Case No. 14-1090

United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION, DEBTOR'S REPRESENTATIVES, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED
***Interested Parties – Appellants*,**

v.

THE FINANCE COMMITTEE, CLAIMANTS' ADVISORY COMMITTEE
***Interested Parties – Appellees*.**

On Appeal from the United States District Court for the Eastern District of Michigan

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REPLY BRIEF OF APPELLANTS DOW CORNING CORPORATION, DEBTOR'S REPRESENTATIVES, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED

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Table of Contents

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The Claimants' Advisory Committee ("CAC") misleadingly frames the issue before the Court as a "promise" unfulfilled. In its telling, the parties "promised" or "expressed intent" to pay Premium Payments to claimants "a few years" into the settlement program. CAC Br. 1, 2, 5, 7, 8, 27, 41, 47, 51, 55. That representation is simply not true and reflected nowhere in the Plan Documents or anywhere else. In fact, Premium Payments are but one category of Second Priority Payments to be made if and only if clearly defined conditions have been met: if "the District Court determines that all other Allowed and allowable Claims, including Claims subject to resolution under the terms of the Litigation Facility Agreement, have either been paid or adequate provision has been made to assure such payments." SFA, RE #826-2, Page ID #13281, 7.01(c)(iv). Claimants have no automatic right to distribution of Premium Payments at any particular time, or at all.

For all that it contests, the CAC's brief is more notable for what it concedes. The CAC readily acknowledges that the Plan requires equal treatment of Second Priority Payments and therefore that the Finance Committee and the district court erred by prioritizing Premium Payments over Class 16 Payments. It also concedes that the Independent Assessor's Report ("IA Report"), upon which the Finance Committee and the district court relied, is predicated upon speculation and assumptions. Further, the CAC does not dispute the import of the Finance

Committee's recommendation and the district court's ruling: they discriminate among *First* Priority Claimants by granting earlier filers First Priority payments plus supplemental payments, while potentially leaving later filers with nothing.[1] Notwithstanding these numerous errors and the resulting fundamental unfairness, the CAC asks this Court to affirm. This Court should decline for several reasons.

1. The CAC tries to sidestep the district court's disparate treatment among Second Priority claimants by arguing that the court did not address the payment of Class 16 claims because that issue was uncontested and did not consider Increased Severity claims because the value of those claims has not yet been determined. These arguments fail as a matter of law. The Settlement Facility Agreement ("SFA") expressly provides a process for determining the distribution of Second Priority Payments: the district court may only authorize such payments upon receiving a recommendation from the Finance Committee so requesting. The SFA does not provide for or contemplate a motion to pay only Premium Payments. The fact that the CAC concedes Class 16 Payments must be distributed does not cure the error. The Finance Committee, which has not filed an appellate brief,

[1] The Plan establishes a 15-year settlement program so that claimants who develop qualified medical conditions during that time have the ability to receive compensation. The CAC's argument that this is a "mature tort" that is "winding down" (CAC Br. 4) suggests that the CAC believes that all claims were filed or should have been filed in the early years of the program. This ignores the purpose of the multi-year settlement program.

affirmatively excluded Class 16 payments from its recommendation below and the district court has no authority to amend the Finance Committee recommendation. The fact that Increased Severity claims have "not yet been quantified" by the Independent Assessor or "processed or approved for payment" by the Settlement Facility ("SF-DCT") is hardly justification for the district court to ignore them. CAC Br. 35. To the contrary, the fact that they are unquantifiable further demonstrates that the Independent Assessor's projections have glaring gaps that are wholly inconsistent with the required "assurance" standard, making this issue not just "ripe" but critically important to this Court's determination.

2. In contending that the appropriate standard for determining whether Second Priority Payments may be paid is "adequate assurance," the CAC disregards the plain language of the SFA. The SFA prohibits distribution unless "adequate provision has been made to assure" such payments. The term "adequate" modifies "provision" – not "assure" – and thus, the relevant inquiry is whether all First Priority Payments can be "assured" without qualification. In claiming otherwise, the CAC contravenes textbook principles of contract law and compounds the error by relying upon extrinsic evidence without alleging – much less establishing – that the SFA is ambiguous.

The CAC acknowledges that its preferred outcome would discriminate among First Priority Claimants, allowing earlier filers to receive both First Priority

and Second Priority Payments while later filers could be left with nothing. Such disparity contravenes one of the SFA's most fundamental tenets: equality of treatment.

3. The CAC attempts to avoid the real issues in this case. Using its own "illustrative" calculations, it argues that there are sufficient funds to pay the Premium Payments as well as all future claims and therefore the district court's order should be affirmed. But this argument is entirely circular: If the district court applied the wrong standard (as it did), then its assessment of the sufficiency of assets is irrelevant. If the calculations do not provide the requisite certainty (as they do not) then they cannot support the distribution of Second Priority Payments even if they purport to show substantial residual funds.

The CAC acknowledges that the calculations are based entirely on assumptions about claimant characteristics and behavior and that certain projections are "speculative." CAC Br. 16. The IA Report does not opine on whether there will be sufficient assets to pay all First Priority Payments.[2] Instead,

[2] The Independent Assessor's failure to offer an opinion on the sufficiency of funding is not surprising where the so-called "cushion" represents a tiny fraction of the $1.95 billion Settlement Fund. As the CAC acknowledges, the "cushion" would be sufficient to pay approximately only 10 percent of outstanding claimants who are eligible to file claims. *See* CAC Br. 30 (the cushion would be adequate to pay 6,550-7,160 additional disease claims); Hinton Declaration, RE #826-5, ¶12(a) (filed under seal) (approximately 70,000 domestic claimants remain eligible to file disease claims, in addition to 14,000 foreign claimants).

the IA Report cautioned that the calculations would change if the assumptions were to change and that ordinary events could affect the assumptions. Calculations that admittedly depend entirely on a series of assumptions that may or may not prove to be correct cannot provide assurance of funding.

All of this uncertainty and guesswork underscores why the SFA incorporates the "assurance" standard. The touchstone of the agreement was to ensure payment of all eligible First Priority Claims (including future claims) and only then begin distributing Second Priority Payments. But such assurances do not – and cannot – exist until there is far more certainty regarding the number and value of First Priority Claims. That is why the Plan Documents provide that Second Priority Payments will only commence once First Priority Payments have either all been paid or are virtually guaranteed to be paid.

4. The CAC contends that the district court's reliance on and characterizations of the Litigation Fund asset and the $200 million net present value ("NPV") adjustment amount in determining whether to authorize payment of Premium Payments do not matter because (a) the Independent Assessor did not count those amounts in its calculations and (b) it is – in the CAC's view – "most likely" that the Settlement Fund will be sufficient to pay all First Priority Payments. In so arguing, the CAC ignores the fact that the district court viewed both funds as backstops that enabled the authorization to distribute Premium

Payments, substitutes its own view for that of the "neutrals" whom the CAC urges must control this analysis, and introduces yet another, inapplicable standard – "most likely" – as opposed to the "assurance" required in the Plan.

For these reasons, the district court's order is entitled to no deference and must be vacated.[3]

[3] Notwithstanding the CAC's efforts to characterize the standard of review as decidedly deferential, this Court has repeatedly explained that a district court's interpretation of unambiguous Plan language is reviewed *de novo*. *See Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 517 F. App'x 368, 372 (6th Cir. 2013); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769, 771-72 (6th Cir. 2010). The CAC argues for a different standard here by repeating, ***nearly verbatim***, arguments it previously made and that this Court rejected 14 months ago. *See* CAC Br. 32-33; June 12, 2012 Brief of Appellee Claimants' Advisory Committee, Case No. 11-2632, Document #22 at 22-23. The CAC's only new argument is unavailing because parties cannot agree to alter this Court's standard of review. *Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006); *K & T Enters, Inc., v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996) ("The parties, however, cannot determine this court's standard of review by agreement. Such a determination remains for this court to make for itself."). The CAC's attempt to distinguish *Regional Airport* based on the source of the agreement is meritless as this Court did not limit its holding to such circumstances.

ARGUMENT

I. THE DISTRICT COURT'S DISPARATE TREATMENT OF SECOND PRIORITY CLAIMANTS MANDATES REVERSAL.

The CAC admits "that all categories of Second Priority claims" should be paid "simultaneously." CAC Br. 36. Yet it argues – incredibly – that the district court's disparate treatment of Second Priority claimants is "a minor issue" of "no…substance." *Id.* at 35-36. That assertion is untenable. The SFA makes no distinction among the three categories of Second Priority Payments: Premium Payments, Increased Severity Payments, and Class 16 Payments. SFA, RE #826-2, Page ID #13280, §7.01(a)(iii). By authorizing only one category of Second Priority Payments, the district court effectively modified the confirmed Plan by demoting the two other categories to a lower priority, in violation of the Plan and the Bankruptcy Code.[4]

A. The Parties Agree That Class 16 Payments And Premium Payments Must Be Treated Equally.

The CAC concedes that the Plan Documents require equal treatment of Class 16 Payments and Premium Payments. *See, e.g.,* CAC Br. 36. Since the Finance Committee's Motion ignored this Plan requirement and requested authorization to

[4] The CAC confirms that the provision of SFA Section 7.03 authorizing "Second Priority Payments, or some portion thereof" allows approval of *partial* Second Priority Payments, meaning a percentage less than 100. CAC Br. 10. The CAC does not and cannot argue that language allows the Finance Committee or the district court to favor one category of Second Priority Payments over another.

distribute only Premium Payments, the relief sought was fundamentally flawed and should have been rejected by the district court *ab initio*. Motion, RE #814, Page ID #12357, 12361.

The CAC asserts there is "no reason why [the parties' agreement that a 50 percent Class 16 payment] cannot be implemented by the District Court either now or after the mandate issues in connection with this appeal." CAC Br. 36. But there is a reason. Any payments must be authorized by the district court and such authorization can ***only occur*** after there is a recommendation from the Finance Committee. SFA, RE #826-2, Page ID #13285, §7.03(a); *see also* Appellants Op. Br. 27-28, n. 12. Counsel for the CAC has acknowledged as much. Tr. Jan. 31, 2012, 101:21-22 ("I think the way that the plan is structured you need a finance committee recommendation" before the court can deviate from the recommendation as issued by the Finance Committee).

B. A Calculation That Excludes Increased Severity Payments Cannot Reliably Assure That First Priority Claimants Will Be Fully Compensated.

The CAC contends that because the Independent Assessor "has assigned no specific value to" Increased Severity claims and their value "has not yet been quantified," those claims are not "ripe" and the district court need not have

considered those claims in its analysis.[5] CAC Br. 29, 35, 36. That conclusion defies logic and the SFA. The fact that the SF-DCT has not yet processed Increased Severity Claims[6] does not mean that the district court can ignore those claims and the Plan's express requirement of parity. To the contrary, exclusion of these potentially high-value claims from the Independent Assessor's calculations demonstrates a palpable hole in the calculations that undermines the certainty required by the Plan.

The CAC nonetheless suggests that it is permissible to pay Increased Severity Payments at a later date – after other Second Priority Payments are distributed. CAC Br. 37. Again, the CAC misses the point. Increased Severity claims can be paid only if Second Priority Payments are authorized properly, which cannot occur unless and until all such claims are evaluated and quantified. There has been no such quantification of Increased Severity Claims.

[5] APRC did not state why its calculations do not include Increased Severity Payments. The CAC has no basis to assert that the Independent Assessor did "not view[] [these claims] as sufficiently concrete or material to influence its analysis." CAC Br. 19, n.11.

[6] Though the SF-DCT has not yet approved any Increased Severity claims, the CAC neglects to mention that that as of December 2011, the SF-DCT had already received approximately 150 Increased Severity claims and these claims are currently pending review. 12/13/11 Phillips email, RE #846-2 (filed under seal).

II. THE CAC MISINTERPRETS THE SFA'S PLAIN LANGUAGE AND IMPROPERLY RELIES ON EXTRINSIC EVIDENCE.

The SFA is unmistakable in its intent to protect the full payment of all First Priority claims. To that end, the word "assure" is unmodified in Sections 7.01(c)(iv) and 7.03(a) of the SFA. The word "adequate" modifies the word "provision," which it immediately precedes, not the word "assure." If the Plan Proponents had intended the construction adopted by the district court and advocated by the CAC, Sections 7.01(c)(iv) and 7.03(a) would have said "provision has been made to adequately assure such payment" instead of "adequate provision has been made to assure such payment." *See* 11 U.S.C. § 365(b)(1)(C), relied upon by the district court and the CAC (where "adequate" immediately precedes "assurance").

Were there any doubt, the SFA's "General Principles" for "Priority of Payment for Claims," dispels it, providing for the reduction of all categories of payment "if necessary to ***assure*** payment in full of First Priority Payments (subject to the limits of the Settlement Fund and the Litigation Fund)." SFA, RE #826-2, Page ID #13281, §7.01(c)(i) (emphasis added). The word "adequate" does not appear at all in this statement of General Principles. The CAC does not even

attempt to explain how an "adequate" assurance standard can be reconciled with this overarching mandate to "assure[]" First Priority Payments.[7]

The CAC poses a confusing argument that the standard was intended to be lenient because the word "assure" appears (they say) in the context of a "projection" and not in the context of a "promise." CAC Br. 31, 43. The CAC

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[7] The fact that the parties qualified "assure" in Section 7.01(c)(v) with "reasonable" – thereby adopting a more lenient "reasonable assurance" standard – demonstrates that the parties purposely tailored different standards to address different levels of risk. Section 7.01(c)(v) governs the contemporaneous distribution of Second Priority Payments and higher priority payments ***if*** Second Priority Payments have been properly authorized; the provision has nothing to do with the threshold standard governing the authorization to pay Second Priority Payments, which is affirmatively set forth in Sections 7.01(c)(iv) and 7.03.

The CAC selectively quotes from Section 7.01(c)(v) to argue that language in that provision – "[n]othing herein shall be interpreted as limiting the discretion of the Finance Committee…." – applies to the standard for issuing Second Priority Payments and "is not merely meant to address the timing of categories of payments." CAC Br. 46. The full text of Section 7.01(c)(v) makes clear that it was expressly intended to address the Finance Committee's discretion ***only*** with respect to the ***timing*** of categories of payments. Section 7.01(c)(v) provides in full:

> **(v)** ***Timing*****.** Nothing herein shall be interpreted as limiting the discretion of the Finance Committee with the approval of the District Court ***to pay lower priority payments and higher priority payments contemporaneously***, so long as the ability to make timely payments of higher priority claims is reasonably assured.

SFA, RE #826-2, Page ID #13281(emphasis added). In other words, that provision – and the "reasonably assured" standard adopted therein – is expressly limited to timing of payments. Nothing in that provision addresses the conditions for issuing Second Priority Payments.

argues that the New York cases cited by Appellants do not apply here because they "apply[] a dictionary definition" of "assurance" "as a synonym for 'guaranty' – *i.e.*, as a *promise,* rather than as a *forecast,* of future ability to pay." *Id.* at 31, 42-44 (emphasis in original). In other words, the CAC asserts that in this one provision of the SFA, the word "assure" does not mean assure as ordinarily defined and as it is defined everywhere else in the Plan. This contention is contrary to the plain language of the SFA, the acknowledged meaning of "assure" in other provisions of the SFA, principles of contract construction, the structure of the Plan (which creates two priorities of payment) and common sense.[8]

The CAC then asserts that notwithstanding the many provisions in the Plan protecting First Priority Payments, there was a "promise" or "expressed intention" to pay Premium Payments to claimants a few years into the settlement program. CAC Br. 1, 2, 5, 7, 8, 27, 41, 47, 51, 55. Yet there is no language anywhere in the Plan demonstrating any such promise or intention. A "promise" is "a legally

[8] The CAC concedes that "assure" means a promise in other SFA provisions. *See* CAC Br. 47, n.20. In so doing, it seeks to define the same term differently throughout the SFA in violation of the well-established rule of contract construction that "[t]erms in a document…normally have the same meaning throughout the document in the absence of a clear indication that different meanings were intended." *Md. Cas. Co. v. W.R. Grace & Co.*, 128 F.3d 794, 799 (2d Cir. 1997) (citation omitted); 28 N.Y. Prac., Contract Law § 10:8. The "contextual" argument fails for another reason: the word "assure" in Section 7.03 is not linked to a projection or forecast as the CAC seems to claim.

binding declaration that gives the person to whom it is made a right to expect or to claim the performance . . . of a specified act." Merriam Webster, http://www.merriam-webster.com/dictionary/promise (last visited June 13, 2014). Claimants have no automatic right to distribution of Premium Payments at any particular time, or at all.[9] To the contrary, Second Priority Payments (not simply Premium Payments) can be made if and only if "the District Court determines that all other Allowed and allowable Claims, including Claims subject to resolution under the terms of the Litigation Facility Agreement, have either been paid or adequate provision has been made to assure such payments." SFA, RE #826-2, Page ID #13281, § 7.01(c)(iv). The SFA even expressly cautions claimants that Premium Payments might not be made until "all Allowed and allowable First Priority Claims . . . ***have been paid***." *Id.* at Page ID #13285, § 7.03(a) (emphasis added).[10]

[9] By contrast, eligible claimants *were* promised that they would receive their First Priority Payments even if they did not file their claims until the last day of the Plan (subject only to the funding cap). Eligible claimants were further promised that their First Priority Payments would not be jeopardized by distributing Premium Payments to claimants who previously received their First Priority Payments. This promise – to "assure" priority of First Priority Payments through the end of the Plan – is precisely the context in which the CAC admits that New York courts properly construe "assurance" as a virtual guarantee.

[10] Thus, the parties did not "always contemplate[] that Premiums would be paid after a delay of only a few years, well *before* conclusion of the 16-year settlement program." CAC Br. 48 (emphasis in original).

Lacking support in the Plan Documents, the CAC improperly relies on the Disclosure Statement and other extrinsic evidence.[11] Even if this Court considers such extrinsic evidence, the CAC's arguments fail because there is no such expression of intent.

The Disclosure Statement unambiguously states that "'Premium' payments can be deferred and ***will not be paid unless all First Priority Payments are assured***." Disclosure Statement, RE #858-1, Page ID #14576 (emphasis added). The Disclosure Statement also is clear that this provision supersedes the "adequate assurance" language cited by the CAC, which appears in a footnote in the "Plan Overview" summary. The summary is sandwiched between disclaimers emphasizing that the more detailed language in the Plan and other sections of the Disclosure Statement govern. For example, the Disclosure Statement cautions that,

[11] Reliance on the Disclosure Statement and other extrinsic evidence is improper here because the relevant provisions of the SFA are not ambiguous, and the CAC has not asserted otherwise. When construing a contract, a court must look first to the explicit contract language in determining the parties' intent, and may resort to extrinsic evidence only if the contract language is ambiguous. *See S. Rd. Assocs., LLC v. Int'l Bus. Machs. Corp.*, 4 N.Y.3d 272, 278 (2005) ("extrinsic evidence may not be considered unless the document itself is ambiguous"); *Greenfield v. Philles Record Inc.*, 98 N.Y.2d 562, 569 (2002); *R/S Assocs. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 33 (2002); *see also Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009). Extrinsic evidence may not be used "'to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face,'" *S. Rd. Assocs.*, 4 N.Y.3d at 278 (citation omitted), as are the Plan Documents here. Appellants contend that the SFA is unambiguous, but discuss the Disclosure Statement and other extrinsic evidence only to rebut the incorrect inferences that the CAC attempts to draw from it.

> The summaries of the Plan and other documents contained in this Disclosure Statement are qualified by reference to the Plan itself, the exhibits thereto, and Plan Documents . . . . In the event of any conflict between the provisions of this Disclosure Statement and the Plan or Plan Documents, the provisions of the Plan and the Plan Documents shall, in that order, control.

Id. at Page ID #14482. The Disclosure Statement repeats elsewhere that the "Summary Is Not Controlling" and that:

> Any differences between this Summary and the more detailed descriptions in the Plan and the balance of this Disclosure Statement are controlled by the more detailed descriptions below and, ultimately, by the Plan and the Plan Documents, and not by this Summary.

Id. at Page ID #14493. The footnote cited by the CAC thus is merely an extraneous notation contradicted and overridden by the language of the SFA and other provisions of the 114-page Disclosure Statement, which confirm the high assurance standard.[12]

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[12] The other sections of the Disclosure Statement cited by the CAC are equally unavailing. A statement that Premium Payments will "likely…be delayed for several years" is not a promise that they will be paid, and in fact, another sentence on the very same page begins "***[i]f*** a 'Premium' is paid to a Breast Implant Claimant with a disease Claim," thereby alerting claimants to the very real possibility that Premium Payments may never be paid. *Id.* at Page ID #14491 (emphasis added). Similarly, the qualifiers that the Plan Proponents "expect" that Premium Payments will "likely" begin several years after the Effective Date undermines the CAC's asserted "promise," especially when those qualifiers follow "Because of their lower priority under the Plan…" *See id.* at Page ID #14578. Finally, the CAC fails to explain how a chart that lists Base and Premium Payments in separate columns "promises" Premium Payments. CAC Br. 50.

The Plan Proponents' communications with claimants soliciting votes for the Plan also reinforce that Premium Payments can be made to those claimants whose

(Footnote continued)

The Dunbar testimony at the confirmation hearing cannot supply the missing "promise." Dr. Dunbar did not testify that Premium Payments would be paid in the seventh year of the settlement program. He merely provided an illustration of potential cash flow based on projected claim filings. His illustration did not represent and was not intended to represent any predetermined cash flow analysis guaranteeing payments at any particular time, or at all. Hinton Declaration, RE #826-5, ¶¶83-85 (filed under seal).

All these arguments ignore and undercut the primary intention clearly expressed in the Plan: First Priority Payments in fact have first priority. They may not be put at risk to pay lower priority payments. If there is any promise in the Plan, it is that First Priority Payments are sacrosanct. The CAC's willingness to undermine the protections granted to First Priority Payments is inexplicable.

(Footnote continued from previous page)
disease claims are approved "***if sufficient funds are available***." FAQs, RE #858-2, Page ID #14694 (emphasis added). By contrast, the FAQs make clear that claimants who qualify under Disease Option I or II "***will receive base payments***" within a defined range. *Id.* (emphasis added). *See also A Message to Attorneys from the Tort Claimants Committee*, RE #858-2, Page ID #14706; *An Important Message to Non-U.S. Personal Injury Claimants from the Tort Claimants Committee in the Dow Corning Chapter 11 Bankruptcy Proceeding*, RE #858-2, Page ID #14711.

III. THE CAC MISCHARACTERIZES THE DISTRICT COURT'S CONSIDERATION OF LITIGATION FUND ASSETS.

The CAC admits that "the Litigation Fund cannot be used to pay Second Priority Claims." CAC Br. 12. Yet, it asserts that the Finance Committee may "towards the end of the settlement program…seek access to the Litigation Fund" to pay First Priority Payments if the Settlement Fund is exhausted improperly by Second Priority Payments. *Id.* at 39-40. The SFA allows access to the Litigation Fund only for First Priority Payments and only in the event that the Settlement Fund lacks sufficient funds to pay in full all First Priority Payments. SFA, RE #826-2, Page ID #13280-81, 13285, §7.01(a); §7.01(b)(ii); §7.03(b). It would undermine the purpose of this limited access to allow the Finance Committee to create a shortfall and then remedy that shortfall by accessing these funds that are reserved for other purposes. The district court is required by Section 7.03 to ensure that First Priority Claims and Litigation Payments are made from the "available assets" – that is, the Settlement Fund for First Priority Payments and the Litigation Fund for Litigation Payments. Nothing in the SFA allows the district court to re-characterize the Litigation Fund as an asset that is available to pay First Priority Claims absent the limited circumstances explained above.

The CAC characterizes the district court's decision on this issue as dicta, claiming that the district court's reference to a cushion that did not include the Litigation Fund necessarily means it did not actually rely on the Litigation Fund.

CAC Br. 39. But the court expressly found that "[t]he Finance Committee properly included the Litigation Fund assets in its recommendation" and that the court could "consider [the Litigation Fund] in determining whether to distribute Premium Payments." Order, RE #934, Page ID #15774-75. The court later referred to the $68 million cushion, but never said that cushion was sufficient for its determination. *Id.* at Page ID #15778. Therefore, because the Litigation Fund cannot be considered an available asset in this analysis, at the least this Court must reverse and remand so that the district court can evaluate the recommendation without considering the Litigation Fund assets.[13]

IV. THE DISTRICT COURT IMPROPERLY INCLUDED AN ADDITIONAL $200 MILLION IN ITS ANALYSIS EVEN THOUGH THE NET PRESENT VALUE ISSUE IS NOT YET DECIDED.

The CAC acknowledges that the question of the proper NPV value to assign to Dow Corning's payment of over $1 billion before the Effective Date was not decided by this Court and is currently *sub judice* by the district court and that the $200 million at stake should not be included in the district court's determination. CAC Br. 40. The CAC contends that this issue is not grounds for reversal because

[13] This determination cannot wait until the Finance Committee seeks access to the Litigation Fund, as the CAC asserts. CAC Br. 39-40. It will be too late to consider this issue if the Settlement Fund is exhausted by Second Priority Payments. If, as the CAC suggests, this question is decided only after the Settlement Fund is exhausted, how will First Priority Payments be paid if the Litigation Fund is determined to not be an available asset?

the district court did not include the $200 million in its analysis. But the district court explicitly stated that "$200 million may be included in the analysis of whether there are sufficient funds to distribute both First and Second Priority Claims." Order, RE #934, Page ID #15777.

If the district court did not intend to consider the $200 million NPV amount as part of the basis for its determination, it would not have said that it "may be included." And if the district court did not intend to consider this amount in its determination it could have said so clearly. Neither the CAC nor this Court can speculate as to how the district court *would have ruled* had it properly concluded that the $200 million was not an available asset. Since it is undisputed that this $200 million should not have been included in the district court's analysis, this Court should reverse and remand the decision so that the district court can consider the sufficiency of assets absent the $200 million.

V. APPELLANTS' EXPERT ANALYSIS WAS APPROPRIATE AND ADDRESSED THE RELIABILITY OF THE INDEPENDENT ASSESSOR'S CALCULATIONS.

The CAC attacks Appellants for "avoiding a frontal assault on the merits of the solvency determination" (CAC Br. 52) yet at the same time argues that Appellants' expert analysis – which did precisely that – was properly ignored by the district court.

The IA Report upon which the CAC and the district court rely has two components: a calculation of the cost of resolving claims that had been filed (and are therefore known) and a projection of the cost of resolving claims that have not yet been filed (and are therefore unknown). To calculate this future claim cost, the IA Report estimates how many claims will be filed in each year, their claim type (*i.e.*, the type of disease or other claim), their value (which depends on the severity of the condition) – and the time required to process and pay the claims. *See generally* Hinton Declaration, RE #826-5, ¶¶17-23 (filed under seal). These estimates assume that the 70,000 potential future domestic claimants (as of the time of the IA Report) will behave in the same manner and have the same claim characteristics (including type and severity of disease) as the 838 claimants who filed claims during the time period selected by the Independent Assessor. *Id.* at ¶¶12(a)-12(b).

Any of the 70,000 potential claimants who develop one of the qualified conditions during the operation of the settlement program is eligible to claim compensation. The first step in any projection of future claims logically should be to assess the potential number of claimants who could become eligible. But the IA Report contains no such analysis. Appellants' expert explained that a projection of future filings is not reliable if it does not consider the characteristics of the claimant population that influence the ability to make claims and claiming

behavior, such as the prevalence and incidence of qualifying diseases. Hinton Declaration, RE #826-5, ¶¶ 12(d), 40 (filed under seal). Appellants' expert provided data regarding the prevalence of the eligible medical conditions among claimants who could file disease claims in the remaining years of the program, which show that there is potential for far more claim filings than the IA Report projected.[14] Hinton Declaration, RE #826-5, ¶¶54-66 (filed under seal).

Similarly, where the standard for authorization of payment requires "assurance" as it does here (or even "adequate assurance" as the CAC contends), any analysis of projected claims filings must quantify the extent of uncertainty or test the sensitivity of the analysis to even minor alterations in the assumptions. *See id.* at ¶¶ 10-11. The IA Report did not do so. To the contrary, it expressly cautioned that the assumptions "can change…[based on] outreach programs" and other events which "would likely change filing patterns and outcomes." Report of Independent Assessor End of Fourth Quarter 2010 Preliminary Report May 20, 2011, RE #814-13, Page ID #12565-66 (filed under seal).

Appellants' expert demonstrated the sensitivity of the Independent Assessor's assumptions to slight changes. For example, if the Independent Assessor had calculated the percentage of disease claims paid as Option I versus

[14] Contrary to the CAC's assertions, this is "evidence in the record" of relevant epidemiological data, that Appellants have not only "purported to identify" but actually have identified. CAC Br. 24.

Option II based on actual experience in 2009 and 2010 (rather than based on claims filed as far back as 2003), the calculated "cushion" would drop by $37.3 million. Hinton Declaration, RE #826-5, ¶¶50-52 (filed under seal). Appellants' expert also noted errors in the calculations. For example, the Independent Assessor projected a "surge" in claims filings patterned after filings at the deadline for Rupture claims, but neglected to include one critical day – the actual Rupture deadline – in its calculation. Correcting this error (which the Independent Assessor and the CAC did not contest) would lower the projected "cushion" by $8.1 million.[15] *See* Hinton Declaration, RE #826-5, at ¶53 (filed under seal). At a minimum, the district court was required to consider the evidence of the risk of additional filings and the limitations in the assumptions in determining whether future payments are "assured." The IA Report did not discuss or analyze the potential for variation on the calculations, and the district court erred by failing to even consider Appellants' expert's analysis.

In addition to the demonstrated risk of variation, there is a more fundamental and fatal error in the calculations. The CAC goes to great lengths to explain the series of assumptions that lead to the conclusion that there would be $68 million remaining in the Settlement Fund after all future payments are made. But as the

[15] This is one example of a "specific material error[]" that Appellants identified in the Independent Assessor's application of its methodology, despite the CAC's contention that no such errors were identified. CAC Br. 26.

CAC admits, this amount does not even account for all known categories of claims: the calculations exclude Increased Severity Payments which could be payable to thousands of claimants. That omission alone makes the calculations upon which the district court relied insufficient under the SFA standard. Contrary to the CAC's assertion, there are "real grounds for reversal based on adequacy of funding." CAC Br. 34.

The CAC does not argue that Appellants' expert analysis is not relevant. Instead, it contends it should be ignored because 1) the Independent Assessor's methodology was "*required* by the Plan Documents" (*Id.* at 53) (emphasis in original); 2) Appellants agreed to the appointment of the Independent Assessor (*Id.* at 54); 3) Appellants did not previously object to the Independent Assessor's basic methodology (*Id.*); and 4) the SFA's provision for "expedited procedures for review" forecloses the parties from relying on any experts other than the Independent Assessor.[16] *Id.* at 56. In other words, the CAC contends that the SFA prohibits consideration of expert analysis that would be relevant to the ultimate determination and that Appellants should be estopped from presenting any such analysis. This is clearly not what the SFA contemplates.

[16] Of course, the CAC does not believe that the "expedited procedures for review" foreclose its own ability to submit expert testimony in this matter.

First, the Plan does not require the district court's inquiry to be limited to the IA Report. Nor does the SFA "specifically mandate[]"any methodology for the Independent Assessor to follow. CAC Br. 32. The only guidance that the SFA provides with respect to the IA Report is to list five factors to be addressed in any report. The SFA does not dictate how those factors are to be evaluated, measured, calculated or weighed. That is, the SFA does not define the methodology, it only defines certain factors to be discussed. More importantly, the CAC's position cannot be squared with the clear-cut standard for distributing Second Priority Payments. When the SFA outlines documentation and calculations that must be submitted with a recommendation to distribute Second Priority Payments, the SFA does not mean that any recommendation that contains those enumerated elements *ipso facto* satisfies the standard for distributing of Second Priority Payments. SFA, RE #826-2, Page ID #13281-82, § 7.01(d)(i).

Second, under the SFA, the Finance Committee selects the Independent Assessor. SFA, RE #826-2, Page ID #13267, § 4.05. The fact that Appellants did not object to the selection of the Independent Assessor does not mean that Appellants waived any right to oppose a recommendation by the Finance Committee based on the Independent Assessor's analysis. Provisions for appointment of an Independent Assessor have nothing to do with the procedures

applicable to an authorization hearing or the district court's evaluation of a distribution recommendation.

Third, Appellants' comments on previous IA reports are irrelevant and even if Appellants had failed to raise particular issues, that failure cannot be deemed a waiver of arguments when the report is actually submitted to support a recommendation. The Plan requires a specific determination by the district court – and that determination is not based on the behavior or past actions of any party. The CAC is also just wrong about the facts. Appellants consistently raised questions about the Independent Assessor's failure to include any sensitivity analysis, the effect of underlying disease incidence and age on filing rates and the potential effect of changes in the processing guidelines. *See, e.g.,*6/6/2008 Greenspan email, RE #846-3 (filed under seal); 7/30/2010 Greenspan email, RE #846-4 (filed under seal). Dow Corning also complained that its lack of access to underlying data made it difficult to evaluate the Independent Assessor's analysis. *See, e.g.,* 7/17/2009 Greenspan letter, RE #846-5 (filed under seal).

Fourth, the parties' agreement to cooperate in an expedited process means just what it says: that the parties will work to expedite the proceedings as much as practicable. It does not restrict the evidence that must be considered at the hearing, limit the submissions of the parties or alter the normal procedures attendant to

motion practice. Had waiver of such an important right been intended, the SFA would have so provided.

Finally, Appellants respectfully contend that the sufficiency of funding should be evaluated by the district court in the first instance with reference to the proper standard and with an adequate opportunity for the parties to be heard and present evidence, but nonetheless feel compelled to address certain misrepresentations in the CAC brief.

- The CAC argues that the Independent Assessor's assumptions are "conservative," they "suggest[] that the cushion was probably significantly *understated*" and that actual claims experience has been lower than the Independent Assessor's "upper bound." CAC Br. 15, 16, 24 (emphasis in original).

The Independent Assessor does not refer to its calculations or the cushion as "conservative" and the CAC has no basis to do so either. Nor does the Independent Assessor refer to its calculations as an "upper bound" and there is no reason to believe that claims could not exceed the Independent Assessor's highest calculation. In fact, claim filings in 2011 ***exceeded*** the Independent Assessor's "upper bound." *See* Hinton Declaration, RE #826-5, ¶¶ 28, fig. 1-4 (filed under seal); 9/20/2011 Independent Assessor Memorandum, RE #814-12, Page ID #12560-61 (filed under seal).

The CAC argues that claims experience was lower than projected by the Independent Assessor because actual *payments* in 2011 were lower than forecast. CAC Br. 16-17. But filing rates and payment rates are independent. The rate of payment in any year depends primarily on the processing time (and related administrative resources) and on whether the claimant has provided the required information. The filing typically occurs months or years before the actual payment is issued. The Independent Assessor itself acknowledged that actual claim filings from mid-2010 through mid-2011 ***exceeded*** its forecasts. Report of Independent Assessor End of Fourth Quarter 2010 Preliminary Report May 20, 2011, RE #814-13, Page ID #12589-92 (filed under seal); 9/20/2011 Independent Assessor Memorandum, RE #814-12, Page ID #12560-61 (filed under seal).

- ♦ The CAC argues that claims data from the Revised Settlement Program "strongly suggest" that future claims to the SF-DCT will also decline. CAC Br. 17-18, 24.

There is nothing in the data cited by the CAC that explains the size and characteristics of the universe of potential claims from which the final RSP filings arose. Those factors would be important in assessing whether or how one could use the RSP experience to inform any prediction of future filings here. It is clear that the RSP applied different rules for the availability of payments and filing deadlines. *See* Appellants' Reply, RE #846, Page ID #18284-85. The Independent

Assessor did not rely on RSP experience and the CAC's attempt to rely on it to support the Independent Assessor's analysis illustrates a lack of confidence in the IA Report.

The analysis of Appellants' expert is highly relevant to the analysis the district court is required to make under the terms of the SFA – and the district court's decision to ignore that evidence is contrary to the procedures outlined in the Plan and the obligations imposed on the district court. Any shortcomings in the calculations are relevant and should have been considered by the district court.

CONCLUSION

For the foregoing reasons and those set forth in its opening brief, Appellants respectfully request that the Court reverse and vacate the Order of the district court.

Dated: June 13, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word), this brief contains 6,995 words.

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CERTIFICATE OF SERVICE

I certify that on June 13, 2014, I electronically filed a copy of the foregoing Reply Brief of Appellant Dow Corning Corporation, Debtor's Representatives, The Dow Chemical Company, Corning Incorporated with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

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ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (00-00005)

RE #	Description of Filing	Page ID #
814-12	9/20/11 ARPC Memorandum Regarding Its Review of DCT claims filings January through July 2011 (Filed Under Seal)	12560-12561
846-2	12/13/11 email from A. Phillips to D. Pendleton Dominguez, et al. (Filed Under Seal)	All
846-3	6/6/08 email from D. Greenspan to T. Florence, et al. (Filed Under Seal)	All
846-4	7/30/10 email from D. Greenspan to D. Austern, et al. (Filed Under Seal)	All
846-5	7/17/09 letter from D. Greenspan to D. Austern, et al. (Filed Under Seal)	All
858-2	Exhibits F-H of 1/25/12 Sur Reply of Appellants: • Exhibit F - *Answers by the Tort Claimants Committee and Dow Corning Corporation to Frequently Asked Questions.* • Exhibit G - *A Message to Attorneys from the Tort Claimants Committee.* • Exhibit H - *An Important Message to Non-U.S. Personal Injury Claimants from the Tort Claimants Committee in the Dow Corning Chapter 11 Bankruptcy Proceeding.*	14694; 14706; 14711