

# **Exhibit B**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

**In re:** §  
§  
**Dow Corning Corporation,** § **Case No. 00-CV-00005-DT**  
§ **(Settlement Facility Matters)**  
§  
**Reorganized Debtor** § **Hon. Denise Page Hood**

**AFFIDAVIT OF DAVID T. AUSTERN**

STATE OF TEXAS §  
COUNTY OF HARRIS §

David T. Austern, being duly sworn, deposes and says:

1. I am the Claims Administrator of the Settlement Facility-Dow Corning Trust (“SF-DCT”).
2. I have personal knowledge of the facts set forth in this Affidavit.
3. Numerous motions have been filed with this Court concerning the SF-DCT standards applied to the evaluation of Disability Level A claims. A number of exhibits, affidavits, and declarations have been filed in support of these motions. On June 20, 2006, the Court held a hearing with respect to some of these motions.
4. Various tasks were undertaken by me with respect to the Level A disability dispute in the hope that the results might help resolve the disputes pending between the Claimants Advisory Committee (“CAC”) and the Debtor’s Representatives (collectively, the “Parties”) before the Court. For instance, I suggested to the Parties that it might be useful for

me to provide a recommendation as to how best to evaluate Level A claims. The Parties agreed that such a recommendation might be useful. In the pursuit of such recommendations, I held a series of discussion with the Parties regarding Level A issues.

5. For a number of reasons, I believed it would be useful, from a historical perspective, to give my impressions on how the MDL 926 Claims Office (the "Claims Office") processed Level A claims, but it was not my purpose or intention to examine precisely how the Claims Office processed claims, or for what reason, and I did not have an assignment from the Parties to do this. To that end, I examined the Claims Office Level A guidelines, interviewed former Claims Office personnel who were familiar with the Claims Office practices (most of whom are now employed by the SF-DCT) to hear their recollections of such past practices, and attempted to trace various changes in the Claims Office Level A processing practices. The purpose of my investigation was to provide a recommendation for the appropriate treatment of Level A claims by the SF-DCT and I set forth my recommendations in a memorandum dated June 9, 2006 (the "June 9 Memorandum"). Stated differently, I am not a historian, I am unfamiliar with historical research methodology, and there was no attempt on my part to establish the empirical history of the Claims Office processing practices.

6. I have sent the June 9 Memorandum only to the CAC and the Debtor's Representatives.

7. In addition, as previously reported by me to the Parties in a memorandum, the Claims Office Level A processing practices evolved over time and were somewhat different at the Claims Office inception than they were in later years. Any historical investigation of the Claims Office processing practices, whether for the purposes described herein or otherwise, is inevitably frustrated by the fact that the early processing practices were not recorded in written

form. Thus, one must rely on oral history, with all the attendant failings that such history brings, to understand the early Claims Office processing practices. Furthermore, at least with respect to Level A disability claims, the Claims Office processing practices changed over time, and some Level A claims which were paid at the inception of the Claims Office apparently would not have been paid at Level A had they been submitted at a later time. The memorandum noted above was sent to the Parties for whatever use they saw fit to employ it.

8. During August 2005, I sent to the Parties a draft memorandum that was intended to explain why some claims might have a different outcome at the Claims Office as compared to such outcomes at the SF-DCT. The purpose of this memorandum was to obtain the reactions, comments or questions from the Parties, virtually all of whom know the history of the Claims Office processing practices to a greater extent than I do. My memorandum, as described above, was not the result of a rigorous or due diligence review of the Claims Office practices, and my investigation of the historical Claims Office practices was solely in support of my recommendations.

9. Finally, with respect to the Claims Office practices, it was my preference to reveal the text of the Claims Office guidelines so that the Parties would be in a position to understand the evolution of such guidelines and the fact that, over time, they were not constant. However, the Parties pointed out to me that the guidelines were protected by a confidentiality Order issued jointly by the MDL 926 Court and by this Court. Obviously, the best evidence of the Claims Office practices and guidelines are the guidelines themselves, and not a report by me that tries to describe, from oral history resources and oral recollections of others, the evolution of the guidelines.

10. Also in pursuit of an examination of how the SF-DCT should process Disability Level A claims, I have sent to the Claims Office a sample of claims filed and resolved at the SF-DCT, and requested a “blind review” by the Claims Office to determine whether the SF-DCT resolves Level A disability claims similarly to how the Claims Office resolves (or did resolve) such claims. To date, I have submitted 79 claims to the Claims Office, and that office has reviewed 59 of them. (While sixty claims were reviewed, one claim turned out to be a duplicate. Twenty additional claims have been submitted, but the Claims Office has not reported on the results.) Of the 59 claims reviewed, the Claims Office agreed with the SF-DCT processing outcome 44 times. Of the remaining 15 claims, the Claims Office approved the claims at a lower level than the SF-DCT in eight cases, and approved the claims at a higher level in seven cases. However, with respect to the claims where one facility paid at a higher level than the other, comparisons are not simple, idiosyncratic guidelines sometimes come into play, and the raw data can be misleading.

11. Individual SF-DCT claims have been referenced in certain of the Level A motions submitted to the Court, and certain SF-DCT claims have been referenced during oral argument. With respect to the former, I have requested the SF-DCT staff to review those claims that I could identify that are the subject of pending motions. (Because the SF-DCT is not a party to the motions that have been filed, the Facility is not always served by those filing such motions, and I make no representation that I know of each and every such motion.) Attached to this Affidavit is a chart prepared by the SF-DCT staff showing the results of that review. Of the 37 claims, some were deficient because the claimant’s medical records contradicted the disability level cited by the claimant’s Qualified Medical Doctor (QMD), some were deficient because disability statements were not provided by the QMD or the treating

physician as required by the SF-DCT guidelines, some were deficient because the claimant did not have symptoms required by the SF-DCT guidelines, and some were deficient because of the lack of documentation regarding the claimant's ability to perform vocational and self-care activities. In addition, some of the claims, notwithstanding the fact that they had been submitted with reference to SF-DCT to Level A guidelines, had been assigned a Level B or Level C disability by the claimant's own physician. Other claims have been approved and paid at the disability level requested.

12. With respect to claims cited during oral argument, two SF-DCT claims have been identified as examples of inappropriate SF-DCT standards applicable to Level A Disability issues. Both claims (Claim A and Claim B) were originally denied by the SF-DCT. Claim A was denied because the QMD letter submitted by the claimant conflicted with the underlying medical records. The claimant submitted additional documentation and the claim was ultimately approved and paid as a Level A. However, the reviewer who first looked at the additional documentation failed to approve the claim based on the additional information, (it should have been approved), and the claim was paid only because it went through the SF-DCT error correction process. Claim B was denied because the QMD letter submitted by the claimant did not link the claimant's disability to the qualified symptoms as required by SF-DCT processing guidelines. However, upon re-review, the SF-DCT determined that it was possible to infer this linkage from the underlying medical records, notwithstanding the omission in the QMD letter. As a result, the claim was approved. (Purely by accident, Claim B was submitted to the Claims Office for the "blind review" cited above. The Claims Office declined to approve the claim as a Disability Level A claim.)

13. Claim A should have been approved by the SF-DCT upon the submission of the additional documentation. While the claim was ultimately approved at Level A, it should have been approved earlier. Claim B was also approved at Level A; I do not believe one can fairly characterize the initial denial of this claim as a processing error. Reviewing a disease claim is complex and time-consuming. Each claim is reviewed on its merits and involves a review of each medical document submitted and a determination as to whether the documents set forth qualifying symptoms or findings. Thereafter, a determination must be made as to whether such qualifying symptoms or findings are linked to a disability. The Plan does not permit the SF-DCT to rely solely on any single document in order to determine disability, whether the document in question is a treating physician's notes or a letter from a QMD. Most claims are subject to multiple reviews and quality control examination.

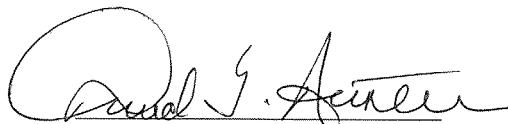
14. Previously, I was asked by the CAC and thereafter, separately, by the Debtor's Representatives to sign declarations and letters concerning the Parties' respective motions concerning various facts that the Parties believed were relevant to the Level A disability issues pending before the Court. In retrospect, it was a mistake for me to sign such declarations and letters. It would have been, in my judgment, a far better practice for one or more of the Parties to have requested my testimony at a hearing before the Court so that each side could cross-examine me with respect to whatever issues in the Level A disability dispute I might be able to offer relevant testimony. Because the Plan sets forth in great detail the processing guidelines to be employed by the SF-DCT when considering Level A claims, I believe that my views with respect to what the Claims Office did or did not do are largely irrelevant. The Plan requires that the SF-DCT consider the Level A disability guidelines of the Claims Office under certain circumstances, although the Claims Administrator is given some latitude with respect to such

guidelines. In addition, almost any statement by me about Level A disability matters might be reasonably construed by one side or the other as a departure from my role as a Neutral, and while the same might be said of my testimony, at least testimony is subject to explanation and cross-examination.

15. Having proceeded down this unfortunate road of statement and counter-statement, and recognizing that this procedure was an error, I am submitting this Affidavit at the request of one of the Parties, and it will be the last declaration, affirmation or written document I am willing to prepare – subject to a direction by the Court to the contrary -- about the Level A Disability dispute. Again, I would encourage the Parties to consider whether testimony by the Claims Administrator, however irrelevant such testimony may be regarding the actual practices of the Claims Office, is not in fact the better course to employ in this matter. As implicitly stated in this Affidavit, to the extent my views are relevant, I believe testimony by the Claims Administrator is a preferable approach to this matter in lieu of written submissions.

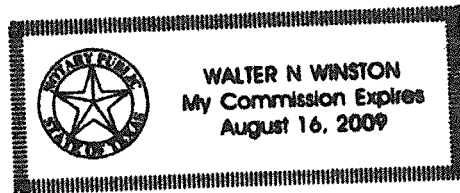
I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of September 2006.

  
David T. Austern

Subscribed and sworn to before me this 12th day of September 2006.

  
Notary Public



My commission expires: 8/16/09



# **Exhibit 1**

**(FILED  
UNDER SEAL)**