

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:)
) CASE NO. 00-CV-00005-DT
) (Settlement Facility Matters)
DOW CORNING CORPORATION,)
)
)
Reorganized Debtor.) HON. DENISE PAGE HOOD

RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE TO
MOTION OF [CLAIMANT NAME REDACTED] TO TOLL THE SIX MONTH
DEADLINE FOR CURING RUPTURE DEFICIENCIES

AND

MOTION OF CLAIMANTS' ADVISORY COMMITTEE TO TOLL
THE CURE DEADLINE FOR ALL REQUESTS FOR RE-REVIEW
THAT ARE PENDING MORE THAN 21 DAYS

The Claimants' Advisory Committee ("CAC") submits this response in support of the *Motion Of [Claimant Name Redacted] To Toll The Six Month Deadline For Curing Rupture Deficiencies* filed by Doffermyre Shields Canfield Knowles & Devine ("the DSCKD Motion"). The CAC also contemporaneously submits its own *Motion to Toll The Cure Deadline For All Requests For Re-Review That Are Pending More Than 21 Days* and respectfully requests that this Court enter an Order as set forth herein.

BRIEF IN SUPPORT

I. The Settlement Facility Represented That Re-Review Requests Would Be Prioritized And Completed Within 21 Days of Receipt by the SF-DCT

Annex A to the Settlement Facility Agreement sets forth the criteria and deadlines applicable to implant claimants. The criteria incorporate virtually all of the substantive criteria from the Revised Settlement Program ("RSP"). However, at least one major

change from the RSP was to insert deadlines for claimants who have a deficiency in their claim to cure the deficiency or be barred from compensation for that claim. The cure deadline for explant and rupture claims is six months from the date of the Notification of Status letter (see Annex A, Section 7.09(a)(ii) at p. A-52 - explant cure deadline and Section 7.09(c) at p. A-53 - rupture cure deadline), and the cure deadline for disease claims is one year from the date of the Notification of Status letter. See Section 7.09(b)(ii) at p. A-52. This change from the RSP was significant in that the RSP contained no deadline to cure a deficiency. Therefore, the parties wrote into the Plan Documents the requirement that the Claims Administrator would establish reasonable times to complete re-reviews. The intent was to allow claimants prioritized review for deficiency requests so that they could maximize *their ability to cure the deficiency within the applicable* deadline before being barred on that claim altogether.

As the Settlement Facility organization was put together over the last several years, the Claims Administrator repeatedly assured the parties that the claims office had a separate processing queue and staff that would prioritize requests for re-review to cure a deficiency, as set forth in Annex A Section 7.09(b)(iii). That Section provides that:

Re-review. The Claims Office may establish regulations relating to the submission of medical documentation and set reasonable periods during which to conduct the evaluation or re-evaluation of a Claimant's eligibility and benefits based on supplemental submissions and for submission of supplemental documents after notice of deficiencies.

Immediately prior to conducting a series of nine (9) claimant meetings throughout the U.S. prior to November 29, 2004 opt-out deadline, the issue was discussed in great specificity. At that time, the Claims Administrator stated to the Claimants' Advisory

Committee – and then later relayed the same comment to attendees at the claimant meetings – that:

1) The Settlement Facility had a system in place to immediately identify requests for re-review as they were submitted;

2) The Mail Room and Data Entry at the Settlement Facility would maintain no more than a 3-day backlog of unopened mail so that requests for re-review could be identified as fast as possible;

3) The Settlement Facility had a separate processing queue for requests for re-review so that requests would not be placed at the end of the line of claims seeking an initial review;

4) The Settlement Facility had adequate staff in place dedicated to respond to requests for re-review within 21 days following receipt by the SF-DCT; and

5) Most importantly, if the request for re-review was pending more than 21 days, the Settlement Facility would toll the cure deadline beginning on the 22nd day.

See Statement of Claimants' Advisory Committee members, Sybil Niden Goldrich, Ernest Hornsby and Dianna Pendleton-Dominguez, attached hereto as Exhibit 1.

When the series of claimant meetings were concluded in September 2004, the Claimants' Advisory Committee issued an electronic newsletter dated October 1, 2004 that included updates and developments provided at the claimant meetings. One such update concerned the re-review issue, and the newsletter reflected what was stated at the claimant meetings:

Because there are short deadlines to cure deficiencies in claims, the Settlement Facility had prioritized the submission of new documents or information for review. It is very important that you use the form provided by the Settlement Facility called the "Additional Information Form" when you submit new documents for review to cure a deficiency. The Settlement Facility mail room and data entry departments specifically look for these forms to route them immediately to the appropriate claims department for review, so please make sure you use this form. The Settlement Facility informs us that their goal is to provide a re-review on deficiency claims within 21 days, *so that claimants can maximize their ability to cure the deficiency within the applicable deadline.*

See Exhibit 2 attached, Excerpt from CAC E-Newsletter dated October 1, 2004

(emphasis added).¹

In late 2004, the CAC began to receive a large volume of phone calls and correspondence from claimants indicating that their re-review request had been pending in excess of 21 days. The CAC consulted with the Claims Administrator in various telephone calls and were informed that the Settlement Facility was generally processing re-review requests within 21 days and, if a claim could not be processed within that time, the Settlement Facility would toll the cure deadline as of the 22nd day. See Exhibit 1 attached, statement of CAC members.

In January 2005, the Claimants' Advisory Committee attended a Finance Committee and budget planning meeting at the Settlement Facility. During that meeting, the CAC again raised the issue of pending re-reviews and was informed for the first time that, contrary to prior representations, there was a "substantial" backlog of pending re-review requests and, based on this and other reasons, the various review departments planned to focus exclusively on processing re-review requests during the first several

¹ The Claims Administrator was consulted about the accuracy of this information prior to the issuance of the e-newsletter. In addition, the Claims Administrator is on the e-newsletter mailing list and received a copy of the newsletter.

weeks of February 2005. See Exhibit 1 attached, statement of CAC members. The CAC asked what the Settlement Facility intended to do about the cure deadlines that were running. Deputy Claims Operation Manager, Ellen Bearicks, responded that the Settlement Facility was informing affected claimants that their deadline was tolled as of the 22nd day following receipt of the re-review request by the Settlement Facility. See Exhibit 1 attached, statement of CAC members.

The CAC conveyed this message to claimants, but we have been informed by a number of claimants and counsel that when they call Claims Assistance to confirm that cure deadlines would be tolled, Claims Assistance representatives respond that they are not aware of this policy. See Exhibit 1 attached, statement of CAC members. The CAC also wrote directly to the Claims Administrator on January 11, 2005 asking her to confirm in writing what had been represented verbally on a number of occasions – both publicly and privately. See Exhibit 3 attached, email correspondence from D. Pendleton-Dominguez to Wendy Trachte-Huber. To our dismay, the Claims Administrator responded that same day that the treatment concerning requests for re-review and tolling was a “confidential internal policy” of the Settlement Facility and could not be disclosed. See Exhibit 4 attached, email correspondence from Wendy Trachte-Huber to Debtor’s Representatives and CAC. In her email though, the Claims Administrator acknowledged that the re-review policy had been implemented in July 2004 (consistent with the statements of CAC members attached as Exhibit 1), that the policy provides for extending deadlines if the “standard internal processing standard is exceeded ...,” and that the SF-DCT has been “implementing this extension for rupture, explant and disease as we are

experiencing a delay in processing Requests for the Review of Additional Information.”

Id.

The CAC believes that issues such as tolling of the cure deadline are substantive matters that claimants have a right to know about. Certainly, some claimants have been informed of the policy directly by the Claims Administrator, i.e., those who attended the claimant meetings in July and September 2004 as well as claimants whose re-review was not processed within the 21 days, and others have been informed of the policy through the CAC’s communications. At no time was it conveyed that the information or policy was “confidential” and not to be disclosed.

Since January 2005, the CAC has received in excess of two hundred emails and phone calls from claimants and attorneys concerning this issue as their re-review request (or that of their client) has been pending for 4-6 months and their cure deadline for an explant and/or rupture claim either is about to expire or had expired without a response from the Settlement Facility. The CAC attaches to this Motion (under seal to preserve claimant confidentiality) a sampling of the emails received in the past month alone on this issue. See Exhibit 5 attached hereto under seal (a redacted set of the correspondence is attached for copies to persons other than the Court). We respectfully ask the Court to enter an Order providing the following relief: first, order that any claimant whose re-review request has been pending for more than 21 days will have their cure deadline tolled as of the 22nd day following receipt of the request by the SF-DCT. Second, direct the Settlement Facility to structure their staffing so that re-review requests can be prioritized and reviewed in a timely fashion. If the 21 day turnaround goal set by the Claims Administrator was too lofty as it now appears, then we urge that a more realistic

goal that does not greatly exceed this time period be determined and adhered to going forward and that claimants whose re-review request are not processed in a timely manner should have their cure deadline tolled until such time as the review is complete and a new Notification of Status letter is issued. If this relief is afforded, then this should satisfactorily resolve the request to toll the cure deadline as set forth in the pending DSCKD Motion.

Respectfully submitted,

Dianna Pendleton-Dominguez

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing Response and Motion of the Claimants' Advisory Committee To Toll The Cure Deadline For All Requests For Re-Review That Are Pending More Than 21 Days and attached exhibits was sent via Federal Express to the Court this 7th day of February 2005 and was served via electronic mail this 7th day of February 2005 on the Debtor's Representatives and Doffermyre Shields Canfield Knowles & Devine.

Dianna Pendleton-Dominguez
Dianna Pendleton-Dominguez

EXHIBIT 1

STATEMENT OF CLAIMANTS' ADVISORY COMMITTEE

1. On May 20, 2004, the United States District Court for the Eastern District of Michigan entered an Order noticing the appointment of the Claimants' Advisory Committee ("CAC") in *In re Dow Corning Corporation, Debtor*, Civil Action No. 00-CV-00005. The CAC consists of Sybil Niden Goldrich, Ernest Hornsby and Dianna Pendleton-Dominguez.
2. Since June 1, 2004, the CAC has performed the functions set forth in the Amended Joint Plan of Reorganization of Dow Corning Corporation ("the Plan").
3. The undersigned CAC members make this statement, to the best of their memory and recollection, under oath.
4. The CAC participated in a series of claimant meetings conducted by the SF-DCT during July and September 2004. We were also involved in drafting the Power Point presentation given by the Claims Administrator at these meetings.
5. During conference calls prior to the meetings, the issue arose concerning the time the SF-DCT would take to process and respond to requests for re-reviews seeking to cure deficiencies. The Claims Administrator responded that the SF-DCT had a system in place to immediately identify requests for re-review as they were submitted, the Mail Room and Data Entry at the Settlement Facility would maintain no more than a 3-day backlog of unopened mail so that requests for re-review could be identified as fast as possible, the Settlement Facility had a separate processing queue for requests for re-review so that requests would not be placed at the end of the line of claims seeking a first review, the Settlement Facility had adequate staff in place dedicated to respond to requests for re-review within 21 days following receipt by the SF-DCT, and most importantly, if the request for re-review was pending more than 21 days, the Settlement Facility would toll the cure deadline beginning on the 22nd day.
6. At the claimant meetings held in July and September 2004, the Claims Administrator disclosed this policy to claimants and counsel, and the CAC discussed the policy further during their presentation. The CAC also discussed this policy in its electronic newsletters, to which the Claims Administrator affirmatively registered to receive a copy.
7. In late 2004, the CAC began to receive a large volume of phone calls and correspondence from claimants indicating that their re-review request had been pending in excess of 21 days. The CAC consulted with the Claims Administrator in various telephone calls and were informed that the

Settlement Facility was generally processing re-review requests within 21 days and, if a claim could not be processed within that time, the Settlement Facility would toll the cure deadline as of the 22nd day.

8. In January 2005, the Claimants' Advisory Committee attended a Finance Committee and budget planning meeting at the Settlement Facility. During that meeting, the CAC again raised the issue of pending re-reviews and was informed for the first time that, contrary to prior representations, there was a "substantial" backlog of pending re-review requests and, based on this and other reasons, the various review departments planned to focus exclusively on processing re-review requests during the first several weeks of February 2005.
9. The CAC asked what the Settlement Facility intended to do about the cure deadlines that were running. Deputy Claims Operation Manager, Ellen Bearicks, responded that the Settlement Facility was informing affected claimants that their deadline was tolled as of the 22nd day following receipt of the re-review request by the Settlement Facility.
10. The CAC conveyed this message to claimants, but we have been informed by a number of claimants and counsel that when they call Claims Assistance to confirm that cure deadlines would be tolled, Claims Assistance representatives respond that they are not aware of this policy.

Sybil Niden Goldrich

Ernest Hornsby

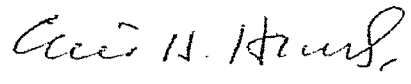
Dianna Pendleton-Dominguez
Dianna Pendleton-Dominguez

Dated: FEBRUARY 9, 2005

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Sybil Niden Goldrich



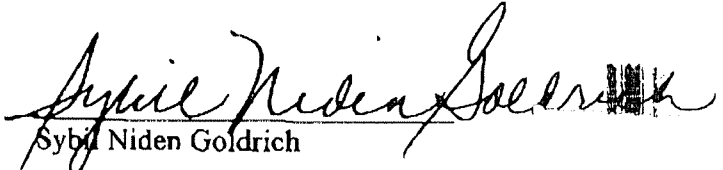
Ernest Hornsby

Dianna Pendleton-Dominguez

Dated: _____

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Sybil Niden Goldrich

Ernest Hornsby

Dianna Pendleton-Dominguez

Dated: _____

2/4/05

EXHIBIT 2

Subj: CLAIMANTS' ADVISORY COMMITTEE NEWSLETTER Volume 1, No. 6
Date: 10/1/2004 2:34:11 PM Central Standard Time
From: tortcomm@rxs.com
To: dpendleton@blizzardlaw.com

Sybil Niden Goldrich
Ernest Hornsby, Esq.
Dianna Pendleton-Dominguez, Esq.

CLAIMANTS' ADVISORY COMMITTEE E-NEWSLETTER
Volume 1, No. 6, October 1, 2004

Welcome to the sixth e-newsletter from the Claimants' Advisory Committee (CAC) in the Dow Corning bankruptcy Settlement Plan. You were sent a copy of the newsletter because our records show that you requested to be on the mailing list. If you wish to unsubscribe, [click here](#). The CAC will publish this e-newsletter monthly. If you would like to read prior CAC e-newsletters, they are available on the CAC website by clicking on "Electronic Newsletter." We urge you to also visit the Settlement Facility website (www.dcsettlement.com) and CAC website (www.tortcomm.org) on a regular basis to download or view relevant documents and read updates and new information.

I. Litigation Opt-Out Update

- a. **Case Management Order # 2 Entered by Judge Hood on September 29, 2004.** This update applies only to claimants who affirmatively elect litigation by checking Box 2B on their Participation Form. It does not apply to claimants who elect to remain in the Settlement Option.

On September 29, 2004, Judge Hood signed and entered Case Management Order No. 2 ("CMO 2"). We are reprinting CMO 2 in this newsletter, but you can also download a copy on the CAC's website under "Court Orders" and under "Opt-Out Information for Litigation." CMO 2 supplements Case Management Order No. 1 and modifies and supercedes particular provisions of CMO 1, so it is very important that claimants and attorneys review CMO 2 for more complete information about the opt-out procedures.

CASE MANAGEMENT ORDER NO. 2

This Case Management Order ("CMO") No. 2 is entered pursuant to the Amended Joint Plan of Reorganization, as updated June 1, 2004 (the "Plan"), and this Court's continuing jurisdiction over claims asserted against the DCC Litigation Facility, Inc. ("Facility"), which is predicated, *inter alia*, on Article III of the United States Constitution, the Bankruptcy Code, Proofs of Claim that were previously filed and various provisions of the Plan, including Sections 8.7.1, 8.7.3 and 8.7.8. CMO No. 2 supplements CMO

No. 1 and, where noted, modifies and supersedes particular provisions of CMO No. 1. CMO No. 2 governs all personal injury claims brought against the Facility (hereinafter "Opt-Out Claims"). (Note: Capitalized terms not specifically defined in this CMO No. 2 are defined in the Plan.)

1. Required Procedure for Commencing an Opt-Out Claim

Friday, October 01, 2004 America Online: Guest

settled for Dow Corning claimants.

The defendants in the RSP, i.e., Bristol, Baxter, 3M, and Union Carbide, and others have reached a settlement of the appeal by the U.S. Government regarding payments allegedly made by various U.S. agencies to claimants with Bristol, Baxter and/or 3M breast implants. The defendants and others agreed to pay the U.S. Government approximately \$ 11.3 million and, in exchange, the U.S. Government has agreed to drop its claims seeking repayment for medical treatment received at or paid by various federal agencies on behalf of implant claimants. We will post a copy of the settlement agreement on the CAC website under "Other Downloads" as soon as it becomes available.

6. Explant Assistance Program. Claimants who have a Dow Corning breast implant (either saline or silicone gel) who want to have it removed may do so through the Explant Assistance Program (EAP). To be eligible, you must first submit acceptable proof that you have a Dow Corning breast implant. If you do, the Settlement Facility will send you a package with information on how to proceed and have the costs of the implant removal surgery up to \$5,000 (U.S.) paid for directly from the Settlement Facility to your surgeon. Claimants who participate in the Explant Assistance Program do not have to independently obtain documentation of their explant surgery and, if applicable, their rupture claim, because the explanting surgeon must provide these documents to the Settlement Facility directly before they can be paid. Also, claims for Explant Assistance are prioritized for review and payment; generally, doctors can expect payment to be issued within 60 days after they have provided the necessary documents. For more information, contact the Claims Assistance Program at 1-866-874-6099 or by email at info@sfdct.com.

- a. Many claimants have asked whether there is a list of surgeons who are willing to perform the explant surgery as part of the Explant Assistance Program. Neither the Settlement Facility, Claimants' Advisory Committee nor Dow Corning have such a list. We suggest that claimants discuss this issue with their family doctor or implanting physician, or contact the breast implant support groups (listed on the CAC website under "Other Downloads"), or local plastic surgery associations for referrals to an appropriate surgeon.

7. Requests to the Settlement Facility for A Re-Review. Because there are short deadlines to cure deficiencies in claims, the Settlement Facility has prioritized the submission of new documents or information for review. **It is very important that you use the form provided by the Settlement Facility called the "Additional Information Form" when you submit new documents for review to cure a deficiency.** The Settlement Facility mail room and data entry departments specifically look for these forms to route them immediately to the appropriate claims department for review, so please make sure you use the form. The Settlement Facility informs us that their goal is to provide a re-review on deficiency claims within 21 days, so that claimants can maximize their ability to cure the deficiency within the applicable deadline.

EXHIBIT 3

Subj: **Re-reviews**
Date: 1/11/2005 10:31:11 A.M. Eastern Standard Time
From: DPEND440
To: ewhuber@sfdct.com
CC: Ehornsby@fphw-law.com

Wendy: We are getting inquiries from claimants and attorneys concerned about the length of time re-reviews are taking and their cure time. Please confirm that the cure deadline is tolled for any re-review pending beyond 21 days, so that we can accurately advise these claimants and their attorneys.

Thanks, Dianna

EXHIBIT 4

Subj: **re. Confidential Internal Policy regarding Re-reviews**
Date: 1/11/2005 3:47:22 P.M. Eastern Standard Time
From: EWHuber@sfdct.com
To: sybilG58@aol.com, GreenspanD@dsmo.com, DPendleton@blizzardlaw.com, ewrich@dow.com, Ehornsbysby@fphw-law.com, j.d.dodd@dowcorning.com, jschultz@nixonpeabody.com, marcus.worsley@dowcorning.com, EWHuber@sfdct.com
CC: ebearick@sfdct.com, APhillips@sfdct.com, ceatmon@sfdct.com, cowsley@sfdct.com

Greetings:

We have discussed in our meetings—we have an internal policy implemented in July 2004. This policy provides for administratively extending deadlines during the review of additional information reviews if the standard internal processing standard is exceeded. We have been implementing this extension for rupture, explant and disease as we are experiencing a delay in processing Requests for the Review of Additional Information. As there is nothing in the Plan providing specific timing we have developed internal procedures for extending the Cure Deadline date. We have discussed this in earlier meetings and felt we had CAC/DR agreement that this was a prudent practice.

If you have further questions, we can discuss during our call tomorrow. I will try to “clean-up” the agenda.

Elizabeth W. Trachte-Huber, Esq.
Claims Administrator/ C.E.O.
Settlement Facility-Dow Coming Trust
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Houston, TX 77002

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FAX (713)874-6061
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Tuesday, January 11, 2005 America Online: Guest