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

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| **IN RE:** | § | **CASE NO. 00-CV-00005-DT** |
| | § | **(Settlement Facility Matters)** |
| **DOW CORNING CORPORATION,** | § | |
| | § | **Hon. Denise Page Hood** |
| **REORGANIZED DEBTOR** | § | |

**NOTICE OF FILING OF SUPPLEMENTAL EXHIBIT TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR THE DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION**

The Claimants' Advisory Committee submits the attached document as a supplemental exhibit to its Motion For The Disclosure of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility and Request For Expedited Consideration. The document is entitled, "Memorandum" from David Austern, Claims Administrator for the SF-DCT, to "The Parties" (Debtor's Representatives and Claimants' Advisory Committee) dated June 9, 2005. The Memorandum is being filed with the permission of the Claims Administrator.

Respectfully submitted,

FOR THE CLAIMANTS' ADVISORY COMMITTEE

/s/

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the Notice of Filing of Supplemental Exhibit to was electronically filed with the U.S. District Court for the Eastern District of Michigan, Southern Division today, June 19, 2006, and a copy of the same will be sent to the Debtor's Representatives and Claims Administrator via electronic mail on June 19, 2006.

/s/
Dianna Pendleton-Dominguez

S F D C T

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**MEMORANDUM**

**TO:** The Parties

**FROM:** David Austern

**DATE:** June 9, 2005

**RE:** Issues Concerning Option 1 ACTD Disability Level A Guidelines

## I. Introduction

Numerous motions have been filed in the United States District Court seeking judicial relief from alleged outcome differences of ACTD Level A claims as between the MDL Claims Office and the SF-DCT. Argument on these motions is scheduled for later this month. I suggested to the Debtor's Representatives and the Claimants' Advisory Committee (the CAC) (the Parties) that it might be useful if I prepared a report concerning (1) how one might explain the numerous complaints about processing differences between the SF-DCT and the MDL Claims Office, and (2) my recommendations as to what the SF-DCT ACTD Level A claims processing rules should be. Because my recommendations concerning ACTD Level A claims almost certainly exceed my authority to make processing changes (and arguably may usurp the authority of others), a brief review of the SF-DCT Claims Administrator's responsibilities and direction is useful, particularly as they concern the instant matter.

Section 4.03(a) of the Settlement Facility Agreement (SFA) instructs that the Claims Administrator is responsible for insuring that the SF-DCT applies the appropriate processing and evaluation guidelines described in the Plan. This same section mandates the Claims Administrator to rely on the processing guidelines compiled by the MDL Claims Administrator as of 2003, and gives the SF-DCT Claims Administrator the discretion to modify SF-DCT claims processing procedures or interpretations to conform to such MDL modifications after 2003. However, the SF-

DCT Claims Administrator is not required to conform SF-DCT claims processing procedures to such post-2003 MDL modifications.

Section 4.03(a) also contains a sentence that seems to summarize its intent: "It is expressly intended that the Settling Breast Implant Claims shall be processed in substantially the same manner in which claims filed with the MDL 926 Claims Office under the Revised Settlement Program were processed except to the extent criteria or processing guidelines are modified by this Settlement Facility Agreement or the Claims Resolution Procedures, or this Section 4.03, and that the Claims Office shall manage its operations to the extent feasible as they have been conducted under the Revised Settlement Program."

Section 5.05 of the SFA requires the Claims Administrator to consult with and obtain the advice and consent of the Parties regarding any additions or modifications to substantive eligibility criteria, among other things, in claims submissions to the extent such interpretations have not previously been addressed (as of February 2003) by the MDL Claims Administrator. The same section provides that, in the event of a dispute between the Debtor's Representatives and the CAC, the SF-DCT Claims Administrator may determine the issue or apply to the District Court for consideration of the matter. Exhibit A to the June 10, 2004 Stipulation and Order Establishing Procedures For Resolution of Disputes Regarding Interpretation of the Amended Joint Plan establishes procedures for seeking Debtor's Representatives and CAC views (and responses) with respect to Plan interpretation issues.

These provisions and others create the following mandate for the Claims Administrator.

- The SF-DCT should process claims in substantially the same manner in which similar claims were processed by the MDL Claims Office (except where criteria or processing guidelines were modified by the SFA);

- The SF-DCT should manage all of its operations to the extent feasible in the same manner as such operations were conducted by the MDL;

- The SF-DCT is authorized to rely on the processing guidelines compiled by the MDL Claims Administrator as of February 2003;[1]

- There is no requirement that the SF-DCT alter its procedure to conform to MDL modifications that occurred after February 2003.[2]

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[1] The Debtor's Representatives appear to believe that the MDL processing guidelines that existed on November 30, 1999, the date of the Plan Confirmation Order, are the MDL processing guidelines on which the SF-DCT should rely.

[2] Section 7.01(c) of Annex A to the SFA requires the SF-DCT to institute procedures to assure consistency of processing and of application of criteria in determining eligibility and to ensure fairness in claims processing.

If the instructions to the SF-DCT with respect to the application of MDL processing guidelines appear to be inconsistent or confusing, an agreement among the Parties as to which MDL processing guidelines should be employed by the SF-DCT would ameliorate or even eliminate any such confusion. However, there is no such agreement. It is inappropriate for me to reveal the positions of the Debtor's Representatives or the CAC that had been communicated to me by them, particularly where these communications have taken place (almost exclusively by telephone) in the absence of the other side. However, I do not believe it breaches the implicit confidentiality of any such conversations if I report that there appears to be a disconnect between the Parties as to how MDL claims were processed, and when such processing guidelines were changed.

In addition, the Plan contains many references to the SF-DCT adhering to MDL processing rules, even to the extent of requiring the SF-DCT to approve automatically a disease claim that was approved at the MDL at the same level (so-called MDL "pass throughs"). As noted below, many of these MDL pass throughs receive an ACTD Level A award by the SF-DCT while other SF-DCT claimants with the exact same proof and disability statements are denied a Level A award based solely on the fact that the MDL changed its processing guidelines only after almost all of its ACTD Level A claims had been processed.

The history of the MDL ACTD Level A processing guidelines with respect to Level A claims is short and relatively easy to understand.

## II. MDL 926 ACTD Level A Processing Guidelines

At MDL inception, all processing guidelines (not just ACTD Level A claims) were unrecorded. Former MDL employees who are now employed at the SF-DCT, some of whom were among the first employees at the MDL, have reported to me that the initial MDL processing guidelines were based on oral history and verbal communications between and among claim reviewers. Later, the MDL Claims Administrator issued processing "guidelines" that were written in the margins of memoranda addressed to her by the claims reviewers. Still later, some formality was adopted when the processing guidelines were recorded in memoranda from the MDL Claims Administrator to her staff.[3]

When discussing the ACTD Level A claims MDL guideline procedures history, it is important to be sure everyone understands what "disability" means in the ACTD Level A claims context. Annex A of the SFA defines an Option 1 Level A claim as one filed by an individual who is dead or totally disabled. A totally disabled person is one who demonstrates a functional capacity adequate to consistently perform none or only a few of the usual duties or activities of vocation or self-care. Of course, the purpose of this memorandum is to address the question of whether a loss of both vocation *and*

[3] However, not all MDL guidelines were in written form and when the SF-DCT facility was established, some MDL processing guidelines were "adopted" based on the memory of the SF-DCT staff who had worked at the MDL.

self-care activities or duties is required to qualify for ACTD Level A compensation, or whether the loss of only vocation *or* self-care is required. Vocation has been defined by both the MDL Claims Office and the SF-DCT as including the inability to work, attend school, or perform household activities (sometimes referred to as "homemaking"). Self-care disability includes the inability to perform the activities associated with dressing, feeding, bathing, grooming or toileting. For both vocation and self-care, the disability must relate to a condition that is compensable under the Plan.

Note that in each case, vocation and self-care, a claimant can qualify for ACTD Level A disability if she can still perform a few of the usual duties of vocation or self-care. For instance, with respect to vocation, a claimant who because of a compensable condition has stopped working full-time but works a few hours a week from a home office, and does so because she has to schedule rest times, could qualify as a Level A claim based on her inability to work. Similarly, an ICU nurse who is unable to remain employed because of joint pain and fatigue, but is able to work part-time, might qualify for a Level A vocational disability.

With respect to self-care, to qualify for Level A disability, a claimant must be unable to perform at least two areas of self-care. Thus, if a claimant cannot dress or groom herself, she would qualify for a Level A claim.[4]

The MDL Claims Office processed and approved claims beginning in 1996. Between 1996 and 1999 the MDL Claims Office processed and approved 23,561 ACTD claims.[5] The claims, listed by the year in which the claims were processed and approved, are as follows:

| Year | No. of Claims |
|---|---|
| 1996 | 11,134 |
| 1997 | 12,205 |
| 1998 | 169 |
| 1999 | 53 |

During this period the MDL Claims Office approved 14.3% of these claims as Level A ACTD claims.[6]

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[4] Over time, the MDL 926 Claims Office altered its self-care disability rules to require disability in all five areas of self-care, reduced this requirement to three areas, and then reduced it again to two areas.

[5] An additional 14 claims were processed and approved between 2000 and 2005.

[6] These statistics have been reviewed with the MDL Claims Office. MDL claims were not always paid during the year they were processed and approved.

To date, the SF-DCT has completed the reviews of 12,941 ACTD claims and has approved at Level A approximately 5% of such claims.[7] The fact that the MDL Claims Office approved ACTD Level A claims at a rate nearly three times higher than the SF-DCT has approved such claims has been the subject of the motions filed in the District Court alleging that the SF-DCT is not adhering to the MDL ACTD Level A processing guidelines.

Unquestionably, the MDL Claims Office presently requires an ACTD Level A claimant to establish that she can consistently perform none or only a few of the usual duties or activities of vocation *and* self-care. A November 8, 2005 Order (No. 270) of the United States District Court, Northern District of Alabama (Southern Division) approved certain proposed Questions and Answers to be distributed to MDL claimants and their attorneys. Among these questions and answers were the following:

Q 2-5: My doctor said I was totally disabled from my job. Why didn't you approve me for "A" disability?

A 2-5: Level "A" disability pertains to both vocation and self-care. To qualify for Level 'A', you must demonstrate disability in both areas.

However, this has not been the processing rule for MDL ACTD Level A claims from MDL inception, and for a period of time the MDL processed and approved ACTD Level A claims where claimants could demonstrate that they were unable to perform none or only a few of the usual duties or activities of vocation *or* self-care.

The change in the processing rules followed a September 30, 1997 Order of the United States District Court, Northern District of Alabama (Southern Division). In the case before the Court (Patricia Jean Stone, No. 453-68-8026), Judge Pointer held that the claimant, who had appealed from a decision of the MDL Claims Administrator, was entitled to a Level C rather than a Level A award. The claimant's physician had not addressed the claimant's capacity to perform self-care activities. On appeal, the claimant argued that the physician's finding that the claimant was unable to perform vocational activities was enough to qualify her for a Level A award.

In examining the MDL settlement, Judge Pointer found the MDL Plan language in question – "An individual will be considered totally disabled if she demonstrates a functional capacity adequate to perform none or only few of the usual duties or activities of vocation or self-care" – contained "some ambiguity or inconsistency." Judge Pointer went on to note that "[H]ad the words 'or only few' been omitted, the meaning would have been clear, namely a requirement that there be limitations affecting both vocational and self-care activities." The Court then held that the inclusion of the words "or only few" was intended to permit a Level A award even where a claimant could perform a few vocational or self-care activities. In addition, a claimant had to establish a loss of vocational *and* self-care activities. Thereafter, the

[7] SF-DCT April 30, 2006 Claims Processing Report.

Court found that the MDL Claims Administrator had "consistently" applied such an interpretation in ACTD Level A claims.

Implicit and arguably explicit in this last judicial finding is that the MDL Claims Office consistently awarded ACTD Level A compensation only where a claimant had both self-care and vocational functional incapacity, at least to some extent. The evidence is to the contrary and consists of the following:

- All SF-DCT employees who were formerly employed at the MDL state that prior to Judge Pointer's Order noted above, the MDL awarded Level A compensation to ACTD claims where the claimants' disabilities resulted in an inability to perform all or none of the activities of self-care *or* vocation. The MDL did not require a loss of vocation and self-care activities.

- A review of the MDL files the SF-DCT has been given supports the statement in the previous bullet point. Indeed, it is almost impossible to find an MDL claim processed prior to the Judge Pointer Order where a claimant was denied Level A compensation because the claimant did not have a loss of both vocation and self-care.[8]

- So ingrained was the MDL practice of looking to *either* vocation *or* self-care in awarding Level A disability that even after Judge Pointer's Order, for a period of several months stretching well into the first quarter of 1998, the MDL continued to make Level A awards based on *either* vocation *or* self-care activity loss.[9]

Based on conversations I have had during the past 15 months with the Parties, I believe that as of the Plan Confirmation (and even later), the Parties may have had different views with respect to the history of MDL ACTD Level A processing. I believe that as of the date of the Confirmation Order, the Debtor's Representatives believed that the MDL processed ACTD Level A claims as Judge Pointer's Order directed *and* that the MDL always had processed the claims in that manner (as Judge Pointer's Order appears to state). Conversely, I believe the CAC was of the view that the MDL processed claims in the manner described in the bullet points that appear above and, that the MDL always had processed the claims in this manner.

Ultimately, well after entry of Judge Pointer's Order, the MDL changed its processing practices and required statements concerning a claimant's loss of activities with respect to vocation *and* self-care. During 2002, when the SF-DCT was formulating claim review procedures in accordance with the practices of the MDL, it was the "*and*" requirement of vocation *and* self-care with respect to ACTD Level A

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[8] By way of example, the following SF-DCT claims were each awarded ACTD Level A compensation by the MDL with evidence of a loss of only vocation (and no evidence of self-care activities): SID Nos. 6218573, 6202638, 0299076, 6187603, 6187211, 0963517, 0238238, 0268859, 6241478, 0227847.

[9] MDL Claim 266-90-4152 and MDL Claim 566-02-1996 were approved and paid after the date of Judge Pointer's Order, and each claim was awarded Level A ACTD compensation with evidence of a loss only of vocation activities.

compensation that was communicated to the SF-DCT. Unfortunately, before the MDL changed the processing rules and communicated the "new" rules to the SF-DCT, the MDL had processed and approved approximately 99% of all of the ACTD Level A claims that the MDL has ever processed.

It is not surprising, therefore, that many MDL claimants and their attorneys who submitted claims to the SF-DCT seeking the same ACTD Level A compensation that they had received at the MDL for claims that in all respects were the same as claims submitted to the MDL, were surprised to learn that they did not qualify for such Level A compensation because there was no evidence (in most cases) of a loss of self-care activities. Indeed, the overwhelming plurality of all medical statements submitted in support of MDL claims did not even address self-care because there was substantial evidence of a loss of vocational activities, and such loss was sufficient to qualify a claimant for ACTD Level A compensation.

Thus, claimants who received MDL ACTD Level A awards based on a loss of vocational activities but with no proof of a loss of any self-care activities, and who then file with the SF-DCT, will receive a Level A award at the SF-DCT (as an MDL pass through). Claimants who did not file with the MDL but who have exactly the same factual and medical proof showing a loss of vocational activities as the MDL claimants, will not receive an SF-DCT ACTD Level A award if they have not established they have a loss of self-care activities. Where the prior MDL claimants and the SF-DCT claimants are represented by the same lawyer, it is no wonder that such lawyers are disappointed (or have a less benign reaction) when their SF-DCT claim does not receive a Level A award. They argue, rightly so I believe, that their SF-DCT claim would have been approved at the MDL as a Level A, at least if it had been filed before 1998.

I have received over a score of complaints from attorneys whose ACTD claim has been awarded ACTD Level B (or lower) compensation by the SF-DCT notwithstanding submission of the same type of evidence that was submitted to the MDL that resulted in a Level A award by the MDL Claims Office. In the words of a number of these plaintiffs' attorneys, the Dow Corning Bankruptcy Settlement was "sold" to them based on the understanding that the SF-DCT would resolve claims in the same manner as they had been resolved by the MDL Claims Office, and that has not been the case. [10]

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[10] Because the SF-DCT is not technically a party to the numerous Level A "appeals" filed with Judge Hood, I have not received all such motions. The Parties, however, have been cooperative in forwarding to me pleadings where the SF-DCT may not have been served. Nonetheless, I cannot represent that I have seen all of the motions filed in court which complain of the SF-DCT practices with respect to ACTD Level A awards. I have reviewed many of them, however, and I have spoken with many of the lawyers who have filed such motions. Almost invariably, they have presented evidence that their clients were awarded ACTD Level A compensation by the MDL and when they filed a similar claim with the exact same evidence on behalf of an SF-DCT claimant, the SF-DCT awarded Level B compensation because the claimant was missing evidence of a loss of self-care activities (or, in a few cases, a loss of vocation). This is not to say, however, that there are not other deficiencies that the SF-DCT has discovered with respect to some of these claims. The Parties should know that were the SF-DCT to change its processing guidelines and adopt the processing guidelines that existed at the MDL Claims Office prior to 1998 with respect to ACTD Level A compensation, some of the claims addressed in the motions before Judge Hood with respect to this matter would nonetheless be denied because of other deficiencies.