UNITED STATES DISTRICT 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 DOW CORNING CORPORATION TO
MOTION FOR EQUITABLE RELIEF

Dow Corning Corporation ("Dow Corning") respectfully submits this response to the *Motion for Equitable Relief* filed on February 9, 2006 by the law firm of Doffermyre Shields Canfield Knowles & Devine, LLC on behalf of claimant Nancy Forehand (the "Forehand Motion").

The Forehand Motion asks this Court to direct the Claims Administrator to approve the rupture claim filed by Ms. Forehand in the Settlement Facility-Dow Corning Trust ("SF-DCT") even though the claimant has admittedly not supplied the documentation specifically required by the Plan to confirm a qualified rupture. *See* Forehand Motion at 1. The movant's request that this Court in effect rule on the individual claim directly contravenes the Plan and must be denied. First, the Plan expressly delegates claims evaluation decisions to the Claims Administrator and sets forth an appeals procedure that prohibits appeals to the Court. *See* Settlement Facility and Fund Distribution Agreement ("Settlement Facility Agreement") §§ 4.02(a), 5.05 and Annex A § 8.05. Second, of course, as admitted by the claimant, the documentation as

provided simply does not meet the requirements of the Plan and thus cannot be accepted to support the claim. If this Court were to accept the movant's submission, it would effectively be amending the Plan without the written consent of the parties, in violation of the plain language and intent of the Plan. Significantly, the movant repeatedly acknowledges that her operative report does not document a rupture under the Plan and that her submission to the SF-DCT and the IRP did not include several records that are attached to this motion. Moreover, the movant has availed herself of each of the procedures set forth in the Plan to challenge the decisions of the SF-DCT and, in each instance, the review concluded that the documentation did not satisfy the Plan requirements and therefore affirmed the SF-DCT's denial of her claim. The fact that the decision of the Appeals Judge, the final arbiter of claims decisions, was unfavorable to her does not warrant a review prohibited by the Plan. She has exhausted the claims review options allowed by the Plan, and therefore she has no other recourse.

The structure of the Plan – both in terms of the procedure for evaluation and review of claims and the substantive guidelines – were the subject of extensive negotiations and serve specific, rational purposes. By channeling the settling claims to a trust for determination, the Plan assures that claims are reviewed using consistent standards and eliminates the potential for litigation over potentially thousands of claims. The movant's suggestion that this Court, rather than the SF-DCT, should

determine whether claim-specific documentation inconsistent with the Plan requirements should nevertheless be allowed to demonstrate a rupture would open the floodgates for claimants dissatisfied with the decisions of the SF-DCT to mount individual appeals to this Court.

As a factual matter, Dow Corning disagrees with the movant's assertion that the totality of the circumstances *proves* a rupture. The documents initially submitted by the movant to the SF-DCT and IRP do not demonstrate a rupture. For these reasons, as set forth in more detail below, the Forehand Motion must be denied.

Argument

A. The SF-DCT, Not the Court, Has the Authority to Evaluate Claims

The movant's argument that "there is nothing in the Plan Documents that prohibits approval of this claim" simply misunderstands the structure, intent and plain language of the Plan. Forehand Motion at 8. The Plan establishes the SF-DCT as the entity with the obligation and the authority to resolve all Settling Personal Injury Claims. Under the Settlement Facility Agreement, the SF-DCT is required to evaluate each claim in accordance with the detailed guidelines specified in the Plan. *See* Settlement Facility Agreement § 4.02(a). Any claimant who disagrees with the decision of the SF-DCT may appeal that decision to the Appeals Judge. The appeals process envisions that the Appeals Judge will review the application of the Plan's guidelines to the particular claim. The Plan expressly prohibits the Claims Administrator and the

Appeals Judge from developing new or revising previous interpretations of the Plan criteria. *See* Settlement Facility Agreement § 5.05 and Annex A § 8.05.[1] There is no right of appeal beyond the determination of the Appeals Judge. *See id.* at Annex A § 8.05. Thus, the Plan was expressly intended to prevent litigation over the evaluation of individual claims and the interpretation and application of claims-processing criterion in individual claims. Indeed, if litigation over individual claim decisions were permitted, then every single claimant who is dissatisfied with the decision of the SF-DCT could (and likely would) initiate litigation in this Court. Rather than having an efficient administrative procedure for resolving claims that have selected the settlement option, this Court and the parties would become embroiled in detailed litigation over perhaps thousands of individual claims. Each individual claimant – including this movant – had the option of rejecting the settlement option if she wanted to proceed before this Court in litigation. The movant did not elect the litigation option, and therefore is bound by the terms of the settlement program.

One of the key benefits of a uniform claims-processing system employing objective guidelines is to avoid inequities among claimants. The Forehand Motion underscores the inadvisability of allowing piecemeal litigation over the proper interpretation of an individual claim. The SF-DCT applied its claim review guidelines

[1] Section 8.05 of Annex A reads in relevant part: "The Appeals Judge shall apply the guidelines and protocols established in Annex A to the Settlement Facility Agreement, including the provisions of the Revised Settlement Program as adopted by this Annex A, and the appeals process shall not result in any modification of substantive eligibility criteria."

and found that the medical records submitted by the movant did not comply with the Plan requirements. *See id.* at Exhibits 4, 10, 11, 12, 13, and 16. The movant admits that the records do not meet the Plan requirements but argues that the Court should write new standards into the Plan in this one case. *See* Forehand Motion at 1, 7-10. In order for the Court to comply, the Court would not only have to review all of the documents but would effectively have to amend the standards. If the Court disagrees with the claimant, then the claimant might seek to appeal to the Sixth Circuit, and, if the Court's decision differs from the standards applied by the SF-DCT, then potentially thousands of claimants would then challenge their claim evaluations.

Moreover, the movant's suggestion that the Individual Review Process ("IRP") "mandates" payment is entirely misguided. *See* Forehand Motion at 8-9. The Plan provision governing the IRP for certain rupture claimants merely states that claimants who meet certain criteria are "eligible to participate" in the IRP; it does not, as movant suggests, state that claimants who meet certain criteria are guaranteed claim approval. *See* Settlement Facility Agreement, Annex A § 6.02(e)(vi)(6). Thus, even assuming that the mammograms may suggest a breach of the elastomer envelope, that fact merely enables her to *participate* in the IRP. It does not automatically warrant approval of her rupture claim. Approval under the IRP requires examination of the totality of records and evidence.

B. The Movant Acknowledges She Does Not Satisfy the Rupture Requirements Under the Plan

In order to qualify for a rupture payment, a claimant must meet the following requirements, set forth in relevant part:

> ii) **Eligibility**. To be eligible under the Rupture Payment Option, Eligible Breast Implant Claimants must submit:
>
> a. acceptable proof of implantation with one or more Dow Corning silicone get Breast Implants in accordance with Schedule I, Part I and;
>
> b. documentation that a Dow Corning silicone get Breast Implant has been removed; and
>
> c. documentation, as specified at subparagraph (v) below, showing that the removed Dow Corning silicone get Breast Implant was ruptured as defined above.
>
> (iii) **Rupture Proof.**
>
> a. Breast Implant Claimants explanted prior to January 1, 1992 must submit a contemporaneous operative or pathology report documenting the Rupture.

Settlement Facility Agreement, Annex A at § 6.02(e)(ii), (iii). Thus, under the terms of the agreed-upon Plan, a claimant must submit either an operative report or a pathology report showing that the implant was ruptured, and such report must be contemporaneous. These explicit documentation requirements have a distinct and important purpose: the explanting physician (at the time of explant) is in the best position to determine whether there is a tear or breach in the elastomer envelope and whether that tear or breach occurred *before* the removal surgery. The pathologist who examines the removed implant immediately thereafter is able to determine upon close

examination whether there is a tear or breach. The first-hand observations of those physicians as to the condition of the implants upon explantation are eminently reliable due to the immediate and hands-on nature of the physicians' involvement. By contrast, other medical reports, like mammograms for example, can generate false positives or false negatives and therefore generally cannot be *determinative* of a rupture.

The movant herself acknowledges both in her submission to the SF-DCT and in her motion before this Court that "the operative report from her [March 10, 1989] explantation surgery, technically, does not document a rupture" and therefore does not "technically" satisfy the Plan requirements. Forehand Motion at 1. The extensively negotiated substantive proof requirements of the Plan can hardly be described as mere "technicalities." These requirements are grounded in sound medical and practical judgments and they should not be waived or modified. *See* Settlement Facility Agreement § 5.05; Annex A § 8.05.

C. The Movant Has Exhausted Her Appeals: There Is No Right of Appeal to This Court

The Plan affords a claimant several opportunities to seek review of a denial by the SF-DCT. She may, for example, appeal the decision to the Claims Administrator, appeal the decision to the Appeals Judge, seek an "error correction" review or elect to

participate in the IRP.[2] *See* Settlement Facility Agreement, Annex A §§ 6.02(e)(vi)(d), 8.02, 8.04, 8.05. The movant in fact availed herself of all of these procedures and, in each instance, her claim denial was affirmed. *See* Forehand Motion at Exhibits 2, 7, 10, 11, 12, 13. In each submission, the movant explicitly acknowledged that her records did not include the documentation required to support a rupture claim. *See id.* at Exhibit 3 (Addendum to Rupture Claim Form Submitted May 23, 2003) ("the operative report does not document rupture"), Exhibit 5 (Request for Review of Additional Rupture Information, Submitted November 22, 2004) (the "operative report does not state whether the implants were ruptured or intact"), Exhibit 9 (March 15, 2005 Letter from L. Bryan to SF-DCT Regarding Error Correction Review) (same), Exhibit 14 (April 27, 2005 Letter from L. Bryan to SF-DCT Regarding Appeal to Appeals Judge) (same). The Plan expressly provides that "[t]he decision of the Appeals Judge will be final and binding on the Claimant" and therefore prohibits claimants from petitioning the Court to "try again" after completing the appeals process. Settlement Facility Agreement, Annex A § 8.05. As observed above, allowing individual litigation over claims denied by the SF-DCT violates the plain language of the Plan and would undermine the structure of the Plan's settlement program.

[2] A rupture claimant may "simultaneously" proceed with an appeal to the Claims Administrator and the IRP. Settlement Facility Agreement, Annex A § 6.02(vi)(d). The purpose of this provision was to allow claimants to proceed with the correction of deficiencies through the appeals process while seeking an alternative means of qualifying for a rupture payment under the IRP.

D. Approval of This Claim Is Tantamount to Amendment of the Plan

The movant acknowledges that the records do not meet the rupture requirements under the Plan but argues that this Court should adopt new standards in this case. *See* Forehand Motion at 1, 7-10. If this Court grants the relief requested by the movant – i.e., directing the SF-DCT to approve her rupture claim – it would effectively create a new way to document a rupture. The Plan expressly prohibits amendments or modifications to the Plan absent written agreement of the parties. *See* Settlement Facility Agreement § 10.06. This prohibition was adopted in view of the fact that the parties had engaged in extensive negotiations regarding the substantive proof requirements and that, as a result, any proposed amendments to the Plan must be closely scrutinized and subject to the express, written consent of the parties. To permit the relief requested would violate the plain language and intent of the Plan and would constitute an impermissible Plan modification and therefore must be denied.

E. The Documents Do Not Confirm Rupture

Even assuming that the SF-DCT is authorized to waive or modify the rupture requirement – which it is not – there is insufficient evidence to support a rupture claim under the Plan. The movant argues that while her operative report does not document a rupture, the "totality of the circumstances" warrant the approval of her claim. Among the "circumstances" cited by the movant are mammogram reports, doctors' notes and

questions asked by Dow Corning counsel at two 1994 depositions.[3] *See id.* at 1, 3-9. The Plan does not, of course, permit the SF-DCT to accept such documents.[4]

The movant argues that while there was no mention of rupture in the March 10, 1989 operative report when her implants were removed, her medical records from 1979 and 1982 contain evidence of "some trauma" to both breasts and her mammogram reports contain evidence of "leakages." Taken together, she argues, this "evidence" demonstrates a rupture. These arguments are of no consequence and do not demonstrate a rupture. First and foremost, the movant acknowledges that several of the documents submitted to this Court – including photocopies of the 1986 and 1988 mammograms, the 1992 mammogram report and certain physicians' notes – were "not included in any of the materials submitted to the SF-DCT." Forehand Motion at 5, fn. 7. As the Plan makes clear, it is incumbent on the *claimant* to timely submit any additional documentation to support her claim. It is inappropriate for the movant to show up in this Court with documents not previously submitted to the SF-DCT or the IRP and

[3] The movant also suggests that a comment by the Appeals Judge – that "in all likelihood one or both of Ms. Forehand's implants were ruptured prior to explantation, neither the Claims Administrator not the [Appeals Judge] has any authority to waive or vary the requirements of Annex A" – provides support for her claim. Forehand Motion at 7, Exhibit 2. That comment is not "proof" of rupture and therefore is of no consequence. What is important, however, is the Appeals Judge's reiteration of the Plan's express prohibition on any modification of "the clear requirements of Annex A" in affirming the denial of the claim by the Claims Administrator and the IRP review, finding that there was "inadequate" proof of rupture required by the Plan. *See id.*

[4] Based on Dow Corning's understanding, the documents that were initially submitted by the movant to the SF-DCT and IRP included the March 10, 1989 operative report, the 1986 and 1988 mammogram reports (without photocopies of either mammogram) and selected doctor's notes and records from 1988 and 1999. As the movant acknowledges, and as set forth below, several documents that were attached to her motion in support of her claim were *not* initially submitted to the SF-DCT and IRP.

suggest that the decisions of the SF-DCT and IRP were in error. However, in light of the agreed order extending all cure deadlines that have run to April 17, 2006, and the fact that the movant's rupture deadline expired on June 19, 2005, Dow Corning has no objection to allowing the movant to submit additional, properly authenticated documents to the IRP. *See* December 23, 2005 Agreed Order Modifying and Extending the Orders of August 5, 2005 and October 6, 2005 That Temporarily Suspend Cure Deadlines. Since many of the documents attached to this motion were not previously reviewed by the IRP,[5] it is possible that the IRP will reach a different determination.

Even assuming that these documents can be considered at this juncture, they do not satisfy the requirements as defined in the Plan. With respect to the 1979 and 1982 records , the Plan requires not simply any medical records but *contemporaneous operative or pathology records* documenting a rupture. *See* Settlement Facility Agreement, Annex A at § 6.02(e)(iii)(a). Records dating from *seven to ten years* prior to the explant procedure can hardly be considered contemporaneous and therefore cannot be deemed credible support. Likewise, with respect to the 1992 mammogram, the notation that the movant

[5] Under the Plan, upon notification by a claimant of her intention to participate in the IRP, the SF-DCT is required to "forward to Reorganized Dow Corning the Rupture documentation relied on by the Claimant to support the Rupture Claim." Settlement Facility Agreement, Annex A § 6.02(e)(vi)(a). Several documents that were attached to this motion were not submitted to the IRP, including photocopies of the 1986 and 1988 mammograms, the 1992 mammogram report, medical records showing that the movant had closed capsulotomies, and doctor's notes from 1979 and 1982 showing the movant was involved in an accident and was struck in the left breast with a ball. *See* Forehand Motion at Exhibits 3. 3A and 3B It is Dow Corning's understanding that the IRP reviewed the documentation for both the left and right implants and determined that there was insufficient documentation for both implants to support a rupture claim.

had "a small amount of silicone in the breasts due to rupture of an old implant" is insufficient to satisfy the contemporaneous criteria given that such notation was made three years after the explantation procedure. Forehand Motion at Exhibit 3. First, there is no documentation of how the individual reviewing the mammogram determined that there was silicone (as opposed to some other substance). Second, of course, as noted below, if it is silicone, it could be the result of other factors – not necessarily a rupture of a Dow Corning implant. Moreover, although the movant argues that the 1986 and 1988 mammograms "clearly" show a rupture, mammograms are not considered sufficient documentation of rupture for the SF-DCT and would not generally, in the absence of other evidence, be sufficient to support a claim under the IRP. *See* Settlement Facility Agreement, Annex A § 6.02(e)(iii).

Furthermore, the fact that there may have been some silicone in the breast is not, as the movant suggests, a basis for determining whether an implant is ruptured since the existence of silicone in the breast may be the result of, for example, silicone injections, prior ruptured implants or gel bleed from an intact implant. In fact, the Plan requires that the operative or pathology report affirmatively show "the failure of the elastomer envelope(s) surrounding the silicone-gel Breast Implant to contain the gel *…not solely as a result of "gel bleed", but due to a tear or other opening in the envelope after implantation and prior to the explantation procedure*." *See* Settlement Facility Agreement, Annex A at §§ 6.02(e)(i) (emphasis added); 6.02(e)(v). Thus, absent affirmative proof in

the operative or pathology report of a *tear* or *breach* of the envelope, the records simply do not satisfy the rupture requirements under the Plan. Indeed, the Appeals Judge noted that the operative report "makes no mention of the condition of the implants upon removal" in denying the movant's rupture claim. Forehand Motion at Exhibit 2.

The movant also cites excerpts from two depositions taken in connection with potential litigation against the MDL 926 facility as evidence that Dow Corning has "acknowledged" that she had a ruptured implant. A review of the deposition transcripts, however, indicates no such acknowledgment. *See* Forehand Motion at 7-8. The questions posed by Dow Corning counsel are merely that – questions. Counsel often phrase questions in such a way as to enable them to understand what the claimant is arguing, and such questions are not acknowledgments in any way. Significantly, the Appeals Judge specifically *rejected* the movant's argument that the exchange in the March 18, 1994 deposition constitutes an admission of a rupture, stating that the exchange "occurred in litigation, and does not constitute one of the criteria for Proof of Rupture under the Settlement Facility Documents."[6] Forehand Motion at Exhibit 3 (August 11, 2005 Opinion of Frank Andrews Denying Appeal). In light of the fact that the decision and, by extension, the reasoning of the Appeals Judge is final and binding on the claimant, the comment of counsel for Dow Corning cannot be considered as "evidence" of the movant's rupture claim.

[6] While the Appeals Judge does not address the exchange in the February 3, 1994 deposition, the same conclusion may be said to apply to that deposition.

Conclusion

For the reasons stated herein, the relief requested by the Forehand Motion violates both the language and structure of the Plan and must be denied. The Plan clearly establishes the SF-DCT, not the Court, as the entity vested with the authority to evaluate individual claims and expressly prohibits appeals to the Court. The movant's attempt to seek an additional review by this Court after having been denied by the Appeals Judge, the final arbiter of claims decisions under the Plan, is entirely impermissible. Moreover, the movant's request that this Court direct the SF-DCT to approve her rupture claim, despite the fact that her records admittedly do not comply with the Plan requirements, is tantamount to an unauthorized Plan modification and must be denied.

Respectfully submitted this 2nd day of March 2006.

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	§	**HON. DENISE PAGE HOOD**
REORGANIZED DEBTOR	§	

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 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 OF DOW CORNING CORPORATION TO MOTION FOR EQUITABLE RELIEF

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