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COLUMN ONE

When Law, Tragedy Intersect

■ The emotionally charged settlement in silicone breast implant case broke new ground. It showed how to resolve massive and complex litigation and still have money left over for the victims.

By HENRY WEINSTEIN
TIMES LEGAL AFFAIRS WRITER

BIRMINGHAM, Ala.—It was 6:30 p.m.—cocktail hour—and some of the day's most important work was about to begin for U.S. District Judge Sam C. Pointer Jr.

As a jazz combo played, the 24-year veteran of the federal bench purposefully roamed around a dimly lit reception room at a downtown Holiday Inn.

One moment, Pointer was chatting with a high-priced attorney representing Bristol-Myers Squibb Inc. Next, drink in hand, he acknowledged the greeting of an affluent Cincinnati lawyer who specializes in class-action cases. Later, Pointer, 59, listened intently to a Long Island woman who runs a foundation that is concerned about children affected by toxic substances.

All these people have one thing in common. They are enmeshed in some of the most complicated, emotionally charged and potentially expensive litigation in U.S. history—the claims of thousands of women who say they were seriously injured by several major U.S. corporations that marketed silicone gel breast implants without adequate safety testing or health warnings. There are even contentions that children have become ill drinking the breast milk of women who had implants.

Pointer's "cocktail hour" was part of a strategy to find a way to resolve 6,000 federal breast implant lawsuits that were consolidated here, and perhaps pave the way to clear many of the 6,000 cases pending in state courts.

For more than a year, Pointer has been meeting with all of the major participants for drinks before each month's formal status conference in court. He guided them, listened to them, calmed them.

On Wednesday, there was a major development.

Three major defendants—Dow Corning, Baxter International and Bristol-Myers—reached a record-breaking \$3.75-billion settlement with a coalition of plaintiffs' lawyers. Several other companies have tentatively agreed to put in another \$170 million, bringing the settlement pot to almost \$4 billion. Negotiations are continuing with several other large companies, including 3M, which could enrich the settlement by hundreds of millions more.

The settlement—which will be the richest of its kind if it is approved by Pointer after a June hearing on its fairness—may enable thousands of women to resolve their cases without a trial.

Significantly, this development comes at a time when many experts question the ability of the American legal system to cope with such "mass torts," where law, science and human tragedy intersect on a Gargantuan scale.

"The processing and resolution of mass tort cases have been slow and expensive, and have produced results that have sometimes seemed capricious," a 1991 study by RAND's Institute of Civil Justice noted.

Looming over the implant lawsuits is the specter of two decades of uncompleted asbestos litigation, which has driven 18 companies into bankruptcy and made millionaires of dozens of lawyers while sick people died without a trial. The crush of filings overwhelmed courts throughout the country.

"Our system didn't do a very good job of handling the asbestos cases," Pointer said.

Members of Congress, other judges, lawyers on both sides, and thousands of women hope that Pointer, a specialist in complex litigation, can help prevent a repeat of that debacle.

A special panel of federal judges transferred all the federal breast implant cases to him in June, 1992, after a bitter conflict arose as to how the lawsuits should be handled.

If Pointer can oversee a broad-gauged settlement that works fairly and efficiently, it could help many women and their families, leave companies with more money to compensate the sick rather than lawyers, and be a great boon to a legal system that faces the prospect of becoming more clogged from the implant cases.

"This is his Sistine Chapel," said Tennessee trial lawyer David E. Waite, who represents more than 100 women who are suing implant manufacturers. "He's going to prove that the tort system can work."

The judge does not tend to speak in such grandiose terms. He simply said: "It's certainly the most challenging situation I've faced in terms of everything involved."

Indeed, when the cases landed on Pointer's doorstep, the legal situation was far from a Sistine Chapel. It was more like a runaway train.

□

The government estimates that 1 million women in this country have gotten silicone gel breast implants, about 80% for cosmetic reasons and 20% during reconstructive surgery after mastectomies.

Although the implants were initially marketed in the United States in 1962 and the first multimillion-dollar verdict came a decade ago, until recently there were few signs that the devices would generate an avalanche of litigation.

But just before Christmas, 1991, there was a critical turn of events. A San Francisco jury awarded a woman \$7.5 million for injuries caused by her implants—\$6.5 million of it punitive damages against Dow. The case was the third multimillion-dollar verdict in a breast implant case in 1991; the others came in Alabama and New York.

Two weeks later, one of the woman's lawyers, Dan C. Bolton, sent a letter to Dr. David A. Kessler,

commissioner of the Food and Drug Administration, describing some of the company documents that had been revealed during the trial and accusing Dow of "engaging in a consistent pattern of corporate deceit and dishonesty related to the safety of implants."

The letter heightened Kessler's concerns about the safety of implants and on Jan. 6, 1992, he announced a moratorium on their manufacture until further studies could be performed.

Within a month, what had been a trickle of personal injury cases became a flood and lawyers for manufacturers of implants soon realized that their clients had a major problem.

"It became pretty obvious there would be mass filings of lawsuits," and rapidly escalating costs to defend them, said James R. Jenkins, Dow Corning's general counsel.

Jenkins maintained that Dow has a good defense to the lawsuits: "There has been no definitive link shown between implants" and various medical problems that women have developed—including scleroderma, lupus, autoimmune diseases, neurological impairments, tremors, muscle inflammation, burning pain in the extremities and short-term memory loss.

But Jenkins acknowledged that some scientists would testify that there is a link between implants and medical problems. And he understood that their testimony, combined with troubling internal documents of the type used in the San Francisco case, would mean "a lot of these cases would end up going to a jury," where anything could happen.

So after consulting with Dow Chairman R. Keith McKennon, he called Kenneth R. Feinberg, a Washington lawyer who specializes in settling big cases, including one lodged by Vietnam veterans against Dow Chemical and other companies stemming from injuries believed to have been caused by the Vietnam-era defoliant Agent Orange.

"We agreed Ken would go out and talk confidentially to plaintiffs' lawyers, some of whom he knew from other cases," Jenkins said.

Several months later, officials of Deerfield, Ill.-based Baxter, the nation's largest hospital supply company, reached a similar conclusion. Baxter retained David I. Shapiro, a high-powered Washington lawyer who had built a reputation for hammering out major agreements between warring parties.

Santa Barbara-based implant manufacturer Mentor Corp., a considerably smaller company, also saw trouble on the horizon, according to its attorney, William B. Griffin of San Francisco's Brobeck, Phleger & Harrison. "They looked into the future and saw disaster. . . They were being engulfed in the legal equivalent of war, and like Napoleon's Russian campaign, a war that can only be lost, even if all the battles are won."

Griffin wanted peace, but before he could initiate talks he had to figure out who could negotiate for the plaintiffs.

About the same time, Cincinnati attorney Stanley M. Chesley filed a federal class-action suit on behalf of women who had implants. Chesley had become a wealthy man during the last 20 years by filing early class-action suits after mass disasters such as the MGM Grand fire in Las Vegas.

Many trial lawyers loathe Chesley because they think he settles cases too cheaply, depriving plaintiffs of the possibility of a larger recovery. Moreover, by moving the cases into the class-action arena, Chesley strips other attorneys of the chance to try cases individually and earn large fees themselves.

Although Chesley had very few breast implant clients, he was rapidly granted permission to proceed by U.S. District Judge Carl Rubin, a jurist before whom Chesley had appeared many times.

Scores of plaintiffs' lawyers immediately challenged Rubin's ruling. They asked a special panel of federal judges to move the issue out of Cincinnati and consolidate all the cases.

In September, 1992, the special panel sent the cases to the Birmingham courtroom of Pointer, who had written a manual for federal judges on how to handle complex litigation.

Pointer, a 1970 appointee of President Richard Nixon, had a reputation as an incisive questioner and was widely viewed as the ideal candidate for a tough case.

From the start, Pointer made it clear that he would not permit the sort of scorched earth tactics—such as costly, lengthy and pointless fights over turning over key documents—that have come to dominate civil litigation in recent years.

He commanded the defendants to turn over all potentially relevant documents and on one occasion roasted a defense lawyer who was vigorously resisting. By now, more than 6 million

documents have been collected, indexed and placed on CD-ROMS.

Pointer also directed both sides to swiftly conduct depositions so that cases could be readied for trial. He told warring plaintiffs' lawyers that they would have to moderate their differences and function as a unit.

Pointer appointed a 17-member plaintiffs steering committee, chaired by Chesley and Ralph Knowles of Atlanta, one of the original leaders of the Breast Implant Litigation Group of the Assn. of Trial Lawyers of America. The committee has responsibility for the overall management of litigation for the plaintiffs.

(In turn, Dow Corning hired three large law firms, Chicago's Kirkland & Ellis, Cincinnati's Dinsmore & Shohl and New York's Skadden, Arps, Slate, Meagher & Flom, as well as smaller firms in virtually every state. Baxter's defense is spearheaded by Santa Monica's Dickson, Carlson & Campillo and Bristol-Myers by McCarter & English of Newark, N.J.)

The judge also urged lawyers on both sides, and other interested parties such as leaders of breast implant support groups, to attend the monthly cocktail parties. The social gatherings give Pointer an opportunity in an informal setting to hear what's on everyone's mind.

The reception technique, virtually unheard of in legal circles, also is designed to foster civility among the most hostile of adversaries.

Virtually all the attorneys said the cocktail parties had helped create an atmosphere that enhanced the possibility of a massive settlement.

"For lack of a better word, there have been no New York-style antics in the courtroom," said Frank Woodside of Cincinnati, one of three national counsels for Dow Corning. "The level of advocacy has not been reduced, but the level of animosity has."

The judge paid particular attention to the plaintiffs, whose voices sometimes get lost in the labyrinth of large litigation.

"Judge Pointer . . . listens to our concerns," said Sybil Goldrich, a Beverly Hills woman who blames numerous illnesses on her implants and is co-founder of the Command Trust Network, a nationwide information clearinghouse for breast implant recipients. The judge also gave Goldrich and representatives

of similar groups the opportunity to speak in court. In one instance, he went along with Goldrich's recommendation that hundreds of women—who, without lawyers, had earlier settled cases for small amounts of money—be allowed to participate in the large settlement anyway.

Meanwhile, the plaintiffs' lawyers gained momentum, borrowing several million dollars to finance their research efforts.

Bristol-Myers turned over 12 million documents from its Medical Engineering subsidiary in Racine, Wis. Gayle L. Troutwine, a Portland attorney, said a coalition of 20 plaintiffs' lawyers and paralegals went to Racine, where they "culled the documents down to 1 million" that appeared relevant and sent them off to a depository in Cincinnati for indexing and potential use later. (Troutwine said the documents helped her settle five cases against Bristol-Myers in 1993, including one for \$900,000 and another for \$400,000.)

Moreover, concern mounted among the companies when a Houston jury awarded \$25 million, including \$20 million in punitive damages, to a Texas woman for the damage caused to her body when her silicone gel implants ruptured.

The verdict precipitated the filings of hundreds of more lawsuits during the next several weeks, making it necessary for the Harris County, Tex., District Court clerk to add a night shift so that her workers could process all the paperwork.

A new adversary also popped up for the implant manufacturers—their insurance carriers were starting to resist coverage of legal bills, which were mounting dramatically. Dow is reported to be spending \$10 million a month.

Over the next several months, Chesley and Knowles, joined by attorneys Margaret M. Branch of Albuquerque, Elizabeth J. Cabrasser of San Francisco and Arnold Levin of Philadelphia, forged a \$25.8-million settlement with Mentor.

Still, several plaintiffs lawyers said that was "chump change" compared to a deal that was being secretly negotiated between Chesley and Knowles for the plaintiffs and attorneys representing Dow and Baxter.

When word of the secret talks leaked out in spring, 1993, internecine warfare among the plaintiffs lawyers

was reignited.

"The next three days were the worst 72 hours of my life," said Francis H. Hare, a genial Birmingham lawyer called "Brother" by just about everyone. Hare, a longtime leader of the Assn. of Trial Lawyers of America, had been brought into the secret negotiations as a consultant to the plaintiffs.

"I got calls saying 'Brother, you won't believe what's happened. . . . They're trying to take my cases away,'" Hare said.

Finally, Hare was released from his pledge of confidentiality. "Then, I had to call my friends back and tell them I had been part of the secret negotiations," Hare said. Among the angriest were Margaret Branch and Houston trial lawyer Michael T. Gallagher, both of whom represent several hundred women with implants.

After another stormy hearing in Pointer's courtroom, Branch and Gallagher were added to the plaintiffs' negotiating team. So was Cabrasser of San Francisco.

The expanded team started meeting with the other side: Feinberg for Dow, Shapiro for Baxter and John L. McGoldrick, the Harvard-educated lawyer representing Bristol-Myers.

There was considerable sparring at the start, according to numerous sources.

At an early meeting at a New York hotel, McGoldrick declared that everything the negotiators agreed on would "have to be approved by people at 345 Park Ave.," a reference to Bristol-Myers' nearby corporate headquarters.

"What city is that in?" retorted Gallagher, a wealthy Texas trial lawyer who takes his own jet to court hearings around the country and is unimpressed with East Coast locales and Ivy League pedigrees.

At times, the defense negotiators had spirited arguments among themselves—including several debates over how much each company's share of the deal would be. One session in a hot tub at the Canyon Ranch resort in the Berkshire Mountains in Massachusetts became so agitated that other exasperated bathers told Feinberg, Shapiro and McGoldrick they had to leave.

Among the most heated aspects of the bargaining between the defendants and plaintiffs were debates over definitions of diseases for which women could be compensated in the highly complex settlement.

"We argued over every word in those definitions," said Liz Dudley, a Wichita, Kan., registered nurse who has worked as a paralegal medical specialist for a decade and has compiled a database of 1,200 medical and scientific articles on implants for the plaintiffs. After months of haggling, Dudley said, Feinberg, Dow's lead negotiator, finally agreed to the definitions.

"He stormed into the meeting room at the Carlyle Hotel in New York at 2 a.m. He had the papers with the definitions rolled up in his hand. He was screaming: 'We'll give you your damn disease definitions!' " (Dudley said that comment was tepid, compared to much of the language during negotiations. Feinberg declined comment.)

The true test of the accord is about to begin.

It is perhaps the most elaborate products liability settlement ever designed and contains so many escape hatches it could still fall apart months from now.

Women will be making decisions on whether to join the settlement, based on a host of factors. Among them are the nature of their injuries and their desire to avoid lengthy court battles, in which they would have to undergo questions about intimate details of their lives. (Women seeking details about the settlement can call a court information phone line at (800) 887-6828).

If the settlement attracts more participants than expected, it could drive down the individual shares, now estimated at \$160,000 to \$1.6 million per plaintiff, depending on the extent of her injuries. If other companies join the settlement, those amounts could go up to a range of \$200,000 to \$2 million.

Lower payouts could prompt women to drop out, and a smaller than anticipated class of plaintiffs could be grounds for the defendant corporations to walk away from the pact.

"The big question now is whether there are sufficient funds" to cover all the claims women are expected to file, said Albuquerque, N.M., lawyer Branch, who was on the plaintiffs' negotiating team. "If not, I certainly would hope the defendants would contribute more money so that the compensation amounts will not have to be reduced. For the companies to reduce these compensation amounts would produce a flood of 'opt-outs' that would jeopardize the entire settlement."

Some plaintiffs' attorneys have

indicated that they believe their clients would fare better in a court trial, and hope to proceed with their cases this year.

Breast Implant Lawsuit

Here is a look at some of the key players in a record-breaking \$3.75-billion settlement by three U.S. corporations with lawyers representing thousands of women who say they were seriously injured by silicone gel breast implants.

U.S. District Judge Sam C. Pointer Jr.

* Age: 59

* Notable: The 24-year federal judge is presiding over 6,000 breast implant cases that have been consolidated in his Birmingham, Ala., courtroom.

Kenneth R. Feinberg

* Age: 47

* Notable: The Washington, D.C., lawyer specializes in settling major cases on behalf of large corporations. He was the lead negotiator for Dow Corning Corp. in a record-breaking settlement announced this week.

Stanley M. Chesley

* Age: 58

* Notable: The Cincinnati lawyer specializes in class-action litigation. He was on the plaintiffs' negotiating team in discussions with breast implant manufacturers.

Sybil N. Goldrich

* Age: 53

* Notable: The Beverly Hills woman is co-founder of an information clearinghouse for women with breast implants. Goldrich is a plaintiff in a suit against Dow Corning, stemming from problems that she contends were caused by her implants.

Photo:

Plaintiffs' lawyer Michael Gallagher, left, assistant Pamela Moorer and defense attorney John McGoldrick.

Photographer:

FRANK J. COUCH / For The Times

Photo:

U.S. District Judge Sam C. Pointer Jr.

Photo:

Kenneth R. Feinberg

Photo:

Stanley M. Chesley

Photo:

Sybil N. Goldrich

Type of Material

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Infobox

Descriptors

CLASS ACTION SUITS;
BREAST IMPLANTS;
WOMEN — HEALTH;
SETTLEMENTS;
CIVIL JUSTICE;
JUDGES

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