

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

|                         |   |                          |
|-------------------------|---|--------------------------|
| IN RE                   | § |                          |
|                         | § |                          |
| DOW CORNING CORPORATION | § |                          |
|                         | § |                          |
| Reorganized Debtor      | § | CASE NO.: 00-CV-00005-DT |
|                         | § |                          |
|                         | § | Hon.Denise Page Hood     |
|                         | § |                          |
|                         | § |                          |
|                         | § |                          |

**RESPONSE TO DOW CORNING’S CROSS MOTION**

Dow Corning opposed the Motion for Reversal of Decision of SFDCT Regarding Korean Claimants. Dow Corning alleged that the Motion for Reversal(“Motion for Reversal”) is nothing more than an appeal from an adverse claims decision by SFDCT and moved to dismiss that appeal because there is no right of appeal to the Court. Dow Corning’s Cross Motion(“DC Cross Motion”) misconstrued the provision of Section 8.05 of Annex A of the Settlement Facility and Fund Distribution Agreement(“SFA”) and distorted the nature of Motion for Reversal. Accordingly, the Court has jurisdiction over Motion for Reversal and DC Cross Motion shall be denied.

**I. BASIS**

Dow Corning alleged that Korean claimants’ appeal must be dismissed pursuant to the plain languages of SFA. However, it is not correct.

Section 8.05 of Annex A to SFA provided;

*Appeals to Appeals Judge.* Claimants who disagree with the rulings of the Claims Administrator may appeal to the Appeals Judge by submitting a written statement outlining the Claimant’s position and statement as to why the Claimant believes the Claims Office and Claims Administrator have erred. The Appeals Judge shall review the appeal record

and Claim file in deciding the appeal. The Appeals Judge shall apply the guidelines and protocols established in this 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. Any appeal that involves a new interpretation of the substantive eligibility criteria must be submitted to the Debtor's Representatives and the Claimants' Advisory Committee consistent with Section 5.05 of the Settlement Facility Agreement. The Appeals Judge shall issue a determination on the appeal in writing. The decision of the Appeals Judge will be final and binding on the Claimant. The decisions of the Appeals Judge will be served on the Claimant, the Debtor's Representatives, and Claimants' Advisory Committee.

Section 5.05 of SFA provided;

*Interpretation of Criteria/Consent of Parties.* The Claims Administrator shall obtain the consent of the Debtor's Representatives and Claimants' Advisory Committee regarding the interpretation of substantive eligibility criteria and the designation of categories of deficiencies in Claim submissions. The Claims Administrator shall consult with and obtain the advice and consent of the Claimants' Advisory Committee and the Debtor's Representatives regarding any additions or modifications to guidelines for the submission of Claims. The Debtor's Representatives and Claimants' Advisory Committee are authorized to provide joint written interpretations and clarifications to the Claims Administrator and the Claims Administrator is authorized to rely on those joint written statements. In the event of a dispute between the Debtor's Representatives and the Claimants' Advisory Committee, the Claims Administrator may determine the issue or apply to the District Court for consideration of the matter. There shall be no modification of any substantive eligibility criteria specified herein or in Annex A through the appeals process or otherwise, except as expressly provided in this Section 5.05 and in Section 10.6 herein.

The above provisions intended that a claimant who disagrees with the rulings of the Claims Administrator shall submit an appeal to the Appeals Judge whose decision is final. However, it only applies to an individual claimant. Motion for Reversal by Korean claimants was not filed by an individual claimant. The Ruling of the Claims Administrator applied to entire Korean claimants.

Moreover, Motion for Reversal by Korean claimants seeks a new interpretation of the substantive eligibility criteria. Any appeal that involves a new interpretation of the substantive eligibility criteria must be submitted to the Debtor's Representatives and the Claimants' Advisory Committee [Obviously, it is not necessary to submit an appeal because the Debtor's Representatives manifested their opinion on Motion for Reversal through DC Cross Motion]. The

Appeals Judge has no jurisdiction over a new interpretation of the substantive eligibility criteria. In addition, an appeal to the Debtor's Representatives and the Claimants' Advisory Committee is not exhaustive. A claimant who disagrees with the rulings of the Debtor's Representatives and the Claimants' Advisory Committee may appeal to the Court because the rulings will be issued not by the Appeals Judge but by the Debtor's Representatives and the Claimants' Advisory Committee. Section 5.05 of SFA expects the Court to consider the interpretation of eligibility criteria.

The decision of the Claims Administrator is as follows:

- (i) SFDCT can no longer accept affirmative statements that medical records were destroyed after ten year period;
- (ii) SFDCT can not accept affirmative statements as proof of manufacturer for claimants who have yet to file a claim;
- (iii) Any claimant of 1, 742 claimants who filed claim forms and who were previously paid based solely upon affirmative statement is not eligible for further benefits including premium payments;
- (iv) SFDCT will remove the claims where a determination will be made that documents have been altered from processing;
- (v) SFDCT cancelled POM approvals for 1,742 claimants who filed claim forms; etc.

The decision of the Claims Administrator is not a normal decision where a certain claimant who submitted claim forms received the ruling from the Claims Administrator. If the claimant disagrees with the ruling of the Claims Administrator, she must appeal to the Appeals Judge. The Decision of the Appeals Judge is final thus she is not allowed to appeal to the Court. If the decision of the Claims Administrator made to Korean Claimants in the letter of August 22, 2011 is the normal decision, the assertions in DC Cross Motion are just and reasonable. However, as seen in the above, the decision of the Claims Administrator is abnormal in nature. It relates to a new interpretation of eligibility criteria. Whether the Claims Administrator has the power over

cancellation of POM approval to 1,742 claimants although they already received notification letters of POM approval[decision(v)] is a matter of new interpretation of eligibility criteria. Especially, the decision of the Claims Administrator which got rid of the right of premium payments of 660 claimants who already received the payments[decision(iii)] is a matter beyond the scope that SFA never stipulated. It relates to a new interpretation of eligibility criteria for premium payments.

Furthermore, in disagreement with the rulings of the Claims Administrator, Korean claimants argued in Motion for Reversal as follows:

- (i) SFDCT failed to establish separate processing for 6. 2 Class;
- (ii) The Claims Administrator did not keep promises made to the claimants through the counsel;
- (iii) SFDCT violated the expectations or the rights of 1,742 claimants who already received notification letter of POM approval and the expectations or the rights of 660 claimants who already received the payments and are waiting for premium payments just in case;
- (iv) Affirmative statements of Korean claimants were not fabricated because they were signed by the implanting physicians and the form of affirmative statements were approved by the Claims Administrator;
- (v) SFDCT abused power and authority because the Claims Administrator cancelled all of 1,742 claimants who received notification letters of POM approval resulting that even the claimants who never submitted documents older than ten year period are subject to the cancellation of POM approval.

On its face, the arguments above are not related to the ruling as to claim files which submitted for reviewing eligibility criteria. Most of them are related to the misconducts of the Claims Administrator, the abuse of power, and more significantly the breach of SFA by failing to establish separate processing where Dow Corning obviously conspired with.

In addition, Korean claimants in Motion for Reversal seek other reliefs such as the restructure of the employees who routinely discriminated 6.2 claimants including Korean claimants, the prohibition SFDCT from enforcing Korean claimants to accept Class 6.2 Payment option, and the establishment of separate claim processing for 6. 2 Class. These reliefs sought through Motion has nothing to do with the rulings of the Claims Administrator as shown in Section 8.05 of Annex to SFA.

## II. CONCLUSION

In conclusion, the Court has jurisdiction over Motion for Reversal filed by Korean claimants. Therefore, DC Cross Motion to dismiss Motion for Reversal on the basis that the Court has no jurisdiction under 8.05 of Annex to SFA is baseless. There is no necessity to respond to the allegations as to the merits because Dow Corning only contested jurisdiction of the Court in Cross Motion. Furthermore, the clause as to ten year period in affirmative statements of Korean claimants which was asserted on the merits in Cross Motion was fully explained in Motion for Reversal. For the above reasons, Korean Claimants request the Court to deny DC Cross Motion.

Dated: October ,2011

Respectfully submitted,

(signed) *Yeon-Ho Kim*

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**PROPOSED ORDER OF KOREAN CLAIMANTS BENYING DOW CORNING’S CROSS  
MOTION TO DISMISS KOREAN CLAIMANTS APPEAL(STYLED AS “MOTION FOR  
REVERSAL OF DECISION OF SFDCT REGARDING KOREAN CLAIMANTS”)**

The Court has considered Dow Corning’s Cross Motion to dismiss Korean claimants’ Motion for Reversal of Decision of SFDCT Regarding Korean Claimants, and the Court finds and concludes that Dow Corning’ s Cross Motion lacks merit and should be denied with prejudice.

ACCORDINGLY, it is hereby ORDERED that the Cross Motion by Dow Corning is DENIED with prejudice.

Date: \_\_\_\_\_

DENISE PAGE HOOD  
United States District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on October ,2011, this Response has been electronically filed with the Clerk of Court using the ECF system, and same has been sent through e-mails to the following:

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