UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	§	
	§	**CASE NO. 00-CV-00005-DPH**
DOW CORNING CORPORATION,	§	**(Settlement Facility Matters)**
	§	
REORGANIZED DEBTOR	§	**Hon. Denise Page Hood**

THE FINANCE COMMITTEE'S REPLY TO DOW CORNING'S OPPOSITION TO THE FINANCE COMMITTEE'S FIRST AMENDED RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE PARTIAL PREMIUM PAYMENTS

The Finance Committee files this reply to the Opposition of Dow Corning Corporation, The Debtor's Representative and the Shareholders Response to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments (the "Opposition"). (Dkt. 826.) Nothing in the Opposition changes the Finance Committee's Recommendation. While the Finance Committee does not believe a point-by-point rebuttal is necessary, the Finance Committee believes that the Opposition should not sway the Court for eight reasons.

First, under the express language of the Settlement Facility Agreement, Premium Payments should be approved if "**adequate provision has been made to assure payment**" of First Priority Payments. The Opposition ignores the "adequate" modifier of "assurance" and incorrectly asserts that First Priority Payments must be "assured." This contention is belied by the documents and Dow Corning's past statements. In its disclosures, Dow Corning described when Premium Payments would be made, stating that "such payments would be made if funds are available after payment of all First Priority Payments is adequately assured." New York courts have construed "adequate assurance" in the analogous context of assuring performance of executory contracts in a bankruptcy as meaning reasonable assurance. The Court should follow

the standard applied in those cases. Further, if the Court determines that the standard is strict assurance of payments as the Opposition suggests, then it may be that Premium Payments cannot be made until the Facility ends or Dow Corning agrees to make such payments.

Second, under New York law, in a motion such as this, none of the parties has the burden of proof. This is not an adversarial proceeding, and the terms of the Settlement Facility Agreement require the Recommendation to be submitted to and decided objectively by the Court. Put simply, this is not a situation in which the Finance Committee has filed a motion seeking affirmative relief.

Third, the Finance Committee supports making the Increased Severity Payments on similar terms to those in the Recommendation. It, however, may be premature to make such payments at this time because of some uncertainties as to the amounts of those payments. Nevertheless, it is clear that if Premium Payments are expanded to include Increased Severity Claimants as suggested in the Opposition, that expansion will not materially affect the solvency of the Settlement Fund. It also is clear that the Court is not required at this time to make Second Priority Payments to all classes of claimants at the same time. The Settlement Facility Agreement clearly provides that "some portion" of Second Priority Payments can be made when appropriate. This fact is amplified by the fact that the Court previously has approved (with Dow Corning's agreement) Second Priority Payments to certain claimant classes but not to others.

Fourth, the Court is entitled to consider available assets in the Litigation Fund when it determines whether adequate provision has been made to assure First Priority Payments. This adds at least $350 million NPV to the $68-82 million NPV conservatively calculated surplus provided by the Recommendation.

Fifth, an additional $200 million NPV can be added to the amounts expected to remain in the Settlement Fund after Premium Payments as a result of the Court's November 28, 2011, Order Regarding Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents. (Dkt. 836.) The total surplus now exceeds $600 million NPV.

Sixth, the opinion evidence in the Opposition is not permitted by the Settlement Facility Agreement and the purported evidence should not be considered.

Seventh, even if the evidence is considered, the opinion evidence is based upon fundamentally flawed assumptions and facts that do not exist.

Eighth, the experience of other settlement funds, governed by different terms is not relevant to the determination before the Court.

I. ARGUMENT & AUTHORITY

A. The Standard Is "Adequate Assurance," Not "Assured".

The standard for making Premium Payments is set out in the Settlement Facility Agreement. Section 7.03(a) of the Settlement Facility Agreement provides that Second Priority Payments, or some portion thereof, may be paid when "**adequate** provision has been made to **assure** such payment" of First Priority Claims. (Stlmt. Fac. Agrmt. § 7.03(a) (emphasis added).) Section 7.01(c)(iv) reiterates that Second Priority Payments can be made when "**adequate** provision has been made to **assure…** payment" of First Priority Claims. (*Id.* (emphasis added).) Section 7.01(c)(v) goes even further, stating that nothing in the Settlement Facility Agreement "shall be interpreted as limiting the discretion of the Finance Committee with the approval of the District Court to pay lower priority payments and higher priority payments contemporaneously, so long as the ability to make timely payments of higher priority claims is **reasonably assured**." (*Id.*)

It is improper to ignore the word "adequate" that appears twice in the Settlement Facility Agreement. (*See* Opposition at 7 ("Such payments may not be made '***unless and until***' this Court determines that payment of all other allowable First Priority Claims' and litigation Payments is **assured.**") (emphasis and modification in original).) The Opposition omits the modifying language to suggest that payment of First Priority Claims must be "assured" in an insurance-like manner before Second Priority Payments can be made. The Finance Committee believes that this is incorrect. In fact, if the standard is actual assurance as the Opposition suggests, it is likely that Premium Payments could not be made until the end of the Facility or until Dow Corning determined such payments were appropriate.

As this Court recently reiterated, under long-settled Sixth Circuit law, if a contract provision is unambiguous, the contract is to be enforced as written. *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006) (*quoted in* Dkt. 836.). There is no ambiguity about whether First Priority Payments must be "assured" versus "adequately assured" for Second Priority Payments to be authorized under the Settlement Facility Agreement: the parties specifically qualified "assured" with "adequate" not once, but twice.

The Opposition's contention that absolute assurance is required is belied by Dow Corning's previous statements. When it was seeking approval of its reorganization, Dow Corning, along with the Official Committee of Tort Claimants, filed an Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization ("Joint Disclosure"). (*See* Relevant Pages attached as Exhibit P.) In that Joint Disclosure, Premium Payments are discussed. (*See Id.* at 4 & n. 3.) Dow Corning, at that time, stated that "[t]hose payments designated as **"Premium"** payments, also called **"Second Priority Payments,"** will

be made only if funds are available after payment of all First Priority Payments is **adequately assured**." (*Id.* at n. 3 (first and second emphasis in original).)

"Adequate assurance" has been construed in a number of reported New York cases. *See In re M. Fine Lumber Co., Inc.* 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008); *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985); *In re Res. Tech. Corp*., 624 F.3d 376, 384 (7th Cir. 2010); *see also Enron Power Mktg., Inc. v. Nevada Power Co*., No. 01-16034 (AJG), 2004 WL 2290486, at *6 (S.D.N.Y. Oct. 12, 2004). Those cases are controlling. Although the standard articulated in the Settlement Facility Agreement contains the phrase "provision has been made to" in between the words "adequate" and "assurance," as Dow Corning implicitly agreed to in its Joint Disclosure, no meaningful modification of the phrase is effected by those connecting words. A fair reading of the Settlement Facility Agreement and the Disclosure indicate that the intended standard is "adequate assurance," a phrase that has been construed in a number of contractual contexts, including bankruptcy.

The Opposition contends that the Court should ignore the New York adequate assurance cases cited in the Recommendation because some of them deal with executory contracts and, according to the Opposition, that makes them irrelevant. But bankruptcy cases deciding whether a trustee has provided adequate assurance that a debtor can meet its obligations under an executory contract are entirely analogous to this situation, where the question before the Court is whether there is adequate assurance that First Priority Claims will be paid if the Recommendation is authorized. Notably, New York courts have held that pre-bankruptcy settlement agreements requiring continued performance as part of a bankruptcy plan **are** executory contracts. *See In re Worldcom, Inc.*, 343 B.R. 486, 492-493 (Bankr. S.D.N.Y. 2006)

(holding a pre-bankruptcy settlement agreement was an executory contract and defining an executory contract as one on which post-bankruptcy performance remains due to some extent).

While the cases in the Recommendation are on point, those in the Opposition are inapposite. None of the cases the Opposition cites even mention "adequate" and "assurance" in the same sentence, much less interpret the interplay of the two terms used together. *Davenport* is a negligence decision from 1868 that addressed the proper jury instructions for a contributory negligence claim by a legally blind plaintiff. *See Davenport v. Ruckman,* 37 N.Y. 568 (1868). That case actually held that a nearly-blind woman could recover against a premises owner because, despite her blindness, she could see well enough to provide "reasonable assurance" that she could have safely walked the streets if not for the premises defect. *Davenport,* 37 N.Y. at 568.

In re Picard's Estate is a 1953 decision permitting the executor of a trust to invade the trust's corpus to make required annual payments when the interest earned by the trust was insufficient, and the purpose of the trust was to "assure" that the yearly payments were made, not to preserve the corpus. *In re Picard's Estate*, 125 N.Y.S.2d 84, 85 (N.Y. Sup. Ct. 1953).

In *CBS Inc.*, a dispute over representations in an acquisition, the court evaluated the term "warranty" in a purchase agreement. *CBS Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496, 503 (1990). The court determined that a warranty was the kind of assurance that can actually be relied upon, as opposed to the kind of assurance that cannot. *Id*.

In re Holly discusses when relief from an automatic bankruptcy stay is appropriate. *See* 140 B.R. 643, 702 (Bankr. W.D. Mich. 1992). The meaning of the term "assured" is explored in the context of the debtor's required showing of successful reorganization. *Id*. at n.98. The case

simply contains a footnote to a dictionary definition of the word "assure." *Id*. There is no analysis that applies to the instant matter.

In short, none of the cases cited in the Opposition provides any guidance as to how to determine whether, under the Recommendation, "**adequate** provision has been made to **assure** such payment" of First Priority Claims.

The phase adequate assurance is, however, not without scholarly explanation. Williston explained:

> The phrase "adequate assurance of future performance" is not defined by the Bankruptcy Code, but the courts have given the phrase a practical, pragmatic construction based on the circumstances of the case. The assurance that is necessary in any particular case, in order for it to be deemed adequate, falls considerably short of an absolute guarantee. However, although an absolute guarantee of future performance is not required before assumption of a contract or lease will be approved, more than a mere speculative plan is necessary. Thus, adequate assurance of future performance under an unexpired lease or executory contract will be found when the assurance makes the future performance likely, that is, more probable than not.

SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 78:54 (4th ed. 1993 & Supp. 2010). That is the standard that should be applied to the Recommendation.

B. <u>None Of The Parties Has The Burden Of Proof.</u>

It also is incorrect to claim that the Finance Committee has the burden of proof. The Opposition cites *In Re Grossman*, a New York case construing the burden of proof in a mandamus case brought by public lawyers seeking to reverse the New York Civil Service Commission's determination that certain lawyers should be exempt from the "competitive" class of public servants. (*See* Opposition at 11 (citing *In Re Grossman v. Rankin*, 373 N.E.2d 267, 271 (N.Y. 1977)).) That case contains dicta stating the "general rule" in such cases is that a movant seeking affirmative relief has the burden of proof. *Id*.

That case in inapplicable. Under New York law, neither party bears the burden of proof where a motion is made in a non-adversarial proceeding or where a particular kind of finding or determination must be made or approved by a court. *See In Re Cohen*, 636 N.Y.S.2d 994, 996-997 (N.Y. Sup. Ct. 1995) (holding neither party had the burden of proof as to validity of independent valuation recommendation made in corporate dissolution proceeding because the Court was duty-bound to determine the value of the shares before the dissolution could occur); *Newburgh Urban Renewal Agency v. Williams*, 361 N.Y.S.2d 842, 847 (N.Y. Sup. Ct. 1974); (holding neither party had the burden to prove valuation in condemnation proceeding because there is no burden of proof where "the parties are not adversaries and therefore neither party should have a greater burden of proof than the other").

That is the case with the Premium Payments determination. Section 7.03(a) of the Settlement Facility Agreement requires the Finance Committee to file a recommendation and motion with the Court requesting authorization to distribute full or partial Premium Payments. The Court is then to consider the recommendation and determine whether there is in fact adequate provision that First Priority Claims will be paid in light of available assets. (*Id.* §§ 4.01; 4.08(b)(ii); 6.01(a); 7.03(a).) The Finance Committee has nothing to gain by the Recommendation, and neither the Finance Committee nor anyone else has the burden of proof as to its merits. *See In Re Cohen*, 626 N.Y.S.2d at 996-997; *Newburgh Urban Renewal Agency*, 361 N.Y.S.2d at 847.

C. The Finance Committee Has No Objection To Making Increased Severity Payments, But The Court Is Not Required To Make All Second Priority Payments Simultaneously.

The Finance Committee has no objection to the Court's authorization of 50 percent Increased Severity Payments should the Court opt to modify the Recommendation as such. [1] In fact, the reason that the Recommendation did not initially include Increased Severity Payments was not for fear of jeopardizing the solvency of the Settlement Fund. It was because Dow Corning and the CAC have not agreed upon the payment criteria or amounts. If Dow Corning and the CAC now agree that Increased Severity Payments should total the $21.2 million NPV cap provided by the Settlement Facility Agreement and the sensitivity analysis contained in the Independent Assessor's Report, the Finance Committee has no objection to making partial Increased Severity Payments as part of the Recommendation.

The Court, however, is not required to make those payments in order to approve the Recommendation. Section 7.03 of the Settlement Facility Agreement provides that "Second Priority Payments, **or some portion thereof**, may be distributed" as long as adequate provision has been made to assure payment of First Priority Claims. Contrary to the Opposition's contention, there is no requirement that all payments that qualify as Second Priority Payments must be made at the same time. In fact, the Court already has approved making certain kinds of Second Priority Payments without making others.

In 2007, Dow Corning and the CAC agreed to, and the Court granted, a Consent Order to Establish Guidelines for Distributions From, and to Clarify the Allocation of, the Covered Other

[1] Further, the analysis provided by the Independent Assessor includes the projected costs of making 50 percent Class 16 Payments. (*See* Ex. J, September 22, 2011 ARPC Memorandum Providing Updated Premium Payment Estimates) If the Court determines that some portion of all Second Priority Claims should be paid as part of the Recommendation, both 50 percent Class 16 Payments and 50 percent Increased Severity Payments can be added to the Recommendation and there will still be adequate assurance that future First Priority Claims will paid.

Products Fund. (*See* Dkt. 605.) Covered Other Products Payments are defined as Second Priority Payments just like the Increased Severity Payments with which the Opposition purports to be concerned.[2]

Even if Increased Severity Payments need to be paid at the same time as Premium Payments, there is more than sufficient money in the Settlement Fund to do so. The Opposition suggests that 50 percent Increased Severity Payments will cost $10.6 million NPV. (Opposition at p. 17 n.16.) As discussed below, the Recommendation will leave a surplus in excess of $600 million NPV.

D. The Litigation Fund Is An Available Asset For Payment Of First Priority Claims And Adds $350 NPV To The Recommendation's Cushion.

The Opposition contends that the money in the Litigation Fund cannot be considered when the Court determines whether there is adequate assurance that First Priority Claims will be paid if the Recommendation is authorized. (*See* Opposition at 13-14.) The Opposition is mistaken.

Section 7.03(a) of the Settlement Facility Agreement provides that the Court should authorize Second Priority Payments, or some portion thereof, if, "**based upon available assets**," adequate provision has been made to assure such payment" of First Priority Claims. While "available assets" are not defined in that paragraph, the very next subsection, 7.03(b), defines "Conditions and Authorization for Access to Litigation Fund for Payment of First Priority Payments." It specifically characterizes the Litigation Fund money as an "asset." (Stlmt. Fac.

[2] In support of its incorrect claim that partial Premium Payments cannot be made, Dow Corning cites Section 7.03(a)'s requirement that notice shall be sent to the CAC, Debtor's Representatives, and the Non-Settling Personal Injury Claimants with pending Claims, as opposed to all claimants. The reason that notice is sent to only certain groups as opposed to all claimants is obvious: it is impractical to serve notice on all claimants. It has nothing to do with whether or not partial Second Priority Payments can be made. (Again, the Settlement Facility Agreement expressly provides that "some portion" of Second Priority Payments can be made if there is adequate assurance.) Further, the interests of Increased Severity Claimants are represented by the CAC. The CAC has been provided with notice and an opportunity to respond to the Recommendation. The CAC has agreed that the Recommendation should be authorized.

Agrmt. § 7.03(b) ("In determining whether such an order should issue, the District Court should determine whether the remaining *assets* of the Litigation Fund will be adequate to pay all claims subject to the Litigation Fund.").) Likewise, Section 7.01(d), "Procedures for Determining Assets Available for Distribution to Claimants," includes the Litigation Fund as an available asset, and requires Litigation Fund projections to "[take] into account any projected need to access the Litigation Fund for purposes of payment of First Priority Payments pursuant to Section 7.03(b)." (*Id.*)

Section 7.03(b) states that the Court can authorize the use of the Litigation Fund to make First Priority Payments if the Settlement Fund is exhausted. There is no language restricting the Litigation Fund's use only to situations where the Settlement Fund is exhausted solely by First Priority Payments (as opposed to a combination of First Priority Payments and Second Priority Payments, as would be the case if the Recommendation is authorized and the Settlement Fund is exhausted before all First Priority Payments are made). To the contrary, under the plain language of the Settlement Facility Agreement, if unforeseen circumstances occur and the surplus provided by the Recommendation is not enough, the Court can authorize the $350 million NPV of Litigation Fund money to be used to pay First Priority Claims.

E. <u>The Court's Time Value Credits Order Adds $200 Million NPV To The Cushion.</u>

On November 28, 2011, after the filing of the Motion, the Court entered its Order Regarding Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents. (*See* Dkt. 836, Order of Nov. 28, 2011, (the "TVC Order").) In the TVC Order, the Court determined that Dow Corning was not entitled to a $200 million NPV credit for making Settlement Facility Agreement funds available earlier than required by the funding agreements.

The Recommendation conservatively modeled the amount of funds available under the assumption that Dow Corning would receive the full NPV amount of its claimed time value credit. (*See* Report of Ind. Assessor at 59; Memo of June 14, 2011.) Because Dow Corning lost the motion, however, at least $200 million NPV can be added to the existing surplus provided by the Recommendation. (*See* Report of Parties of Impact of TVC Ruling.) In total, the surplus amounts in the Settlement Fund and the Litigation Fund, plus those resulting from the TVC Order, bring the total cushion provided by the Recommendation to approximately $618 million NPV.

F. The Independent Assessor Is The Entity To Conduct All Financial Analysis.

The Settlement Facility Agreement articulates the specific rights, duties, and obligations of various parties and consultants, including the Independent Assessor, CAC, and the Debtor's Representatives. Section 4.05 of the Settlement Facility Agreement describes the duties of the Independent Assessor. That provision requires the Independent Assessor to be an independent entity selected with input from Dow Corning and approved by the Court. It further provides that the Independent Assessor, **and only the Independent Assessor**, has the right and obligation to prepare the analysis concerning the availability or adequacy of assets in the Litigation Fund and the Settlement Fund, and that analysis is the sole basis upon which the Court is to base its determination as to whether Second Priority Payments can be made under Section 7.03(a).

Section 4.09(c) of the Settlement Facility Agreement outlines the purpose and function of the CAC and Debtor's Representatives. While that section authorizes the Debtor's Representatives and the CAC to advise and assist "the Independent Assessor regarding all matters of mutual concern," it does not vest the CAC or Debtor's Representative with authority to contravene the Independent Assessor with third-party experts or to prepare their own counter-projections. The Settlement Facility Agreement does not contemplate protracted litigation

involving dueling experts. The Agreement does provide the CAC and Dow Corning the right to be heard, and they can claim that the Recommendation does not make adequate provision for First Priority Payments in light of the Independent Assessor's analysis (or that the Recommendation should be increased in light of that analysis). But nothing in the Settlement Facility Agreement authorizes the CAC or the Debtor's Representatives to engage, or the Court to consider, projections or analysis by experts paid to advocate for one side or the other. The Court should therefore not consider Exhibits C, D, and E to the Opposition when it decides whether or not to authorize the Recommendation.

G. The Opposition's Examples Are Flawed And Misleading.

Even if the Settlement Facility Agreement permitted The Opposition's purported expert evidence to be considered when the Court evaluates the Recommendation, the examples proffered are fundamentally flawed and misleading. Some of the most glaring issues and inconsistencies are discussed below. Even if the analysis in the Opposition were permissible and correct (and it is neither), that analysis still leaves more than a $400 million NPV surplus if the Recommendation is authorized.

1. General Notes.

The Recommendation is based upon the most conservative of Independent Assessor's scenarios, i.e. the one with the greatest number of claims. If any of the conservative assumptions underlying that scenario do not materialize, the surplus will be increased.

Further, the Opposition wrongly claims that the Independent Assessor's analysis should consider additional and undefined criteria that cannot be reasonably ascertained. (*See* Opposition at 18-20.) However those are not considerations to be analyzed under the plain terms of the Settlement Facility Agreement.

Section 7.03(a) of the Settlement Facility Agreement states that the determination whether there is adequate provision to assure First Priority Payments should be based upon the Accounting analysis prescribed by Section 7.01(d). Section 7.01(d), "Procedures for Determining Assets Available for Distribution to Claimants," states that the Independent Assessor shall make projections based upon the following five factors **to the extent known or knowable**: (i) the number of Claims filed with the Settlement Facility, (ii) the rate of Claim filings in the Settlement Facility, (iii) the average resolution cost of Claims in the Settlement Facility, (iv) the pending claims in the Settlement Facility, and (v) projected future filings with the Settlement Facility." (Stlmt. Fac. Agrmt. § 7.01(d).) Those are the only factors that the Independent Assessor is supposed to take into account when preparing its projections. They are the only ones the Court is supposed to consider when it decides the Motion. All are addressed in the Accounting and, by extension, the Motion.

In considering those factors, it is incorrect to suggest that only the experience from 838 claimants was used or the methodology was suspect. (*See* Opposition at 20.) Rather, each year the Independent Assessor has performed its duties as set out in the Settlement Facility Agreement and provided an analysis of the number, type and costs of claims submitted as well as estimates of future claim numbers and costs. Dow Corning was provided with that analysis and given the chance to comment before the Independent Assessor's reports were presented to the Court. Dow Corning did not criticize the analysis or methodology. Moreover, those reports show that the methods used by the Independent Assessor to support the Recommendation have been accurate over time. If there has been any divergence from the Independent Assessor's forecasts, it has been that fewer claims than expected were made. (*See, e.g.*, Independent Assessors Reports for 2007, 2008, and 2009.)

2. When Seeking Plan Approval, Dow Corning's Bankruptcy Expert Opined That Premium Payments Would Be Made Early; He Was Evaluating The Fund's Adequacy.

Further, the Opposition argues that work papers prepared by Dow Corning's expert in conjunction with the approval of the bankruptcy plan and Settlement Facility Agreement, which opined that Premium Payments would be made seven years after the effective date, were "merely a cash flow illustration of funding sufficiency." (Opposition at 18 n.18.) That characterization is inaccurate.

The exhibit was offered in conjunction with the testimony of Fred Dunbar. (*See* June 29, 1999, Transcript from Continued Confirmation Hearing, relevant pages attached as Exhibit Q.) He was proffered as a witness by Dow Corning to discuss the "costs of resolving the personal injury claims and **whether the funding for resolving those claims is adequate."** (*Id.* 23:3-4.) (emphasis added) During his testimony, Mr. Dunbar testified that Premium Payments were enhancements to the settlement plan. (*Id.* 46:12-15 ("Q. And in what form . . . do those enhancements take, Mr. Dunbar? A. Those are the premium payments that are available for the Option 1 and Option 2 claimants."); *see also id.* 49:21-50:2 (agreeing that the Dow Corning plan had financial benefits superior to the RSP).) Mr. Dunbar opined that those enhancements would make people more likely to make claims.

Finally, Mr. Dunbar described what the seven year estimate meant. He testified:

Q. . . . [W]hat is your estimation of when those premium payments would be paid?

A. Well, actually, that's a good point.

Q. You said seven years from now, didn't you Mr. Dunbar?

A. **Yeah, they are going to paid seven years from now.**

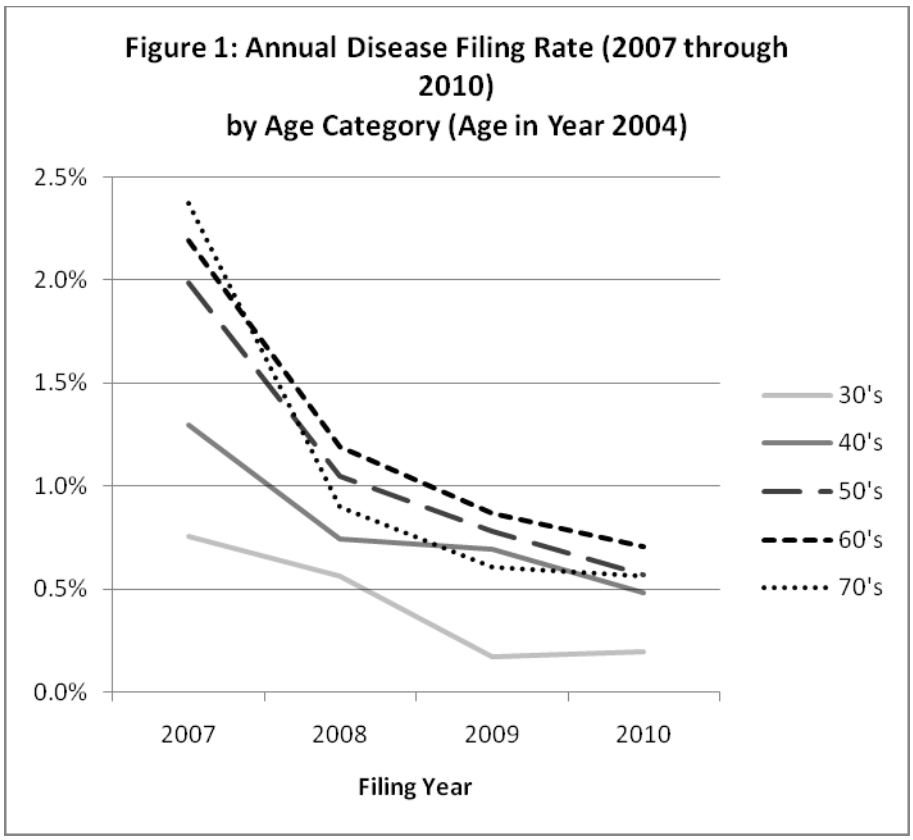
(*Id.* 303:14-19.) Mr. Dunbar's testimony is clear; at the time it was arguing for the settlement plan to be approved, Dow Corning claimed that Premium Payments would entice claimants to

opt in to receive Premium Payments not later than seven years after the effective date. More importantly, Mr. Dunbar accurately testified that there would be sufficient funding to do so.

3. The Opposition Is Wrong To Conclude That As The Claimant Population Ages, Claims Will Increase.

The Opposition's first example of an unaccounted-for scenario contends that more claimants will file as they get older. The Opposition correctly notes that older claimants filed claims at higher rates than younger claimants. That, however, does not show that people become more likely to file a claim as they get older.

There is no empirical evidence that the filing rate increases as the claimant population ages. In fact, the data suggests that the opposite is true. The Independent Assessor developed a table showing the claim rate by age group, using the claimants' age category in year 2004. The annual filing rate relative to the eligible population for each age group from 2007 through 2010 is calculated so that the association with aging and propensity to file can be seen.



(Comments on Examples in Dow Corning Opposition Filing at 2, attached as Exhibit R.)

As the chart illustrates, as a group of potential claimants gets older, they actually file claims less frequently.

The Independent Assessor also developed a chart showing similar information.

Figure 2: Number of Disease Filings by Age Category

Age (in 2004)	File Year 2007	2008	2009	2010
30's	27	20	6	7
40's	259	147	137	94
50's	664	346	256	186
60's	484	260	187	152
70's	210	79	53	49

(*Id.*)

The data shows that for all age cohorts, the rate of claims decreases with age. Thus, the Opposition's statement that "the data show the filing rate tends to increase by 5% for each year of increased age" is misleading. (*See* Opposition at 21.) While older claimants filed claims at higher rates, the data does not show that as potential claimants age they are more likely to file claims. There is no evidence to support the notion that as the claimant population ages, more claims will be filed.

4. The Second Example Dramatically Overestimates Potential Surges. Actual Experience Bears Out the Independent Assessor's Estimates.

The Opposition claims that there will be more dramatic deadline surges, and the estimate of filings in response to future deadlines should increase. (*See* Opposition at 21.) The Opposition fails to note, however, that the Independent Assessor's projections have already proven to be reasonable. As an evaluation of the current estimates, the Independent Assessor also reviewed the responses to the 2010 mass mailings. From the time of mailing through September 2011, the number of claims expected from the mailing population is 526 (using the Constant Model and including the expected surge as currently calculated), and the number received was 544. (Comments on Examples in Dow Corning Opposition Filing at 3.) If an examination of filings received as a result of mass direct mailings shows that the current method of surge estimation has produced results that are consistent with actual filings, there is no reason to believe that $8.1 million of unanticipated filings are likely to occur simply because future deadlines will elapse.

5. The Opposition's Third Example Is Not A "Modest" Increase In The Filing Rate; It Doubles The Number Of Claimants per Month.

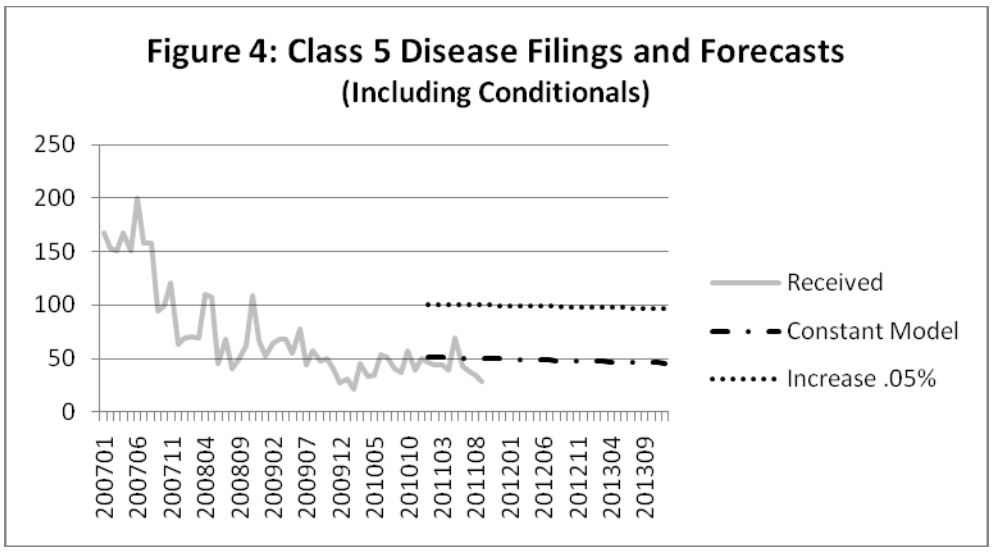
Despite the fact that the number and percentage of new Class 5 Disease Claimants has decreased each year, the Opposition suggests that the Court should consider the effect of a "modest" .05 or .1 percent increase in the monthly Disease Claim filing rate. (*See* Opposition at

21.) Such an increase is not modest: it would double the historically-based estimate of the monthly filing rate.

The Independent Assessor's most aggressive case-scenario projected a monthly Disease Claim filing rate of .05 percent.[3] That is based upon the average monthly filing rate from December 2008 to May 2010, after the claims process had matured. Experience shows that fewer than 47 claims per month were made between December 2008 and May 2010. The Independent Assessor's constant model projects that there will be approximately 50 claims per month between 2011 and 2019. The Opposition suggests that it is possible that there will be 100-150 claims per month between 2011 and 2019. (*See* Opposition Ex. A at Attachments 9, 10, 31.23.) There is absolutely no basis for either of the projections proposed in the Opposition.

The table below shows the disease claims filed from January 2008 through September 2011, the Independent Assessor's forecast from July 2010 through December 2013, and the Independent Assessor's forecast increased by 0.05 percentage points for the same period. (Comments on Examples in Dow Corning Opposition Filing at 3-5.) The increase of 0.05 percentage points suggested in the Opposition results in a forecast that is not consistent with actual filing patterns since the beginning of 2009, even after the outreach in 2010 to certain populations which was expected to result in a higher-than-average potential filing rate.

[3] The calculation of a monthly filing rate of 0.066% in the Opposition assumes that the claims expected during the deadline surges in 2014 and 2019 are evenly spread over all months. The Independent Assessor's methodology actually estimates an overall monthly filing rate of about 0.05% with much higher rates during the two filing surges.



(Comments on Examples in Dow Corning Opposition Filing at 4.)

As the graph shows, after the initial rush of claims after the Settlement Facility became effective, the claim rate has decreased.[4] A .05 percent increase in the rate is dramatic. A table prepared by the Independent Assessor shows the magnitude of the increases suggested in the Opposition.

Figure 3: Class 5 Disease Filings and Forecasts (Including Conditionals)

	Received	Constant Forecast	Increase by 0.05%	Increase by 0.1%
Jan 2011	47	51	101	144
Feb 2011	44	51	101	144
Mar 2011	44	51	101	143
Apr 2011	39	51	101	143
May 2011	69	51	100	143
Jun 2011	43	51	100	143
Jul 2011	38	50	100	143
Aug 2011	35	50	100	142
Total Jan-Aug 2011	**359**	**407**	**804**	**1,145**

(Comments on Examples in Dow Corning Opposition Filing at 4.)

[4] The facility became effective in 2004. The chart starts in 2007.

Thus, given the actual rate of filing, an increase of 0.05 percent is not "modest." It would be more accurate to describe the suggested increase as a doubling of the forecast; instead of the 50 or 51 monthly claims projected, the Opposition's model suggests that there will be 100-150 monthly claims. Further, the actual data shows that except for one month, claims actually have numbered less than 50 per month, and often less than 40 per month.

There simply is no empirical support for a revision such as that suggested in the Opposition. Such an estimate does not provide an accurate representation of actual observed claimant filing behavior, and it would result in a forecast that is wildly unrepresentative of the filings that the Settlement Facility is experiencing.

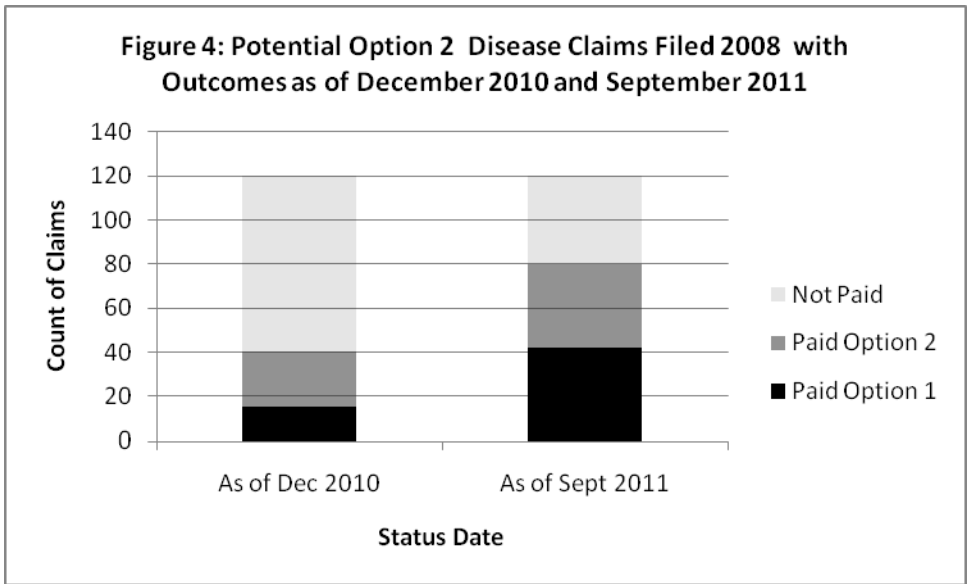
6. The Opposition's Fourth Example Fails To Account For The Historical Decline In The Percentage of Option 2 Disease Claims That Are Approved.

Disease Claims paid under Option 2 are worth more than those paid under Option 1. The Independent Assessor projects that 467 of the 5,993 projected Disease Claims will be approved and paid as Option 2. The Opposition's purported expert asks the Court to assume without any basis that 823 of those 5,993 projected disease claims will be approved and paid as Option 2, another doubling of the Independent Assessor's projection. (Opposition Ex. A at Attachments 13-16.)

The Opposition supports its proposal through an assumption that either misunderstands or misrepresents how the Option 2 Claims process works. Because Option 2 Claims pay more, a substantial number of Disease Claims are submitted for consideration under Option 2. A proportion of the legitimate Option 2 Claims can be easily identified and are quickly paid. Others, however, are reviewed, given a chance to cure deficiencies, rejected as Option 2 Claims, and paid as Option 1 Claims. Because that process takes time, the Opposition's 2010 snapshot of how many 2010 disease claims were (a) paid in the same calendar year, (b) submitted as Option

II Claims, and (c) paid as Option II Claims is misrepresentative. (Comments on Examples in Dow Corning Opposition Filing at 5.)

The bias that results from limiting review can be seen by comparing claims filed in 2008 and the result of those claims as of December 2010 and September 2011, after the claims have been processed.[5] As of December 2010, the proportion of paid 2008 claims determined to be Option 2 was 63 percent. (*Id.*) As of September 2011, the proportion was 48 percent. (*Id.*) The bar chart below shows claims filed and paid. The longer file-to-payment period results in a larger proportion of claims paid as Option 1.



(Comments on Examples in Dow Corning Opposition Filing at 6.)

This example shows that it is necessary to consider the Settlement Facility's review process and that failure to do so can result in faulty estimates. The observable patterns in the claims data show that the estimate of Option 2 payments decreases with the length of review time, even when the increased review time is only nine months. It is not reasonable to limit the

[5] The count of potential Option 2 and paid claims differs from the count presented in the Dow Corning's purported expert evidence, but the pattern resulting from additional review time is consistent across time periods.

file-to-payment period as suggested in the Opposition. The inclusion of mature claims is necessary to capture final outcomes.

7. The ACTD Projection Is Misleading And Fails To Take Into Account The Disability Requirement.

The Opposition suggests that the Independent Assessor has not considered the prevalence of compensable Atypical Connective Tissue Disorder ("ACTD") conditions in the aging population of claimants who remain eligible to file Disease Claims. That is, strictly speaking, true. But the reason such data has not been analyzed is that the Settlement Facility Agreement requirements do not require such an analysis. Moreover, such an analysis it is wholly impractical and wholly unhelpful, particularly as applied to the list of "compensable conditions" for ACTD Disease Claims. ACTD conditions include things like joint pain and arthritis that are both prevalent and difficult to measure. Moreover, the mere presence of compensable ACTD conditions does not entitle a claimant to make a Disease Claim. The claimant also must show that she is disabled.

The claims history, the only relevant criteria the Independent Assessor is supposed to consider under the Settlement Facility Agreement, does not show any increasing trend for Disease Claim filings. In fact, as discussed above, the number of Disease Claim filings has dropped year-over-year. There is no basis to assume that more ACTD or other Disease Claims will be filed and approved. The suggestion to the contrary is nothing more than unfounded speculation.

H. <u>The Experience In Other Limited Fund Settlement Trust With Different Terms Is Irrelevant.</u>

The Opposition also suggests that because other settlement trust funds ran short of funds, the Settlement Facility should wait before making Premium Payments. The Opposition, however, ignores the fact that those different funds were governed by different agreements.

For example, the experience in Dalkon Shield is materially different from that in the instant matter. The Settlement Facility Agreement in this case established a system in which claimants were to receive a set amount of their award upon claim approval and Premium Payments when the Finance Committee recommended and the Court agreed that there was adequate assurance that funds were available to make all First Priority Payments. Dalkon Shield's agreement did not contain any provision for Premium Payments. Rather, it provided that "to the extent funds . . . remain **after all claims are paid in full, the remaining funds shall be paid to all claimants . . . who received compensatory damage awards."** (Dalkon Shield Trust Claims Resolution Facility ¶ 14, attached to Opposition as Attachment 4 to Exhibit D (emphasis added).) How Dalkon Shield evaluated how and whether to make pro rata payments in the face of plan language that allowed for payments only after all claims were paid in full is not relevant. The language governing the settlement facilities in the asbestos and Fen-Phen also differed and has no relevance to the matters before the Court.

II. CONCLUSION

For the above reasons, as well as those stated in the Motion, the Finance Committee requests that the Court grant the Motion and authorize the Finance Committee to implement the Recommendation. The Finance Committee further requests that the Court grant the Finance Committee all other just relief.

Dated: December 23, 2011

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2011, the foregoing motion (and proposed order) has been electronically filed with the Clerk of Court using the ECF system, and same has been mailed via Certified Mail/Return Receipt Requested or via email to the following:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	§	
	§	**CASE NO. 00-CV-00005-DPH**
DOW CORNING CORPORATION,	§	**(Settlement Facility Matters)**
	§	
REORGANIZED DEBTOR	§	**Hon. Denise Page Hood**

INDEX OF EXHIBITS

The following is an index of exhibits attached to the Finance Committee's Reply to Dow Corning's Opposition to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments filed on December 23, 2011.

Exhibit P – Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization (relevant pages).

Exhibit Q – June 29, 1999 Transcript from Continued Confirmation Hearing (relevant pages).

Exhibit R – Comments on Examples in Dow Corning Opposition Filing (sealed).

Affidavit of Jean Malone (sealed).

EXHIBIT P

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

IN RE:	§	
	§	
DOW CORNING CORPORATION	§	**CASE NO. 95-20512**
	§	**(CHAPTER 11)**
DEBTOR	§	
	§	**Judge Arthur J. Spector**

AMENDED JOINT DISCLOSURE STATEMENT WITH RESPECT TO AMENDED JOINT PLAN OF REORGANIZATION

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ATTORNEYS FOR
OFFICIAL COMMITTEE
OF TORT CLAIMANTS

DATED: February 4, 1999

If a Claimant has an approved Claim under the Rupture Payment Option, an approved Claim under the Disease Payment Option, and has Dow Corning Breast Implants and acceptable proof of a silicone gel breast implant(s) manufactured by Bristol, Baxter or 3M and if the Claimant received a "rupture enhancement payment" under the Revised Settlement Program, then her Rupture and Disease compensation collectively will be reduced by 50%.

A qualified Rupture is defined as a tear or other opening in the envelope surrounding the silicone gel. Gel bleed does not qualify as Rupture. To document a Rupture Claim, you will need to submit explantation operative and/or pathology reports and, perhaps, additional statements from doctors depending on when the ruptured Implant was removed. The documentation required is the same as is required under the Revised Settlement Program, except that where the type of proof required is keyed to the date the ruptured Implant is removed, the dates have been modified. You should review the description of the Rupture documentation in the CRP to determine how it applies to you.

The Settlement Program also offers a feature that was not present in the RSP. If your rupture proof is found to be unacceptable, you can still qualify if you meet one of two additional standards for Rupture. These standards require medical documentation of visual confirmation of a breach in the elastomer envelope found upon or prior to removal of the Dow Corning silicone gel Breast Implant or medical documentation demonstrating migration along tissue planes distant from the site of breast implantation of a substantial mass of material confirmed by biopsy to be silicone from a ruptured Dow Corning silicone gel Breast Implant.

In addition to this Individual Review process of certain Rupture Claims, there is a provision that allows Claimants who have not been explanted to recover rupture benefits provided that explantation is medically contraindicated (as specifically defined in the CRP) because the Claimant suffers from a serious chronic medical condition that precludes surgical removal.

c. Disease Payment Option/Expedited Release Payment Option.

(1) Disease Payment Option. A Claimant may qualify for payment depending on her disease or medical condition. Compensation is determined by two payment grids (collectively, the "**Grid**") established in the CRP. Under the Grid, more severe medical conditions will be compensated at higher levels than less severe conditions. The "Base"[3] Grid payments for Domestic Claimants range from $10,000 to $250,000. If additional "Premium" payments are allowed by the District Court, the total Grid payments will range from $12,000 to $300,000.

To qualify for payment, a Claimant must document one of the conditions defined in the CRP. Disease Payment Option I provides payments for Breast Implant Claimants who meet the disease and disability criteria under the Original Global Settlement (the Fixed Amount Benefit Schedule in the Revised Settlement Program). If a Breast Implant Claimant meets the Original Global Settlement disease and disability criteria, the Claimant will receive a "Base" payment of $10,000 for disability Severity Level C, $20,000 for disability Severity Level B, or $50,000 for disability Severity Level A. Disease Payment Option II, which has more stringent criteria, provides "Base" payments ranging from $75,000 to $250,000. These Disease Payment Option II eligibility criteria are the same as the Long-Term Benefit Schedule criteria under the Revised Settlement Program.

To qualify for payment under the Disease Payment Option the Claimant must submit medical records that document one of the covered conditions defined in the CRP. A Claimant may rely on the claim forms and supporting records and documents previously submitted to the MDL 926 Claims Office. To qualify for higher payments under Disease Payment Option II, Claimants may need to submit additional documentation and undergo further testing and examination. Not all conditions or symptoms will qualify under either Disease Payment Option and you should carefully evaluate your own condition and your medical records to determine if and to what extent you would qualify under either Disease Payment Option.

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[3] "**Base**" payments under the Settlement Facility Agreement are also called "**First Priority Payments.**" First Priority Payments are the highest priority payments made from the Settlement Fund. Those payments designated as "**Premium**" payments, also called "**Second Priority Payments,**" will be made only if funds are available after payment of all First Priority Payments is adequately assured.

EXHIBIT Q

AT

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

IN THE MATTER OF, Case No. 95-20512

DOW CORNING CORPORATION Bay City, Michigan
June 29, 1999
_____/ 9:13 a.m.

CONTINUED CONFIRMATION HEARING
BEFORE THE HONORABLE ARTHUR J. SPECTOR
HONORABLE DENISE PAGE HOOD
TRANSCRIPT ORDERED BY: BARBARA HOUSER, ESQ., SHERYL TOBY, ESQ., DENNIS HALEY, ESQ., KENNETH ECKSTEIN, ESQ., DENNIS MEIR, ESQ., KENNETH KABLE, ESQ., LENARD PARKINS, ESQ., JAMES PLEMMONS, ESQ., H. JEFFREY SCHWARTZ, ESQ., STEPHEN WEINER, ESQ., JOEL MILLER, ESQ., VITA CAPIALBI

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Q Could you please tell the Court, Mr. Dunbar, what topic you'll be addressing here this morning?

A The costs of resolving the personal injury claims and whether the funding for resolving those claims is adequate.

Q Could you please give us briefly by way of background before you express that issue, a recitation of your educational experience and then your career since that time?

A Yes. I went to college at Reed College in Portland, Oregon. I majored in economics and mathematics.

From there I went to graduate school in economics at Tufts University where I received a Master of Arts and a Ph.D. in economics. While at Tufts I taught upper division and graduate course called social control of industry.

And then from there I went to Northeastern University which was forming a graduate school in economics. And I designed the courses in econometrics, statistics, and mathematical economics for the graduate school.

I taught there for two years and then I left to join a firm called Charles River Associates. At Charles River Associates I mainly did work under government grants on economic research in the policy issues that were affecting the country during the 70's. And that included a fair amount of research on the environment.

Our typical clients were organizations such as the National Science Foundation and the National Academy of

Dunbar's testimony we'll be making a proffer of certain documentary evidence that will include his C.V. which we'll furnish to the Court at that time.

Q Now, Mr. Dunbar, this particular case, could you -- could you give us a general statement of the approach that you took in determining what it would take, that is the cost to resolve the outstanding tort claims?

A Yes. We're very fortunate in this case to have had an historical experiment just like the joint plan. And that's the revised settlement program.

So we take the data from the revised settlement program which is the current market for breast implant settlements and we apply the results from the revised settlement program to the Dow Corning plan to determine how the breast implant users will respond to the settlement.

We augment that data because it has some gaps with data from the Dalkon Shield trust in order to determine what we will call a price acceptance relationship. That is the tendency of people to opt out as a function of the offers that are given them in the -- in the joint plan.

Q You've referred to the RSP as being the current marketplace. What relationship is there -- is there if any in your view between current market prices and projections or estimates of the likelihood that a particular plan or scheme will be accepted within that marketplace?

A The -- the current marketplace will establish -- gives us the best estimate of what is going to happen. And the reason for that -- the reason why the RSP can be used is that you've got the same population of people, breast implant users, you've got the same product and you've got the same standards.

So basically you have all of the conditions that are necessary for taking the -- the results from the -- the results from that market and applying them to the Dow Corning plan with a very high degree of confidence in your -- in your results.

Q You also made reference to the Dalkon Shield's experience and you heard the comments that were made by counsel a few minutes ago. Now we're going to talk a little bit more about Dalkon Shields in detail. But are you here representing to the Court that the Dalkon Shields experience is the same in all respects as the experience with breast implants?

A No, I am not.

Q Have you prepared an overview of the steps that you have followed in your work and that you will follow in connection with your testimony here?

A Yes, I have.

Q Turning -- I've got two little -- may I approach?

THE COURT: Yes.

JUDGE HOOD: Thank you.

MR. GEOFFREY WHITE: Do you have an extra copy,

CROSS EXAMINATION

BY MR. LEWIS:

Q Dr. Dunbar, good afternoon. I'm Ogden Lewis for the Unsecured Creditors' Committee.

A Good afternoon.

Q I just wanted to make sure that I have a correct understanding of just a very few of your overall conclusions from your testimony this morning. Based on your testimony this morning, Dr. Dunbar, and particularly Exhibit 26, my understanding is that it's your expert opinion that the likely over funding of amounts needed to satisfy all the tort and personal injury claims and related costs out of the settlement trust and likely to be needed to resolve or pay claims through the litigation facility is in the vicinity of $565,000,000. I can take you through how I get that, but perhaps I can ask you that conclusory question.

A Net present value.

Q On a net present value basis. Is that -- am I right in that? Perhaps I should break it down for you.

A I think that's a little high.

Q Let me perhaps go -- I'll show you how I get it. You have in front of you a set of demonstrative exhibits that Mr. Bernick guided us all through with your -- with your assistance?

A Yes, I do.

THE COURT: And '99?

A I believe that includes '99, yes.

THE COURT: Okay. Up until the time you did your analysis?

A Right.

THE COURT: All of those averaged out to be $88,000. And that averages in zero verdicts?

A That averages in zero verdicts. It's either eighty-eight or ninety-five, I can't remember. It's less than 100,000.

THE COURT: But that was without considering loss of consortium for the husband and any other ancillary damages and also excluding punitive damages?

A It only excluded punitive damages.

THE COURT: Oh, it included loss of consortium and secondary losses of that type?

A I believe.

THE COURT: It excluded punitive damages?

A Excluded only punitive damages.

THE COURT: Okay.

Q You would agree with the proposition that in light of the cap on funding for the litigation facility there is at least a mathematical risk that the funding for that facility may be insufficient to pay off all allowed claims in full?

A There's a mathematical risk. I don't believe there's a reasonable risk.

A But this is not a matter of statistical explanation, these dollars --

Q It's addition, that's right, it's addition. So --

THE COURT: Which one is $1,000 more?

A Pardon?

THE COURT: Which one is $1,000 more?

A Dow plan is $1,000 more.

THE COURT: If you count the enhancement?

A Premium. The premium payments, yes.

THE COURT: Okay.

Q Now Mr. Dunbar we've talked a lot about these premium payments. What is your estimation as to when the women with Dow Corning claims in this bankruptcy were making the decision as to whether to settle or go in the litigation facility, what is your estimation of when those premium payments would be paid?

A Well, actually that's a good point.

Q You said seven years from now, didn't you, Mr. Dunbar?

A Yeah, they are going to be paid seven years from now. So some -- if there is discounting of the -- of the premium payment then it could -- it could flip.

Q As a matter of logic you think that the fact that a woman is going to get some extra money seven years down the road is going to make a pretty big difference in her -- in the behavioral probabilities?