

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
DETROIT DIVISION

In Re:	)	Case No. 00-CV-00005
	)	(Settlement Facility Matters)
Dow Corning Corporation	)	HON. DENISE PAGE HOOD

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**OUT OF TIME MOTION AND MEMORANDUM IN SUPPORT  
OF IMMEDIATELY ORDERING THE DOW CORNING SETTLEMENT TO EVALUATE ALL  
LEVEL A DISABILITIES ACCORDING TO THE LANGUAGE FOUND IN  
THE SETTLEMENT DOCUMENT WHICH ALLOWS A QMD TO APPLY  
THE DEFINITIONS OF EITHER VOCATION OR SELF-CARE; TOLLING THE ONE YEAR  
DEADLINE FOR CURING DISEASE CLAIM DEFICIENCIES  
FOR HELEN BOLSTORFF UNTIL THE DECISION IS MADE :**

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Comes now Helen Bolstorff, (SID: 0611989), by and through her undersigned  
counsel of record, and requests that the Court toll the one year deadline for curing  
deficiencies in her disease claim. In support of her Motion, Ms. Bolstorff  
shows the following:

**INTRODUCTION:**

Ms. Bolstorff was implanted with Dow Corning silicone implants in 1973. She had  
several closed capsulotomies during the first several years post-implant. Ms. Bolstorff had  
her implants removed in 1993 and found that the right implant had ruptured and the left  
capsule had deteriorating with significant gel bleed.

**PROCEDURAL BACKGROUND:**

**1. September 16, 1994 Global Settlement Claim Submission:**

Ms. Bolstorff was first examined by Dr. James Barker, a QMD who diagnosed her

with Atypical Rheumatologic Syndrome now incorporated into the definition of Atypical Connective Tissue Disease (ACTD) and he stated that she qualified for level A "because of her illness, she gave up work in 1990 due to pain and swelling in the wrist and difficulty using her hands, as well as neck pain associated with the position she had to assume at work (See Exhibit 1). She has also had to limit her home activities in significant ways." The disease disability language stated that to qualify for a Disability Level A "an individual will be considered totally disabled if she demonstrates a functional capacity adequate to consistently perform none or only a few of the usual duties or activities of vocation or self-care. Obviously, Dr. Barker made a professional judgment that she qualified as Level A because she no longer could do her job based on her symptoms associated with ARS. In the RSP Settlement, Dr. Barker's diagnosis on several dozen claims was never found to be deficient.

**2. April 15, 2003 Dow Corning Settlement Claim Submission:**

On April 15, 2003, Ms. Bolstorff submitted her Dow Corning Proof of Manufacture Explant, Rupture and Disease Claim forms for the disease category of ACTD based on her already submitted medical records from 1994 (See Exhibit 2). She was relying on the above diagnosis of Dr. Barker at a disability level A. Ms. Bolstorff's Proof of Manufacture, Explant claim and Rupture Claims were approved by the Settlement Facility Dow Corning Trust.



**3. June 11, 2004 Disability Level A Deficiency Notice:**

On June 11, 2004, Ms. Bolstorff received a Disease Claim Review: Notification of Status Letter - Class 5 (See Exhibit 3). Her diagnosis of ACTD was approved but at a level B. The Deficiency was for the A level of disability. The deficiency letter stated: "Dr. James M. Barker on 1994-06-22 assigned or described level A, total disability; however, you need to submit adequate documentation about your daily life and limitations in performing your usual activities of \*self-care to confirm this level. In order for the SF-DCT to approve level A, you need to submit documentation of your daily life and limitations in performing your usual activities of vocation AND self-care. Your documents must demonstrate a functional capacity to consistently perform none or only few of the usual duties or activities of vocation and self care. This was the first time that she had seen the substantial material change in language for Level A Disability which now required her to prove disability in both vocation AND self-care.

**4. October 4, 2004 Attempt to Cure Deficiency:**

On October 4, 2004 Ms. Bolstorff asked Board Certified Internist, Dr. Christopher M. Foley, to assist her in curing her level A disability. The cost of the office visit was \$300. The cost of reviewing all of her 20 years of medical records, her disability questionnaire, interviewing her and writing the additional evaluation was \$375 for a total of \$675.00. In his diagnosing letter Dr. Foley stated that "Ms.

Bolstorff is near totally disabled from performing her usual and customary activities of daily living and self care (See Exhibit 4). Specifically she has a great deal of difficulty merely walking without significant pain that goes unrelieved with the use of prescribed drugs. She has been unable to do any but the most basic of household tasks such as running errands, cooking, or cleaning, without a great deal of pain. No tasks can be undertaken for any length of time. She has lost her capacity to enjoy avocational activities that formerly were very important to her such as XC skiing, golf, hiking, or jogging. There has also been a major loss of consortium owing to the disfigurement of her breasts as a result of the implants.”

In his dictated office notes, Dr. Foley states that “she had to quit her job as a dental hygienist owing to the CTS symptoms in .....both wrists. She cannot fall and stay asleep owing to the pain and numbness in her right leg and arthralgias in the knees. She has numbness in the right leg to the waist, middle toes on both feet, CTS both hands, and a sense of cognitive loss.” This disability cure was mailed to the SFDCT on October 28, 2004 (See Exhibit 4).

**5. November 16, 2004 Notice of Failure of Attempted Disability Cure:**

On November 16, 2004, Ms. Bolstorff was informed by SFDCT that she still had a disability deficiency in that “your medical record dated 2004-10-04 contains documentation about your vocation (homemaking) and self-care that contradicts the level of total disability (See Exhibit 5). Specifically, you indicated in your



handwritten disability statement that you could perform your self-care activities but only with difficulty. Furthermore, Dr. Foley indicated that you were able to perform your homemaking activities but not without a great deal of pain. Please note, because of your ability to perform your self-care and homemaking activities; you do not meet the Settlement's criteria for level "A" (total) disability. The Deficiency letter further stated that "In order for the SF-DCT to approve Level A, you need to submit documentation of your daily life and limitations in performing your usual activities of vocation **AND** self-care. Your documents must demonstrate a functional capacity to consistently perform none or only few of the usual duties or activities of vocation **AND** self-care."

**6. Waiting for the Court to decide the issue:**

It was at that time that Ms. Bolstorff decided it was unclear as to what she had to do to cure her deficiency and further more she could not afford to take any further action to cure her claim. She decided it would be more prudent to wait until the Federal District Court made a decision on the motion of the Claimant's Advisory Committee asking for a ruling on the disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration. This motion was filed on December 6, 2004. These issues were identical and at the end of the motion the movants had requested that in addition the Court enter an order to toll the deadlines to cure deficiencies for any

claimant whose claim was found deficient based on the criteria that they were not informed about. It was presumed by this attorney that Ms. Bolstorff's claim would automatically be part of this Motion and would certainly be heard before June 1, 2005 or before her one year cure date of June 11, 2005 at the latest. Unfortunately, after six months nothing has been decided on this issue.

**7. Request for Extension of Time Requested:**

In the Claimant's Advisory Committee Newsletter of May 12, 2005, under heading number 5, "Pending Motions Before the Court" it states the following: We understand that the Settlement Facility has granted extensions to some claimants who has asked for this extension. HELPFUL HINTS: If you have a cure deadline that has expired or is set to expire soon and you intend to file a motion asking to toll or extend your cure deadline, download and use one of the pending motions to toll on the CAC website as a template. On May 31, 2005, Ms. Paula Muller, nurse paralegal from the Faris and Faris Law Office called Ms. Diane Pendleton who advised her to request an extension from SF-DCT by calling Ms. Lucy Malone and faxing Ms. Malone the request so she could submit it to the Claims Administrator for determination.

**8. Extension Request Denied:**

Pursuant to the above advice, on May 31, 2005, this firm faxed a letter to Ms. Lucy Malone at the SF-DCT asking for an extension for Helen Bolstorff's disability



deficiency cure deadline (See Exhibit 6). Although the letter from SF-DCT which denied the request for extension was dated June 8, 2005, it was not received in this office until Monday, June 13, 2005 (2 days after the one year cure deadline). (See Exhibit 7). Ms. Faris was out of the office for the next two weeks and was unable to make a motion until the present time.

**ARGUMENT:**

**A. ISSUE: WHICH DEFINITION FOR THE LEVEL "A" DISABILITY SHOULD APPLY?**

Should the definition that is consistently defined as "vocation OR self-care" and found in the Dow Corning Settlement Agreement apply or should the language found in the Notice of Status Letter sent to the claimant which reads "vocation AND self-care" apply to a Level A Disability?

**B. MS. BOLSTORFF RESPECTFULLY REQUESTS THAT THIS COURT ORDER THE DOW CORNING SETTLEMENT TO EVALUATE ALL LEVEL A DISABILITIES ACCORDING TO THE LANGUAGE FOUND IN THE SETTLEMENT DOCUMENT WHICH ALLOWS A QMD TO APPLY THE DEFINITIONS OF EITHER VOCATION OR SELF-CARE:**

**1. ORIGINAL DISEASE AND DISABILITY LANGUAGE WAS ADOPTED BY SF-DCT:**

The original disease and disability language in the Global Settlement was

adopted by both the RSP and the Dow Corning Bankruptcy Settlement. As part of the 1998 Dow Corning Bankruptcy Plan of Reorganization, the definitions in the RSP Settlement were adopted wholesale. The language of all three settlements included carefully crafted and specific criteria for disease claims and required that all disease claimants who wished to be a "Current Disease Claimant" submit a detailed disease claim by September 1994. The disease criteria were the result of lengthy, protracted negotiations where each symptom and criteria to qualify was exhaustively scrutinized before the various entities finally reached agreement. In the case of disability, the claimant must also document that she has a disability-based on either the severity of her disease or on her functional capacity to perform activities of vocation, avocation and/or self-care. For an A level of disability, the claimant must demonstrate a functional capacity adequate to consistently perform none or only a few of the usual duties or activities of vocation or self-care. For B and C levels of disability, the claimant must demonstrate an impact on "vocation, avocation and self-care.

**2. DOW CORNING SETTLEMENT DOCUMENTS:**

The following definitions are found in the Dow Settlement Documents discussing disability definitions:

**ON ANNEX PAGE A-48 #5**, it states that in the case of a disability



determination that is inconsistent with the disease criteria of Schedule II, Part A, it can be cured by a statement from the Claimant's QMD or treating physician assigning a disability level that is appropriate for the Claimant's condition or providing information about the Claimant's disability that is consistent with criteria for that level (See Exhibit 8).

**ON ANNEX PAGE A-48 #6**, it states if "the Claimant's documents contain insufficient information about the Claimant's condition to evaluate whether the disability determination is consistent with disease criteria of Schedule II, Part A, it can be cured by providing a supplemental statement from the Claimant's treating physician or QMD describing the Claimant's level of pain or limitations on his/her activities (see exhibit 8).

**ON ANNEX PAGE A-52 #6 PARAGRAPH 5**, it states "For a Disease Payment Option Disability Option I Disability Level A: If the Claimant's physician assigned disability level "A," the Claimant should keep in mind that the settlement's definition of this assigned disability level is a difficult one to meet. The Claimant must be unable to do any of her normal activities or only be able to do a very few of them. The Claimant should review the Claim documents carefully to ensure that there is enough description of her daily life and limitations to allow a reader to know that she does indeed meet this strict definition of total disability...(see exhibit 9)."

**ON ANNEX PAGE A-88 PARAGRAPH 3**, it states “In preparing a claim for an “A” level disability, Claimant’s and their physicians (and their counsel, if applicable) should be aware *that the definition of this assigned disability level is a difficult one to meet*. A Claimant must be unable to do any of her normal activities or only be able to do a very few of them. In preparing a submission, it should be reviewed to determine whether there is enough description of the Claimant’s daily life and limitations to allow a reader to know that she does indeed meet this strict definition of total disability...(see exhibit 10).”

**ON PAGE 6 OF THE DISEASE CLAIMANT INFORMATION GUIDE**

**Q1-10:** What is the definition of Level “A” disability for ANDS and ACTD disability level “A” at Tab 1?

.... “You will be considered totally disabled if you demonstrate a functional capacity adequate to consistently perform none or only a few of your usual duties or activities of vocation **OR** self-care. In preparing a claim for a Level “A” disability, be aware that the definition of this assigned disability is a difficult one to meet. You must be unable to do any of your normal activities or only able to do a very few of them. Disability Level “A” claims will be reviewed to determine if there is a sufficient description of your daily life and limitations to determine that you meet this strict definition of total



disability...(see exhibit 11).”

3. **SOME PARTICULARITY IS FOUND IN THE ACTD DEFINITION OF LEVEL A DISABILITY:**

The only place where Level A Disability has been defined with particularity in the Settlement Documents is in the Medical Conditions and Characteristics Outline of Definitions and Classification Criteria, on Tab 1 (which has no numbered pages), on the 5<sup>th</sup> page after the title “**ATYPICAL CONNECTIVE TISSUE DISEASE (ACTD); ATYPICAL RHEUMATIC SYNDROME (ARS); NON-SPECIFIC AUTOIMMUNE CONDITION (NAC)**” the following information about Level A disability reads:

A. **Severity/Disability Compensation Categories:**

“The compensation level for **ACTD/ARS/NAC** will be based on the degree to which the individual is ‘disabled’ by the condition, as the individual’s treating physician determines in accordance with the following guidelines. The determination of disability under these guidelines will be based on the cumulative effect of:

1. The symptoms on the individual’s ability to perform her vocational (Vocational means activities associated with work, school, and homemaking),
2. Avocational (Avocational means activities associated with recreation and leisure), **OR**

3. Usual self-care (Usual self-care means activities associated with dressing, feeding, bathing, grooming, and toileting) activities.
4. In evaluating the effect of the Breast Implant Claimant's symptoms, the treating physicians will take into account the level of pain and fatigue resulting from the symptoms.
5. The disability percentages appearing below are not intended to be applied with numerical precision, but are, instead, intended to serve as a guideline for the physician in the exercise of his or her professional judgment. Level A. Death or total disability resulting from the compensable condition. An individual will be considered totally disabled if she demonstrates a functional capacity adequate to consistently perform none or only a few of the usual duties or activities of vocation **OR** self-care (see Exhibit 12)."

4. **THE LANGUAGE OF THE NOTICE OF DEFICIENCY DOES NOT MATCH THE LANGUAGE OF THE SETTLEMENT AGREEMENT.**

Numbers 1, 2, and 3 describe some of the characteristics that would be considered in evaluating a claim for vocational, avocational and self-care disability. No where does it describe how many of the characteristics must be met before that category of disability is approved.

Numbers 4 and 5 describe the evaluation as a very subjective process



allowing the QMD to exercise his or her professional judgment. In Ms. Bolstorff's case, she was diagnosed by two Qualified Medical Doctors as being totally disabled from her vocation as a Dental Hygienist as a result of the Dow Corning silicone implants. Without a doubt, this should qualify her for a Level A disability payment.

**5. THE NEW LANGUAGE MATERIALLY CHANGES THE PROOF FOR A LEVEL A DISABILITY:**

The new language used in the Deficiency Letter/Notice of Status Letter materially changes the proof that is required for a Level A disability. If the only way a claimant can be diagnosed as a level A disability is by the evaluation of her degree of "Self-Care," why did the guidelines include the definition of "Vocational" and "Avocational" as a category for disability?

**6. PURPOSE OF ADOPTING THE DISEASE AND DISABILITY LANGUAGE OF THE GLOBAL SETTLEMENT:**

The primary purpose for adopting the originally created disease and disability language in both the RSP Settlement and the Dow Corning Bankruptcy Settlement was to allow for prompt processing and payment of pending diseases and to ensure that those claimants who relied on the global disease criteria would not incur additional expenses or delay to be re-evaluated with

new criteria.

**A. PROMPT PROCESSING:**

In the RSP Settlement, both the disease and rupture claims were processed very quickly. In 1994, Faris and Faris represented 215 current disease claimants whose claims were submitted by September 1994. (This number does not include Mentor, Bioplasty or Cox cases). Of those claims, 215 were 3M/McGhan, Bristol or Baxter that were processed in the Revised Settlement Program (RSP). 169 (78.6%) current disease claims were paid within the year that processing began. Of the 38 Level A disability claims, none of them were deficient and they were promptly paid and thirty one were paid within one year of the start of processing (71%) and eight others were paid by the end of 1998 (34%). In the Dow Corning Settlement, Faris & Faris represents 69 current disease claimants who were submitted by the September 1994 deadline. Of those claims, 21 (30%) were paid within 12 months. Of the 18 Level A Disability claims, 1 (.05%) has been paid within 12 months and 2 were found deficient because the 1994 doctor's diagnosis did not address "Self-Care." The remaining 15 have not been evaluated (83%).

**B. ADDITIONAL EXPENSE:**



After Ms. Bolsdorff received her level A deficiency from the Dow Settlement, she went to Dr. Chris Foley for an additional evaluation. It cost her an additional \$650 out of pocket money. This is a lot of money for a woman who has been disabled since 1990 and unable to work. This is an unfair burden to put on a claimant who was told her claim would be evaluated using the original language on the diagnosis and medical records.

**7. APPLYING A NEW MORE RESTRICTIVE DEFINITION AFTER THE OPT OUT DEADLINE IS UNFAIR AND A DENIAL OF MS. BOLSTORFF'S RIGHT TO DUE PROCESS:**

This alleged "Strict Definition" of "Level A Disability" for an ANDS disease was not formally defined and articulated to Ms. Bolstorff prior to her choosing to stay within the Settlement or to Opt Out. This undefined, arbitrarily applied criteria is unfair and has denied my client her rights to Due Process. She made her decisions based on the language of the Settlement. Now she is told that in order to qualify for an A Level Disability she must qualify for criteria that was never before communicated to her. She has been evaluated by two qualified medical doctors who based their decision on the reading of the definitions articulated in the Settlement Documents. In

addition, they each read her medical records dating from 1984 to the present, performed a physical exam and personally interviewed her. This seems to be a perfect example of two Qualified Medical Doctors exercising their professional judgment and coming to the same diagnosis. I find it difficult to believe that the professional judgment of the first doctor was not sufficient. I do not agree with the Dow Settlement that Bolstorff's disability needed to be cured by addressing her activities for self-care. According to the Settlement language and the Disease forms, she was entitled to rely on her original diagnosis and her original medical records and the language that governed that original diagnosis did not require the physician to address the claimant's issues of "Self-Care." The rules are always changing.

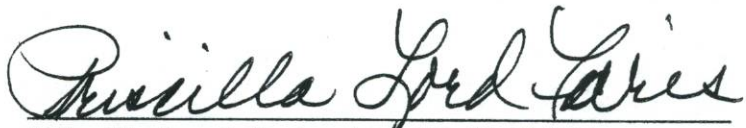
- C. MS BOLTORFF RESPECTFULLY REQUESTS THAT THIS COURT TOLL HER DISEASE CURE DEADLINE UNTIL THE COURT HAS ORDERED THE DOW CORNING SETTLEMENT TO EVALUATE ALL LEVEL A DISABILITIES ACCORDING TO THE LANGUAGE FOUND IN THE SETTLEMENT DOCUMENT WHICH ALLOWS A QMD TO APPLY THE DEFINITIONS OF EITHER VOCATION OR SELF-CARE:**
- D. MS. BOLSTORFF RESPECTFULLY REQUESTS THAT THIS COURT MAKE THIS MOTION A TOP PRIORITY AND DECIDE TO ENFORCE THE SETTLEMENT LANGUAGE AS IT PERTAINS TO THE LEVEL A**



**DISABILITY IMMEDIATELY:**

I have represented Ms. Bolstorff since 1993. She has already waited 12 years to be compensated for a very serious disease and to cause her to wait any longer is in violation of the spirit of the settlement.

This is the 14<sup>th</sup> day of July 2005.

A handwritten signature in cursive script, reading "Priscilla Lord Faris", written over a horizontal line.

Priscilla Lord Faris, Atty ID #123754

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## CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2005, I have filed by U. S. Mail the foregoing MOTION AND MEMORANDUM IN SUPPORT OF HELEN BOLSTORFF TO TOLL THE ONE YEAR DEADLINE FOR CURING DISEASE CLAIM DEFICIENCIES with the Clerk of the Court. I further certify that I have e-mailed the foregoing to each of the following individuals with the attachments to follow:

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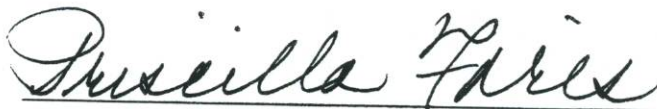
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