UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

In Re:	§	**Case No. 00-CV-00005-DT**
	§	
DOW CORNING CORPORATION,	§	**(Settlement Facility Matters)**
	§	
Debtor.	§	**HON. DENISE PAGE HOOD**

NOTICE OF ESTIMATE OF TIME, EXHIBITS AND WITNESSES WITH REGARD TO THE MOTION OF CLAIMANTS' ADVISORY COMMITTEE TO INTERPRET ANNEX A, THE CLAIMS RESOLUTION PROCEDURES, SCHEDULE II, PART B, GENERAL CRITERIA (A) - TOLLING

The Claimants' Advisory Committee file this document consistent with the requirements of Section 2.01(d)(2) of the Stipulation And Order Establishing Procedures For Resolution Of Disputes Regarding Interpretation Of The Amended Joint Plan and the Fourth Amended Case Management and Administrative Order.

Estimate of time: 30 minutes

Witnesses: The Claimants' Advisory Committee does not see the need for Witnesses

Exhibits: The Claimants' Advisory Committee does not see the need for exhibits at a status conference on the motion.

Respectfully submitted this 19th day of July, 2004.

CLAIMANTS' ADVISORY COMMITTEE

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MOTION OF CLAIMANTS' ADVISORY COMMITTEE TO INTERPRET ANNEX A, THE CLAIMS RESOLUTION PROCEDURES, SCHEDULE II, PART B, GENERAL CRITERIA (A) - TOLLING

The Claimants' Advisory Committee ("CAC") respectfully submits this motion pursuant to the Stipulation And Order Establishing Procedures For Resolution Of Disputes Regarding Interpretation Of The Amended Joint Plan dated June 10, 2004 ("the Stipulation"). For the reasons stated herein, we respectfully submit that the correct interpretation of the Plan language in Annex A, Schedule II, Part B, General criteria "A" is that claimants are not required to document eligible symptoms under Disease Option 2 during the pendency of the Dow Corning bankruptcy, i.e., from May 15, 1995 to June 1, 2004, and that this time period is "tolled" consistent with the language in the Plan.

Procedural History

1. In January 2003, the Claims Administrator requested the parties to provide a Plan interpretation regarding the tolling language in Annex A, the Claims Resolution Procedures ("Annex A") at Schedule II, Part B, General Criteria "A" which provides as follows:

> 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.)

(emphasis added)

2. On August 7, 2003, the Claims Administrator sent to the parties the Procedures for Resolution of Disputes under the Provisions of the Settlement Facility Agreement Section 5.05 ("the Procedures"). Pursuant to these Procedures, the Tort Claimants' Committee submitted its position statement to the Claims Administrator on September 19, 2003, and Dow Corning submitted its response on October 3, 2003.

3. Thereafter, the parties reached an agreement on procedures for resolution of disputes regarding interpretation of the Amended Joint Plan ("the Stipulation"). Pursuant to the terms of the Stipulation, a conference with the parties and the Claims Administrator was held on June 22, 2004. Thereafter, on June 28, 2004, pursuant to Section 2.01(c)(4) of the Stipulation, the Claims Administrator issued a statement informing the parties that she did not intend to issue a decision on the tolling plan interpretation dispute.

4. Therefore, pursuant to Section 2.01(d)(2) of the Stipulation, the parties have 15 business days from the date of the Claims Administrator's June 28, 2004 statement to file cross motions with the District Court for a ruling on the plan interpretation dispute.

Standard of Review

Although the Stipulation provides a standard of review in the event the Claims Administrator issues a decision (de novo), there is nothing in the Stipulation that specifies

the standard of review when the Claims Administrator declines to issue a decision. The Claimants' Advisory Committee believes, however, that the proper standard of review by the District Court is de novo.

Relevant Facts

1. During the summer of 1998, negotiations were ongoing to finalize the Plan Documents in the Joint Plan of Reorganization of Dow Corning. The relevant Plan Document that pertained to the rights and compensation of tort claimants was Annex A, the Claims Resolution Procedures ("Annex A"), which was annexed to the Settlement Facility and Fund Distribution Agreement ("SFA"). Annex A outlined the settlement options offered to tort claimants and was based extensively on the previously implemented settlement in the MDL 926 proceedings, called the Revised Settlement Program ("RSP"). In fact, numerous references in the SFA provide that the express intent of the parties is that the processing protocols and criteria shall be applied in the same manner as the RSP. See, e.g., SFA Section 4.03(a) which is discussed in greater detail below.

2. In the RSP, there are two disease options afforded to eligible Bristol, Baxter and 3M claimants. The first option is called the Fixed Benefit Option, and incorporates the disease definitions that were agreed to as part of the original global settlement. In the Dow Corning Plan, Fixed Benefit Option is the same as Disease Option 1. The second disease option in the RSP – the Long Term Benefit Schedule – is new, and provides compensation for serious, recognized rheumatic diseases of scleroderma, systemic lupus, polymyositis, and dermatomyositis, as well as a condition defined by the parties

specifically for the RSP called General Connective Tissue Symptoms or GCTS. In the Dow Corning Plan, the Long Term Benefit Schedule is called Disease Option 2.

3. One of the primary differences between the disease options is that the Long Term Benefit Schedule (Disease Option 2 in the Dow Corning Plan) contained much stricter and more objective diagnostic criteria. In exchange for meeting these more difficult, rigorous diagnostic criteria, claimants were paid significantly higher compensation ranging from $75,000 to $250,000.

4. The Plan Proponents in the Dow Corning Plan wanted the best measure of certainty available to predict the number of disease claims and the projected payout for these disease claims. As a result, the parties adopted wholesale and verbatim the medical criteria and requirements contained in the RSP's Fixed Benefit and Long Term Benefit Schedule disease options. However, there was one single exception, that being the inclusion of tolling language in the Long Term Benefit Schedule (Disease Option 2) under the General criteria "A."

5. Specifically, the Dow Corning Plan included language that provided that during the pendency of the bankruptcy – which was a specifically defined period from the date of the bankruptcy filing on May 15, 1995 until the Effective Date – claimants would not have to document their symptoms or undergo medical testing. In other words, the bankruptcy "tolled" the requirement for testing and submission of a disease claim.

6. The chart below compares the language in General criteria "A" from both the RSP and the Dow Corning Plan with the language in question in bold.

Revised Settlement Program, Long Term Benefit Schedule	**Amended Joint Plan, Disease Option 2**
A. A claimant may 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. (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.)	A. A claimant may 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.)

7. The intent of the Tort Claimants' Committee in including the tolling language noted above was threefold: a) there was great uncertainty in 1998 concerning the projected length of time it could take before the Joint Plan was approved, appeals were over, and all preconditions to an Effective Date were met, a concern that was proven legitimate inasmuch as the Effective Date did not occur for another six years; b) Dow Corning breast implant claimants did not have notice and knowledge of the Disease Option 2 criteria to be able to have their symptoms documented within a single 24-month period during the pendency of the bankruptcy, and c) significantly, claimants did not have claim forms or a claims facility to submit their claims within the time frame required in General criteria "A."

8. In recognition of these concerns, the one change made to the RSP's disease criteria when it was adopted verbatim in the Dow Corning Plan was to add tolling

language in Disease Option 2 as specified in paragraph 6 above. In other words, the change that was made expressly provided that claimants would not be penalized and would not have an otherwise valid claim denied because they either were not aware of the medical criteria or were physically unable to file a disease claim within the specified time periods because there was no mechanism to do so.

9. The Claimants' Advisory Committee believes that the tolling language in Disease Option 2 was intended to and should be interpreted to mean that claimants were not required to document their eligible symptoms during the pendency of the bankruptcy within a "single 24-month period within the five years immediately preceding the submission of the claim." We respectfully urge the Court to adopt this interpretation.

Argument

Disease Option 2 Should Be Applied In A Manner That Is Consistent With The RSP

The interpretation of the tolling language in Disease Option 2 can and should be viewed from the standpoint of ensuring consistency with the RSP, a hallmark of the Dow Corning Plan. For example, Section 4.03(a) of the SFA states that:

> 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 ....

Similar provisions in the SFA evidence the desire for consistency in application and interpretation of provisions of disease claims between the RSP and the Joint Plan. Viewed from this basic premise that the Dow Corning Plan should be applied in a manner consistent with the RSP, it logically flows that the tolling language the parties added to

Disease Option 2 should be interpreted in a way that is similar to the opportunity afforded to RSP claimants. In other words, RSP claimants enjoyed the following: first, the ability to be informed about the medical criteria and requirements needed to qualify; second, to use that criteria to have objective tests conducted prospectively and to do so within the time frames specified in the documents that were provided to them; and three, to allow for a truly meaningful opportunity to seek compensation significantly higher than that afforded in the Fixed Benefit Schedule (Disease Option 1). Each of these points will be discussed below.

First, the RSP gave claimants the information about the new disease option – what the Dow Corning Plan refers to as Disease Option 2 – on a prospective basis. In other words, RSP claimants were sent a notice from the MDL Court in January 1996 informing them of the new criteria and requirements to qualify in Disease Option 2. At that time, they were informed of the option prospectively to be evaluated and have symptoms documented to apply for the higher paying conditions in Disease Option 2. Thus, they were able to prospectively seek a medical examination, document the objective medical findings required including laboratory or other objective test that needed to be conducted, and to have these tests completed and symptoms documented within a single 24-month period as required in Disease Option 2.

In the Dow Corning Plan, Dow Corning breast implant claimants were first informed of the disease criteria when claim forms were mailed in February 2003. Prior to that time, the limited mailings and information provided to claimants consisted only of an Amended Joint Disclosure Statement that was mailed in March 1999, followed by a newsletter from the Settlement Facility in September 2001. Neither of these documents,

however, included the list of medical criteria claimants would need to document to qualify for compensation. The Amended Joint Disclosure Statement in March 1999 included barely a one page summary of the entire disease option (pages 79-80) and did not identify the diseases and medical conditions eligible for compensation much less the specific diagnostic criteria claimants would need. Similarly, and again without being critical of the Settlement Facility, the September 2001 newsletter did not contain any specifics about the disease options or criteria for claimants.

The first mailing that claimants received that included the diagnostic criteria was when claim form packages were mailed in February 2003. Therefore, the earliest possible date that claimants could know what the medical criteria was and could then seek prospective medical testing to have symptoms documented for Disease Option 2 was February 2003. Prior to this time, claimants did not have the medical criteria to know what diagnostic tests to have done much less the prescience to know and schedule the diagnostic tests to occur within a single 24-month period.

If the Plan is to be interpreted in a manner that gives Dow Corning breast implant claimants the same opportunity for compensation as RSP claimants were afforded, then we believe that the only fair interpretation is to apply the tolling language in the way we have suggested, i.e., to allow Dow Corning breast implant claimants to rely on the medical criteria and requirements as of the date the claim forms were mailed and to toll the requirement that symptoms had to be documented during the pendency of the bankruptcy proceedings.

The CAC does not believe that either party to the Amended Joint Plan seriously envisioned a settlement plan where claimants were somehow required to have medical

tests conducted on them when they were not even informed what the criteria was, and during a time when in fact the criteria had not even been developed (i.e., Dow Corning filed for bankruptcy in May 1995 and the Disease Option 2 criteria were not developed until January 1996). To accept Dow Corning's interpretation that claimants were required to document their symptoms during the pendency of the bankruptcy would place a virtually impossible obstacle to recovering compensation in Disease Option 2. Rather, the only fair application of the tolling language in Disease Option 2 is that claimants were under no affirmative duty to document medical symptoms or findings within any specific time frame during the pendency of the bankruptcy proceedings.

Dow Corning may claim, as they did at the June 22, 2004 conference with the Claims Administrator, that claimants with a serious illness should have sought treatment during the pendency of the bankruptcy regardless of whether the symptom was eligible for compensation. While there is a ring of truth to this statement, it overlooks three significant facts:

1) A diagnosis of one of the Disease Option 2 diseases by a rheumatologist is, in and of itself, not sufficient alone to qualify for compensation. The treating board-certified rheumatologist must provide additional documentation about symptoms that pre-existed the date of implantation, a statement that excludes other potential explanations for certain symptoms, and provide laboratory results and medical records that support the affirmative finding for each symptom. Claimants seeking treatment during the pendency of the bankruptcy had no way to know that this documentation was needed and therefore would not have requested it from their rheumatologist;

2) Rheumatologists who are treating patients with one of the Disease Option 2 recognized rheumatic diseases do not routinely order continuing diagnostic and laboratory tests unless and until a patient complains of a specific new symptom, her condition worsens, or treatment is needed. Without a specific need for a test, a claimant's health insurance is unlikely to cover the cost of what can be very expensive tests, procedures and examinations. Therefore, these tests and examinations are not the type of tests that can be done routinely, easily or inexpensively, particularly if they are done at the expense of the claimant; and

3) The condition of General Connective Tissue Symptoms is not a recognized rheumatic disease; it is a collection of objective medical tests and symptoms which are written and defined specifically for the RSP. As a result, doctors would need to know each specific test that must be run to determine if the correct combination of eligible symptoms is sufficient to meet the criteria in GCTS. Without information about the medical criteria needed to qualify, claimants would not have had any reason to have all testing done within a specific and limited time frame of 24 months during the pendency of the bankruptcy.

Claimants who meet the strict criteria in Disease Option 2 should be allowed to document their symptoms using the benefit of the tolling language that was expressly negotiated for and included in the Dow Corning Plan. The nine long years claimants spent waiting for the bankruptcy to conclude should not now be used against them by adopting an interpretation that can only be described at this late date as a "gotcha." Instead, this time period should be tolled, allowing claimants to rely on symptoms

documented before the bankruptcy, during its pendency when time periods are tolled, and after the Effective Date for a combined total of a single 24 month period.

The tolling language in General criteria "A" uses the same phrase "this period" in a consistent way to refer to the single 24-month period

The language in the General criteria "A" uses a specific phrase three separate times when it refers to the tolling of deadlines during the pendency of the bankruptcy. Specifically, the second sentence states:

> 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 .... (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.)

The language in General criteria "A" in Disease Option 2 consistently refers to **this period** (the period that is tolled) as the **24-month period**. Thus, the CAC believes that the appropriate interpretation of what period is tolled is **the 24-month period**. This is further supported, we believe, by the fact that the bankruptcy itself acted to toll the submission of claims during its pendency simply because there was no mechanism available for claimants to file claims from May 15, 1995 to February 2003. Claim forms simply were not available prior to February 2003. Claimants could not file a disease claim within five years of being diagnosed with an eligible disease as General Criteria "A" requires, and the Plan Proponents were aware of this fact when they added the tolling language. If the tolling language in General criteria "A" is to have any meaning at all, then the only logical conclusion is that it must apply to the 24-month period requirement, and not to just the five years within the submission of the claim.

For the reasons stated, the Claimants' Advisory Committee respectfully requests that this Court interpret the language in Annex A, Schedule II, Part B, General criteria "A" to mean that the requirement of having symptoms documented within a single 24-month period is tolled from May 15, 1995 to the Effective Date, June 1, 2004.

Respectfully submitted this 19th day of July, 2004.

CLAIMANTS' ADVISORY COMMITTEE

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CERTIFICATE OF SERVICE

The undersigned represents that (s)he caused a copy of the foregoing Motion to be sent by electronic mail, to each member of the Debtor's Representatives and to the Claims Administrator on July 19, 2004.

Dianna Pendleton-Dominguez

Dianna Pendleton-Dominguez