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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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In re DOW CORNING CORPORATION,	)	Appeal from the United
	)	States District Court for
Debtor	)	the Eastern District of
-----	)	Michigan, Southern Division
HEIDI LINDSEY, et al.,	)	
	)	
Plaintiffs,	)	No. 95-CV-72397-DT
	)	
OFFICIAL COMMITTEE OF TORT	)	
CLAIMANTS,	)	Hon. Denise Page Hood,
	)	<u>District Judge</u> , Presiding
Plaintiffs - Appellees	)	
	)	
v.	)	
	)	
O'BRIEN, et al.,	)	
	)	
and	)	
	)	
DOW CORNING CORPORATION, et al.,	)	
	)	
Defendants - Appellants	)	

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**BRIEF OF APPELLANTS**  
**DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY,**  
**AND CORNING INCORPORATED**

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ORAL ARGUMENT REQUESTED

October 27, 1995

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**DISCLOSURE OF CORPORATE AFFILIATIONS**

[form from court--to be provided by each appellant]

**REASONS WHY ORAL ARGUMENT SHOULD BE HEARD**

Thousands of breast implant claims have been filed around the country against Dow Corning Corporation, which is now reorganizing under Chapter 11 of the Bankruptcy Code, and its two shareholders, The Dow Chemical Company and Corning Incorporated. This appeal, from the district court's refusal to transfer to the Eastern District of Michigan the breast implant cases pending against Dow Corning's shareholders, will have a significant impact on the future course of that massive litigation. The appellants believe that oral argument (1) is warranted in light of the public importance of the breast implant litigation and Dow Corning's reorganization efforts, and (2) will assist the Court in resolving this case, which raises significant issues concerning the jurisdiction of federal courts in bankruptcy cases.

**STATEMENT OF JURISDICTION**

On May 15, 1995, Dow Corning Corporation ("Dow Corning" or "the debtor") filed, in the Eastern District of Michigan, a petition for reorganization under Chapter 11 of the Bankruptcy Code. The district court had jurisdiction over that proceeding pursuant to 28 U.S.C. § 1334(a).

Several weeks later, Dow Corning moved, pursuant to 28 U.S.C. § 157(b)(5), to transfer to the Eastern District of Michigan all of the breast implant claims pending against it, as well as all of the breast implant claims pending against its shareholders, The Dow Chemical Company ("Dow Chemical"), and Corning Incorporated ("Corning") (collectively, the "Shareholders"). R. 2.<sup>1/</sup> Dow Chemical and Corning joined in that motion to transfer. R. 185, pp. 1-2; R. 190, p. 3. On September 12, 1995, the district court granted the motion as to claims against Dow Corning, but denied the motion to transfer the claims against the Shareholders and prohibited the Shareholders from making further removals of cases to the federal system. R. 389. The court supplemented that order on September 14, 1995. R. 392. Dow Corning, Dow Chemical, and Corning filed a timely joint notice of appeal on September 20, 1995 and an amended joint notice of appeal on October 3, 1995. R. 402, 436.

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<sup>1/</sup> References to the record are to the district court docket number and, where appropriate, to specific pages of particular documents. References to the transcript of the July 31, 1995 hearing on the motion to transfer are to the docket number at which the transcript appears (R. 410).

This is an appeal of a final order disposing of all issues concerning the motion to transfer. As this Court has recognized, federal courts of appeals "have consistently considered finality in a more pragmatic and less technical way in bankruptcy cases than in other situations.'" In re Cottrell, 876 F.2d 540, 541-42 (6th Cir. 1989). See also, e.g., A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1009 (4th Cir.) ("Robins I") (discussing the "more relaxed standard of finality" for bankruptcy appeals), cert. denied, 479 U.S. 876 (1986); In re Saco Local Develop. Corp., 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.) ("orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case," even if they would not be considered final in non-bankruptcy cases).

Accordingly, the district court's denial of the motion to transfer the claims against the Shareholders is reviewable under 28 U.S.C. § 1291, either as a final order or under the collateral order doctrine; federal courts of appeals have ruled uniformly that a ruling on a motion to transfer under 28 U.S.C. § 157(b)(5) is immediately appealable. See In re White Motor Credit, 761 F.2d 270, 271 (6th Cir. 1985) (reviewing an order denying transfer); In re Pan Am. Corp., 950 F.2d 839, 843-44 (2d Cir. 1991) (same); Murray v. Pan Am. World Airways, Inc., 16 F.3d 513, 515-16 (2d Cir. 1994) (reviewing an order granting transfer); Robins I, 788 F.2d at 1009 (same). "[V]iewed functionally," as orders are in bankruptcy cases, Cottrell, 876 F.2d at 541, there is no doubt that the September 12 order, as supplemented, is

final and appealable. The district court has completely disposed of the motion to transfer the claims against the Shareholders.

#### **STATEMENT OF THE ISSUES**

1. Whether the breast implant claims against Dow Corning's Shareholders could have any "conceivable" effect on Dow Corning's bankruptcy case and thus are within the jurisdiction of the district court under 28 U.S.C. § 1334(b).

2. Whether the Shareholders should be permitted to remove additional cases to federal court in which jurisdiction is asserted under 28 U.S.C. § 1334(b).

#### **THE STATUTE INVOLVED**

28 U.S.C. § 1334 provides, in relevant part (emphasis added):

"(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

#### **STATEMENT OF THE CASE**

**A. Nature of the Case.** The district court denied the motion to transfer the claims against Dow Corning's Shareholders solely because it concluded that those claims were not "related to" Dow Corning's bankruptcy case and that it therefore lacked jurisdiction under 28 U.S.C. § 1334(b). This appeal turns principally on whether that jurisdictional ruling was correct.

**B. The Course of Proceedings and Disposition in the District Court.** As noted above, Dow Corning moved to transfer to the Eastern

District of Michigan the breast implant claims against its products that had been removed to federal court. These claims have been asserted in approximately 19,000 lawsuits. R. 257, p. 2. The debtor's motion sought transfer of claims involving its products, regardless of whether the claims were stated against Dow Corning or against its Shareholders. Judge Hood granted the motion to transfer the claims made against the debtor, but denied the motion to transfer the claims made against the Shareholders. R. 389. The court's denial of the request to transfer the litigation against the Shareholders was based solely on the ground that it did not have "related to" jurisdiction over those claims under 28 U.S.C. § 1334(b). Id. at 20-24.

The court acknowledged that "related to" jurisdiction is established whenever actions involving non-debtors "could 'conceivably' have an [e]ffect on the Debtor's bankruptcy case" (id. at 20; emphasis added), but held that the claims against the Shareholders did not meet this test. First, the district court rejected Dow Corning's arguments that the claims against the Shareholders could conceivably have an effect on the bankruptcy even though insurance coverage shared by Dow Corning and its Shareholders may be depleted if thousands of cases against the Shareholders are permitted to proceed simultaneously. Judge Hood reasoned that the bankruptcy court has "broad discretion over the Debtor's interest in a liability insurance policy" that is shared with a non-debtor and that since "there has been no judgment entered against the Shareholders, the Shareholders have no claim

pending against the insurance policy at this time." Id. at 23 (emphasis added).<sup>2/</sup>

Second, the district court also rejected the argument that "related to" jurisdiction was established because continued litigation against the Shareholders might result in contribution and indemnification claims by the Shareholders against Dow Corning:

"In the instant case, as in Pacor, there will be no contingent claim by the Shareholders against the debtor for indemnification until such time as a judgment is rendered and, then, the non-debtors would still have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor under 11 U.S.C. § 502."

Id. at 23 (following In re Pacor, Inc., 743 F.2d 984 (3d Cir. 1984)).

For these reasons, the district court ruled that it had no jurisdiction over the claims against the Shareholders under § 1334(b) and denied the motion to transfer those claims. Id. at 24.<sup>3/</sup> Judge Hood did not address Dow Corning's argument that "related to"

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<sup>2/</sup> The court did not discuss the undisputed fact that the Shareholders will incur substantial defense costs, and may incur costs associated with settlements and judgments, if all of the breast implant claims against them continue full speed ahead and that those costs may erode insurance proceeds that would otherwise be available to pay valid breast implant claims. To place those costs in perspective, excluding internal costs and settlement costs, Dow Corning's outside defense costs have exceeded \$190 million since the beginning of 1992. R. 257, p. 2.

<sup>3/</sup> The court's September 14 order (R. 392) supplemented its original September 12 decision by extending that ruling to "opt-in" breast implant claims (i.e., claimants who had agreed to participate in the global settlement, see p. 8, infra). However, the September 14 order also dealt with certain matters concerning non-breast implant claims. By separate motion, Dow Corning has asked the District Court to modify, under Fed. R. Civ. P. 60, these non-breast implant claims rulings and will, by separate motion, ask this Court to grant permission to the district court for such modifications if the district court indicates an inclination to make the requested modifications.

jurisdiction was established by the heavy litigation burdens that would be imposed on Dow Corning by trials against the Shareholders. Nor did the court address the argument that resolution of claims against the debtor's products in the context of a lawsuit against the Shareholders would significantly impact the debtor's defense of the same products from the same claims in the bankruptcy.

Besides denying the motion to transfer, the court also ordered the Shareholders not to remove any more cases to federal court: "claims against the Shareholders currently pending before a state court should no longer be removed to the U.S. District Court if the only basis for removal is under 28 U.S.C. § 1334(b)." Id. at 24. This part of the court's ruling essentially continued in effect previous orders, entered in August 1995, that enjoined the Shareholders from removing any additional cases to federal court pending a decision on the motion to transfer. R. 338, 340.

Judge Hood refused to stay her ruling pending appeal, but in doing so stated that she "will" assume jurisdiction over the claims against Dow Chemical and Corning if this Court disagrees with her on the legal issue of the scope of "related to" jurisdiction under § 1334(b). R. 405, p. 2.

**C. Statement of Facts.**

**1. Background.** Dow Corning is a leading manufacturer of silicone industrial products. Incorporated in 1943 to supply a silicone grease for the World War II effort, Dow Corning is a Fortune 500 company with strong operating earnings and employs, with its

subsidiaries, more than 8,000 people. Along with its subsidiaries, Dow Corning sells more than 8,700 products, nearly all of which are made from silicones or otherwise incorporate silicone technologies. R. 410, p. 4. In 1991, the peak year for sales of Dow Corning's breast implant products, breast implants constituted less than 1% of Dow Corning's total sales. Id.

In January 1992, the Food and Drug Administration announced a temporary moratorium on the sale and manufacture of silicone breast implants. In the years since, tens of thousands of recipients of Dow Corning's silicone gel breast implants have sued, claiming to have been injured by "autoimmune reactions" to the silicones in their implants. R. 257, p. 2. Recent medical studies -- conducted by some of the country's leading research institutions, including the Harvard Medical School and the Mayo Clinic -- have consistently found no connection between silicones and autoimmune disorders. For example, the most recent and most comprehensive study by Harvard doctors, reported in the New England Journal of Medicine on June 22, 1995, concluded: "we did not find an association between silicone breast implants and connective tissue diseases, defined according to a variety of standardized criteria, or signs and symptoms of these diseases." R. 255, Ex. 2, p. 1666. See also The New York Times, October 25, 1995 (national edition), p. B7 (newly-completed studies by American College of Rheumatology "provide compelling evidence that silicone implants expose patients to no demonstrable additional risk for connective tissue or rheumatic disease"); Declaration of Howard B. Comet in Support of Emergency Motion of Minnesota Mining and Manufacturing Company, filed

on October 10, 1995, in No. 95-2084; The New Republic, September 11, 1995, pp. 17-21. Nonetheless, the flood of breast implant suits has continued unchecked.

As a result of the barrage of litigation, Dow Corning was forced to respond to the demands of trial courts around the country ordering discovery, trials, and the like. Dow Corning's resources were stretched to the breaking point simply monitoring, responding to, and handling these demands. When the so-called "Global Settlement" in the federal multidistrict proceeding, In re Silicone Gel Breast Implant Product Liability Litig. (MDL-926), No. CV-92-P10000-S (N.D. Ala.), became imperiled by mass opt-outs from the state of Texas and an apparent shortfall in funding, Dow Corning faced yet another exponential increase in its litigation burden.<sup>4/</sup> The cumulative impact and burden of responding simultaneously to literally tens of thousands of cases around the country, with more cases entering the pipeline constantly, finally necessitated Dow Corning's Chapter 11 filing on May 15, 1995.

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<sup>4/</sup> Judge Pointer, who is presiding over the multidistrict litigation, recently announced that the Global Settlement has collapsed and gave permission to participants in that settlement to file new lawsuits after November 30, 1995. See Ex. A, attached. Judge Pointer anticipates that tens of thousands of new suits may be filed shortly. Id. at 2. Indeed, the co-chairperson of the MDL plaintiffs' steering committee has stated unequivocally in recent weeks that at least 100,000 more breast implant cases will be filed in the near future. See Reply Memorandum in Support of Emergency Motion for Stay Pending Appeal, Ex. A (filed in No. 95-2034 on Sept. 29, 1995).

Dow Corning's goal in filing was quite simple. It sought a forum in which to resolve its liability to the implant recipients in a single proceeding, and to do so in a manner that is fair and equitable to all tort claimants as well as to Dow Corning, its employees, trade creditors and Shareholders, Dow Chemical and Corning, each of which owns 50% of Dow Corning. To that end, Dow Corning moved, pursuant to 28 U.S.C. § 157(b)(5), to transfer to the Eastern District of Michigan, where Dow Corning's bankruptcy is pending, breast implant claims that had been filed against itself and against Dow Chemical and Corning. R. 2. Dow Chemical and Corning joined the transfer motion. R. 185, pp. 1-2; R. 190, p. 3.<sup>5/</sup>

The Shareholders were included in the debtor's transfer motion because of the inextricably-intertwined relationship between the claims against the Shareholders and those against Dow Corning. Thousands of the suits against Dow Corning have included claims against Dow Chemical and Corning, even though neither of those companies designed, manufactured, tested, or sold breast implants. R. 410, pp. 6-7, 20-21. Plaintiffs have generally alleged that the Shareholders are liable for Dow Corning's acts because they purportedly (1) negligently undertook

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<sup>5/</sup> 28 U.S.C. § 157(b)(5) provides that "the district court in which the bankruptcy case is pending" may order that "personal injury tort and wrongful death claims" filed elsewhere shall be tried in that district. As discussed in the pages that follow, the cases against the Shareholders were properly transferrable to the Eastern District of Michigan because that court has jurisdiction over the claims sought to be transferred under 28 U.S.C. § 1334(b). Section 1334(b) provides that a district court has jurisdiction of "all civil proceedings . . . related to cases under title 11." See p. 3, supra.

Dow Corning's duties in connection with Dow Corning's products, (2) aided and abetted Dow Corning's manufacture and sale of unsafe products, or (3) conspired with Dow Corning in the sale by Dow Corning of unsafe or inadequately tested products. See R. 257, Exs. 2(a)-2(g). As explained in detail below, Dow Corning believes that there is a substantial risk that what transpires in the tens of thousands of lawsuits against Dow Chemical and Corning -- concerning products designed, manufactured, tested, and sold by Dow Corning -- could have a significant adverse impact on the bankruptcy estate before Dow Corning can proceed with its efforts to resolve all of its breast implant liabilities in the bankruptcy court.<sup>6/</sup>

**2. Dow Corning's Shared Insurance With Dow Chemical and Corning.**

Dow Corning shares coverage with Dow Chemical and with Corning under a substantial number of liability insurance policies. These policies constitute one of the largest assets of Dow Corning's bankruptcy estate. Altogether, the shared insurance policies provide total aggregate coverage limits of more than \$1 billion. R. 410, pp. 19-20.

This shared insurance falls into two categories. First, from 1955 to 1986, Dow Chemical purchased certain excess liability insurance policies that cover Dow Chemical and Dow Corning, as well as numerous present and former Dow Chemical subsidiaries. Affidavit of Scott Adams, p. 1, R. 255, attached to Ex. 3. These policies provide more

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<sup>6/</sup> Dow Corning intended to seek a common issues trial on whether silicone causes the autoimmune diseases at issue in this litigation so as to expedite the reorganization process. Judge Hood declined to undertake such a trial at this time, but kept open the possibility that she might do so in the future. R. 389, pp. 18, 20, 26, 27.

than \$1 billion of coverage for products and general liability claims asserted against the various insureds. Id. at 2. Each of these policies contains an aggregate limit of liability for products liability claims, which limits the amount each insurer will pay for all products claims brought by all insureds.<sup>2/</sup> These aggregate limits of liability are reduced, or "exhausted," dollar for dollar, by payments of products claims for (1) settlements or judgments, or (2) the defense of named insureds. Id. Dow Chemical claims that breast implant claims brought against it are covered under these excess policies. Id. The appellants' position is that the district court's September 12 order -- by allowing thousands of breast implant claims to proceed against Dow Corning's co-insured, Dow Chemical -- will diminish the value of Dow Corning's insurance asset to the extent that settlements, judgments, and defense costs that Dow Chemical incurs exhaust the policy limits otherwise available to Dow Corning and its creditors, including women asserting claims in the bankruptcy.

Second, other insurance policies purchased by Dow Corning extend coverage to Dow Chemical and Corning. Id. These policies also have certain aggregate policy limits, which may be reduced for all insureds when a payment is made to any of the three companies.

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<sup>2/</sup> There are no aggregate limits applicable to general liability claims in the policies, though both product liability and general liability claims may be subject to per occurrence limits. There has been no judicial determination of whether breast implant claims against Dow Chemical are product claims, as defined in the policies, or general liability claims. That issue will be resolved in other litigation.

### SUMMARY OF ARGUMENT

The district court denied the motion to transfer the claims against the Shareholders, and barred future removals of any such claims from state court, solely on the ground that it lacked jurisdiction over those claims under 28 U.S.C. § 1334(b). That conclusion is clearly wrong. "Related to" jurisdiction under § 1334(b) is quite broad, and this Court has held repeatedly that § 1334(b) jurisdiction exists as long as the claims at issue may "conceivably" affect the bankruptcy case. Here, it is undoubtedly "conceivable" -- indeed, it is virtually certain -- that the claims against the Shareholders will have an adverse impact on Dow Corning's bankruptcy case. Most significantly, continued prosecution of the claims against the Shareholders may jeopardize Dow Corning's insurance assets, to the detriment of all of Dow Corning's creditors, including the tens of thousands of women expected to participate as claimants in the bankruptcy. Dow Corning, Dow Chemical, and Corning share certain insurance coverage, and any payment of product liability claims to the Shareholders by the insurers (for defense costs, as well as for any settlements or judgments) could reduce the amounts available to Dow Corning and its creditors. See pp. 15-21, infra.

The debtor's estate may also be reduced by any contribution or indemnification claims by the Shareholders against Dow Corning. Judge Hood held that the possibility of contribution or indemnification should be disregarded until a judgment is entered against one of the Shareholders. But this Court has already rejected that position. Under this Court's precedent, a finding of "definite liability" is not

a "condition precedent to holding an action related to a bankruptcy proceeding." In re Salem Mortgage Co., 783 F.2d 626, 635 (6th Cir. 1986). See pp. 21-23, infra.

Moreover, all theories under which the Shareholders may be liable -- no matter how denominated -- presuppose a finding that Dow Corning's products were both defective and caused the claimants' injuries. Adverse findings on these points in the cases against the Shareholders could estop Dow Corning from seeking contrary determinations in indemnification or contribution actions brought by its Shareholders or in any future estimation (or other mass resolution) proceeding. At a minimum, such findings would disparage the safety of silicone-based products generally -- the very foundation of the business Dow Corning seeks to reorganize -- and could materially strengthen the bargaining position of plaintiffs engaged in negotiating the cost of settlement with Dow Corning. See pp. 23-27, infra. In addition, Dow Corning's witnesses would be cross-examined repeatedly, magnifying the burden placed on the debtor, and increasing the risks that such testimony might undermine Dow Corning's position in the bankruptcy court or in the state court litigation Dow Corning has initiated to recover under its liability insurance policies. See pp. 28-30, infra. Further, because the focus of the suits against the Shareholders will remain on Dow Corning and its products -- regardless of who the named defendants are -- Dow Corning will continue to be subjected to third-party discovery requests and requests for assistance from its Shareholders, particularly as cases go to trial, and the attention of many of Dow Corning's officials will be focused on ongoing

litigation rather than the reorganization of the debtor's business. See pp. 27-31, infra.

In seeking to bring all of the claims involving Dow Corning's products into one forum, Dow Corning does not write on a blank slate. Other debtors like Johns-Manville and A.H. Robins -- driven to seek the protection of the bankruptcy courts by mass tort crises -- have received similar relief. Indeed, the district court here stands alone in not recognizing the imperative of having all of the claims involving the debtor's product together under one roof.

In short, unless the claims against Dow Corning products are kept together in one federal court so that this massive litigation can be coordinated in a sensible and economical fashion, Dow Corning will be denied, contrary to federal bankruptcy policy, both a respite from the burdens of litigation that led to its Chapter 11 filing in the first place and an orderly and centralized resolution of its tort liabilities under the supervision of the bankruptcy court. The effect on Dow Corning's bankruptcy is thus quite real and well in excess of the minimal "conceivable" threshold required for "related to" jurisdiction.

#### **ARGUMENT**

##### **I. STANDARD OF REVIEW.**

The district court's denial of the motion to transfer turned entirely on the court's view that it did not have "related to" jurisdiction under 28 U.S.C. § 1334(b). This Court "review[s] questions of jurisdiction de novo." In re Wolverine Radio Co., 930 F.2d 1132, 1138 (6th Cir. 1991), cert. dismissed, 503 U.S. 978 (1992).

II. THE DISTRICT COURT HAD JURISDICTION UNDER § 1334(b) BECAUSE IT IS "CONCEIVABLE" THAT THE LITIGATION AGAINST THE SHAREHOLDERS MAY HAVE AN EFFECT ON DOW CORNING'S BANKRUPTCY CASE.

A. Jurisdiction Under § 1334(b) Is Extraordinarily Broad.

The transfer provision found in 28 U.S.C. § 157(b)(5) is designed "to centralize the administration of the estate and to eliminate the "multiplicity of forums for the adjudication of parts of a bankruptcy case." " Pan Am., 950 F.2d at 845 (quoting Robins I, 788 F.2d at 1011, and the legislative history). Transferring to one court all claims that might have an impact on a bankruptcy case "mak[es] it possible for a single forum to oversee the many claims and proceedings that might arise in or affect a bankruptcy case." Calumet Nat'l Bank v. Levine, 179 B.R. 117, 121 (N.D. Ind. 1995). Pursuant to 28 U.S.C. § 1334(b), that single forum has jurisdiction of all claims "relating to" a bankruptcy case.<sup>8/</sup>

That grant of jurisdiction in § 1334(b) is "extraordinarily broad." In re Salem Mortgage Co., 783 F.2d 626, 634 (6th Cir. 1986). As a result, federal courts "have uniformly adopted an expansive

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<sup>8/</sup> The multidistrict litigation panel has recognized that the cases against the Shareholders need to be brought together in one forum, pending resolution of this appeal. On September 29, 1995, the MDL panel ordered the transfer of 98 actions against Dow Chemical and other non-debtors, pending in 15 district courts around the country, to Judge Pointer. See Ex. B, attached. Although the multidistrict order did not transfer to Judge Pointer the thousands of pending federal cases against the Shareholders that were not then the subject of transfer motions, the panel made clear that additional motions to transfer "are plainly within the spirit, if not the letter, of this transfer order." Id. at 3. Accordingly, the court noted, any parties opposing transfer of other cases to Judge Pointer "will bear a very heavy burden of persuasion." Id. The parties in the multidistrict case have briefed the issue whether the cases against the Shareholders that have been transferred to Judge Pointer should remain centralized before him or whether they should be remanded to state courts.

definition of a related proceeding under section 1334(b)." Robinson v. Michigan Consol. Gas Co., 918 F.2d 579, 583 (6th Cir. 1990). Under the applicable test, a district court has jurisdiction under § 1334(b) over any actions involving non-debtors that could even "conceivably" have an effect on the Debtor's bankruptcy case. In re Time Constr., Inc., 43 F.3d 1041, 1045 (6th Cir. 1995); Robinson, 918 F.2d at 583-84. To be sure, jurisdiction is not established by "an extremely tenuous connection to the estate." Robinson, 918 F.2d at 584. However, under § 1334(b), jurisdiction exists with respect to "related" claims -- even when the claims are not "against the debtor or the debtor's property" -- "as long as the outcome could alter the debtor's rights, liabilities, options, or freedom of action." Time Constr., 43 F.3d at 1045 (quoting Robinson, 918 F.2d at 583). Thus, even when there is a "possibility that the [non-debtors'] dispute may ultimately have no effect on the debtor," there is still jurisdiction under § 1334(b) unless the court can "conclude that it will have no conceivable effect." Wolverine Radio, 930 F.2d at 1143. Accord, e.g., In re Wood, 825 F.2d 90, 94 (5th Cir. 1987).<sup>2/</sup>

In sum, Congress clearly intended in § 1334(b) for bankruptcy courts to have jurisdiction over a wide range of disputes that might potentially affect a debtor's estate. For several independent reasons,

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<sup>2/</sup> See also Wolverine Radio, 930 F.2d at 1145 ("having decided that jurisdiction exists, we merely decided the threshold question of whether any judgment which might result from the [non-debtors'] dispute could have a tangible effect on the debtor bankruptcy estate") (emphasis added).

this "extraordinarily broad" jurisdictional grant, Salem Mortgage, 783 F.2d at 634, is undoubtedly satisfied here.

**B. Claims Against The Shareholders Could Result In The Loss Of Insurance Proceeds That Would Otherwise Be Available To The Bankruptcy Estate.**

Dow Chemical and Corning are insured along with Dow Corning under various insurance policies which together provide over \$1 billion in insurance coverage. Dow Corning's interest in this insurance is obviously a significant asset of the bankruptcy estate. Indeed, insurance is often a bankruptcy estate's "most important asset" where, as here, the debtor is faced with "substantial liability claims" in a mass tort case. Robins I, 788 F.2d at 1001. Dow Chemical, however, has notified the insurers that it also is asserting claims against the policies for breast implant claims. Dow Chemical's position is that, as a co-insured, it is entitled to recover from the insurers, on a dollar-for-dollar basis, all of its defense costs, as well as any settlements or judgments paid by it in the breast implant litigation.

Accordingly, permitting scores of trials against the Shareholders to go forward while litigation against the debtor is stayed may result in the Shareholders making claims for insurance and seeking and obtaining payment from the insurers before Dow Corning can make any claims of its own. And any money actually paid to Dow Chemical or Corning by the insurers may reduce the pool of coverage available to Dow Corning to fund a reorganization plan. See pp. 10-11, *supra*; see also Robins I, 788 F.2d at 1008 (recognizing that "suits against these co-defendants, if successful, would reduce and diminish the insurance fund or pool represented in Aetna's policy in favor of Robins and

thereby affect the property of the debtor to the detriment of the debtor's creditors as a whole").

The district court's observation that it has "broad discretion over the Debtor's interest" in the insurance policies, R. 389, p. 23 (emphasis added), does not solve the problem. Dow Chemical's position is that the bankruptcy court has no power over Dow Chemical's interest in the shared insurance and that the insurance claims of the Shareholders may increase their priority to insurance proceeds. See In re Forty-Eight Insulations, Inc., 133 B.R. 973, 977-79 (Bankr. N.D. Ill. 1991) (the bankruptcy court cannot diminish a non-debtor's contractual rights under insurance policies it shares with the debtor; the bankruptcy court "does not have any authority" to issue an order "that impairs a non-debtor's contractual rights against another non-debtor"), aff'd, 149 B.R. 860, 863-64 (N.D. Ill. 1992).

To be sure, Dow Corning disagrees with Dow Chemical's position on these points. But resolution of these issues on the merits -- an issue that is being argued in other forums -- is not a prerequisite to the existence of "related to" jurisdiction. To the contrary, the only necessary threshold for finding "related to" jurisdiction is that the dispute might "conceivably" affect the bankruptcy case. Time Constr., 43 F.3d at 1045; Wolverine Radio, 930 F.2d at 1143; Salem Mortgage, 783 F.2d at 634-35. See also Wood, 825 F.2d at 94 ("We raise these possibilities, not to resolve them . . . but to illustrate the conceivable effect of the complaint on the administration of the bankruptcy"). The dispute over rights to the insurance proceeds easily meets this standard.

Indeed, it is well settled that a potential impact on a debtor's insurance is enough to demonstrate a "conceivable" effect on the bankruptcy case and thus to establish jurisdiction. See Celotex Corp. v. Edwards, 115 S. Ct. 1493, 1500 (1995) ("related to" jurisdiction established where, if suits against the debtor's sureties were allowed to proceed, "the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral," which "could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated") (emphasis added); In re Titan Energy, Inc., 837 F.2d 325, 330 (8th Cir. 1988) (dispute over insurance policies is within "related to" jurisdiction even though "[i]t remains to be seen whether, and to what extent, National Union's action will affect Titan's estate"; "even a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets the broad jurisdictional test" of § 1334(b)); In re Zale Corp., 62 F.3d 746, 758-59 (5th Cir. 1995) ("We need not decide whether the [insurance] proceeds are property of the estate, if we find that the disputes over the CIGNA policy can have an effect on the estate"; bankruptcy court had "related to" jurisdiction over non-debtors' claims against insurer); Coar v. National Union Fire Ins. Co., 19 F.3d 247, 249 (5th Cir. 1994) (suit against debtor's insurer "related to" bankruptcy case because there was "a cognizable threat" that "the policy proceeds would

not cover plaintiffs' claims and could expose the debtor's estate" to liability).<sup>10/</sup>

The district court, however, concluded that the shared insurance would have no conceivable effect on the bankruptcy case. In so holding (R. 389, p. 23), the district court relied solely on In re Vitek, Inc., 51 F.3d 530 (5th Cir. 1995). However, the Vitek court itself, in resolving that Chapter 7 case, stated that "the precedential -- or even merely instructional -- value of this opinion to future Chapter 11 cases should probably be 'little or none,'" a warning that the Fifth Circuit said applied with "particular[]" force to "Chapter 11 proceedings that implicate mass tort litigation." Id. at 533 n.3. See also id. at 538 n.39 ("again cautioning our readership against relying on this opinion as precedential or instructive beyond its narrow holding in the context of the particular facts and circumstances of this case").

In short, if thousands of actions against the Shareholders continue to be litigated simultaneously, without any sort of central coordination, Dow Corning's rights to proceeds from more than \$1 billion in liability insurance coverage will be threatened. Such a result would render the bankruptcy "breathing spell" a nullity, would be diametrically opposed to what Congress contemplated in enacting the Bankruptcy Code, and would be fundamentally unfair to creditors of Dow Corning, who are entitled to the preservation of Dow Corning's asset

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<sup>10/</sup> See also Robins I, 788 F.2d at 1001; In re Johns-Manville Corp., 33 B.R. 254, 261 (Bankr. S.D.N.Y. 1983) (both recognizing that insurance assets may be depleted by non-debtors who qualify as additional insureds).

base. Put plainly, unless the district court's order is reversed, assets otherwise available to support Dow Corning's reorganization plan -- a plan that will benefit all creditors and tort claimants uniformly -- may be drained away or, at a minimum, placed in jeopardy, at the early stages of the Chapter 11 proceeding. The end result will be that the majority of women who received breast implants, and who are looking to the bankruptcy estate for compensation, will be harmed if scores of trials against the Shareholders jeopardize insurance assets that would otherwise be available to the Dow Corning estate for compensation.

**C. Contribution And Indemnification Claims By The Shareholders Will Affect The Bankruptcy.**

"Related to" jurisdiction is also established by the fact that any judgments against the Shareholders would generate claims for contribution or indemnification against Dow Corning that will need to be resolved as part of the plan process. In fact, the Shareholders have already asserted thousands of cross-claims for indemnity and contribution against Dow Corning in breast implant suits. R. 257, p. 2. The district court nonetheless rejected this basis for "related to" jurisdiction, relying solely on the Third Circuit's decision in In re Pacor, Inc., 743 F.2d 984 (3d Cir. 1984), to conclude that an actual judgment against the Shareholders was necessary before contribution and indemnification claims were even relevant for "related to" jurisdiction. R. 389, p. 22.

This Court, however, has already specifically rejected this portion of Pacor. In Salem Mortgage, this Court stated that Pacor is not "compelling" on this point and held, unlike Pacor, that "the

statute does not require a finding of definite liability of the estate as a condition precedent to holding an action related to a bankruptcy proceeding." 783 F.2d at 634-35. Indeed, this Court ruled in Salem Mortgage that "related to" jurisdiction was established there simply because the non-debtors "may have an action against the debtors such as breach of the assignment agreement." Id. at 734 (emphasis added). The district court's order did not even mention, let alone try to distinguish, this Court's decision in Salem Mortgage. See also Wolverine Radio, 930 F.2d at 1143 (holding that there was "related to" jurisdiction even though the debtor "would not be affected until and unless" the non-debtor sought indemnification; the Court recognized that the non-debtors' dispute "may ultimately have no effect on the debtor").

Other courts have likewise held that "related to" jurisdiction is established by claims that may be asserted against the debtor in the future and may have an impact on the bankruptcy estate. See, e.g., Wood, 825 F.2d at 94 (finding "related to" jurisdiction over suit against non-debtor where, depending on the outcome of the litigation, the debtor "may bear" all, part, or none of the judgment); In re American Hardwoods, Inc., 885 F.2d 621, 624 (9th Cir. 1989) (holding that "related to" jurisdiction existed for third-party claim against debtor's guarantor because guarantor "would likely" make claim against debtor's officers' stock, which "`could conceivably' affect the administration of [the debtor's] plan"); In re New York Int'l Hostel, Inc., 157 B.R. 748, 751 (S.D.N.Y. 1993) (where resolution of claims against non-debtor "might" result in non-debtor having claims against

debtor, claims against non-debtor were related to bankruptcy proceedings).

These principles have particular force where, as here, the plaintiffs claim that the debtor and the non-debtors acted in concert. See R. 257, Exs. 2(a)-2(g). "[W]hen the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334." Wood, 825 F.2d at 94 (following this Court's decision in Salem Mortgage, 783 F.2d at 634). See also In re Michigan Real Estate Ins. Trust, 87 B.R. 447, 454-55 (E.D. Mich. 1988) ("related to" jurisdiction exists over claim between parties whose "relationship with one another radiates from the debtor, [and] the actions of the debtor are central in the determination of this cause of action").

**D. Litigation Against The Shareholders May Increase Dow Corning's Own Exposure To Breast Implant Claimants.**

The litigation against the Shareholders poses yet another serious threat to Dow Corning's efforts to reorganize itself: allowing all of the cases against the Shareholders to go forward simultaneously will harm Dow Corning because judgments against the Shareholders could lead to contribution claims against Dow Corning that it might be estopped from relitigating in whole or in part.<sup>11/</sup> And although we do not believe that collateral estoppel should apply, there is authority suggesting that Dow Corning might be precluded from litigating certain issues

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<sup>11/</sup> Given that the Shareholders did not design, test, manufacture, or sell breast implants and have little experience with the complex task of defending the products' safety, Dow Corning is particularly concerned that judgments against the Shareholders are both more likely, and more likely to be in higher amounts, absent its participation.

entirely. See, e.g., In re MacDonald Assocs., Inc., 54 B.R. 865, 869 (Bankr. D.R.I. 1985) (there is "a clear risk" that the debtor could be collaterally estopped from relitigating matters decided in cases against its sole shareholders); In re Sudbury, Inc., 140 B.R. 461, 463 (Bankr. N.D. Ohio 1992) (debtor's liability "may be determined on collateral estoppel principles [by fact determinations reached on same fact issues] in Plaintiffs' actions" against non-debtors) (emphasis added); In re American Film Technologies, Inc., 175 B.R. 847, 849-51 (Bankr. D. Del. 1994) (same); In re Johns-Manville Corp., 26 B.R. 420, 426 (Bankr. S.D.N.Y. 1983) (successful actions against Manville's directors "could" collaterally estop the debtor in subsequent actions), aff'd, 40 B.R. 219 (S.D.N.Y. 1984). See also Restatement of Restitution § 81, comment h (1937).

Moreover, where, as here, a non-party participates in defending litigation because its interests are inextricably intertwined with those of a party, the risk of collateral estoppel is heightened. See, e.g., Montana v. United States, 440 U.S. 147, 154-55 (1979) (collateral estoppel may apply "when nonparties assume control over litigation in which they have a direct financial or proprietary interest" or where the nonparty "had a sufficient `laboring oar' in the conduct of the [prior] litigation to actuate principles of estoppel"); Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407, 1414 n.7 (8th Cir. 1983) ("[a] person is in `functional privity' with a party and is thus collaterally estopped where he has participated in the prior fair and adequate litigation of the issue sought to be relitigated").

In short, there is a danger that prosecution of the actions against Dow Chemical or Corning could have a preclusive effect on critical and complex factual issues relevant to the resolution of the silicone implant claims against Dow Corning. This possibility alone is more than sufficient to establish a "conceivable" impact on its bankruptcy, which in turn establishes "related to" jurisdiction. See Wolverine Radio, 930 F.2d at 1143 ("related to" jurisdiction exists where, inter alia, the debtor "could be bound by res judicata or collateral estoppel"); Sudbury, 140 B.R. at 463; Manville, 26 B.R. at 426; In re A.H. Robins Co., 828 F.2d 1023, 1026 (4th Cir. 1987) ("Robins II"), cert. denied, 485 U.S. 969 (1988). As one court has commented, "[i]t is not possible for the debtor to be a bystander to a suit which may have a \$20 million issue preclusion effect against it in favor of a pre-petition creditor.'" In re Lomas Financial Corp., 117 B.R. 64, 67 (S.D.N.Y. 1990), remanded on other grounds, 932 F.2d 147 (2d Cir. 1991).

Even if Dow Corning were not formally estopped from relitigating liability and damages issues adjudicated against the Shareholders, there is no question that Dow Corning will be adversely affected by any such adverse findings -- which would of necessity be predicated on a finding that Dow Corning's products were defective -- and Dow Corning will have every interest in seeing the safety of its own products effectively defended. This is particularly true given that all of the plaintiffs who have asserted claims against the Shareholders have also

asserted the same claims against Dow Corning. See Sanders Confectionery Products, Inc. v. Heller Financial, Inc., 973 F.2d 474, 482 (6th Cir. 1992) (suit between debtor's parent corporation and one of debtor's creditors was related to the debtor's chapter 11 case where the case involved "the same facts" as those considered by the bankruptcy court in resolving the dispute between the debtor and the creditor), cert. denied, 113 S. Ct. 1046 (1993); In re Eagle-Picher Industries, Inc., 963 F.2d 855, 860 (6th Cir. 1992) (affirming an injunction staying litigation against non-debtors where, "`because the same issues have been asserted in the Texas action against the debtor and [the non-debtors] and because the interests of the debtor and [the non-debtors] are intertwined, the debtor must actively participate in the Texas action in order to protect its interests and avoid potential risks"). Moreover, in comparative fault jurisdictions, juries may well be asked to assess Dow Corning's relative fault, even though it is not a defendant. See Robins II, 828 F.2d at 1026.

All of this demonstrates that jury verdicts against one or both of the Shareholders, necessarily predicated on attacks against Dow Corning products, would obviously affect the negotiating position of plaintiffs in the bankruptcy negotiations against the debtor based on the same product complaints. Indeed, it is inconceivable that continued litigation against Dow Corning's products -- regardless of whether the named defendant is one of the Shareholders or the debtor -- will have no effect on the debtor's negotiations and ability to resolve the very same claims, involving the very same claimants, against the very same products in its bankruptcy.

**E. Unless The Litigation Against The Shareholders Is Conducted In A Coordinated Fashion By One Judge, The Burdens Imposed On Dow Corning By The Litigation Will Continue.**

Because the safety and efficacy of Dow Corning's products will be "on trial" in any litigation against the Shareholders, Dow Corning of necessity may have to defend its interests in those cases in order to minimize the risk of an adverse judgment that might have collateral estoppel effect on issues related to the safety and efficacy of Dow Corning's product. See, e.g., Robins I, 788 F.2d at 1005. At a minimum, Dow Corning will be conscripted to participate as discovery requests are served on it, its employees are called as fact witnesses, and its lawyers appear to protect its rights. The cost of this participation, both in terms of money and in the diversion of Dow Corning's attention from its reorganization and other business interests will, itself, have a significant impact on the administration of Dow Corning's bankruptcy case, e.g., Robins II, 828 F.2d at 1026, and is "precisely what the automatic stay is intended to excuse [the debtor] from doing," American Film Technologies, 175 B.R. at 851.

In fact, one reason that Dow Corning sought the protection of the bankruptcy court was the need to escape the crushing burden of preparing for and litigating thousands of breast implant cases around the country. R. 3. Courts have long recognized that litigation involving non-debtors may have a deleterious impact on the debtor's reorganization due to the time and resources that the debtor must de-

vote to ongoing lawsuits. E.g., In re Lazarus Burman Assocs., 161 B.R. 891, 898-900 (Bankr. E.D.N.Y. 1993); In re Venzke Steel Corp., 142 B.R. 183, 185 (Bankr. N.D. Ohio 1992); Sudbury, 140 B.R. at 463, 465; MacDonald Assocs., 54 B.R. at 870. This danger is especially high here in light of the extraordinary number of suits pending and threatened against the debtor's Shareholders.

In addition, Dow Corning personnel may, of necessity, have to assist with preparation for, and resolution of, trials against the Shareholders because such trials are, fundamentally, attacks against Dow Corning's products. In any event, continued litigation against the Shareholders would require continued participation by Dow Corning personnel. Dow Corning documents and witnesses must inevitably be produced at future trials concerning the safety of Dow Corning's breast implants. Moreover, throughout the history of the breast implant litigation, each new trial has generated new theories of liability, new document discovery demands, and new depositions and witness testimony. New discovery requests require intensive responsive efforts, including time consuming and costly "sweeps" through Dow Corning's files. And each new deposition demand requires similarly burdensome searches for, and preparation of, appropriate Dow Corning witnesses.

Moreover, because ongoing discovery against Dow Corning personnel is inevitable whether or not it chooses to participate in actions against the Shareholders, continuing litigation carries with it the risk that statements, testimony, and other evidence generated in the thousands of active cases against the Shareholders across the country will be used against Dow Corning. This danger and the burden of

protecting against it were key factors leading to the grant of injunctive relief in Manville. The danger, as explained in Manville, is that

"once a witness has testified to a fact, or what sounds like a fact, that witness may be confronted with his prior testimony under oath in a future proceeding directly involving Manville, whether or not Manville was a party to the record on which the initial testimony was taken. Once an admission against interest is made, under oath or otherwise, by the agent of a party, that admission stands for all time. No matter what Lake may stipulate, the thousands of other claimants and cross-claimants who are after Manville's assets, would be entitled to use the product of such discovery."

In re Johns-Manville Corp., 40 B.R. 219, 225 (S.D.N.Y. 1984).

Similarly, in Robins II, the court stayed litigation of issues related to underlying liability against the debtor's primary insurer, Aetna, because the "primary defense logically will be that Robins -- not Aetna -- is responsible for the injuries suffered by these plaintiffs." 828 F.2d at 1026.

The logic of Manville and Robins II applies with equal force here. If actions against the Shareholders are not coordinated in a centralized proceeding, Dow Corning will be exposed to the risk that its witnesses might be induced during pre-trial discovery or trial to engage in harmful "surmise or speculation or guesswork." Manville, 40 B.R. at 224. Similarly, Dow Corning witnesses might be induced to compromise, if not waive, important privileges, to Dow Corning's prejudice. This risk is magnified in this mass tort case because Dow Corning witnesses will be involved in numerous cases across the country. The cost to Dow Corning's estate of minimizing these risks by actively and carefully defending its witnesses will be substantial even

if the attack on the product is ostensibly aimed solely at the Shareholders.<sup>12/</sup>

In short, the relief Dow Corning sought to obtain in the bankruptcy court from the debilitating effect of silicone implant litigation will be largely foiled if the litigation against the Shareholders goes forward simultaneously in virtually every jurisdiction in the country. Dow Corning "will inexorably be drawn into this litigation," whether it wants to or not. Robins II, 828 F.2d at 1026. This is sufficient by itself to demonstrate a "conceivable" effect on Dow Corning's bankruptcy case. See Eagle-Picher Industries, 963 F.2d at 860 (quoting the district court's finding that proceeding with the litigation against the non-debtors would "needlessly divert key employees from the debtor's reorganization effort"); Robins I, 788 F.2d at 1012 (the reorganization of the debtor "may well be completely thwarted if the energies of the debtor's executives and officers are

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<sup>12/</sup> These concerns are real and immediate. For the last few weeks, Dow Chemical has been on trial in Nevada in the first post-bankruptcy breast implant trial against a Shareholder, Mahlum v. Dow Chemical, No. CV93-05941 (Washoe County Dist. Ct.). Because Dow Chemical's lawyers had no experience in litigating the safety of Dow Corning's breast implants, Dow Corning agreed to provide lawyers who had represented it in previous trials to defend the product. The trial judge sustained plaintiffs' objections to such representation, however, and the trial proceeded without the benefit of their expertise (and with an attendant added risk of an adverse verdict). When plaintiffs objected on authentication grounds to admission of many Dow Corning documents, it became necessary to fly in two Dow Corning employees and an in-house Dow Corning lawyer to authenticate the documents. In addition, Dow Corning's in-house counsel participated in preparing witnesses, and Dow Corning retained local counsel to protect its attorney-client privilege. See also R. 257, p. 3 (describing work required of Dow Corning in-house counsel, after the bankruptcy filing, with respect to privileged Dow Corning documents sought for litigation against Dow Chemical).

initially diverted by, and the resources of the debtor are dissipated in the expenses of litigating, the trial of thousands of personal injury suits in courts throughout the land spread over an interminable period of time"); Sudbury, 140 B.R. at 463 ("it is clear that the Debtor and its present personnel will bear the brunt of discovery and of mounting a defense for the individual [non-debtor] defendants").

**III. THE DISTRICT COURT HAD NO AUTHORITY TO PREVENT THE SHAREHOLDERS FROM REMOVING ANY ADDITIONAL CASES.**

The district court barred future removals based on its holding on the scope of "related to" jurisdiction. See R. 389, p. 24 ("Furthermore, claims against the Shareholders currently pending before a state court should no longer be removed to the U.S. District Court if the only basis for removal is under 28 U.S.C. § 1334(b)"). But if this Court reverses the district court's underlying jurisdictional ruling, the prohibition on removals must necessarily fall as well; if the claims against the Shareholders are within federal jurisdiction under § 1334(b), there is no basis to prevent the removal of any such claims.

**CONCLUSION**

For the reasons stated, it is far more than "conceivable" that the cases against the Shareholders may have an effect on Dow Corning's bankruptcy case -- it is inconceivable that those cases would not have an effect. Because showing a conceivable effect is all that is needed to establish jurisdiction under § 1334(b), the district court clearly erred in concluding that it had no jurisdiction. Accordingly, appellants respectfully request that the district court's orders be

reversed and that the case be remanded to the district court for further proceedings.<sup>13/</sup>

October 27, 1995

Respectfully submitted,

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<sup>13/</sup> As part of that relief, Dow Chemical also asks this Court to extend the time to remove additional cases. See Bankr. Rule 9006(b)(1). On August 10, 1995, the district court enjoined Dow Chemical and Corning from removing any more cases pending its decision on the motion to transfer. R. 338, 340. The time to remove cases expired on September 15 (see R. 338, p. 3), and without an extension of that time period, Dow Chemical and Corning may be precluded from removing any additional cases.