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	§	

REPLY OF CLAIMANTS' ADVISORY COMMITTEE TO DOW CORNING'S RESPONSE TO THE MOTION FOR THE DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION

The CAC and Debtor's Representatives have had a number of discussions over the past several months in an effort to narrow the issues presented in the CAC's Motion For Disclosure. The parties have found a lot of common ground, including it appears agreement on a fundamental point which resolves much of the pending Motion. As stated in the Response of Dow Corning, they agree that if the SF-DCT advises claimants of processing standards via telephone or via the Notification of Status letters sent to claimants who have a deficiency in their claim, then "it is appropriate, in Dow Corning's view, to provide this information to claimants at an earlier stage in the process both to avoid unnecessary cost to the claimant for seeking a second disability evaluation and to save the SF-DCT the cost of processing the claim a second time after the revised medical report is submitted …." Response of Dow Corning at p. 2. This is the underpinning behind the CAC's Motion For Disclosure and, with Dow Corning's agreement that disclosure is appropriate prior to submission of the claim, the Motion has or should be largely been resolved in that the Settlement Facility is currently disclosing the information in the "confidential annotations" when claimants call for assistance to cure a deficiency. There remains a question concerning what remedy to apply to claimants who were not afforded adequate disclosure prior to submitting their claim, and

more significantly, whether the criteria that is being disclosed accurately reflects what the MDL 926 Claims Office did in processing disability A claims in 1996 and 1997 (when the bulk of current disease claims were processed), and in processing other types of claims. These are issues that the parties are unable to determine based on the current facts and information.

The Settlement Facility Discloses Information in the "Confidential Annotations" Telephonically and in Notification of Status Letters

First, Dow Corning's statement that information that is being disclosed telephonically or in writing during the deficiency process should be disclosed "at an earlier stage in the process" applies to virtually all requests for information by a claimant to cure a deficiency. The Settlement Facility has and continues to provide detailed information to claimants concerning the criteria, interpretations and information in the so-called "confidential annotations" when they call the nurse reviewer in Claims Assistance. See, e.g., Exhibit 1 attached, copy of redacted correspondence to the Claimants' Advisory Committee from an attorney who was provided detailed information about the disability criteria in the "confidential annotations" during a scheduled telephone conference with a nurse reviewer in the Claims Assistance Program. This correspondence is consistent with other correspondence and information received by the CAC in which claimants and counsel have reported that the nurse reviewers at the Claims Assistance Program have provided detailed information contained in the annotations to them when they call to seek clarification about or help curing their claim deficiency. This is also consistent with the practice in the RSP whereby the MDL 926 Claims Office provided and continues to provide detailed disease and disability information contained within the annotations when claimants call concerning a

deficiency.[1] Based on the practice of the MDL 926 Claims Office, the Claims Administrator determined that it was appropriate for the Settlement Facility to also disclose criteria when claimants called in response to a deficiency notice. We believe that this disclosure by Claims Assistance is appropriate.[2] We simply believe, and Dow Corning has agreed in its Response, that such disclosure must occur prior to the time the claim is submitted so that claimants do not have to incur the cost of multiple disease evaluations and to prevent multiple (and costly) evaluations and additional manpower to staff and inform claimants of the criteria on a claimant-by-claimant basis by the SF-DCT.

All information and criteria that is disclosed telephonically or in written deficiency letters by the Settlement Facility (and/or the MDL 926 Claims Office) must be disclosed in a written form to claimants earlier than the deficiency stage and on a more widespread basis than through individual calls with claimants. Furthermore, all claimants who received a deficiency because they did not have access to the correct criteria prior to submission of their claim should be afforded a new opportunity to submit a claim to qualify.[3]

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[1] While it is accurate that no one outside of the MDL 926 Claims Office had access to the written interpretations applied by the MDL 926 Claims Office, claimants and counsel were provided this information verbally when they contacted the MDL 926 Claims Office. Response of Dow Corning at p. 6. Also, law firms who represented clients with claims in the Revised Settlement Program had received their award review letters in 1996 and 1997; the Plan was negotiated in 1998 and confirmed in 1999. By this time, the TCC was aware generally of how claims were processed and what type of submission was acceptable. We therefore respectfully disagree with Dow Corning's statement in its Response that the TCC had only a "basic understanding of the standard" being applied by the MDL 926 Claims Office or that "The Plan Proponents agreed to accept those criteria 'sight unseen' …." The TCC had much more than a basic understanding – it had first hand experience of knowing what documentation was needed to have a claim approved.

[2] We agree that disclosure is appropriate earlier than the telephonic consult after a deficiency letter is issued because the Plan differs from the Revised Settlement Program in a significant way, i.e., the Plan has short deadlines to cure a deficiency or the claim is forever barred whereas the Revised Settlement Program has no deadline to cure a deficiency other than the 15 year life of the program. Second, recognizing the short cure deadline, the parties provided that the Notification of Status letter would contain detailed information about the deficiency and how to cure it, In contrast, because of programming constraints in the Revised Settlement Program, the deficiency letter did not provide any information but instructed claimants to call to obtain the information.

[3] Frankly, we do not understand the rationale for the harsh policy that requires claimants to first receive a deficiency and thus trigger the running of the cure deadline before the correct criteria would be disclosed telephonically.

The CAC Requests Additional Information To Determine If The Annotations Developed By The Settlement Facility Accurately Reflect How Claims Were Processed In the Revised Settlement Program

With regard to the second issue, neither the CAC nor the Debtor's Representatives are not in a position to determine if the MDL 926 processing annotations and applications are being correctly applied by the Settlement Facility as the Plan directs. We know through the true-up arbitration process that the Settlement Facility developed its own processing manuals and annotations and did not simply use the existing manuals it received from the MDL 926 Claims Office. It was represented to the parties during the true-up arbitration process that the Settlement Facility annotations were developed largely based on interviews with former MDL nurse reviewers who attempted to reconstruct processing protocols and annotations from memory and on the materials provided by the MDL 926 Claims Administrator. We have also been informed that the Claims Administrator submitted the manuals prepared by her office to the MDL 926 Claims Administrator (both to former Administrator Ann Cochran and to current Administrator Jean Eliason) and asked them to confirm the accuracy of the information in the annotations, but it was represented to the CAC that both Claims Administrators declined to do this. We are not aware of the reasons why they declined to do this. We are also unaware of what other measures have been put in place to assure that claims are processed in the same manner and with the same results obtained by the MDL 926 Claims Office such as claims audits and comparisons between the two facilities.

Since the Effective Date, the CAC has received a large volume of complaints – and regularly continues to hear from numerous law firms who represented claimants in both the Revised Settlement Program and the Settlement Facility -- who state that the disease submissions prepared at the same time in 1994 for the original global settlement by the same Qualified Medical Doctor were accepted in the RSP but are being classified as deficient by the Settlement Facility. Given the volume of correspondence we have

received on this topic alone and on the way the Settlement Facility developed its own annotations instead of relying solely on the materials received from the MDL 926 Claims Office, we must question whether the Settlement Facility annotations correctly reflect how claims were processed in the RSP. Our concerns seem to be further supported by the data in the SF-DCT monthly reports that show a discrepancy between claims approved in the RSP and lower approval numbers for the same type of claims processed by the Settlement Facility.[4]

We suggest that it would be reasonable and appropriate for the two claims facilities to work together to pull a sample of current disease claims approved in the Revised Settlement Program in 1996 and 1997 and compare them with the Disease Option 1 claims reviewed thus far to determine if there is consistency in processing and outcomes as required by the Plan Documents. We also suggest that the two claims facilities must coordinate and agree upon the correct set of annotations and organize them in such a way that any information about criteria that is disclosed to claimants when they call can be made publicly available to everyone, not just those fortunate enough to speak to one of two nurse reviewers in Claims Assistance.

Summary

The CAC respectfully submits that there is agreement between the CAC and Dow Corning that information that is disclosed to claimants telephonically and/or in detailed deficiency letters should be disclosed at an "earlier stage." While we are two years into claims submissions, the Settlement Facility has not completed processing of many Dow Corning only disease claims.[5] We submit that it would be appropriate at this

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[4] The CAC acknowledges that data from seven (7) months of processing may not be predictive of long term statistics, but the data is consistent with the experiences of law firms who have had disease claims processed in both the RSP and the Settlement Facility.

[5] A significant number of disease claims processed to date are "MDL pass through" claims where claimants who had both a Dow Corning and a Bristol, Baxter or 3M breast implant have already received their award

early stage in the processing of claims to 1) send a letter to all claimants providing them with accurate information about the criteria needed to qualify, i.e., whatever information is already being disclosed by nurse reviewers during deficiency consultation calls, and 2) reset existing cure deadlines to begin running in individual claims only upon receipt of new NOS letters to allow these claimants to have access to accurate information.

Respectfully submitted,

FOR THE CLAIMANTS' ADVISORY COMMITTEE

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from the RSP – reduced by 50% -- and now seek to recover the other portion of their disease award from the SF-DCT.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply of the CAC to the Response of Dow Corning to the Motion For Disclosure was sent to the Court via Federal Express on February 7, 2005 for filing and was served on the Debtor's Representatives by electronic mail on February 7, 2005.

Dianna Pendleton-Dominguez

Dianna Pendleton-Dominguez

EXHIBIT 1

Subj: **Level A Disability**
Date: 1/20/2005 1:05:03 P.M. Eastern Standard Time
From: REDACTED
To: info@tortcomm.org

To whom it may concern,
I have just spoken to the Dow Trust nurse Yohanna regarding my client REDACTED who has applied for a Level A Disability in the Option 1 disease claim. She has MS and is unable to get about without a wheel chair and an attendant's care. She has been denied a level A because we did not address the 5 issues of self-care which Yohanna states are as follows:

Feeding
Dressing
Bathing
Grooming
Toileting

Furthermore, she states that the reviewers have told her that the claimant must be unable to perform 3 out of the 5 in order to qualify for the level A.

I have submitted 15 Option one disease claims at level A that were recently reviewed by a Board Certified Internist and who provided an indepth report for those individuals.

Why were we not told about the 5 areas of measurement for the level A? This is a huge waste of the client's money and time, not to mention my own. The RSP/MDL 926 settlement did not require this strictness. Most of all, I am shocked to see what is required to get paid $50,000 and that we had never been informed of the criteria. Please respond.

Very truly yours,

REDACTED