UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

DOW CORNING CORPORATION,

Debtor.

Bankruptcy Case No. 95-20512 and
Settlement Facility Matters
No. 00-CV-00005-DT
Honorable Denise Page Hood

/

ORDER REGARDING DOW CORNING'S MOTION TO ESTABLISH GUIDELINES FOR THE CLAIMS ADMINISTRATOR CONCERNING DETERMINATION OF MEMBERSHIP IN THE CANADIAN SETTLEMENT CLASSES (CLASSES 6A, 6B, and 6C)

Dow Corning Corporation("DCC") brought this Motion to Establish Guidelines for the Claims Administrator Concerning Determination of Membership in the Canadian Settlement Classes (Classes 6A, 6B, and 6C). The Tort Claimants' Committee ("TCC") responded and DCC replied.

Three class action proceedings involving breast implants were pending in the Canadian courts when DCC filed bankruptcy in 1995. These class actions were certified under Canadian law by presiding judges in British Columbia, Ontario and Quebec. *(Helen Harrington v. Dow Corning Corp., et al*, Registry No. C95 4330 (British Columbia, 1995); *Deborah Bendall and Wendy Norman v. McGhan Medical Corp. and Dow Corning Canada, Inc. and Dow Corning Corp.*, Court File No. 14219/93 (Ontario 1993); *Manon Doyer v. Dow Corning Corp and Dow Corning Canada, Inc.*, No. 500-06-000013-934 (Quebec, 1993)).

Settlements were negotiated by DCC in each of these class actions. Class members were represented by counsel in Canada and each settlement was subject to notice and hearing before the

respective Canadian courts. The three negotiated settlements were approved by the courts in Canada. All of this took place before the confirmation hearing before the bankruptcy court in Bay City, Michigan. The Canadian settlements were wholly incorporated into the Amended Joint Plan of Reorganization ("Plan") and the Plan sets forth three subclasses corresponding to the Canadian class actions: Class 6A, the Quebec settlement; Class 6B, the Ontario settlement; and Class 6C, the British Columbia Settlement. (Plan, §§ 3.2.10-12) Each of the settlements is administered by a Canadian Claims Administrator selected by Canadian class counsel with the concurrence of DCC and approval by the Canadian court presiding over the settlement. Payments under the settlement agreements are triggered by the Effective Date of the Plan, set by this Court as June 1, 2004.

At issue in this motion is the jurisdiction of this Court over membership in the Canadian settlements and the role of the Claims Administrator in the United States with respect to classification of claimants. It is not surprising that DCC and the TCC take different views of this issue. By its motion DCC asks for: 1) clarification regarding the obligation of the United States Claims Administrator; 2) confirmation that membership in the three Canadian classes must be determined by the Canadian courts with jurisdiction over those classes; and, 3) procedures for the United States Claims Administrator to follow to assure that the United States Settlement Facility ("SFDCT") does not "inadvertently" process claims of claimants who are members of the three Canadian classes. (DCC Motion, p. 4)

In February 2004, DCC agreed that claims packages should be mailed to the 50 or fewer claimants who had been placed in Classes 6A, 6B, or 6C for voting purposes but had requested claims form packages and informed the Settlement Facility that they are United States citizens or permanent resident aliens who meet the definition for inclusion in Class 5 or Class 9. DCC

continues to object to the classification of these claimants by the United States Claims Administrator. However, according to the TCC, the United States Claims Administrator has previously reclassified claimants who were originally classified for voting purposes into Class 5 into Classes 6A, 6B, and 6C where their documentation established that they properly belonged in Classes 6A, 6B or 6C, with no objection.

It is clear to this Court that the classification for voting purposes was exactly that--a classification for the purpose of voting on the Plan of Reorganization. The Order Regarding Joint Motion for Preliminary Classification of Claims for Voting Purposes and to Approve Balloting Procedures in Connection with Amended Joint Plan of Reorganization entered by the Bankruptcy Court stated in pertinent part:

> 1. Each Personal Injury Claimant, for voting purposes only, is hereby placed into one of the specific Classes set forth in the Amended Joint Plan under the procedures set forth herein. ...
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> 2. The Proponents are hereby authorized to determine whether a Claim (including a Health Insurer Claim) is a Foreign Claim or a Domestic Claim by reviewing the address of the Claimant stated on the Proof of Claim Form or an updated address known to the Debtor. If the address on the Claimant's Proof of Claim Form (or as such address has been updated as may be known by the Debtor) is outside of the Greater U.S., the Claim is hereby classified, for voting purposes, as a Foreign Claim. If the address on their Proof of Claim Form (or as such address has been updated as may be known by the Debtor) is within the Greater U.S., the Claim is hereby classified, for voting purposes, as Domestic Claim.
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> 3. The Proponents are hereby authorized to further determine the Class of Foreign Claims, other than those who are only placed in a Settlement Class (Class 6A-6C), by reference to Exhibit C of the Amended Joint Disclosure Statement.
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> * * *

6. The Proponents are hereby authorized to determine whether a Foreign Claimant is a member of a Class covered by a Class Settlement Agreement by reviewing the address of the Claimant provided on the Proof of Claim Form or an updated address known to the Debtor. If a Claimant address falls within the jurisdictional reach of one of the Class Settlement Agreement, then the Proponents may treat the Claimant as a member of that Settlement Class. This treatment for each Claim type is appropriate and is approved as submitted.

7. Because Claimants in the Settlement Class for Quebec and Ontario have overwhelmingly accepted their Class Settlement Agreement, and because the few claimants who have "opted out" may still accept the Class Settlement Agreement at a later date, the Debtor shall treat all possible members of these Classes as Settlement Class member ***for voting purposes***.

8. Recognizing that other Settlement Classes (Classes 6C or 6D) are allowed to make an election fo their Class Settlement treatment, it is appropriate that Claimants in these Classes be allowed to make an election between Class 6C or 6D and Class 6, 7 or 8. ...

(Order Regarding Joint Motion for Preliminary Classification of Claims for Voting Purposes and to Approve Balloting Procedures in Connection with Amended Plan of Reorganization, pp. 6-8) Any argument that the classification for voting purposes is in some way a final determination of a claimant's classification is without merit.

It is also clear that the Canadian courts have jurisdiction over the Canadian class settlements. (See Plan, § 1.141 (Quebec Breast Implant Settlement Agreement (class action pending in the Quebec court) and § 5.5.1 (Class 6A, Quebec Breast Implant Settlement Agreement under the direct supervision of the court of Quebec); § 1.112 Ontario Breast Implant Settlement Agreement)(class action pending in the Ontario court) and § 5.6.1 (Class 6B, Ontario Breast Implant Settlement Agreement under the direct supervision of the court of Ontario)); and, § 1.15 (B.C. Class Action

Settlement Agreement)(class action pending in the British Columbia court) and § 5.7.1 (Class 6C, B.C. Class Action, Class Action Settlement Agreement under the direct supervision of the court of British Columbia)).

The Plan specifically designates in § 3.2.10, Class 6A as the Quebec Class Action Settlement Claims, in § 3.2.11, Class 6B as the Ontario Class Action Settlement Claims, and in § 3.2.12, Class 6C as B.C. Class Action Settlement Claims. The Plan further identifies the Claimants in each settlement agreement. See Plan, § 1.16 ("B.C. Class Action Settlement Claimants" means the parties designated as "Settlement Class Members" in the B.C. Class Action Settlement Agreement.); § 1.114 ("Ontario Class Action Settlement Claimants" means the parties designated as "Settling Claimants" in the Ontario Breast Implant Settlement Agreement.); and, § 1.143 "Quebec Class Action Settlement Claimants" means the parties designated "Settlement Class Members" in the Quebec Breast Implant Settlement Agreement.) The Canadian settlements specifically identify the criteria for class membership. The Canadian settlements contain language that controls participation in a settlement class based on "geographic nexus" if the claimant is entitled to participate in more than one class. (DCC Motion, p. 10; Quebec Agreement § 7.2; Ontario Agreement § 8.2; British Columbia Agreement § 8.2) The Plan contains language that directs what class an individual may be assigned to if they "opt out" of the settlement. (Plan, §§ 5.5.1, 5.6.1, and 5.7.1) However, this language obviously pertains to individuals who would be classified "foreign claimants" under Class 6.1, not claimants who may be able to demonstrate that they meet the criteria for classification as "domestic claimants" under Class 5. Class 5 includes "Domestic Breast Implant Personal Injury Claims." (Plan, § 3.2.7) "Domestic" means "a Claim that is not a Foreign Claim." (Plan, § 1.55)

DCC suggests that only those claimants who timely opted out of the Canadian class

settlements, or who failed to timely opt in, can be treated as claimants in another class under the Plan. DCC agrees that claimants whose names appear on the opt out lists previously provided to the United States SFDCT are not members of a Canadian class and can be classified in the appropriate class based on the Plan definitions. DCC recognizes that the United States Claims Administrator and the Canadian Claims Administrators will have to coordinate amongst themselves confirmation of class membership and monitoring payment such that no claimant receives multiple payments. The class lists used for balloting, the opt out lists and the registrants in the British Columbia class have already been provided to the United States Claims Administrator. DCC recognizes the possibility that some claimants may be classified incorrectly and may belong in a different Canadian class, some may not belong in any Canadian class and some who are classified in Classes 6.1, 6.2 or even Class 5 may belong in a Canadian class.

Membership in the Canadian classes is very clearly defined in those settlement agreements. *See,* British Columbia Agreement, § 1.54 (defining "Resident Subclass"), § 1.39 (defining "Non-Resident Subclass," and § 1.59 (defining "Settlement Class Members); Ontario Agreement, § 1.39 (defining "Settlement Class"), § 1.48 (defining "Settling Claimants"); and, Quebec Settlement Agreement, § 1.39 (defining "Quebec Class") and § 1.48 (defining "Quebec Settlement Class"). These definitions of class members have been certified by the Canadian courts. *See, Harrington v. Dow Corning, et al.,* Vancouver Registry No. C95 4330 (British Columbia Supreme Court, February 11, 1999)(Order certifying class, appointing class representative, approving Settlement Agreement); *Doyer v. Dow Corning Corp. & Dow Corning Canada, Inc.,* No. 500-06-000013-934 (Quebec Superior Court, July 10, 1998)(Judgment approving the Settlement Agreement, determining the definition of the class bound by the Judgment, and ordering notice); and, *Bendall and Norman v.*

McGhan Medical Corp., Dow Corning Canada, Inc. and Dow Corning Corp., Court File No. 14219/93 (Ontario Court (General Division), November 24, 1998)(Order approving class settlement, declaring that settlement is binding on parties and all class members, providing for publication of a notice, and declaring Agreement contingent upon appointment of claims administrator and claims facility).

Because these class settlements more specifically define the class members, the United States Claims Administrator and the Canadian Claims Administrators should cooperatively determine whether a claimant should be classified in one of those classes.[1] Upon a collaborative determination by the Claims Administrators that a claimant belongs in one of the Canadian classes, the Canadian court shall have jurisdiction over that claimant. If the claimant disputes such classification, the claimant shall follow the procedures for challenging that classification set in the Canadian claims facilities and/or by the appropriate Canadian court. Should a claimant prevail on a claim that the claim should not be part of the Canadian settlement classes, the United States Claims Administrator shall otherwise classify her. Otherwise, the claimant is bound by the decision of the Canadian court. Should the claims administrators collaboratively determine that a claimant does not belong in any of the Canadian settlement classes, the United States Claims Administrator shall otherwise classify the claimant.

If the Claims Administrators cannot agree regarding the classification of any claimant, the Canadian Claims Administrators shall follow the appropriate procedures for seeking a determination from the Canadian courts of whether the claimant belongs in any of the Canadian classes. Similarly,

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[1] If the Canadian Claims Administrators are not given authority by the courts to determine class membership at the claims facility level, then this Court will revisit its decision in this matter.

a claimant dissatisfied with the decision of the Claims Administrators may request a decision from the Canadian courts consistent with the protocols set in the Canadian Claims facilities or by the Canadian courts. Upon a determination that the claimant does not belong in any of the Canadian classes, the United States Claims Administrator shall classify the claimant consistent with the Plan.

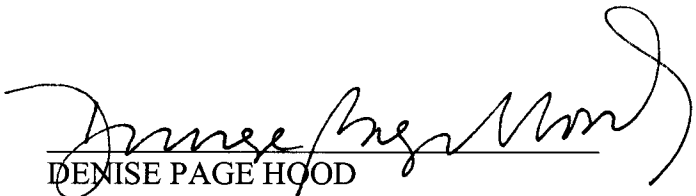
It is clear from the provisions of the Canadian settlement agreements that the Canadian courts are vested with the authority over "all Settlement Class Members" and their respective settlement agreements, as well as the "administration or distribution of the Settlement Amount paid" under those agreements. See, Quebec Agreement at §10.1; Ontario Agreement at §11.1; British Columbia Agreement at §12.1. However, the United States Bankruptcy Court (and in this instance because the reference has been withdrawn, the United States District Court) retains jurisdiction over "the Dow Corning Settlement Facility and Settlement Class Members who filed proofs of claim in the U.S. Bankruptcy Case..." and "(2) over this Agreement ...to enforce the releases provided for herein, to assure that all payments by the Settlement Facility are properly made, and to resolve disputes related to the implementation; provided, however, that the U.S. Bankruptcy Court shall not retain jurisdiction, if any, over the administration or distribution of the Settlement Amount paid." *Id.*

Adoption of the procedures set forth herein comports with judicial notion of comity and respects both the jurisdiction of the Canadian courts, the United States District Court as well as providing a mechanism for payment of claimants with valid claims against the DCC. *See, Badalament, Inc. v. Mel-o-Ripe Banana Brands, Ltd.*, 265 B.R. 732 (E.D. Mich. 2001). It is clear that the United States Settlement Facility ("SFDCT") and its Claims Administrator will be required to coordinate with the Canadian Claims Administrators to confirm class membership and to assure that no claimant receives a payment from both the SFDCT and one of the Canadian settlements.

Accordingly,

IT IS ORDERED that Dow Corning Corporation's Motion to Establish Guidelines for the United States Claims Administrator Concerning Determination of Membership in the Canadian Settlement Classes (Classes 6A, 6B, and 6C) is GRANTED IN PART and DENIED IN PART as more fully set forth above.

IT IS FURTHER ORDERED that the procedures outlined in the Opinion above shall direct the U.S. Claims Administrator in establishing communications with the Canadian facilities and courts.



DENISE PAGE HOOD
United States District Court

DATED: OCT 07 2004