

**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

**MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR
AN EXTENSION OF THE JUNE 1, 2006 DEADLINE
FOR CERTAIN GROUPS OF CLAIMANTS**

The Claimants' Advisory Committee ("CAC") respectfully submits this Motion seeking the Court's approval as part of its inherent authority, supervisory powers and jurisdiction over the Settlement Facility – Dow Corning Trust ("SF-DCT") pursuant to Section 8.7 of the Amended Joint Plan of Reorganization of Dow Corning Corporation for an extension of the June 1, 2006 deadline for certain groups of claimants. The CAC does not seek an extension of the June 1, 2006 deadline for all claimants in all classes. Rather, we seek a limited extension of time for certain claimants to submit claim forms for Rupture, Class 7 or Class 9/10 benefits, as applicable. The extension is sought on behalf of the following:

1. "Conditional Notice of Intent Claimants" – claimants who timely filed a Notice of Intent form but whose claims for Explant and Rupture are the subject of a pending motion and objection filed by Dow Corning in 2004. This group of claimants also now includes

those persons who filed a Notice of Intent or other correspondence prior to November 30, 1999, but who did not return a Proof of Claim form by the 2004 deadline pursuant to paragraph 10 of the November 30, 1999 Confirmation Order (so-called "Paragraph 10 Claimants"); and

2. Late Claimants whose claim has been recently allowed as timely by either the parties and/or the Court and Late Claimants whose claim may be allowed as timely in the future ("Late Claimants"); and
3. Claimants whose release dispute is described in paragraph 1 of Exhibit A to the *Stipulation and Order Establishing Procedures For Resolution of Disputes Regarding Release of Claims Against Dow Corning and Election of Settlement Option*, dated December 22, 2004 ("Disputed Release Claimants"); and
4. Claimants who were not able to be explanted by the June 1, 2006 deadline because of problems experienced by the SF-DCT in implementing the Explant Assistance Program, problems experienced by claimants in locating a qualified surgeon willing to perform the surgery through the Explant Assistance Program, and/or claimants who could not afford the surgical costs or could

not afford to prepay the surgical costs as required by many surgeons; and

5. Claimants whose medical records for rupture are either in Dow Corning's or the SF-DCT's possession pursuant to the *Stipulated Confidentiality Order Regarding Unredacted Medical Records in Dow Corning's Possession*, dated December 23, 2005, but the claimant has not been informed of this by the June 1, 2006 deadline so that she could file a Rupture Claim Form.

As more fully described herein, the CAC believes that it is appropriate, warranted and necessary for the Court to authorize an extension of the June 1, 2006 deadline for the claimants listed above. We urge the Court to approve an extension of time of one year from the date of a final ruling that approves the eligibility of Conditional NOI Claimants (including Paragraph 10 Claimants), Late Claimants, or Disputed Release Claimants as described in paragraphs 1 -3 above. In the alternative, the CAC proposes that if we are able to reach resolution with Dow Corning on the pending motions regarding Conditional NOI Claimants, Late Claimants and/or Disputed Release Claimants, then those claimants whose claims are allowed be afforded a one-year extension of time from the date the claim is allowed to submit a claim form for Rupture, Class 7, or Class 9/10 as applicable.

We also urge the Court to adopt a one-year extension of time – or until June 1, 2007 – for claimants in groups 4 and 5 above to submit a Rupture Claim Form, provided that the SF-DCT completes the remaining document review of unredacted Dow Corning medical records within the next 60 days and thereafter immediately notify affected claimants.

MEMORANDUM IN SUPPORT

**A. Conditional Notice of Intent Claimants (including
“Paragraph 10 Claimants”)**

In March 2004, Dow Corning filed a *Motion To Establish Procedures to Determine the Eligibility of Claimants Filing Notices of Intent (“NOI”) After the Confirmation Date and Within 90 Days After the Effective Date*. The Tort Claimants’ Committee (“TCC”), the predecessor to the CAC, filed a response, and subsequently, the parties submitted a proposed agreement to the Court regarding a process to resolve the dispute. See Order dated June 10, 2004. The process required the Settlement Facility-Dow Corning Trust (“SF-DCT”) to mail a survey to unmatched Notice of Intent claimants, match claimants’ names and other identifiers to names and descriptions in Rule 3005 co-debtor filings, gather data about the value of the claims based on the survey results, and provide the parties with information about the survey answers. This process was intended to be a fast, efficient way to determine if the value of the unmatched Notice of Intent claims for Explant and Rupture exceeded \$25 million, the amount at which Dow Corning agreed

to waive its objection to these claims. Two years and hundreds of thousands of claimant dollars later, the parties still do not have the information the Order provided.

Since Dow Corning's motion was filed in March 2004, Conditional NOI Claimants have had their claims placed on hold.¹ This means that Conditional NOI Claimants have been told for the past two years that they are not eligible for any benefits, and they have not been able to participate in the Explant Assistance Program to have their Dow Corning breast implants removed. For claimants who do not have access to the Explant Assistance Program, the surgical costs they face are significant – most explantations are in excess of the \$5,000 Explant Payment and they are not covered by most health insurance policies if the original implantation was for cosmetic purposes. Thus, claimants – many of who are financially desperate, unemployed or on state or federal disability assistance – have not been able to have their implants removed by June 1, 2006. If their Conditional NOI Claims are ultimately allowed, it would be a hollow victory if they are then told that they are ineligible for Rupture because the deadline to have the implants removed has passed. Conditional NOI Claimants should be offered access to the Explant Assistance Program so that they can

¹ In September 2005, Dow Corning acknowledged in a letter to the Claims Administrator that domestic claimants who submitted proof that they had a Dow Corning breast implant and who also filed a disease claim, match to the Dow Chemical co-debtor filing for purposes of disease payments only. Because of system limitations at the SF-DCT which do not allow the recognition of partial claims (i.e., claims for disease only and not claims for Explant and Rupture), the disease claims for Conditional NOI Claimants have not been reviewed.

have their implants removed, determine if they are ruptured, and submit the required forms and supporting documents for payment.

“Paragraph 10 Claimants” are in the same position. Dow Corning has asserted for the past two years that these claimants are not eligible for compensation and, in fact, the SF-DCT communicated this to Paragraph 10 Claimants. See Exhibit 1 attached hereto, redacted letter from SF-DCT to a claimant dated June 5, 2005. Recently – in April 2006 – following discussions with the CAC, Dow Corning informed the SF-DCT that it now agrees that “Paragraph 10 Claimants” should be treated the same as Conditional NOI Claimants, meaning that Dow Corning has agreed that domestic claimants who have a Dow Corning breast implant and who file a Disease claim may have their disease claim reviewed.² This information has not been communicated to Paragraph 10 Claimants yet. As a result, the CAC believes it is appropriate and necessary to provide Paragraph 10 Claimants additional time to inform them of their revised status and to allow them to submit a claim for Rupture, Class 7 or Class 9/10 as applicable. Moreover, if Conditional NOI Claims for deemed eligible for Explant and Rupture benefits, these claimants should be afforded access to the Explant Assistance Program so that they have an opportunity to submit a claim for Rupture.

² Dow Corning is still disputing whether these claimants can seek benefits for Explant and Rupture.

B. Late Claimants Who Either Have Been Recently Reclassified as Timely Or Who Are Reclassified as Timely In The Future

The process for addressing disputed late claims has only recently begun. To date, the parties have received five (5) CD's from the Court containing late claim requests, but only the names of claimants on the first CD have been fully reviewed by the parties and addressed on Scheduling Orders 1 and 2. Several claimants identified in these Orders have been reclassified as timely, have had their names removed from the list because they were erroneously classified as a late claimant, or their late claim was the subject of an Order that allowed them to be reclassified if they timely submitted a Notice of Intent or Proof of Claim form.

The CAC believes it is appropriate to allow these claimants additional time to comply with the June 1, 2006 deadline and to allow all other late claimants whose claims are allowed as timely in the future additional time to submit claim forms. We propose that each Late Claimant be given one-year from the date she is notified that she is eligible to submit a claim for Rupture, Class 7 or Class 9/10 as applicable.

**C. Claimants Described in Paragraph 1 of Exhibit A
To The *Stipulation and Order Establishing Procedures
For Resolution of Disputes Regarding Release of
Claims Against Dow Corning and Election of
Settlement Option***

In late 2004, the Debtor's Representatives and CAC presented to the Court agreed procedures for the resolution of disputes regarding claims of released claimants or those whose claims were dismissed or had a judgment entered against them. *Stipulation and Order Establishing Procedures For Resolution of Disputes Regarding Release of Claims Against Dow Corning and Election of Settlement Option*, dated December 22, 2004 ("Release Dispute Procedures). Paragraph 1 of Exhibit A to the Release Dispute Procedures exempted two categories of claimants from the release dispute process because it was contemplated that the CAC would file a motion on behalf of claimants whose "release" circumstances were described in paragraph 1 ("Disputed Release Claimants"). The CAC filed a motion seeking relief on behalf of claimants whose release was provided in connection with the Dow Corning Removal Assistance Program (or in reasonable reliance on that program), and we are in the process of finalizing a second motion regarding unrepresented claimants who signed a release in exchange for payment of \$15,000 or less.

Claimants identified by Dow Corning as having released their claim were provided to the SF-DCT, and the SF-DCT subsequently informed them that they were

ineligible for benefits in the Settlement Option. As a result, many of the Disputed Release Claimants have not submitted a claim for Rupture believing that they were ineligible. If the CAC prevails on its motions regarding the Disputed Release Claims, then these claimants should be given an opportunity to submit a Rupture claim.

**D. Claimants Who Have Not Been Able To Be
Explanted By June 1, 2006**

With regard to the fourth group of claimants, the CAC has been inundated for the past two years with reports from claimants that they are unable to locate a qualified surgeon willing to perform the explant surgery for the \$5,000 Explant Payment amount or through the Explant Assistance Program directly, and that surgeons have insisted on pre-payment of their fees and expenses before the surgery, often at a cost that vastly exceeds the \$5,000 Explant Payment. As a result, many claimants who are unable to afford the surgery or who could not find a doctor willing to be paid through the Explant Assistance Program could not have their implants removed by the deadline. The CAC believes that an extension of time is warranted to allow these claimants time to work with the SF-DCT to locate a doctor and to make arrangements to authorize payment from the SF-DCT for the surgery up to the \$5,000 Explant Payment and/or to make additional private arrangements to secure a loan for payment of the remaining amount. We believe this relief is supported based on the numerous problems that the SF-DCT has encountered over the past two years – and in particular during the first year after the Effective Date -- in getting the Explant Assistance Program operational.

For example, the SF-DCT Monthly Claims Reports shows that at the end of 2004 – seven months after the Effective Date – only 5 claimants had been approved through the Explant Assistance Program. At one year after the Effective Date, only 53 claimants had been approved in the Explant Assistance Program. Moreover, the CAC discovered that many claimants who had requested Explant Assistance had not been mailed the package during the first year after the Effective Date because the SF-DCT mistakenly believed that a claimant could only receive the package after they had submitted acceptable proof of a Dow Corning breast implant. Soon after the successor Claims Administrator, David Austern, was appointed on May 23, 2005 (almost one full year after the Effective Date), changes began to be implemented in the Explant Assistance Program: a staff member was assigned to deal solely with explant assistance issues and to work directly with doctors regarding payment, in late July 2005 the SF-DCT provided a preliminary list to the CAC of doctors who had performed the explant surgery for other claimants in the Explant Assistance Program (which was then updated in November 2005), and in early 2006, the SF-DCT took over the task of directly assisting claimants with names of surgeons who were willing to remove explants and receive payment through the Explant Assistance Program.³ All of these things have greatly improved the situation for claimants seeking explantation, resulting in the mailing of several thousand EAP packages to claimants since June 2005, and the payment of 153

³ Prior to this time, claimants were told that the SF-DCT could not assist them in locating a doctor.

new EAP claims during this time. Despite these efforts though, the EAP numbers are far below what the CAC believes were paid by the Revised Settlement Program during this same time period and far below our expectations based on the volume of calls and inquiries we have received. As recently as May 2006, the CAC continued to receive reports from law firms and claimants that they still cannot find a surgeon willing to perform the surgery and receive payment from the SF-DCT. See Exhibit 2 attached hereto. We respectfully submit that claimants who have attempted to have their implants removed by June 1, 2006 but were unable to do so because of difficulty finding a surgeon or a surgeon willing to wait for payment from the SF-DCT should be given an extension of one year to be explanted and submit a claim for Rupture.

E. Claimants Whose Medical Records Are In DCC's Possession

Last, the parties reached an agreement in late 2005 that allowed the SF-DCT and the CAC access to unredacted medical records in Dow Corning's possession. See *Stipulated Confidentiality Order Regarding Unredacted Implant Records in Dow Corning's Possession*, dated December 23, 2005. A first review of some of the requested records has occurred, but additional work remains. SF-DCT staff has been able to locate proof of manufacturer, explant and rupture proof for some claimants in these documents, and have imaged the documents for the SF-DCT staff to use. Pursuant to the *Stipulated Confidentiality Order*, the SF-DCT and CAC are permitted to disclose the fact that relevant records were found to the claimant whose name appears in the medical records

(and to their attorney). The records are also permitted to be used by the SF-DCT as if the claimant had submitted them and to notify the claimant accordingly. Because this process is not yet complete, and because the CAC has not been provided with the unredacted medical records selected by the SF-DCT staff, we have not been able to notify claimants that their records were located and that they could now submit a Rupture claim form. The CAC believes that an extension of time is appropriate to allow the SF-DCT and CAC to complete the review of the unredacted medical records, scan the selected documents and provide them to the SF-DCT staff and CAC, and allow time to notify affected claimants so that a claim form can be filed.

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
COMMITTEE

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2006, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following: Debtor's Representatives and Finance Committee.

/s/ Dianna Pendleton-Dominguez
Dianna Pendleton-Dominguez
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EXHIBIT 1



**SETTLEMENT FACILITY
DOW CORNING TRUST**

P.O. Box 52429
Houston, Texas 77052

Telephone 713.874.6099
866.874.6099

June 8, 2005

SID: 2730344

David Vaughn, Esq.
Armstrong Vaughn and Scroggins
P.O. Box 2370
Daphne, AL 36520

Re: KATHERINE COLBERT - Eligibility to participate in the Settlement program

On May 11, 2004 Dow Corning mailed to you and all affected claimants a Notice From Dow Corning Corporation And The Official Committee of Tort Claimants To Certain Parties In The Dow Corning Bankruptcy Case, In Re Dow Corning Corporation, Case No. 95-20512. In that Notice you were advised of the limited extension of a deadline for filing a Proof of Claim. That notice was approved by the U. S. District Court Judge overseeing this matter.

Our records indicate that you did not comply with the Notice and are, therefore, no longer eligible to participate in the Settlement.

A copy of the Order and Notice are attached for your reference. A remedy available to you is described in the Order.

Settlement Facility – Dow Corning Trust
Claims Assistance Program

Enclosure

EXHIBIT 2

Subj: Claimants can't find doctors to do surgery through EAP.
Date: 5/25/2006 6:49:27 PM Eastern Daylight Time
From: lhenehan@lchb.com
To: info@tortcomm.org
CC: Hfooster@lchb.com, tthomas@lchb.com

We have heard from many of our claimants for whom we applied for the Explant Assistance Program (EAP), and not a one has been able to find a doctor in her area that is willing to go through this program. The claimants in question are understandably very frustrated, as are we when we speak with them.

REDACTED

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