

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

DOW CORNING CORPORATION,

REORGANIZED DEBTOR.

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CASE NO. 00-CV-00005-DT
(Settlement Facility Matters)

Hon. Denise Page Hood

REPLY TO DOW CORNING'S RESPONSE TO MOTION OF CLAIMANTS'
ADVISORY COMMITTEE FOR AN EXTENSION OF THE JUNE 1, 2006 DEADLINE
FOR CERTAIN GROUPS OF CLAIMANTS

1. Conditional Notice of Intent Claimants, Late Claimants Who Are
Reclassified and Allowed as Timely, and Disputed Release Claimants

The CAC is pleased to see that Dow Corning agrees that an extension of the June 1, 2006 deadline is appropriate for many of the claimant groups identified in the *Motion of Claimants' Advisory Committee For An Extension Of The June 1, 2006 Deadline For Certain Groups of Claimants* (Docket Number 413) (hereinafter "the Motion of the CAC").

Specifically, Dow Corning agrees that all "Conditional NOI Claimants" – including the recently reclassified group of "Paragraph 10 Claimants" – should, if they are ultimately allowed to obtain rupture benefits, be given additional time to document and submit their claim. In addition, Dow Corning agrees that an extension is appropriate for certain late claimants who were either wrongly classified as late, or who have been or

will be in the future reclassified from late to timely,¹ and for “disputed release claimants” whose claims are ultimately allowed.

The CAC requested a one-year extension for these groups of claimants with regard to their Rupture claim. This would allow claimants sufficient time for a) the SF-DCT to locate claimants who did not keep their contact information current with the SF-DCT because they were told years ago (erroneously) that they were ineligible for benefits from the Settlement Facility; b) to allow claimants adequate time to locate a surgeon willing to perform the surgery, and to schedule an appointment, pre-surgical diagnostic testing and surgery as well as time away from their employment; c) to work with the SF-DCT to pay for the surgical costs through the Explant Assistance Program² and/or to work with health insurers who require pre-authorization for the surgery (which takes months to complete because claimants must prove that the surgery is medically necessary. This in turn requires claimants to undergo pre-surgical diagnostic

¹ The CAC does not understand Dow Corning’s distinction that certain claimants are “authorized to file a late claim.” If Dow Corning is suggesting that there is a distinction between late claim requests submitted to the Court before June 1, 2006 and those filed thereafter, the CAC agrees that claimants who did not submit a late claim request before June 1, 2006 should not be considered for Rupture if their late claim request is allowed unless the Court directs otherwise on a claimant-by-claimant basis. We take issue, however, with pejorative remarks by Dow Corning that describe claimants as “sitting on their rights.” See Response of Dow Corning at p. 4. We also take issue with comments that suggest that the January 1997 bar date notice is determinative or that there is a “limited fund” to pay these claims. As the Independent Assessor Report submitted to this Court demonstrates, a summary of which is now posted and publicly available on the SF-DCT website, it is projected that there are more than adequate assets to pay claims from the \$2.35 (NPV) funding stream provided in the Plan.

² This is especially true since the SF-DCT employs one staff person to address all Explant Assistance requests.

testing to confirm the rupture); d) to recover from the surgery and have adequate time to obtain the medical records and the statement of the explanting surgeon required by the Plan, and e) to seek expert review of the removed implant if that claimant chooses or needs to obtain additional documentation of rupture.

For claimants in Class 7 or 9, a one-year extension is warranted because these classes require the submission of a disease claim (which takes months of doctor's appointments to document the disease and disability level) or a Medical Condition claim (which requires the removal and replacement of a vital joint implant, such as a hip, knee, TMJ, etc.). The same reasons listed above are equally applicable and necessitate a longer extension than six months for claimants in one of these classes.

Dow Corning misses the point in its Response when it proposed a 6-month extension on the premise that all claimants had to do was "file a claim form." As noted above, claimants have much more to do than just filing a form. Six months is simply not adequate time to complete all of the tasks necessary including the removal of a medical device and recovery from that surgery. It is inconsistent for Dow Corning to suggest that an extension is appropriate and then provide inadequate time for the claimant to take advantage of it. The CAC respectfully requests that the Court grant a one-year extension as requested in the CAC's Motion.

**2. Claimants Who Were Not Able To Be Explanted By June 1, 2006
Through The Explant Assistance Program**

In its Motion for Extension, the CAC documented numerous problems with implementing the Explant Assistance Program ("EAP"), including the fact that only five claimants nationally and internationally had been processed and paid through the EAP as of seven months after the Effective Date.³ More striking, it is now two years after the Effective Date and only five foreign claimants have received compensation through the Explant Assistance Program (four were paid in April 2006 and one additional claim was paid in May 2006). See Exhibit 3, excerpt from the SF-DCT Monthly Claims Report for the period ending May 31, 2006 and Exhibit 4, Sworn Statement of Melissa R. Ferrari, Esq.⁴ These undisputed facts are particularly distressing since the Settlement Facility

³ The CAC discovered in late 2004 that the Explant Assistance Program was not even operational. See Exhibit 1, Declaration of Dianna Pendleton-Dominguez and Exhibit A attached thereto, E-Mail dated 8/16/2004 from a claimant (name redacted) that included a response from the Claims Assistance Program stating, "The Explant Assistance Program will be available within the next few weeks." See also Affidavit of Sybil Niden Goldrich, attached hereto as Exhibit 2. The CAC inquired about this to the then-Claims Administrator, and she confirmed that the Explant Assistance Program was not yet available to claimants. See Exhibit 1, Declaration of Dianna Pendleton-Dominguez, and Exhibit 2, Affidavit of Sybil Niden Goldrich. The parties then issued a joint Plan interpretation letter in November 2004 (and repeated in January 2005) stating that the Explant Assistance Program requests should be in a separate processing queue. See Exhibit B to the Declaration of Dianna Pendleton-Dominguez, copy of the 1/19/2005 joint letter to the Claims Administrator at paragraph 11 on p. 4. Despite this, months later, the CAC continued to receive reports from law firms that this had not been implemented at the SF-DCT and that claimants had to wait 6 months or longer just to get information and forms about the EAP. See Exhibits C and D to the Declaration of Dianna Pendleton-Dominguez.

⁴ Ms. Ferrari is the court-designated foreign liaison counsel to the CAC. When it became apparent in mid-2005 that the EAP program was non-existent in Europe, Ms. Ferrari began her own search to locate doctors willing to participate in the program. She was able to locate only one such doctor located in Germany. See Exhibit 4 attached, Sworn Statement of Melissa R. Ferrari.

had been operational since before claim forms were mailed in February 2003. This means that for two years only five Explant Assistance claims were processed. The problems with the Explant Assistance Program continued well into 2005. See Exhibit E to the Declaration of Dianna Pendleton-Dominguez, a sample of several letters and E-Mails from law firms from 2005 expressing their frustration that they have not been able to obtain an Explant Assistance Program package despite repeated requests to the SF-DCT. See also Exhibit 2, Affidavit of Sybil Niden Goldrich.

Dow Corning did not dispute any of the statements in the CAC's Motion regarding the failure of this program prior to David Austern's appointment. They do acknowledge, just as the CAC acknowledged in its Motion, that the Explant Assistance Program for domestic claimants greatly improved under the management of the successor Claims Administrator, David Austern. But those improvements took time to develop and implement so it was not until late 2005 that the Explant Assistance Program began to function and pay more than a few U.S. claims for EAP per month. The first foreign claim paid through the Explant Assistance did not receive compensation until April 2006, two years after the Effective Date. See Exhibit 3 attached hereto, excerpt from the April 2006 claims processing report, and Exhibit 4, Sworn Statement of Melissa R. Ferrari. The net result is that claimants lost over 75% of the two year period from June 1, 2004 (the Effective Date) to June 1, 2006 (the Rupture Deadline) that the Explant Assistance Program was supposed to be in place and assisting

claimants with surgical costs. This was not the fault of claimants; it was the failure of the SF-DCT during the predecessor administration. At a minimum, claimants should be given an additional year to obtain financial assistance through the EAP to have their failed implants removed and to submit Rupture documentation.

Dow Corning claims that claimants should have paid for the surgery themselves and sought reimbursement. This ignores the reality that a significant number of claimants – many of whom are vocationally disabled and either do not have medical insurance or the insurance does not cover the surgery - cannot afford \$5,000 or greater for surgical and hospital costs. As one claimant so eloquently wrote in a May 27, 2006 email to the CAC:

I have written to David Austern and now I am writing to you. I am in a panic, as I have gone through practically every plastic surgeon in my area and no one will cooperate with the terms of the SFDCT regarding waiting for payment after the explantation is done. I am unable to travel to any outside areas, as I have neither the money, nor a vehicle to take me there. I am fundamentally impoverished.

My health situation is getting worse every day that these leaking implants are in my body. I am barely functional, due to the pain in my joints and the extreme edema in my legs. I am sick and I need help. I do not have any medical coverage. I have waited for many years for this case to finally be settled, and now, that I have finally held out for the day, I am stopped by the (mercenary) doctors who will not do the surgery, without being paid up front. ...

My attorneys [sic], Weitz & Luxemburg, have tried to get the Claims Administrator, David Austern to allow extra time for the claimants who can't find a doctor to participate in the Plan. What I am asking, begging, is that perhaps you pay the doctors up front, not after the surgery. Please! I implore you. I need explantation and I don't have any money. I am sure I am not the only one in my position. W&L tell me that there is a growing list of claimants who don't have the money to lay out, either.

I am pleading with you to at least consider the possibility of paying the doctors, first. I guarantee you will have more of them waiting to participate. I have so far called 12 plastic surgeons, all of whom refuse to wait for payment. One was going to consider it and when he read the protocol [sic] package terms, he said 'too complicated; can't take all the paper work.'" He was the only one who even agreed to receive the package from W&L, then told me flatly, no. The others emphatically refused.

I have been a part of this class action suit from its inception. I need the settlement to happen. It would change my life. I literally am going under, due to not having money and being too sick to work on a regular basis.

I am at a total loss, completely at the end of my rope, despondent. My hopes of having these implants removed are shattered. Please help me.

See Exhibit F to the Declaration of Dianna Pendleton-Dominguez, E-Mail dated May 27, 2006 from a claimant (name redacted) to the CAC that is representative of hundreds of emails, letters and phone calls that the CAC has received from claimants and law firms alike. Situations such as this were exactly what the Explant Assistance Program was designed to address. Claimants and attorneys alike continue to report significant problems locating surgeons willing to perform the surgery under the terms of the program. See Exhibit G to the Declaration of Dianna Pendleton-Dominguez, a sample of the hundreds of unsolicited e-mails that the CAC has received from claimants and attorneys about this issue, and Exhibit 4, Sworn Statement of Melissa Ferrari, foreign liaison counsel to the Claimants' Advisory Committee, stating that there has been no EAP program in Europe. No claimants in Class 6.2 have received Explant Assistance benefits. See Exhibit 3, excerpt of April 2006 claims processing report, and Exhibit 5,

Declaration of Karen Read, Esq. who represents individual claimants in Class 6.2. Ms. Read states that she represents many claimants in Class 6.2 who are experiencing great difficulty complying with the Plan's requirements for Proof of Manufacturer because it is not customary or required for claimants in many countries in Class 6.2 to provide medical records to patients and that, instead, doctors will only provide a written summary of what is contained in the medical records. See Exhibit 5 attached hereto, Declaration of Karen Read. She recounts the great difficulties foreign claimants have experienced in finding a doctor in Guatemala and Brazil, for example, who are willing to participate in the EAP. Id. As a result, claimants in these countries could not be explanted by June 1, 2006 to then make a claim for rupture. Id.

Claimants should not be penalized because the Explant Assistance Program was virtually non-existent until the fall of 2005. Claimants should be given additional time to have their failed implants removed and paid for via the Explant Assistance Program and the Claims Administrator should be permitted latitude to implement creative solutions to ensure that claimants can access financial assistance as the Plan promised.

**3. Claimants Whose Medical Records Supporting Rupture Are Located
In Dow Corning's Files**

Because of the passage of time from when the global settlement was reached (March 1994) until the Effective Date of the Plan (June 1, 2004), many medical records were destroyed by doctors and hospitals under their 7-year retention policy.

Frequently, doctors submitted a copy of the Operative and Pathology Report to Dow

Corning under various “guarantee” programs such as the Product Replacement Expense Program (P.R.E.P.), Removal Assistance Program (RAP) or for credit because the implant was defective. Claimants began to inquire about locating and gaining access to their records when claim forms were mailed in February 2003. While the agreement to gain access to the unredacted medical records was being negotiated between the parties, claimants were instructed by the prior Claims Administrator Wendy Trachte-Huber not to contact the SF-DCT seeking such documents until a review could be completed. See Exhibit 2 attached hereto, Declaration of Dianna Pendleton-Dominguez. The CAC repeated this request in its newsletters and at Claimant Information Sessions sponsored and conducted by the SF-DCT in 2003, 2004 and 2005. Id. Unfortunately, negotiations over access to the records were protracted. Following entry of the Order in December 2005, it took six months to schedule and then review the medical records to locate and match them to claimants in the SF-DCT database. The CAC is informed that the review of the records was completed just weeks ago (after the June 1, 2006 deadline) and that the matching process is ongoing. Id.

The Order governing this issue – to which Dow Corning agreed – explicitly states that, “The CAC is authorized to review the information to assist claimants in locating documents.” The CAC received a copy of the CD with the medical records on it last week, two weeks after the June 1, 2006 deadline passed. Id. The CAC filed a motion

seeking an extension of time for these claimants to be notified that their records have been found and to submit the Rupture Claim Form.

Dow Corning did not respond to or dispute these facts in its Response; it simply states that it is a claimant's responsibility to submit a claim form and documentation. Their position basically rewards Dow Corning for protracting the negotiations and review process to ensure that the review was not complete until after the deadline passed. This nullifies the purpose and intent of the agreement and corresponding Order. Since there are only a small number of claims affected by the review process, the CAC believes that it and the SF-DCT can work together to contact the affected claimants so that a Rupture Claim Form can be submitted within 90 days following entry of an Order granting the extension.

SUMMARY

For these reasons, the CAC respectfully requests that this Court enter an Order granting an extension of time to certain groups of claimants with regard to the June 1, 2006 deadline for Rupture, Class 7 and Class 9/10.

FOR THE CLAIMANTS' ADVISORY
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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2006, I electronically filed the foregoing Reply with the Clerk of Court using the ECF system which will send notification of such filing to the following: Debtor's Representatives and Claims Administrator.

/s/ Dianna Pendleton-Dominguez
Dianna Pendleton-Dominguez