UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE TO MOTION OF DOW CORNING CORPORATION FOR A DETERMINATION THAT THE TOLLING PROVISION IN THE DISEASE OPTION II GUIDELINES DOES NOT MODIFY THE "24-MONTH" ELIGIBILITY REQUIREMENT

The Claimants' Advisory Committee ("CAC") respectfully submits this response to Dow Corning's Motion that seeks to limit the tolling language in Disease Option 2 claims. For the reasons stated herein and in the CAC's Motion, we respectfully submit that the correct interpretation of the tolling language in Annex A, Schedule II, Part B, General Criteria "A" is that claimants were 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 Documents.

Argument

As noted in the CAC's Motion – and as acknowledged by Dow Corning in its Motion – the parties adopted wholesale and verbatim the medical criteria and requirements contained in the Revised Settlement Program's (RSP) Fixed Benefit and Long Term Benefit Schedule disease options with one exception, that being the inclusion

of tolling language in the Long Term Benefit Schedule (Disease Option 2) under the General Criteria "A." General Criteria "A" provides 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 submit a disease claim within a specific time period (generally referred to as the 24 month / 5 year time period). In other words, the bankruptcy "tolled" the requirement that claimants obtain medical testing to submit a Disease Option 2 claim until after the Effective Date occurred.

Dow Corning now seeks to gut the bargained-for benefit the tolling language provided and, at this late juncture when claimants cannot go back in time to document symptoms, Dow Corning seeks to impose the harshest possible interpretation and application of the tolling language on claimants. Dow Corning's primary basis for claiming that the tolling language is limited is stated by Dow Corning in its Motion:

> The negotiations regarding this provision were clear and specific: the Plan Proponents agreed during the negotiations to allow claimants to re-submit their original MDL submissions in order to make a claim for settlement benefits with the SF-DCT, and the Tort Claimants' Committee wanted to assure that these materials could be used even if 5 years had passed. Since it was clear at the time of those negotiations that it was possible that the SF-DCT would not be established until more than 5 years after many claimants would have submitted materials to the MDL-926 Claims Office, the parties inserted this tolling provision. The tolling provision was thus conceived as a means to permit this use of MDL materials in the event that the Dow Corning facility was not able to distribute claim forms within 5 years after the claimant submitted her materials to the MDL-926 Claims Office. <u>In short, the proviso was drafted to 'toll' the 5 year requirement during the pendency of the bankruptcy case and thereby facilitate a claimant's use of claim materials previously submitted to the MDL-926 Claims Office.</u>

(Dow Corning's Motion at pp. 3-4, emphasis added) This language underscores what the CAC believes is Dow Corning's fundamental misunderstanding and erroneous memory about why the tolling language was added.

The Original MDL Global Settlement in 1994 Had Only Disease Option 1 Disease Criteria; Disease Option 1 Does Not And Never Has Had Any Time Limit To Document Symptoms To Be Eligible For Compensation

The following facts are not contested: Claimants who submitted a disease claim in 1994 in the original MDL global settlement had only Disease Option 1 disease criteria available to them. Disease Option 2 was not part of the original MDL global settlement and was not even developed until two years after the 1994 global settlement. [1]

Disease Option 1 criteria does not and has never had any time limits on when symptoms must be documented or claims submitted to be eligible for compensation. To the contrary, under Disease Option 1, a claimant only needs to establish that she has the requisite number of symptoms and meets the disability requirement, and she is eligible for compensation regardless of when the symptoms occurred. The "24 month/5 year period" is not and has never been part of Disease Option 1. Yet Dow Corning claims that the tolling language for Disease Option 2 claims was added to the Plan Documents to "facilitate a claimant's use of claim materials previously submitted to the MDL-926 Claims Office." The CAC submits that the tolling language has absolutely no effect on "claims materials previously submitted to the MDL-926 Claims Office" because all such claims were and could only be Disease Option 1 claims.

[1] As noted in the CAC's Motion, Disease Option 2 criteria was added two years after the failed 1994 global settlement -- in 1996 -- as part of the Revised Settlement Program. The 24 month/5 year criteria was added only when Disease Option 2 was developed in 1996. The criteria does not and has never applied to Disease Option 1 claims.

Disease Option 2 was developed and implemented for the first time in 1996 as part of the Revised Settlement Program, not the original MDL global settlement as Dow Corning mistakenly states. In 1996, Dow Corning had withdrawn from the original global and filed for bankruptcy protection; as a result, Dow Corning claims were not part of the Revised Settlement Program. This is important because it is impossible for a single claimant to rely on their original MDL global settlement disease submission to qualify under Disease Option 2 criteria. In every instance, the Dow Corning claimant would have to seek additional documentation, testing and re-review by a Qualified Medical Doctor. The only conclusion that can be drawn is that there are no claimants who submitted a claim in the MDL in 1994 who would benefit by the tolling language interpretation offered by Dow Corning because the claims in 1994 were only for Disease Option 1. Dow Corning's contention that the tolling language from the 1996 Revised Settlement Program was included in the Plan to allow claimants to rely on their 1994 disease claim does not ring true.

The only logical interpretation of the inclusion of the tolling language in Disease Option 2 is that it tolled the requirement that claimants seek specific (and expensive) medical testing set forth in Disease Option 2 during the pendency of the bankruptcy. (See Motion of Claimants' Advisory Committee To Interpret Annex A, The Claims Resolution Procedures, Schedule II, Part B, General Criteria (A) – Tolling a pp. 6-11)

Claimants Were Not Given The Disease Option 2 Criteria Until February 2003

Dow Corning claims that the tolling language applies only to the requirement that disease claims be filed within five years of diagnosis of one of the eligible diseases in Disease Option 2. They claim that, "A claimant could obtain those [Disease Option 2]

medical findings at any time without any restriction or delay imposed by the bankruptcy case." (Dow Corning's Motion at p. 6) This is simply not true. As explained in the CAC's Motion, claimants with Dow Corning breast implants were only given the specific diagnostic criteria in Disease Option 2 when claim form packages were mailed in February 2003. Claimants did not have notice of the Disease Option 2 diagnostic criteria during the pendency of the bankruptcy. It was not provided with the Disclosure Statement in 1999 or in any subsequent mailing from Dow Corning or the Settlement Facility until claim forms were mailed in 2003. To the contrary, the first Newsletter claimants received in the fall of 2001 provided a "Checklist For Claimants: Things You Can Do Now." (See Exhibit 1 to this Response) The checklist did not instruct claimants to begin the process of medical testing, review and evaluation. At most, the checklist instructed claimants to "obtain any records that document a sign, symptom, finding or test result that supports one of the nine eligible diseases or conditions." The Newsletter did not identify what 9 eligible diseases and conditions nor did it provide specific diagnostic criteria for claimants to use. Instead, the sole purpose of the Newsletter was to instruct claimants to obtain their medical records before those records were destroyed as part of doctor's and hospital's record retention policy.

If Dow Corning's interpretation were accurate, then one would assume that the Newsletter or some other document would have been sent to claimants giving them the specific diagnostic criteria and severity level descriptions, instructed them to begin the process of trying to qualify, and advising them that if they did not do this, they would lose their ability to rely on symptoms that occurred from 1995 to 2004. This, of course, was not done. To impose Dow Corning's interpretation now would mean that claimants

will be barred from recovering the higher compensation in Disease Option 2 simply because they were not given the criteria until it was too late for many to use it.[2] This is a true "gotcha" which should be prevented at all costs. Full disclosure is a basic tenement imposed on a debtor in sending a disclosure statement to creditors seeking their support for a plan of reorganization. If Dow Corning's interpretation is adopted, then claimants may have a legitimate basis to challenge the integrity of the Plan process based on Dow Corning's failure to give claimants full disclosure in 1999 of what was required of them to prevail on a disease claim. This omission in the Disclosure Statement will result in otherwise valid and very serious illnesses that the Plan was designed to compensate being denied. Dow Corning should not be permitted to lay silent for six years and, only now, when claims are being processed and paid, come forward with a Plan interpretation that would foreclose many claimants from qualifying.

Summary

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

[2] Dow Corning claims that if the 24 month requirement were to be tolled during the pendency of the bankruptcy, that claimants could qualify under Disease Option 2 based on "a finding of 'muscle aches' in 1995 along with a finding of Raynaud's in 2004." (Dow Corning's Motion at p. 6) This is simply not accurate. Disease Option 2 consists of the following serious and often life-threatening rheumatological diseases – Scleroderma, Systemic Lupus Erythematosus, Polymyositis and Dermatomyositis. None of these would be diagnosed based on Dow Corning's description of muscle aches and Raynauds. In addition to these four rheumatological diseases, Disease Option 2 contains a condition called "General Connective Tissue Symptoms" or "GCTS." Similarly, under GCTS, a claimant would not qualify based on muscle aches and Raynauds as Dow Corning suggests. GCTS requires very specific symptoms that are documented by medical tests. For example, one GCTS symptom -- Keratoconjunctivitis Sicca -- requires a Schirmer's test, a positive Rose-Bengal or fluorescein staining of cornea and conjunctiva, or abnormal biopsy of the minor salivary gland before a claimant can rely on this symptom. In addition to this objective medical criteria, a claimant would still need to document other symptoms that are equally as objective and stringent to meet.

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.

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 9th day of August, 2004.

CLAIMANTS' ADVISORY COMMITTEE

_____

Dianna Pendleton-Dominguez, Esq.
Blizzard, McCarthy & Nabers LLP
440 Louisiana Street, Suite 1710
Houston, TX 77002
Phone: 713-844-3750
Fax: 713-844-3755

_____

Ernest Hornsby, Esq.
Farmer, Price, Hornsby & Weatherford LLP
100 Adris Place
Dothan, AL 36303
Phone: 334-793-2424
Fax: 334-793-6624

CERTIFICATE OF SERVICE

The undersigned represents that (s)he caused a copy of the foregoing Response to be sent by electronic mail, to each member of the Debtor's Representatives and to the Claims Administrator on August 9, 2004.

_____

Dianna Pendleton-Dominguez