

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

Dow Corning Corporation,

Reorganized Debtor

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§

Case No. 00-CV-00005-DT
(Settlement Facility Matters)

Hon. Denise Page Hood

**RESPONSE TO NOTICE OF FILING OF SUPPLEMENTAL EXHIBIT TO
MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR THE
DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED
AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY
AND REQUEST FOR EXPEDITED CONSIDERATION**

Dow Corning Corporation ("Dow Corning") respectfully submits this response to the *Notice of Filing of Supplemental Exhibit to Motion of Claimants' Advisory Committee for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration* (the "Supplemental Exhibit").

On June 19, 2006 at 4:18 p.m., on the eve of oral argument, the Claimants' Advisory Committee ("CAC") filed as a supplemental exhibit to its motion for disclosure¹ a memorandum prepared by the Claims Administrator and circulated to the CAC and the Debtor's Representatives regarding the application of the Disability Level A guideline. The memorandum is not probative and does not purport to represent an effort to compile objective facts, and therefore cannot be considered as determinative of any factual questions or any practices of the MDL Claims Office.² Indeed, as set forth in

¹ The CAC's original motion, the *Motion of the Claimants' Advisory Committee for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration*, was filed on December 15, 2004.

² In addition, as set forth in Dow Corning's *Objection to the Notice of Filing of Supplemental Exhibit to Motion of Claimants' Advisory Committee for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration* ("Dow Corning's Objection") the Supplemental Exhibit was untimely filed and constitutes hearsay and therefore should be stricken from the record.

the attached letter offering additional clarification from the Claims Administrator regarding the nature and scope of his memorandum, the Claims Administrator has confirmed that this memorandum was not intended to be an unequivocal statement of fact suitable for introduction into evidence, but rather was intended to offer the parties some issues to consider in resolving the pending motions.³ See June 20, 2006 Fax from David T. Austern to Jordana Feldman, attached as Exhibit 1.

First, the Claims Administrator has confirmed that, in conducting his analysis, he did not review a statistically significant sample of MDL claims or a random sample of MDL claims. As such, any statements in the memorandum about the MDL's practices do not represent a statistically significant or random sampling of MDL claims. See *id.* at 1. Second, the Claims Administrator has confirmed that his analysis of MDL claims and Settlement Facility-Dow Corning Trust ("SF-DCT") claims cited in the pending Disability Level A motions reveals that the difference between the approval rates in the MDL (14.3%) and the SF-DCT (5%)⁴ is not solely, or even primarily, attributable to different Disability Level A processing guidelines in the two facilities but, rather, reflects a number of other issues. These issues include, but are not limited to, deficiencies in SF-DCT claims based on lack of adequate documentation of disability, documentation showing that the claimant's disability was caused by a non-compensable or pre-existing condition, the failure to provide disability statements by a QMD or treating physician, and conflicting medical evidence regarding the underlying symptoms and/or level of disability. See *id.* Third, the statements in the memorandum

³ The CAC, by filing this pleading, has put Dow Corning in the very difficult position of having to respectfully suggest that this Court consider whether it is necessary to hold an evidentiary proceeding or reject the supplemental filing in its entirety.

⁴ These figures are based on monthly processing reports of the SF-DCT and information provided to the Claims Administrator by the MDL Claims Office.

are based in large part on the oral history obtained through conversations of the Claims Administrator with former MDL claims reviewers who relayed their recollections of events 10 years ago. The Claims Administrator has confirmed his understanding that these claims reviewers did not necessarily have the authority to issue final decisions. *See id.* Fourth, in preparing his memorandum, the Claims Administrator was not able to speak with Ann Cochran, who was the Initial Claims Administrator of the MDL during the relevant period. *See id.* at 1-2. Finally, the Claims Administrator is not disputing the statement by Judge Pointer in his September 30, 1997 appeals decision regarding the practices of the MDL Claims Office at the relevant time. *See id.* at 2. In his September 1997 Order, Judge Pointer provided the following interpretation of the Disability Level A standard:

There is some ambiguity or inconsistency in this language. Had the words “or only few” been omitted, the meaning would have been clear, namely a requirement that there be limitations affecting both vocational and self-care activities. The court, acting under its expressly reserved powers to interpret the terms of the settlement, concludes that the inclusion of the phrase “or only few” was intended to provide some relaxation from that standard, by enabling a determination of total disability even though the person may be able to perform a few of the vocational or self care activities – and not, as Ms. _____ contends, to dispense with the requirement that there be limitations with respect to both self care activities and vocational activities. ***In accordance with this interpretation, the Claims Administrator has consistently applied the language respecting disability level A for other claimants as she has with respect to Ms. _____’s claim.***

September 30, 1997 Order, Case No. CV-94-11558 (Docket No. 1062) (emphasis added).

This judicial finding expressly provides that the MDL Claims Office consistently awarded Disability Level A compensation only where a claimant had both vocational and self-care disabilities, at least to some extent.

As set forth in Dow Corning's Objection, this Court should not consider the Supplemental Exhibit and the pleading should be stricken from the record. However, in the event this Court accepts the Supplemental Exhibit as part of the record, Dow Corning respectfully requests this Court to consider this pleading for the foregoing reasons.

Respectfully submitted this 20th day of June 2006.

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

By: /s/ Deborah E. Greenspan

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DEBTOR'S REPRESENTATIVE AND
ATTORNEY FOR DOW CORNING CORPORATION

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 §

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2006 a true and correct copy of the following pleading was served via electronic mail, telecopy, or overnight mail upon the parties listed below:

**RESPONSE TO NOTICE OF FILING OF SUPPLEMENTAL EXHIBIT TO
MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR THE
DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED
AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY
AND REQUEST FOR EXPEDITED CONSIDERATION**

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EXHIBIT 1



THE YALE CLUB OF NEW YORK CITY

FACSIMILE TRANSMITTAL SHEET

TO: Jordana Feldman, Esq. FROM: David Austerlitz
 COMPANY: _____ DATE: _____
 FAX NUMBER: 212-277-6501 TOTAL NO. OF PAGES, INCLUDING COVER: _____
 PHONE NUMBER: 212-277-6553 SENDER'S PHONE NUMBER: _____
 RE: Letter SENDER'S FAX NUMBER: _____

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS

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June 19, 2006

VIA FACSIMILE

David Austern
President
CRMC
3110 Fairview Park, Suite 200
Falls Church, VA 22042

RE: Disability Level A Claims Data

Dear David:

In light of today's filing by the Claimants' Advisory Committee of your June 9, 2006 memorandum addressing issues related to the application of the Disability Level A guideline, it is important that we clarify certain of the statements in the memorandum. In explaining your memorandum to me, you have characterized your analysis in a way that is critical for the Court to understand in the event that the Court accepts your memorandum as part of the record.

First, the purpose of the memorandum was to offer the parties some issues to consider that may help to resolve the pending motions. You have advised that you did not intend this memorandum to be an unequivocal statement of fact suitable for introduction into evidence. Second, in conducting your analysis, you did not review a statistically significant sample of MDL claims or a random sample of MDL claims. As such, your statements about the MDL's practices do not represent a statistically significant or random sampling of MDL claims. Third, you have advised that your analysis of MDL claims and Settlement Facility-Dow Corning Trust ("SF-DCT") claims cited in the pending motions reveals that the difference between the approval rates in the MDL (14.3%) and the SF-DCT (5%) is not solely, or even primarily, attributable to different Disability Level A processing guidelines in the two facilities but, rather, reflects a number of other issues. These issues include, but are not limited to, deficiencies in SF-DCT claims based on lack of adequate documentation of disability, documentation showing that the claimant's disability was caused by a non-compensable or pre-existing condition, the failure to provide disability statements by a QMD or treating physician, and conflicting medical evidence regarding the underlying symptoms and/or level of disability. Fourth, the statements in your memorandum are based in large part on the oral history obtained through conversations with former MDL claims reviewers who relayed their recollections of events 10 years ago. You have confirmed your understanding that these claims reviewers did not necessarily have the

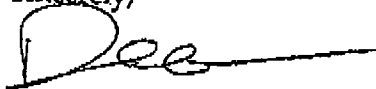
DOCSNY.201634.1

June 19, 2006
Page 2

authority to issue final decisions. Fifth, in preparing your memorandum, you were not able to speak with Ann Cochran, who was the Initial Claims Administrator of the MDL during the relevant period. Finally, you are not disputing the statement by Judge Pointer in his September 30, 1997 appeals decision regarding the practices of the MDL Claims Office at the relevant time.

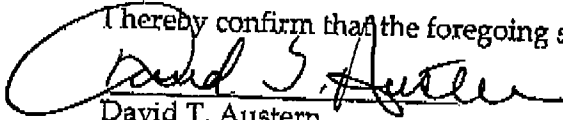
If this accurately reflects the scope and basis of your memorandum, please either sign below confirming your agreement and return to me or send me an email confirming your agreement as soon as possible. I plan to submit this letter to the Court at tomorrow's hearing.

Sincerely,



Deborah E. Greenspan

I hereby confirm that the foregoing statements are correct.



David T. Austern
Claims Administrator

DEG:jhf