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

IN RE:	§	
	§	
DOW CORNING CORPORATION,	§	
	§	
Reorganized Debtor	§	CASE NO.: 00-CV-00005-DT
	§	
	§	Hon. Denise Page Hood
	§	
	§	Magistrate Judge Paul J. Komives
	§	
	§	
	§	
	§	

FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE PARTIAL PREMIUM PAYMENTS

Pursuant to Article VII of the Settlement Facility and Fund Distribution Agreement between Dow Corning Corporation and The Claimant's Advisory Committee (the "Settlement Facility Agreement", attached as Exhibit "A"), The Finance Committee makes this recommendation of and motion for authorization to make, beginning in 2012, fifty percent Premium Payments to Historical Claimants from the Settlement Facility-Dow Corning Trust (the "Settlement Facility"), a Qualified Settlement Fund under the Internal Revenue Code.[1]

I. BACKGROUND

The Settlement Facility became effective in 2004 as a mechanism to resolve certain claims against Dow Corning. (*See* Settlement Facility Agreement at § 2.01.) The bulk of the claims arise from allegedly defective breast implants manufactured by Dow Corning. The claims settlement requirements and administration parameters are set out in the Settlement Facility

[1]This recommendation assumes that all approvals and challenges to these 50% Premium Payments are complete so that the payments can be made no later than 2014. If that is not the case, a recommendation seeking premiums well in excess of 50% may be necessary.

Agreement. (*See* Settlement Facility Agreement.) In the seven years since it began paying claims, the Settlement Facility has paid claims and maintained data by the types of claims it has paid and is likely to pay in the future. That data has been analyzed and a report of the analysis and the data underlying it recently was completed. That careful analysis indicates that there are sufficient funds to make fifty percent premium payments on claims paid through December 31, 2010.

A. The Settlement Facility's Operations.

The Settlement Facility Agreement sets out a carefully thought out system for paying claims. The Finance Committee is the body charged with distributing Settlement Facility funds, defending the Settlement Facility, and ensuring that the Settlement Facility Agreement is followed. (*See* Settlement Facility Agreement at § 4.08.) The Finance Committee has no financial stake in whether payments are made.[2]

The system of payments set out in the Settlement Facility Agreement classifies different types of payments for different types of claims. (*See id* § 7.01.) The payment types include: "First Priority Payments," "Settlement Fund Other Payments," "Second Priority Payments," and "Litigation Payments." (*Id.*) All of the payment categories are not treated the same; the Settlement Facility Agreement mandates that certain types of claims be paid before others. (*Id.* at § 7.01-7.03.)

The payment hierarchy is straight forward. "First Priority Claims" are to be paid first, and "Second Priority Claims" are to be paid with moneys that remain or are expected to remain

[2] There are, however, two other groups that theoretically could be financially affected by Facility payments: (1) Dow Corning, the entity that funds the payments; and (2) the Claimants' Advisory Committee ("CAC"), the entity that represents the claimants who receive those payments. (*See* Settlement Facility Agreement at § 4.09.) Pursuant to § 7.03(a) of the Settlement Facility Agreement, the CAC, Dow Corning's Representatives, the Shareholders (Corning, Dow Chemical and Dow Holdings, Inc.), and the Non-Settling Personal Injury Claimants with pending claims are being served with this motion.

after First Priority Claims are paid. (*See* Settlement Facility Agreement at § 7.01(c).) The group of Second Priority Claims includes "Premium Payments." (*See id.* At § 7.01(a)(iii).) Premium Payments allow an extra twenty percent payment to all approved and paid First Priority claimants who show that breast implants caused a disease, and an extra twenty-five percent payment to all approved and paid First Priority claimants who show that a breast implant ruptured before it was removed from a claimant's body. (*See* Annex B, Settlement Grid Personal Injury Claims, attached as Exhibit "B"; *also see* Settlement Facility Agreement at § 7.01(a)(iii).)

B. The Settlement Facility's Funding.

The net present value ("NPV") of the Facility is $2.35 billion. (*See* Funding Payment Agreement Art. 2.01, attached as Exhibit "C".) Of that amount, $1.95 billion is the "Settlement Fund" that can be used to either pay First Priority Claims or make Premium Payments. The remaining $400 million is allocated to a separate "Litigation Fund." (*See* Litigation Facility Agreement between Dow Corning Corp. and DCC Litigation Facility, Inc., attached as Exhibit "D".) The Settlement Facility can use the Litigation Funds to pay First Priority Claims, in the increasingly unlikely event that the $1.95 billion Settlement Fund were insufficient to cover First Priority Payments. (*Id.*; Settlement Facility Agreement at §§ 3.02(a); 7.01(b)(ii); 7.03(b).)

While the Litigation Fund can be used to pay First Priority Claims, it cannot be used to make Premium Payments. (*See* Settlement Facility Agreement at § 7.03(b).) Further, any money remaining in the Litigation Fund at the end of 2019 will revert to Dow Corning.[3] (*See*

[3] Dow Corning has a remainder interest in the Litigation Fund. Under the terms of that remainder interest, if Premium Payments are made now as opposed to 2019, it is theoretically possible that unanticipated new First Priority Claims will exhaust the Settlement Fund, and that payment of those new First Priority Claims will require the Finance Committee to use the Litigation Fund. That would leave less money to revert to Dow Corning. Dow Corning has, however, recognized the improbability of such a scenario: in connection with the 2001 settlement confirmation hearing, Dow Corning's expert, Fred Dunbar, reported that he expected Premium Payments to be made in 2011. (*See* Report of National Economic Research Associates, Summary of Funding Adequacy at n. 2, attached as Exhibit "E" (discussing assumption that premium payments would be made after years).)

Litigation Facility Agreement at § 8.03(b) ("Upon termination of the Litigation Facility under this Agreement . . . the balance, if any, of the Litigation Facility assets . . . shall be distributed to Debtor.").) Premium Payments cannot be made until the Finance Committee requests authority from the Court to make the payments and the Court grants such authority. (*See* Settlement Facility Agreement at § 7.03(a).)

The CAC began requesting that the Finance Committee seek Court authorization to make Premium Payments in December 2009. (*See* Ltr. of Dec. 9, 2009, from Jeffrey Trachtman to Prof. Francis McGovern, et al., attached Exhibit "F"; Ltr. of Sept. 15, 2010 from Jeffrey Trachtman to Prof. Francis McGovern, attached as Exhibit "G".) The Finance Committee has not previously requested Premium Payments, however, because it wanted adequate assurance that there were sufficient monies in the Settlement Fund to pay new and existing First Priority Claims. (*See, e.g.,* Ltr. of Oct. 1, 2010 from Finance Committee Dow Corning Trust to Hon. Denise Page Hood, attached as Exhibit "H".) Now, two years later, the Finance Committee is confident that the claims projections and underlying methodology are sound, and that partial Premium Payments can be made in a manner that provides adequate assurance that new and existing First Priority Claims will be paid.

C. Procedure for Determining Whether Premium Payments Are Appropriate.

Importantly, Second Priority Claims are not to be held until the Priority Claims process is complete. (*See* Settlement Facility Agreement at §§ 7.01(c) and 7.04(a) (discussing procedure for Premium Payments prior to conclusion of claims process).) Rather, as detailed below, the Agreement contemplated Second Priority Payments while First Priority Payments were being paid where, as is the case, there is adequate assurance that all First Priority Claims will be paid.

Section 7.01(c) of the Agreement provides in part:

> **(iv)** ***Second Priority Payments.*** Premium Payments shall be deemed "Second Priority Payments." Second Priority Payments may not be distributed unless and until the District Court determines that all other Allowed and allowable Claims, including Claims subject to resolution under the terms of the Litigation Facility, have either been paid or adequate provision has been made to assure such payments.
>
> **(v)** ***Timing.*** Noting 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.

(Settlement Facility Agreement at § 7.01(c).)

Section 7.03(a) further provides that, if adequate assurance can be made for payment of First Priority Claims, the Finance Committee shall file a recommendation and motion with the Court requesting authorization to distribute Premium Payments, accompanied by a detailed accounting of the status of claims payments (the "Accounting"). (*See* Settlement Facility Agreement at §§ 7.01(c)(iv), 7.03(a).) After such a recommendation is made, the Court is to consider the recommendation and determine whether adequate provisions have been made to assure payment of First Priority Claims in light of available assets. (*Id.* at §§ 7.03(a); 6.01(a).) An affirmative determination of that issue by the Court means that Second Priority Payments or some portion of them can be made. (*Id.* at § 7.03(a).)

D. Neither the Finance Committee Nor Anyone Else Has the Burden to Prove Premium Payments Should Be Made.

Importantly, the Settlement Facility Agreement does not place any burden of proof upon the Finance Committee with regard to a Premium Payment recommendation. (*See* Settlement Facility Agreement at § 7.03(a).) Instead, the Court simply must consider the merits of any recommendation and determine whether adequate provision has been made to assure payment of

First Priority Claims. (*Id.*) The Court's determination is binding and cannot be overturned unless an objecting party can prove on appeal that the Court abused its discretion. (*Id.*)

E. "Adequate Assurance" Means More Likely than Not There Will Be Enough Money to Pay First Priority Claims; No Guarantee Is Required.

What constitutes adequate provision to assure payments is determined under New York law, which governs the construction of the Settlement Facility Agreement. (*Id.* at § 10.07.) Several federal courts in New York and elsewhere have construed "adequate assurance" in various contractual contexts, most notably in reference to bankruptcy obligations.

Courts have been clear—adequate provisions to assure payments does not mean absolute certainty or require a guarantee of a future outcome or solvency. To the contrary, the phrase is given a practical, pragmatic construction in light of the facts of each case, and assurance can be "adequate" even if it falls considerably short of an absolute guarantee. *See In re M. Fine Lumber Co., Inc.* 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008); *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985). ***In fact, courts have generally held that adequate assurance is shown so long as future performance appears more likely than not***. *See, e.g., In re Natco Indus., Inc.*, 54 B.R. at 440; *In re Res. Tech. Corp.*, 624 F.3d 376, 384 (7th Cir. 2010); Samuel Williston & Richard A. Lord, A Treatise On the Law of Contracts § 78:54 (4th ed. 1993 & Supp. 2010); *see also Enron Power Mktg., Inc. v. Nevada Power Co.*, No. 01-16034 (AJG), 2004 WL 2290486, at *6 (S.D.N.Y. Oct. 12, 2004) (holding that, under the Uniform Commercial Code, "[i]n appropriate circumstances, a promise to perform can be an adequate assurance").

II. ARGUMENT AND RECOMMENDATION

The CAC has suggested that Premium Payments should be made immediately and in full. (*See* Ltr. of Dec. 9, 2009, from Jeffrey Trachtman to Prof. Francis McGovern, et al.; Ltr. of Sep. 15, 2010, from Jeffrey Trachtman to Prof. Francis McGovern.) On the other hand, Dow Corning

would like to delay all Premium Payments until 2019, when no further First Priority Claims can be asserted. (*See* Ltr. of June 7, 2011, from Deborah Greenspan to Jeffrey Trachtman, attached as Exhibit "J".) The Finance Committee recommends that the Court take the middle road: authorize partial, fifty percent Premium Payments to begin in 2012 to Historical Claimants--those whose claims were paid before January 1, 2011.[4] ("The Recommendation."). The Court should authorize such payments as soon as possible because the internal administrative process required to make the payments may take significant time. The required Accounting that supports the Recommendation is set out in the Report of Independent Assessor, End of Fourth Quarter 2010, Preliminary Report, May 20, 2011 (the "Accounting"). (*See* Affidavit of Jean Malone and Exhibit 1 to Malone Aff., attached as Exhibit "I".)

Time does not work in favor of paying claims. In the years since the Settlement Facility became effective, claimants have died, moved, or otherwise become impossible to track down. This trend will, of course, exacerbate in the future, and delaying Premium Payments will likely result in fewer claimants being paid. That is immaterial if there is not adequate provision made to assure payment of existing and future First Priority Claims. Fortunately, there is more than adequate provision.

As discussed below, under the most conservative estimate, the Recommendation plus payment of existing obligations ***will leave more than $80 million NPV in the Settlement Fund,*** not including the millions of Litigation Fund dollars that will also be available to pay any new or existing First Priority Claims in the unlikely event that the projections are not accurate.[5] (*See*

[4] The Finance Committee is not recommending that other Second Priority Payments, such as Class 16 payments, be made at this time.

[5] In a best case scenario, assuming that the rate of claims declines and that other matters are decided such that fewer claims are paid, there will be more than $129 million left in the Settlement Fund if 50% premium payments are made in 2012. (*See* Mem. of June 28, 2011, from ARPC to David Austern, attached as Exhibit 3 to Malone Aff.)

Report of Ind. Assessor; Memo of June 14, 2011 from ARPC to David Austern, attached as Exhibit 2 to Malone Aff.) The Recommendation provides reasonable assurance that new and existing First Priority Claims will be paid. It also ensures that Historical Claimants will receive at least a portion of the Premium Payments to which they are entitled while they are still alive and can be located.

A. Excluding Monies in the Litigation Fund, There is NPV $1.95 Billion in Funds Available to Pay Claims.

Every quarter, an analysis of claims and payments is conducted. (*See* Settlement Facility Agreement § 7.01 (d)(i).) Each year, a report on the "the development of projected funding requirements . . . and the assessment of the availability and adequacy of assets in the Litigation Fund and the Settlement Fund" is completed. (Settlement Facility Agreement §4.05; *see also* Settlement Facility Agreement § 7.01 (d)(i) ("In conjunction with the Independent Assessor, the Finance Committee shall . . . on a quarterly basis . . . prepare projections of the likely amount of funds required to pay in full all pending, previously Allowed but unpaid and projected future First Priority Payments.").) The most recent analysis indicates that there is $1.95 billion NPV in the Settlement Fund available to pay claims.[6] (*See* Report of Ind. Assessor, at p. 61; Memo of June 14, 2011.)

Full 2012 Premium Payments to all Historical Claimants whose claims were paid by December 31, 2010 would cost approximately NPV of $128 million. (*See* Report of Ind. Assessor at p. 89; Memo of June 14, 2011.) Implementing the Recommendation, which

[6] The Figures in the Report of Independent Assessor, End of Fourth Quarter 2010, Preliminary Report, May 20, 2011 state that there is $1.978 Billion NPV available to pay claims. This figure, however, is related to how the money in the two funds is allocated. For purposes of comparing the estimated liabilities with the funding available in the two funds, the Independent Assessor assumed that $1.95 billion of the Settlement Fund is available to pay claims and that $27.9 million NPV of the Litigation Fund would be available to pay claims. Thus, in the Independent Assessors Report, the total funding cap is listed at $1.9779 billion ($1.95 billion + $27.9 million).

contemplates fifty percent Premium Payments to Historical Claimants beginning in 2012, will cost approximately $64 million.[7] (*Id.*)

The Recommendation does not propose, seek, or make specific allowances for Premium Payments to new claimants whose claims were paid after December 31, 2010. That is because the Agreement contemplates that partial Premium Payments will be made to the greatest extent possible consistent with providing reasonable assurance that First Priority Claims will be paid. It does not contemplate or require that claimants whose claims were not paid before December 31, 2010, receive the same Premium Payment as those who have been waiting on them for years.[8] Future Premium Payments, if any, will have to be evaluated and/or authorized at the appropriate time.

Pending before the Court is Dow Corning's Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents. Dow Corning essentially seeks a determination that it has to pay less money into the Facility going forward because the funds were made available earlier than required by the funding agreements. The Recommendation assumes that Dow Corning will prevail and receive the approximately $200 million time value credit sought in the motion. (*See* Report of Ind. Assessor at 59; Memo of June 14, 2011.) If Dow Corning does not win the motion, however, then approximately $200 million time value credit can be added to the more than $80 million cushion provided by the Recommendation.

[7] If Class 16 Payments were paid at the same time, the costs would increase to just over $138 million for full payments and $69 million for 50% payments. As noted above, the Recommendation does not include Class 16 payments at this time.

[8] In fact, the Agreement favors early filers, as evidenced by the fact that the contemplated payment amounts are not adjusted for inflation, and that the Facility self-terminates in 2019, regardless of whether legitimate claims may remain unasserted at that time.

B. It will take $1.83 Billion to Fund First Priority Claims.

In the Accounting, the Independent Assessor, ARPC, has performed several cost projections related to First Priority Claims. (*See generally* Report of Ind. Assessor.) The more than $80 million cushion provided by the Recommendation relies upon the most conservative of those projections. (*Id*.) The projection relied upon by the Recommendation estimates that it will take $1.83 billion to fund the First Priority Claims. (*See* Report of Ind. Assessor at p. 66, 88; Memo of June 14, 2011.)

In addition to the effect of the Time Value Credits issue, the projection is conservative because there are future events that could very well increase the amount of money left in the fund. First, the projection assumes a constant rate of eligible claimants will continue to make claims. In fact, the trend in relation to the Dow Corning settlement, as well as in many other mass tort settlements, is for the claims' rate to drop sharply over time. (*See* Report of Ind. Assessor at p. 66; Ltr. of June 7, 2011.) Second, the projection assumes that the Court will grant the CAC's request that $7.5 million in tissue expander claims be considered breast implant claims. The issue is currently under reconsideration. (*Id*. at p. 10.)

Third, the projection assumes that the Court will approve an additional $1.2 million in claims for unacceptable implant rupture expert evidence to be sufficient and admissible. (*Id*.) Those claims, however, only can move forward if the Court grants pending motions on the validity of those claims. Fourth, the projection assumes that all of the $5.2 million estimated to be in a subset of rupture claims will be filed and paid. Fifth, the projection contemplates a surge in claims at the 2014 explants filing deadline, and another surge preceding the scheduled end of the Settlement Facility in 2019. The rationale for these spikes is that there may be outreach that leads more claimants to file or pursue their claims before the deadlines, thereby possibly causing an increase in new claims. (*See id*. at p. 25.)

C. The Projections Are Based on the Appropriate Information.

There have been suggestions that Premium payments are inappropriate because: (1) the projections undergirding future payments are based upon trends involving eligible claimants and not on an analysis of the underlying population of claims; and (2) there might be a dramatic spike in the number of claims as the claim population ages and develops symptoms that could lead to claims. (*See* Ltr. of June 7, 2011.) Neither of these concerns has merit.

First, an epidemiological-like study is not required; there is no need to analyze claimants who are not eligible to assert claims. As to relying upon past trends, the Agreement specifically contemplates and dictates that any projections will take into account past trends. (*See* Settlement Facility Agreement at §7.01(d)(i).) Specifically, the Agreement mandates how projections are to be made, stating:

> [P]rojections shall, to the extent known or knowable, be based upon and take into account all data (as of the date of the analysis) regarding (i) the number of Claims filed with the Settlement Facility, (ii) the rate of Claim filings in the Settlement Facility, (iii) the average resolution cost of Claims in the Settlement Facility, (iv) the pending Claims in the Settlement Facility, and (v) projected future filings with the Settlement Facility. Such projections shall also state the anticipated time period for the resolution of such Claims.

(*Id.*) Those are the factors that were considered in the Recommendation, and those factors provide adequate assurances that the appropriate payments will be made.

Moreover, the Recommendation assumes that the rate that claims are filed will remain constant, a conservative measure that likely inflates the number of claims that will actually be asserted. In truth, the data collected indicates that the number of claims will likely decrease substantially, because most people who have manifested compensable diseases already have filed claims and because most claimants with lawyers (who are statistically more likely to file claims)

have already filed their claims. There is no data or other evidence that in any way suggests that the Recommendation does not provide adequate assurance that First Priority Claims will be paid.

Second, the adequate assurance standard in the Agreement permits Premium Payments to be made even if there is a possibility that some First Priority Claims might not be paid. It would violate the spirit and terms of the Settlement Facility Agreement to refuse to make Premium Payments to rightful claimants for fear that some unknown doom-and-gloom scenario might unfold. If the Settlement Facility Agreement was to ensure with certainty that First Priority Claims would be paid even if some statistically insignificant possibility plays out, it could have been written so that Premium Payments were paid only when the Settlement Facility closes in 2019. But that is not what the Settlement Facility Agreement provides.

By definition, any projection contains some uncertainty. The "adequate assurance" standard articulated in the Settlement Facility Agreement acknowledges that axiom, and it authorizes Premium Payments to be made even if doing so could mean that under some circumstances all First Priority Claims will not be paid. The Recommendation is based upon conservative methodology and projections, and even under that cautious prediction, it is clearly more likely than not that there will be sufficient funds available to pay First Priority Claims. *In re Natco Indus., Inc.*, 54 B.R. at 440; *In re Res. Tech. Corp.*, 624 F.3d at 384. The Recommendation thus provides the adequate assurance required by the Settlement Facility Agreement. (*See* Settlement Facility Agreement at §§ 7.01(c); 7.03(a).)

D. Additional Monies Are Available in the Litigation Fund.

The more than $80 million cushion provided by the Recommendation does not include any of the Litigation Fund money that is available to pay First Priority Claims under the Agreement. (*See generally* Settlement Facility Agreement at § 7.03(b).) Those funds, however, are available, and they are worth mentioning. (*Id.*) As of the most recent calculations, the

Litigation Fund has paid around $31 million in claims. There are fewer than thirty claimants asserting demands on the Litigation Fund. In the unlikely event that the Settlement Fund is exhausted before all First Priority Claims are paid, most of the $369 million currently in the Litigation Fund will be available to pay existing or future First Priority Claims. (*Id.*) Nothing prohibits the Court from considering that additional financial backstop in determining whether or not a recommended Premium Payment provides adequate assurance that First Priority Claims will be paid. (*Id.*)

III. CONCLUSION

For the above reasons, the Finance Committee recommends that the Court authorize fifty percent Premium Payments to Historical Claimants beginning in 2012. The Finance Committee requests that the Court authorize the Recommendation as soon as possible, so that the administrative process can be completed in time to make Premium Payments in 2012.[9] The Finance Committee further requests that the Court grant the Finance Committee all other just relief.

[9] As noted above, if the process for Premium Payments is not completed in time for the 50% premium payments to be made in 2014, a recommendation seeking premiums well in excess of 50% may be needed.

Dated: June 30, 2011

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2011, the foregoing motion (and proposed order) has been electronically filed with the Clerk of Court using the ECF system, and same has been mailed via Certified Mail/Return Receipt Requested or via email to the following:

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