

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

**MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR
DECLARATORY RELIEF THAT THE "RECEIPT AND RELEASE"
DOCUMENT SOLICITED BY THE DOW CORNING LEGAL DEPARTMENT
FROM UNREPRESENTED CLAIMANTS FROM 1992 – 1995 AS PART
OF THE REMOVAL ASSISTANCE PROGRAM (OR REPRESENTED AS
PART OF SUCH PROGRAM) IS NOT A GENERAL RELEASE**

TO THE HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE:

The Claimants' Advisory Committee ("CAC") respectfully submits this Motion, pursuant to Bankruptcy Code §§ 1142 and 105(a) and Section 8.7 of the Amended Joint Plan of Reorganization ("the Plan") seeking declaratory relief on behalf of Settling Breast Implant Claimants who signed a "Receipt and Release" document for their explant surgery under circumstances that warrant voiding the release. Specifically, the "Receipt and Release" was obtained unfairly and unconscionably through (or in reasonable reliance on) the Dow Corning Legal Department's "Removal Assistance Program" ("RAP") and is therefore invalid, or the release was limited to claims arising out of "the costs of the corrective surgery" and was not a release for general damages. Accordingly, the CAC requests that this Court enter an Order that the "Receipt and Release" document does not bar claimants from participating in and receiving compensation from the Settlement Option. Alternatively, the CAC requests that if this relief is denied and the release is determined to bar the claimant's participation in the Settlement Option,

then claimants should be permitted to now “opt-out” to pursue a claim against the Litigation Facility based on their mistaken belief that they were eligible for benefits in the Settlement Option. The CAC respectfully states as follows:

SUMMARY

Annex A to the Settlement Facility and Fund Distribution Agreement (“SFA”) provides at Section 5.01(a) that claimants who released their “Claim” against Dow Corning or its Shareholders or had such “Claim” resolved by final judgment, dismissal or order, are ineligible to apply for benefits from the Settlement Facility-Dow Corning Trust (“SF-DCT”). The Plan Documents are silent on the procedure claimants should follow to challenge the validity and enforceability of a release of their “Claim.”¹ However, the Plan provides for the set off against payments to Settling Claimants who previously obtained explant money as part of the Removal Assistance Program. *See* Section 7.02(c), page 26 of the SFA. To address this, the Claimants’ Advisory Committee and Debtor’s Representatives (collectively “the parties”) submitted a proposed Stipulation and Order to the Court, which was approved on December 23, 2004, that outlined an administrative process for Settling Claimants to use. (*See* Exhibit 1 attached to the Memorandum in Support, *Stipulation and Order Establishing Procedures For Resolution of Disputes Regarding Release of Claims Against Dow Corning and Election of Settlement Option*).

¹ Although the word “Claim” is capitalized in Section 5.01(a), it is not a defined term in the Plan Documents. It is defined in the Bankruptcy Code at Section 101(5) as:

‘claim’ means –

- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, or
- (B) right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or secured; ...

Claimants in one or both of the categories listed below are exempted from the administrative process so that they can contest the release directly with the Court:

(1) Claims alleging that the Plan does not bar recovery under the Settlement Option where an unrepresented Claimant signed a release in exchange for a payment of less than \$15,000 during the period 1992 through May 15, 1995 and (2) Claims alleging that the release was provided in connection with the Dow Corning Removal Assistance Program.

Id., Exhibit 1, at Exhibit A ¶ 1.

In response to the FDA's moratorium on silicone gel breast implantations in 1992 and the extensive media coverage about women who had experienced severe injuries caused by their implants, Dow Corning publicly announced that it was establishing a \$10 million fund and a "Removal Assistance Program." Dow Corning claimed that the Removal Assistance Program would assist claimants with the costs of removing their implant where the woman was unable to pay for the surgery. It was widely publicized that a release of liability would not be required for women who participated in the program.

It has only recently been discovered that the Dow Corning Legal Department devised and operated the Removal Assistance Program as part of its legal defense strategy for breast implant cases, as a "pipeline into the claims" to obtain information to use against implanted women, and specifically to obtain releases of liability from women through what can only be called fraudulent, deceptive, misleading and unconscionable circumstances.

Claimants thereafter pursued their "claims" against Dow Corning in the original global settlement and/or the Dow Corning bankruptcy case, believing that they had released only claims for "the costs of the corrective surgery" and not claims for rupture, disease and other injuries. They filed a Proof of Claim form in 1996, received a ballot to vote on the Disclosure Statement

and Amended Joint Plan of Reorganization of Dow Corning in 1999, received claim forms from the Settlement Facility in 2003, and returned completed claim forms for benefits in 2003-2005. These ongoing communications from Dow Corning and the Settlement Facility led them to further believe that they were eligible for compensation for their other injuries.

The Dow Corning Removal Assistance Program was devised to attract and pull in the most financially desperate women who had a valid and pressing medical need to have the implants removed. Unbeknownst to the women who called, calls were transferred to Dow Corning paralegals -- misleadingly renamed as "Customer Relations Specialists" -- in 1992 when the Removal Assistance Program was established. The Customer Relation Specialists gave incentives to explanting surgeons to secure releases of liability for Dow Corning by offering them full payment of their fees, compared to a meager \$1,200 payment to the doctor if no release was obtained. Further, the entire amount paid for the "release" went to the explanting surgeon in virtually all instances. Claimants received no money or other compensation for their injuries, and each of the representative claimants states in the attached statements that she would not have signed the document if she had understood that she would be barred from additional compensation.

Claimants who signed a "Receipt and Release" should be permitted to participate in the Settlement Option with a set-off against their Explant Payment pursuant to Section 7.02(c), page 26 of the SFA for the amount the doctor has already been paid, or, alternatively, the claimants should be permitted to opt out to pursue their claim(s) against the Litigation Facility. Global disposition of such claims is appropriate in light of the common facts presented by the cases of most claimants and to save the SF-DCT and this Court the burden of adjudicating significant numbers of repetitive cases presenting the same issues. However, at the very minimum, each

individual claimant must be given the fair opportunity to demonstrate that the “release” obtained against her by Dow Corning is unconscionable and therefore unenforceable.²

Respectfully submitted,

ON BEHALF OF THE CLAIMANTS’ ADVISORY
COMMITTEE

By: /s/ Patrick L. Hughes, Esq.

Haynes and Boone L.L.P.
1221 McKinney, Suite 2100
Houston, TX 77010-2007
Phone: 713-547-2550
Fax: 713.547.2600

By: Dianna Pendleton-Dominguez, Esq.

Law Office of Dianna Pendleton
401 N. Main Street
St. Marys, OH 45885
Phone: 419-394-0717
Fax: 419-394-1748
E-mail: dpend440@aol.com

By: Ernest Hornsby, Esq.

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

² While Dow Corning produced some documents regarding the two Removal Assistance Programs to the National Depository, the CAC believes that additional documents have been withheld or classified as attorney work product and privileged. Discovery, including depositions of Dow Corning, may be necessary.