

Case No. 11-2632

**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**

**RESPONSE OF DOW CORNING CORPORATION TO APPELLEE'S
PETITION FOR REHEARING AND REHEARING *EN BANC***

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Rehearing of the Opinion issued on March 8, 2013 (the “Decision”) is neither appropriate nor necessary. It is not appropriate because the CAC’s Petition does not satisfy the rigorous and limited criteria demanded by the Federal Rules and the Sixth Circuit rules for rehearing by the panel that rendered the Decision (the “Panel”) or for rehearing *en banc*. It is not necessary because the Decision correctly decided that the specific issue noted by the CAC can and should be addressed by the district court in the first instance.¹

The issue below and on appeal was the extent to which the time value of various early payments made by Dow Corning should be applied as a credit to adjust certain Annual Payment Ceilings. Dow Corning’s position was that such Time Value Credits were necessary to preserve the net present value funding cap mandated by the Plan. Both the district court and this Court held that Dow Corning was entitled to Time Value Credits only in certain circumstances where the Funding Payment Agreement expressly stated that a Time Value Credit was to be applied to adjust a particular payment ceiling. Both the district court and this Court distinguished between a Time Value Credit and the net present value adjustment that is required to preserve the funding cap. Both courts agreed that

¹ The arguments herein apply equally to the CAC’s alternative request that the Court reissue its opinion by deleting Section II.F. Moreover, deleting that section would simply leave the issue unstated rather than actually resolving it.

Dow Corning is entitled to net present value adjustments to assure the \$2.35 billion net present value cap, but rejected Dow Corning's argument that net present value adjustments are the same as Time Value Credits.

The district court did not address the mechanism for protecting the absolute net present value funding cap, but rather noted that it was first necessary to obtain calculations from the Claims Administrator. This Court similarly concluded that Time Value Credits are not necessary to protect the funding cap because other provisions of the Funding Payment Agreement perform this function. Contrary to the CAC's assertion in the Petition, this Court properly declined to address the issue of whether a net present value adjustment should be applied to the Initial Payment before the district court has an opportunity to consider it in the first instance.

I. THE EXACTING STANDARD FOR *EN BANC* CONSIDERATION HAS NOT BEEN MET

“A petition for rehearing *en banc* is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent.” 6 Cir. I.O.P. 35(a). Rehearings *en banc* are granted only in “the rarest of circumstances.” *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Kethledge, J., concurring in the denial of a rehearing *en banc*). Moreover,

“The decision to grant *en banc* consideration is unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel. Such a determination should be made only in the most compelling circumstances.”

Id. (quoting *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243-44 (D.C. Cir. 1987)) (Edwards, J., concurring in the denial of rehearing *en banc*). It thus is not surprising that this Court decided just three cases *en banc* in 2012.²

The Decision does not present any compelling circumstance warranting *en banc* review. It does not conflict with binding precedent, and the “error” claimed by the CAC is neither precedent-setting nor of exceptional public importance. Rather, the alleged error relates to “the facts of the case,” which precludes a rehearing *en banc*. 6 Cir. I.O.P. 35(a).

II. THE CAC’S ALLEGATION OF PANEL ERROR IS INCORRECT

A Panel rehearing is equally inappropriate. The CAC’s contention that rehearing is warranted is not based on any clear error of fact or law. Instead the CAC contends essentially that the Panel misunderstood the decision of the district court and erred in deciding that the issue of a net present value adjustment for the Initial Payment was not argued below and resolved in the first instance by the

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<http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S01Sep12.pdf>

district court. The Panel noted expressly that the issue presented to the district court and to the Panel was the mechanism for adjusting Annual Payment Ceilings and not the process for determining the net present value of each payment for purposes of determining whether the aggregate cap had been reached. The district court's opinion expressly states that the argument that the funding cap would be exceeded if the Annual Payment Ceilings were not adjusted to reflect a Time Value Credit was speculative, and that any analysis of this issue must await calculations of the Claims Administrator.³

This appeal arose out of Dow Corning's request that the Annual Payment Ceilings that govern its funding obligations be adjusted to account for the time value of various payments made in advance of the funding schedule outlined in the Funding Payment Agreement. Dow Corning argued that the only way to ensure that it does not pay more than the Plan's absolute \$2.35 billion net present value funding cap is by applying Time Value Credits to the Annual Payment Ceilings. *See, e.g., Dow Corning Br., pp. 9, 27-28.* Dow Corning maintained that the Funding Payment Agreement referred to these adjustments as "NPV [net present

³ Since the time of the district court's decision, the Claims Administrator issued its calculations of the Annual Payment Ceilings. Dow Corning's objections to those calculations are currently pending before the district court. *See RE #882, Dow Corning Corporation's Motion to Reject Report of Claims Administrator of its Calculations of Time Value Credits of Certain Insurance Proceeds and Adjustment of Annual Payment Ceilings.*

value]” or “Time Value Credit” adjustments, and that those terms were “synonymous.” *Id.*

Both the district court and the Panel disagreed, finding that net present value adjustments and Time Value Credits are distinct concepts. Both courts also concluded that it was not necessary to apply a Time Value Credit to Annual Payment Ceilings to protect the absolute funding cap, as long as net present value adjustments were applied (*i.e.*, calculating the net present value of each payment as of the Effective Date). Specifically, the district court concluded:

Dow Corning is entitled to Net Present Value adjustments, which are also at a discount rate of 7% per annum. Dow Corning’s motion attempts to “lump” together both the Net Present Value rate and the Time Value Credit rate—meaning that Dow Corning is entitled to both. The FPA only mentions Time Value Credit in certain instances, as noted above. Dow Corning is not entitled to Time Value Credit, other than as specifically noted above. . . . Dow Corning argues that without applying the Time Value Credit, Dow Corning’s funding of the Plan will exceed the \$2.35 billion cap Net Present Value. The Claims Administrator has not made a determination on the Annual Payment Ceiling, therefore, this argument is speculative at this time, although certain ongoing calculations have been made and presented to the Court as to the Net Present Value issue.

RE #836, 11/28/11 Order, p. 16.

This Court reached the same conclusion:

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.”

Decision, p. 13.

The Decision affirmed the district court’s ruling and provided a more detailed rationale. In so doing, the Panel explicitly noted the outstanding issue of whether Dow Corning is entitled to a net present value adjustment for the early payment of the Initial Payment. The district court determined generally that “Dow Corning is entitled to Net Present Value adjustments,” but did not decide how the net present value adjustment would be applied to pre-Effective Date payments.

The CAC acknowledges that there is no specific language in the district court’s opinion or in the parties’ briefs addressing whether Dow Corning is entitled to a net present value adjustment for the Initial Payment. The CAC contends only that the district court “implicitly” rejected such an adjustment. CAC Pet. pp. 3, 12. The CAC is incorrect. The district court did not implicitly address or decide (nor did the parties raise there) the issue of a net present value adjustment for the Initial Payment; nor was that issue subsumed in or necessary for the district court’s denial of a Time Value Credit for the Initial Payment. Thus, the Panel appropriately

determined that it should have the benefit of an express ruling from the district court addressing Dow Corning's entitlement to a net present value adjustment for the Initial Payment before addressing the issue.

III. THE CAC'S ASSERTION THAT REHEARING IS NECESSARY MISSTATES THE NATURE OF ISSUES PENDING IN THE DISTRICT COURT

The CAC mischaracterizes the intent of the Time Value Credits motion. The purpose of the motion was not, as the CAC asserts, "to resolve a contingency affecting the availability of funding for Premium Payments." *Id.* at 3.⁴ Rather, the purpose was to determine the proper methodology for calculating the amounts Dow Corning could be required to pay under the Annual Payment Ceilings and still protect the \$2.35 billion net present value cap. CAC Pet. Ex. B (12/4/12 Oral Argument), p. 6. As the motion recounts, Dow Corning had requested the application of Time Value Credits to adjust the Annual Payment Ceilings in correspondence to the Claims Administrator in 2004, long before the issue of Premium Payments was even under consideration. Dow Corning filed the Time Value Credits motion after attempts to resolve the issue proved unsuccessful. Resolution of the mechanism for adjusting the Annual Payment Ceilings was and is important to Dow Corning (which must plan for potential future funding

⁴ Similarly, the CAC has no basis for asserting that the district court decided this motion in order "to facilitate approval of Premium Payments." *Id.* at 2-3, 12.

requests) and the Finance Committee (which must prepare annual budgets related to cash flow).

The CAC claims that the “exceptional importance” necessitating rehearing *en banc* is that resolution of the pending Premium Payments motion could be delayed if this Court does not decide now whether Dow Corning is entitled to a net present value adjustment for its early payment of the Initial Payment. This simply does not qualify as an issue of “exceptional importance” within the meaning of the Federal Rules and the rules of this Court, but even if it did, the Premium Payments motion does not hinge on this issue.

Premium Payments are supplemental payments to eligible claimants, who as of the time the Premium Payments motion was filed had already received over \$1 billion in base payments from the Settlement Facility. The Plan does not promise that Premium Payments will be paid at any specific time, or even that they will be paid at all. Rather, Premium Payments are “Second Priority Payments” that may be paid only if and when all First Priority Payments – including those due to claimants who file claims up until the filing deadline in 2019 – are “assured.” *See* RE #714-7, Settlement Facility and Fund Distribution Agreement, § 7.01(c)(iv).

Thus, Premium Payments may be made after all claims are filed and evaluated, or when and if the district court has sufficient data to determine the number, timing and value of additional claims that may be filed by the filing

deadline. The Premium Payment briefing was accompanied by calculations and assumption-based projections regarding the number and nature of future claim filings. The issue of a net present value adjustment for the Initial Payment does not affect those projections; rather, it is relevant to cash flow and the timing of available assets. Resolution of whether Dow Corning is entitled to a net present value adjustment for its early payment of the Initial Payment will not resolve the analysis of the liquidated value of future claims that is pertinent to the Premium Payment issue.

The Finance Committee filed the motion to authorize the distribution of Premium Payments more than a year and a half after Dow Corning filed the Time Value Credits motion. The motion seeks approval to distribute Premium Payments regardless of the outcome of the Time Value Credits motion. That is, the motion's proponent does not assert that the distribution of Premium Payments hinges on any decision regarding Time Value Credits or net present value adjustments for pre-Effective Date payments. RE #814, Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments, p. 10. While the CAC now argues that failing to resolve the net present value adjustment issue "may materially affect the timing of Premium Payments" (CAC Pet. p. 2), it argued in the lower court that Premium Payments could be paid irrespective of this issue. *See, e.g.*, RE #848, Reply of Claimants' Advisory

Committee in Further Support of Finance Committee’s First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments, pp. 2, 5. The CAC cannot credibly argue that its Petition presents an issue of “exceptional importance” to the Premium Payments motion when it has argued in the district court that the outcome of the Time Value Credits motion (and this appeal) is immaterial to that motion.

Moreover, the potential delay of an arguably-related motion does not justify the drastic departure from the fundamentals of appellate procedure that the CAC requests. Nor does the CAC cite any authority for such a proposition. Granting rehearing simply because a party claims it might avoid delay would actually have the opposite effect: endless re-litigation and a needless waste of judicial resources.

IV. CONCLUSION

For the foregoing reasons, Dow Corning Corporation respectfully suggests that the Court should deny the CAC’s Petition for Rehearing.

Dated: April 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 8, 2013, I electronically filed a copy of the foregoing Response of Dow Corning Corporation to Appellee's Petition for Rehearing and Rehearing *En Banc* with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

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