Case No. 14-1090

In the United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION; DEBTOR'S REPRESENTATIVES; THE DOW CORNING CHEMICAL COMPANY; CORNING, INCORPORATED,

Interested Parties - Appellants,

v.

CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE,

Interested Parties - Appellees.

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

APPELLEE CLAIMANTS' ADVISORY COMMITTEE'S PETITION FOR REHEARING AND REHEARING *EN BANC*

Dianna Pendleton-Dominguez
LAW OFFICE OF DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717

Ernest Hornsby
FARMER, PRICE, HORNSBY & WEATHERFORD LLP
100 Adris Court
Dothan, AL 36303
(334) 793-2424

Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Counsel for the Claimants' Advisory Committee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statute

Other

Pursuant to Fed. R. App. P. 35 and 40, Appellee Claimants' Advisory Committee ("CAC") respectfully submits this Petition for Rehearing and Rehearing *En Banc* of this Court's January 27, 2015 decision (the "Decision"). *See Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, No. 14-1090 (6th Cir. Jan. 27, 2015) (attached as Ex. A).

PRELIMINARY STATEMENT

The Decision erroneously treats the subject of this appeal as a *de novo* litigation rather than what it is: a step in implementing a carefully negotiated global settlement. This Petition presents questions of exceptional importance because the Decision threatens to (1) undermine the ability of parties to rely on negotiated procedures to resolve complex disputes, and (2) unnecessarily delay payment of millions of dollars in benefits that claimants have been waiting to receive *since 1999*.

To induce breast implant tort claimants to support a $3 billion settlement that permitted it to emerge from bankruptcy more than a decade ago, Dow Corning agreed to provide settling claimants with "Premium Payments" ("Premiums") augmenting their disease and rupture settlements if, as was expected, adequate funding was available. Claimants were told these payments would likely be issued a few years into the settlement program, once it was established that funding to pay all base claims was "*adequately* assured." RE #848-5, Disclosure Statement, Page ID #14411 n.3 (emphasis added).

The task of recommending when Premiums should be paid was entrusted to a neutral "Finance Committee" informed by neutral claim projection experts, and the parties expressly agreed *in the Plan documents* that the District Court's decision to approve the Finance Committee's recommendation would be subject to review only for "abuse of discretion." These terms were part of the court-approved settlement and are binding on the parties.

In 2013, more than halfway into the settlement program, with claims payments running *below* projected levels, the District Court adopted the Finance Committee's conservative recommendation to make only a 50% installment payment on earned Premiums (the "Premiums Order"). Based on its reading of the Plan's Premiums provisions and its understanding of their place in the overall settlement, the District Court concluded that the parties intended for Premiums to be paid *during* the settlement program based on a standard of reasonably adequate funding. The District Court thus rejected Dow Corning's argument that Premiums should be paid only when adequate funding to pay all remaining claims was virtually guaranteed, which would likely be only at or near the end of the program.

On Dow Corning's appeal, a panel of this Court disregarded the express Plan provision by which the parties agreed to be governed by the District Court's judgment absent an abuse of discretion. Instead, the panel subjected the Premiums Order to *de novo* review. The panel then imposed its own reading of the Plan

language, concluding that Premiums may not be paid until adequate funding is virtually guaranteed. Both holdings warrant rehearing.

First, the panel's imposition of *de novo* review amounts to an impermissible Plan modification – ignoring a provision carefully negotiated by the parties and expressly included in the Plan documents. This provision has substantive significance, because it signals the parties' agreement to a streamlined process largely entrusted to designated neutrals and the District Court. The panel overruled this Plan provision based on citation of a single inapposite case holding only that parties cannot alter this Court's standard of review through *post hoc* agreement *in their appellate briefs*. The panel cited no authority for the proposition that a standard of review adopted *in a court-approved plan* as part of a comprehensive, post-bankruptcy implementation of a global settlement is somehow, alone among all other agreed Plan provisions, unenforceable.

Second, on the merits, the panel's Decision imposes a result at odds not just with the plain language of the Plan documents but also with the parties' intentions as expressed in a variety of settings. The requirement that funding adequacy be "virtually guaranteed" before Premiums may be approved appears nowhere in the Plan documents and flies in the face of the oft-expressed intention to pay Premiums *simultaneously* with base payments *during* the administration of the settlement rather than at or near the *end* of the 16-year program. Among other

things, the panel's anomalous holding renders materially misleading Dow Corning's written representation to thousands of claimants voting on its Plan that Premiums would be paid when funding is *adequately* assured.

Reconsideration by the panel – or the full Court – is necessary to avoid undercutting the ability of parties to rely on negotiated and approved settlement provisions and to vindicate the parties' intention that millions of dollars in Premiums *not* be delayed until the conclusion of the settlement process.[1]

STATEMENT OF FACTS

To convince creditors to vote for the settlement embodied in its Plan and to compensate for the delays of bankruptcy, Dow Corning promised that breast implant claimants who qualified for and received rupture and disease payments would receive additional Premium Payments, constituting 20-25% of their base payments, if funds were available within the settlement cap. Premiums were expected to be issued several years into the 16-year life of the Settlement Facility,

[1] The District Court and this Court both denied motions to stay the Premiums Order pending appeal. As a result, in the ordinary course, approximately 98% of eligible claimants have received their 50% installments. Unfortunately, as a result of the Decision, the Settlement Facility has stopped processing the remaining payments. It has refused to reissue checks lost in the mail or checks returned to the Settlement Facility so that they can be made payable to the estates of deceased claimants rather than to the claimant herself. These consequences give rise to the possibility that a minority of claimants will have to wait until nearly the end of the settlement program to receive even the first half of their Premiums. Granting rehearing even to the limited extent of making the Decision prospective (*i.e.*, applicable only to the decision to pay the second half of the Premiums) would at least alleviate this unfairness.

which began paying claims in 2004 and is now well past the halfway point. The Plan provides for an Independent Assessor ("IA") to conduct annual projections of the Trust's outstanding liabilities and analyze whether the remaining funding stream will be sufficient to pay all future base claims as well as Premiums. Based on the IA's work, the Finance Committee is charged with recommending to the District Court when to authorize Premium Payments. *See* RE #826-2, Settlement Facility Agreement ("SFA"), Page ID #13285, § 7.03.[2]

Through 2010, claimants had qualified for Premiums totaling approximately $222 million. *See* RE #825, Appellee's Resp., Page ID #13194. In 2011, the Finance Committee moved for authorization to pay 50% of the outstanding Premiums, which would leave a substantial cushion under the funding cap.[3] Appellants objected to the Recommendation, arguing, *inter alia*, that Premiums cannot be authorized until virtually all claims have been paid, insisting there must be a "virtual[] guarantee" of adequate funding. RE #826, Appellants' Resp., Page ID #13227-28. The CAC responded that a "guarantee" standard was neither mandated by Plan document language nor consistent with the parties' intentions.

---

[2] For further explanation of the structure of the Plan provisions governing Premium Payments, *see* Appellee Br. at 8-15.

[3] *See* RE #814, Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments, Page ID 12359-61.

In its December 31, 2013 Memorandum Opinion and Order, the District Court concluded that, in light of the parties' expressed intention to pay Premiums *during* the settlement period and *simultaneously* with ongoing First Priority Payments, adopting Appellants' "guarantee" standard would be "contrary to the purpose of the Premium Payment provision" and would render it "meaningless." RE #934, Premiums Order, Page ID #15771-72. The District Court construed the phrase "adequate provision" in SFA § 7.01(c)(iv) as modifying the word "assure" in the same sentence and concluded that the parties intended to require only reasonable or adequate assurance. *Id.*, Page ID #15772-73. The court further noted that § 7.01(c)(v) expressly contemplated simultaneous payment of lower and higher priority claims so long as the ability to pay the higher priority claims is "reasonably assured." *Id.*, Page ID #15769-70.

On appeal, a panel of this Court acknowledged that the Dow Corning Plan documents expressly provide that any appeal of an order authorizing Premiums is subject only to abuse of discretion review, but declared that provision "unenforceable." Decision at 6. On the merits, as relevant here, the panel concluded solely on its own reading of the SFA language that the term "adequate provision" did not modify "assure" in SFA § 7.01(c)(iv). *Id.* at 9. It further held that the "reasonably assured" language in § 7.01(c)(v) shed no light on the parties'

intentions because the panel read the language as applicable only after the supposedly higher standard of subsection (c)(iv) had been met. *Id.* at 8.

ARGUMENT

BY IGNORING THE STANDARD OF REVIEW SPECIFIED IN THE PLAN AND SUBSTITUTING ITS OWN READING FOR THE DISTRICT COURT'S WELL-INFORMED UNDERSTANDING, THE PANEL IMPROPERLY MODIFIED THE PLAN AND IMPOSED UNNECESSARY DELAY UPON THOUSANDS OF CLAIMANTS

As part of the comprehensively negotiated settlement with tort claimants, Dow Corning expressly agreed that the District Court's decision whether to approve a Finance Committee recommendation on Premium Payments would be reviewed only for abuse of discretion. That agreement is embodied in the SFA and is thus a binding part of the confirmed Plan. *See* RE #826-2, SFA, Page ID #13285, § 7.03(a); *In re Russell Cave Co.*, 107 F. App'x 449, 452 (6th Cir. 2004) ("The provisions of a confirmed Plan are binding on all parties, 11 U.S.C. § 1141(a), and we reject the Committee's attempt to sidestep the language in the Plan it agreed upon.").[4]

Although it acknowledged that this deferential standard of review is specified in the Plan documents, the panel, citing *K & T Enterprises, Inc. v. Zurich*

[4] The parties further agreed that the District Court's Plan interpretation "findings" more generally would be subject to review only on a "clearly erroneous" basis. *See* RE #53, Plan Interpretation Stipulation, Ex. A, Page ID #123, § 2.01(d)(5). Dow Corning has argued that "findings" should be limited to formal findings of fact, but that would be a nonsensical reading of the parties' agreement, since that deferential standard of review applies automatically to factual findings.

Insurance Co., 97 F.3d 171, 175 (6th Cir. 1996), held that SFA § 7.03(a) is "unenforceable because parties 'cannot determine this court's standard of review by agreement. Such a determination remains for this court to make for itself.'" Decision at 6. But *K & T Enterprises* holds only that parties may not bind the court merely by agreeing *in their appellate briefs* to a particular standard of review. *K & T Enters.*, 97 F.3d at 175. The case does not bar parties structuring a comprehensive settlement from setting standards to govern future disputes in connection with implementing the settlement. To the contrary, this Court has recognized that parties may take the more extreme step of "consent[ing] to making a trial court's determination final and waiving their right to appeal" so long as the waiver is explicit. *1651 N. Collins Corp. v. Lab. Corp. of Am.*, 529 F. App'x 628, 631 (6th Cir. 2013).[5]

The panel's holding on this point – not addressed at oral argument and scarcely mentioned in the briefs – should be revisited as a matter of both law and policy. First, the holding constitutes an impermissible plan modification. The standard of review provision is part of a Plan that was confirmed, affirmed on

[5] *See also Slattery v. Ancient Order of Hibernians in Am., Inc.*, No. 97-7173, 1998 WL 135601, at *1 (D.C. Cir. Feb. 9, 1998) (per curiam) (upholding settlement agreement provision waiving certain rights to appeal); *In re Lybarger*, 793 F.2d 136, 139 (6th Cir. 1986) (upholding consent decree's provision that District Court's decision shall be final and immune from appellate review); *Brown v. Gillette Co.*, 723 F.2d 192, 193 (1st Cir. 1983) (per curiam) (upholding settlement agreement waiving "any right to appeal" determinations of district court).

appeal, put into effect under the authority of the District Court, and substantially consummated years ago. A confirmed plan may be modified only prior to substantial consummation and on request of a party after notice and hearing.[6]

The panel's disregard of the parties' negotiated standard of review is also bad policy. Of course, an appellate court ordinarily determines for itself the appropriate standard of review in *de novo* litigation. But here the parties negotiated a comprehensive plan embodying myriad carefully calibrated compromises, including with respect to conflict resolution. They agreed that the District Court's findings on all Plan interpretation issues should control unless clearly erroneous and, specifically, that the decision to authorize Premium Payments be made pursuant to streamlined procedures and insulated from reversal absent an abuse of discretion. The District Court did not decide claimants' entitlement to Premiums, but only whether the point had arrived in the administration of the settlement for them to be paid. The Plan specifies in SFA § 7.03(a) how that decision should be made and reviewed.

---

[6] *See* 11 U.S.C. § 1127(b); *U.S. Brass Corp. v. Travelers Ins. Group, Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296, 307 (5th Cir. 2002) (Section 1127(b) "operates to prohibit modification once substantial consummation has occurred" (internal quotation marks and citation omitted)); *Official Comm. of Unsecured Creditors of Apex Global Info. Servs., Inc. v. Qwest Commc'ns Corp.*, 405 B.R. 234, 252 (E.D. Mich. 2009) ("Section 1127(b) is the sole means for modification of a confirmed plan . . . ."); *In re Boylan Int'l Ltd.*, 452 B.R. 43, 48 (Bankr. S.D.N.Y. 2011) ("The bankruptcy court cannot on its own modify a confirmed plan. Modification must be sought by a proper party under section 1127(b)."") (citation omitted).

The panel's rejection of that provision will tend to undermine parties' ability to rely on negotiated dispute resolution mechanisms that help dispose of complex, hotly contested litigation. This conflicts with strong policies favoring settlement and adoption of cost-effective dispute resolution measures. *See, e.g.*, *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 748 F.3d 708, 717 (6th Cir. 2014) (describing benefits of flexibility in designing efficient and streamlined alternative dispute resolution mechanisms); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 354 (6th Cir. 1998) (recognizing "policy of encouraging settlement"), *abrogated on other grounds by United States v. Atl. Research Corp.*, 551 U.S. 128 (2007).[7]

On the merits, the panel's conclusion that Premiums should not be authorized until adequate funding to pay all future base claims is "virtually

[7] It is worth noting that the "abuse of discretion" standard is actually the one generally applied to decisions interpreting the language of a confirmed bankruptcy plan. *See In re Dow Corning Corp.*, 456 F.3d 668, 675-76 (6th Cir. 2006). Dow Corning has argued for closer scrutiny on the ground that the District Court had not originally confirmed the Plan. In *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769 (6th Cir. 2010), this Court acknowledged the distinction but noted that Judge Hood "has presided over this bankruptcy case continuously since 1995" and has "acted as the court of first resort" for nine (now thirteen) years. *Id.* at 772. Conceding that "[t]here is simply no denying that she is much more familiar with this Plan – and with the parties' expectations regarding it – than [this Court is]," this Court has held that Judge Hood's readings of Plan language warrant "a measure of deference." *Id.* While the Court accorded less deference to the District Court's interpretation of unambiguous Plan language, it cautioned that, even there, it "should be mindful that [its] blind spots with respect to how one provision might interrelate with others are likely much larger than are the district court's." *Id.*

guaranteed" is inconsistent with the plain language of the Plan Documents, which requires only that all relevant claims "have either been paid or *adequate provision has been made to assure such payments*." RE #826-2, SFA, Page ID #13281, § 7.01(c)(iv) (emphasis added). It would also defeat the parties' intention – expressed in the structure of the Premium Payment provisions and in communications to claimants asked to vote on the Plan – that Premiums be paid *during* the Settlement Program. As the District Court correctly held, delaying Premiums until payment of every last claim was "guaranteed" would be "contrary to the purpose of the Premium Payment provision" and would render it "meaningless." RE #934, Premiums Order, Page ID #15771-72.

The panel accepted Appellants' analysis, focusing solely on the word "assure" and treating it as synonymous with pledge or guaranty. *See* Decision at 9. But the meaning of a word or phrase depends on the context in which it is used.[8] Here, "assure" is used not in the context of a particular party's *promise* of future payment, but rather in connection with a *projection* or *prediction* that adequate funding will be available in administering the SF-DCT. Thus, a more appropriate analogy is provided by cases considering whether there has been "adequate

[8] Under New York law, which governs construction of the Plan, *see* RE #826-2, SFA, Page ID #13291, § 10.07, words in a contract should be considered not in isolation but as they relate to the *overall agreement* between the parties. *See Kass v. Kass*, 91 N.Y.2d 554, 566 (1998).

assurance" of future performance of a contract assumed under § 365(b)(1)(C) of the Bankruptcy Code. In that setting, courts give the phrase a practical, pragmatic construction in light of the facts of each case, generally requiring a level of assurance that "falls considerably short of an absolute guarantee." Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 78:54 (4th ed. 2004).

This non-absolute standard is consistent with the plain language of the Plan Documents and the inherent need to balance the interests of current and future claimants. The SFA does not require "assurance" in a vacuum, but rather a finding that "*adequate* provision has been made to assure" payment of all claims. RE #826-2, SFA, Page ID #13281, § 7.01(c)(iv) (emphasis added). Other SFA provisions are similarly qualified. For example, SFA § 7.01(d) requires the Finance Committee to prepare quarterly projections of the "*likely* amount of funds required to pay in full" all base claims as well as "[c]laims and expenses subject to the Litigation Fund." *Id.*, Page ID #13281-82, § 7.01(d) (emphasis added). This language reflects an understanding that the parties must rely on projections establishing likelihood rather than certainty. Indeed, the very terms "projection" (*id.*, SFA § 7.01(d)) and "assessment" (*id.*, Page ID #13267, § 4.05) imply a degree of inevitable uncertainty.

Moreover, SFA § 7.01(c)(v) grants the Finance Committee discretion, with court approval, to issue lower priority payments and higher priority payments contemporaneously, so long as the ability to make timely payments of higher priority claims is "*reasonably* assured." RE #826-2, SFA, Page ID #13281, § 7.01(c)(v) (emphasis added). The panel concluded that this subsection pertains only to claim categories that have already been separately approved for payment under subsection (c)(iv). Decision at 8. But section 7.01(c)(v) refers directly back to the preceding subsections – it states that "*[n]othing herein* shall be interpreted as limiting the discretion of the Finance Committee . . . ." RE #826-2, SFA, Page ID #13281, § 7.01(c)(v) (emphasis added). In other words, nothing in the preceding subsections describing the standards for authorizing different categories of payments should be seen as a categorical bar on authorizing simultaneous payment of higher and lower priority claims. Subsection (c)(v) therefore gives further guidance to the District Court in determining when and whether to authorize claim payments and is not merely meant to address the timing of categories of payments that have already been separately approved.

A "virtually guaranteed" standard would also be at direct odds with the basic structure of the Plan as described to claimants and presented at confirmation. The parties always contemplated that Premiums would be paid after a delay of only a few years, well *before* conclusion of the 16-year settlement program – an

expectation that, in and of itself, precludes enforcement of a "virtually guaranteed" standard. Dow Corning's own expert, Dr. Fred Dunbar, affirmatively testified at confirmation that Premiums "are going to be paid seven years from now." RE #848-3, Confirmation Hr'g Tr., Page ID #14402. Dr. Dunbar offered this testimony to defend his assumption that "more women are likely to accept the settlement offers in the Dow Corning joint plan" than accepted offers in earlier settlements because the Dow Corning Plan offered "enhanced" benefits – including, significantly, Premium Payments. *Id.*, Page ID #14400-01.

Dr. Dunbar's testimony was consistent with how the settlement options were presented to claimants. The Disclosure Statement, in its key introductory section, specifically told tort claimants asked to vote on the Plan that Premium Payments would be made "if funds are available after payment of all First Priority Payments is *adequately* assured." RE #848-5, Disclosure Statement, Page ID #14411 n.3 (emphasis added). If there was a meaningful difference between "adequate provision . . . to assure" and "adequately assured," as Dow Corning now suggests, then the Disclosure Statement was materially misleading.

Claimants voting on the Dow Corning Plan were told to expect Premium Payments during the first half of the Settlement Facility duration – at a time when many millions of dollars in claims would remain to be processed and paid. It is not plausible that the parties intended, in that setting, to require a guarantee of all

future base payments. More significantly, that is not what claimants were told or what the Plan documents required. Claimants were told only that future claim payments would have to be "*adequately* assured." *Id.*, Page ID #14411 n.3. Rehearing is necessary to prevent years of additional delay for thousands of claimants in receiving what was promised to them.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that the Court order rehearing or rehearing *en banc*.

Dated: New York, New York
February 10, 2015

Respectfully submitted,

Dianna Pendleton-Dominguez
LAW OFFICE OF DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717

Ernest Hornsby
FARMER, PRICE, HORNSBY & WEATHERFORD LLP
100 Adris Court
Dothan, AL 36303
(334) 793-2424

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Counsel for the Claimants' Advisory Committee

CERTIFICATE OF SERVICE

I certify that on February 10, 2015, I electronically filed a copy of the foregoing Petition for Rehearing and Rehearing *En Banc* with the Clerk of the 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.

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS &
FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100 (telephone)
(212) 715-8000 (fax)
jtrachtman@kramerlevin.com

EXHIBIT A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 15a0080n.06

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,*	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
v.	)	
CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE, *Interested Parties - Appellees.*	)	OPINION

Before: BOGGS and COOK, Circuit Judges; and QUIST, District Judge.[*]

BOGGS, Circuit Judge. In this bankruptcy case, the bankrupt company challenges the district court's authorization of payments to lower-priority creditors, when not all higher-priority creditors have yet been paid, as contrary to the requirements of the bankruptcy plan. In 1995, Dow Corning filed for bankruptcy in response to numerous tort claims and established the Settlement Fund to pay known and future claimants between 2004 and 2019. The Settlement and Fund Distribution Agreement ("SFA") permits early payments to lower-priority creditors subject to a district-court determination that such payments would not jeopardize future payments to higher-priority creditors. The SFA Finance Committee, with the support of the Claimants'

[*] The Honorable Gordon J. Quist, United States District Court for the Western District of Michigan, sitting by designation.

Advisory Committee ("CAC"), requested that the district court authorize Premium Payments, a category of lower-priority payments, and the district court approved. Dow Corning and its shareholders, Dow Chemical and Corning Incorporated, appeal the district court's judgment on the ground that the court failed to follow SFA requirements. We reverse and remand.

I. BACKGROUND

In order to settle thousands of breast-implant-related product-liability lawsuits, Dow Corning filed for bankruptcy under Chapter 11 of the Bankruptcy Code in 1995.[1] *In re Dow Corning Corp.*, 280 F.3d 648, 653-54 (6th Cir. 2002). In 1999, the Bankruptcy Court for the Eastern District of Michigan confirmed the Amended Joint Plan of Reorganization ("Plan"), *id.* at 654, which became effective on June 1, 2004, *In re Settlement Facility Dow Corning Trust*, No. 00-00005, 2013 WL 6884990, at *1 (E.D. Mich. Dec. 31, 2013).

The Plan provides that the United States District Court for the Eastern District of Michigan will "resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents." Plan § 8.7.3. The Plan provides for payments to claimants until the end of 2019, up to an aggregate cap of $2.35 billion net present value ("NPV").[2] Claimants have the option of settling through a Settlement Facility or litigating against a Litigation Facility. *Id.* § 5.4-5.4.2. A $400-million-NPV Litigation Fund is reserved for the Litigation Facility, and $1.95 billion NPV is reserved for the Settlement Fund. *Id.* § 5.3; SFA § 3.02(a). Any assets remaining in the Litigation Fund at the end of 2019 revert to Dow Corning. Litigation Facility Agreement § 8.03(b). If all settlement claimants are paid in full, the CAC is authorized to disburse all remaining assets in the Settlement Fund to approved claimants

[1] Unlike most bankruptcy debtors, Dow Corning was solvent when it filed and has remained so since that time. *In re Dow Corning Corp.*, 456 F.3d 668, 671 (6th Cir. 2006).

[2] Net present value (NPV) expresses all payments from 2004 to 2019 in terms of the aggregate value of such payments as of June 1, 2004. Plan § 1.102. The discount rate used for calculating NPV is 7% compounded annually. *Ibid.*

on a pro rata basis, if cost effective, or to a medical research institute or university. SFA § 10.03(b).

The Settlement Facility–Dow Corning Trust ("Settlement Facility") resolves the claims of those who settle. Plan § 1.154. The Finance Committee "is responsible for financial management of the Settlement Facility, including preparing recommendations to the District Court regarding the release of funds for payment of Claims resolved by the Settlement Facility and the Litigation Facility." *Id.* § 1.67. The CAC represents claimants' interests, and the Debtor's Representatives represent Dow Corning's interests. SFA § 4.09.

The SFA establishes four categories of payments: First Priority Payments, Settlement Fund Other Payments, Second Priority Payments, and Litigation Payments. *Id.* § 7.01(a). First Priority Payments includes all "base" payments identified in the settlement value chart that specifies the value of each type of claim. *Ibid.* Settlement Fund Other Payments include payments to certain classes of creditors and are considered a type of First Priority Payments. *Ibid.* Second Priority Payments are divided into three subcategories: (1) Premium Payments for certain classes of claimants; (2) Increased Severity Payments for certain claimants whose conditions worsen; and (3) Class 16 payments, which reimburse Dow Chemical for settlement payments made before the Plan came into effect in 2004. *Ibid.* Litigation Payments include various litigation-related expenses. *Ibid.* Premium Payments are at the heart of this dispute. They include an extra 20% payment to approved-and-paid First Priority claimants who meet certain criteria and an extra 25% payment to approved-and-paid First Priority claimants who suffered an in-body implant rupture. *Ibid.* Annex B, Settlement Grid Personal Injury Claims.

In order to distribute Second Priority Payments—including Premium Payments—before all First Priority and Litigation Payments have been made, the Finance Committee must obtain

authorization from the district court. *Id.* § 7.03(a). The court may grant authorization only after it holds a hearing and determines that "all Allowed and allowable First Priority Claims and all Allowed and allowable Litigation Payments have been paid or *that adequate provision has been made to assure such payment* . . . ." *Ibid.* (emphasis added). The SFA further notes that "[t]he parties agree that any appeal of an order of the District Court regarding the [authorization of Second Priority Payments] shall be on an abuse of discretion standard." *Ibid.*

In 2011, the Finance Committee requested that the district court authorize it to distribute 50% of historical and future Premium Payments before all First Priority and Litigation Payments have been disbursed. The Finance Committee supported its recommendation with an assessment from the SFA's Independent Assessor, Analysis Research Planning Corporation ("ARPC"). ARPC concluded that $1.981 billion NPV is available in the Settlement Fund,[3] and that it would cost $1.83 billion NPV to pay all First Priority claims, leaving $151 million NPV. The Finance Committee relied upon this assessment to estimate that a fifty-percent disbursement of historical and future Premium Payments would cost $83 million NPV, leaving a $68-million-NPV "cushion" in the Settlement Fund. The Finance Committee argued that this demonstrated adequate provision to assure payment of all First Priority Payments, and further reassured the district court that an additional $368 million in the Litigation Fund could be available to make First Priority Payments in the event such required payments exceeded the balance in the Settlement Fund. The CAC supported the Finance Committee's recommendation.

The Appellants opposed the Finance Committee's recommendation on several grounds at the payment-authorization hearing before the district court. First, they argued that the SFA

[3] This figure exceeds the $1.95 billion funding cap of the Settlement Fund because the Settlement Fund paid $31 million to satisfy Litigation Claims. Therefore, the "Settlement Fund [will] not be exhausted until Dow Corning [is] called upon to make Qualified Transfers of approximately $1.981 billion (i.e., $1.95 billion plus $31 million)." Appellee's Br. at 13 n.1.

requires that the ability to make First Priority Payments must be "virtually guaranteed" before Second Priority Payments, including Premium Payments, can be made, and that the Finance Committee did not meet this burden. In support of this argument, the Appellants submitted to the district court reports and testimony that undermined the reliability of ARPC's projections. Second, the Appellants disputed the Finance Committee's position that assets in the Litigation Fund could be counted as available when the district court assessed whether adequate provision exists to make all First Priority Payments. Finally, they contended that making Premium Payments without simultaneously making other Second Priority Payments would violate the SFA by treating same-priority creditors differently.

Interpreting the "adequate provision . . . to assure payment" language in § 7.03(a), the district court rejected the "virtually guarantee" standard proposed by the Appellants in favor of the Finance Committee's less-strict "adequate assurance" standard. The court declined to consider exhibits and expert testimony that Appellants submitted and relied upon ARPC's projection of a $68-million-NPV post-disbursement "cushion" to conclude that adequate provision has been made to assure all First Priority Payments. *In re Settlement Facility Dow Corning Trust*, 2013 WL 6884990, at *10. It also determined that the amount in the Litigation Fund and a $200 million "Time-Value Credit" are available assets for the purpose of determining whether there are sufficient funds to assure all First Priority Claims, but did not rely on those determinations in light of ARPC's projection. *Id*. at *8-9. The district court did not address whether non-Premium Second Priority Payments would have to be paid at the same time as the requested Premium Payments. Accordingly, the district court granted the Finance Committee the authority to make a fifty-percent distribution of historical and future Premium Payments. The Appellants timely appeal.

II. STANDARD OF REVIEW

SFA § 7.03(a) states that "[t]he parties agree that any appeal of an order of the District Court regarding [authorization of Second Priority Payments] shall be on an abuse of discretion standard." This provision is unenforceable because parties "cannot determine this court's standard of review by agreement. Such a determination remains for this court to make for itself." *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996).

The dispute in this case turns on conflicting interpretations of terms found in the Plan and the SFA. We apply principles of contract interpretation when interpreting a confirmed bankruptcy plan. *In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006). When reviewing a district court's interpretation of a bankruptcy plan where the district judge did not confirm the plan but has extensive knowledge of the case, we grant the district court significant deference with respect to its assessment of extrinsic evidence. *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 772 (6th Cir. 2010). However, we evaluate de novo a district court's interpretation that does not rely on extrinsic evidence. *In re Settlement Facility Dow Corning Trust*, 517 F. App'x 368, 372 (6th Cir. 2013). As the district court did not rely upon extrinsic evidence to interpret Plan and SFA provisions, we review its interpretations de novo. New York Law governs our interpretation of the Plan and related documents. Plan § 6.13.

III. DISCUSSION

A

We first review the district court's interpretation of the key requirement that it may authorize Second Priority Payments only if "adequate provision has been made to assure" that all future First Priority and Litigation Payments can be paid "based on available assets." SFA § 7.03(a). The court interpreted this to mean that the SFA requires an "adequate assurance" of

payment. The parties agree that the district court must rely on projections of the availability of funds, including the cost of making future First Priority and Litigation Payments and the cost of the requested Second Priority Payments, to determine whether making Second Priority Payments would jeopardize future First Priority and Litigation Payments. They disagree over the level of confidence that the district court must have in the projections before it may authorize Second Priority Payments.

Appellants argue that the proper standard of confidence is one of "virtual guarantee" because, under New York law, "assurance of payment" is equivalent to "guarantee of payment." Appellants' Br. at 32. The Appellee argues for interpreting SFA § 7.03(a) to mean that the court need only find that available assets provide "adequate assurance" that all higher-priority payments can be made. Appellee's Br. at 43. "Adequate assurance" is a term of art in the Bankruptcy Code that denotes the assurance of performance that a trustee must provide to assume a contract or lease after a default. 11 U.S.C. § 365(b)(1)(C). This level of assurance falls below "absolute guarantee," *In re Fine Lumber Co.*, 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008), and can mean "a strong likelihood," *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986), or "more probable than not," *In re Patriot Place, Ltd.*, 486 B.R. 773, 803-04 (Bankr. W.D. Tex. 2013).[4]

The district court adopted the Appellee's "adequate assurance" standard. *In re Settlement Facility Dow Corning Trust*, 2013 WL 6884990, at *6 ("The Court finds that the Finance Committee's and the CAC's arguments regarding plan interpretation of the phrases at issue are the more persuasive."). Noting that the meaning of "adequate" depends upon context, *id.* at *7,

[4] "Adequate assurance" is also a term of art in contract law. Under the Uniform Commercial Code, it is the assurance of performance that a contracting party can demand after discovering grounds for insecurity. U.C.C. 2-609(1). "In appropriate circumstances, a promise to perform can be an adequate assurance." *Enron Power Mktg., Inc. v. Nev. Power Co.*, 2004 WL 2290486, at *6 (S.D.N.Y. Oct. 12, 2004).

the district court did not articulate a precise confidence level for "adequate," but ruled that a projection of a $68-million-NPV cushion meets that standard. *Id.* at *10.

The district court rejected the "virtual guarantee" standard for two reasons, neither of which we find persuasive. First, the district court found that it would frustrate SFA § 701(c)(v)'s (denominated by the district court as the "Premium Payment provision") purpose of giving "the Finance Committee the discretion to seek court approval to pay Premium Payments *contemporaneously* with the First Priority Payments if the Finance Committee is 'reasonably assured' that there are sufficient funds to distribute both payments." *Id.* at *6. The Premium Payment provision is the only portion of the SFA that contemplates the contemporaneous payment of lower- and higher-priority payments, and it states that:

> 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 § 7.01(c)(v) (emphasis added). A condition precedent to this provision's applicability is district-court approval to make lower-priority payments, which could be granted only if "adequate provision has been made to assure" higher-priority payments. *Id.* §§ 7.01(c)(iv), 7.03(a). Therefore, to the extent that the Premium Payment provision has as its purpose facilitating the contemporaneous payment of Premium and higher-priority Payments, that purpose is subordinate to the district-court approval procedures and so cannot be the basis for interpreting those procedures. In sum, the "reasonably assured" language of the Premium Payment provision is applicable *only* after the CAC and the Finance Committee demonstrate that "adequate provision has been made to assure" payment of the First Priority and Litigation Payments. SFA §§ 7.01(c)(iv), 7.03(a).

The district court also rejected the Appellants' "virtual guarantee" interpretation because it believed that the term "'adequate provision' modifies the term 'assure,'" and that the cases Appellants cited "[did] not construe the term 'adequate provision,' but only the term 'assure.'" *In re Settlement Facility Dow Corning Trust*, 2013 WL 6884990, at *6. The district court has it backwards: the term "assure" provides context for the term "adequate provision." If a borrower tells a bank that he needs to borrow "enough money to buy a house," we would not look to the term "enough money" to find the meaning of "buy a house." The obvious inquiry would be to figure out the price for buying the house to determine how much money is enough. Similarly, the relevant inquiry here is to determine what provision would be adequate. New York law recognizes that defining "adequate provision" may be difficult because "the notion of 'adequate' is a variable one; some things are more adequate than others." *Broodstone Realty Corp.* v. *Evans*, 251 F. Supp. 58, 64 (S.D.N.Y. 1966). Fortunately, SFA § 7.03(a) makes the requisite level of adequacy clear: the provision must be so adequate as to "assure" future First Priority and Litigation Payments. We look to the word "assure" to interpret "adequate provision." The New York case cited by the parties interpret the word "assure," made in the context of making future payments, to mean guaranteeing that those payments will be made. *Utils. Eng'g Inst. v. Kofod,* 58 N.Y.S.2d 743, 744-745 (N.Y. Mun. Ct. 1945) ("It is true that the dictionary gives different meanings to the word 'assure' depending on the way it is used. . . . In the way in which the word was used here [i.e., to assure future payment], the word means 'guarantee' and all parties must have so understood it.").

Because it is impossible to account for all possible future uncertainties, we will not impose an "absolute guarantee" standard of confidence, as that would make SFA § 7.03(a) superfluous. *See Reyes v. Metromedia Software, Inc.*, 840 F. Supp. 2d 752, 756 (S.D.N.Y. 2012)

(noting that it is a "cardinal rule that a contract should not be read to render any provision superfluous"). Accordingly, we adopt the Appellant's terminology of "virtual guarantee" to describe the required confidence standard under SFA § 7.03(a). While this standard does not require absolute certainty, it is nonetheless stricter than the "strong likelihood" or "more probable than not" levels of confidence that describe "adequate assurance."

B

We now turn to the question of whether the district court erred by refusing to consider the Appellants' reports and testimony. The Appellants sought to undermine ARPC's projections at the payment-authorization hearing by offering reports and expert testimony that criticize ARPC's methodologies and conclusions. The district court declined to consider these reports and testimony because "the SFA provides that the Court consider the recommendation of the Finance Committee *based on* the Independent Assessor's analysis and projections." *In re Settlement Facility Dow Corning Trust*, 2013 WL 6884990, at *9 (emphasis added). While the Appellants are guaranteed an "opportunity to be heard with respect to the motion [to authorize the distribution of Second Priority Payments]" under SFA § 7.03(a), the district court nonetheless refused to consider their evidence because the Appellants already "had the opportunity to test and challenge the Independent Assessor's Reports throughout the years, yet no objections have been brought to the Court's attention that the Reports have been misleading or inaccurate." *Ibid.*

We first consider whether the Appellants' "opportunity to challenge the Independent Assessor's Reports *throughout the years*," *ibid*. (emphasis added), satisfied their contractual right to an "opportunity to be heard *with respect to the motion*," SFA § 7.03(a) (emphasis added), and conclude that it did not. In the due-process context, an "opportunity to be heard [is] an opportunity which must be granted at a meaningful time in a meaningful manner." *Armstrong v.*

Manzo, 380 U.S. 545, 552 (1965). We find this understanding of the term relevant to interpretation of SFA § 7.03(a), which concerns the proper procedures for payment-authorization hearings. It would not be a meaningful opportunity if the Appellants must voice specific objections to ARPC's projections before they know what arguments those projections were being used to support. For example, one of Appellant's experts criticized ARPC's methodology for failing to specify the level of confidence in its projections. This criticism does not allege that the projections are necessarily "misleading or inaccurate," but rather that they do not prove what they are cited as proving, i.e., high confidence in an accurate and precise projection. Because ARPC projections were used for many purposes that do not require a confidence estimate, it is understandable that the Appellants did not object to the lack of a confidence estimate in those projections until the Finance Committee's motion to disburse lower-priority payments under SFA § 7.03(a) made confidence a relevant issue. Further, the phrase "with respect to the motion" makes it clear that the Appellants' "opportunity to be heard" applies to any evidence offered at the payment-authorization hearing, even if they may have had opportunity to object in the past.

Next, we consider whether the Appellants' right to an "opportunity to be heard" includes the right to challenge ARPC's projections and conclude that it does. While the district court is correct in that it must make its decision to authorize Second Priority Payments "*based on* the Independent Assessor's analysis and projections," *In re Settlement Facility Dow Corning Trust*, 2013 WL 6884990, at *9 (emphasis added), those projections are neither immune from criticism, nor impervious to modification by the court, depending on evidence developed at the hearing. If the parties intended that the Independent Assessor's projections could not be challenged at the hearing, they could have made them determinative, rather than requiring district-court review

and approval. An opportunity to be heard must include the right to make methodological challenges at the relevant time. Accordingly, we reverse the district court's judgment insofar as it interpreted the SFA to grant it the discretion to ignore timely produced, otherwise admissible evidence concerning whether ARPC's projections demonstrate that "adequate provision has been made."

C

The Appellants raise several other questions that we need not resolve in order to dispose of this appeal. However, as the district court may consider these matters on remand, we note the arguments. First, the Appellants argue that the district court's asset-sufficiency analysis should consider the cost of making non-Premium Second Priority Payments—Increased Severity and Class 16 Payments—on the same basis as the requested Premium Payments. The Plan expressly requires that Class 16 Payments must be made "on the same basis and with the same priority as [other] 'Second Priority Payments' under the Settlement Facility Agreement," Plan §§ 6.16.5, 6.16.6, and the CAC concedes that "all categories of Second Priority claims *could be* paid simultaneously." Appellee's Br. at 36 (emphasis added).

Second, the Appellants challenge the district court's dicta that it can count the nearly $400 million in the Litigation Fund as available for the purpose of determining whether there are sufficient funds to assure all higher-priority payments. The SFA expressly provides that the Litigation Fund is separate from the Settlement fund and "shall be used *solely* for the payment of Litigation Payments." *Id.* § 7.01(b)(ii) (emphasis added). The only exception to this rule is that the Litigation Fund can be used, subject to district-court approval, to make First Priority Payments "[i]n the event that the Settlement Fund lacks sufficient funds in the aggregate to pay in full all First Priority Payments." *Id.* § 7.03(b).

Finally, Appellants dispute the district court's dicta that the Settlement Fund will be entitled to an additional $200 million. In 2013, we rejected Dow Corning's request for a $200 million (nominal) "Time-Value Credit" for early payment of $1 billion (nominal) but expressly left undecided the question of whether Dow Corning is also entitled to a net-present-value adjustment. *In re Settlement Facility Dow Corning Trust*, 517 F. App'x at 378-79. Both issues concern whether Dow Corning is overpaying, in nominal terms, its obligation to place $1.95 billion NPV into the Settlement Fund. *Id.* at 372.

IV. CONCLUSION

We REVERSE the district court's judgment with respect to its rulings that (1) "adequate assurance" is the proper standard for assessing the availability of funds under SFA § 7.03(a) and (2) that the SFA grants it the discretion to ignore otherwise competent reports and testimony challenging ARPC's methodologies, and we REMAND for further proceedings consistent with this opinion.