

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

RESPONSE TO MOTION OF [REDACTED] TO TOLL THE SIX MONTH DEADLINE FOR CURING RUPTURE DEFICIENCIES, MOTION OF CLAMANTS' ADVISORY COMMITTEE TO TOLL THE CURE DEADLINE FOR ALL REQUESTS FOR RE-REVIEW THAT ARE PENDING MORE THAN 21 DAYS, AND MOTION OF DEBORAH DESANTO FOR 60 DAY EXTENSION TO CURE HER EXPLANT AND RUPTURE DEFICIENCIES BASED ON SPECIAL CIRCUMSTANCES

Dow Corning Corporation ("Dow Corning") respectfully submits this *Response To Motion Of [Redacted] To Toll The Six Month Deadline For Curing Rupture Deficiencies, Motion Of Claimants' Advisory Committee To Toll The Cure Deadline For All Requests For Re-Review That Are Pending More Than 21 Days, And Motion Of Deborah Desanto For 60 Day Extension To Cure Her Explant and Rupture Deficiencies Based on Special Circumstances.*

On January 25, 2005, the law firm of Doffermyre Shields Canfield Knowles & Devine filed the *Motion Of [Redacted] To Toll The Six Month Deadline For Curing Rupture Deficiencies* ("Doffermyre Motion to Toll"), requesting an extension of time in which a claimant could cure her rupture claim in the event the Settlement Facility-Dow Corning Trust (the "SF-DCT") found the initial cure attempt to be inadequate. On February 7, 2005, the Claimants' Advisory Committee ("CAC") filed its own *Motion of Claimants' Advisory Committee To Toll The Cure Deadline For All Requests For Re-Review That Are*

Pending More Than 21 Days (“CAC Motion to Toll”) in conjunction with *the Response of Claimants’ Advisory Committee To Motion of [Claimant Name Redacted] To Toll The Six Month Deadline For Curing Rupture Deficiencies*. The CAC Motion to Toll more broadly requests the Court to enter an Order providing that any claimant whose re-review request has been pending for more than 21 days with the SF-DCT have her cure deadline tolled as of the 22nd day following receipt by the SF-DCT and directing that the SF-DCT structure its staffing so that re-review requests can be prioritized and reviewed in a timely fashion. On February 25, 2005, Deborah DeSanto filed the *Motion Of Deborah Desanto For 60 Day Extension To Cure Her Explant and Rupture Deficiencies Based on Special Circumstances* (“DeSanto Motion”), joining in the Doffermyre Motion to Toll and the CAC Motion to Toll and requesting an additional 60 days to cure deficiencies in her claims because of the active hurricane season in Florida in 2004. Collectively, the various motions are referred to herein as the “Motions to Toll”.

Each of the Motions to Toll raises different issues and seeks different relief. The relief sought in the Doffermyre Motion to Toll is inconsistent with the Plan and would undercut the carefully constructed deadline provisions in the Plan. The CAC Motion to Toll seeks to establish guidelines to assure that claimants are not penalized by processing delays outside of their control. As a conceptual matter, Dow Corning believes that the approach advocated by the CAC is reasonable, but that the details of the guidelines must be more carefully evaluated. The DeSanto Motion to Toll seeks

relief based simply on the fact that several hurricanes created delays in mail delivery in Florida. The DeSanto Motion to Toll, however, does not provide any relevant factual evidence to support the requested extension and must be denied.

While the Plan allows claimants ample time to cure a deficiency (one year for disease claims, and six months for rupture or explant claims), it does not grant claimants the unfettered right to multiple chances to cure deficient claims within those time periods. Indeed, *nothing* in the Claims Resolution Procedures (“CRP”) guarantees claimants the opportunity to receive *multiple* written NOS letters to detail continuing deficiencies and multiple chances to cure a claim. While the Plan authorizes the SF-DCT to review a disease claim submission twice, it does not mandate that the SF-DCT do so and does not mandate that the SF-DCT respond to a claimant’s original attempt to cure the deficiency, much less within a specified number of days. Moreover, it does not even grant such express authority for re-reviews in the case of rupture or explant claims. Accordingly, to the extent the Motions to Toll seek relief that would result in multiple deadline extensions based on multiple efforts to cure deficiencies, the Motions must be denied.

Background

The CRP establish generous but firm overall time limits in which a claimant is allowed to cure a deficient submission. With respect to the Disease Payment Option for Breast Implant Claims: “Claimants shall have one year from the date of the Notification of Status letter to cure any deficiency in the Claim.” Settlement Facility Agreement, Annex A §7.09(b)(ii)(1).¹ For disease claims, the Claims Office is authorized to “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 documentation after notice of the deficiencies.” *Id.* at §7.09(b)(iii). The CRP do not require that the SF-DCT re-review a disease claim multiple times within a set time period, nor do they require that the SF-DCT provide multiple NOS letters to claimants in response to attempts to cure deficiencies. Rather, the CRP set a *limit* on what the SF-DCT *can* do in this regard: “Generally, the Claims Office will not review a Claimant’s submission(s) in response to a deficiency notice more than twice; however, the Claims Administrator may conduct a third review after completion of the review of all other Claims for Disease Payment Option Benefits.” *Id.*

¹ Claimants who fail to meet cure the deficiency within the one-year period are still eligible to receive the Expedited Release Payment Option (even if the Expedited Release Payment Option has concluded). Annex A §7.09(b)(ii)(2).

With respect to explant and rupture claims, the Plan grants claimants six months to cure any deficiency: The CRP plainly provide that “[i]n the event that the Rupture Payment Option Form or supporting documentation is deficient, the Claimant shall have six (6) months from the date of the Notification of Status letter identifying the deficiency to submit additional documentation to cure the deficiency.” Annex A §7.09(c)(ii). Likewise, explant claimants have six months from the date of the NOS letter to cure a deficiency. *Id.* at §7.09(a)(iii). Notably, for explant and rupture claims, the CRP contain *no* express authorization for the SF-DCT to conduct multiple re-reviews.

Argument

A. The Doffermyre Motion to Toll Must Be Denied

The Doffermyre Motion to Toll must be denied because the claimant seeks an open ended extension of the deadline and appears to claim a right to a “new” six month period to cure after each NOS letter. The Doffermyre Motion to Toll complains that the claimant had not received a response to her timely additional submission (sent in response to the NOS letter) stating: “Indeed, if she received an NOS today, she would only have ten days in which to respond before her ‘cure deadline’ expired. Were that to occur, Ms. [] would have had less than two weeks – and not the promised six months – in which to cure the deficiency.” Doffermyre Motion to Toll, ¶ 10. This statement assumes that the claimant has a right either to: an immediate response from the SF-DCT to any submission in response to an NOS letter or a six month cure period from

the date of a second NOS letter. The Plan confers no such rights and places no such obligations on the SF-DCT. The Doffermyre Motion to Toll then asks this Court to extend the deadline to cure to account for the “delay” in re-reviewing the submission. This request (and assertion of delay) assumes that there is a set time period in which the SF-DCT is required to review a supplemental submission and that the SF-DCT has failed to comply with that time period. Again, the Plan does not establish any such time period or requirement. The claimant is entitled to a six month period from the date of the original NOS letter to “submit additional documentation to cure the deficiency”. Annex A §7.09(c)(ii).² The claimant has by her own admission submitted additional documentation within that six month period. In fact, the claimant had the right to make multiple submissions during that six month period. All such submissions would have been timely filed. There is nothing in the Plan that requires the SF-DCT to respond to any such submission before the end of the six month period so that the claimant can make additional responsive submissions before the six month period expires. If the assumption that underlies the Doffermyre Motion to Toll were to be accepted, then each claimant could unilaterally extend every deadline simply by submitting some new documentation before the end of the cure period. The new submission would automatically trigger a new cure period, and claimants could effectively avoid the deadline requirements in the Plan.

² The CRP establish the identical six month cure period for claimants other than breast implant rupture claimants. Annex §§6.03(f)(i)(c)(v), 6.03(f)(ii)(e), 6.03(f)(ii)(e).

In sum, the Plan and the CRP do not guarantee any claimant the right to receive repeated written responses from the SF-DCT, to which they can submit repeated submissions within an ever-extending cure deadline. The CRP establish firm cure deadlines of six months or one year, which would be eviscerated by the relief sought here. Moreover, claimants already have recourse available in a cure process in that they have the opportunity to call and speak with SF-DCT staff for clarification or assistance during the six-month or one-year cure periods. The Plan does not further guarantee a certain number of opportunities to cure within the established deadlines. Accordingly, the relief sought in this motion must be denied.

B. The CAC Motion To Toll Suggests a Possible Temporary Approach to Address Unacceptable Delays in Processing

The CAC argues that the SF-DCT has previously indicated in certain contexts that they would seek to respond to requests for re-reviews within 21 days and would toll the cure deadline beginning the 22nd day if requests for re-review were pending more than 21 days. The Plan does not, however, authorize the SF-DCT to “toll” deadlines established in the CRP for curing claims.³ Claimants are provided lengthy

³ As indicated in the CAC Motion, the Claims Administrator recently advised that the SF-DCT has adopted an “internal policy” implemented in July 2003 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.” See CAC Motion to Toll at Exh. 4 (1/11/05 email from E.W. Trachte-Huber) (Emphasis added). It is unclear where the SF-DCT thought it derived the authority to “administratively” extend deadlines if what is referred to are the six-month and one-year overall cure deadlines established by the Plan documents. The fact that the Plan granted the SF-DCT the authority (not the mandate) to conduct re-

periods in which to cure deficient claims (six months to one year), but those outside deadlines are not dependent on what the SF-DCT does or does not do in response to re-review requests within that period. The deadlines are triggered by the issuance of an NOS letter, and it is up to the claimant to cure any deficiency within the six-month or one-year period. While the SF-DCT is authorized to establish procedures for re-review of disease claims, the CRP do not mandate that the SF-DCT respond to such requests in writing (much less within 21 days or any other time period) and do not guarantee any claimant the right to submit continuing responses to multiple NOS letters. Rather, for disease claims, the SF-DCT is authorized to provide procedures for re-review and the CRP limit such re-reviews by providing that “[g]enerally, the Claims Office will not review a Claimant’s submission(s) in response to a deficiency notice more than twice; however the Claims Administrator may conduct a third review after the completion of the review of all other Claims for Disease Payment Option Benefits.” Annex A §7.09(b)(iii).

The CAC asks this Court to compel the SF-DCT to abide by the guideline that it apparently publicized – *i.e.* that the office would administratively toll the cure deadlines indefinitely for any claimant whose request for re-review has been pending for more

reviews and did not specify internal deadlines by which the facility should complete such re-reviews does not mean that the SF-DCT’s inability to meet its own internal deadlines is grounds for “administratively” extending overall cure deadlines established in the Plan. Nor is it clear why rupture and explant claims were categorized with disease claims, since the CRP includes no provision for re-review in such cases.

than 21 days with the SF-DCT. *See* CAC Motion to Toll at 6. Dow Corning submits that this request must be denied both because the SF-DCT did not have authority to establish an across the board administrative tolling provision and because the 21 day period to review submissions appears unrealistic and thus an inappropriate basis to serve as the “trigger” for extending a clear cut deadline in the Plan.

Dow Corning believes, however, that it is reasonable to take into account the fact that there may have been, and may continue to be, processing delays at the SF-DCT during this first year of full operations. Dow Corning does not have any objection to providing some modest relief to claimants whose ability to respond to an NOS letter is affected by such delays. Dow Corning suggests that it would be appropriate to establish a realistic time period for the SF-DCT to process submissions for “re-review” and to allow the SF-DCT to toll the cure period if the SF-DCT fails to review the supplemental submission within that period and if the period would not have been exhausted had the SF-DCT reviewed the supplemental submissions within that period. In other words, if the SF-DCT is expected to review a submission within 60 days of receipt, and if the supplemental submission is sent to the SF-DCT one month before the cure deadline, then there would be no “tolling” of the cure deadline. If, on the other hand, the supplemental submission were sent to the facility four months before the cure deadline and the SF-DCT does not review the submission within that 60 day period, then the cure deadline would be tolled from day 60 until the SF-DCT completes its

review of the supplemental submission. Dow Corning suggests that this “tolling” concept should apply only until the end of this year. By that point, the SF-DCT should have reviewed the large number of claims submitted near or shortly after the Effective Date and processing delays should be eliminated.

While Dow Corning is willing to agree to a tolling concept as outlined above, it is necessary to determine the appropriate period of time that will “trigger” the tolling provisions. Dow Corning submits that this determination can only be made in consultation with the Finance Committee, the CAC and the Debtors Representatives. Accordingly, Dow Corning suggests that the Court provide an opportunity for the parties to confer and fashion an acceptable solution.

C. The Desanto Motion Should Be Denied

The Desanto Motion requests an additional 60 days to cure the deficiencies in her explant and rupture claims. In support of her motion, Desanto asserts that “[a]s a result of the active hurricane season in 2004, claimant did not receive the Notification of Status letters in a timely fashion and, when they were received, she was not able to respond to them in a timely fashion to cure the deficiency.” Desanto Motion at 3. While Dow Corning recognizes the impact of the hurricane season in Florida, the Desanto Motion provides no factual support on which to find “special circumstances” that would warrant a two month extension of the cure deadline.

First, there is no basis in the Plan to extend the deadline, which is not so short as to compel extensions in cases where events or circumstances inevitably impact certain claimants. However, even if it were appropriate to extend the deadline in individual cases, the Desanto Motion presents no factual basis to do so. The motion vaguely asserts that the “claimant did not receive the Notification of Status letters in a timely fashion.” There is no evidence to support this claim. Nor is there any indication of when claimant did receive the NOS letters, or if they were received so late as to warrant a two month extension of a six month deadline. Likewise, the motion simply states that “when they were received, she was not able to respond to them in a timely fashion.” Again, there is no evidence to support this claim and no explanation of why she was not able to respond, how the hurricane season impaired her ability to do so, or for how long such factors precluded her from responding. The *only* evidence presented in support of this motion is that Florida experienced several hurricanes.

If the Desanto Motion were granted, then claimant after claimant could come before this Court with bare assertions that their mail was delayed or that weather or other circumstances beyond their control made it difficult to respond to deadlines. Indeed, her Motion would “support” a two month extension for all claimants in Florida as much as it supports an extension in her own case. Since there is no factual basis to support a finding of “special circumstances” to warrant an extension here even if such an extension could be proper, and no basis to find that any such circumstances would


warrant a two month extension of an already ample six month deadline, the Desanto Motion should be denied.

Conclusion

For the reasons stated herein, the Motions to Toll must be denied. However, Dow Corning is willing to consider implementation of a limited process similar to that discussed in the CAC Motion to Toll to address issues of processing delay.

Respectfully submitted this 18th day of March 2005,

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EASTERN DISTRICT OF MICHIGAN
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§ (Settlement Facility Matters)
DOW CORNING CORPORATION, §
§ HON. DENISE PAGE HOOD
REORGANIZED DEBTOR §

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2005 a true and correct copy of the following pleading was served via electronic mail, telecopy, or first-class mail upon the parties listed below:

RESPONSE TO MOTION OF [REDACTED] TO TOLL THE SIX MONTH DEADLINE FOR CURING RUPTURE DEFICIENCIES, MOTION OF CLAIMANTS' ADVISORY COMMITTEE TO TOLL THE CURE DEADLINE FOR ALL REQUESTS FOR RE-REVIEW THAT ARE PENDING MORE THAN 21 DAYS, AND MOTION OF DEBORAH DESANTO FOR 60 DAY EXTENSION TO CURE HER EXPLANT AND RUPTURE DEFICIENCIES BASED ON SPECIAL CIRCUMSTANCES.

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