

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:)
)
DOW CORNING CORPORATION,) CASE NO: 2:00-MC-00005-DPH
) (Settlement Facility Matters)
)
REORGANIZED DEBTOR) Hon. Denise Page Hood

**REPLY BY CLAIMANT MAXINE LOUISE SWAIM'S COUNSEL TO THE RESPONSE
BY DOW SILICONES CORPORATION AND THE DEBTOR'S REPRESENTATIVE
SERVED IN OPPOSITION TO CLAIMANT'S COUNSEL'S REQUEST FOR
CLARIFICATION OF CLOSING ORDER NO. 5 DEADLINE FOR QUALIFYING
CLAIMANTS TO CONFIRM ADDRESSES AND SUBMIT ESTATE DOCUMENTS
(ECF NO. 1718)**

Claimant Decedent Maxine Louise Swaim's Counsel submits this response to Dow Silicones Corporation (hereinafter "Dow") and the Debtor's Representative's Opposition to Claimant's Counsel's Request for Clarification of Closing Order No. 5 Deadline for Qualifying Claimants to Confirm Addresses and submit Estate Documents (ECF No. 1718) (the "Motion") and respectfully states as follows:

PRELIMINARY STATEMENT

Claimant Decedent's position is set forth more fully in the Motion filed on May 25, 2023 (ECF No. 1718). Further, Claimant Decedent Maxine Louise Swaim submits this reply to Dow's assertions that Claimants cannot appeal the final decisions of the Claims Administrator. While this might generally be correct if a claimant were seeking this Court's review of an issue related to Product ID, Proof of Rupture, Disease Review, Proof of Injury, Disability Level Review, Deficiency Issues, Errors in Processing claims, or Requests for Extensions of Time to Respond.

However, here Claimant Decedent is not disputing a benefits eligibility determination or level of injury decision. That issue was already determined, in her favor and the Claimant Decedent was entitled to receive Premium Payments for her Rupture and Disease claims, as those prior claims had been reviewed, approved and paid. Those facts are not in dispute. Instead, the issue that needs clarification is whether this Court should exercise its discretionary powers, to correct what Claimant Decedent Maxine Louise Swaim contends is an error in the interpretation and application of this Court's Closing Order No. 5. Moreover, the clarification that Claimant Decedent is seeking will not only impact her individual claim but upon information and belief, a limited number of other claimants who are also seeking clarification of the very same order for similar reasons. A determination in favor of Claimant Decedent Maxine Louise Swaim will not unreasonably delay the resolution of the settlement process.

Dow also contends that Claimant does not have standing to bring this claim, but that issue should be considered moot, as upon information and belief the Claimants Advisory Committee has initiated their own action to obtain clarification of Closing Order No. 5 for similar reasons.

CLARIFICATION OF THE FACTUAL BACKGROUND

Claimant Decedent's Counsel for the most part does not disagree with the Factual Background set forth by Dow's counsel in Dow's Opposition papers. However, Counsel offers some additional clarifications in the interest of completeness. Claimant Decedent's Counsel's office was retained by Claimant Maxine Louise Swaim on May 21, 1997, and thereafter, pursued claims on her behalf against the manufacturer of her silicone breast implants.

Claims were subsequently filed on Mrs. Swaim's behalf seeking compensation for her Ruptured Dow implants and for her Disease claim. Ultimately Mrs. Swaim's claims were

approved, and the initial Premium payment for Mrs. Swaim's Rupture claim was forwarded to Counsel's office on May 14, 2014, with the settlement payment being forwarded to Mrs. Swaim on June 13, 2014. That settlement check was negotiated by Mrs. Swaim on June 24, 2014. Thereafter, a Premium payment for Ms. Swaim's Disease claim was received by Counsel's office on December 19, 2014, and that settlement payment was forwarded to her on January 23, 2015, and thereafter, negotiated on February 4, 2015. Contrary to the Finance Committees erroneous contentions, Claimant Decedent's Counsel is not holding any settlement funds for Claimant Decedent nor was counsel holding any funds for Claimant Decedent when the Audit Survey was submitted on April 28, 2022, as required by Closing Order No. 4.

At that point Claimant Decedents counsel had no reason to believe that Mrs. Swaim was deceased, as the settlement check was not returned to counsel's office, and it had been negotiated. Counsel's office was not advised by Mrs. Swaim's family that she had passed away. A recent review of Counsel's files shows that the settlement check was negotiated, but it is hard to determine who endorsed the check. However, it clearly was cashed by a bank, so one could presume that it was negotiated by a person authorized to do so. At that point in time Claimant Decedent's Counsel's office had no reason to suspect that Mrs. Swaim was deceased, as no correspondence had been received by Counsel's office advising of her passing nor had any correspondence that was sent to her attention by Counsel, been returned to Counsel's office as undeliverable.

Despite what is stated in Dow's statement of facts, it should be noted that a review of Counsel's files fails to reveal any evidence of a written communication from the SF-DCT dated November 29, 2021, requesting an address verification for Claimant Decedent. As the SF-DCT will attest Counsel's office has been extremely diligent in responding to queries from the SF-

DCT over the last nineteen years. Additionally, the SF-DCT claims that they did a search on some unidentified date and learned that Mrs. Swaim had passed away on July 14, 2014. This search was conducted almost seven years after the last settlement check had been negotiated. Upon information and belief, Christine R. Conrad, Claimant Decedent's daughter had been appointed as the Executrix of her mother's Estate, and in that capacity may have negotiated the settlement payment check shortly after her mother's death. Sadly, Christine died on September 28, 2019, and Maxine Swaim's spouse William Swaim died shortly thereafter on October 23, 2019. Claimant Decedent's counsel received no notice from the family of the passing of the above-named individuals.

It should be noted that the normal procedure of the SF-DCT, when they learn of the death of a Claimant, is to send out a Request for Probate Documents. Upon information and belief, no such request was received by Counsel's office, nor does it appear that such a request was forwarded to Claimant Decedent's family. It also was not noted as having been done in Dow's opposition papers.

When the directives set forth in Order No. 5 filed on June 13, 2022, became known, as acknowledged in Dow's Responsive papers, Claimant's Counsels office timely submitted either the requested updated address information or a Lien Request, when a claimant or their family failed to respond or could not be located. This was done for approximately 311 cases out of 313 identified on the SF-DCT posting. With respect to Maxine Swaim Counsel's office followed the same procedures as with the other 313 cases, so as to locate and obtain the required information. Claimant Decedent's Counsel's office made various attempts both written and by telephone to reach the Claimant Decedent. At this point Counsel's office was still unaware that Maxine Swaim had passed away. However, it was during the course of Counsel's office's search that it

was determine that not only had Maxine Swaim passed away, but as stated above her spouse and daughter had passed away as well.

Counsel's office forwarded several letters to the last known address of Maxine Swain to advise any remaining family of the impending deadline, and to request that they contact Counsel's office us and provide the requested information. Until Counsel's office was contacted by the family at the very last moment, Counsel had no information to verify a valid address for Claimant Decedent's Estate Representative, nor did Counsel have any paperwork to confirm that an Estate had been set up or that anyone had the authority to act for the Estate. Once that information was provided Counsel's office promptly filed it on the following Monday, and withdrew Counsel's attorney lien as Counsel now had a family member to work with.

ARGUMENT

Claimant Decedent adopts by reference the arguments more fully set forth in the prior Motion filed by her Counsel on May 25, 2023 (ECF No. 1718) and all the submissions and arguments submitted and made by the Claimants Advisory Committee.

Significantly and contrary to the positions taken by Dow, Claimant Decedent is not seeking to challenge a decision related to Product ID, Proof of Rupture Proof of Disease, Proof of Disability level, Disease Review, Deficiency Issues, Errors in Processing Claims, or the denial of a request for extensions of time. Nor is this challenge unique to this Claimant, as it is understood that a limited number of other claimants are seeking similar clarification of this Court's order as well.

Clearly this Court, can in the interests of justice and fairness exercise its discretion and rule on this issue without compromising the legitimacy of the whole settlement process.

Especially when there is no prejudice to Dow, the settlement monies at issue would not be taken away from any other claimant and Claimant Decedent would have received Premium payments for her Disease and Rupture Claims, but for the arbitrary and capricious ruling by the SF-DCT. Additionally, should this Court rule in favor of the Claimant Decedent it will not unreasonably delay the final resolution of the settlement process.

Importantly, the cases cited by Dow as reasons as to why this Court cannot and should not act in this matter, are claimant specific disputes related to their injuries and disability levels. That is not the issue here. Further, as stated in Claimant's prior papers Annex A 3.02 (c)(i) to the Settlement Facility Agreement ("SFA") specifically states: "If the Election Deadline or **any** deadline in the Claims Resolution Procedures falls on a Saturday, Sunday or federal holiday, the next business day shall be the applicable Deadline." (Emphasis added) It clearly states that this applies to "any deadline". Any reasonable reading of this section would cause the reader to conclude and to reasonably rely on that language therein when faced with a due date that fell on a weekend or federal holiday. Thus, Claimant Decedent's Counsel's expectation that the due date would be rolled over to the next business day was reasonable, and that Rule 6 would be applied to any deadline that fell on a Saturday, Sunday or federal holiday. It clearly was not unreasonable to believe this procedure would be followed by the SF-DCT.

For consistency's sake alone it does not make any sense to use different deadline calculations from the posted applicable rules, that differs from the posted rules, which were relied on by claimants and their counsel. As stated in Counsel's prior papers Fed. R. Civ P 6(a)(1) is also applicable to this situation and should assist the Court in its final determination.

However, Dow claims that a specific calendar date deadline was established, and thus the case law cited supports their contention that failure to meet a specific calendar deadline warrants

denial of the claim. Their reliance on these prior rulings is misplaced, as this Court's Order No 5 did not set a specific calendar date for compliance. Rather, the SF-DCT used this Court's Order to do their own calculations to create due dates for the various issues addressed in Order No.5. Respectfully, September 17, 2022, is not stated in the Order as being a due date to submit Address Verifications or to submit Estate Documents. That was a date created by the SF-DCT, and upon information and belief, without consultation or input from the Claimants' Advisory Committee. Therefore, Rule 6 should have been applied. The SF-DCT chose to pick a due date that fell on a Saturday, and in reasonable reliance on Rule 6, Claimant's Counsel reasonably believed that they had until the next business day to file the requested paperwork, which they did. The SF-DCT could just as easily picked any business day that didn't fall on a Saturday, Sunday or federal holiday, and this issue would not have arisen.

Significantly, Counsel's office has submitted paperwork to the SF-DCT for thousands of claims and a significant number had filing deadlines that fell on weekends or federal holidays, and to Counsel's recollection, this is the first time a filing that was rolled over and filed on the next business day was rejected.

It was Counsel's understanding that in return for giving up their litigation rights claimants were promised a fairly straight forward and clear settlement process. That has not always happened, but in the past the SF-DCT would work to assist the claimants and make the settlement process more user friendly. Now almost twenty years later, as we near the end of this process, a family is being denied the benefits that the Plaintiff Decedent qualified for and would have been paid, but for the arbitrary and capricious ruling by the SF-DCT. Especially considering that in the past Rule 6 had been applied to this type of issue and was consistently resolved in a claimant's favor. This confusion was created by the SF-DCT, and it has been

understood that efforts should be directed to error on the side of including claimants in the plan not excluding them. Moreover, if there was confusion or ambiguity in the rules or how they were being applied, the SF-DCT had in the past worked to help facilitate the claims. For some reason, now that we are near the end of the settlement process, that policy seems to have changed, which has created unwarranted confusion among claimants and their counsel. Plaintiff Decedent's family should not be denied the benefits that she qualified for and should have received.

CONCLUSION

For the reasons stated above, Claimant Decedent's Counsel respectfully requests that the Court enter an Order, in the form attached hereto, clarifying that Claimants including Claimant Decedent Maxine Louise Swaim, whose Estate Representative contacted the SF-DCT through her Counsel on Monday, September 19, 2022, acted timely under Closing Order 5, and grant such further relief as justice requires.

Dated: New York, New York
June 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 20, 2023, a copy of the foregoing was filed on the Court's CM/ECF system, which will serve all counsel of record.

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