Case No. 14-1090

United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

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

***Interested Parties – Appellants*,**

v.

CLAIMANTS' ADVISORY COMMITTEE, FINANCE COMMITTEE

***Interested Parties – Appellees*.**

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

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REPLY OF DOW CORNING CORPORATION, DEBTOR'S REPRESENTATIVES AND SHAREHOLDERS TO THE RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE IN OPPOSITION TO THE MOTION TO STAY THE DISTRICT COURT'S RULING REGARDING PARTIAL PREMIUM PAYMENT DISTRIBUTION RECOMMENDATION BY THE FINANCE COMMITTEE PENDING APPEAL

Deborah Greenspan
Dickstein Shapiro LLP
1825 Eye Street, N.W.
Washington, DC 20006
Tel: (202) 420-3100

Counsel for Appellant Debtor's Representative and Counsel for Appellant Dow Corning Corporation

Laurie Strauch Weiss
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
Tel: (212) 506-3749

Counsel for Appellant Shareholder The Dow Chemical Company

David H. Tennant
Nixon Peabody LLP
1300 Clinton Square
Rochester, NY 14604
Tel: (585) 263-1021

Counsel for Appellant Shareholder Corning Incorporated

A stay is necessary and warranted. Pursuant to the district court's order, the SF-DCT has reported that it will be ready to start distributing over $100 million to thousands of individual claimants by the end of March 2014 – within days of this filing. Once distributed, these funds cannot be recovered. The Movants (as well as future claimants) will be irreparably harmed.

The Claimants' Advisory Committee's ("CAC") arguments to the contrary rely on circular reasoning, erroneous statements of the standards governing the distribution of Second Priority Payments, and mischaracterization of the district court's order. They contend that there can be no harm without a stay because they expect to prevail on appeal. If this were the standard, then there would never be any basis to find harm supporting a stay pending appeal.

The CAC incorrectly argues there is no harm because (1) claimants are "*automatically* and undisputedly entitled" to receive Premium Payments and (2) there is a "significant cushion" and so there likely will be sufficient funds to pay all (including future) First Priority Payments. Opp. at 2, 14, 15 (emphasis in original). First, the Plan does not guarantee Premium Payments. It allows Second Priority Payments only if First Priority Payments are assured. The district court's erroneous interpretation of this requirement is one issue on appeal. The second argument is wrong because it assumes a factual finding that does not exist. The Independent Assessor ("IA") Report upon which the district court relied lacks any

analysis of probability or calculation of degree of confidence or risk. As Movants will demonstrate in this appeal, this is precisely why the IA Report does not and cannot satisfy the Plan's strict standard governing the distribution of Second Priority Payments. With over 80,000 remaining claimants who could potentially file and receive First Priority Payments, an analysis that fails to account for or analyze risk does not "assure" (as the Plan requires) First Priority Payments.

The district court's failure to address the two other categories of Second Priority Payments results in different treatment of same priority claims, in violation of the Plan and the Bankruptcy Code, which in and of itself merits reversal of the Order. The CAC contends this is unimportant because these claims represent only a "tiny" fraction of the Second Priority Payments to be paid. *Id*. at 9. There is no basis for this: the record demonstrates no analysis of Increased Severity claims and the IA calculations do not include these claims in the overall computation.[1]

The CAC wrongly contends that the district court's error in characterizing the Litigation Fund as an "available" asset is not relevant because the IA report did not count Litigation Fund assets. This reversible error would cause irreparable

[1] The IA Report references a sensitivity analysis of the value of only one category of Increased Severity claims based on an arbitrary assumption about a percentage of claimants who will assert such claims. RE #814-13 at 13. Accepting this calculation, the total Increased Severity claims would amount to 15% of the Finance Committee's supposed "cushion," an indisputably significant amount. *See* RE #826 at 17, fn. 16. Additionally, the $17.7 million Class 16 payment is by no means "tiny." *See* RE #814-13 at 12

harm. Thousands of claimants have not yet received their First Priority Payments (and have until June 2019 to file Disease claims), and those claimants – and the value of their claims – are unknown. The improper distribution of Premium Payments creates a risk that there will be insufficient funds to pay First Priority Payments in full, resulting in the impermissible and inequitable treatment of claims, in violation of the Plan, the SFA and the Bankruptcy Code. If the $68 million cushion that the district court relied on is insufficient, the Finance Committee would seek to remedy the shortfall by compelling Dow Corning to fund (and thereby finance the Premium Payments) by improperly tapping and depleting the remaining amount of the Litigation Fund in violation of the Plan. This is hardly a mere timing issue as the CAC asserts.

I. The Appeal Raises Serious Difficult And Meritorious Issues

The CAC recognizes but mischaracterizes at least two serious issues going to the merits and erroneously dismisses three other legitimate issues as "red herrings."[2] Opp. at 8, 10. First, by asserting that the district court applied the proper legal standard under the Plan for issuing Premium Payments, the CAC

[2] The CAC's assertion that the "Movants' burden is to articulate *specific reasons the Order is likely to be reversed*" (Opp. at 11 (emphasis in original)) is an incorrect characterization of the applicable standard. In fact, it is "inappropriate at this stage of the proceedings to enter into a detailed discussion" of the substantive merits of the appeal. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991).

simply repeats the same incorrect standard: "adequate" provision. The Plan requires that First Priority Payments must be "assured" before distributing Second Priority Payments. This means the Plan does not allow the distribution of Second Priority Payments based on the mere supposition that if all the assumptions used in the IA's estimate prove correct then there will be adequate funding. The district court's failure to apply the strict criteria governing the distribution of Second Priority Payments is a serious legal error that will be addressed in this appeal.

The CAC seeks to minimize this clear error by asserting that Dow Corning agreed to rely on the IA calculations. Opp. at 11-12. There is no such agreement. Nor does the SFA "specif[y]" any methodology that the IA is to follow in calculating its projections. *Id.* at 5. Rather, it provides five factors that the IA is to consider, but in no way specifies how those factors are to be evaluated, measured, calculated or weighed. RE #826-2, § 7.01(d)(i). In fact, the Movants repeatedly and timely challenged the IA's methodology for the same reasons they do now: it is a simple extrapolation of filing data from a short period of time and fails to quantify or even address the inherent uncertainty of its calculations.

The district court's refusal to consider the Movants' expert analysis demonstrating why the IA's deficient projections do not satisfy the Plan's strict standard for issuing Second Priority Payments is clear legal error that warrants

reversal. The Movants have a right to be heard and this is precisely the mechanism through which Movants can and did challenge the IA's analysis.[3]

The CAC's Litigation Fund and time value credit arguments are also wrong – the district court did consider those assets as available in the Premium Payments determination. RE #934 at 14-15 ("The Finance Committee properly included the Litigation Fund assets in its recommendation to distribute Premium Payments to the Court."); *id.* at 17 ("$200 million [time value credit claim] may be included in the analysis of whether there are sufficient funds to distribute both First and Second Priority Claims."). The district court's determination that Dow Corning was not entitled to "time value credit" for early payment of the Initial Payment and other payments made before the effective date of the Plan, when that issue was expressly not decided by this Court and remains under advisement by the district court, is unquestionably a significant issue that warrants reversal.

The CAC's improper assertion that the district court's failure to address the two other categories of Second Priority Payments "cannot lead to reversal because it has nothing to do with the adequacy of funding to pay Premiums" (Opp. at 9) is a

[3] Movants are not precluded from exercising their right to ensure that the Plan's terms are implemented because they were involved in selecting the IA or because they received prior IA reports (*Id.* at § 4.09(c)), which consistently concluded that Second Priority Payments threatened the solvency of the Fund. Had the parties intended that the IA's calculation be determinative, the SFA would have so stated and the motion and hearing process required by the Plan would not be necessary.

non-sequitur. First, the CAC's only support is another bald assertion for which it cites no record reference: that the other categories of Second Priority Payments are "a tiny percentage of the total payments." *Id.* Second, and more importantly, the district court's clear error in failing to address the other categories of Second Priority Payments in and of itself merits reversal, and therefore has a significant likelihood of success on appeal because it would result in an unlawful modification to the confirmed Plan and unequal treatment of equal priority claims, in violation of the Plan and the Bankruptcy Code. All three forms of Second Priority Payments – Premium Payments, Class 16 payments, and Increased Severity payments – are to be treated equally and, in particular, the Plan provides that Class 16 Claims "shall be reimbursed . . . on the same basis and with the same priority" as other Second Priority Payments. RE #826-3, §§ 6.16.5, 6.16.6. Yet, the Finance Committee's recommendation and district court order unlawfully prioritize Premium Payments above the other Second Priority Payments.

The CAC acknowledges the Plan's requirement that all Second Priority Payments be paid together (Opp. at 9-10) but the Ruling does not comply with this requirement. *See* RE #934 at 4, 18. The CAC's recognition demonstrates not just a likelihood of success on the merits, but acknowledgement that Movants' position is *in fact* meritorious. Accordingly, this Court's intervention is necessary to prevent the immediate, discriminatory distribution of Second Priority Payments.

Contrary to the CAC's statements, the issues to be addressed on appeal are purely legal issues that, among other things, relate to the interpretation of the Plan, the SFA and the Bankruptcy Code. *See, e.g.*, Mot. at 5-6; February 10, 2014 Civil Appeal Statement of Parties and Issues filed by Deborah E. Greenspan. Thus, the district court's findings and conclusions are subject to a heightened level of scrutiny beyond the traditional abuse of discretion standard and are entitled to no deference. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1378 (6th Cir. 1995) (in applying abuse of discretion standard, "legal conclusions are given *de novo* review").

II. Movants And Future Claimants Will Suffer Irreparable Harm

The harm is imminent and irreparable because without a stay, the Trust will reportedly be ready to start distributing over $100 million of Premium Payments to thousands of claimants – within days of this filing – that could never be recovered if the Ruling is reversed.[4] Mot., Exhibit A, ¶ 9, 15. If the Settlement Fund is exhausted with Base payments still unfunded, the Finance Committee would seek to require Dow Corning to pay significant funds out of the remaining amount of the Litigation Fund in violation of the Plan. This harm is not speculative: the Finance Committee (and CAC) have asserted that the Litigation Fund is available

[4] "Difficulty in collecting a damage judgment" has been recognized to demonstrate irreparable injury. *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986).

for that purpose, and Movants' submissions in opposition to the Recommendation demonstrated how easily the balance of the Settlement Fund could be depleted.

Future claimants would also suffer irreparable harm to the extent that the inappropriate distribution of Premium Payments would jeopardize their First Priority Payments.[5] The CAC incorrectly dismisses such harm as one "assumed by all claimants under the settlement" under SFA § 7.03(c). Opp. at 15, fn. 6. The SFA provides no such thing. Section 7.03(c) allows for a pro rata reduction if "necessary to assure equitable distributions to Claimants" but nothing in the SFA or Plan allows for a reduction in payments to be applied only to future claimants. Such a reduction would result in unequal and discriminatory treatment of claims in violation of the Plan, the SFA and Section 1127(b) of the Bankruptcy Code.

III. Claimants Will Not Suffer Significant Harm If A Stay Is Granted

Claimants do not, as the CAC asserts, have an automatic right to Premium Payments.[6] The minimal delay pending appeal does not create any significant hardship. The CAC admits that "the relevant claimants have already…received payment on their basic disease and/or rupture claims." Opp. at 14. It cannot

[5] Those entitled to the other categories of Second Priority Payments would be at similar risk of non-payment.

[6] The Plan Proponents' expert did not testify that Premium Payments would be paid in the seventh year. Opp. at 17. The expert merely provided an illustration showing a potential cash flow scenario based on projected claim filings; it did not represent and was not intended to represent any predetermined cash flow analysis guaranteeing payments at any particular time, or at all. *See* RE #826-5, ¶¶ 83-85.

credibly argue that staying distribution of a *supplemental* $1,000-$5,000 Premium Payment (Mot., Exhibit A, ¶ 8) would affect the ability of "every eligible claimant" "to meet basic living expenses." Opp. at 3, 17. Moreover, the CAC concedes that funds will be preserved should a stay be issued pending appeal.

IV. The Public Interest Favors A Stay

The CAC does not and cannot explain how a temporary stay would in any way compromise the settlement. To the contrary, there is a compelling public interest to grant the stay in order to avoid increasing the risk that eligible future claimants would not receive their First Priority Payments in full, as mandated by the Plan, the SFA and the Bankruptcy Code.

V. A Stay Is Warranted Under Rule 62(d)

Movants have also established that a stay is warranted under Rule 62(d). The CAC recognizes there are adequate funds held by the Trust that will be preserved during appeal and that obviate the need for bonding. Rule 62(d) applies when an order binds a party to pay a specific sum of money. *Titan Tire Corp. of Bryan v. United Steel Workers of Am., Local 890L*, No. 09-4460, 2010 WL 815557, at *1 (6th Cir. Mar. 10, 2010); *Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992). Indeed, the one case the CAC cites recognized that a "judgment which requires one party to pay a specific sum of money…is, in essence, a monetary judgment." *Peacock v. Merrill*, No. 05-00377-KD-C, 2010 WL 2231896

at *1 (S.D. Ala. June 2, 2010). This case similarly involves the payment of a specific sum of money and thus Movants are entitled to a stay under Rule 62(d).

CONCLUSION

For the foregoing reasons and those set forth in the Motion to Stay, Movants respectfully request that the Court stay the Ruling pending appeal.

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Respectfully submitted,

/s/ *Deborah E. Greenspan*

David H. Tennant
Nixon Peabody LLP
1300 Clinton Square
Rochester, NY 14604
Tel: (585) 263-1021
Fax: (866) 947-0755
dtennant@nixonpeapody.com

Counsel for Appellant Shareholder Corning Incorporated

Deborah E. Greenspan
Dickstein Shapiro LLP
1825 Eye Street, N.W.
Washington, DC 20006
Tel.: (202) 420-3100
Fax: (202) 420-2201
greenspand@dicksteinshapiro.com

Counsel for Appellant Debtor's Representative and Counsel for Appellant Dow Corning Corporation

Laurie Strauch Weiss
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
Tel: (212) 506-3749
Fax: (212) 506-5151
lstrauchweiss@orrick.com

Counsel for Appellant Shareholder The Dow Chemical Company

CERTIFICATE OF SERVICE

I certify that on March 18, 2014, I electronically filed a copy of the foregoing Reply with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this Reply to all registered counsel in this case.

/s/ Deborah Greenspan
Deborah Greenspan
Dickstein Shapiro LLP
1825 Eye Street, N.W.
Washington, DC 20006
Tel.: (202) 420-3100
Fax: (202) 420-2201
greenspand@dicksteinshapiro.com