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.	§	
	§	

RESPONSE OF DOW CORNING TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE TO INTERPRET ANNEX A, THE CLAIMS RESOLUTION PROCEDURES, SCHEDULE 11, PART B, GENERAL CRITERIA (A) - TOLLING

Dow Corning Corporation ("DCC") submits this RESPONSE OF DOW CORNING TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE TO INTERPRET ANNEX A, THE CLAIMS RESOLUTION PROCEDURES, SCHEDULE 11, PART B, GENERAL CRITERIA (A) - TOLLING in accordance with the terms of the *Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan* dated June 10, 2004.

Overview

DCC demonstrated in its *Motion by Dow Corning for a Determination That the Tolling Provision in the Disease Option II Guidelines Does Not Modify the "24-Month" Eligibility Requirement* ("Motion" or "DCC Motion") filed on July 19, 2004 that the "tolling" language that appears in the disease guidelines at Annex A, Schedule II, Part B, General, Paragraph A has only one logical interpretation: the tolling language applies only to "toll" the five-year "claim-filing" deadline so that claimants whose conditions were diagnosed before or during the pendency of the Chapter 11 case and more than five years before the distribution of claim forms would not be precluded from filing claims simply because the pendency of the case prevented them from making a submission within the five-year time frame. This is the only reasonable interpretation of the plain language of the tolling provision.

Remarkably, the Claimants' Advisory Committee ("CAC") contends that the tolling language

applies to "toll" not the five-year filing requirement but the substantive disease guidelines which require that "qualifying findings" occur within a single 24-month period. The CAC bases its argument on two unsupportable propositions: First, the CAC argues that such an interpretation is necessary to ensure that claimants applying to the Settlement Facility-Dow Corning Trust (SF-DCT) are treated in a manner that is consistent with the treatment applied in the Revised Settlement Program ("RSP") administered by the MDL 926 Claims Office. Of course, modification of the 24-month requirement would, in fact, ensure that the claimants to the SF-DCT would be treated differently than claimants in the RSP. As explained below, the CAC's interpretation inevitably would result in inconsistent determinations between the SF-DCT and the MDL facility. Second, the CAC contends that the phrase "this period" in the tolling proviso corresponds to the earlier reference to the "single 24-month period" and argues that the "appropriate" interpretation of the language is that the "24-month period" is tolled. After linking the phrase "this period" to the 24-month requirement, the CAC then makes the inexplicable leap to the conclusion that *BOTH* the 24-month period and the five-year filing requirement are tolled. The CAC bases this argument on the remarkable proposition that the pendency of the bankruptcy case itself tolls the five-year filing requirement -- a requirement that is embodied in the Dow Corning Amended Joint Plan of Reorganization (the "Plan") that by definition becomes effective at the conclusion of the bankruptcy case.

Argument

I. The CAC's Factual Assertions are Incorrect and the CAC's Interpretation of the Tolling Provision Would Undermine the SF-DCT's Obligation to Evaluate Disease Claims in a Manner Consistent with the RSP Under Section 4.03(a) of the Settlement Facility and Fund Distribution Agreement.

The CAC asserts that the language of Section 4.03(a) of the Settlement Facility Agreement ("SFA"), which states 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...," leads to the conclusion that the tolling language applies to the 24-month requirement of the disease guidelines. This assertion is nothing short of bizarre: the interpretation

urged by the CAC not only ignores the plain language of the Plan, but also it would inevitably result in the type of inconsistent outcomes that Section 4.03(a) was designed to avoid. In short, the interpretation suggested by the CAC is directly contrary to the plain language and intent of the Plan.

The Plan adopts verbatim the substantive disease "guidelines" that were applied in the RSP to determine compensable settling claims. The intent of the parties, as indicated by Section 4.03(a) of the SFA, was that the DCC claims office (the SF-DCT) apply the disease criteria in a manner that is consistent with the application of disease criteria in the RSP so that, for example, a claimant who was eligible to apply to both settlement programs would receive the same determination from both facilities. Ironically, the CAC's argument that the tolling provision applies to the 24-month diagnostic requirement of Disease Option II violates the requirements of Section 4.03(a). If the SF-DCT were to apply the tolling provision as the CAC suggests, then the SF-DCT would assure different outcomes as between the RSP and the SF-DCT. For example, if a claimant had been diagnosed with myalgias (muscle aches) in December 1994 and then was diagnosed with peripheral neuropathy and interstitial lung disease in May 2004, the MDL 926 Claims Office would find the claimant ineligible -- because the combination of findings and symptoms did not occur within a 24-month period. But under the interpretation suggested by the CAC, the same claimant would be eligible because in computing the 24-month period, the SF-DCT would not count the period May 15, 1995 through June 1, 2004.

The CAC's interpretation of the tolling provision appears to rest on the proposition that Section 4.03(a) of the SFA requires that claimants in the Plan should have the same "prospective notice" of the disease requirements that was afforded to the RSP claimants. The CAC states that the RSP claimants had the opportunity to seek medical treatment after receiving notice of the disease eligibility criteria, which, according to the CAC, means that the claimants could advise the doctor of exactly what "findings" and "symptoms" were required in order to receive compensation. Thus, apparently, the RSP claimants could assure that their claim submissions would meet the published disease criteria. The CAC states, in explaining this position, that it cannot 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 [sic]...." CAC Motion at 8-9.

The CAC's argument is factually incorrect and turns Section 4.03(a) on its head. First, it is simply incorrect to state that DCC claimants had no knowledge of the disease criteria before the mailing of claim forms in February 2003. In fact, the parties filed the Plan in February 1999 and sent ballots to claimants in March 1999. All claimants received a Disclosure Statement with their ballots that advised that the breast implant claims would be given the opportunity to settle their claims using the criteria applied in the RSP. The Disclosure Statement specifically stated that the Disease Payment Option II requirements were precisely the same as the Long-Term Benefits Schedule criteria under the Revised Settlement Program. Disclosure Statement at 4, 80. Copies of the Plan Documents were available to any claimant upon request at DCC's expense simply by calling the toll-free number. In addition, the Plan Documents were all available on DCC's website. Moreover, the Tort Claimants' Committee conducted numerous, extensive informational sessions with lawyers and claimants to advise them of the settlement criteria. Thus, claimants were advised nearly five years before claim forms were mailed of the eligibility criteria for the disease payment options. To the extent, therefore, that the CAC argues that claimants were not informed of the disease eligibility criteria before the claim form mailings, the CAC is simply incorrect.

Moreover, the CAC's argument rests on the assumption that Section 4.03(a) should be interpreted to mean that claimants in the RSP and claimants in the Plan must receive the same sort of notice of the disease criteria. Section 4.03(s) says no such thing. Section 4.03(a) places a mandate on the SF-DCT to apply the disease criteria and process the claims in a consistent manner. This means that the SF-DCT is obligated to apply the 24-month requirement in the same way it is applied in the RSP; that is, the SF-DCT must find that requisite symptoms and findings were documented within a single 24-month period in order to be "counted" for purposes of determining eligibility for a Disease

Option II settlement payment. Section 4.03(a) does not create any obligation or standard that relates to the knowledge or understanding of claimants. To apply the tolling provision to the 24-month requirement, as the CAC suggests, would violate Section 4.03(a) because it necessarily means that the SF-DCT would be applying the disease criteria in a manner that is fundamentally different from the manner in which the RSP interprets the disease criteria. Of course, the CAC's argument is troubling for another reason: implicit in the argument is the assumption that it is somehow unfair for claimants to seek medical treatment for their conditions unless they know the specific eligibility requirements for compensation under the Plan. This assumption flies in the face of prudent medical treatment. The claimants should, of course, seek and obtain whatever medical treatment is required based on their condition and not on the terms of a settlement.

Next, the CAC seems to suggest that requiring claimants to "document their symptoms during the pendency of the bankruptcy would place a virtually impossible obstacle to recovering compensation in Disease Option 2." CAC Motion at 9. This statement is nonsensical. Neither the Plan nor DCC suggests that claimants had to document their symptoms during the pendency of the bankruptcy. There is no time requirement other than the requirement that the symptoms be documented within a single 24-month period. That 24-month period can start at any time. Thus, claimants were not required in any way to seek medical treatment at any particular point in time or to document symptoms while the case was pending. The CAC next states that if the claimants did not know the criteria for Disease Option II before the claim form mailing, then they would not have known to ask their doctor to provide a statement excluding potential explanations for the symptoms and providing the results of laboratory tests. This argument too must fail. As discussed above, the claimants did have access to the disease criteria during the pendency of the case; and, moreover, nothing prevents the claimants from returning to their doctors to obtain the specific documentation required.

The CAC's argument fundamentally rests on the proposition that in order for the requirements

of Section 4.03(a) to be met, the claimants must have the same notice of the disease requirements as was provided to the claimants in the RSP. As discussed above, the DCC claimants have had ample notice of the disease requirements. But, more to the point, the CAC's argument misinterprets Section 4.03(a) and its interpretation of the tolling language would require the SF-DCT to violate the provisions of Section 4.03(a).

II. The CAC Misinterprets the Plain Language of the Tolling Provision.

The particular Plan section at issue provides:

> "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.)"

In its initial Motion, DCC explained that the plain language of the tolling provision permits only one interpretation: that the "tolling" applies only to "this period," meaning the five-year period for filing a claim. The CAC appears to be arguing that the phrase "this period" applies instead to the 24-month period -- apparently because the phrase "24-month period" contains the word "period." As explained in the DCC Motion, the only logical interpretation of the plain language of this section is that the tolling proviso applies to the five-year filing requirement that immediately precedes the tolling language. The CAC's argument conflicts with the plain and simple reading of the provision.

As noted, the CAC interprets the tolling provision as applicable only to the 24-month requirement. However, the CAC asserts that the five-year filing requirement is also "tolled." They argue that the five-year filing requirement is tolled by "the bankruptcy itself." CAC Motion at 11. This argument is untenable. The CAC seems to be arguing that the five-year period is tolled automatically because claim forms were not available until February 2003. As explained in DCC's Motion, the parties developed the tolling language purposely to address the fact that the Plan allowed claimants to rely on their prior MDL claims to obtain compensation from the SF-DCT and that those

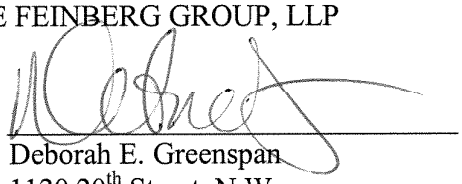
claims would likely be more than five years old by the time the Plan became Effective. In short, the parties negotiated the tolling language specifically to relieve claimants of the five-year filing requirement during a period when it was impossible to file. It is this language -- not the existence of the bankruptcy case -- that permits the SF-DCT to disregard the period of time during the pendency of the bankruptcy case when determining whether a claimant has filed timely in accordance with the five-year period.

Conclusion

For the reasons stated above and in the DCC Motion, the tolling provision contained at Annex A to the SFA at 103, Schedule II, Part B, General, Paragraph A must be interpreted by applying only to the five-year filing requirement for Disease Option II claims.

Respectfully submitted this 9th day of August 2004,

THE FEINBERG GROUP, LLP

By: 

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REORGANIZED DEBTOR	§	

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2004 a true and correct copy of the below listed pleading was served via overnight delivery and either e-mail or telecopy upon the parties listed below.

1. RESPONSE OF DOW CORNING TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE TO INTERPRET ANNEX A, THE CLAIMS RESOLUTION PROCEDURES, SCHEDULE 11, PART B, GENERAL CRITERIA (A) - TOLLING.

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