

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In Re:	§	Case No. 00-CV-00005-DT
	§	(Settlement Facility Matters)
Dow Corning Corporation,	§	
	§	HON. DENISE PAGE HOOD
Reorganized Debtor.	§	
	§	

**MOTION BY DOW CORNING FOR A DETERMINATION THAT
THE TOLLING PROVISION IN THE DISEASE OPTION II GUIDELINES
DOES NOT MODIFY THE “24-MONTH” ELIGIBILITY REQUIREMENT**

Dow Corning submits this MOTION BY DOW CORNING FOR A DETERMINATION THAT THE TOLLING PROVISION IN THE DISEASE OPTION II GUIDELINES DOES NOT MODIFY THE “24-MONTH” ELIGIBILITY REQUIREMENT in accordance with the terms of the “Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan” dated June 10, 2004.

I. Background and Summary.

The Claims Administrator requested that the Plan Proponents interpret the “tolling” language that appears in Annex A (Claims Resolution Procedures), Schedule II to the Settlement Facility and Fund Distribution Agreement (the “Settlement Facility Agreement”). The Plan Proponents submitted written position statements to the Claims Administrator in September and October 2003. The Claims Administrator held a hearing on June 22, 2004, and the Claims Administrator issued on June 28, 2004 a written determination declining to decide the issue. In accordance with the Dispute Resolution Procedures approved by the Court, Dow Corning submits this Motion.

The sole issue for determination is whether the tolling language applies to both the 24-month requirement and the 5-year requirement set forth in Schedule II of Annex A. In Dow Corning’s view, the plain language of the Plan leads inescapably to the conclusion that only the 5-year filing period is

tolled. The relevant section of Annex A to the Settlement Facility Agreement provides:

A claimant must file with the Claims Office all medical records establishing the required findings or laboratory abnormalities. Qualifying findings must have occurred within a single 24-month period within the five years immediately preceding the submission of the claim except that this period is tolled during the pendency of the bankruptcy (May 15, 1995 until the Effective Date). (Findings supplemented in response to a deficiency letter sent by the Claims Office do not have to fall within the 24-month period outlined above.)

Annex A to the Settlement Facility Agreement at 103, Schedule II, Part B, “General.”

This language defines eligibility and submission criteria for claims submitted under Disease Option II.

The tolling provision was specifically intended to release claimants from the 5-year filing deadline in recognition of the fact that the pendency of the bankruptcy case prevented claimants from filing claims. At no time did the Plan Proponents ever discuss or negotiate language to “toll” the 24-month diagnostic requirement in the disease definition. Indeed, the 24-month requirement is not a filing requirement but rather a substantive component of the disease definitions. A modification of that requirement (i.e., a determination that the 24-month requirement is tolled) would substantively change the disease eligibility guidelines and would have the inevitable effect of expanding the universe of claimants. In fact, such a modification would, in Dow Corning’s view, change the premises upon which the Plan Proponents estimated the number of eligible claimants at the Confirmation Hearing. For all the reasons articulated below, the language must be interpreted to toll only the 5-year filing requirement.

II. Argument.

A. The Tolling Language Does Not Apply to the 24-Month Requirement.

The tolling language applies only to the 5-year period for submission of claim materials. It does not and was not intended to affect the requirement that all disease components be documented within a 24-month period. The Claimants’ Advisory Committee takes the position that the phrase “this period is tolled” really means that both the 5-year period and the 24-month period mentioned in that

sentence are tolled during the pendency of the bankruptcy case. This interpretation not only ignores the precise language of this provision of the Settlement Facility Agreement, but it also ignores the fundamental difference between the two time intervals. Only the 5-year period is, in effect, a limitations period of the sort that might be tolled so that claims are not time-barred through no fault of a claimant. The 24-month period is entirely different. The 24-month period is a component of the disease definitions. Since many of the diagnostic criteria for various “disease” categories compensable under the Plan consist of common symptoms or laboratory findings experienced by a large portion of the population at one time or another, it is only when these conditions occur in combination or in relatively close chronological proximity that their presence can reasonably define a single “disease” entity for purposes of compensation under the Plan.

The 24-month period at issue here is the negotiated “temporal proximity” for purposes of the disease criteria in this settlement program. “Tolling” this period due to the pendency of the bankruptcy case makes no sense medically, logically or legally. To permit such an interpretation would substantially broaden the disease definitions in a way that is arbitrary, medically nonsensical and in direct contradiction to the settlement terms negotiated by the parties.

1. The language cited above -- except for the “tolling” proviso -- was copied directly from the Revised Settlement Program (“RSP”). The tolling proviso was inserted specifically to address the problem that could arise if claimants wanted to rely on an MDL submission but were unable to file their submission with the Settlement Facility-Dow Corning Trust (“SF-DCT”) within 5 years because the claim forms were not made available until more than 5 years after that MDL submission had been made.

The negotiations regarding this provision were clear and specific: the Plan Proponents agreed during the negotiations to allow claimants to re-submit their original MDL submissions in order to make a claim for settlement benefits with the SF-DCT, and the Tort Claimants’ Committee wanted to assure that these materials could be used even if 5 years had passed. Since it was clear at the time of

those negotiations that it was possible that the SF-DCT would not be established until more than 5 years after many claimants would have submitted materials to the MDL-926 Claims Office, the parties inserted this tolling provision. The tolling provision was thus conceived as a means to permit this use of MDL materials in the event that the Dow Corning facility was not able to distribute claim forms within 5 years after the claimant submitted her materials to the MDL-926 Claims Office. In short, the proviso was drafted to “toll” the 5-year requirement during the pendency of the bankruptcy case and thereby facilitate a claimant’s use of claim materials previously submitted to the MDL-926 Claims Office. It was not intended to modify any substantive requirement for disease claims.

2. The Plan language is unambiguous and must be enforced as written. “When the contract terms are plain and unambiguous, a court will construe the contract as it is written and presume the parties’ intent is consistent with the ordinary meaning of the terms of the contract.” United Rentals (North America), Inc. v. Keizer, 355 F.3d 399, 407 (6th Cir. 2004) (quoting Lozada v. Dale Baker Oldsmobile, Inc., 197 F.R.D. 321, 339 (W.D. Mich. 2000)). “Contracts which are unambiguous are not open to construction and must be enforced as written.” United Rentals, 355 F.3d at 407 (quoting Britton v. John Hancock Mut. Life Ins. Co., 30 Mich. App. 566, 186 N.W.2d 781, 782 (1971)). See also Wright v. DaimlerChrysler Corp., 220 F. Supp.2d 832, 843 (E.D. Mich. 2002) (“If a contract is clear and unambiguous, the court must enforce the contract as written, according to its plain meaning.”) (citation omitted).

The tolling proviso modifies only the 5-year requirement. The proviso does not say that “both periods,” i.e., the 24-month period and the 5-year period, are to be tolled. The proviso says only that “this period,” i.e., the single period of time that immediately precedes the proviso (not “these periods”), is to be tolled. Indeed, if the tolling provision were intended to apply to the 24-month period as well as to the 5-year period, then the parties would have modified the language of the parenthetical that appears at the end of the paragraph to make it clear that the 24-month period was also “tolled.”

3. The conclusion that the tolling provision applies only to the 5-year period for submission is

the only logical and reasonable interpretation. The guidelines for Disease Option II claims are intended to assure that only persons currently suffering from the requisite conditions are eligible to receive benefits. The 5-year period is intended to achieve this result by essentially defining a “statute of limitations” for the assertion or submission of a claim so that claims submitted more than 5 years after the medical diagnosis are simply “stale” and thus time barred. When legislatures or litigants wish to relieve a party of a statute of limitations requirement to account for intervening events that made it impossible for the individual to pursue the claim, they develop a “tolling” provision. This is a routine and typical mechanism for addressing deadlines for filing, and that is exactly what the Plan Proponents did by inserting the “tolling” proviso into Schedule II.

The 24-month period, by contrast, is not a “statute of limitations-type” provision at all. Rather, it represents a “temporal proximity” criterion that is a fundamental component of the disease guidelines. The various “diseases” that are eligible for compensation under Disease Option II require documentation of a multitude of findings, symptoms or laboratory test results -- none of which alone, or even in some combination, defines any disease or condition. For example, to obtain a diagnosis of lupus an individual must experience at least 4 different conditions (out of a list of 11 qualifying conditions). These conditions include, as an example, arthritis and photosensitivity. Obviously, either of these conditions can occur commonly in the absence of lupus and indeed could be symptoms of other diseases. It is the combination of conditions occurring either together or serially within a reasonable period of time that leads the physician to develop the diagnosis of lupus. The 24-month period is intended to assure that isolated manifestations of unrelated conditions do not comprise a qualified disease claim under Disease Option II.

This “proximity-in-time” requirement is even more important for those claimants asserting GCTS (the negotiated “condition” that is not a recognized disease) and illustrates the reason the provision was specifically negotiated to toll only the 5-year period. The various findings and symptoms that can be used to qualify for GCTS can have a multitude of causes or could be evidence of

numerous normal or temporary conditions (such as infections). The 24-month requirement is an essential component of this “condition,” for without this requirement claimants could potentially qualify for the substantial Disease Option II payments by dredging up old medical records containing an isolated reference to a one-time “finding” like “muscle aches.”

Disease Option II, of course, is intended to set a strict qualifying standard to justify the substantially higher payment levels. To adopt an interpretation that inserts the “tolling” proviso into the 24-month requirement would gut the fundamental qualification standards of Disease Option II, resulting in inequitable and clearly unintended outcomes. If the 24-month requirement were to be tolled during the 9-year pendency of the bankruptcy case, the Settlement Facility could be faced with claims asserting symptoms or findings spread out over a decade: a claimant might assert a finding of “muscle aches” in 1995 along with a finding of Raynaud’s in 2004. Such a result would eliminate the carefully negotiated disease parameters that are intended to assure that only appropriate claims qualify for payment from the limited fund.

The simple purpose of the tolling provision was to prevent the bankruptcy filing (in particular, any related delay in establishing the SF-DCT and its transmittal of claim forms to claimants) from either (1) prejudicing a claimant’s ability to use materials submitted in the MDL as support for a disease claim in the SF-DCT, or (2) preventing SF-DCT filings by claimants diagnosed during the bankruptcy case but more than 5 years before the claim form mailing. That purpose is fulfilled by tolling only the 5-year period. Tolling of the 24-month period is unnecessary and inappropriate because neither the bankruptcy filing nor any related delays in establishing the Settlement Facility prevented any claimant from obtaining qualifying findings of her conditions within a single 24-month period. A claimant could obtain those medical findings at any time without any restriction or delay imposed by the bankruptcy case. Thus, there is no bankruptcy-related reason for tolling or, more accurately, for expanding that 24-month period.

III. Summary.

In sum, the tolling provision was negotiated to address the specific issue of persons who had an otherwise eligible disease claim filed in the MDL or who were diagnosed with an eligible disease claim during the pendency of the bankruptcy, but more than 5 years before claim forms were made available for submission to the SF-DCT. The provision does nothing more than permit those persons to file a claim after the claim forms were mailed. The tolling provision was not intended to, and does not, modify the *substantive* 24-month requirement (which is adopted verbatim from the RSP) that defines an eligible Disease Option II claim. At no time during the negotiations or during the Confirmation Hearing -- when the Plan Proponents set forth the estimation of likely claims -- did the Tort Claimants' Committee take the position that the Disease Option II claims estimate would have to be revised based on an assertion that the Plan modified the 24-month criterion. In fact, the claims estimate was based on the RSP data with no assumed modification in the underlying definitions, which include the 24-month criterion. A modification of the 24-month criterion would assuredly expand the universe of eligible claimants and would undermine the assumptions and analysis presented to the Court during the Confirmation Hearing.

IV. Conclusion.

Dow Corning submits that the only possible conclusion is that the tolling provision applies only to the 5-year "statute of limitations."

Respectfully submitted this 19th day of July 2004,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: § Case No. 00-CV-00005-DT
§ (Settlement Facility Matters)
DOW CORNING CORPORATION, §
§ HON. DENISE PAGE HOOD
REORGANIZED DEBTOR §
§

**ESTIMATE OF TIME, EXHIBITS AND WITNESSES REQUIRED
FOR HEARING ON MOTION BY DOW CORNING FOR A DETERMINATION
THAT THE TOLLING PROVISION IN THE DISEASE OPTION II GUIDELINES
DOES NOT MODIFY THE "24-MONTH" ELIGIBILITY REQUIREMENT**

Pursuant to paragraph 2(E) of the Fourth Amended Case Management and Administrative Order entered by the Court on November 1, 2001, the Reorganized Debtor estimates its hearing requirements on the MOTION BY DOW CORNING FOR A DETERMINATION THAT THE TOLLING PROVISION IN THE DISEASE OPTION II GUIDELINES DOES NOT MODIFY THE "24-MONTH" ELIGIBILITY REQUIREMENT:

Hearing Time:	<input type="checkbox"/> < 30 min.	<input checked="" type="checkbox"/> 30-60 min.	<input type="checkbox"/> > 60 min.
No. of Witnesses:	<input checked="" type="checkbox"/> 0	<input type="checkbox"/> 1-5	<input type="checkbox"/> > 5
No. of Exhibits:	<input checked="" type="checkbox"/> 0	<input type="checkbox"/> 1-5	<input type="checkbox"/> > 5
Importance of Matter: ¹	<input checked="" type="checkbox"/> A	<input type="checkbox"/> B	<input type="checkbox"/> C

The Reorganized Debtor reserves the right to modify this Estimate of Time, Exhibits and Witnesses, if necessary, as further discovery takes place.

Respectfully submitted this 19th day of July 2004.

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¹

A: Crucial that it be heard on the date fixed;
B: Prefer matter be heard, but accommodations can be made; and
C: Matter can wait

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§ HON. DENISE PAGE HOOD
REORGANIZED DEBTOR §

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2004 a true and correct copy of the below listed pleading was served via overnight delivery and either e-mail or telecopy upon the parties listed below.

1. MOTION BY DOW CORNING FOR A DETERMINATION THAT THE TOLLING PROVISION IN THE DISEASE OPTION II GUIDELINES DOES NOT MODIFY THE "24-MONTH" ELIGIBILITY REQUIREMENT.

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