

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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

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

Pursuant to section 7.03(a) of the Settlement Facility and Fund Distribution Agreement (“SFA”),¹ the Finance Committee of the Settlement Facility Dow-Corning Trust (“SF-DCT”) files this recommendation and motion with the Court, requesting authorization to distribute Second Priority Payments, and would respectfully show as follows:

BACKGROUND

A. Plan Provisions on Second Priority Payments

The SFA sets the priority of payment for claims. First Priority Payments² must be distributed as soon as “reasonably practicable” following the approval of a claim. SFA

¹ The SFA, including Annexes A and B to the SFA, is attached hereto as Exhibit A. The Amended Joint Plan of Reorganization is attached hereto as Exhibit B.

² Section 7.01(a)(i) lists First Priority Payments as:

Payments identified on the Settlement Grid, Annex B hereto, as Expedited Release Payments (for both Settling Breast Implant and Covered Other Products Claims), Explanation Payments, Disease Base Payments (for Breast Implant Claims), Rupture Base Payments (for Breast Implant Claims), Medical Condition Payments for Covered Other Products, and Silicone Material Payments, along with related administrative costs, are defined as “First Priority Payments.” Payments to be distributed to or for the benefit of Allowed Claims of Settling Claimants in Classes 4A, 6A, 6B, 6C and 6D, Classes 14 and 15 (as described at Article III), and, to the extent provided in the Litigation Facility Agreement, Litigated Shareholder Claims shall also be defined as First Priority Payments.

§ 7.01(c)(ii). Premium Payments, or Second Priority Payments,³ cannot be made unless the Court determines that “all other Allowed and allowable Claims, including Claims subject to resolution under the terms of the Litigation Facility Agreement, have either been paid or adequate provision has been made to assure such payment.” SFA § 7.01(c)(iv). The Finance Committee is not precluded from seeking approval to make Second Priority Payments prior to completing all First Priority Payments as long as the ability to make First Priority Payments is “reasonably assured.” *See* § 7.01(c)(v). As discussed below, the Sixth Circuit has interpreted the SFA to authorize early payment of Second Priority Payments so long as all First Priority Payments are “virtually guaranteed.” *See In re Settlement Facility Dow Corning Tr.*, 592 F. App’x 473, 478–80 (6th Cir. 2015).

The SFA also outlines the procedure for seeking authorization to make Second Priority Payments. *See* SFA § 7.03. The Finance Committee initiates the authorization process by filing a recommendation and motion with the Court. *Id.* The recommendation and motion must be 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 and projections⁴

³ Section 7.01(a)(iii) lists Second Priority Payments as:

Payments identified on the Settlement Grid as “Premium Payments” for Breast Implant Disease Payment Option Claims and Rupture Payment Option Claims and for Covered Other Products Claim and payments for increased severity of disease or disability under the Breast Implant Disease Payment Option (for both Disease Payment Option I and Disease Payment Option II) as outlined shall be defined as Second Priority Payments. Payments made to Class 16 Claimants in respect to the obligations in Sections 6.16.5 and 6.16.6 of the Plan that are to be paid by the Settlement Facility shall also be defined as Second Priority Payments.

⁴ The SFA’s provision regarding Settlement Facility Projections states that:

and analysis of the cost of resolution of such pending Claims as described in Section 7.01(d).” *Id.* The Debtor’s Representatives and the Claimants’ Advisory Committee (“CAC”) must be provided with a copy of the recommendation and motion and given the “opportunity to be heard.” *Id.* Second Priority Payments may be authorized, if, after a hearing, “the District Court rules 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 (along with administrative costs) based on the available assets.” *Id.*

B. Prior Litigation on Second Priority Payments

The Finance Committee first moved for authorization to make Second Priority Payments on October 7, 2011. (Dkt. No. 814). The Court granted the motion, concluding that there was more than “adequate provision” to assure payment of First Priority Payments and partial Second Priority Payments. *In re Settlement Facility Dow Corning Tr.*, 2013 WL 6884990, at *10 (E.D. Mich. Dec. 31, 2013). The Sixth Circuit reversed, disagreeing with the Court’s Plan interpretation and holding that the Plan required a “virtual guarantee” that First Priority Payments would be made before Second Priority Payments could be authorized. *See Dow Corning Tr.*, 592 F. App’x at 478–80.

In conjunction with the Independent Assessor, the Finance Committee shall, 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.

On December 30, 2016, the Finance Committee filed a new recommendation and motion to make partial fifty percent Second Priority Payments. (Dkt. No. 1279). At that time, there were over 70,000 claimants who could have filed claims eligible for First Priority Payments. *In re Settlement Facility Dow Corning Tr.*, 2017 WL 7520575, at *10 (E.D. Mich. Dec. 27, 2017). The Independent Assessor therefore had to estimate future liability for unfilled claims based on historical claims data. *Id.* at *9. Dow Silicones⁵ challenged the Independent Assessor’s estimates, claiming that they were “fraught with uncertainty.” *Id.* at *7. Nevertheless, following briefing and oral argument by the parties, the Court again granted the Finance Committee’s motion, this time under the “virtually guaranteed” standard. *Id.* at *9. The Court relied heavily on the Independent Assessor’s conservative analysis, which concluded that there would be a surplus of \$100.4 million (in net present value) even if First and Second Priority Payments were made. *Id.* The Court recognized that despite some degree of uncertainty in the projections: “The Independent Assessor’s methodology has been proven to be correct and more conservative throughout the years.” *Id.* The Sixth Circuit affirmed the Court’s finding that First Priority Payments were virtually guaranteed. *In re Settlement Facility Dow Corning Tr.*, 754 F. App’x 409, 417 (6th Cir. 2018).

C. The Independent Assessor’s November 18, 2020 Draft Report

The Finance Committee asked the Independent Assessor, who has been providing consulting services to the SF-DCT for over eight years,⁶ to evaluate claim and payment

⁵ Dow Corning Corporation changed its name to Dow Silicones Corporation effective February 1, 2018.

⁶ Moreover, the Independent Assessor has served on the Closing Committee for the past two years, which has allowed it to enhance its knowledge about the SF-DCT’s operations, including its claims processing database, and the Plan documents. Report at 4.

data to assess whether Second Priority Payments could be distributed under the Plan. Second Priority Payments here refers to claims that already received a 50% premium payment or increased severity award pursuant to this Court's authorization, *see In re Settlement Facility Dow Corning Tr.*, 2017 WL 7520575, at *10 (E.D. Mich. Dec. 27, 2017), including the 50% Class 16 payment, and claims that have not been paid any portion of a Second Priority Payment and therefore could receive a 100% premium payment or increased severity award. Report at 6, 11.

The Finance Committee received the Draft Report of the Independent Assessor (the "Draft Report") on November 20, 2020.

On December 3, 2020, the Finance Committee, Dow Silicones and the Debtor's Representatives (collectively, "Dow"), and the CAC participated in a conference call to discuss the Draft Report.

A week after the call, on December 11, 2020, Dow and the CAC submitted comments and questions on the Draft Report.

D. The Independent Assessor's December 21, 2020 Final Report

The Independent Assessor issued its Final Report (the "Report") on December 21, 2020, which is attached as Exhibit C. In its Report, the Independent Assessor estimated the value of the remaining claims in Classes 5, 6.1 and 6.2 entitled to First Priority Payment to ensure that funding for these payments was "virtually guaranteed."⁷ The Independent Assessor also calculated the amount due to Class 16 claimants. This time, however, the Independent Assessor's estimate was not based on projections of future claims that had not been submitted, but rather on a fixed universe of claims since the

⁷ The remaining classes (7,9, and 10) have already been closed; therefore they are not included in the Independent Assessor's estimate of future potential payments. Report at 4.

last remaining filing deadline passed 18 months ago, on June 3, 2019.⁸ There is therefore no uncertainty surrounding the number of claims that could receive First Priority Payments, as the Independent Assessor’s estimation of outstanding payment obligations is based on claims in hand at the SF-DCT. Report at 4.

After an extensive analysis of the closed universe of 62,809 claims eligible for First Priority Payments, the Independent Assessor concluded that there would be a \$172,595,097 surplus of funds (in nominal dollars) even after making First **and** Second Priority Payments and paying estimated administrative expenditures through 2024. *Id.* at 12–15. This estimate is based on claims data as of August 31, 2020, and financial data as of October 31, 2020. *Id.* at 3, 14.

First and Second Priority Maximum Payments for Pending Claims			
Settlement Payment Option	Base Amount	Premium Amount	Total (\$)
Expedited Release	2,295,800	N.A.	2,295,800
Disease	204,012,072	112,367,704	316,379,776
Increased Severity Option 1	19,341,750	4,152,500	23,494,250
Increased Severity Option 2	14,941,250	3,181,500	18,122,750
Explantation	1,209,750	N.A.	1,209,750
Rupture	5,710,000	65,027,656	70,737,656
Total	247,510,622	184,729,360	432,239,983

Total Projected Funds Available to Fund Future Trust Payments	\$ 649,313,463
Projected Maximum First and Second Priority Payments	\$ (432,239,983)
Administrative Expenditures	\$ (30,678,383)
Projected 2nd 50% Class 16 Payment - 12/31/2020	\$ (13,800,000)
Remaining Projected Funds Available	<u>\$ 172,595,097</u>

⁸ June 3, 2019 was the deadline for filing disease and expedited release claims. The deadlines for rupture and explant claims expired on June 1, 2006, and June 2, 2014, respectively.

The Independent Assessor maintained its approach of basing its analysis on conservative assumptions that overestimate potential liability for First Priority Payments. For instance, the Independent Assessor took an expansive view of the claims that could potentially be eligible for First Priority Payments and included claims that had any conceivable chance of receiving payments, such as claims under appeal, claims with incorrect addresses, deficient claims that have not received a Final Determination Letter, and claims with returned or stale checks. Report at 5 n.2, 8. Historical data from over 15 years of claims processing establishes that a much smaller pool of these claims will actually be eligible for a First Priority Payment. *Id.* at 16.

The Independent Assessor also assumed that each claim would receive the maximum payment allowed under the Plan. Report at 8–10. This assumption is most relevant for disease claims for which First and Second Priority Payments are based on various awards according to the severity of the disease. SFA § 7.01(a)(i), (iii), Annex B. For the 2,232 disease claims that have been filed but not reviewed, the Independent Assessor identified the specific disease that the claimant elected on the claim form and assumed that the claimant would receive the maximum payment level. *Id.* at 9–10. This resulted in a maximum exposure for these claims of \$182,591,400. *Id.*⁹ But again, historical data demonstrates that medical records and other documentation supporting

⁹ The Independent Assessor also used a historical approach to estimate the potential value of these claims. Report at 9. For this approach, the Independent Assessor made assumptions based on historical claims data to determine what percentage of these claims would fall in each disease category and then assumed that each claim would receive the highest disease award allowed in that category. *Id.* This approach yielded an estimated future liability of \$54,002,458 for this group of claims. *Id.* Consistent with its conservative approach aimed to maximize potential exposure, the Independent Assessor used the higher \$182.6 million figure in the calculations used to determine the viability of making Second Priority Payments. *Id.* at 10.

the disease claims will not support maximum severity or corresponding payment levels for all of these claims. Report at 16.

Finally, the Independent Assessor's \$172.6 million surplus includes the full amount of Second Priority Payments without reductions for certain funding caps. *Id.* at 12. For example, payment to NOI Claimants for rupture and explant claims is subject to a \$30 million funding cap. Report at 14–15. To date, the Settlement Facility has distributed \$27,329,141 to these NOI Claimants. *Id.* at 15. The remaining balance under the funding cap is insufficient to allow for the nearly \$7 million in Second Priority Payments that NOI Claimants could receive absent the funding cap. Despite the NOI Claimants inability to receive this full \$7 million payment, it is nevertheless included in the Independent Assessor's analysis.¹⁰

Ultimately, even under conservative assumptions that overestimate liability by using unlikely maximum payment levels and an overinclusive pool of claims, the Independent Assessor concludes that there will be a \$172.6 million funding cushion after First and Second Priority Payments are distributed and other obligations, like administrative expenditures, are paid. Accordingly, it is virtually guaranteed that all First Priority Payments will be made as required under the Plan to distribute Second Priority Payments.

LEGAL STANDARD

The Plan permits the Court to authorize distribution of Second Priority Payments if, after holding a hearing and providing Dow and the CAC an opportunity to be heard, the Court determines that distribution of all First Priority Payments is “virtually

¹⁰ The Independent Assessor observes that NOI Claimants would likely be entitled to a pro-rata share of the \$6,982,000 in potential Second Priority Payments. Report at 14–15.

guaranteed.” *Dow Corning Tr.*, 592 F. App’x at 478–80; *see also* SFA, § 7.03(a) (allowing Second Premium Payments if “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 (along with administrative costs) based on the available assets”). “This standard does not require absolute certainty, but it is nonetheless stricter than the ‘strong likelihood’ or ‘more probable than not’ levels of confidence that describe ‘adequate assurance.’” *Dow Corning Tr.*, 754 F. App’x at 413 (alterations and citation omitted). As this Court has previously found, its decision to authorize Second Priority Payments must be based on the Independent Assessor’s analysis and projections. *Dow Corning Tr.*, 2017 WL 7520575 at *8.

RECOMMENDATION

The Finance Committee recommends and moves for authorization to distribute Second Priority Payments consisting of: (1) premium payments to Classes 5, 6.1, 6.2 for Breast Implant Disease and Rupture Payment Option Claims; (2) increased severity of disease or disability to Classes 5, 6.1, 6.2 under the Breast Implant Disease Payment Option; and (3) the remaining 50% payment to Class 16 Claimants. This recommendation is consistent with the Plan’s terms and supported by the Independent Assessor’s detailed and conservative analysis that maximizes potential exposure and by prior decisions of this Court.

The Plan envisions that Second Priority Payments may be made and authorizes such payments if the Court 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.” SFA § 7.03(a); *see also Dow Corning Tr.*, 2017 WL 7520575, at *9 (“The terms in the SFA expressly provides

Second Priority Payments if funding can be adequately assured.”). As interpreted by the Sixth Circuit, this provision requires the Court to assess “whether there is a ‘virtual guarantee’ that all First Priority Claims will be paid before authorizing any Second Priority Payment.” *Dow Corning Tr.*, 2017 WL 7520575, at *8.

The Independent Assessor’s analysis supports a finding that the remaining First Priority Payments are virtually guaranteed. The Independent Assessor concludes, based on conservative and overinclusive assumptions, that there will remain a \$172.6 million surplus even if Second Priority Payments are made. This surplus is based on several conservative assumptions that use an expansive class of claims and that award maximum payments for those claims. As over 15 years of claims-processing data bears out, the Independent Assessor’s methodology and assumptions overestimate liability for all First and Second Priority Payments, meaning that the remaining surplus after these payments are made could be significantly higher.

The Court has previously found that First Priority Payments were virtually guaranteed, relying heavily on the Independent Assessor’s analysis. *Dow Corning Tr.*, 2017 WL 7520575, at *9 (recognizing that the Independent Assessor’s “methodology has been proven to be correct and more conservative throughout the years.”). The Court came to this conclusion even though the Independent Assessor’s prior analyses required predicting liability for future claims, which inserted some measure of uncertainty into the Independent Assessor’s methodology. *Id.* (concluding that these “built-in uncertainties . . . [did] not change the fact that the Independent Assessor’s projections have proven accurate”). The Sixth Circuit affirmed the Court’s virtual guarantee finding on appeal. *See Dow Corning Tr.*, 754 F. App’x at 417.

A finding that First Priority Payments are virtually guaranteed is even more warranted at this late juncture of these proceedings, which have been ongoing for over 20 years. Because the claims deadline passed on June 3, 2019, the prior uncertainty involved in projecting liability for future claims has been virtually eliminated. The SF-DCT anticipates completing claims processing by December 2022. Given the closed universe of claims at issue and imminent closure of the SF-DCT, there can be no surprise spike in claims or other unknown unknowns for which to build in contingencies. Even assuming that such contingencies were still necessary—and they surely are not—the estimated \$172.6 million cash cushion would be more than sufficient to cover any unexpected additional costs.

Finally, there is no reason to wait until the SF-DCT completes processing all First Priority Payments before making Second Priority Payments. Delaying these payments would raise the specter of notable bankruptcy inequities, as many claimants have already received 50% Second Priority Payments while others in the same class have not received any such payment. *See* 11 U.S.C. § 1123(a)(4) (requiring bankruptcy plans to “provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest”). Moreover, waiting to process and make these payments until all First Priority Payments are processed will extend the timeline for completing claims processing beyond December 2022, which would inevitably increase the cost of operating the SF-DCT. Beginning the Second Priority Payment process now will ensure the efficient and cost-effective resolution of all remaining claims and of winding up the SF-DCT and this litigation.

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2020, the foregoing pleading has been electronically filed with the Clerk of Court using the ECF system which will send notice and copies of the document to all registered counsel in this case.

/s/ Karima G. Maloney
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**APPENDIX
TO FINANCE COMMITTEE’S RECOMMENDATION AND MOTION FOR
AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS**

Appendix	Description
A.	Settlement Facility and Funding Distribution Agreement between Dow Corning Corporation and the Claimants’ Advisory Committee (February 4, 1999)
B.	Amended Joint Plan of Reorganization (updated June 1, 2004)
C.	Report of the Independent Assessor (December 21, 2020)