
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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,)	
)	
OFFICIAL COMMITTEE OF TORT)	
CLAIMANTS,)	
)	
Plaintiffs-Appellees,)	
)	No. 95-CV-72397-DT
v.)	
)	
O'BRIEN, et al.,)	
)	
Defendants,)	
)	
and)	
)	
DOW CORNING CORPORATION, et al.,)	Hon. Denise Page Hood,
)	<u>District Judge</u> , Presiding
Defendants-Appellants.)	

BRIEF OF APPELLANTS
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AND CORNING INCORPORATED

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ORAL ARGUMENT REQUESTED

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Thousands of breast implant claims have been filed around the country against Dow Corning Corporation ("Dow Corning" or "the debtor"), which is now reorganizing under Chapter 11 of the Bankruptcy Code, and its two shareholders, The Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning") (collectively the "Shareholders"). This Court recently reversed the district court's ruling that it did not have "related to" jurisdiction and did not have the power under 28 U.S.C. § 157(b)(5) to transfer the breast implant cases pending against the Shareholders to the Eastern District of Michigan for trial. In re Dow Corning Corp., 86 F.3d 482 (6th Cir. 1996). The Court remanded for further consideration of the § 157(b)(5) motion to transfer.

On remand, the district court again refused to transfer the cases for trial. The court concluded that all of the thousands of claims against the debtor's Shareholders should not be centralized, but should be tried separately in virtually every jurisdiction in the land, thus fragmenting the process of resolving claims against the debtor's products. This Court's review of that ruling will "significantly impact the future course of this massive litigation." Id. at 487. Oral argument would assist the Court in assessing the effects of the district court's decision on the debtor's bankruptcy proceeding and on the administration of justice and the judicial system.

INTRODUCTION

The district court's refusal to fix trial venue in the Eastern District of Michigan for the claims against the debtor's Shareholders is fatally flawed for a host of reasons. The most fundamental problem with that decision is that it closes the door on any prospect of developing a means to expedite resolution of this mass tort crisis through a common issues trial or related global approach. Instead, the district court's ruling compels a procedure requiring a plaintiff seeking compensation for one injury to litigate on two fronts -- as part of the bankruptcy and in state court. As a result, the Shareholders will have to try thousands of cases separately in state courts, an endeavor that will take years and cost enormous sums of money. Much of this may be paid for by the joint insurance that the debtor shares with Dow Chemical and Corning, which would deprive the bankruptcy estate of millions of dollars in joint insurance proceeds that would otherwise be available to tort claimants and the debtor's creditors.

The sheer waste and inefficiency of the district court's approach is highlighted by the fact that any common issues trial held as part of the bankruptcy process will resolve the central issue in virtually all of the cases in which the debtor has been sued: do Dow Corning's implants cause various types of disease, as the tort claimants assert? It defies reason to exclude from that trial claims made by the same plaintiffs against the debtor's Shareholders -- all of which involve the same issue of whether Dow Corning implants cause disease. In light of the inseparable link between the claims against the debtor and the

claims against the debtor's Shareholders, it makes absolutely no sense to bar the Shareholders from a causation trial, instead forcing them to litigate the same complex causation issue in court after court around the country. That will not only result in huge defense costs that may dissipate the joint insurance proceeds, but juries in different jurisdictions may reach inconsistent verdicts on what should be a straightforward question of science: do the debtor's products cause disease?

Keeping open the option of holding a single causation trial including the Shareholders is the single best opportunity to take control of this mass tort crisis. Most significantly, a decision that Dow Corning's products do not cause disease would resolve thousands of claims against Dow Corning, as well as thousands of claims against the Shareholders, in one fell swoop. If, on the other hand, the jury decides that Dow Corning implants do cause some diseases, or that there is a somewhat increased incidence of certain diseases, then the federal courts will be no worse off. The claims against the debtor are all now in federal court anyway, and the claims against the Shareholders, because they are entirely derivative of the claims against the debtor, are nearly identical. Thus, keeping the Shareholders' claims in federal court will not add to the burden on the federal judiciary, since the federal courts already have thousands of cases involving the debtor's implants; the Shareholders are simply additional defendants who have been sued by the same plaintiffs in the very same cases. The state courts, however, would be saved from the burden of trying thousands of separate and duplicative suits against Dow Chemical.

Moreover, having all of the claims concerning the debtor's products together in federal court will increase the likelihood of a consensual global resolution, or a resolution through the bankruptcy process. Either scenario would relieve the court system of the nightmarish mountain of litigation it now faces.

Proceeding in the manner we have outlined is also the best way to take full advantage of a Rule 706 panel of experts that is appointed to assist in the resolution of scientific issues. Keeping all of the cases involving the debtor's products together in federal courts -- both for pretrial purposes and for a possible common issues trial -- will insure that the views of any Rule 706 panel will be heard on the scientific issue that is at the heart of these cases: whether Dow Corning's products cause disease.

In short, retaining the possibility of having a common issues trial with respect to the debtor's products, or of devising some other means for global resolution of this massive litigation, could result in tremendous savings to the court system and to the parties. The district court needlessly foreclosed those options. As we will show in the pages that follow, that decision is inconsistent with both common sense and this Court's prior opinion.

STATEMENT OF JURISDICTION

On May 15, 1995, Dow Corning 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 case pursuant to 28 U.S.C. § 1334(a).

In this Court's previous decision, it held that there was "related to" jurisdiction over claims against the debtor's Shareholders, and it

also reversed the district court's holding that it lacked the power to transfer those claims for trial pursuant to 28 U.S.C. § 157(b)(5). In re Dow Corning Corp., 86 F.3d 482 (6th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3167 (U.S. Aug. 29, 1996) (No. 96-330).

On remand, the district court, in an order entered on July 30, 1996, once again declined to transfer the claims against the Shareholders, this time stating as its reason that it would abstain from hearing the cases. R. 549 (Jt. App. 581). Dow Chemical and Corning filed notices of appeal on August 1, 1996. R. 552, 553 (Jt. App. 589, 590). Dow Corning filed its notice of appeal on August 5, 1996. R. 557 (Jt. App. 591). As explained in detail in our response to the motion to dismiss these appeals, this Court has a variety of grounds for appellate jurisdiction in this case: 28 U.S.C. § 1291, the collateral order doctrine, and the doctrine of pendent appellate jurisdiction. Alternatively, the Court may review the district court's decision under its supervisory mandamus powers, 28 U.S.C. § 1651. See Response of Dow Corning Corporation, The Dow Chemical Company, and Corning Incorporated to Motion of Appellee Official Committee of Tort Claimants to Dismiss Appeals (filed Sept. 3, 1996).

STATEMENT OF THE ISSUE

Whether, in light of this Court's previous opinion, the district court abused its discretion in denying the motion, under 28 U.S.C. § 157(b)(5), to transfer the thousands of claims asserted against the debtor's Shareholders when (1) those claims involve the same products, the same plaintiffs, and the same factual issues as claims already

pending against the debtor, and (2) the same claims against the debtor have already been transferred and thus centralized in the federal system.

STATEMENT OF THE CASE

A. Nature of the Case. This appeal arises out of "one of the world's largest mass tort litigations." Dow Corning, 86 F.3d at 486. The central question on appeal is whether thousands of claims against the debtor's Shareholders -- claims that this Court has already held may have a significant impact on the bankruptcy estate and the reorganization process -- should be tried separately in hundreds of state courts, or should be centralized in one federal forum in order to fulfill this Court's "primary goal" in this litigation: "to establish a mechanism for resolving the claims at issue in the most fair and equitable manner possible." Id. at 487.

B. The Course of Proceedings and Disposition in the District Court. After this Court's decision earlier this year, the claimants asked the district court to deny transfer on the ground that it should abstain from hearing the claims against the Shareholders. R. 508-09, 516-17, 522 (Jt. App. 2379, 2453, 2546, 2598, 2619). The plaintiffs argued in the district court that "[t]hese cases belong in state court and cannot be transferred to this Court as defendants seek," R. 509, p. 1 (Jt. App. 2460); that "the efficiency of administering this case would not be aided by transfer," R. 508, p. 8 (Jt. App. 2386); and that "the cases need not be transferred to [the district court] for the bankruptcy to proceed," R. 517, p. 15 (Jt. App. 2615). Following

remand and without a further hearing on the matter, the district court agreed with the plaintiffs and thus decided once more not to transfer the claims against the Shareholders to the Eastern District of Michigan for trial. R. 549 (Jt. App. 581). The court, noting that "[i]n a section 157(b)(5) motion, an abstention analysis is required," id. at 2 (Jt. App. 582), denied transfer on the ground that it would abstain from hearing the claims against the debtor's Shareholders, id. at 2-7 (Jt. App. 582-587).

C. Statement of Facts.

1. Background. Dow Corning is a leading manufacturer of silicone industrial products. Incorporated in 1943 at the request of the War Department to supply a silicone grease for the World War II effort, Dow Corning is a Fortune 500 company with strong operating earnings that 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 (Jt. App. 3467). 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 recent years, 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 (Jt. App. 1500). The ensuing avalanche of litigation forced Dow Corning to respond to the demands of trial courts around the country ordering discovery, trials, and the like. Simply monitoring,

responding to, and handling these demands stretched Dow Corning's resources to the breaking point. 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, Dow Corning faced yet another exponential increase in its litigation burden. The cumulative impact and burden of responding simultaneously to literally thousands of cases around the country, with more cases entering the pipeline constantly, finally necessitated Dow Corning's Chapter 11 filing. See generally Dow Corning, 86 F.3d at 485-86.

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 would be fair and equitable to all tort claimants as well as to Dow Corning, its employees, trade creditors and two Shareholders. 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 its products, regardless of whether the defendant was itself, Dow Chemical, or Corning. R. 2 (Jt. App. 120). All of these claims involve implants made by Dow Corning; neither Dow Chemical nor Corning designed, manufactured, tested, or sold breast implants. Nonetheless, thousands of the suits against Dow Corning have included claims against Dow Chemical and Corning.

The claims involving Dow Corning's products are asserted in two ways. First, they are asserted directly against the debtor. Second,

claims against Dow Corning's products are also asserted indirectly -- that is, they are asserted against the debtor's Shareholders by the same plaintiffs who are asserting claims against the debtor. These indirect claims are the subject of this appeal. Both types of claims are attacks on the debtor's products. Whether such attacks are asserted directly against the debtor or indirectly against its Shareholders, the threshold issue is the same -- did Dow Corning's products cause harm? That is why the debtor included the Shareholders in its transfer motion; the claims against the Shareholders and those against Dow Corning are inextricably intertwined, involving the same plaintiffs, the same products, the same evidence, and the same factual issues. R. 257, Exs. 2A-2G (representative examples of complaints filed against the debtor and its Shareholders) (Jt. App. 1504-1606); R. 410, pp. 6-7, 20-21 (Jt. App. 3469-3470, 3483-3484). In fact, to the best of our knowledge, before Dow Corning filed for bankruptcy, the Shareholders had never been sued by a plaintiff who had not also sued Dow Corning.

2. Dow Corning's Shared Insurance With Dow Chemical and Corning. As noted in this Court's recent opinion, Dow Corning for years shared coverage with Dow Chemical and Corning under a substantial number of liability insurance policies. Dow Corning's interest in these policies and their proceeds constitutes "one of the largest assets of [the] bankruptcy estate." Dow Corning, 86 F.3d at 494. The shared insurance policies have total aggregate coverage limits of more than \$1 billion. R. 410, pp. 19-20 (Jt. App. 3482-3483). In some instances, the insurance policies have been the subjects of recent

settlements, which have resulted in the reduction of available limits and the payment of insurance proceeds into funds supervised by the bankruptcy court. Those funds will be available to insureds based on their respective rights under the settled insurance policies; the extent of the parties' rights will be determined in other litigation. See In re Dow Corning Corp., 192 B.R. 415 (Bankr. E.D. Mich. 1996); In re Dow Corning Corp., 198 B.R. 214 (Bankr. E.D. Mich. 1996).

Regardless of whether it has been the subject of a settlement, the 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 (Jt. App. 1274). These policies provide more than \$1 billion of coverage for products and general liability claims asserted against the various insureds. Id. at 2 (Jt. App. 1275). 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.^{1/} 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

^{1/} 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.

of named insureds. Id. Dow Chemical claims that breast implant claims brought against it are covered under these excess policies. Id. See generally Dow Corning, 192 B.R. at 419, 422 (recognizing that Dow Chemical has stated "forceful" and "formidable" arguments that it has property interests in insurance policies under which Dow Chemical and Dow Corning are co-insureds).

Second, a series of other insurance policies purchased by Dow Corning extends millions of dollars of primary coverage to Dow Chemical and Corning. Affidavit of Scott Adams, p. 2, R. 255, attached to Ex. 3 (Jt. App. 1275). 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.

As this Court has already held, if the claims against Dow Chemical and Corning proceed "separate[ly]," the debtor's "insurance coverage may be eviscerated when the proceeds are eventually distributed." Dow Corning, 86 F.3d at 495. This could occur either because of settlements or judgments paid by the Shareholders, or because of the Shareholders' defense expenses, which are covered by some policies. Id. To the extent the insurance policies have been the subjects of settlements, they continue to be subject to competing claims by Dow Corning, Dow Chemical and, in some cases, Corning. See Dow Corning, 192 B.R. at 419-20.

3. Proceedings in the MDL. In the district court's initial transfer ruling, in September 1995, it transferred the claims against the debtor (but not the Shareholders) to the Eastern District of Michigan. In re Dow Corning Corp., 187 B.R. 919, 925-30 (E.D. Mich.

1995). In so ruling, the district court expressly noted that "one or more causation trials held during the estimation process for the purpose of assuring a more accurate estimation can best be accomplished if all cases pending against the Debtor are before one court, the district court where the bankruptcy is pending." Id. at 929. The court indicated that it would remain open to the possibility of having a common issues trial at some point in the future, id. at 930, 932, and in the meantime transferred the claims against the debtor to Judge Pointer in the Northern District of Alabama for consolidated pretrial proceedings, subject to the Bankruptcy Code's automatic stay, id. at 929-30.

Judge Pointer has been overseeing all of the federal breast implant cases since 1992, including claims against the debtor's Shareholders. In re Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992). There are two groups of claims against the Shareholders. First, many claims were filed originally in various state courts and then removed to federal court pursuant to 28 U.S.C. § 1452(a), the bankruptcy removal statute. Dow Corning, 86 F.3d at 486. Several weeks after Judge Hood first declined to transfer those claims, in September 1995, the Panel on Multidistrict Litigation transferred those "removed" cases to Judge Pointer for consolidated pretrial proceedings. Ex. A (attached). Second, there are thousands of other claims against the debtor's Shareholders as to which there is federal jurisdiction for reasons unrelated to the bankruptcy -- for example, diversity jurisdiction. Well before Dow Corning's bankruptcy,

these claims against the Shareholders were consolidated in front of Judge Pointer.

In the order that is the subject of this appeal, Judge Hood refused to fix the Eastern District of Michigan as the trial venue for the claims against the Shareholders. Instead, the court concluded in effect that trials against the debtor's Shareholders should occur in a myriad of state courts around the country.

The practical effect of the orders issued by Judge Hood and the MDL panel is threefold: (1) substantially all of the cases against both Dow Corning and its Shareholders are now before Judge Pointer for pretrial proceedings, regardless of whether they started in state court or federal court (subject to the automatic stay as to Dow Corning); (2) Judge Hood is leaving open the opportunity to have a common issues trial for claims against the debtor; but (3) if the instant decision stands, such a common issues trial would not address the claims against the Shareholders -- even though these are claims brought by the same plaintiffs who have claims against the debtor involving the same Dow Corning implants and the same alleged injuries.

Shortly after this Court's previous decision in this case, Judge Pointer issued Order No. 29B (attached as Ex. B) in which he commented on the possible impact of this Court's ruling on the national breast implant litigation. In that order, Judge Pointer noted that this Court's ruling "provide[d] the seeds for enhancing [the] opportunities" for "efficiently managing complex litigation" -- "at least from the standpoint of those who have longed for other ways to coordinate mass torts pending in both state and federal courts." Id. at 7. Judge

Pointer also indicated his willingness to coordinate pretrial proceedings for all the cases before him and to work with Judge Hood to efficiently manage the litigation. Id. at 5-7.

Judge Pointer has continued to preside over a host of important ongoing pretrial matters in the ensuing months. In particular, pursuant to Fed. R. Evid. 706, Judge Pointer has recently appointed a panel of neutral experts to evaluate and critique the pertinent scientific literature and studies.^{2/} Order Nos. 31, 31A, 31B (attached as Ex. C).

SUMMARY OF ARGUMENT

The claims against the debtor and the claims against the debtor's Shareholders are the very same claims: they are brought by the same plaintiffs, involve the same Dow Corning products, and have the same factual issues. Given that undisputed fact, it is wholly unreasonable to divide the same case in two, so that all of the claims against the debtor will be resolved in one federal court, while the identical claims against the co-defendant Shareholders will be resolved in thousands of separate state court trials.

Proceeding in this manner is a fundamental departure from the approach advanced by this Court in its earlier opinion. Following the model established by the Fourth Circuit in A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), cert. denied, 479 U.S. 876 (1986), the Court

^{2/} Dow Corning had previously moved in the bankruptcy court for appointment of a Rule 706 panel. Bankruptcy Judge Spector has not yet ruled on Dow Corning's request.

concluded that centralizing the claims involving the debtor's products "will further the prompt, fair, and complete resolution of all claims `related to' [the] bankruptcy proceedings." Dow Corning, 86 F.3d at 497. Moreover, the Court held that the prospect that Dow Chemical and Corning may be able to make claims against the joint insurance policies if separate litigation against them continues was "sufficiently immediate" to threaten the loss of hundreds of millions of dollars in joint insurance coverage. Id. at 495.

The district court ignored all of this. Instead, just a few weeks after this Court's mandate issued, it decided to completely abandon any effort at centralization. Under the district court's approach, the result will be a chaotic version of the very "`multiplicity of forums'" that the Bankruptcy Code's transfer provision was designed to "`eliminate.'" Id. at 496 (quoting Robins, 788 F.2d at 1011). Claims against the debtor will be resolved in the federal system as part of the centralized bankruptcy process, but the same claims against the Shareholders will be tried separately in state courts, at great expense. Indeed, as a result of the district court's decision, the debtor is now faced with the very real possibility that millions of dollars in joint insurance proceeds may be lost to it forever. Instead of that insurance money being available to pay the claims of the estate's creditors -- including thousands of women who hope to receive a uniform and equitable recovery via the bankruptcy process -- it may be used to pay the defense costs incurred by the debtor's Shareholders in litigating countless separate suits.

This is surely not what this Court had in mind for the "future course of this massive litigation." Id. at 487. This case cries out for centralization in one forum. The MDL panel has recognized as much. In 1992, the MDL panel consolidated all federal breast implant cases for pretrial purposes. And last September it rejected attempts to separate the claims against the Shareholders and continued its policy of transferring those claims to Judge Pointer for pretrial proceedings. This MDL initiative provides the opportunity for a creative judicial resolution of the entire universe of cases involving the debtor's products. The cases against the Shareholders should be handled the same way as the cases against the debtor: they should remain with Judge Pointer for pretrial proceedings, leaving open the option of having a common issues trial in the Eastern District of Michigan. If and when there is a common issues trial concerning the claims against the debtor, it should also encompass the claims against the Shareholders -- which involve the same products, the same claims, and the same plaintiffs as the claims against the debtor. Unless the cases stay together in a centralized forum, the judiciary will lose any chance of devising an appropriate means for resolving, on a global basis, this mass tort crisis that threatens to overwhelm the American judicial system.

ARGUMENT

I. STANDARD OF REVIEW.

The district court's decision on whether to exercise its power to transfer under 28 U.S.C. § 157(b)(5) is reviewed on appeal under an abuse of discretion standard. In re White Motor Credit, 761 F.2d 270, 275 (6th Cir. 1985).

II. CENTRALIZATION IS REQUIRED IN THIS EXTRAORDINARY CASE.

A. This Court Has Already Recognized That The Need For Centralization Is Particularly Strong With Respect To The Claims Against The Shareholders.

This Court's decision only a few months ago repeatedly emphasized the benefits of keeping all of the litigation concerning Dow Corning's breast implants together in one forum. As explained in detail below, it is clear from that opinion that the claims against the debtor's Shareholders -- like the claims against the debtor -- should be centralized and coordinated in one federal court.

1. Centralization is essential to providing the courts an opportunity to resolve the breast implant claims on a global basis.

In its prior opinion, this Court held that centralization would (1) "increase[] the debtor's odds of developing a reasonable plan of reorganization," (2) benefit all of the tort claimants by reducing the "`stupendous costs'" of trying all of the cases separately, thus increasing the likelihood that all claimants will "`realize reasonable compensation for their claims,'" and (3) serve "the judicial system's interest in allocating its limited resources effectively and efficiently." 86 F.3d at 487, 496 (quoting Robins, 788 F.2d at 1013).

In praising the Fourth Circuit's approach in Robins, this Court recognized that "these objectives could not be achieved until `all [personal injury] claims and suits [were] centralized before a single forum where all interests [could] be heard and in which the interests of all claimants with one another [could] be harmonized.'" Id. at 496-97 (quoting Robins, 788 F.2d at 1014). Indeed, as the Court held, the whole purpose of the power to fix trial venue under 28 U.S.C. § 157(b)(5) is to "centraliz[e]" cases covered by the "broad jurisdictional grant" of 28 U.S.C. § 1334(b), so that the numerous "`parts of a bankruptcy case'" will be litigated in one place, not many. Id. at 496, 497 (quoting Robins, 788 F.2d at 1011).

Having a centralized forum for all of the claims involving the debtor's products is especially critical because of this Court's "primary goal" in this case: "to establish a mechanism for resolving the claims at issue in the most fair and equitable manner possible." Id. at 487. In that connection, the Court stressed the importance of developing a means "`to obviate the tremendous expense of trying these cases separately.'" Id. at 496 (quoting Robins, 788 F.2d at 1013). Specifically, the Court recognized that devising an acceptable "`mechanism for dispute resolution" would be of "`great benefit to all the claimants'" because "`the excessive expense of innumerable trials, stretching over an interminable time, could be avoided.'" Id. (quoting Robins, 788 F.2d at 1013).

The district court made no mention of any of this in its opinion. Rather, the district court's vision for the future course of "one of the world's largest mass tort litigations," id. at 486, was to ignore

entirely this Court's ringing (and repeated) endorsement of centralization. Instead, it concluded that the thousands of cases involving the debtor's products should be tried separately in virtually every jurisdiction in the land, thereby destroying any opportunity for an innovative court to adopt a "mechanism for dispute resolution" that would avoid incurring the staggering costs -- to the parties and the judicial system -- of trying all of these cases separately. Id. at 496 (quoting Robins, 788 F.2d at 1013).

That conclusion is directly at odds with this Court's prior decision. The only way to accomplish this Court's goal of "establish[ing] a mechanism" to resolve all of the claims fairly and efficiently, id. at 487, is to keep all of the cases involving the debtor's breast implants together in one forum. Indeed, the MDL panel has already transferred the removed "related to" cases against the Shareholders to Judge Pointer for pretrial proceedings to effectuate precisely these goals. However, because Judge Pointer has suggested an inclination to follow Judge Hood's lead with respect to venue (Ex. B at 7), Judge Hood's opinion has the potential to undermine, if not frustrate entirely, the judiciary's attempt to centralize even pretrial proceedings. If, on the other hand, the cases remain together in one federal forum, the parties and the judiciary will continue to benefit from coordinating discovery and motion practice.

Moreover, considering the interests of the judicial system as a whole -- the only sensible way to approach the problems posed by this extraordinary litigation -- strongly suggests that the courts should

keep open the possibility of resolving the cases involving the debtor's products on a global basis. This might involve having a common issues trial on causation, or having certain science issues considered by a Rule 706 panel of experts. See generally In re Bendectin Litig., 857 F.2d 290, 294, 308-17 (6th Cir. 1988) (approving the use of a causation trial to determine whether Bendectin causes birth defects), cert. denied, 488 U.S. 1006 (1989). The conclusions reached by a Rule 706 panel, for example, would likely help the parties value the plaintiffs' claims, thus enhancing the prospects for consensual resolution. There certainly is no need at this stage to abandon any of these possible approaches -- and spawn thousands of separate trials that would clog up American courtrooms for years -- yet that is the inevitable result of the district court's precipitous decision. The courts should not "squander[] the very economies which are the purpose of multidistrict transfer." In re Apex Oil Co., 980 F.2d 1150, 1153 (8th Cir. 1992).

The district court's ruling is particularly perplexing given that it has expressly left open the possibility of having a common issues trial with respect to claims against the debtor. But the claims against the debtor are the same as the claims against the Shareholders. There is no reason to fragment those claims -- requiring proceedings in the bankruptcy court and in a state court -- just because a plaintiff has sued the debtor and the debtor's Shareholders for the very same alleged injuries. To the contrary, "the judicial system's interest in allocating its limited resources effectively and efficiently," Dow Corning, 86 F.3d at 487, requires that each plaintiff's injury claim be

litigated only once, not twice. See White Motor, 761 F.2d at 274 (courts "strong[ly]" favor avoiding duplicative proceedings in different courts in deciding transfer motions under § 157(b)(5)); Apex Oil, 980 F.2d at 1153 n.8 (same). Courts in two jurisdictions should not independently resolve identical injury claims alleged by the same plaintiff involving the same product. Cf. Groseclose v. Dutton, 829 F.2d 581, 585 (6th Cir. 1987) ("to have two or more judicial cooks stirring the same broth in the same . . . kitchen would be a recipe for chaos").

Aside from considerations of judicial economy, the monumental expense of trying thousands of claims against the Shareholders separately might well eat up a considerable portion of the joint insurance that the debtor shares with its Shareholders, and thus reduce the estate's assets by millions of dollars. It is to this point that we turn next.

2. Without centralization, the debtor may lose its rights to millions of dollars in joint insurance proceeds.

This Court has already recognized that if litigation against the Shareholders proceeds separately, the joint insurance coverage -- "one of the largest assets of [the] bankruptcy estate," providing hundreds of millions of dollars in coverage -- "may be eviscerated" because Dow Chemical and Corning could "assert mature, liquidated claims against," or establish "priority" to, the insurance proceeds in which the Debtor claims an interest. Dow Corning, 86 F.3d at 494, 495. "[D]efense expenses . . . alone may significantly reduce the pool of [insurance] coverage available to Dow Corning if the claims pending against Dow

Chemical and Corning Incorporated are allowed to proceed separately." Id. at 495.^{3/} In short, as this Court made crystal clear, simultaneous, active litigation against the Shareholders in thousands of cases around the country could well dissipate the insurance proceeds otherwise available for the estate's many other creditors, including the thousands of tort claimants who are looking to the bankruptcy estate for fair and uniform compensation.

The district court, however, completely disregarded this Court's statements about the joint insurance policies. Indeed, it acted as if this Court's discussion of insurance did not exist. Instead, the district court inexplicably reached the wholly unsupported conclusion that the debtor "has not put forth proof that its estate would be dissipated based upon the `threat' posed to those insurance policies by Dow Chemical and Corning Incorporated." R. 549, p. 7 (Jt. App. 587). But there was plenty of "proof." In fact, the evidence before the district court with respect to the joint insurance (see pp. 8-10, supra) was precisely the same as the evidence that led this Court to conclude just a few months ago that there was a "sufficiently immediate" risk that the debtor's insurance coverage "may be eviscerated" if the claims against the debtor's Shareholders "are allowed to proceed separately." 86 F.3d at 495. The evidence demonstrating the risk of "possible depletion of insurance policies"

^{3/} As an illustration of the immense costs of defending thousands of lawsuits all over the country, Dow Corning's defense costs for the three years preceding its Chapter 11 filing -- excluding any payments for settlements or liability awards -- totaled approximately \$190 million. R. 257, ¶ 5 (Jt. App. 1500).

(id.) did not change one iota; after remand, none of the parties submitted any new evidence concerning the joint insurance, and the district court held no hearings on the matter.

At one point in its opinion, the district court noted that "it has been argued" that the joint policies are only excess policies and that Dow Chemical has sufficient primary insurance. R. 549, pp. 6-7 (Jt. App. 586-587). Regardless of what has been "argued," as an evidentiary matter this is simply incorrect. First, the joint insurance includes millions of dollars in primary coverage. See Affidavit of Scott Adams, p. 2, R. 255, attached to Ex. 3 (Jt. App. 1275). Second, as this Court held in the last appeal, the evidence is that there is a serious risk that the "pool of coverage available to Dow Corning" may be "significantly reduce[d]" if the claims against the Shareholders proceed separately. 86 F.3d at 495. The complete absence of evidence supporting the district court's statement is illustrated by its citation for this point, R. 549, p. 7 (Jt. App. 587), to Ex. A to the Tort Committee's brief in the district court. That exhibit is not evidence at all. It is an abstention order issued by a California district court last September that does not discuss what evidence (if any) on insurance was submitted in that proceeding, does not reach any conclusions about insurance, and only notes what the plaintiffs there had argued. See R. 509, Ex. A, p. 5 (Jt. App. 2484).

As noted above, the evidence submitted in this case is that -- as this Court held -- separate litigation against the Shareholders poses a significant threat to the joint insurance proceeds. Since there has

been no new evidence on this issue and the law has not changed, the district court was required to adhere to that conclusion on remand. Except for those limited circumstances, "once an appellate court has ruled on a particular issue, . . . the ruling is final and must be followed by the district court on remand." Miles v. Kohli & Kaliher Assocs., Ltd., 917 F.2d 235, 241 (6th Cir. 1990). Thus, "findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994). See also Petition of United States Steel Corp., 479 F.2d 489, 495 (6th Cir.) (rejecting a factual argument that was inconsistent with the facts as found in a previous appeal), cert. denied, 414 U.S. 859 (1973). Separate litigation against Dow Chemical and Corning could be catastrophic to the debtor's interest in the insurance that it shares with the Shareholders and to the interests of tort claimants seeking compensation through the bankruptcy process. The district court's failure to follow this Court's decision recognizing these facts is unsupportable.

3. There is a close link between claims against the debtor's Shareholders and claims against the debtor.

Besides avoiding the risk that the joint insurance will be consumed by the expense of defending endless state court cases, there are other reasons for keeping the cases against Dow Chemical and Corning together under one roof with the cases against the debtor. As this Court has indicated, the claims against the Shareholders are different from those against the other defendants, all of whom manufactured and sold their own silicone breast implants. Dow Chemical

and Corning never made implants. Rather, the claims against the Shareholders all involve the debtor's products, and each tort claimant is asserting the same claims of injury against the debtor that it is asserting against the Shareholders.

In light of the inseparable link with the claims against Dow Corning, centralization is especially important with respect to the claims against the Shareholders. The success or failure of the debtor's reorganization efforts depends to a large extent on the debtor's ability to resolve the thousands of breast implant claims for which it -- or its assets (such as insurance) -- may be liable. It defies reason to decline to centralize and coordinate claims involving the same products, the same plaintiffs, the same factual allegations, the same evidence, and the same insurance -- particularly when all of these claims may ultimately rest (through contribution or indemnity actions, if successful) at the same place, the debtor's bankruptcy.^{4/}

In short, the claims against the Shareholders and the claims against the debtor are inextricably intertwined. This undeniable fact argues strongly in favor of resolving the claims against the debtor's Shareholders in the same manner as the claims against the debtor. See Dow Corning, 86 F.3d at 492-93 (noting that "[t]he degree of identity between a debtor and nondebtor codefendants" is an "important factor" in finding "related to" jurisdiction and that bankruptcy jurisdiction

^{4/} The Shareholders have already asserted thousands of cross-claims for indemnity and contribution against Dow Corning in breast implant cases. R. 257, p. 2 (Jt. App. 1500).

exists "when the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants").

Plaintiffs themselves have recognized the tight bond between litigation against the debtor and its Shareholders. For example, the Tort Claimants' Committee has argued that prior implant judgments and settlements, including a judgment against Dow Chemical, should be used to estimate the debtor's liability because they are the "best" evidence of the value of the claims pending against the debtor. Motion of Tort Claimants' Committee for Order Approving and Establishing Procedures to Estimate Debtor's Aggregate Tort Liability for Plan Feasibility Purposes, pp. 28, 30-31 (filed March 5, 1996) (Bankr. Docket No. 4980) (Jt. App. 3441, 3443-3444). As a result, the Tort Claimants' Committee informed Bankruptcy Judge Spector that he should consider last year's \$14.1 million Mahlum verdict against Dow Chemical in estimating the debtor's liability. Id. at 31 (Jt. App. 3444).

* * *

In ruling on transfer motions in bankruptcy cases,

"Congress has indicated that courts should not be too quick to abstain from exercising their transfer powers under 28 U.S.C. § 157(b)(5). Transfer should be the rule, abstention the exception."

In re Pan Am. Corp., 950 F.2d 839, 845 (2d Cir. 1991). The general rule of transfer should be followed in this exceptional case. Keeping all of the cases involving the debtor's implants together will maximize the assets in Dow Corning's estate and optimize the chances for a successful reorganization, while at the same time provide the means for

resolving Dow Corning's contingent breast implant liabilities comprehensively, equitably, and efficiently -- in one forum. As this Court has said in another context, resolving a legal problem in a

"fractured, piecemeal fashion . . . is an unsatisfactory procedure both for the potential litigants and for the courts who will adjudicate the various lawsuits. . . . addressing the problem in one lawsuit is preferable to encouraging a patchwork case-by-case approach."

Grubbs v. Norris, 870 F.2d 343, 347 (6th Cir. 1989).

The district court's ruling reflects a radically different approach to this litigation. Because of the close connection between the claims against the debtor and the claims against the debtor's Shareholders, the district court's decision poses a serious threat to the debtor's reorganization. Reversal is imperative.^{5/}

B. The District Court Abused Its Discretion In Denying Transfer On Abstention Grounds.

The reasons already given are enough by themselves to overturn the district court's decision. In addition, the district court's discussion of abstention -- its reason for denying transfer -- is fatally flawed, as we discuss below.

^{5/} In addition, the Court should order the district court to extend the time for the Shareholders to remove additional cases from state court pursuant to Fed. Bankr. R. 9006(b) and 9027. (In the wake of its July 30 order denying transfer, the district court refused the Shareholders' request for additional time to remove. R. 564 (Jt. App. 606). The Shareholders' appeal from the latter order is docketed in this Court as No. 96-2139.) Newly-removed cases could then be transferred by the MDL panel to Judge Pointer for pretrial proceedings.

1. Mandatory abstention does not provide a reason to deny transfer.

a. The first reason why mandatory abstention does not apply is that the thousands of breast implant claims against the debtor's Shareholders cannot possibly be "timely adjudicated" in state court, as required by 28 U.S.C. § 1334(c)(2). Only a tiny handful of those cases will be ready for trial any time soon. The amount of time it would take to try each one separately would not only have a detrimental effect on the overwhelming majority of individual tort claimants, who would be waiting at the end of very long queues in state courts, but it could significantly delay the debtor's reorganization efforts.

The principal purpose of the "timely adjudicat[ion]" requirement is to ensure that state court litigation is not allowed to delay the administration of the bankruptcy or the debtor's ability to reorganize its business. J.D. Marshall Int'l, Inc. v. Redstart, Inc., 74 B.R. 651, 654-55 (N.D. Ill. 1987). In considering this issue, as one must, from the standpoint of the impact on the debtor's bankruptcy, the Court in a mass tort case necessarily has to look at the tort claims as a group rather than focusing on any specific claim in order to determine whether those claims can be "timely adjudicated" in their original courts. See generally Dow Corning, 86 F.3d at 496 ("`if all the claims here had to be tried,'" there would be "`innumerable trials, stretching over an interminable time'") (quoting Robins, 788 F.2d at 1013).

Thus, the district court's assertion that some claims could be tried promptly in a given state court, R. 549, p. 3 (Jt. App. 583),

misses the point. As this Court has already suggested, the only rational way to approach the timely adjudication requirement is to consider the impact of the entire group of cases on the bankruptcy estate. Applying that test -- which the district court did not do -- mandates the conclusion that the thousands of claims at issue here cannot be timely adjudicated if they are tried separately. Quite the contrary -- the best way to resolve all of the claims against the debtor's Shareholders is to keep alive the possibility of devising a means for resolving these claims on a global basis rather than trying every single case separately. And a global dispute resolution mechanism can be adopted and used only if the cases are kept together in one forum.

Furthermore, the district court's statement that "numerous" cases are ready for trial, R. 549, p. 3 (Jt. App. 583), is simply not accurate. The evidence submitted by the claimants identified only 14 specific cases anywhere in the country with actual trial dates, none of which involve the Shareholders. R. 526, Affidavit of D'Juana Parks, ¶ 2 (Jt. App. 2644-2645); R. 530, Affidavit of Michael Schumacher, ¶ 4^{6/} (Jt. App. 2695-2696); R. 508, Ex. 2, ¶ 4, Ex. B (Jt. App. 2436); R. 508, Ex. 3, ¶ 4 (Jt. App. 2438). As for the district court's statement that Judge Pointer and the MDL panel have also identified "numerous"

^{6/} The Schumacher affidavit was attached to an abstention motion filed after the district court ordered, on June 14, 1996, that no additional abstention motions could be filed with the court. R. 532 (Jt. App. 3003). Since the district court thus declined to consider any abstention motions filed after June 14, Schumacher's affidavit (and other post-June 14 material submitted by the tort claimants) should not be considered by this Court either. In re Application for Access to Sealed Transcripts, 913 F.2d 89, 96-97 (3d Cir. 1990).

cases ready for trial, R. 549, p. 3 (Jt. App. 583), the cited orders return a grand total of 19 cases to state court for trial; none of these involve the debtor's Shareholders either. See Ex. D (attached).^{2/}

All of this is obviously just a drop in the bucket compared to the thousands upon thousands of cases that are without trial dates and are not even close to being ready for trial. As a result, the plaintiffs fell far short of meeting their burden of proving that the cases will be tried in timely fashion in state court.

The reality is that the overwhelming majority of breast implant claims against the Shareholders are not set for trial or are anywhere near ready for trial. Thus, if the cases are sent to state courts, Dow Corning's ability to administer its estate and formulate a plan may be impeded by the inevitable, lengthy delays inherent in resolving, in their entirety, the breast implant claims involving Dow Corning's products. See White Motor, 761 F.2d at 274 (if the debtor's insurance coverage is not "adequate to cover all filed claims, it would be necessary to liquidate all claims before any insurance money was paid out"). The best way to accomplish the enormous task of resolving all of the claims concerning the debtor's products promptly and economically is to centralize the litigation in one forum, thus

^{2/} Judge Pointer is currently considering whether to remand several hundred other cases -- including many cases against Dow Chemical, but not against the debtor -- to the state courts in which they originated. Order No. 34 (attached as Ex. E). At present, this issue is still being briefed.

preserving the opportunity to coordinate discovery and resolve common issues in one proceeding, rather than thousands.^{8/}

The vast majority of states have not established any centralized coordination of breast implant suits, and only a federal court has the power to coordinate these cases on a national level and resolve common issues in a single proceeding. As a result, if the claims against the Shareholders are dispersed around the country for litigation, it may be a decade or more before the lawsuits are resolved, hardly a "timely adjudication." That would undermine the central purpose of the bankruptcy scheme: to allow consolidation of all claims that may affect a bankruptcy in order to facilitate the debtor's ability to reorganize promptly. J.D. Marshall Int'l, 74 B.R. at 655.

The length of time it would take to try all of these cases separately is especially important here because Dow Corning filed for reorganization under Chapter 11; there is an "urgency" in facilitating the debtor's reorganization in a Chapter 11 proceeding. In re World Solar Corp., 81 B.R. 603, 612 (Bankr. S.D. Cal. 1988). "Lengthy delays

^{8/} For example, Judge Pointer has already granted final summary judgment in favor of Corning, In re Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1455 (N.D. Ala. 1995), and has narrowed (and, pursuant to some pending motions, could further narrow) the remaining issues with respect to Dow Chemical. In addition, Judge Pointer currently has before him Dow Chemical's motion to certify for immediate appeal, under 28 U.S.C. § 1292(b), the court's ruling on Dow Chemical's motion for summary judgment. A ruling by the Eleventh Circuit in Dow Chemical's favor on the merits, in whole or in part, would, of course, resolve or, at a minimum, further streamline the litigation against Dow Chemical. As these examples illustrate, the possibility of a global resolution of the claims against the Shareholders, and of avoiding the need for repetitive, duplicative briefing and/or trials in a series of courts, is obviously enhanced if all of the cases are kept together in federal court.

in . . . resolving other claims which might substantially enhance the viability of the estate, may prove fatal to reorganization efforts." Id. See also Dow Corning, 86 F.3d at 496-97 (indicating that a "`mechanism for dispute resolution'" in a centralized forum "`where all interests could be heard'" would "further the prompt, fair, and complete resolution of all claims" and would "increase[] the debtor's odds of developing a reasonable plan of reorganization") (quoting Robins, 788 F.2d at 1013-14); World Solar Corp., 81 B.R. at 612-13 (noting that "[t]he possibility of prosecuting a multiplicity of suits in various Los Angeles County Superior Court divisions and the potential for protracted litigation" could "endanger[] the reorganizational efforts of the debtor").

b. In order for mandatory abstention to serve as the basis for denying transfer, the plaintiffs must also demonstrate that an action with respect to the claims against Dow Chemical and Corning "could not have been commenced in a court of the United States" absent "related to" jurisdiction. 28 U.S.C. § 1334(c)(2). No such showing is possible here.

The district court concluded that this requirement had been satisfied because, absent the bankruptcy, the Eastern District of Michigan would not have jurisdiction over the claims at issue. R. 549, pp. 2-3 (Jt. App. 582-583). But that is the wrong test. The question is whether any federal court -- "a court of the United States" in the words of § 1334(c)(2) -- would have had jurisdiction over the claims against the Shareholders without the existence of the bankruptcy case. And the answer to that question is "yes."

Section 1334(c)(2) requires a claim-by-claim analysis in determining whether the claims could have been brought in federal court; the statute refers to "a State law claim or State law cause of action . . . with respect to which an action could not have been commenced" in federal court absent jurisdiction under § 1334(b). 28 U.S.C. § 1334(c)(2) (emphasis added). (This provision is thus parallel with the bankruptcy removal statute, 28 U.S.C. § 1452(a), which permits removal of "any claim or cause of action.") Accordingly, a mandatory abstention analysis involves determining "whether the factors calling for mandatory exemption under Section 1334(c)(2)" apply to "the claims pending against the nondebtor defendants." Dow Corning, 86 F.3d at 497-98 (emphasis added). See also, e.g., J.D. Marshall, Int'l, 74 B.R. at 654 ("`a district court must abstain from hearing a pure state law claim . . . where the claim can be timely adjudicated in state court'") (emphasis added); Macon Prestressed Concrete Co. v. Duke, 46 B.R. 727, 729 (M.D. Ga. 1985) ("abstention would be mandatory if MPC's counterclaim could not have been commenced in this federal court" absent bankruptcy jurisdiction) (emphasis added), overruled on other grounds, Tidwell v. Omni Petrol., Inc., 164 B.R. 188 (M.D. Ga. 1994).

In this case, the claims against the Shareholders could have been filed in federal court based on diversity of citizenship under 28 U.S.C. § 1332. That many plaintiffs may have named non-diverse parties in order to defeat diversity and frustrate removal (prior to Dow Corning's bankruptcy filing) is irrelevant to application of

§ 1334(c)(2).^{2/} Since the claims against the Shareholders could have been filed in federal court on diversity grounds without regard to whether they are "related to" Dow Corning's bankruptcy case, they are not subject to mandatory abstention.

2. Discretionary abstention does not support denial of transfer either.

The fundamental flaw in the district court's discretionary abstention analysis is that it is contrary to this Court's previous decision in this case. The Court noted that the principal focus when considering discretionary abstention is whether the retention of jurisdiction "would promote or impair efficient and fair adjudication of [the] bankruptcy case[]." Dow Corning, 86 F.3d at 497 (quoting In re Salem Mortgage, 783 F.2d 626, 635 (6th Cir. 1986)). And it is clear from that opinion as a whole that centralization is the only way to achieve "efficient and fair adjudication" in this mass tort case. The Court not only repeatedly recognized and endorsed the benefits of retaining in one forum all of the claims against the Shareholders, but it specifically acknowledged the risk that Dow Corning's rights to millions of dollars of joint insurance proceeds might be eroded by massive, simultaneous, and uncoordinated litigation against the Shareholders. Dow Corning, 86 F.3d at 494-97.

As we have already discussed, the district court did not pay the least attention to this Court's statements about centralization.

^{2/} For example, Texas plaintiffs routinely attempt to defeat diversity jurisdiction by naming physicians as defendants, but they always later drop the doctors from the cases. Marcia Angell, Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case 137 (1996).

Instead, the court's discretionary abstention analysis focused on other items. R. 549, pp. 6-7 (Jt. App. 586-587).

First, the district court thought that there was no proof that the joint insurance proceeds might be dissipated if all of the claims against the Shareholders were tried separately. Id. at 7 (Jt. App. 587). For the reasons already explained, that conclusion is directly at odds with both the evidence and this Court's prior decision. See pp. 20-23, supra.

Second, the district court also believed that keeping the claims against the Shareholders in one forum would be contrary to § 524(e) of the Bankruptcy Code. R. 549, p. 7 (Jt. App. 587). That is not so. Section 524(e) provides that the liability of non-debtors is not automatically affected just because a debtor receives a discharge. That provision has absolutely no bearing on a court's power to devise a means to resolve, on a global basis, all claims involving the debtor's products. And the district court's discussion of § 524(e) is completely contrary to the Robins model -- praised enthusiastically in this Court's prior opinion -- of establishing just such a mechanism in a mass tort case. If the district court's interpretation of § 524(e) is correct, that would mean that courts in cases involving non-debtors that affect the bankruptcy estate would never fix the venue for trial in the bankruptcy court's district. That would render "related to" jurisdiction and the transfer power in § 157(b)(5) a nullity.

Finally, the district court's statements about the estimation process are also misguided. We have not argued that the courts must

"[w]ait[] until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated." R. 549, p. 6 (Jt. App. 586). To the contrary, our position is that keeping the cases together gives the judiciary a chance to come up with a mechanism for global resolution that would greatly assist with the estimation process and confirmation of a reorganization plan. Furthermore, if "various trials proceed against the nondebtors" (id.) now, that may have a detrimental effect on the estimation process with respect to the claims against the debtor; the claimants have already attempted to use a verdict against Dow Chemical as the "best" evidence of the value of the claims against the debtor. See p. 25, supra.

* * *

Trying all of these cases separately in courts across the country would be wholly inconsistent with this Court's objective of resolving this enormous litigation in any sort of coordinated, economical fashion. Under the circumstances, there was absolutely no reason for the district court to deny transfer on the ground that discretionary abstention would be appropriate.

III. THE CASES AGAINST THE SHAREHOLDERS SHOULD REMAIN TOGETHER FOR PRETRIAL PROCEEDINGS WITH JUDGE POINTER.

For all of the reasons we have discussed, it is essential that the claims against the debtor and its Shareholders be coordinated in one forum and that the courts keep alive the possibility of developing a global dispute resolution mechanism. Right now, Judge Pointer is coordinating pretrial proceedings for (1) the breast implant claims

against the Shareholders that were removed from state court pursuant to 28 U.S.C. § 1452(a) and were subject to the transfer motion, and (2) the breast implant claims against the Shareholders that were filed originally in federal court or were removed on the basis of diversity or federal question jurisdiction. In addition, the breast implant claims against the debtor are also in front of Judge Pointer, subject to the automatic stay, and as noted earlier, Corning has received summary judgment in its favor as to all claims against it.

Leaving the cases with Judge Pointer for the time being would be fully consistent with this Court's prior ruling on the power to transfer under § 157(b)(5).^{10/} Not only would this keep open the option of attempting to devise a dispute resolution mechanism that could obviate the need for "innumerable trials, stretching over an interminable time," 86 F.3d at 496 (quoting Robins, 788 F.2d at 1013), but pretrial activity would continue to be conducted in a forum long experienced in coordinating proceedings in these very types of cases. This would obviously assist in protecting the debtor's interest in the joint insurance proceeds, which depends on coordinated proceedings. It would also protect the judicial system from being overwhelmed by "one of the world's largest mass tort litigations." Id. at 486.

CONCLUSION

The district court's decision could have disastrous consequences -- for the debtor and its rights with respect to the joint insurance

^{10/} This Court expressly "limited" its holding on transfer to "the trial venue of the breast implant claims at issue." Dow Corning, 86 F.3d at 497 n.12 (emphasis added).

proceeds; for the debtor's creditors, including tort claimants expecting fair and uniform compensation through the bankruptcy court; and for the judicial system as a whole. If, as the district court contemplates, the same claims involving the debtor's products will be fragmented in multiple jurisdictions, American courts will be congested for years with thousands upon thousands of these cases and the reorganization efforts of a Fortune 500 company may be imperiled.

To prevent this from happening, this Court should reverse the district court's decision and rule that the claims against the debtor's Shareholders should not be separated from the claims against the debtor. Thus, this Court should make clear that the claims against the Shareholders should remain with Judge Pointer for pretrial purposes, order that the Shareholders be included in any common issues trial concerning the debtor's products that is held in the Eastern District of Michigan, give the Shareholders 30 days to remove additional cases now pending against them in state courts, and order such other relief as is just.

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Respectfully submitted,

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