UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

IN RE:	§	
	§	**CASE NO. 95-20512**
DOW CORNING CORPORATION	§	
	§	**(Chapter 11)**
DEBTOR.	§	
	§	**Judge Denise Page Hood**

ORDER GRANTING MOTION BY PLAN PROPONENTS TO APPROVE CLAIM PROCESSING IN AUSTRALIA FOR CERTAIN BREAST IMPLANT CLAIMANTS IN CLASSES 6.1 AND 7, TO CAP LIABILITY THEREFOR, TO RESOLVE PENDING CONFIRMATION APPEAL BY AUSTRALIAN CLAIMANTS, AND FOR EXPEDITED CONSIDERATION

I. BACKGROUND

This matter is before the Court on the Plan Proponents' Motion to Approve Claim Processing in Australia for Certain Breast Implant Claimant in Classes 6.1 and 7, to Cap Liability Therefor, to Resolve Pending Confirmation Appeal by Australian Claimants, and for Expedited Consideration. An Objection was filed by the Korean Claimants. A hearing was held on the matter.

On January 10, 2003, the Australian Claimants filed an appeal from the Plan Confirmation Order before the Sixth Circuit Court of Appeals. That appeal is pending. In an effort to resolve the Australian Claimants' appeal, the Plan Proponents and the Australian Claimants reached a resolution and the Plan Proponents filed the instant motion.

II. ANALYSIS

A. Standard

The Bankruptcy Rules provide that, "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Bankr. R. 9019(a). In a Chapter 11 case, a debtor-in-possession is required to "perform all of the functions and duties ... of a

trustee serving in a case under this chapter." 11 U.S.C. § 1107. The court must make the following inquiries in approving a compromise or settlement: 1) whether the proposed settlement includes provisions which if enforced, would be illegal or against public policy; 2) if the proposed settlement is not illegal or against public policy, whether the trustee or proponent has a personal interest in the subject matter of the settlement, that is, whether the trustee or proponent has fulfilled the duty of loyalty to the estate; 3) in the case of a debtor-in-possession, whether the proposed settlement unfairly favors the interests of an insolvent debtor's shareholders or third parties over the interests of the debtor's creditors; and, 4) if the court finds that the trustee has fulfilled the duties of loyalty, any objecting party then has the burden to establish that the trustee did not make a rational business decision in reaching the settlement. *In the Matter of Dalen,* 259 B.R. 586, 611-13 (Bankr. W.D. Mich. 2001), *citing Williams v. Vukovich,* 720 F.2d 909, 920-21 (6th Cir. 1983) and *In re Consumers Power Co. Derivative Lit.,* 132 F.R.D. 455, 464 (E.D. Mich. 1990).

Other courts have noted that settlements reached as part of the bankruptcy process must be "fair and equitable" or in the "best interest of creditors." *See, e.g., In re Drexel Burnham Lambert Group, Inc.,* 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991), *citing Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414 (1968).[1] Although the *Dalen* case holds that only the above factors need be considered by the court when reviewing a settlement proposal, additional factors courts have considered include: 1) the balance between the likelihood of the plaintiff's or defendant's success should the case go to trial compared to the present and future benefits offered by the settlement; 2) the prospect of

[1] It is noted that the *Anderson* analysis involved the standards required for confirmation of a Chapter X plan of reorganization and did not address the circumstances under which a court could approve a settlement proposed by the trustee. *In the Matter of Dalen*, 259 B.R. at 600.

complex, costly and protracted litigation if settlement is not approved; 3) the proportion of class members who do not object or who affirmatively support the proposed settlement; 4) the competency and experience of counsel who support the settlement; 5) the relative benefits to be received by individuals or groups within the class; 6) the nature and breadth of releases to be obtained by officers and directors; and, 7) the extent to which the settlement is the product of arm's length bargaining. *Id.* at 614, n. 39, *citing In re Dow Corning Corp.,* 192 B.R. 415, 421-22 (Bankr. E.D. Mich. 1996).

Although the Plan Proponents do not argue that the proposed settlement agreement is a modification of the Plan, the Bankruptcy Code allows a proponent of a plan to modify a plan at any time after confirmation of such plan and before substantial consummation of such plan as long as the plan as modified meets the requirements of sections §§ 1122 and 1123 (classification and treatment of the claims). 11 U.S.C. § 1127(b). The court, after notice and a hearing, may confirm such plan as modified pursuant to § 1129. The "fair and equitable" or the "best interest of creditors" factors noted by courts in reviewing settlement proposals are based on the standards for confirmation set forth in §§ 1123 and 1129.

B. Korean Claimants' Objections

The Korean Claimants presented essentially five arguments in their Objection to the proposed settlement. First, the Korean Claimants argue the proposed settlement creates a new class which benefits the Australian Claimants only. In response, the Plan Proponents argue that the proposed settlement does not create a new class since there are currently two classes in which the Australian Claimants fall, Class 6.1 or Class 6D. Class 6.1 includes Foreign Breast Implant Personal Injury Claims. Class 6D covers the Australia Breast Implant Settlement Claims. (Joint Amended Plan of Reorganization, Art. §§ 3.2.8, 3.2.13) The Australia Breast

Implant Settlement Claimants are holders of Foreign Breast Implant Personal Injury Claims, Silicone Material Claims and Raw Material Breast Implant Claims who currently reside in Australia or who received breast implants in Australia and who timely elect to participate in Class 6D based on an agreement styled, the Dow Corning Settlement Option Regarding the Voluntary Australian Subclass. The payment of such claims are from the fund entitled Australia Breast Implant Optional Settlement Fund. (*Id.*, Art. §§ 1.6, 1.7, 1.8)

The Australian Claimants before this Court are currently classified Class 6.1 and Class 7 (Silicone Material Claims). These current Australian Claimants may not technically qualify as Class 6D participants since the payment of the claims in the proposed settlement will come from a different fund than the fund for Class 6D claimants. However, the claim qualification criteria established for Class 6D and compensation categories and levels for Class 6.1 and Class 6D will be used under the proposed settlement. (See p. 5 of Motion) The Bankruptcy Court previously found that "different breast-implant claims warrant different settlement offers is a perfectly 'legitimate reason' to classify those claims separately." *In re Dow Corning Corp. (Amended Opinion on the Classification and Treatment of Claims)*, 244 B.R. 634, 664 (Bankr. E.D. Mich. 1999). Both foreign claimant classes, Classes 6.1 and 6.2, are accepting classes. Because the Korean Claimants are part of an accepting class, Class 6.2, the cram down provisions under 11 U.S.C. § 1129 are not triggered. There is nothing in the Bankruptcy Code or the confirmed Plan that prohibits a post-confirmation settlement between members of a class and the Plan Proponents.

The Korean Claimants next argue that the creation of an Independent Claim Reviewer in Australia, who is not overseen by the Claim Administrator, is not cost effective. The Korean Claimants do not support their argument with any facts. The Plan Proponents assert that the

appointment of an Independent Claim Reviewer is cost effective arguing that the onus of assembling the medical documentation is on the Australian Claimants. The Australian Claimants have indicated to the Plan Proponents that their medical packages are ready for review. The parties have established a deadline of November 30, 2003 for medical submissions by the Australian Claimants. The Independent Claim Reviewer, in consultation with the Plan Proponents, is given the authority to either accept or reject a claimant's submission, using the same criteria established for Class 6D and compensation categories and levels as those for Class 6.1 and Class 6D. If the submission is rejected by the Independent Claim Reviewer, the Claimant may submit the claim to an independent arbitrator in Australia, selected by agreement of the Plan Proponents and Claimant or Claimant's counsel. There is no change in the Plan values.

Because the Australian Claimants will be responsible for assembling the medical documents, this reduces the administrative cost of the Claims Administrator in receiving, categorizing, filing, and further processing of these documents. The Court notes that because this process will occur prior to the effective date of the Plan, the administrative costs of administering and processing the claims, which would have been borne by the Settlement Facility in the United States, will not be expended. The Court further notes that the Administrative Fund in connection with the proposed settlement is a component of the Subfund created under the proposed settlement, which has a cap of $10 million U.S. Dollars, $15.3 million Australian Dollars. The Administrative Fund includes any attorney fees related to the resolution of the Australian claims. Although the proposed settlement with the Australian Claimants does not necessarily speed up the effective date of the Plan, the proposed settlement resolves the Australian Claimants' appeal before the Sixth Circuit, saving the cost of further

litigation. The Australian Claimants will receive their payments immediately after the Effective Date and prior to the claimants in other classes who have not entered into Settlement Agreements with the Plan Proponents and have yet to elect to settle their claims with the Settlement Facility, relieving the Settlement Facility from processing time required for Australian Claimants and shortening the queue.

As to the Korean Claimants' concern that the process is not overseen by the Claims Administrator, it is noted that the Claims Administrator does not oversee the processing of the claimants of the classes who have entered into Settlement Agreements with the Debtor. (See, Art. §§ 5.5, 5.6, , 5.7 and 5.8) No one raised this issue during the confirmation hearing. The Korean Claimants have not shown that the Independent Claims Review process is not cost effective.

Third, the Korean Claimants argue that the Independent Claim Reviewer would be biased in favor of the Australian Claimants regarding product identification issues. In response, the Plan Proponents argue that product identification will not be affected by the proposed settlement.

The Korean Claimants have not shown that the product identification process will be different than that already set out in the Plan. The claim qualification criteria established for Class 6D and compensation categories and levels stated in Class 6.1 and Class 6D are to be used. The issue of product identification and claim criteria qualification were not raised during the confirmation hearing. The Korean Claimants have failed to show that a product identification criteria different from that used in other classes will be used for the Australian Claimants.

Fourth, the Korean Claimants argue that setting aside the $10 million U.S. dollars for Australian Claimants is prejudicial to others. In response, the Plan Proponents argue that the $10

million is not “carved out” solely for the Australian Claimants but is a cap agreed to by the Australian Claimants, converted to Australian Dollars.

The Court finds that the $10 million U.S. dollars cap does not impact the Plan negatively and is not unfair to the other claimants. It is noted that the Bankruptcy Court found that the Plan was sufficiently funded to pay both the settlement and litigation claims. This Court agreed that the Plan Proponents had shown that the funding of the Plan was sufficient and that ruling has not been reversed by any court at this juncture. The $10 million is a cap agreed to by the Australian Claimants, subject to approval of the claims by the Independent Claim Reviewer. If the claims submitted by the Australian Claimants do not exceed the cap, the unused funds will be used to pay out other claims. There has been no showing that the Australian Claimants will be paid more than they would have received without the proposed settlement under Class 6.1 or Class 6D.

Finally, the Korean Claimants argue that they did not receive similar treatment as that given to the Australian Claimants by having their own independent claim reviewer in Korea. In response, the Plan Proponents argue that ¶ 8 of the Motion provides that claimants from foreign countries may petition the Claims Administrator for alternative processing in their countries or regions.

Based on the proposed settlement by the parties and the Plan Proponents’ request that Section 6.05(g) of Annex A apply to any foreign claimant, the Court finds that the Korean Claimants are not treated differently from the Australian Claimants. The Korean Claimants may petition the Claims Administrator for alternative processing in Korea. The proposed settlement between the Plan Proponents and the Australian Claimants does not preclude such a request from the Korean Claimants.

C. Further Findings

The Court has considered the Motion by Plan Proponents to Approve Claim Processing in Australia for Certain Breast Implant Claimants in Classes 6.1 and 7, to Cap Liability Therefor, to Resolve Pending Confirmation Appeal by Australian Claimants, and for Expedited Consideration (the "Motion"), the Objection filed by the Korean Claimants, together with the presentation and arguments of counsel, and the Court further finds and concludes as follows:

1. The Motion is meritorious and should be granted.
2. The proposed settlement does not include any provision which if enforced, would be illegal or against public policy.
3. The Plan Proponents, specifically, the Debtor, has the requisite inherent duty of loyalty to the estate.
4. The proposed settlement does not unfairly favor the interests of the Australian Claimants over the Objecting Korean Claimants.
5. The Objecting Korean Claimants have not shown that the Plan Proponents failed to exercise a rational business decision in reaching the settlement.
6. The claim processing procedures described in the Motion are likely to increase the overall cost efficiency and timeliness of claim processing under the Amended Joint Plan of Reorganization (the "Plan") without prejudicing any claimant or providing any claimant overall treatment materially inconsistent with that offered to other claimants under the Plan.
7. The relief requested in the Motion and provided in this Order is authorized by Bankruptcy Code section 105 and paragraph 2 of the Confirmation Order, and is

consistent with Bankruptcy Code, 11 U.S.C. §§ 1127 and 1129 and Bankruptcy Rule 9019. Neither the implementation of the claim processing procedures and other provisions set forth in the Motion nor the revisions in section 6.05(g) of Annex "A" to the Settlement Facility Agreement set forth in Exhibit "B" to the Motion and approved below is a waiver by either of the Plan Proponents of the conditions to the Effective Date of the Plan, is a modification of the Plan, violates any of the provisions of Bankruptcy Code section 1129 or 1127, or requires any re-noticing of claimants, re-solicitation, or re-balloting with respect to the Plan.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that the Plan Proponents' Motion to Approve Claim Processing in Australia for Certain Breast Implant Claimants in Classes 6.1 and 7, to Cap Liability Therefor, to Resolve Pending Confirmation Appeal by Australian Claimants, and for Expedited Consideration is GRANTED.

IT IS FURTHER ORDERED that:

1. The Motion is granted in all respects, including, without limitation, the claim processing procedures, conditions, and requirements provided in paragraph 7 of the Motion, and the Plan Proponents are authorized to implement all relief requested in the Motion.

2. The revision of section 6.05(g) of Annex "A" to the Settlement Facility Agreement set forth in Exhibit "B" to the Motion is approved.

3. If at any time before this Order becomes final and non-appealable the Plan Proponents jointly determine, in their sole discretion, that any proceedings regarding this Order

would unduly delay the Effective Date or unduly delay or complicate the processing of claims under the Plan, the Plan Proponents may file and serve a notice of such determination with this Court and thereafter, without further order of this Court, the Plan Proponents shall have no duty or obligation to implement the relief requested in the Motion.

4. This Court shall retain jurisdiction to hear and determine any issue or dispute concerning the interpretation or implementation of this Order or the Motion.

______________/s/______________________
Denise Page Hood
United States District Judge

DATED: July 17, 2003