UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

I. INTRODUCTION

The Settlement Facility and Fund Distribution Agreement ("SFA", attached as Exhibit A) defines Second Priority Payments and the procedure for their authorization and distribution.[1] Second Priority Payments include: 1) premium payments for Breast Implant Disease and Rupture Payment Option Claims; 2) increased severity of disease or disability under the Breast Implant Disease Payment Option; and 3) payments to Class 16 Claimants.[2] The Finance Committee initiates the authorization process by filing a "…recommendation and motion with the District Court….accompanied by a detailed accounting of the status of Claims payments and distributions under the terms of the Settlement and Litigation Facilities, including a detailed accounting of pending Claims as described in Section 7.01(d)."[3] With this Recommendation and Motion, the Finance Committee seeks the Court's authorization to make fifty percent (50%) Second Priority Payments.

II. BACKGROUND

The Finance Committee requested the Independent Assessor ("IA") make its Annual Report and include the status of claim payments as of June 30, 2016. The Report of Independent Assessor End of Second Quarter 2016 was received on October 18, 2016 ("IA's Report", attached as Exhibit B). After receiving the IA's Report, Dow Corning Corporation and the

[1] Exh. A, §§ 7.01, 7.02.

[2] Second Priority Payments are defined in the SFA as: "'Premium payments' for Breast Implant Disease Payment Option Claims and Rupture Payment Option Claims and for Covered Other Products Claims and payments for increased severity of disease or disability under the Breast Implant Disease Payment Option….shall be defined as Second Priority Payments. Payments made to Class 16 Claimants…shall also be defined a Second Priority Payments." Exh. A, § 7.01(a)(iii). Premium payments for Covered Other Products have already been paid by consent of the parties.

[3] Exh. A, §7.03(a).

Debtor's Representatives ("Dow") as well as the Claimants' Advisory Committee ("CAC") submitted questions to the IA and were given an opportunity to discuss the IA's Report findings with the IA. Subsequently, the Finance Committee asked the parties to submit position briefs in advance of a meeting that was held on December 7, 2016, that allowed for an open and thorough discussion of the issues concerning Second Priority Payments.[4] This recommendation is based on the IA's Report, the presentations of the parties, Plan documents, and case law.

III. ISSUES

The question of whether or not to recommend payment of Second Priority Payments implicates three conflicting issues: (1) an interpretation of the Amended Joint Plan of Reorganization regarding the propriety of Second Priority Payments; (2) the meaning of "virtual guarantee" as a legal standard for a recommendation; and (3) the Amended Joint Plan of Reorganization's equities for the preservation of assets for all claimants, and the Bankruptcy Code's horizontal equity mandate between claimants who have already received Premium Payments and those who have not or have deceased during the pendency of the recommendation process.

IV. PLAN OF REORGANIZATION

Under the Amended Joint Plan of Reorganization ("Plan", attached as Exhibit C), there are priorities to make Second Priority Payments before the termination of the Settlement Facility-Dow Corning Trust ("SF-DCT"). One possible assumption under those provisions[5] is that Second Priority Payments are to be made based upon the available data, analysis, and projections by the IA. If, on the other hand, the assumption is that no Second Priority Payments can be made until the termination of the SF-DCT because that is the only time that all actual, rather than projected, data is available, then no Second Priority Payments can be made until the end of the SF-DCT.

The IA estimated that a surplus of $100.4 million NPV will remain in the Fund through the end of the operation of the Settlement Facility for claims and operating expenses if 50% of all three types[6] of Second Priority Payments are distributed as claims are approved. This conclusion was determined as follows:

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[4] The parties agreed at the meeting that they had been afforded full due process and were given every opportunity to present their respective positions. There is also an agreement that the Finance Committee may file a supplemental recommendation after any hearing the Court should hold on this recommendation.

[5] Exh. C, §§ 6.16.5, 6.16.6.

[6] "'Premium payments' for Breast Implant Disease Payment Option Claims and Rupture Payment Option Claims and for Covered Other Products Claims and payments for increased severity of disease or disability under the Breast Implant Disease Payment Option….shall be defined as Second Priority Payments. Payments made to Class 16 Claimants…shall also be defined a Second Priority Payments." Exh. A, § 7.01(a)(iii). Premium payments for Covered Other Products have already been paid by consent of the parties.

> The estimated future liability in the base case constant model, including base payments yet to be paid, scenarios[7] and Trust expenses, is $65.0 million NPV. After deducting this amount, the NPV of surplus funds is an estimated $159.0 million NPV. If all Second Priority payments are made at 50% (with Option 2 Increased Severity as a "worst case" scenario), the estimated NPV of those payments is $62.9 million. The resulting estimated surplus funds total $100.4 million NPV.[8]

This expert opinion was based on the claims data of June 30, 2016, using a Constant Model.[9] The analyses included the historical trends and data learned over the last twelve (12) years of annual reports. The IA's projections have always been based on the Constant Model methodology that have resulted in the IA's consistent history of conservative forecasting, that has overestimated liability.

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[7] Scenarios are calculations based on additional data. The relevant scenarios used by the IA included:

1. The SF-DCT Rupture Department has identified almost 14,000 acceptable POMs without a Rupture form. Based on a sample of 200 of these claims, the SF-DCT estimated that approximately 3% have submitted Rupture proof and are eligible to submit a Rupture form. If all of the estimated 420 Rupture claims were filed and paid, the effect would be $3.4 million NPV. This does not include Premium Payments.
2. Rejected Disease claims that do not accept an Expedited payment can re-file for a new condition that manifests after the conclusion of the one-year cure period. The SF-DCT reports that as of April 26, 2016, there were 78 Class 5 Claimants, 52 Class 6.1 Claimants, and 1 Class 6.2 Claimant who have timely returned their Disease or Expedited Release payment to reserve their right to file for a new condition. The IA's Report considers a wider potential population of claims. All claims that have an acceptable POM, an unacceptable Disease, and no Expedited payment are identified. Cure Rates are applied, and all of the approximately 400 remaining claims are assumed to re-file for a new disease. The total estimated liability for this scenario is approximately $3.0 million NPV.
3. Late claimants will be paid only if the payment will not have any effect on Base Payments to timely filed claimants and will not have a materially adverse effect on the payment of Premium Payments to timely filed claimants. Assuming that payment will be made for 63 Explant claims, 80 Rupture claims, 26 Disease claims, and 58 Expedited claims, the estimated liability would be approximately $1.0 million NPV. Late claimants are not eligible for Premium Payments.

[8] The table on Exhibit B, page 18 shows NPV surplus under various assumptions. The footnote on Exhibit B, page 66 defines the calculation of the NPV of total qualified transfers that could be available to the Trust. The fourth bullet on Exhibit B, page 11 states that the IA Report forecast are calculated under the assumption that the Time Value Credit requested by Dow Corning will be approved. The amounts given in the referenced paragraph cannot be calculated without taking into account the schedule of NPV qualified transfers and therefore do not sum exactly.

[9] Exh. B, p. 10.

Concerns about the validity of these projections expressed by Dow include the possibility of future adverse effects altering the IA's analysis:

1. historical filing patterns from the calibration period changing;

2. historical qualification rates, approval rates, and claim values changing ;

3. claim data having errors or misclassified claims;

4. policies and procedures changing;

5. changes in how claims are administered or how directions in the Plan are interpreted;

6. claimants waiting until the June 2019 deadline to file a claim.

The SFA provides:

> Settlement Facility Projections. In conjunction with the Independent Assessor, the Finance Committee shall, commencing the first quarter after the conclusion of the opt-out process and on a quarterly basis thereafter or at the request of the District Court, prepare projections of the likely amount of funds required to pay in full all pending, previously Allowed but unpaid and projected future First Priority Payments. Such projections shall, to the extent known or knowable, be based upon and take into account all data (as of the date of the analysis) regarding (i) the number of Claims filed with the Settlement Facility, (ii) the rate of Claim filings in the Settlement Facility, (iii) the average resolution cost of Claims in the Settlement Facility, (iv) the pending Claims in the Settlement Facility, and (v) projected future filings with the Settlement Facility. Such projections shall also state the anticipated time period for the resolution and payment of such Claims.[10]

In accordance with the SFA, the analysis provided by the IA utilizes all potential and available data since 2004 to make projections.[11] Indeed, the SFA arguably contemplates Second Priority Payments being made before all First Priority Payments are made.[12] Such a payment must, by necessity, be based on "known or knowable" projections.

For example, there are over 60,000 Class 5 claimants who never filed a Claim Form for Disease or Expedited payment to begin the processing of a claim. These claimants have been the subject of multiple mailings over thirteen years advising them about the claims process, providing opportunities for early payment, and requesting a Claim Form and/or a POM. The IA projects that less than 2,000 people in this category will file the required forms and medical documentation by June, 2019. This projection is based upon the known or knowable data

[10] Exh. A, § 7.01(d) (1).
[11] The IA's Report uses data from the beginning of the Trust. The first full IA Report from ARPC/ANKURA used data as of October 26, 2005.
[12] Exh. A, §§7.01 (c) (iv-v); 7.03 (a).

regarding the Settlement Facility. There is always a possibility that unknowable events will affect this projection.

There are two critical checks on the accuracy of the IA's projections: a comparison between the projected claim filings and actual filings over the last twelve (12) years; and the experience of MDL-926 and its Revised Settlement Plan ("RSP"). The IA has consistently been more conservative and has overestimated the number of disease claims filed with the SF-DCT. For example, the projected number of filings for Class 5 disease claims made for 2015 in the 2014 analysis was 473. Actual 2015 filings totaled 168. This history of conservative estimates suggests that the IA's projections for future filings will be higher than the actual, and there will be more, rather than less, surplus funding for Second Priority Payments.

In addition, a comparison with the final RSP report shows that through 2015 payments by SF-DCT were lower than payments by the RSP facility. The IA estimate of payable Inventory Claims and Forecasted claims from 2016 through the end of the Trust is actually higher than the actual experience of RSP. This provides further confidence that the IA Report has over-estimated, rather than under-estimated, the SF-DCT final outcome.

Under the second assumption regarding the Plan, that projections based upon historic data are inadequate to assure sufficient funding for Base Payments, the IA's Report would never be adequate for that assurance because it is inherently founded on past experience.

V. LEGAL STANDARD

The SFA permits the Court to authorize Second Priority Payments if it determines that "…all Allowed and allowable First Priority Claims and all Allowed and allowable Litigation Payments have been paid or that adequate provision has been made to assure such payment."[13] The Court previously interpreted this provision to require "adequate assurance" that First Priority Payments will be paid,[14] but the United States Court of Appeals for the Sixth Circuit reversed, holding that "assure" means that First Priority Payments must be "virtually guaranteed" before Second Priority Payments may be authorized.[15] The Sixth Circuit remanded the case to assess the propriety of Second Priority Payments under the "virtually guaranteed" standard.

The Sixth Circuit did not define "virtually guaranteed," explaining only what the standard does *not* mean. The Court said:

> Because it is impossible to account for all possible future uncertainties, we will not impose an "absolute guarantee" standard of confidence.
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[13] Exh. A, § 7.03(a).
[14] Doc. No. 934.
[15] *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473, 479-80 (6th Cir. 2015).

> [W]e adopt the Appellant's terminology of "virtual guarantee" to describe the required confidence standard under SFA § 7.03(a). While this standard does not require absolute certainty, it is nonetheless stricter than the "strong likelihood" or "more probable than not" levels of confidence that describe adequate assurance.[16]

The cases cited by the Sixth Circuit and Dow on appeal do not further illuminate the meaning of "virtually guaranteed." The Court of Appeals cited only one case—*Utilities Engineering Institute v. Kofod*—for the proposition that a promise to "assure" payment is a promise to "guarantee" it.[17] That 1945 New York Municipal Court case, however, does not further define "guarantee." Nor did it need to, because the simple question in that case was whether a father had promised to pay his son's tuition if his son did not pay; "guarantee" simply meant the father had to pay the known sum. The same is true of the cases cited by Dow. In the 1917 case, *National Watch Company v. Weiss*, an attorney personally "assured" his client's payment of a judgment that had been entered against his client, and the court held that he had committed to function as a guaranty of that known sum.[18] Likewise, the 1969 case, *United States v. Jacobs*, held that funds escrowed to "secure" tax payments meant the funds were to assure or guarantee the payments and thus must be distributed to pay a known tax claim.[19] These cases are not persuasive because they do not address "guaranteeing" that the present payment of known sums from a settlement fund will not jeopardize future payment of unknown sums.

Marine Bank v. Weaver, a 1982 United States Supreme Court case, is more helpful.[20] There, the Court considered whether a certificate of deposit issued by a domestic bank is a security subject to federal securities laws. The court held that certificates of deposit are not securities because they are insured by the FDIC and thus holders of certificates assume little risk of nonpayment; FDIC history showed that "nearly all" depositors in failing banks had received full payment of their deposits. Payment of a certificate deposit is thus "virtually guaranteed," the Court observed, in contrast to other long-term debt obligations.[21] *Weaver* is thus consistent with the Sixth Circuit's suggestion that "virtually guaranteed" payments permit a risk—albeit a very small one—of nonpayment.

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[16] *Id.* at 480.
[17] *See* 58 N.Y.S.2d 743, 744–45 (N.Y. Mun. Ct. 1945).
[18] *See* 163 N.Y.S. 46 (N.Y. Sup. Ct. 1917).
[19] *See* 304 F. Supp. 613, 618 (S.D.N.Y. 1969).
[20] *See* 455 U.S. 551, 557–58 (1982).
[21] *Wolf v. Banco Nacional de Mexico*, 739 F.2d 1458 (9th Cir. 1984), applied *Weaver* to a certificate of deposit issued by a Mexican bank and concluded that such certificates are also not subject to federal securities laws because Mexican law affords holders the same degree of protection from nonpayment as United States banks. Mexico had no FDIC equivalent to insure certificates of deposit, but the court cited (1) legal oversight of Mexican banks, (2) the history that no Mexican bank had failed for 50 years, and (3) that certificates of deposit under Mexican law have higher priority over other obligations should a bank fail, to support its conclusion that future payment of Mexican certificates was also virtually guaranteed. *Id.* at 1463.

Because the "virtual guarantee" standard in the context of the SFA is essentially a burden of proof imposed on the Finance Committee and the Court, we consider the Sixth Circuit's opinion alongside familiar burdens of proof known to the common law. As courts in the Sixth Circuit have recognized, "beyond a reasonable doubt" is the highest burden of proof in the legal system. *See, e.g.*, *United States v. Sills*, 692 F. Supp. 2d 792, 800 (E.D. Mich. 2010). The "clear and convincing" standard is the highest burden of proof imposed in civil cases. *Clifton v. Shelter Mut. Ins. Co.*, No. CIV-14-152-D, 2016 WL 538487, at *2 (W.D. Okla. Feb. 9, 2016).

We do believe that "clear and convincing" evidence that First Priority Payments will be fully funded would arguably not satisfy the Sixth Circuit's "virtually guaranteed" standard. New York defines "clear and convincing" evidence as evidence showing that a fact is "highly probable." *See, e.g.*, *People v. Velazquez*, 37 N.Y.S.3d 481, 490 (N.Y. App. Div. 1st Dep't 2016); *In re Estate of Cella*, 689 N.Y.S.2d 909, 909 (N.Y. App. Div. 4th Dep't 1999); N.Y. Pattern Jury Instruction Companion Handbook §§ 3.1, 8.4; 5 N.Y. Prac., Evidence in New York State and Federal Courts § 3.10. A high probability of funding for First Priority Payments appears synonymous with a "strong likelihood" of funding, which the Sixth Circuit held would be insufficient to authorize Second Priority Payments under the SFA.[22]

Given this analysis, there are at least two standards that the Finance Committee could use to explain "virtually guaranteed": (1) "beyond a reasonable doubt," and (2) "beyond any reasonable possibility." New York's highest court has approved a definition of "reasonable doubt" as "an actual and substantial misgiving or doubt"—a doubt that is not "vague," "imaginary," or a "mere possibility of doubt." *People v. Jones*, 27 N.Y.2d 222, 226–27 (N.Y. 1970). Thus, only actual and substantial doubts, not a mere possibility of doubt or unreasonable doubts, are enough to foreclose a factfinder's determination of fact under this standard.

The "beyond a reasonable doubt" standard is a closer analogue to the "virtually guaranteed" standard articulated by the Sixth Circuit. Because absolute certainty that funding for First Priority Payments will be available is not required, the Court may entertain the possibility of doubt about future funding and still authorize Second Priority Payments. The Court could also conclude that any lingering doubts about future funding are not reasonable and therefore authorize Second Priority Payments. This would be consistent with *Weaver*'s implied acknowledgment that a "virtual guarantee" admits of some small risk of nonpayment. But if the court has actual, substantial, and reasonable doubts about future funding for First Priority Payments, however, then those payments are not "virtually guaranteed" and Second Priority Payments may not be made.

If, on the other hand, the Finance Committee uses a "beyond any reasonable possibility" standard, then there is always a chance that there would not be sufficient funds to make First Priority Payments. Dow has raised a number of possibilities that appear reasonable. Although highly unlikely, it is indeed possible that there may be any number of currently unknown future

[22] The Sixth Circuit also held that a lesser, "more probable than not" standard would be insufficient; that formulation reflects the "preponderance of the evidence" standard that falls below "clear and convincing" evidence on the burden-of-proof spectrum. *In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 480.

events that might alter the IA's projections. As a result, the use of the "beyond any reasonable possibility" standard would preclude a recommendation to make Second Priority Payments.

VI. BANKRUPTCY

The Plan provides that there must be sufficient funds so that Base Payments can be paid in full before there can be Second Priority Payments. In order to have actual certainty in this regard, Second Priority Payments cannot be made until after all Base Payments have been made.

There are notable bankruptcy inequities should Second Priority Payments not be made at this time. First, many claimants have already received premium payments, while others will be required to wait. A fifty percent (50%) Premium Payment has already been made to most of the claimants whose claims were processed prior to January 1, 2014; while fifty (50%) Premium Payment has not been made to claimants whose claims were processed on or after January 1, 2014. Second, a delay in making Second Priority Payments may result in some claimants missing the opportunity altogether. Approximately seven to ten percent of the claimants are expected to die by the end of the Trust, and cannot benefit from prospective Premium Payments.

A conflict exists between the terms of the Plan itself and the reality that some claimants have been paid and other similarly situated claimants have not or will never be paid. Thus, there is a horizontal equity problem that cannot be avoided absent approval of a continuation of fifty percent (50%) Second Priority Payments. Yet, there is a competing demand in the Plan that sufficient funds be reserved for future Base Payments.

VII. CONCLUSION

Given the complexity of the Plan, the legal standard, and bankruptcy issues, the Finance Committee has concluded that the only way these issues can be resolved is with a recommendation supporting a fifty percent (50%) Second Priority Payment. If the Finance Committee were to recommend no Second Priority Payment, the decision-making process would end without further review. If, on the other hand, the Finance Committee recommends a fifty percent (50%) Second Priority Payment, the District Court, and perhaps the Sixth Circuit Court of Appeals, will have the opportunity to decide whether or not such a Second Priority Payment should be made.

The Finance Committee therefore recommends that a fifty percent (50%) Second Priority Payment be made. As stated above, Second Priority Payments include: 1) premium payments for Breast Implant Disease and Rupture Payment Option Claims; 2) increased severity of disease or disability under the Breast Implant Disease Payment Option; and 3) payments to Class 16 Claimants. This recommendation is made with full awareness that the Plan, legal standard, and bankruptcy issues may very well preclude this recommendation from ever being implemented. Without this recommendation, however, the parties will not have a full opportunity to address the issues. Accordingly, the Finance Committee respectfully requests the Court grant this Recommendation and Motion for Authorization to Make Second Priority Payments.

Dated: December 30, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2016, the foregoing Recommendation and Motion has been electronically filed with the Clerk of Court using the ECF system which will send notice and copies of the aforementioned document to all registered counsel in this case.

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