
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. |) | |

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

Herbert L. Zarov
James C. Schroeder
Theresa A. Canaday
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603-3441
(312) 782-0600

Attorneys for The Dow
Chemical Company

William D. Eggers
NIXON HARGRAVE DEVANS
& DOYLE LLP
P.O. Box 1051
Clinton Square
Rochester, NY 14603
(716) 263-1000
Attorneys for Corning
Incorporated

Barbara J. Houser
George H. Tarpley
SHEINFELD, MALEY & KAY P.C.
1700 Pacific Avenue, Suite 4400
Dallas, TX 75201-4618
(214) 953-0700

Attorneys for Dow Corning
Corporation

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| INTRODUCTION | 1 |
| I. THE CLAIMS AGAINST THE SHAREHOLDERS SHOULD BE CENTRALIZED WITH THE CLAIMS AGAINST THE DEBTOR. | 3 |
| A. The Courts Should Not Abandon Any Possibility Of Having A Common Issues Trial For All Of The Claims Involving The Debtor's Products. | 4 |
| B. Separate Trials Against The Shareholders Could Have A Devastating Effect On The Debtor's Interest In The Joint Insurance. | 14 |
| II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING TRANSFER ON ABSTENTION GROUNDS. | 16 |
| A. Plaintiffs Have Not Satisfied All Of The Requirements For Mandatory Abstention. | 16 |
| B. Transfer Should Not Be Denied On The Basis Of Discretionary Abstention. | 19 |
| CONCLUSION | 21 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page(s)</u> |
|---|----------------|
| <u>"Agent Orange" Prod. Liab. Litig., In re,</u> 611 F. Supp. 1223 (E.D.N.Y. 1985), <u>aff'd,</u> 818 F.2d 187 (2d Cir. 1987), <u>cert. denied,</u> 487 U.S. 1234 (1988) | 9 |
| <u>A.H. Robins Co. v. Piccinin,</u> 788 F.2d 994 (4th Cir.), <u>cert. denied,</u> 479 U.S. 876 (1986) | 18 |
| <u>American Medical Systems, Inc., In re,</u> 75 F.3d 1069 (6th Cir. 1996) | 11 |
| <u>Bendectin Litig., In re,</u> 857 F.2d 290 (6th Cir. 1988), <u>cert. denied,</u> 488 U.S. 1006 (1989) | 7, 8 |
| <u>Chapman, In re,</u> 132 B.R. 153 (Bankr. N.D. Ill. 1991) | 19 |
| <u>Cimino v. Raymark Industries, Inc.,</u> 751 F. Supp. 649 (E.D. Tex. 1990) | 10 |
| <u>Dow Corning Corp., In re,</u> 86 F.3d 482 (6th Cir. 1996), <u>petition for cert. filed,</u> 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) | <u>passim</u> |
| <u>Dow Corning Corp., In re,</u> 187 B.R. 919 (E.D. Mich. 1995) | 4 |
| <u>Dow Corning Corp., In re,</u> 192 B.R. 415 (Bankr. E.D. Mich. 1996) | 15 |
| <u>Dow Corning Corp., In re,</u> 198 B.R. 214 (Bankr. E.D. Mich. 1996) | 15 |
| <u>Georgine v. Amchem Products, Inc.,</u> 83 F.3d 610 (3d Cir. 1996), <u>cert. granted,</u> 65 U.S.L.W. 3159 (U.S. Nov. 1, 1996) (No. 96-270) | 11 |
| <u>Jenkins v. Raymark Industries, Inc.,</u> 782 F.2d 468 (5th Cir. 1986) | 8, 13, 18 |
| <u>Joint Eastern & Southern Dist. Asbestos Litig., In re,</u> 129 B.R. 710 (E. & S.D.N.Y. 1991), <u>vacated</u> <u>on other grounds,</u> 982 F.2d 721 (2d Cir. 1992) | 4 |
| <u>McGhan Medical Corp. v. Superior Court,</u> 14 Cal. Rptr. 2d 264 (App. 1992) | 3, 17, 18 |
| <u>Rhone-Poulenc Rorer Inc., In re,</u> 51 F.3d 1293 (7th Cir.), <u>cert. denied,</u> 116 S. Ct. 184 (1995) | 11 |

| <u>Cases</u> | <u>Page</u> |
|---|-------------|
| <u>Rusty Jones, Inc., In re</u> , 124 B.R. 774 (Bankr. N.D. Ill. 1991) | 19 |
| <u>Silicone Gel Breast Implants Prods. Liab. Litig., In re</u> , 793 F. Supp. 1098 (J.P.M.L. 1992) | 10 |
| <u>Sterling v. Velsicol Chem. Corp.</u> , 855 F.2d 1188 (6th Cir. 1988) | 9 |
| <u>White Motor Credit, In re</u> , 761 F.2d 270 (6th Cir. 1985) | 20 |

| <u>Statutes</u> | <u>Page(s)</u> |
|----------------------------------|----------------|
| 28 U.S.C. § 157(b)(5) | 5, 12, 13, 17 |
| 28 U.S.C. § 1334(c)(2) | 2, 16, 19 |

| <u>Other Authorities</u> | <u>Page(s)</u> |
|---|----------------|
| <u>Manual for Complex Litigation (Third)</u> (1995) | 8, 10 |

INTRODUCTION

The brief filed by the Official Committee of Tort Claimants ("TC Br.") is either conspicuously silent on, or barely mentions, a number of issues that go to the heart of our argument that the claims against the debtor's Shareholders should be kept together with the claims against the debtor. Most significantly:

- ! The Tort Committee does not dispute that the claims against the debtor and the claims against its Shareholders are the same; they are brought by the same plaintiffs, involve the same products, and raise the same factual issues.
- ! Nor does the Tort Committee contest the fact that, as a matter of judicial efficiency, it makes much more sense to try the identical causation issue -- do Dow Corning's implants cause certain diseases? -- just once, in a common issues trial, not thousands of times.
- ! The Tort Committee tries to pretend that the joint insurance that the debtor shares with Dow Chemical and Corning does not exist; the Committee's only argument about the insurance is buried in a footnote on page 35. And even then, the Committee does not seriously dispute that the debtor's estate -- and thus the debtor's creditors, including tort claimants -- may be deprived of hundreds of millions of dollars in joint insurance proceeds if courts around the country proceed with separate trials against the Shareholders.

Rather than contest these fundamental points, the Committee's submission rests, at bottom, on the idea that there is no hope of devising a means of resolving all of the claims involving the debtor's implants on a global basis. But that is flatly inconsistent with this Court's earlier decision: "our primary goal is to establish a mechanism for resolving the claims at issue in the most fair and equitable manner possible." In re Dow Corning Corp., 86 F.3d 482, 487 (6th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3167 (U.S. Aug.

28, 1996) (No. 96-330). Instead of keeping open the option of adopting such a global dispute resolution mechanism, the Committee would prefer just to give up, thereby consigning hundreds of judges to the fate of trying thousands of individual cases involving the debtor's products. This would be the most inefficient means imaginable for dealing with "one of the world's largest mass tort litigations." Id. at 486. What is more, this approach threatens to deplete the size of the debtor's estate considerably if the joint insurance is eroded by the Shareholders' litigation expenses.

Wholly apart from the risk that the insurance proceeds may be drained away, the enormous amount of time it would take to litigate the claims separately is one reason why the district court, in denying transfer of the claims against the Shareholders, incorrectly concluded that mandatory abstention applied. The Committee concedes that the "timely adjudication" element must be considered by looking at the cases as a whole; from this perspective, it is evident that timely adjudication is much more likely to occur if an attempt is made to resolve all of the claims against the debtor's products on a global basis. The other reason why mandatory abstention does not apply is that 28 U.S.C. § 1334(c)(2) requires mandatory abstention only as to "State law claim[s] or State law cause[s] of action . . . with respect to which an action could not have been commenced" in federal court. The claims against the Shareholders could have been filed in federal court, and thus they are not subject to mandatory abstention.

These arguments, as well as others, are developed in further detail in the pages that follow. For all of these reasons, the district court's decision must be reversed.^{1/}

I. THE CLAIMS AGAINST THE SHAREHOLDERS SHOULD BE CENTRALIZED WITH THE CLAIMS AGAINST THE DEBTOR.

One of the decisions cited by the Committee (TC Br. 7) recognizes that assessment of "the benefit to be derived by coordination" is "not necessarily made better by a trial court judge than by an appellate tribunal." McGhan Medical Corp. v. Superior Court, 14 Cal. Rptr. 2d 264, 269 (App. 1992). To the contrary, "this is a decision which requires the `exercise [of] judgment about the values that animate legal principles,' and hence `the concerns of judicial administration . . . favor the appellate court.'" Id.

This case makes the wisdom of these statements abundantly clear. In its prior opinion, this Court stressed "the judicial system's interest in allocating its limited resources effectively and efficiently," Dow Corning, 86 F.3d at 487; endorsed the "goal of centralizing the administration of a bankruptcy estate," id. at 497; and adopted an approach that would "further the prompt, fair, and complete resolution of all claims `related to' bankruptcy proceedings," id. In short, the Court approached the problems posed by this massive litigation by considering the best means to resolve the litigation in

^{1/} On the issue of appellate jurisdiction, the Committee (TC Br. 11-13) briefly summarizes its previous submissions and incorporates them by reference. Our explanation as to why this Court, for a number of reasons, has jurisdiction is contained in our September 3, 1996 response to the Committee's motion to dismiss. Rather than repeat those arguments, we incorporate that document by reference.

its entirety, with particular attention paid to the effect on the judicial system as a whole. It is precisely that broader perspective that is entirely absent from the district court's decision.^{2/}

A. The Courts Should Not Abandon Any Possibility Of Having A Common Issues Trial For All Of The Claims Involving The Debtor's Products.

Any common issues trial that occurs as part of the bankruptcy process will consider whether Dow Corning's implants cause various types of diseases; the district court has indicated it would entertain a motion to have such a trial with respect to the claims against the debtor. In re Dow Corning Corp., 187 B.R. 919, 929, 930, 932 (E.D. Mich. 1995). But if the district court's most recent decision stands, any hope that a common issues trial may address all of the claims involving the debtor's products will vanish. That is because the Shareholders will be barred from that proceeding; all of the claims against them -- which involve precisely the same causation issue as the claims against the debtor -- will be litigated separately. That sort of duplication would be senseless; there is no reason to litigate the same complex causation question in thousands of cases, instead of one. The purpose of 28 U.S.C. § 157(b)(5) is to "eliminate the multiplicity

^{2/} Another case cited by the Committee, In re Joint Eastern & Southern Dist. Asbestos Litig., 129 B.R. 710 (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992) (see TC Br. 32 n.23), recognizes the need to consider systemic interests in mass tort cases. In that decision, Judge Weinstein noted that "[s]everal commentators have recounted the inefficiencies and inequities of case-by-case adjudication in the context of mass tort disasters." 129 B.R. at 750. The court went on to state that "[a] total national consolidation and integrated solution to the asbestos problem is needed if we are to adequately compensate the injured without destroying the effectiveness of much of our industry and some of our courts." Id. at 908-09.

of forums for the adjudication of parts of a bankruptcy case,'" not perpetuate them. Dow Corning, 86 F.3d at 496 (emphasis added).

For that reason, as noted earlier, this Court has already identified its "primary goal" in this litigation as the establishment of a "mechanism for resolving the claims at issue" fairly and equitably. Id. at 487. Achieving that goal, by judicial adoption of a mechanism that might resolve all of the cases involving the debtor's products, is possible only if the cases against the Shareholders are kept together with the cases against Dow Corning. And the effectiveness of other devices that might assist in the ultimate resolution of the claims concerning the debtor's products -- such as a Rule 706 panel of neutral experts to examine the science issues -- obviously would be enhanced if those claims are consolidated in one forum.

The Committee, however, is not concerned with judicial efficiency or with devising a means for the courts to resolve these cases on a global basis. The only "dispute resolution mechanism" that interests the Committee is "settlement." TC Br. 39. But settlement may be difficult to achieve without a decision on the threshold issue of whether the debtor's products cause certain diseases. The parties currently have widely divergent views on that question, and a common issues trial to resolve that issue will provide both sides with important information concerning the value, if any, of the plaintiffs' claims. Thus, keeping the claims involving the debtor's products together is likely to enhance the prospects for settlement.

As for other possibilities, the Committee does not even attempt to provide an alternative means for achieving an efficient global resolution, it says nothing at all about a Rule 706 panel, and it offers only a series of meritless arguments against having a common issues trial.

1. The contention that the Shareholders "never hav[e] requested" a common issues trial (TC Br. 36) is nonsense. The Shareholders have said all along that there should be a common issues trial on whether Dow Corning's implants cause various types of diseases and that such a trial should include the claims against the Shareholders. Dow Chemical and Corning made these points (a) when joining in Dow Corning's initial 1995 transfer motion, R. 185, pp. 1-5, 11-13 (Jt. App. 861-865, 871-873); R. 190, pp. 2-6, 14-15 (Jt. App. 883-887, 895-896); (b) in their appellate briefs in the prior appeal (Nos. 95-2034, 95-2107), Brief of Appellants, pp. 10 n.6, 14; Reply Brief of Appellants, pp. 2-3; (c) on remand in the district court, R. 538, pp. 2-4 (Jt. App. 3103-3105); (d) in briefing in the bankruptcy court concerning the estimation process, Bankr. Docket No. 5757, pp. 24-26 (Jt. App. 3450-3452); and (e) in our opening brief in this appeal. Dow Corning has also argued from the outset in favor of a common issues trial that would include the Shareholders. E.g., R. 2, p. 4 (Jt. App. 123); R. 3, pp. 2-3, 10-11, 15-18 (Jt. App. 206-207, 214-215, 219-222). Any suggestion that we "have not sought a mass `common issues' trial" (TC Br. 36) is preposterous.

2. The Committee then goes on to assert that a common issues trial would be improper and that a "consolidated causation trial of

thousands (or even hundreds) of medical device product liability cases has been held only once." TC Br. 37 (emphasis added). The first problem with the Committee's position is its narrow focus on medical products; there is no reason to limit the universe of pertinent precedent to cases involving "medical devices."

In any event, we acknowledge that a common issues trial like the one we have proposed is not an everyday occurrence -- but this is an unusual case. So was In re Bendectin Litig., 857 F.2d 290 (6th Cir. 1988), cert. denied, 488 U.S. 1006 (1989), where this Court approved the use of a trial in which the jury decided only whether Bendectin causes birth defects. Id. at 294, 308-17. In fact, the Court remarked that "to have broadened the issues beyond that of causation would have occasioned a real risk of overencumbering the jurors and impairing their ability to reach a knowledgeable and intelligent verdict based upon the evidence and upon the law." Id. at 326.^{3/}

One important reason why a causation-only trial was appropriate in the Bendectin case was that, if the defendants prevailed (which they did), it would obviate the need for trying all of the other issues in individual cases, a daunting task that threatened to "`substantially immobiliz[e] the entire Federal judiciary.'" 857 F.2d at 316. The same is true here. If the finder of fact in a common issues trial

^{3/} It is not true that the causation trial there was "largely consensual." TC Br. 37. See 857 F.2d at 306 ("The plaintiffs challenge the district judge's decision to trifurcate this case by trying only the issue of proximate causation. . . . plaintiffs timely preserved their objection to this procedure").

concludes that Dow Corning's implants do not cause disease, thousands of claims against the debtor and the Shareholders will be resolved at once; other factual issues would not need to be tried at all. Aside from motion practice in the MDL proceeding, this is the only way for the courts to decide such a large number of cases at the same time. This tremendous potential for time savings counsels in favor of a common issues trial here. See Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 473 (5th Cir. 1986) (approving the use of a consolidated trial to litigate whether the defendants' products were defective and the state of the art defense in thousands of asbestos cases; "[t]o the extent defendants win, the elimination of issues and docket will mean a far greater saving of judicial resources").

The magnitude of the present litigation would justify a common issues trial even it had never been done before. See Manual for Complex Litigation (Third) § 33.2 (1995) ("Mass tort litigation has stimulated a considerable amount of creativity and experimentation by attorneys and judges pressed to find ways of coping with the volume of litigation"; "`both justice and efficiency can be achieved by those willing to stretch the bounds of the existing procedural scheme to expedite the handling of these cases'"). But that is not the situation. Not only does this Court's decision in Bendectin support the use of a causation-only trial, but that case does not stand alone. Courts in other product liability cases have also recognized the propriety of resolving causation questions (and other common issues) on a consolidated basis.

For example, in Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988), where more than 100 plaintiffs alleged harm from hazardous chemicals, this Court held that "many common issues of fact and law will be capable of resolution on a group basis," including whether "the particular contaminants were capable of producing injuries of the types allegedly suffered by the plaintiffs." Id. at 1200. In the trial in that case, the district court first determined "a kind of generic causation -- whether the combination of the chemical contaminants and the plaintiffs' exposure to them had the capacity to cause the harm alleged," which "still left the matter of individual proximate cause to be determined." Id. This Court stated that "[a]lthough such generic and individual causation may appear to be inextricably intertwined," the finder of fact could initially "assess the defendant's potential liability for its conduct without regard to the individual components of each plaintiff's injuries." Id. If that threshold issue was resolved in plaintiff's favor, it was then "the responsibility of each individual plaintiff to show that his or her specific injuries or damages were proximately caused by" defendant's products. Id.^{4/}

^{4/} Another mass tort case, the Agent Orange litigation, did not go to trial, but the plaintiffs who opted out of the settlement lost on summary judgment because, inter alia, they could not establish that the defendants' products caused harm, a ruling that applied across the board to all of the opt-outs. In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1231-63 (E.D.N.Y. 1985), aff'd, 818 F.2d 187, 193 (2d Cir. 1987) ("epidemiological studies . . . fail to show that Agent Orange was hazardous"), cert. denied, 487 U.S. 1234 (1988). See also Cimino v. Raymark Industries, Inc., 751 F. Supp. 649, 653 (E.D. Tex. 1990) (court tried issues that were common to 2,300 plaintiffs, (continued...))

Similarly, the Manual for Complex Litigation (Third) specifically mentions the breast implant litigation when observing that "the need for special procedures has been starkly demonstrated by the rapidly increasing volume of litigation involving . . . numerous claims arising from discrete uses of or exposures to widely distributed products or substances, usually over an extended period of time." Id. § 33.2. These "special procedures" include the use of a "consolidated trial . . . on common issues only, reserving the individual issues for individual or smaller consolidated trials." Id. § 33.28. Whether such a trial "is permissible or desirable will depend in large part on the extent to which the evidence in the cases is common." Id. § 21.631.

This litigation meets that test easily; the question whether Dow Corning's implants cause different types of disease will involve precisely the same evidence regardless of whether the defendant is Dow Corning or one of Dow Corning's Shareholders. Indeed, in centralizing these cases in the first place, the MDL panel noted that "[t]he actions present complex common questions of fact, as nearly all responding parties have acknowledged, on the issue of liability for allegedly defective silicone gel breast implants." In re Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1100 (J.P.M.L. 1992).

The Committee relies upon In re American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996) (TC Br. 37 n.27), but that decision is not

⁴(...continued)
including whether the defendants' asbestos products were defective and unreasonably dangerous).

inconsistent with any of the foregoing authorities. For one thing, that case involved whether common issues predominated when considered in the context of the whole case. This appeal, in contrast, presents the entirely different question of whether common issues presented by all of the claims against the debtor and its Shareholders can be resolved in a consolidated trial. In addition, in the AMS litigation the MDL panel had denied a request to consolidate all federal penile prosthesis cases because of a lack of common factual issues. Id. at 1081-82. As just noted, the MDL panel reached the opposite conclusion in this case. Finally, there was "no common cause of injury" in AMS. Id. at 1084. Here, plaintiffs contend that there is a common cause; they all allege that they have contracted certain diseases because of silicone.^{5/}

3. There is no right to have cases considered only "by one jury." TC Br. 38. Rather, the Seventh Amendment provides that in federal jury cases, facts determined by the first jury cannot be "reexamined by another finder of fact." In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir.) (emphasis added), cert. denied, 116 S. Ct. 184 (1995). (If it were otherwise, appellate courts could not send a case back for trial on a limited issue, such as damages, while letting the first jury's decision stand on another issue, like

^{5/} In Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996), cert. granted, 65 U.S.L.W. 3159 (U.S. Nov. 1, 1996) (No. 96-270), as in AMS, the court held that class certification was not proper because common issues did not predominate. In so holding, however, the court noted that "[t]he capacity of asbestos fibers to cause physical injury is surely a common question," but "that issue was settled long ago." Id. at 626 (emphasis added). In this case, a common issues trial is warranted precisely because the "capacity" of Dow Corning's implants "to cause physical injury" has not been settled in court.

liability.) A common issues trial here would not violate the Seventh Amendment; the verdict in that trial would conclusively resolve whether the debtor's products were capable of causing the diseases that plaintiffs allegedly have contracted, and that issue could not be relitigated in any subsequent proceedings.

Thus, plaintiffs would have to prevail "twice" (TC Br. 38), but on separate issues. It is no different from a plaintiff having to win on each of several special interrogatories on a verdict form, or to establish loss causation and transaction causation in order to win a securities fraud suit. A plaintiff always has to establish a series of elements in order to recover for any cause of action.

4. The Committee also contends that the "suggestion that there is an overarching policy of centralizing all `related to' claims in one court is belied by the structure of § 157(b)(5) itself." TC Br. 41. This is an odd argument. If anything was settled in the last appeal, it was that § 157(b)(5) permitted courts to "fix venue for cases pending against nondebtor defendants which are `related to' a debtor's bankruptcy proceedings." Dow Corning, 86 F.3d at 497. The Court explained specifically that this "further[ed] the prompt, fair, and complete resolution of all claims `related to' bankruptcy proceedings," in accordance with "the oft-stated goal of centralizing the administration of a bankruptcy estate." Id.

5. Keeping all of the claims involving the debtor's products together would not bring the cases "to a screeching halt." TC Br. 41.

On the contrary, centralization would facilitate a prompt resolution. First, discovery and other pretrial activities can continue (and have continued) in a coordinated, coherent fashion under the supervision of the MDL court. Second, a common issues trial is the most promising means of attempting to resolve thousands of claims at one time; except for a global summary judgment ruling, this is the only prospect for an expeditious judicial resolution of all of the claims involving the debtor's products.

Proceeding in this fashion would not result in all of these cases sitting in Detroit in perpetuity, as the Committee suggests. See TC Br. 25, 41. A victory for the defendants on causation in a common issues trial would definitively resolve thousands of claims. If, on the other hand, the plaintiffs prove in a common issues trial that the debtor's implants cause certain types of disease, the district court could then consider whether to transfer some of those remaining cases to "the district court[s] in the district[s] in which the claim[s] arose," 28 U.S.C. § 157(b)(5), to try the remaining issues, thus distributing the burden more evenly throughout the court system. At a minimum, however, a decision on whether Dow Corning's products cause disease will have narrowed and simplified the issues still left to be tried. See Jenkins, 782 F.2d at 472-73 (findings on common issues will "significantly advance the resolution of the underlying hundreds of cases").

B. Separate Trials Against The Shareholders Could Have A Devastating Effect On The Debtor's Interest In The Joint Insurance.

The Tort Committee says almost nothing about the fact that separate trials against the Shareholders could cost the debtor hundreds of millions of dollars in joint insurance. Indeed, the Committee does not even attempt to defend either the district court's disregard of this Court's discussion of the insurance in the first appeal or the district court's curious statement that there was no evidence that separate litigation against Dow Chemical and Corning posed a "threat" that the joint insurance proceeds would be "dissipated." R. 549, p. 7 (Jt. App. 587). Evidently the Committee recognizes that this Court's earlier opinion on this issue -- which is now law of the case unless there is new evidence -- already determined that "if claims pending against Dow Chemical and Corning Incorporated are permitted to go forward in a separate manner," that litigation "may significantly reduce the pool of coverage available to Dow Corning." Dow Corning, 86 F.3d at 495.

The Committee asserts, however, that this should not be a concern. The Committee contends (without citation) that we have not established that the Shareholders are "anywhere near exhausting [their] separately held primary insurance" and thus are not threatening the jointly-held excess coverage. TC Br. 35 n.26. This Court has already held, however, that the risk of "possible depletion" of those insurance policies is "sufficiently immediate" to threaten the "eviscerat[ion]" of the debtor's interest in the policies. Dow Corning, 86 F.3d at 495. Moreover, in recent bankruptcy court litigation concerning the joint

insurance, Bankruptcy Judge Spector has recognized that Dow Chemical, relying on "strong authority," has "forceful" and "formidable" arguments for its position that it is entitled to a portion of the joint excess policies. In re Dow Corning Corp., 192 B.R. 415, 419, 422 (Bankr. E.D. Mich. 1996). As a result, those insurance proceeds that have been the subject of settlements with the insurers are now being held in escrow, pending future litigation between the debtor and Dow Chemical concerning each party's rights to those proceeds. Id. at 419-20; accord In re Dow Corning Corp., 198 B.R. 214, 220 (Bankr. E.D. Mich. 1996).

The Committee's only other point about the joint insurance is that the shared primary insurance totals only the "inconsequential" amount of \$15.5 million. TC Br. 35 n.26. The Committee's math is wrong; the primary policies actually total \$33.5 million. R. 255, Ex. 3 (Jt. App. 1496-1498). More important, we are not aware of any court that has ever held that the loss of millions of dollars from the estate is "inconsequential." Certainly the Committee cites no authority for this startling proposition.

We have one last point about the insurance. Even if separate trials against the Shareholders might be relevant to the estimation process in the bankruptcy court (see TC Br. 46-47), the cost of defending thousands of separate cases across the country could deprive the estate of hundreds of millions of dollars in joint insurance proceeds. The estate and its creditors, including tort claimants, could be harmed irreparably if the Shareholders incur millions upon millions of dollars in legal fees litigating simultaneously in hundreds of state courts.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING TRANSFER ON ABSTENTION GROUNDS.

As demonstrated in our opening brief, the district court's rationale for denying transfer of the claims against the Shareholders (abstention) cannot withstand scrutiny. The Committee's contentions to the contrary are without merit.

A. Plaintiffs Have Not Satisfied All Of The Requirements For Mandatory Abstention.

1. The most obvious flaw in the district court's reasoning on mandatory abstention is that the Committee has not proven that the claims against Dow Chemical and Corning can be "timely adjudicated" in state court, as § 1334(c)(2) requires. (The Committee does not dispute that it had the burden of proof to establish this statutory requirement. See Dow Corning Br. 28; 3-M Br. 29 & n.11.)

The Committee concedes that the timely adjudication requirement must be evaluated in terms of litigating the tort claims "as a group." TC Br. 24 (quoting Dow Corning Br. 27). The Committee acknowledges that this principle has particular force when the litigation at issue may affect the value of the assets in the debtor's estate. TC Br. 27 & n.20. (That, of course, is the situation here; separate litigation against the Shareholders may deplete the estate considerably because of the effect on the joint insurance.) As a result, it is irrelevant that a few cases could be litigated more quickly if they proceeded separately.^{6/}

^{6/} In any event, the Committee's claim that "many" cases had trial dates in the near future (TC Br. 8) is simply not accurate; as we explained in our opening brief (at 28), the plaintiffs' district court papers identified only 14 specific cases with actual trial dates. Moreover, the Committee does not contest the fact that none of those
(continued...)

Given that the proper focus is on the claims against the Shareholders in the aggregate, it is apparent that the only way those claims will be adjudicated in a "timely" fashion is if there is a common issues trial on whether Dow Corning's implants cause certain diseases. If the debtor and its Shareholders prevail in such a trial, thousands of disease claims would be resolved immediately, a result that would both dramatically reduce the number of claims remaining to be tried and simplify the trials of any such claims. Simplification would also occur if the plaintiffs prevailed in a common issues trial on disease causation, for that would mean that complex question would be resolved once and for all; that issue could not be relitigated, thereby saving several weeks of trial time in each case. And once a common issues trial is completed, the district court could then consider whether to transfer some cases to district courts around the country under § 157(b)(5) to try any issues that are remaining.

In short, whatever the outcome, the time savings that would result from trying the complicated issue of whether the debtor's implants cause disease once, instead of thousands of times, means inevitably that the claims "as a group" (TC Br. 24) will be adjudicated more quickly if there is a common issues trial. See Dow Corning, 86 F.3d at 496 (a centralized "mechanism for dispute resolution" could avoid the need for "innumerable trials, stretching over an interminable time")

⁵/(...continued)

cases involve Dow Chemical or Corning. In other words, this is an instance in which, in the words of a case on which the Committee relies, the "potential detriment to the few [is] a modest price to pay for the efficiency to be gained by the majority of cases through coordination." McGhan Medical Corp., 14 Cal. Rptr. 2d at 270.

(quoting A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1013 (4th Cir.), cert. denied, 479 U.S. 876 (1986)); Jenkins, 782 F.2d at 471, 473 (having a consolidated trial on issues as to which the evidence "would vary little as to individual plaintiffs while consuming a major part of the [trial] time" is "clearly superior to the alternative of repeating, hundreds of times over, the litigation of . . . issues with . . . `days of the same witnesses, exhibits and issues from trial to trial'").

None of this can occur through the "streamlined procedures" that some state courts have established. See TC Br. 25. Only a federal court has the power and ability to hold a single common issues trial that will resolve the central question posed in all of the cases against the debtor and its Shareholders: do Dow Corning's implants cause disease? And as one state court has put it, "giving one judge central authority" is more efficient than dividing control of the cases among "four or five" courts, much less another "twenty or so." McGhan, 14 Cal. Rptr. 2d at 270 (emphasis added).

A common issues trial and the concomitant streamlining of the litigation would aid considerably in facilitating the debtor's prompt reorganization. Not only would this go a long way to avoiding dissipation of the joint insurance proceeds, but the sooner the claims involving the debtor's products are resolved the sooner the debtor can complete the Chapter 11 case and proceed with the operation of its

business. See Dow Corning, 86 F.3d at 496 ("Centralization of claims increases the debtor's odds of developing a reasonable plan of reorganization").

2. In any event, mandatory abstention is inappropriate for the additional reason that the claims and causes of action against the Shareholders could have been "commenced in a court of the United States" absent the bankruptcy. 28 U.S.C. § 1334(c)(2). Dow Corning has moved to transfer certain tort claims against its Shareholders for consolidation with the claims pending against Dow Corning itself in the reorganization proceeding. As we explained in our opening brief, pursuant to § 1334(c)(2), this Court must undertake a claim-by-claim analysis of whether an independent basis for federal jurisdiction over these claims exists. See Dow Corning Br. 31-32; see also, *e.g.*, In re Chapman, 132 B.R. 153, 157 (Bankr. N.D. Ill. 1991) (one requirement for mandatory abstention is that "there is no independent basis for federal jurisdiction for the claim other than the bankruptcy proceeding") (emphasis added); In re Rusty Jones, Inc., 124 B.R. 774, 780 (Bankr. N.D. Ill. 1991) (same). Here, virtually all of the claims against the Shareholders clearly fall within the diversity jurisdiction of the federal courts -- a fact that the Committee does not dispute -- thereby rendering mandatory abstention inapplicable.

B. Transfer Should Not Be Denied On The Basis Of Discretionary Abstention.

The points we have already made, above and in our opening brief, essentially answer the Committee's contention that discretionary abstention is appropriate in this case. We have only two additional items.

First, In re White Motor Credit, 761 F.2d 270 (6th Cir. 1985) (cited at TC Br. 9, 42-43), is nothing like this case. Here, all of the claims against the debtor and the Shareholders involve the same factual issues; that was not true in White Motor. That is why a common issues trial makes perfect sense here, but would have been impossible in White Motor.

Second, the claims against Dow Chemical and Corning are "central to resolution of this bankruptcy." TC Br. 44. Separate litigation of those claims could drain the estate of hundreds of millions of dollars in joint insurance proceeds. It is difficult to imagine an issue more "central" to a bankruptcy than the amount of money that is available to be distributed to creditors, a class that includes thousands of tort claimants whose interests the Committee purports to represent.

CONCLUSION

The debtor and its Shareholders respectfully request that the Court reverse the district court's decision and grant the relief requested in our opening brief (at 36-37).

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Respectfully submitted,

MAYER, BROWN & PLATT

SHEINFELD, MALEY & KAY, P.C.

By: _____
Herbert L. Zarov
James C. Schroeder
Theresa A. Canaday
Attorneys for The Dow
Chemical Company
190 S. LaSalle St.
Chicago, IL 60603-3441
(312) 782-0600

By: _____
Barbara J. Houser
George H. Tarpley
Attorneys for Dow Corning
Corporation
1700 Pacific Avenue, Suite 4400
Dallas, TX 75201-4618
(214) 953-0700

NIXON HARGRAVE DEVANS & DOYLE LLP

By: _____
William D. Eggers
Attorneys for Corning Incorporated
P.O. Box 1051
Clinton Square
Rochester, NY 14603
(716) 263-1000