
Case No. 11-2632

**In the United States Court of Appeals
for the Sixth Circuit**

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION,

Interested Party - Appellant,

v.

CLAIMANTS' ADVISORY COMMITTEE,

Interested Party - Appellee.

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

**APPELLEE'S PETITION FOR
REHEARING AND REHEARING *EN BANC***

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Pursuant to Fed. R. App. P. 35 and 40, Appellee Claimants' Advisory Committee (the "CAC") respectfully submits this Petition for Rehearing and Rehearing *En Banc* of this Court's March 8, 2013 decision (the "Decision"). See *Dow Corning Corp. v. Claimants' Advisory Committee (In re Settlement Facility Dow Corning Trust)*, No. 11-2632 (6th Cir. Mar. 8, 2013) (attached as Ex. A).

PRELIMINARY STATEMENT

The Decision, while nominally an affirmance,¹ vitiates the relief obtained below by expressly leaving open the key issue resolved by the District Court: whether Dow Corning is entitled to a present value adjustment to its settlement funding obligation based on the pre-Effective Date transfer of the Initial Payment into the Trust's escrow account.² Rehearing is warranted because this aspect of the Decision is based on the misapprehension that the present value adjustment issue was not raised below. The case presents a question of exceptional importance because the erroneous portion of the Decision perpetuates uncertainty

¹ A prevailing party has Article III standing to seek further relief when it retains a personal stake in the matter and is injured by the challenged ruling. See *Camreta v. Greene*, 131 S. Ct. 2020, 2028-29 (2011). Moreover, a prevailing party may challenge a ruling that provides some, but not all, of the relief requested. See *Forney v. Apfel*, 524 U.S. 266, 271-72 (1998).

² Capitalized terms not defined herein have the meanings assigned in the Decision or the parties' briefs.

that may have the effect of delaying significantly more than \$200 million in Premium Payments promised years ago to thousands of settling claimants.

The Decision correctly affirms the District Court's holding that Dow Corning is *not* entitled to a Time Value Credit ("TVC") against its Annual Payment Ceilings based on the timing of the Initial Payment. But it seeks to distinguish that specific issue from the supposedly distinct question whether Dow Corning might, in some other manner, obtain a net present value ("NPV") adjustment for the Initial Payment – erroneously holding that the latter question had been briefed and argued for the first time only on appeal and was therefore not properly before the Court. *See* Decision at 20-21.

To the contrary, Dow Corning's TVC motion was filed, at the request of the District Court, for the specific purpose of determining whether Dow Corning was entitled to an NPV adjustment to its funding obligation based on the timing of the Initial Payment. The answer may materially affect the timing of Premium Payments due under the Plan to claimants who have already qualified for and received base payments. Premiums may be paid only when annual projections required under the Plan confirm adequate funding to cover them along with all future base payments. Dow Corning's claim for an NPV adjustment for the Initial Payment created a \$200 million contingency that reduces the available "cushion"

under the settlement cap and therefore may delay Premium Payments – a contingency the District Court intended to resolve through Dow Corning’s motion.

Dow Corning framed its request below as one for a TVC adjustment, but its motion was predicated on the more general claim that it must receive a present value adjustment for any payment made ahead of schedule. The subsequent briefing and hearing before Judge Hood covered the full range of issues ultimately argued before this Court, going not just to technical construction of the TVC provision, but also to whether Dow Corning was entitled to an NPV adjustment *at all* based on the timing of the Initial Payment: *e.g.*, (1) whether the transfer of the Initial Payment from one restricted escrow to another was truly a “payment” under the Plan and (2) whether Dow Corning had bargained to assign the time value of the Initial Payment irrevocably to the Trust as of a fixed date, regardless of when the money was transferred.

In rejecting Dow Corning’s claim for a TVC, the District Court at least implicitly rejected *any* claim for an NPV adjustment for the Initial Payment. This is evident from the broader scope of issues presented to the District Court, its acknowledgement of certain of the CAC’s arguments against an adjustment, and the fact that the very *purpose* of Dow Corning’s motion was to resolve a contingency affecting the availability of funding for Premium Payments. A ruling denying a TVC but leaving open the possibility of an NPV adjustment for the

Initial Payment on some other basis that Dow Corning had never suggested might be available would have been useless to the court and the parties.

On the merits, the idea that Dow Corning could receive an NPV adjustment for the Initial Payment under the Plan's "true-up" provision or when it has actually spent \$2.35 billion NPV (both of which would happen, if at all, only at or near the end of the sixteen-year life of the Trust) makes no sense under the structure of the Plan and is foreclosed, *a fortiori*, by the District Court's affirmed holding that no such adjustment is available through the TVC mechanism. The Decision correctly recognizes, as the CAC argued, that the "true-up" provision of Funding Agreement Section 2.05(a)(ii) may eventually be used to fine-tune the present value calculation based on the timing of certain smaller payments that do not expressly receive TVC credits. But the parties could not have intended to deny Dow Corning a contemporaneous TVC for the Initial Payment only to permit a massive claim to surface *after sixteen years* that could blow up the economics of the Trust. Permitting such a contingency would be fundamentally inconsistent with the need for reliable projections to permit payment of premiums *during* the life of the Trust. The parties and the District Court thus understood that such an NPV adjustment would be available, if at all, only as a TVC.

The Decision creates an issue where none existed before, holds open a claim that Dow Corning never made, and denies the parties and the District Court

the certainty that the order below appeared to provide. The CAC respectfully requests that the Court grant rehearing and either address the merits of the reserved question or reissue its opinion as a simple affirmance by deleting Section II.F.

STATEMENT OF FACTS

The central dispute in this appeal is whether Dow Corning's transfer of the Initial Payment into a restricted escrow within the Trust ahead of the Effective Date was intended to be an event of economic significance – *i.e.*, whether the parties intended that Dow Corning would receive an NPV adjustment with respect to its overall funding obligation based on the timing of this transfer.

Dow Corning moved below, at the District Court's request, to obtain a definitive answer to this question. The funding and claim payment structure of Dow Corning's Plan makes clear why it was crucial for the parties and the court to determine not just whether Dow Corning was entitled to TVC adjustments in its Annual Payment Ceilings, but whether the timing of the Initial Payment entitled Dow Corning to *any* adjustment to the funding stream under *any* rubric.

To induce creditor votes for the settlement embodied in its Plan, 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. These premiums were intended, in part, to compensate for the delays of bankruptcy, and claimants have now been waiting *since 1999* to receive

these payments. Premium Payments were expected to be issued several years into the sixteen-year life of the Settlement Facility, which began paying claims in 2004 and is now past the half-way 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 Trust’s Finance Committee is charged with recommending to the District Court when to authorize Premium Payments. *See* RE # 714-7 (Settlement Facility Agreement) § 7.03.

The IA’s projections conservatively assume that any contingencies that may affect the future funding stream will, in fact, materialize. Thus, until the issue is settled, the IA will likely continue to assume, as it has to date, that Dow Corning *will* receive an NPV adjustment in connection with the Initial Payment – reducing the overall projected available funding by approximately \$200 million. While the question of whether this adjustment is available through a TVC to the Payment Ceilings may affect annual cash flow, the overarching question in projecting the adequacy of the fund is whether such an adjustment will *ever* be available, because making the adjustment at the *end* of the sixteen years would have the same NPV impact on the overall funding stream.³

³ For further explanation of the structure of the Plan provisions governing Premium Payments, *see* RE # 825 (Response of Claimants’ Advisory Committee

Through 2010, claimants had qualified for premiums totaling approximately \$222 million in nominal dollars.⁴ Noting the effect of the Initial Payment issue on the available cushion, the Finance Committee moved in 2011 for authorization to pay 50% of the outstanding premiums, which would cost approximately \$69 million NPV and leave a cushion of approximately \$82 million NPV to pay unanticipated base claims.⁵ Dow Corning opposed the motion, disputing (among other things) whether an adequate cushion existed to permit any premiums to be paid.⁶ The matter is *sub judice* before the District Court.

The parties have long understood that resolving the \$200 million Initial Payment contingency – and potentially confirming the existence of a much larger cushion – could materially affect the timing of Premium Payments. Dow Corning’s motion was thus intended to obtain a definitive ruling as to whether it could, on *any* basis, receive an NPV adjustment in connection with the Initial

to Finance Committee’s Recommendation and Motion for Authorization to Make Partial Premium Payments) at 4-8.

⁴ See RE # 825 at 4.

⁵ See RE # 814 (Finance Committee’s First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments) at 10-12.

⁶ See generally RE # 826 (Opposition of Dow Corning Corporation, The Debtor’s Representatives and the Shareholders to the Finance Committee’s First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments).

Payment. Dow Corning's motion framed this request in terms of TVCs because the parties understood that, if Dow Corning were entitled to such an adjustment at all, it would be under that mechanism.⁷

In response, the CAC noted the absence of any Plan language providing for a TVC in connection with the Initial Payment and also advanced two principal arguments why *any* NPV adjustment for the Initial Payment would be inconsistent with the structure of the Plan and the intent of the parties: (1) transfer of the Initial Payment from one restricted escrow into another could not be considered a "payment" under the Plan, because the funds could not be used to pay claims, but only to cover certain limited administrative expenses on further court order; and (2) providing Dow Corning with a present value adjustment would undo a central bargain in the Plan, through which Dow Corning agreed to assign the earning power of the Initial Payment for the benefit of the Trust starting on April 30, 1999, *regardless of when the funds were actually transferred*.⁸ These are precisely the same arguments the CAC advanced on appeal.

Dow replied on each issue, still focusing on the TVC mechanism, but

⁷ See RE # 714 (Dow Corning Corporation's Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents).

⁸ See RE # 730 (Response to Dow Corning Corporation's Motion to Enforce Application of Time Value Credits) at 11-16.

more broadly arguing the necessity of preserving the NPV of its funding stream – and reflecting its understanding that the parties could not have intended to defer the issue until the end of the Trust: “The inescapable fact is that applying TVCs to the Initial Payment is the *only* way to preserve the NPV cap as of the Effective Date.”⁹

The District Court denied Dow Corning’s claimed NPV adjustment for the Initial Payment, noting the absence of any express provision for a TVC in the Funding Agreement, but also acknowledging the CAC’s arguments that providing Dow Corning with an adjustment “for having transferred the Initial Payment into escrow *pre*-Effective Date is inconsistent with the Plan and the parties’ intentions and conduct.” RE # 836 (11/28/11 Order) at 9. The court further noted the express assignment to the Trust of the actual interest earned on (*i.e.*, the time value of) the Initial Payment starting from April 30, 1999. *Id.* at 10.

On appeal, the parties addressed the same range of arguments – which reflected their continuing understanding that what was at stake was Dow Corning’s entitlement *in any circumstance* to an NPV adjustment based on the timing of the Initial Payment. No new arguments were introduced on appeal.

At oral argument, the panel sought to distinguish between the issue of TVCs to adjust the Annual Payment Ceilings and determining the NPV of Dow

⁹ RE # 736 (Reply in Support of Dow Corning Corporation’s Time Value Credit Motion) at 2.

Corning's overall payments, but the parties explained that the concepts are linked and that the District Court and parties needed, above all, the relief explicitly sought below: a definitive resolution of the Initial Payment dispute. Dow Corning's counsel noted that the Plan documents used the terms "NPV adjustments" and "time value credits" essentially "interchangeably," stressing that the year-by-year adjustments were sought to preserve the NPV of the entire funding stream.

12/4/12 Oral Argument at 3-4 (transcript attached as Ex. B). Counsel further noted that "[i]t's not just Dow Corning that needs to understand this payment stream. The finance committee [and] claims administrator need to make sure they understand it" in order to adjust spending to the ultimate cap. *Id.* at 10-11. Among other things, Dow Corning's counsel noted, Premium Payments could be authorized "in a very short period of time," requiring Dow Corning to make additional cash payments to the Trust, and as a result the question of an accurate NPV calculation "would be an issue if right now we were facing a potential payment and it was not correctly calculated." *Id.* at 8.

Counsel for the CAC further explained that the IA is charged with making projections as to the entire funding stream, on which the District Court must rely in determining when to authorize Premium Payments. *Id.* at 20. That structure requires major issues like an NPV adjustment for the Initial Payment to be resolved now, as the parties and District Court had intended: "You can't hold

that in abeyance and say in year 16 oh it turns out they get a \$200 million credit.

We need to know that in order to make the decision about the Premium Payments.”

Id. at 21.

The Decision affirmed Judge Hood’s TVC determinations but created a distinction between the issues of TVC-based adjustments to the Annual Payment Ceilings (which the Panel viewed as ripe for decision) and whether Dow Corning could receive “a net present value adjustment for the Initial Payment” in some other manner (which the Panel said was “first raised and argued in the briefs on appeal” and thus not properly before the Court). Decision at 21. As a result, the Panel “expressed no opinion” on the central question as to which the parties and the District Court sought a definitive answer – “whether Dow Corning is entitled to a net present value adjustment for the Initial Payment.” *Id.*

ARGUMENT

BY LEAVING OPEN AN ISSUE THAT THE PARTIES AND DISTRICT COURT INTENDED TO RESOLVE, ON THE ERRONEOUS GROUND THAT IT WAS NOT RAISED BELOW, THE DECISION CREATES UNNECESSARY UNCERTAINTY AND DELAY THAT WILL LIKELY HARM THOUSANDS OF SETTLING CLAIMANTS

The Decision appears to give clarity in affirming Judge Hood’s TVC determinations, but then takes it away by holding that the larger NPV adjustment issue was outside the scope of the appeal. This aspect of the Decision is based on a misapprehension of what was actually litigated below; defeats the parties’ attempt to attain certainty on a question they presented for decision; and frustrates the

District Court's efforts to facilitate approval of Premium Payments. Rehearing is thus appropriate to remedy the unintended consequences of the Panel's misapprehension of the procedural record. *See United States v. Bailey*, 553 F.3d 940, 942 (6th Cir. 2009) (granting rehearing to amend panel opinion to correct factual mistake concerning evidence admitted below and to reflect legal consequences of factual correction).

The Panel's statement that "whether Dow Corning should receive a net present value adjustment for the Initial Payment . . . was first raised and argued in the briefs on appeal" (Decision at 20-21) is erroneous. As demonstrated above, the parties briefed in the District Court all the same issues and arguments they presented on this question before this Court. While the District Court's denial of Dow Corning's motion emphasized the lack of authority in the language of the Plan documents for an Initial Payment TVC, it acknowledged the parties' broader contract interpretation and fairness arguments – at least implicitly rejecting Dow Corning's position on these fully briefed issues. This Court has recognized that issues asserted below but not expressly decided may be raised and addressed on appeal. *See Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788, 799 (6th Cir. 2012).

The procedural context below makes clear that the District Court believed it was completely disposing of Dow Corning's claim for an NPV adjustment in connection with the Initial Payment. Any other reading of the

decision below would be nonsensical, because, as explained above, the principal reason for addressing the issue at all was to resolve a contingency delaying approval of Premium Payments. A decision resolving only the specific question of TVCs while leaving open the possibility that Dow Corning might obtain an NPV adjustment under some other mechanism would neither resolve the funding contingency nor facilitate the payment of Premium Payments.

The possibility of using the “true-up” provision of Funding Agreement Section 2.05(a)(ii) was not expressly discussed below because Dow Corning correctly assumed, as it stated in its reply, that the TVC mechanism was the “*only way*” for it to receive a present value adjustment for the Initial Payment. RE # 736 at 2. The idea that Dow Corning could wait sixteen years and then retroactively reduce the available NPV funding by approximately \$200 million did not occur to the parties that drafted the settlement or the court that has interpreted it for nearly fifteen years, because such a suggestion is fundamentally inconsistent with the structure of the Plan.

The CAC agrees – and, indeed, itself argued – that the “true-up” provision may be used, if necessary, to fine-tune the NPV of the payment stream to take account of smaller items not eligible for contemporaneous TVCs under the Funding Agreement. And the CAC also agrees that *this* issue need not be addressed unless or until it appears that the funding ultimately required to pay all

claims comes close to the funding cap. *See* CAC Br. at 37-38. But prior to the Decision, no party had suggested that Dow Corning's purported entitlement to a \$200 million adjustment for a pre-Effective Date payment was intended to be, or as a practical matter *could* be, addressed only at the end of the settlement program, given the parties' need for guidance in the issuance of Premium Payments. It cannot have been the parties' intent to allow such a massive contingency to loom over the Trust for the better part of two decades.

In any event, the chief purpose of the proceedings below was to *eliminate* any such contingency by resolving it one way or the other. By holding the question open, the Decision eviscerates the usefulness of the District Court's order, dooming the parties to replay a multi-year litigation process to answer a question they believed had already been resolved (subject only to this appeal). Since the briefs below and on appeal presented all the factual and legal issues necessary to resolve the broader question, sending the parties back to square one would waste time and resources and inflict needless further injury on claimants.

The CAC therefore respectfully requests that the Court grant rehearing and either (1) address on the merits whether or not Dow Corning is entitled to a net present value adjustment for the Initial Payment or (2) re-issue its decision without Section II.F. The latter course would permit the District Court to interpret the scope of its own order, which was intended to dispose completely of

Dow Corning's claim for a present value adjustment for the Initial Payment. As the Decision notes, "when slogging through the morass of the Dow Corning settlement, we should recognize this judge's many years' experience in exploring this potentially treacherous area." Decision at 8. The wisdom of this dictum may best be honored through a straightforward affirmance that avoids creating new issues that may have unintended consequences and frustrate the expectations of the District Court and the parties.

CONCLUSION

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

Dated: New York, New York
March 22, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 22, 2013, 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.

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Exhibit A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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No. 11-2632

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 08, 2013
DEBORAH S. HUNT, Clerk

IN RE: SETTLEMENT FACILITY DOW)
CORNING TRUST)
)
DOW CORNING CORPORATION,)
)
Interested Party-Appellant,)
)
v.)
)
CLAIMANTS' ADVISORY COMMITTEE,)
)
Interested Party-Appellee.)
_____)

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF MICHIGAN

OPINION

BEFORE: BATCHELDER, Chief Judge; McKEAGUE and GRIFFIN, Circuit Judges.

McKEAGUE, Circuit Judge. In this case arising from its Chapter 11 reorganization, Dow Corning Corporation seeks Time Value Credits to account for the timing of certain payments it made to the Depository Trust set up for the benefit of breast implant tort claimants. The district court denied Dow's requests except for the instances where the Funding Payment Agreement expressly provides for Time Value Credits. We affirm.

I. BACKGROUND

Bankruptcy

The saga of the Dow Corning silicon breast implant litigation settlement has been told before, so we will not repeat it here. *See, e.g., In re Dow Corning Corp.*, 255 B.R. 445 (E.D. Mich. 2000),

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aff'd and remanded, 280 F.3d 648 (6th Cir. 2002). Suffice it to say that faced with thousands of lawsuits brought by women who had received silicon breast implants that it manufactured, Dow Corning Corporation (“Dow”) filed for Chapter 11 bankruptcy on May 15, 1995. The Bankruptcy Court confirmed the Amended Joint Plan of Reorganization (the “Plan”) on November 30, 1999. Much litigation followed, and the Plan finally took effect on June 1, 2004.

The Plan outlines the procedures for resolving breast implant claims. Claimants can choose to settle their claims through a Settlement Facility or litigate their claims against a Litigation Facility. Plan § 5.4. Claims and administrative expenses are paid with monies held in a trust known as the Depository Trust (the “Trust”). Plan § 5.3. The responsibilities of the Trustee are enumerated in a Depository Trust Agreement (the “Trust Agreement”), the first version of which was dated March 27, 2001.

The Funding Payment Agreement

Dow’s payment obligations are set forth in a Funding Payment Agreement (the “Funding Agreement”), which is the document at the center of this appeal. The Funding Agreement requires Dow to make payments to the Trust¹ up to a maximum aggregate amount of \$3.172 billion. Funding Agreement § 2.01. However, the Funding Agreement does not require Dow to make this payment all at once, but spreads out Dow’s payment obligations over time. To account for the timing of these payments, the Funding Agreement provides that Dow’s funding obligation cannot exceed a net present value of \$2.35 billion, calculated as of the Effective Date (June 1, 2004). Funding

¹Although the Funding Agreement uses the term “Settlement Facility,” it means the same thing as the Depository Trust. Funding Agreement § 1.03.

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Agreement § 2.01. To compare the net present value of Dow’s payment stream with the net present value funding cap, all payments—with a possible exception identified below—must be discounted to the Effective Date using a rate of 7% per year compounded annually. Funding Agreement § 2.01; Plan §§ 1.102, 5.3.²

The method by which Dow fulfills its payment obligations under the Funding Agreement is remarkably complicated. We need not describe all the details of the Funding Agreement, but several aspects of the Funding Agreement are important for purposes of this appeal.

First, before the Effective Date, Dow made a series of payments totaling \$985 million. Funding Agreement § 2.01(a). When executing the Plan, the parties anticipated that appeals might be filed that would delay the Plan’s implementation. Plan § 7.4. To prepare for that contingency, the Plan provided that Dow would make an initial payment of \$985 million to the Trust to “be held in escrow pending the outcome of the appeal, with any interest accruing thereon to be held as part of the fund.” Plan § 7.4. The Plan further provided that these funds could be used for administrative expenses by the Settlement Facility to prepare “to begin processing Claims promptly after the Effective Date.” Plan § 7.4. If the confirmation of the Plan was upheld on appeal, these funds would be disbursed to pay claims; if the confirmation of the Plan was overturned on appeal, the remaining

²“Net Present Value” is defined in the Plan as “the value of an amount of money to be paid in the future or over a period of time that has been adjusted or discounted to reflect that amount as of a single earlier date.” Plan § 1.102. The time value of money is a concept central to the Funding Agreement. Simply put, “[t]he time value of money refers to what the value of a dollar amount is today (present value) versus what the value of that same dollar amount will be in X amount of time (future value).” James A. Elfter, *Discounted Cash Flow, in The Portable MBA in Finance and Accounting* 103, 103 (Theodore Grossman & John Leslie Livingstone, eds., 4th ed. 2009).

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funds would be returned to Dow. Plan § 7.4. Of course, the confirmation of the Plan was in fact appealed, so these payments were made—mostly in 2001—pursuant to a detailed provision in the Trust Agreement. *See* Trust Agreement § 4.01(a). Collectively, they are referred to as the “Initial Payment.” Funding Agreement § 2.01(a).

Another important aspect of the Funding Agreement is that Dow’s payment obligations are spread out over time. The Funding Agreement creates a series of sixteen “Funding Periods.” Funding Agreement § 2.01(b). Each Funding Period lasts exactly one year, and the first begins exactly one year after the Effective Date. Funding Agreement § 2.01(b). Each Funding Period has a corresponding “Annual Payment Ceiling” which determines Dow’s maximum payment obligation during that Funding Period. Funding Agreement § 2.01(b). Every three months, the Claims Administrator sends Dow a notification informing Dow of the amount of claims and expenses expected to be paid out in excess of reserves each month. Funding Agreement § 2.02(a). At the end of each month, the Claims Administrator sends Dow a notification informing Dow of the actual claims and expenses paid out in excess of reserves during the preceding month. Funding Agreement § 2.02(b). Dow must promptly pay that amount. Funding Agreement § 2.02(b)(i). Dow is not required to pay more than necessary to cover the actual claims and expenses paid in excess of reserves, Funding Agreement § 2.02(b)(iii), and cannot be required to pay more than the Annual Payment Ceiling. Funding Agreement § 2.02(b)(i).

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But the Annual Payment Ceilings really only limit Dow's obligations with respect to cash payments. "Insurance Proceeds"³ received by Dow before the Effective Date were required to be held in trust by Dow and paid to the Trust 90 days after the Effective Date. Funding Agreement § 2.01(a)(ii). After the Effective Date, Insurance Proceeds are supposed to be paid by the insurers directly to the Trust, and if Dow receives Insurance Proceeds, it must transfer them to the Trust immediately, whether or not they exceed the applicable Annual Payment Ceiling. Funding Agreement §§ 2.01(a)(i), 2.02(c). Of course, requiring Insurance Proceeds to be paid to the Trust without regard to the Annual Payment Ceilings means that Dow's payment of cash and Insurance Proceeds during a Funding Period could exceed the Annual Payment Ceiling. Recognizing this fact, the Funding Agreement provides that when Dow's payments during a Funding Period exceed the applicable Annual Payment Ceiling, Dow receives a credit for the excess amount that operates to reduce the Annual Payment Ceiling in a future funding period.⁴ As explained in more detail below, sometimes this credit is applied to the very next Annual Payment Ceiling, and sometimes it is applied to an Annual Payment Ceiling farther in the future.

In addition to crediting the nominal value of the excess amount against a future Annual Payment Ceiling, the Funding Agreement sometimes also expressly credits the time value of the

³"Insurance Proceeds" is a defined term with a complicated definition in the Funding Agreement. Funding Agreement § 1.02(a). It essentially means funds received from Dow's insurance providers.

⁴Similarly, if the expenditures are less than the Annual Payment Ceiling so that Dow is required to pay less than the Annual Payment Ceiling, the very next Annual Payment Ceiling is increased by the difference, plus 7%. Funding Agreement § 2.02(e).

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excess amount. This so-called “Time Value Credit” recognizes that Dow has essentially paid its obligation early, and credits Dow for the timing of the payment as well as the nominal amount. The Time Value Credit is calculated at the rate of 7% per year—the same rate used to calculate the net present value of the total payments for purposes of comparing it with the net present value funding cap.

Dispute

The Claims Administrator is charged with the responsibility of adjusting the Annual Payment Ceilings. In 2004, Dow requested that the Claims Administrator adjust the Annual Payment Ceilings to take into account several different payments it had made. Dow claimed it was entitled to Time Value Credits for making these payments early. Specifically, Dow sought Time Value Credits for the following eight payments:

- (1) The \$985 million Initial Payment, paid mostly in 2001.
- (2) \$18.4 million paid in 2001 to settle Class 6D claims.
- (3) \$211,456,278 in Insurance Proceeds that were received by Dow before the Effective Date and paid in June 2004.
- (4) \$2.9 million paid from Dow’s MDL 926 escrow account in June 2004.
- (5) \$2,180,656 paid from Dow’s MDL 926 escrow account in June and September 2004.
- (6) \$7.2 million paid in June 2004 to Class 4A claimants.
- (7) \$214,363,369 in Insurance Proceeds that were received by Dow after the Effective Date and paid in June 2004.
- (8) \$57,736,990 in Insurance Proceeds paid in Funding Period 3.

The Claimants’ Advisory Committee (“Committee”), which represents the tort claimants, objected to Dow’s request for Time Value Credits for most of these payments. When the Claims Administrator did not grant its request, Dow filed a motion in the United States District Court for

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the Eastern District of Michigan requesting that the court require the Claims Administrator to award the Time Value Credits.

The district court found that the Funding Agreement is unambiguous. It determined that Dow is entitled to Time Value Credits only in those instances where the Funding Agreement expressly provides for them. It concluded that if the parties had intended Dow to receive Time Value Credits for particular payments, the Funding Agreement would specifically provide for them. Since the Funding Agreement specifically provides a Time Value Credit for the \$214,363,369 in Insurance Proceeds that were received by Dow after the Effective Date and paid in June 2004 (payment number 7 above), the district court found that Dow was entitled to one. It further found that the Funding Agreement specifically provides a Time Value Credit for the \$211,456,278 in Insurance Proceeds received before the effective date and paid in June 2004 (payment number 3 above), but only for the period from the date of payment until the beginning of Funding Period 1. The Funding Agreement does not specifically provide a Time Value Credit for the other payments, so the district court denied Dow's request for Time Value Credits for these payments. Unsatisfied with this outcome, Dow appealed the district court's order.

II. ANALYSIS

A. Standard of Review

We apply principles of contract interpretation when interpreting a confirmed bankruptcy plan. *See In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006). New York law governs our interpretation of the Plan and related documents. *Id.*; Plan § 6.13. Under New York law, the first step in interpreting a contract is to determine whether the contract is ambiguous. *See Space Imaging*

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Europe, Ltd. v. Space Imaging L.P., 38 F. Supp. 2d 326, 333-34 (S.D.N.Y. 1999). “A contract is not ambiguous when the language in it has a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion.” *Id.* at 334 (quotation marks omitted). “Where an agreement is unambiguous on its face, it must be enforced in accordance with the plain meaning of its terms.” *Vintage, LLC v. Laws Const. Corp.*, 920 N.E. 2d 342, 343 (N.Y. 2009) (mem.). In this case, the district court found that the Funding Agreement is unambiguous.

The district court judge whose order Dow is appealing has presided over the Dow Corning settlement since 1995. Another panel of this Court recently discussed the standard of review we apply when reviewing this judge’s determination that a plan document in the Dow Corning bankruptcy is not ambiguous. *See In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 771-73 (6th Cir. 2010). The majority observed that “[o]ur court is reasonably well-equipped to determine whether a plan provision is ambiguous—we construe contracts all the time.” *Id.* at 772. But it noted that when slogging through the morass of the Dow Corning settlement, we should recognize this judge’s many years’ experience in exploring this potentially treacherous area. *Id.* Ultimately, though, the majority concluded that “the determination whether a plan provision is ambiguous is not a point on which we substantially defer.” *Id.* If we stay within the bounds of the plan documents and do not stray into extrinsic evidence, we can traverse the Dow Corning slough as well as the district court. We thus evaluate *de novo* the district court’s determination that the Funding Agreement is unambiguous.

B. Nature of the Dispute

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As a preliminary matter, we think it is important to note what is and is not disputed in this case. What is NOT disputed is Dow's total payment obligation. The plan documents clearly state that Dow is not required to pay a net present value in excess of \$2.35 billion, calculated as of the Effective Date and using a discount rate of 7% per year.⁵ Plan § 5.3; Funding Agreement § 2.01.

What is disputed here is the method used to ensure that Dow's payments do not exceed this funding cap. The gist of Dow's position is that if a Time Value Credit is not awarded for every early payment, its payments might exceed the net present value funding cap. Dow contends that the Annual Payment Ceilings must be reduced every time it makes a payment early. In other words, Dow argues that Time Value Credits are impliedly provided for all early payments, regardless of whether they are expressly set forth in the Funding Agreement, as they are for some payments but not for others. The Committee, on the other hand, contends that except in those instances where the plan documents explicitly provide for a credit to an Annual Payment Ceiling, the net present value funding cap is accomplished through the "true-up" provision which takes effect after the last Funding Period. *See* Funding Agreement § 2.05(a)(ii). The first issue we must resolve, then, is whether Time Value Credits are necessary for all early payments to enforce the net present value funding cap.

C. Meaning and Operation of "Time Value Credit"

"Time Value Credit" is the term at the center of this dispute, so the logical point to begin our analysis is by figuring out exactly what it means. Since "Time Value Credit" is capitalized in the Funding Agreement, it is a defined term. Funding Agreement § 1.01. Unfortunately, it is a very

⁵As discussed below, there is a possible exception to this funding cap.

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poorly defined term. The Funding Agreement incorporates definitions from several other plan documents, including the Plan itself, Funding Agreement § 1.01, but Time Value Credit is not defined in those documents. The term appears only in the Funding Agreement. And it appears in the Funding Agreement three times—twice in § 2.01(a)(ii) and once in § 2.02(d)—before it is finally defined in § 2.03(b). The term also appears several times after § 2.03(b), but only in a section governing modification, which is not relevant to this appeal.

The first two appearances of Time Value Credit are in a provision dealing with Insurance Proceeds received by Dow before the Effective Date. Funding Agreement § 2.01(a)(ii). It provides that Dow receives a credit for the nominal amount of Insurance Proceeds it held in trust on the Effective Date and paid immediately after the Effective Date. The credit is to be applied toward the Annual Payment Ceiling in Funding Period 1. In addition to crediting the nominal amount of the Insurance Proceeds, Dow is entitled to a Time Value Credit of 7% per year calculated from the date the Insurance Proceeds were received by the Trust until the beginning of Funding Period 1.

The third appearance of Time Value Credit is in a provision dealing with payments received by the Trust after Funding Period 2. Funding Agreement § 2.02(d). It provides that if during any Funding Period after Funding Period 2 the total amount of cash and Insurance Proceeds received by the Trust exceeds the applicable Annual Payment Ceiling, the excess amount will be credited against the Annual Payment Ceiling in the next Funding Period, “together with a Time Value Credit calculated at the rate of 7% per annum from the date of receipt of the excess by the [Trust] until the beginning of the next Funding Period.” Funding Agreement § 2.02(d).

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The two provisions described above refer to payments—either cash or Insurance Proceeds—received *before* the Effective Date or *after* Funding Period 2. Insurance Proceeds received *between* the Effective Date and the end of Funding Period 2 receive special treatment in the Funding Agreement, and Time Value Credit is finally defined in the provision dealing with these Insurance Proceeds.

If Insurance Proceeds received between the Effective Date and the end of Funding Period 2 exceed the Annual Payment Ceilings of Funding Periods 1 and 2, the excess amount receives its own defined term: “Excess Insurance Proceeds.” Funding Agreement § 2.03(a). Insurance Proceeds and cash received in other Funding Periods that exceed the Annual Payment Ceilings of those Funding Periods are described generically as “excess,” *see* Funding Agreement § 2.02(d), and are not within the definition of “Excess Insurance Proceeds.”

“Excess Insurance Proceeds” are credited against future Annual Payment Ceilings in a unique way. Although received before the end of Funding Period 2, they are not credited toward the Annual Payment Ceiling of Funding Period 3. Instead, they are credited in Funding Periods 5-8 in specified proportions, thereby “smoothing out” the effect these credits have on the Annual Payment Ceilings, as discussed at oral argument. Funding Agreement § 2.03(b)—the only instance where Time Value Credit is defined—provides the following:

Excess Insurance Proceeds shall be credited against future Annual Payment Ceilings as provided in this Section 2.03 to adjust the Annual Payment Ceilings in Section 2.01(b) so as to maintain a net present value for the aggregate maximum payments of \$2,350,000,000, discounted at the rate of 7% per annum, to the Effective Date. To achieve this, the amount of such credit shall equal the amount of the Excess Insurance Proceeds plus an additional amount (the “Time Value Credit”) calculated at the rate of 7% per annum, compounded annually, from the date of receipt of the

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Excess Insurance Proceeds until the first day of the Funding Period for the Annual Payment Ceiling against which they are to be credited becomes due. Excess Insurance Proceeds together with the applicable Time Value Credit will be credited against Annual Payment Ceilings due in each of Funding Periods 5 through 8, in the following proportions:

Funding Period 5: 50% of Excess Insurance Proceeds and the applicable Time Value Credit thereon;

Funding Period 6: 30% of Excess Insurance Proceeds and the applicable Time Value Credit thereon;

Funding Period 7: 10% of Excess Insurance Proceeds and the applicable Time Value Credit thereon;

Funding Period 8: 10% of Excess Insurance Proceeds and the applicable Time Value Credit thereon.

To the extent that the amount to be credited under this subsection exceeds the relevant Annual Payment Ceiling obligation, the excess amount will be credited against Annual Payment Ceilings due in the immediately succeeding Funding Period(s) including the applicable Time Value Credit.

This provision is obtuse to be sure, but it does provide some insight into the meaning of “Time Value Credit.” Viewing together this provision dealing with “Excess Insurance Proceeds” and the other provisions dealing with generic excess payments, the following meaning of Time Value Credit can be discerned: If a payment is to be credited against a future Annual Payment Ceiling, the Funding Agreement *sometimes* provides that the amount credited shall include both the nominal amount of the payment and an additional amount—a Time Value Credit—that accounts for some or all of the period between the receipt of the payment by the Trust and the time the credit is applied. But the Funding Agreement does not provide a Time Value Credit for every payment credited against

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a Future Annual Payment Ceiling, and as will be seen below, the Time Value Credits provided for are not always calculated in the same way.

D. Time Value Credit and Net Present Value Adjustment Distinguished

When considering the meaning of “Time Value Credit,” it is also crucial to distinguish between a *credit* to a future Annual Payment Ceiling and a net present value *adjustment*. Dow asserts that the concepts are the same, but they clearly are not. The Funding Agreement refers to *adjusting* Dow’s payments to the Effective Date to compare their net present value with the net present value funding cap. Funding Agreement § 2.01. “Net present value adjustment” is a convenient way to refer to this adjustment calculation, but it is not a defined term. As mentioned above, with a possible exception identified below, all payments must be adjusted to the Effective Date to ensure that the net present value of all the payments does not exceed a total net present value of \$2.35 billion. Time Value Credits, on the other hand, perform a different function altogether. A Time Value Credit is only applicable when a payment is required by the Funding Agreement to be credited against a future Annual Payment Ceiling. The key word is “credit.”

In an effort to equate Time Value Credits with net present value adjustments, Dow has created a hybrid term. Dow’s briefs refer to a “Time Value Credit adjustment.” But this term does not appear in the Funding Agreement itself, and it conflates the distinct concepts of credits and adjustments. Although the Claims Administrator must “adjust” the Annual Payment Ceilings when Dow receives a Time Value Credit, by its terms and by its operation, a Time Value Credit is a

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“credit,” not an “adjustment.” A Time Value Credit is only applicable when Dow is entitled to credit a payment against a future Annual Payment Ceiling. In that situation, sometimes Dow is entitled to credit the time value of the payment as well as the nominal amount, and sometimes it is not. *Crediting* the time value of an excess payment against a future Annual Payment Ceiling is a separate calculation from *adjusting* Dow’s total payments to the Effective Date to compare their net present value with the net present value funding cap.

Furthermore, and most importantly, Time Value Credits are not necessary to ensure that the net present value of Dow’s total payments does not exceed the \$2.35 billion net present value funding cap. The cornerstone of Dow’s position in this case is that unless it receives the Time Value Credits it seeks, it may be required to pay an amount greater than the net present value funding cap. Dow states that “[o]nly by giving [Time Value Credit] adjustments for both pre- and post-Effective Date funding in excess of or at a time when there was no outstanding Annual Payment Ceiling can the Plan’s net present value funding cap be enforced.” Appellant Br. 15.

Time Value Credits certainly benefit Dow because they operate to reduce the Annual Payment Ceilings and thus reduce its obligation to make cash payments to cover any deficiencies in reserves and Insurance Proceeds. But Time Value Credits are not necessary to enforce the net present value funding cap because the Funding Agreement contains two other provisions that perform this function. First, the Funding Agreement contains a “true-up” provision that requires the Claims Administrator, after the final Funding Period, to calculate the net present value as of the Effective Date of all payments Dow has made. *See* Funding Agreement § 2.05(a)(ii). This provision ensures that at the end of the last funding period, with a possible exception identified

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below, all Dow's payments will be adjusted to the Effective Date to compare their net present value with the net present value funding cap.

Of course, Dow might legitimately worry that this true-up will be performed too late. If it turns out that the net present value of Dow's payments exceeds the net present value funding cap, Dow might not be able to recover funds already paid out to claimants. But this potential problem is solved by another provision in the Funding Agreement—a provision that neither Dow nor the Committee has cited in their briefs. Funding Agreement § 2.01(c) provides that at any time, if Dow has paid “all amounts required by this Agreement”—that is, if the net present value of its total payments equals \$2.35 billion—then Dow can seek confirmation from the district court that its funding obligations are terminated. This provision completely undermines Dow's position that Time Value Credits are necessary to enforce the net present value funding cap. So long as Dow keeps track of the net present value of its payments and promptly petitions the district court to declare its funding obligations terminated, it will never be required to pay more than it agreed to pay.

When a Time Value Credit is viewed as a credit that merely benefits Dow in the short run but is not designed to enforce the net present value funding cap in the long run, Dow's position evaporates. The true-up and termination provisions protect Dow from paying more than it agreed to pay. Time Value Credits are an additional benefit that Dow should receive only where the Funding Agreement specifically provides for them. The next issue, then, is whether the district court failed to award Time Value Credits for payments when the Funding Agreement specifically provided for them. As explained below, the answer is no, although we must correct one erroneous conclusion in the court's order.

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E. Payments at Issue

1. Initial Payment (\$985 million)

Before the Effective Date, Dow made an Initial Payment of \$985 million. *See* Funding Agreement § 2.01(a). Dow claims that it was not required to make this payment until the Effective Date and therefore should receive a “Time Value Credit adjustment” for making the payment early. The district court found that Dow is not entitled to a Time Value Credit for the Initial Payment. We agree.

As explained above, a Time Value Credit is not an adjustment. The nominal amount of the Initial Payment is not credited against any of the Annual Payment Ceilings, so neither should its time value be credited against those ceilings. Because the Funding Agreement does not provide a Time Value Credit for the Initial Payment, Dow is not entitled to one.

2. Pre-Effective Date Payment for Class 6D Claims (\$18.4 million)

Dow paid \$18.4 million to settle Class 6D claims before the Effective Date. It claims that it is entitled to a “Time Value Credit adjustment” for this payment. The district court found that because this provision does not use the term Time Value Credit, Dow is not entitled to a Time Value Credit for this payment. We agree.

The Funding Agreement provides:

All payments to be made by Dow Corning directly to the 6A-6D Funds on or before ninety (90) days after the Effective Date shall be deducted from the next payment due from Dow Corning under this Agreement, and Dow Corning shall receive appropriate credit, including [a net present value] adjustment in its funding obligation in this Funding Payment Agreement.

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Funding Agreement § 2.10(c). If Dow were entitled to a Time Value Credit for these payments, the Funding Agreement would say so. The parties certainly knew how to specify when a Time Value Credit was required, since they did so elsewhere in the Funding Agreement.

However, the phraseology in this provision is admittedly confusing. The provision says that Dow “shall receive appropriate credit, including [a net present value] adjustment in its funding obligation.” We have explained that Time Value Credits and net present value adjustments are separate concepts, but this phrase almost appears to conflate the two. But it is important to note the nature of the payment to which this phrase refers. In contrast to most of the other payments described in the Funding Agreement, this phrase refers to payments that Dow is making not to the Trust but instead directly to separate funds. Funding Agreement § 2.10(c). Since § 2.01 says that Dow agreed to make payments “to the Settlement Facility”—i.e. the Trust—up to a maximum net present value of \$2.35 billion, § 2.10(c) needed to specify that Dow would receive “credit” for its direct payments to these other funds for purposes of the net present value funding cap.

Furthermore, it is noteworthy that the provision does not say that Dow will receive the “[net present value] adjustment” in the “next payment due”—the point at which it receives credit for the nominal value of the payment. Instead, the phrase “appropriate credit, including [a net present value] adjustment in its funding obligation” is best read to mean that both the nominal amount and the timing of these payments will be taken into account through a net present value adjustment to Dow’s total “funding obligation.” In short, the nominal value of this payment is credited against the “next payment due,” and the net present value of the payment is included when determining the net present value of Dow’s total payments.

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3. *Insurance Proceeds Paid in Funding Period 3 (\$57,736,990)*

The Trust received \$57,736,990 in Insurance Proceeds in Funding Period 3. Dow claims that this payment exceeded the Annual Payment Ceiling of Funding Period 3 (\$374 million), and therefore it is entitled to have this excess amount, with a “Time Value Credit adjustment,” credited against successive Annual Payment Ceilings. The district court found that Dow was not entitled to a Time Value Credit for this payment. We agree.

This payment would only have exceeded the Annual Payment Ceiling of Funding Period 3 if we held that Dow was entitled to a Time Value Credit for the Initial Payment and that amount was credited against the Annual Payment Ceilings of Funding Periods 1-3. Otherwise the money received in Funding Period 3 would fall below the Annual Payment Ceiling. Having concluded above that Dow is not entitled to a Time Value Credit for the Initial Payment since the Funding Agreement does not provide for one, the \$57,736,990 in Insurance Proceeds paid in Funding Period 3 did not exceed the Annual Payment Ceiling, and Dow is not entitled to a Time Value Credit for this payment.

Although Dow is not entitled to a Time Value Credit for these specific Insurance Proceeds because they did not exceed the Annual Payment Ceiling, we disagree with the district court to the extent it found that Dow is *never* entitled to Time Value Credits in Funding Periods after Funding Period 2. *See* R. 836, Order, PageID # 14197. This finding ignores Funding Agreement § 2.02(d), which provides:

In any Funding Period after Funding Period 2 in which the total amount of cash and Insurance Proceeds received by the Settlement Facility exceeds the applicable Annual Payment Ceiling (as adjusted pursuant to Sections 2.03-2.05), the

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excess over the Annual Payment Ceiling will be credited against the Annual Payment Ceiling in the next Funding Period(s), together with a Time Value Credit calculated at the rate of 7% per annum from the date of receipt of the excess by the Settlement Facility until the beginning of the next Funding Period.

This provision clearly entitles Dow to Time Value Credits if the Trust receives funds in excess of the Annual Payment Ceiling in any Funding Period after Funding Period 2. Therefore, to the extent the district court's order says that Dow will never be entitled to a Time Value Credit for Insurance Proceeds received after Funding Period 2, the order is in error. Although we have determined that the Annual Payment Ceiling was not exceeded in Funding Period 3, we have no way of knowing whether a future Annual Payment Ceiling might be exceeded.

4. Pre-Effective Date Insurance Proceeds (\$211,456,278)

Dow received \$211,456,278 in Insurance Proceeds before the Effective Date. Funding Agreement § 2.01(a)(ii) required the following:

Insurance Proceeds held by Dow Corning on the Effective Date shall be held in trust for the benefit of the Trust and paid to the Trust 90 days after the Effective Date and credited against the Annual Payment Ceiling for Funding Period 1, together with a Time Value Credit calculated at the rate of 7% per annum from the date of receipt of such excess by the Settlement Facility until the beginning of Funding Period 1. To the extent the amount to be credited (including the Time Value Credit) exceeds the Annual Payment Ceiling for Funding Period 1, such excess shall be credited against the Annual Payment Ceiling for Funding Period 2.

The district court found that "Dow Corning is entitled to Time Value Credit on Insurance Proceeds upon receipt by the Settlement Facility only until the beginning of Funding Period 1, to be credited, if in excess of the Annual Payment Ceiling for Funding Period 1, against the Annual Payment Ceiling for Funding Period 2." R. 836, Order, PageId # 14194. In other words, it found

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that Dow was not entitled to a second Time Value Credit for the excess that rolled over into Funding Period 2.

Having found that a Time Value Credit is a benefit that Dow receives only when the Funding Agreement explicitly provides it, we agree. The Funding Agreement says that Dow gets a Time Value Credit from the date of receipt of the excess Insurance Proceeds until the beginning of Funding Period 1. It does not provide another Time Value Credit for the amount that rolls over into Funding Period 2. Therefore, we conclude that Dow receives only the Time Value Credit specifically provided for in the Funding Agreement.

5. Payment for Settlement Facility Access to MDL 926 Claims Office Materials (\$2.9 million); Payment from Dow's MDL 926 Escrow Account (\$2,180,656); Payment to Class 4A Claimants (\$7.2 million)

The parties each briefly address whether Dow should receive Time Value Credits for these three relatively small payments, all of which were made after the Effective Date and before the start of the first Funding Period. The district court found that Dow was not entitled to a Time Value Credit for these payments because the Funding Agreement does not provide for one. We agree. Because the Funding Agreement does not provide a Time Value Credit for these payments, Dow is not entitled to one.

F. Net Present Value Adjustment for the Initial Payment

In addition to disputing the eight Time Value Credits sought by Dow, the parties also dispute whether Dow should receive a net present value adjustment for the Initial Payment which was paid several years before the Effective Date. (Recall that the Initial Payment was placed into escrow with the interest accruing to the benefit of the Trust.) The Funding Agreement has a special provision

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addressing the effect the actual interest received on \$905 million of the Initial Payment would have on the net present value funding cap. It provides that the interest received on this amount “shall not be included in calculating the payment of the net present value of \$2,350,000,000 under this Agreement.” Funding Agreement § 2.01(a). Although clearly the actual interest is disregarded when calculating the net present value, the parties dispute whether the \$905 million should be adjusted to the Effective Date using the 7% discount rate used to adjust the other payments.

This issue was first raised and argued in the briefs on appeal. At oral argument, it was unclear whether the parties think this issue needs to be decided now. They informed us that they need to know how much room remains under the net present value funding cap so that they can plan how to allocate payments to different classifications of claimants. However, they also indicated that the issue on this appeal is how to calculate the Annual Payment Ceilings, not how to calculate the net present value of the total payments. Because the issue of a net present value adjustment for the Initial Payment was not argued below and resolved in the first instance by the district court, we decline to address it for the first time on appeal. *See Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1072 (6th Cir. 1993) (“This court does not normally address issues raised for the first time on appeal.”).

III. CONCLUSION

The district court was correct to distinguish between Time Value Credits and net present value adjustments. Time Value Credits are *credits* that operate to reduce the Annual Payment Ceilings when expressly provided for in the Funding Agreement. Net present value adjustments, on the other hand, are the *adjustments* made to compare the net present value of Dow’s total payments

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with the \$2.35 billion net present value funding cap. Accordingly, we **AFFIRM** the district court's order with respect to every finding except its determination that Dow is never entitled to a Time Value Credit for Funding Periods after Funding Period 2. The Funding Agreement clearly states that if the cash and Insurance Proceeds received by the Trust during these Funding Periods exceeds the applicable Annual Payment Ceiling, Dow is entitled to a Time Value Credit for the excess. We hold that the Funding Agreement is unambiguous and that Dow is entitled to Time Value Credits only where expressly provided by the Funding Agreement. We express no opinion as to whether Dow is entitled to a net present value adjustment for the Initial Payment.

Exhibit B

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In re: SETTEMENT FACILITY DOW CORNING TRUST
Dow Corning Corporation v.
Claimants' Advisory Committee
December 4, 2012 Oral Argument

Page 2	Page 3
<p>1 DEBORAH GREENSPAN: --I believe. The 2 District Court's decision that we have appealed 3 is in error because it contravenes a fundamental 4 term of the Dow Corning plan of reorganization 5 and the funding payment agreement. 6 The plan and the funding payment 7 agreement are unequivocal in requiring that the 8 stream of payments that Dow Corning may be 9 obligated to make under this plan cannot exceed 10 the net present value aggregate cap of \$2.35 11 billion. There's no guidelines in the documents 12 about the discount rate and the method of--the 13 fact that the present value is calculated on an 14 annual basis. 15 JUDGE DAVID W. MCKEAGUE: Ms. Greenspan, 16 why do you think that when this agreement was put 17 together that the phrase time value credit was 18 used in some places and was not used in other 19 places? 20 DEBORAH GREENSPAN: I think, Your Honor, 21 that the agreement was put together in various-- 22 in pieces over time; that portions of this 23 document were negotiated at different points in 24 time. They reflect an ongoing negotiation that 25 spanned a substantial period of time. As issues</p>	<p>1 arose, and actually frankly as facts changed, 2 there were additions to the terms of the funding 3 payment obligation. At the end of the process I 4 believe these terms were used interchangeably; 5 NPV adjustments, time value credits were used 6 throughout the document to mean essentially the 7 same thing. 8 The term time value credit is used in a 9 couple of very specific paragraphs that talk 10 about the treatment of certain defined insurance 11 proceeds more specifically. 12 JUDGE DAVID W. MCKEAGUE: Well time 13 value of money is a pretty well understood 14 concept that basically says you're applying a 15 discount rate depending on when a payment is 16 made. So nobody here seems to dispute that in 17 terms of a time value of money standpoint by the 18 time Dow gets all done they're supposed to have 19 contributed this \$2.35 billion. 20 That's phrased in terms of an 21 adjustment. So in other words at the end of the 22 period, 16-year period if I understand it 23 correctly, you make adjustments to make sure that 24 a certain cap isn't met. 25 The other term though is referred to as</p>
Page 4	Page 5
<p>1 a credit and every time that that credit 2 reference is made it seems to be referring to a 3 subsequent annual ceiling. Now it gets even more 4 complicated of course because it doesn't even 5 necessarily mean the next payment that's due. It 6 might mean a ceiling that's two or three years 7 down the road. 8 So your entire premise starts and ends 9 from the proposition as far as I can tell that an 10 adjustment used in one context is the same as a 11 credit which appears to be used in another 12 context. And I'm trying to figure out why you 13 believe they're the same. 14 DEBORAH GREENSPAN: Well mathematically 15 they are the same. When you refer to the 16 adjustment at the end of the 16-year period, you 17 were mentioning I think it's section 2.05 of the 18 funding payment agreement, that charges the 19 claims administrator with looking at the entire 20 stream of payments. It says all payments on the 21 date of receipt. That is supposed to be added up, 22 calculated on a net present value basis and then 23 the claims administrator is to compare that to 24 the cap. That's at the end of the program. 25 Now section 2.05 also says--</p>	<p>1 JUDGE RICHARD ALLEN GRIFFIN: Well 2 doesn't that insure that the total amount does 3 not exceed the \$2.35 billion? 4 DEBORAH GREENSPAN: It cannot assure 5 that. There are a couple of answers to that. It 6 cannot assure that because if you were entitled 7 to adjustments and credits because of payments 8 that were made earlier by the time you get to 9 year 16 there won't be a sufficient amount 10 remaining to be paid to allow that adjustment. 11 JUDGE RICHARD ALLEN GRIFFIN: Well can't 12 Dow Corning petition the Court when they think 13 that they've come to the cap for the net value 14 adjustment? I mean if Dow Corning thinks that 15 they've come to the cap 15 years down the road 16 they can petition, can't they? 17 DEBORAH GREENSPAN: Well, the section 18 2.05 that I've referenced before sets forth a 19 procedure for any party to request an adjustment 20 to be made. That is actually the provision that 21 we proceeded under in the District Court. 22 What you would be doing I think is 23 postponing this discussion to a later stage in 24 the program. 25 JUDGE RICHARD ALLEN GRIFFIN: How does</p>

1 that make any difference? If that protects Dow
 2 Corning from paying over the total \$2.35 billion
 3 what difference does it make?
 4 DEBORAH GREENSPAN: I think there are
 5 two answers to that. First is Dow Corning is
 6 being shown a payment stream and told these are
 7 the payments that you may have to make in each of
 8 these specific years. As a matter of planning,
 9 financial planning, and reserving, the company
 10 needs to understand what that payment stream is
 11 and it should be entitled not to have to wait and
 12 then argue about it at some point when it is
 13 irrevocable. There's nothing more that could be
 14 done. In addition--
 15 JUDGE DAVID W. MCKEAGUE: It's only
 16 irrevocable if you wait too long to petition to
 17 have the Court declare that you've satisfied your
 18 obligation. So if you make that argument, if
 19 that's your principle argument you've got a real
 20 problem with ripeness. That issue isn't even
 21 ripe. This gets more complicated because you
 22 seemingly interweave that argument with this
 23 credit argument and I can understand why if you
 24 were being asked to make an annual payment of X
 25 and you think it should be something different

1 because you didn't get a credit for having paid
 2 something at an earlier date on the time that it
 3 was due, but rather you paid it early, I can
 4 understand why that's ripe?
 5 But what's also mystifying about even
 6 that aspect of the case is am I correct that
 7 aside from the large initial payment, the \$985
 8 million, Dow hasn't been called upon to make any
 9 of the subsequent payments because the excess
 10 insurance payments that have been coming in that
 11 you're obligated to pay over to the trust within
 12 a very short period of time after you receive
 13 them have been adequate to satisfy all of the
 14 annual payments. Am I right about that?
 15 DEBORAH GREENSPAN: It is correct that--
 16 JUDGE DAVID W. MCKEAGUE: So then you
 17 can't be complaining about gee, we don't know
 18 what we're going to have to pay next and we don't
 19 know what to reserve for that next payment
 20 because you aren't making any payments.
 21 DEBORAH GREENSPAN: Well, in a very
 22 short period of time I believe there is the
 23 possibility that the residual amount of the fund
 24 would be used up and there would be payments
 25 made.

1 JUDGE DAVID W. MCKEAGUE: When would
 2 that be and how much is it?
 3 DEBORAH GREENSPAN: That is the subject
 4 of another dispute that's pending before the
 5 District Court right now that has to do with the
 6 payment of--
 7 JUDGE DAVID W. MCKEAGUE: Well why are
 8 you here talking about what may possibly sometime
 9 be a dispute about some unknown amount when
 10 you're in the District Court resolving that as we
 11 speak?
 12 DEBORAH GREENSPAN: That has to do with
 13 a separate payment that may or may not be
 14 required by the District Court to be made which
 15 would be a very large payment to claimants who
 16 have already received some benefits.
 17 But here we face I believe that the
 18 funding payment agreement requires that the
 19 claims administrator make ongoing adjustments in
 20 the stream of payments to reflect the amounts
 21 previously made. And you mentioned that you could
 22 understand that this would be an issue if right
 23 now we were facing a potential payment and it was
 24 not correctly calculated.
 25 Right now we have a payment stream that

1 the claims administrator has proposed to the
 2 District Court that we believe does not comport
 3 with this and would require payments that are
 4 not--
 5 JUDGE DAVID W. MCKEAGUE: Let me just
 6 stop you right there because I would suspect, I
 7 can't speak for the panel of course, but I would
 8 suspect the last thing this panel is going to do
 9 is to try to pretermite some other issue that
 10 you've submitted to the District Court that's
 11 clearly in the best position to be determining
 12 precise payment amounts. So I don't understand
 13 from your arguments' standpoint why we would even
 14 be interested in doing that.
 15 So if you divide your claim into two
 16 parts; what do we have to make on an annual
 17 basis. You say well maybe there's a problem on
 18 there, but that's being addressed by the District
 19 Court. The other part of your argument is gee, at
 20 the end we may have paid too much. But as Judge
 21 Griffin asked you, there is a provision in the
 22 agreement that's not mentioned in either of your
 23 briefs that says you can go back to the District
 24 Court and get your ultimate payment obligation
 25 resolved if you believe that you have or you are

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1 about to have paid too much.
 2 So it's very, very hard to see why
 3 Judge Hood was wrong in this case when part of it
 4 is already back in the District Court already and
 5 the other part neither seems to be ripe nor
 6 particularly even a case in controversy.
 7 DEBORAH GREENSPAN: I think maybe you
 8 misunderstood my statement about what's in the
 9 District Court. I think the question was you had
 10 asked whether we have used up, we haven't had to
 11 make additional payments and the residual amount
 12 in the fund, there are several things pending
 13 that if paid during 2013 would then trigger
 14 additional payments.
 15 The way this is structured is payments
 16 are then made in arrears. So the claims facility
 17 will send an invoice essentially to Dow Corning
 18 and say last month we spent X dollars, you now
 19 have to pay us that amount of money. What will
 20 happen is that as we move forward if in fact we
 21 get to this point where Dow Corning comes in and
 22 says we've now hit the cap, we can't pay anymore
 23 every claim that's now pending and sitting in the
 24 pipeline to be processed would not be processed.
 25 It's not just Dow Corning that needs to

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1 are to be adjusted.
 2 JUDGE DAVID W. MCKEAGUE: The end effect
 3 of which determines whether you owe money in a
 4 subsequent period or you don't.
 5 DEBORAH GREENSPAN: The size of the
 6 payment ceiling will tell us how much potentially
 7 could be owed in one annual period. We have
 8 annual funding periods. The payment ceiling is
 9 the limit of what Dow Corning can be asked to pay
 10 in that period. The claims administrator needs to
 11 adjust its payments to the claimants and Dow
 12 Corning needs to be able to plan its funding
 13 obligations based on those annuals.
 14 JUDGE DAVID W. MCKEAGUE: Well you can
 15 plan your funding obligations. Just do what the
 16 agreement says that you do. Sometimes you get a
 17 credit, sometimes you don't. That doesn't affect
 18 your planning. You just don't like what the
 19 agreement says.
 20 DEBORAH GREENSPAN: No, I think that's
 21 not--I think the agreement clearly mandates that
 22 there must be an adjustment that accounts for the
 23 time of receipt of every payment. That's what it
 24 says in 2.05. That's what it says when we set up
 25 the funding stream and the cap. And the annual

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1 understand this payment stream. The finance
 2 committee claims administrator needs to make sure
 3 they understand it because they have an
 4 obligation to adjust the payment levels to make
 5 sure that they don't overspend either on an
 6 annual basis or at the end of the program. So
 7 these caps are not--they're annual caps and
 8 there's an ultimate cap and there is an adjustment.
 9 We believe there should have been an adjustment
 10 made to the payment made in funding period three.
 11 The Claimants' Advisory Committee disputes that.
 12 That adjustment would be necessitated
 13 by the early payment of the initial payment that
 14 would flow through and require these payment
 15 adjustments so that the future stream--
 16 JUDGE DAVID W. MCKEAGUE: But all that
 17 does is determine how big your credit is that's
 18 carried forward into subsequent periods. You
 19 didn't pay any cash other than the initial
 20 payment. So it's not like you paid too much cash
 21 in addition to the insurance payments or not
 22 enough cash. All you're disputing as I understand
 23 it is a rolling forward credit basis.
 24 DEBORAH GREENSPAN: We are disputing the
 25 computation of the annual payment ceilings which

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1 caps which are created--
 2 JUDGE DAVID W. MCKEAGUE: It says you
 3 get a credit in the sense that you can describe
 4 time value of money as a credit. But the dispute
 5 here isn't whether you get it, it's when you get
 6 it. And so why don't you be thinking about that
 7 while we hear from your opposing counsel?
 8 DEBORAH GREENSPAN: Thank you.
 9 JEFFREY S. TRACHTMAN: Good morning.
 10 Jeffrey Trachtman for the claimant's advisory
 11 committee. I guess to pick up on what you were
 12 saying I think we do see a distinction between
 13 what is ripe and what is not ripe and what
 14 doesn't need to be decided. Ms. Greenspan
 15 referred to what we call the true up provision
 16 2.05 and I think that Your Honor is correct that
 17 the question of whether every little adjustment,
 18 every little payment needs to be accounted for
 19 now or the question of what happens where they
 20 claim a credit, but it's not expressly provided
 21 for in the plan can be brought to the Court's
 22 attention down the road.
 23 What is ripe now is the adjustments
 24 that they are or are not entitled to for the
 25 early years.

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1 JUDGE DAVID W. MCKEAGUE: But before you
 2 leave that as far as the true up at the end they
 3 say they need these credits now so that they
 4 don't pay too much. You say oh, we don't need to
 5 worry about that now, there's a true up at the
 6 end. They respond by saying yeah, but that true
 7 up at the end may come too late. So that's where
 8 the argument was left in the briefing. But there
 9 is another provision, as I mentioned before, that
 10 Judge Griffin mentioned that nobody cites that
 11 also says in addition to the automatic true up
 12 that occurs sometime down the road either party
 13 can come forward and ask the Court to declare
 14 that their obligations are fulfilled.

15 So why doesn't that respond to Dow's
 16 argument that would say the true up may come too
 17 late and we won't be able to clawback money?

18 JEFFREY S. TRACHTMAN: I think it does
 19 respond to that, but I think we still do need to
 20 know the effect of the initial payment and the
 21 accounting of the early insurance payments
 22 because their practical impact as the facility
 23 goes forward.

24 Right now what we're debating is when
 25 there is going to be determined to be enough of a

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1 the initial payment when it comes time to the end
 2 of the agreement they're going to get credit for
 3 having paid that early?

4 JEFFREY S. TRACHTMAN: They're not going
 5 to get credit for having paid it early because it
 6 wasn't paid early. We don't believe they're
 7 entitled to that credit. That issue is ripe--

8 JUDGE DAVID W. MCKEAGUE: Well it was
 9 clearly paid before the effective date.

10 JEFFREY S. TRACHTMAN: It was
 11 transferred from one restricted escrow into
 12 another restricted escrow with heavy
 13 restrictions. But the main point here, which I
 14 guess I'll now get back to sort of the beginning
 15 of my presentation, is that they're not entitled
 16 to time value credit for that because two parties
 17 cannot own the time value of the money at the
 18 same time. There is a specific negotiated
 19 provision, section 2.01 of the funding payment
 20 agreement, which assigns to the trust on a date
 21 certain, which was determined to be April 30,
 22 1999 it's the interest accrual date--

23 JUDGE DAVID W. MCKEAGUE: Well you say
 24 that two parties can't own the same rate at the
 25 same time. All right, that makes sense maybe. But

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1 cushion to pay the premium payments that were
 2 promised under certain circumstances to
 3 claimants. That's the fight we're having now in
 4 the District Court.

5 JUDGE DAVID W. MCKEAGUE: We're just
 6 taking this and dividing it into these two major
 7 issues. Are you going to overpay at the end? That
 8 seems to be addressed by the true up and the
 9 petition the Court provision in the agreement.

10 JEFFREY S. TRACHTMAN: Correct.

11 JUDGE DAVID W. MCKEAGUE: The other
 12 argument is basically we need to know about
 13 whether there is a time value credit in
 14 connection with the initial payment in so far as
 15 it effects subsequent annual ceiling payments.

16 JEFFREY S. TRACHTMAN: As well as the
 17 early--

18 JUDGE DAVID W. MCKEAGUE: That one seems
 19 to be ripe.

20 JEFFREY S. TRACHTMAN: That's ripe and
 21 the insurance issue is ripe although we
 22 substantially agree on the insurance. And we
 23 agree on the overwhelm--

24 JUDGE DAVID W. MCKEAGUE: Am I right
 25 that you don't disagree that even with respect to

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1 the stipulated discount rate that's used in the
 2 agreement is seven percent. What says that the
 3 amount the trust, whoever owned it at the time,
 4 earned on that initial payment was seven percent?
 5 It might have been more. It might have been the
 6 same. It might have been less.

7 So they don't necessarily even equal
 8 each other.

9 JEFFREY S. TRACHTMAN: That just goes to
 10 whether if they get this thing that they're
 11 asking for it completely wipes out the benefit of
 12 what we bargained for, it only partially wipes
 13 out the benefit. The point is that we
 14 contractually agreed to take the initial payment
 15 out of that calculation. The parties essentially
 16 agreed to treat the initial payment, at least
 17 \$905 million of it, as if it were paid on the
 18 effective date. There was a reason for that. Dow
 19 Corning bargained to have the date used to
 20 determine the net present value roll forward to
 21 whatever the ultimate effective date was. And so
 22 this net present value calculation is done as of
 23 2004.

24 That was a huge benefit for Dow Corning
 25 compared to--we made this deal in 1998. The net

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1 present value of that payment in 1998 is \$1.63
 2 billion. We negotiated for a hedge against that
 3 which is we want the time value of the initial
 4 payment. We want a date when we start getting the
 5 value of that. That was negotiated and in the
 6 brief Dow Corning tries to make it sound like
 7 that's all about the commercial committee
 8 dispute, but it's misleading.

9 Dow wanted our support for the
 10 commercial committee in the commercial committee
 11 interest appeal and they said if you support us
 12 and if we win we'll move up the interest accrual
 13 date one month. It will be March instead of
 14 April. And in the end it was determined to be
 15 April.

16 But the reason for the interest accrual
 17 date was that we bargained to get the time value
 18 of that chunk of money and take it out of the
 19 process. They're trying to undo that deal. That's
 20 the problem. The plan specifically contemplated,
 21 in section 7.4, that there might be--it says
 22 there may be an appeal challenging the release
 23 provisions or the funding provisions and if there
 24 is, and we know that can take years, we're going
 25 to pay the initial payment. It's going to go into

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1 why everybody needs to know that and that's
 2 ripe. I don't understand why the question of
 3 have you fulfilled your payment obligation is
 4 even properly before the Court. And that would
 5 include among it whether you get credit at all
 6 for having arguably paid the initial payment
 7 early.

8 JEFFREY S. TRACHTMAN: It's the same
 9 question because we're halfway through and so now
 10 we have an independent assessor who reports each
 11 year on the claims that have been paid, the
 12 claims they think are still going to come in,
 13 what are the risks that it will be higher or
 14 lower or what events might affect claim flow and
 15 they make a prediction about where it's going to
 16 come out. They predict out through the 16 years.

17 We look at that and we say this looks
 18 like they have a lot of money left over. We want
 19 to pay the premiums. We promised that we'd pay
 20 the premiums as long as it wouldn't threaten the
 21 base payments to the rest of the claimants. Dow
 22 Corning looks at it and say no, we think there
 23 are some risks here and we might bust the cap.

24 So you need to project out through the
 25 16 years and if they're going to get the time

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1 escrow so the tort claimants know they have the
 2 money in escrow. But it just goes from one
 3 restricted escrow to another restricted escrow.
 4 It couldn't be used to pay claims.

5 JUDGE DAVID W. MCKEAGUE: Let me phrase
 6 it a little bit differently and you tell me if
 7 I'm on the right track or the wrong track. You
 8 can look at what happens to that initial payment
 9 in terms of what credit they get for it or they
 10 don't get for it towards the \$2.35 billion. That
 11 it seems to me this Court doesn't need to reach
 12 because that's not an issue today.

13 What is an issue is whether they get
 14 this credit in connection with having arguably
 15 paid the initial payment early in connection with
 16 subsequent annual payment ceilings.

17 JEFFREY S. TRACHTMAN: I think it's the
 18 same thing.

19 JUDGE DAVID W. MCKEAGUE: It's not the
 20 same thing. One depends on how much you owe on an
 21 annual basis. The other depends upon when you add
 22 it all up whether you've fulfilled your payment
 23 obligation at the end. I understand why the first
 24 part of that, what you owe in the next annual
 25 payment and the payment after that, I understand

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1 value credit at the end of the day for this \$905
 2 million that we specifically bargained for us to
 3 get the time value credit that's going to affect
 4 very soon the ability to make payments. It
 5 affects those last eight years. So it is kind of
 6 the same question. You can't hold that in
 7 abeyance and say in year 16 oh it turns out they
 8 get a \$200 million credit. We need to know that
 9 in order to make the decision about premium
 10 payments.

11 JUDGE DAVID W. MCKEAGUE: My question
 12 wasn't taking into account both the money going
 13 in and the money going out and you're pointing
 14 out the money going out--the money being paid to
 15 satisfy claims.

16 JEFFREY S. TRACHTMAN: It all needs to
 17 be projected out in order for us to make these
 18 decisions.

19 JUDGE DAVID W. MCKEAGUE: All right.
 20 That answers my question. Thank you.

21 JEFFREY S. TRACHTMAN: Thanks. So I
 22 think I've sort of covered the point that we
 23 bargained for the time value of that money.

24 I think the other piece of it is that
 25 we don't view this money as strictly speaking

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1 being paid and that's another way of looking at
 2 it because it was just moved from one restricted
 3 escrow into another restricted escrow. The parties
 4 are sort of talking past each other in the brief a
 5 little bit on this point.
 6 But Dow Corning talks about how they
 7 gave up control of that money. The fact is they'd
 8 already given up control of the time value. It
 9 was in a restricted escrow and we were getting
 10 the benefit of that interest. By moving it into
 11 this other restricted escrow, they may have given
 12 up control, but that doesn't mean we got the
 13 control. The money could not be used to pay
 14 claims. So as a matter of contract, as a matter
 15 of court order--
 16 JUDGE DAVID W. MCKEAGUE: It might not
 17 have been available to pay claims, but it was
 18 available to pay all of the administrative
 19 expenses. You could take the money out for that
 20 without even seeking Dow's permission.
 21 JEFFREY S. TRACHTMAN: That's actually
 22 not true. That's an inaccurate statement in their
 23 brief. Every penny was negotiated, some of it was
 24 litigated. It was by court order. It was very
 25 carefully controlled. There was not this

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1 They also talk about the IRS ruling
 2 that they obtained that the payments would be
 3 qualified settlement trust payments. That ruling
 4 is based on a series of letters with all kinds of
 5 factual representations that are not in the
 6 record. It does perhaps explain why they needed
 7 to structure it so the escrow was within the
 8 trust. But that doesn't mean it was available to
 9 the settlement facility. It was still separated
 10 like any other escrow.
 11 JUDGE DAVID W. MCKEAGUE: What is your
 12 answer to the question that I asked Ms. Greenspan
 13 at the very beginning and that is why do some
 14 provisions in the agreement refer to a time value
 15 credit of a particular payment and others do not?
 16 She said oh, it doesn't really matter. They're
 17 all the same and because of the overriding
 18 limitation on what has to be paid at the end
 19 they're functionally the equivalent.
 20 JEFFREY S. TRACHTMAN: I think she's
 21 correct that this was cobbled together over a
 22 period of time so some of the inconsistencies in
 23 language may be explained that way. But I think
 24 it's also the case that the plan reflects a
 25 series of choices about when these credits are

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1 unbridled discretion that they describe in the
 2 brief. It's not true. Every nickel was fought
 3 over.
 4 If they want a time value credit for
 5 that \$40 million that's a different story, but
 6 the rest of the money was locked up. We couldn't
 7 touch it. It couldn't be used to pay claims and
 8 it could only be used to pay administrative
 9 expenses by court order. There is a whole series
 10 of court orders about that.
 11 Now they cite a New York statute, EPTL7-
 12 2.1, which is totally irrelevant. That says that
 13 when property is placed into trust the title on
 14 the property is with the trustee rather than the
 15 beneficiary. It does not deal with the effect of
 16 escrows.
 17 And the fact is you can have a
 18 situation where neither party really owns
 19 something. There is a decision actually by
 20 Justice Sotomayor when she was a District Judge where
 21 she talks about in that situation ownership is in
 22 stasis. It's neither the grantor nor the grantee.
 23 That case is 90 Commercial Street v. Goldberg,
 24 Bill F. Supp. 900, Southern District, '93 if you want to look
 25 it up.

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1 going to be made. They try to portray it as every
 2 time we spend a nickel ahead of time we get an
 3 adjustment right away. It's not the way the plan
 4 is structured.
 5 You see in the funding payment
 6 agreement there are a couple of provisions for
 7 the insurance paid early on, 2.01 and 2.02, where
 8 you do get an adjustment sort of in realtime.
 9 Then you have section 2.03 which deals with the
 10 excess insurance where the parties knew there
 11 could be a huge impact and they said well, there
 12 should be a credit here, but if you have it hit
 13 all at once it's going to screw up our cash flow.
 14 So let's plan it out and we'll do it in years
 15 five, six, seven and eight.
 16 Then you have some provisions that
 17 they're claiming credits for that there is no
 18 provision at all. We would say that's for the
 19 true up and that's not ripe. But look at--
 20 JUDGE DAVID W. MCKEAGUE: Interestingly
 21 enough if you're looking for a provision in the
 22 agreement that refers to a time value credit
 23 definitionally the only provision I can even find
 24 is one that speaks to excess insurance payments.
 25 I couldn't find a provision that specifically

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1 even talks about a time value credit for
 2 something other than an excess insurance payment.
 3 JEFFREY S. TRACHTMAN: That's correct
 4 and frankly that is one of the most powerful
 5 arguments we think that the initial payment was
 6 not contemplated to generate a time value credit.
 7 Because if there was anything that was--
 8 JUDGE DAVID W. MCKEAGUE: But under that
 9 argument no subsequent payment, no payments of
 10 cash would get a time value credit because
 11 they're not excess insurance payments. But you're
 12 not making that argument.
 13 JEFFREY S. TRACHTMAN: No, but there's--
 14 JUDGE DAVID W. MCKEAGUE: So you seem to
 15 concede that well maybe sometime you make a cash
 16 payment you get a credit, maybe sometimes you
 17 don't even though the definition seems to limit
 18 time value credits to only insurance payments.
 19 JEFFREY S. TRACHTMAN: Well certainly
 20 2.01 and 2.02, I don't know if they use exactly
 21 time value credit, but it's quite clear that
 22 they're talking about the same kind of
 23 adjustments for insurance that's received before
 24 the effective date and paid in the first 90 days.
 25 Everybody agrees about that. What we don't agree

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1 spreads it out. I think it's 50 percent in year
 2 five and then smaller percentages in years six,
 3 seven and eight. That was very carefully
 4 negotiated because of the large size of that
 5 payment. What I'm saying is that if the parties
 6 had anticipated--everybody knew that there could
 7 be a delay for the appeal. Everybody knew that
 8 this situation could happen. Maybe we didn't
 9 quite expect 2004, but we knew there could have
 10 been a large delay. If the parties had it in
 11 their head that that escrowed money was going to
 12 get a time value credit it would have been
 13 negotiated expressly and it would have been
 14 treated similar to the excess insurance. It would
 15 have been spread out over several years.
 16 JUDGE DAVID W. MCKEAGUE: So your
 17 argument on the initial payment, which is clearly
 18 where the bulk of the money is in terms of the
 19 dispute before the Court today, your argument is
 20 two-fold. One is they don't get a time value
 21 credit for that money at all because it was
 22 bargained away and the other argument is surely
 23 even if they do get a credit at the end they
 24 don't get it in connection with the annual
 25 payment ceilings because if they're right and

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1 about is whether the time value credit gets
 2 carried past the first year. But we agree on
 3 about \$100 million worth of credits out of \$150
 4 leaving aside the initial payment.
 5 But look at the initial payment. If
 6 that had been contemplated to generate a time
 7 value credit it would have been expressed. It
 8 would have been in there. We would have talked
 9 about. We would have fought about it and we would
 10 have figured out a way to spread out the impact
 11 over those years. That's very powerful evidence
 12 to me that nobody thought there was going to be a
 13 time value credit for the initial payment.
 14 JUDGE DAVID W. MCKEAGUE: When you say
 15 spread out the impact is what you're referring to
 16 there the fact that you don't get credits
 17 necessarily in the next annual ceiling?
 18 JEFFREY S. TRACHTMAN: Yes, it could
 19 have been done--
 20 JUDGE DAVID W. MCKEAGUE: Because one
 21 payment if I remember right says if you make it
 22 early you don't get it until the fifth annual
 23 payment or fifth ceiling or something like that.
 24 JEFFREY S. TRACHTMAN: I'm referring to
 25 the excess insurance provision which I think it

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1 they're entitled to it and you're wrong that you
 2 wouldn't have agreed that they got the credit
 3 right away. It would have been phased in over a
 4 period.
 5 JEFFREY S. TRACHTMAN: Well I think
 6 that's evidence to support the first point which
 7 is that it was never intended. I think some of
 8 the smaller credits and some of the things that
 9 aren't referred to specifically in the plan can
 10 be dealt with under the true up or under the
 11 other provision.
 12 JUDGE RICHARD ALLEN GRIFFIN: Under
 13 the what?
 14 JEFFREY S. TRACHTMAN: The true up
 15 provision of 2.05 or the other provision that
 16 Your Honor cited about petitioning the Court and
 17 those issues are not ripe. I think the issue of
 18 the initial payment though is ripe. We do need
 19 to know if there's an adjustment for that and
 20 it's quite clear the parties intended for the
 21 time value of that money to be locked in for us
 22 as of 1999.
 23 JUDGE DAVID W. MCKEAGUE: Judge
 24 Batchelder, did you have any questions?
 25 CHIEF JUDGE ALICE M. BATCHELDER: I

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1 guess I'm still trying to figure out how anybody
 2 reconciled the specific provision that was paid
 3 on the initial payment. It was not [UNINTEL] with
 4 regard to net present value. How that and this
 5 dispute about the time value credit can exist
 6 [UNINTEL].
 7 JEFFREY S. TRACHTMAN: Well from my
 8 point of view I think that our view is the only
 9 one that harmonizes section 2.01 which gives us
 10 the time value of that money, section 7.4 which
 11 says the money may well be transferred pending
 12 the effective date from one escrow to another
 13 that we think that was intended to have no
 14 economic consequences and the parties essentially
 15 agreed to treat the initial payment as if it were
 16 paid on the effective date. We think that
 17 harmonizes with the overall \$2.35 billion and
 18 that the time value credits are really focused on
 19 the fact that Dow Corning had to spread the money
 20 out over time in the future and so we had a
 21 payment schedule of about \$3.12 billion which was
 22 timed out to net present value back to \$2.35. And
 23 the parties did not intend that the initial
 24 payment would carry. That's how we harmonize it.
 25 Ms. Greenspan has a different view, but she gets

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1 effective date. That's simple. If it was paid on
 2 the effective date we wouldn't be here. The net
 3 present value and the nominal value of that
 4 payment would equal the same and then the payment
 5 stream in the future would reflect payments that
 6 occurred after that.
 7 But in fact there was a lengthy dispute
 8 and the payment was made three years before the
 9 effective date. And while Mr. Trachtman suggests
 10 that the control over that payment did not
 11 actually go to the Claimants' Advisory Committee,
 12 the control has never gone.
 13 JUDGE DAVID W. MCKEAGUE: But it still
 14 doesn't answer from my perspective why you knew
 15 to put in language about getting time value
 16 credit with respect to some payments and then
 17 somehow you just forgot in terms of either \$905
 18 million or \$985 million if we add together these
 19 two initial payments?
 20 DEBORAH GREENSPAN: I think there is a
 21 question of timing. The document, all of the
 22 language that you see about the excess insurance
 23 proceeds where the term time value credit is
 24 defined for the only time was negotiated in 1999.
 25 This was before, all of these events occurred

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1 her three minutes now to explain that.
 2 JUDGE DAVID W. MCKEAGUE: All right.
 3 Thank you. Ms. Greenspan?
 4 DEBORAH GREENSPAN: Thank you. There
 5 have been a lot of points raised in the last few
 6 minutes. I'll start with the last one which is
 7 the provision that the only exclusion to the
 8 requirement that there be a net present value
 9 adjustment to reflect the time of receipt of all
 10 payments is this exclusion that was just
 11 mentioned--that the interest accrued from the
 12 interest accrual date does not count in terms of
 13 it doesn't get a net present value credit. It
 14 doesn't count towards computing the \$2.35
 15 billion.
 16 If any other payment was to be excluded
 17 we could have said so. This document doesn't
 18 exclude the initial payment. It doesn't exclude
 19 anything from the computation of the total net
 20 present value of the aggregate amount of funding.
 21 Now the way this was structured was,
 22 and if you look back at the version of the
 23 document that existed at the time of the
 24 confirmation of the plan, the contemplation was
 25 the initial payment would be paid on the

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1 before all of the appeals occurred.
 2 In 2001 when there was a request by the
 3 Tort Claimants' Committee to fund the initial
 4 payment the case was still in the appellate
 5 process and at that point we had one document
 6 which was the depository trust agreement that was
 7 an active document. That document was created for
 8 the purpose of controlling the payment that being
 9 requested in advance of the effective date.
 10 In that document the statement was made
 11 that none of this affects the computation of the
 12 net present value of the entire payment stream.
 13 So it was intended to have no effect.
 14 When we got an order from Judge Hood in
 15 April of 2004 stating that the effective date
 16 would occur on June 1st of 2004 at that point the
 17 parties had to deal with a number of pending
 18 disputes so that the plan could go effective.
 19 There was a concern that there not be extensive
 20 amendments to the documents that had existed as
 21 of the date of the confirmation order. That if we
 22 were to submit documents at that time to the
 23 Court that showed a significant amount of changes
 24 it could raise concerns or perhaps even a dispute
 25 about whether there had been a material change to

1 the document.
 2 So it wasn't a question of forgetting.
 3 It was a question of we thought that this was
 4 already addressed. It was addressed adequately
 5 and appropriately in the mandatory requirement
 6 that the net present value of the funding stream
 7 equaled \$2.35 billion and not more and not less.
 8 And throughout the funding payment agreement at
 9 every juncture it talks about adjusting the
 10 annual payment ceilings to make sure that any
 11 given point in time that stream does not exceed
 12 \$2.35 billion.
 13 JUDGE DAVID W. MCKEAGUE: All right.
 14 Thank you very much. The case will be submitted.
 15 Judge Batchelder will be signing off. Thank you.

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1 Gotham Transcription states that the preceding
 2 transcript was created by one of its employees
 3 using standard electronic transcription equipment
 4 and is a true and accurate record of the audio on
 5 the provided media to the best of that employee's
 6 ability. The media from which we worked was
 7 provided to us. We can make no statement as to
 8 its authenticity.

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 10 Attested to by:
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 13 Sonya Ledanski Hyde

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