution of the funds can occur after the December 16th deadline.

There is one additional requirement for “Foreign Claimants”³—namely, that they must have registered with the Claims Office on or before March 1, 1995 (or, alternatively, for claims against Bioplasty, have timely filed a Proof of Claim with the Bankruptcy Court in Minnesota). In all other respects, Foreign Claimants are treated under the Mentor and Bioplasty eligibility standards and distribution plan identically with domestic claimants.

- B. Plan of Distribution.** Under the proposed plan, the Mentor and Bioplasty settlement funds, to the extent liquidated and after payment of costs of providing notice of and administering the settlement,⁴ will each be divided among and distributed to the eligible claimants (eligibility being set forth in 2A above), without any special classification based on the nature and extent of claimed injuries or medical expenses. A claimant’s share will, however, as indicated below, depend on the identifiable implants received by that claimant—“identifiable” implants meaning those implants whose manufacturer can be identified through reasonable efforts.
- (1) An eligible claimant whose only identifiable implants are Mentor or Bioplasty implants⁵ will be entitled to—
 - (i) a full pro-rata share of the Mentor settlement fund if implanted with a Mentor implant before June 1, 1993, and not implanted with an identifiable Bioplasty implant;
 - (ii) a full pro-rata share of the Bioplasty settlement fund if implanted at any time with a Bioplasty implant and not implanted before June 1, 1993, with an identifiable Mentor implant; or
 - (iii) 50% of a pro-rata share of the Mentor settlement fund and 50% of a pro-rata share of the Bioplasty settlement if both implanted with a Mentor implant before June 1, 1993, and implanted at any time with a Bioplasty implant.
 - (2) An eligible claimant who has been implanted with an identifiable implant from a manufacturer other than Mentor or Bioplasty⁶ will be entitled to—
 - (i) 25% of a pro-rata share of the Mentor settlement fund if implanted with a Mentor implant before June 1, 1993, and/or
 - (ii) 25% of a pro-rata share of the Bioplasty settlement fund if at any time implanted with a Bioplasty implant.
 - (3) Recognizing, from past experience in claims administration, that special circumstances may arise that might justify some relief to individual claimants—for example, the inadvertent failure of a claimant to sign the claim form or the signing of the claim form by an attorney rather than the claimant—the court is reserving the right to set aside from either or both of the funds (in addition to reserves to cover estimated administrative costs), before apportionment and distribution, an amount not to exceed 2% of such funds for later distribution, if equitably justified, to those not participating in the initial distribution. Benefits will not exceed those payable to claimants on initial distribution.
 - (4) Should, after the distributions under (1), (2), and (3) above, there remain undistributed funds—including undeliverable or uncashed checks, amounts subsequently recovered by the Bioplasty Product Claimants Trustees in collecting the note or liquidating the stock held by the Trust, or amounts subsequently recovered for the benefit of the Mentor Settlement Class through Mentor’s claims against Dow Corning—an additional distribution would, if practicable considering the administrative costs and the amounts of individual checks, be made to earlier recipients in proportion to the amount of their earlier benefits. If such a distribution would not be practicable, the court would determine, without the costs of additional notice to the class, an appropriate

3 A Foreign Claimant means a claimant who is not a citizen of the United States, who had not, as of April 1, 1994, been granted status as a permanent resident alien of the United States, and who has not had any of her breast implantation surgeries performed in the United States.

4 See paragraph 2D of this Notice for further information concerning charges against the funds.

5 Such a claimant is not eligible to participate in the RSP.

6 Such a claimant may also be eligible to participate in the RSP. Benefits payable to such a claimant under the Mentor and Bioplasty distribution plan are not affected by eligibility under the RSP or, if eligible, by the claimant’s decision whether or not to participate in the RSP.

and equitable plan for distributing such remaining assets.

C. Rationale for Eligibility Requirements and Distribution Plan. The Eligibility Standards and Distribution Plan have been proposed and tentatively approved by the Court after considering, on equitable grounds, three primary factors:

- The settlement funds are relatively small in relation to the number of potential claimants. The best estimate is that 40,000 to 50,000 persons may be eligible to make claims against the approximately \$26,500,000 expected to be in the Mentor settlement fund (less future administrative costs) and that 4,000 to 5,000 persons may be eligible to make claims against the approximately \$4,500,000 expected to be in the Bioplasty settlement fund (plus further collections on the Uroplasty note, but less future administrative expenses).

- Some—though not all—of the recipients of Mentor and Bioplasty implants also received implants from other manufacturers from whom they may be able to obtain compensation, whether under existing settlement plans or through litigation. As indicated in earlier notices, those whose only opportunity to obtain compensation would be through these two funds may, on equitable grounds, be entitled to greater benefits from these funds than those with at least some possible opportunities to obtain additional compensation from other sources.

- The administrative expenses of receiving, recording, and reviewing these claims must be paid from the Mentor and Bioplasty settlement funds—reducing the amount available for distribution to participants. Likewise, any additional costs that claimants might have to personally incur in obtaining and providing documentation and other proof of eligibility or entitlement to benefits would effectively reduce the limited benefits to be realized by them. If benefits were dependent on consideration of the nature and extent of claimed injuries and medical expenses, which in turn would involve submission and review of medical records, the additional costs would substantially reduce the benefits, as well as significantly delay the time of payment.

D. Expenses; Attorneys' Fees and Costs; Other Claims.

- (1) Expenses incurred by the Claims Office, the escrow agent, and the Bioplasty Product Claimants Trustees in investing the Mentor and Bioplasty settlement funds and in paying taxes on income therefrom have, after review and to the extent approved by the Court, been charged against and paid from those funds. The balances of the funds, as indicated in paragraphs 1A and 1B above, reflect payment of these charges. Any charges for services and expenses incurred to date that are unpaid are relatively minor and involve only charges incurred within the last 45 days. There will, however, be additional expenses chargeable against these funds, primarily in distributing notices of the proposed distribution plan and in administering the distribution plan approved by the court. As indicated in paragraph 2C above, the distribution plan has been designed in a manner to minimize such expenses.

- (2) Pursuant to a condition in the Mentor settlement, agreed to by class counsel in that settlement, no claims for attorneys' fees in negotiating the settlement or in representing the Mentor Settlement Class have been paid from or will be charged against the Mentor settlement funds. This waiver does not, however, apply to out-of-pocket expenses incurred by them in connection with the settlement and its implementation, nor to fees and expenses incurred in pursuing Mentor's claims against Dow Corning (which have been assigned to the Mentor Settlement Class). Under the terms of the settlement order, an advance payment from this fund has, with the Court's approval, been made to class counsel of \$1,000,000 to cover such estimated expenses. Class counsel are being required to submit to the Court additional information relating to expenses chargeable against the Mentor fund; the Court's review of this information may result in some additional payment to class counsel, or in a refund by class counsel of some portion of the amount previously paid, but any such adjustments are not expected to be of a size that would substantially affect the amount of benefits payable to individual members of the Mentor Settlement Class.

- (3) There are some potential charges against the Bioplasty Product Claimants Trust for services of the Trustees or their counsel allowable under terms of the Trust approved by the Bankruptcy Court that have not yet been paid. Additionally, there are some unpaid, but allowable, fees of counsel for Bioplasty tort claimants in connection with obtaining approval for, and assisting in establishment of, the Trust. Any claims for these amounts will be reviewed by this Court and, to the extent approved, would reduce the amount available for distribution to beneficiaries of the Trust. The total amount of such potential charges against the trust funds is not expected to exceed \$315,000 and, as noted, will be subject to review and approval by this Court.

- (4) Claims for fees, costs, or expenses by attorneys for representing individual members of the Mentor Settlement Class or beneficiaries of the Bioplasty Product Claimants Trust will not be allowable as separate charges against the Mentor and Bioplasty settlement funds but will be solely the responsibility of the claimant. Such claims may,

however, be payable from the client's share of such settlement funds subject to the following conditions and limitations: (i) such claims must be allowable under appropriate state law and the terms of the agreement for representation between the client and the attorney; (ii) any claim for reimbursement of costs and other expenses will be limited to costs and other expenses directly attributable to representing the client in connection with claims against the Mentor and/or Bioplasty Defendants and to 10% of the gross amount otherwise distributable from such settlement funds to such claimant; and (iii) any claims for fees will be limited to 10% of the gross amount otherwise distributable from such settlement funds to such claimant. These special limits are imposed because of the relatively small amounts distributable from the Mentor and Bioplasty settlement funds and will not preclude an attorney from asserting a claim for the balance of fees, costs, and expenses authorized under the agreement should additional recoveries be obtained for the client from other defendants through settlement or trial, or through claims in the Dow Corning bankruptcy. (Receipt of benefits from the Mentor or Bioplasty settlement funds does not preclude a claimant from making claims against other manufacturers.) For claimants who indicate on the claim form they are represented by counsel, the Claims Office may issue checks payable jointly to the client and the attorney for division in accordance with this paragraph.

- (5) It will be the responsibility of the claimants to resolve subrogation claims and other liens that may be filed with the Claims Office; claimants' benefits will not be increased to resolve such claims and liens.
- (6) Although payment of claims by or on behalf of deceased claimants or claimants under a legal disability may be made to the duly-appointed personal representative or legal guardian of such person, no separate payments will be paid to family members or others for derivative claims, such as loss of consortium or services.
- (7) To save administrative costs chargeable against the settlement funds, the Claims Office will not provide acknowledgments of receipt of claim forms. Nor should claimants call the Claims Office for verification of receipt unless they fail to receive a distribution of benefits (or notification of denial of their claim) by March 3, 1997.

3. HEARING; OBJECTIONS; IMPLEMENTATION.

- A. **Hearing.** A hearing will be held before Judge Pointer in the Hugo Black Federal Courthouse, 1729 Fifth Avenue North, 18th Street North, Birmingham, Alabama at 9:00 am, on Friday, October 11, 1996, to determine whether or not to approve the eligibility standards and distribution plan as outlined in this Notice. Should the Court determine that other than minor modifications should be made in the standards and distribution plan described in this notice, an additional hearing would be scheduled, though—in order to save further administrative charges against the settlement funds—by giving notice of such additional hearing on the court's Internet address (<http://www.fjc.gov/mdl926.html>) and on the Claim's Office settlement hotline number (1-800-887-6828) rather than by individual mailing.

Note: the Court does not require or expect claimants to appear at the hearing, whether or not they approve of the proposed standards and distribution plan.

- B. **Objections.** Any member of the Mentor Settlement Class or beneficiary of the Bioplasty Product Claimants Trust may present written objections to the proposed eligibility standards and distribution plan by mailing the same, postmarked no later than September 30, 1996, to the Clerk, U. S. District Court, Hugo Black Courthouse, Birmingham, AL 35203 (USA). Any request to appear at the hearing, in person or through counsel, must be clearly indicated on the written submission. Submission of claim forms will not waive objections to the proposed plan.

Please do not submit objections to the amount of settlement funds provided by Mentor or Bioplasty, as these objections cannot be considered by the Court. Also note that those who support the proposed standards and distribution plan need not, and indeed should not, submit to the court statements of support.

- C. **Retention of Jurisdiction.** The court is retaining exclusive, general, and continuing jurisdiction as needed or appropriate in order to administer, supervise, implement, interpret, or enforce the terms of the plan for distribution of the Mentor and Bioplasty settlement funds.

CLAIM FORM--MENTOR AND BIOPLASTY SETTLEMENT FUNDS

CLAIMANT'S NAME (first name--middle name or initial--last name)
Reg. No.

Social Security or MDL

CLAIMANT'S MAILING ADDRESS (include city, state, country, ZIP)
(mo/dy/yr)

Date of Birth

ATTORNEY'S NAME and MAILING ADDRESS (leave blank if unrepresented)

Complete above information by printing legibly and in English

You must answer each of the following questions by marking or checking appropriate box and, where appropriate, provide the additional information regarding qualifying Mentor and Bioplasty implants

yes no

I have identified—or have made reasonable efforts to identify—the manufacturer of each breast implant (or tissue expander) with which I have been implanted. I am answering the remaining questions on this claim form on the basis of that identification (or reasonable efforts to make such identification).

I have been implanted before June 1, 1993, with one or more "Mentor" implants (or tissue expanders), and have not previously received any compensation or financial benefits from any Mentor Defendant. (The names by which Mentor breast implants have been known are the following: "Mentor," "Becker," "Directa Span," "Flat Span," "Heyer-Schulte" (if implanted after March 30, 1984), "Heyer-Schulte Mentor," "Isle," "Radovan," "Siltex," "Siltex Becker," "Spectrum," and "Teckmar.") *(If "yes," you must complete the following for at least one of such implantations.)*

Date (approx.):	Location:	Implant name:
_____	_____	_____
_____	_____	_____

I have been implanted with one or more "Bioplasty" implants (or tissue expanders), and have not previously received any compensation or financial benefits from any Bioplasty Defendant. (The names by which Bioplasty breast implants have been known are the following: "Biomanufacturing," "Bio-oncotic," "Bioplasty," "Klein," "Mammatech," "Misty," "Misty Gold," "Roger Klein," and "Uroplasty.") *(If "yes," you must complete the following for at least one of such implantations.)*

Date (approx.):	Location:	Implant name:
_____	_____	_____
_____	_____	_____

I have been implanted with one or more implants (or tissue expanders) that can be identified as other than a Mentor or Bioplasty implant (or tissue expander).

I am a domestic (not a "Foreign") claimant, as defined in the Notice. (Note: Foreign claimants are eligible for same benefits as domestic claimants, but must have timely registered with Claims Office or Bankruptcy Court.)

Under penalties of perjury, I affirm that—to the best of my knowledge, information, and belief, formed after a reasonable inquiry—the above statements are true, correct, and complete and are made to claim benefits from the Mentor and/or Bioplasty settlement funds.

Date (Mo/Dy/Yr)

Signature of Claimant

Answer each of above questions; see back of this page for instructions and Notice for further information

INSTRUCTIONS FOR COMPLETING AND RETURNING CLAIM FORM

Complete and return this form if, but only if, you have been implanted with one or more Mentor breast implants before June 1, 1993, or been implanted at any time with one or more Bioplasty breast implants and have not previously received any compensation or financial benefits from the Mentor and/or Bioplasty Defendants. The names by which Mentor and Bioplasty breast implants have been known are shown on the front of the claim form.

To participate in distribution of the Mentor or Bioplasty settlement funds, you must also provide the approximate date and location of the implantation of at least one qualifying Mentor or Bioplasty implant. Do not, however, send medical documentation regarding such implantation (or any other implantation) unless this proof is requested by the Claims Office.

A requirement for participation in distribution of the Mentor and Bioplasty settlement funds is the timely return of this form. Previous submissions to the Claims Office or to a court of registrations, other claim forms, proofs of manufacturer, etc. will not satisfy this requirement.

Print legibly and in English. Make sure information is complete and accurate. If you do not answer all questions, your claim may not be acceptable. In answering questions, note that the terms "implant" and "breast implant" include both silicone-gel and saline-filled implants and also include "tissue expanders."

It is particularly important that Foreign Claimants indicate the MDL-926 registration number that was assigned to them when they registered with the Claims Office, as this number will be used in determining when the claimant first registered with the Claims Office. (The only special eligibility requirement for Foreign Claimants is that they must have registered with the Claims Office by March 1, 1995, or—alternatively for claims against the Bioplasty settlement fund—that they timely filed a Proof of Claim with the Bankruptcy Court in the District of Minnesota.)

The form must be personally signed (under penalty of perjury) by the claimant herself—and not by her attorney, family member, or friend. (The only exception to this requirement is that a legally-appointed personal representative or guardian may sign on behalf of a deceased or incompetent implant recipient.)

The completed and signed form must be mailed to the following addressee, in time to be received by 5 pm, CST, December 16, 1996:

Claims Administrator
P. O. Box 56666
Houston, TX 77256 (USA)

Failure to timely submit the completed, signed claim form will result in rejection of the claim. No additional time is allowed for Foreign Claimants.

Do not send a copy of this form to the court, and do not expect to receive—even if requested—an acknowledgment from the Claims Office of receipt of your claim. You should call the Claims Office to inquire about the status of your claim only if by March 3, 1997, you have neither received a distribution of the settlement funds nor been advised of the denial of your claim.