

EXHIBIT A

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.

THE FINANCE COMMITTEE, CLAIMANTS' ADVISORY COMMITTEE
Interested Parties – Appellees.

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

**BRIEF OF APPELLANTS DOW CORNING CORPORATION,
DEBTOR'S REPRESENTATIVES,
THE DOW CHEMICAL COMPANY, CORNING INCORPORATED**

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affirmative and stringent standard is necessary in light of the Plan's mandate to preserve the priority of distributions, to protect the First Priority Payments and to avoid unnecessary and undue risk and potentially unequal treatment to those claimants who may file their claims in the later years of the settlement program.

The district court ignored the plain language of Sections 7.01(c)(iv) and 7.03(a) of the SFA which governs the distribution of Second Priority Payments and instead adopted a different standard that it borrowed from a section of the SFA that does not pertain to the conditions for issuing Second Priority Payments. In so doing, the district court nullified the standard and ceded its authority to the Finance Committee. The district court found that:

The purpose of the Premium Payment provision is to give the Finance Committee the discretion to seek court approval to pay Premium Payments *contemporaneously* with the First Priority Payments if the Finance Committee is "reasonably assured" that there are sufficient funds to distribute both payments. This Court is then to determine whether there is "adequate provision" to "assure" such payments.

Order, RE #934, at Page ID #15772 (emphasis in original).

There is no "Premium Payment provision" in the SFA or the Plan. From the text of the Order, it appears that the district court is referring to a provision in the SFA (Section 7.01(c)(v)) that governs the contemporaneous distribution of Second Priority Payments and higher priority payments *if* Second Priority Payments have

been properly authorized.¹⁵ This provision is necessary because funding payments are capped on an annual basis¹⁶ and if Second Priority Payments are properly authorized while First Priority Payments are being distributed, then the First Priority Payments still have priority in terms of timing of payment. That is, Section 7.01(c)(v) instructs the Finance Committee that it cannot pay higher and authorized lower priority payments contemporaneously at any point in time unless there is “reasonable assurance” that the higher priority payments will be paid “*timely.*” If paying the lower priority payments would result in a delay in the payment of the higher priority payments, then the lower priority payments would have to be deferred.¹⁷ This provision has nothing to do with the threshold standard

¹⁵ Section 7.01(c)(v) of the SFA permits contemporaneous payment of lower and higher priority payments “so long as the ability to make *timely* payments of higher priority claims is *reasonably assured.*” SFA, RE #826-2, Page ID #13281, §7.01(c)(v) (emphasis added). One cannot address the timeliness of payments unless it has already been determined that they are authorized for distribution.

¹⁶ The Funding Payment Agreement is the Plan Document that governs Dow Corning’s obligations to make payments to fund the payment of tort claims under the program. That Agreement sets forth a funding schedule, with an up-front “Initial Payment” and subsequent payments to be made if and as needed subject to annual caps on the funding obligation. Funding Payment Agreement, RE #814-4, Page ID #12421, 12423, §§2.01(a), 2.01(b).

¹⁷ To illustrate: The payment of Second Priority Payments will, by definition, increase the amounts paid in any annual funding period and thus these additional payments could affect the cash flow since funding is capped on an annual basis. If Second Priority Payments, when added to First Priority Payments, would result in an aggregate amount that exceeds the funding cap in that year, then Section
(Footnote continued)

governing the authorization to pay Second Priority Payments – which is plainly and affirmatively set forth in Sections 7.01(c)(iv) and 7.03.

Indeed, the “reasonable assurance” language of Section 7.01(c)(v) shows not only that the parties knew how to deliberately lessen the degree of assurance required to take action under the SFA, but that they also purposely tailored different standards to meet different levels of risk.¹⁸ “Under accepted canons of contract construction, when certain language is omitted from a provision but placed in other provisions, it must be assumed that the omission was intentional.” *Sterling Investor Servs., Inc. v. 1155 Nobo Assocs., LLC*, 818 N.Y.S.2d 513, 516 (N.Y. App. Div. 2d Dep’t 2006). Moreover, a court “‘may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.’” *NFL Enters. LLC v.*

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7.01(c)(v) directs the Finance Committee to avoid distributing Second Priority Payments – even if they are properly authorized under Sections 7.01(c)(iv) and 7.03(a) – if the distribution at that time could delay payment of any First Priority Payments until a later funding period.

¹⁸ It also is noteworthy that the Plan drafters used the word “assure” in another provision of the SFA in a manner consistent with the interpretation of assure to mean “virtually guaranteed.” A fundamental purpose of the Settlement Facility is “to assure that the Trust qualifies as a Qualified Settlement Fund pursuant to § 468B of the Internal Revenue Code and the Treasury Regulations promulgated thereunder.” SFA, RE #826-2, Page ID #13259, §2.01. The parties could not have reasonably intended the same word to be construed differently in Sections 7.01(c)(iv) and 7.03(a).