

**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**

**RESPONSE TO DOW CORNING CORPORATION’S MOTION
TO ENFORCE APPLICATION OF TIME VALUE CREDITS**

The Claimants’ Advisory Committee (“CAC”) respectfully submits this Response to Dow Corning Corporation’s Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents (the “Motion”). The Plan¹ documents provide for Dow Corning Corporation (“Dow Corning” or “DCC”) to receive a Time Value Credit (“TVC”) to compensate for the lost earning power of certain insurance funds that it contributes to the Depository Trust (the “Trust”) post-Effective Date but ahead of the Plan’s funding schedule. However, Dow Corning’s attempt to claim a similar credit for having transferred the Initial Payment into escrow *pre*-Effective Date is inconsistent with the plain language and structure of the Plan and the parties’ intentions and conduct.

PRELIMINARY STATEMENT

The Plan was premised on Dow Corning’s agreement to pay \$2.35 billion to resolve its liability to recipients of Dow Corning breast implants and other implanted medical products. Dow Corning bargained to pay most of this money over time following the Plan Effective Date, and therefore the nominal amounts of its future payments — other than the \$985 million Initial

¹ Terms not defined herein have the meanings assigned in the Motion.

Payment due on the Effective Date — had to be *increased* to have the same Net Present Value (“NPV”) as if the entire amount had been paid at the outset. The resulting payment schedule was embodied in the Annual Payment Ceilings set forth in the Funding Payment Agreement (“FPA”). In certain circumstances where the FPA timetable is accelerated by the early receipt of insurance funds, Dow Corning is entitled to a TVC adjustment in certain Annual Payment Ceilings.

Wholly apart from this post-Effective Date payment schedule, § 7.4 of the Plan provided for Dow Corning to transfer the Initial Payment into escrow pre-Effective Date if, as the parties understood was possible, Plan implementation were delayed by an appeal challenging the Plan’s funding caps or third party release provisions. These funds were to be paid and held conditionally until the Effective Date because, if confirmation of the Plan were reversed, they would have to be returned to Dow Corning. This escrow structure was necessary because the Bankruptcy Code does not permit payments for the benefit of creditors prior to final plan approval. Thus, the Initial Payment could not be released unconditionally for the benefit of tort claimants until the Effective Date, and the Plan unsurprisingly does not provide any TVC in connection with the escrowing of the funds.

Any suggestion that Dow Corning’s pre-Effective Date transfer of the Initial Payment into escrow was intended to have economic consequences under the Plan is further belied by a specific compromise embodied in the Plan documents that Dow Corning’s current claim seeks to unravel. Dow Corning bargained to have the Effective Date — whenever it occurred — be the date used to determine the value of its payments under the Plan, rather than having the value of the settlement fixed as of 1998, when the funding cap and payment schedule were first negotiated. This provided a huge benefit to Dow Corning — it dramatically reduced the true value of the settlement, because the NPV of \$2.35 billion paid as of June 1, 2004, discounted

back to December 31, 1998, is only approximately \$1.68 billion. In return for this significant benefit, Dow Corning agreed to fix a date (ultimately determined to be the Interest Accrual Date of April 30, 1999) after which the earning power of most of the Initial Payment would accrue *for the benefit of the Trust* — even if it were not actually transferred to the Trust until later. Dow Corning promised to pay the actual interest it earned on the money after that date *outside* the \$2.35 billion cap and *without* claiming a TVC.

The heart of Dow Corning’s motion is the astonishing claim that, having bargained to give the Trust the benefit of the time value of the Initial Payment starting from the Interest Accrual Date, Dow Corning should nevertheless get a TVC of more than \$200 million — taking back for itself the time value of the same money — because it also (as contemplated by the Plan) physically transferred the funds to the Trust (to continue to be held in escrow) ahead of the Effective Date. But even if the conditional transfer of the Initial Payment into escrow, where it could not be used to pay claims, were deemed a “payment” under the not-yet-effective Plan, nothing in the Plan documents provides for Dow Corning to receive a TVC in such circumstances. Giving Dow Corning such a credit here would simply undo the bargain it struck in assigning the earning power of that money to the tort claimants as of 1999.

Dow Corning first surfaced with its Initial Payment TVC theory after the Effective Date. As Dow Corning notes, the CAC long argued that it was unnecessary for the Court to address the issue because the CAC believed (and maintains) that ample funds exist to pay all current and future claims, including Premium Payments, with a comfortable margin for error — *even if* Dow Corning were to prevail in its aggressive claim. [REDACTED]

[REDACTED] Recognizing that a ruling *against* Dow Corning on any material portion of the TVC dispute would create a sufficient additional cushion to eliminate any good faith dispute as to the Trust’s ability to pay premiums, the Finance Committee called upon the parties to submit the dispute to the Court for resolution if it could not be settled. Since Dow Corning has declined to respond to the CAC’s proposals to resolve this and other outstanding issues, the Motion became necessary.

We demonstrate below that Dow Corning is *not* entitled to a TVC with respect to the Initial Payment for two reasons based on the plain language of the Plan documents: *First*, the transfer of the Initial Payment into escrow pre-Effective Date did not constitute an unconditional “payment” to the Trust until the Effective Date, when such funds were released to be used for the benefit of the tort claimants. *Second*, the terms of the Plan documents make clear that the parties bargained for the time value of the Initial Payment to go to the Trust starting from the Interest Accrual Date — in the form of Dow Corning’s actual earned interest from 1999 until the Initial Payment was escrowed in 2001, and through the Trust’s own earnings thereafter. Dow Corning’s attempt to take back the time value of the Initial Payment for the 2001-2004 period is inconsistent with the deal struck in the Plan documents and inherently illogical, because it would

mean that tort claimants would have been better off simply leaving the Initial Payment in Dow Corning's hands, earning interest for the benefit of the Trust, until the Effective Date.

Moreover, even if the Plan documents were deemed to be ambiguous, Dow Corning's own conduct in performing under the Plan confirms the parties' intent. Although Plan § 7.4 specifically required transfer of the Initial Payment pending an appeal on the release issue, Dow Corning resisted transmitting the funds for nearly two years, eventually agreeing only to piecemeal payments under pressure (including litigation threats) from the Tort Claimants' Committee ("TCC"). If Dow Corning really believed that by funding the Initial Payment into an escrow account held by the Trust prior to the Effective Date it would receive a TVC of more than \$65 million per year, rather than resisting it would have demanded that the Trust take the money in 1999. In addition, in a 2001 letter to the TCC proposing a schedule to fund the Initial Payment, Dow Corning attempted to re-negotiate the terms of the Plan to provide for a TVC on the Initial Payment. Although the TCC rejected this attempt to change the deal, the letter confirms Dow Corning's contemporaneous understanding that it did not, under the existing Plan documents, already have the right to a TVC based on the timing of the Initial Payment.

As further demonstrated below, the Court should reject Dow Corning's attempt to re-trade the Initial Payment issue. We also explain below why certain other credits that Dow Corning claims should be rejected as lacking any basis in the language of the Plan documents.

FACTUAL BACKGROUND

A. Governing Provisions of the Plan Documents

The Court is familiar with the basic funding structure of the Plan: Dow Corning agreed to pay up to \$2.35 billion NPV to the Depository Trust to resolve all tort claims. Because Dow Corning wished to fund this amount over time, the scheduled payments (other than the Initial Payment) had to be *increased* by 7% per year to account for the delay, such that when discounted

back to the Effective Date they would equal \$2.35 billion. *See* Motion, Ex. 3, FPA § 2.01 (payments deemed to be “discounted at the rate of 7% per annum to the Effective Date”). Dow Corning cites a definition of Net Present Value that similarly focuses on the need to *increase future payments* to account for the earning power lost by the passage of time. *See* Memorandum in Support of Dow Corning Corporation’s Time Value Credit Motion (“DCC Br.”) at 3 n.3.

The TVC concept, awarding Dow Corning a *credit* for paying certain funds *early*, was created for a limited purpose consistent with this overall scheme: where Dow Corning pays two specific categories of insurance proceeds to the Trust (insurance received pre-Effective Date but paid to the Trust immediately *after* the Effective Date, and Excess Insurance Proceeds received prior to the end of Funding Period 2), Dow Corning is to receive credit against certain future Annual Payment Ceilings, carried forward and credited at 7% per year. *See* FPA §§ 2.01(a)(ii), 2.03(b). These credits were provided in return for the obligation to contribute insurance proceeds as received, because Dow Corning was giving up the time value of these proceeds earlier than would otherwise be required by the funding schedule.

The parties recognized that the large reductions in Annual Payment Ceilings that could be necessitated by certain of these adjustments could have a severe impact on the Trust’s cash flow during the crucial early years of its operation. Therefore, the parties agreed that TVCs triggered by the receipt of Excess Insurance Proceeds would not be applied immediately, but would be spread out (with 7% annual adjustments) over Funding Periods 5 through 8. *See id.* § 2.03(b). Dow Corning acknowledges that the parties deferred these credits “to ensure sufficient funding in the initial years of the implementation of the Plan, when a substantial percentage of the claims were expected to be filed.” DCC Br. 7.

However, the FPA specifies very different treatment for the Initial Payment: the parties agreed that interest on most of the \$985 million Initial Payment would accrue *for the benefit of the tort claimants* beginning on the Interest Accrual Date of April 30, 1999. FPA §§ 1.02(b), 2.01(a). This interest is expressly *excluded* in calculating the NPV of Dow Corning's payments and *not* credited towards any Annual Payment Ceiling. *Id.* § 2.01(a). Section 7.4 of the Plan separately provided that, if the Effective Date were delayed by appeals challenging the Plan's release provisions or funding caps, Dow Corning would promptly transfer the Initial Payment into an escrow account held by the Trust. These funds were to be held conditionally and returned if confirmation were reversed and could not be used to pay claims. Dow Corning misleadingly suggests that the Plan documents were belatedly changed at the TCC's insistence to provide for early transfer of the Initial Payment (DCC Br. 10 n.9), but § 7.4 was included in the Plan as originally confirmed and should be read in harmony with the relevant FPA provisions.

Significantly, while the FPA contains detailed provisions specifying how to calculate TVCs based on certain early insurance payments, it contains no parallel provision governing any supposed right to a TVC based on the transfer into escrow of the Initial Payment pursuant to Plan § 7.4 — much less the detailed provision spreading out the impact over several years that one would expect to see if such a massive credit had been contemplated. This is consistent with the facts that (1) the Initial Payment would not be released unconditionally to the Trust until the Effective Date and (2) in any event, the earning power of the Initial Payment from April 30, 1999 had already been assigned to the Trust, eliminating any rationale for Dow Corning to receive a TVC for those funds.

B. Dow Corning's Subsequent Conduct Confirmed Its Understanding That It Had Given Up the Benefit of the Time Value of the Initial Payment

Dow Corning's conduct following confirmation of the Plan but before paying the full Initial Payment into escrow confirmed its understanding that the parties had agreed to assign the time value of the Initial Payment to the Trust going forward from the Interest Accrual Date, wherever the funds physically resided. If Dow Corning believed that it was entitled to a TVC based on funding the Initial Payment in advance of a delayed Effective Date, then its conduct during this period was irrational.

As the Court will recall, the Bankruptcy Court confirmed the Plan in November 1999 but purported, in a December 1999 decision, to eliminate the nonconsensual shareholder release imposed against dissenting creditors. *See In re Dow Corning Corp.*, 244 B.R. 721 (Bankr. E.D. Mich. 1999), *aff'd in part and rev'd in part*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002). Numerous parties appealed confirmation, triggering Dow Corning's obligation, pursuant to Plan § 7.4, to escrow the Initial Payment pending appeal, but Dow Corning declined to transfer the funds, citing the outstanding release issue.

However, even after this Court reversed the Bankruptcy Court's release ruling in November 2000, thereby ordering the Plan confirmed as written, Dow Corning continued to resist transferring the Initial Payment into escrow. Over a period of several months, Dow Corning funded only approximately \$330 million of the Initial Payment, despite repeated requests and even litigation threats from the TCC.

On August 29, 2001, under mounting TCC pressure to transfer the remainder of the Initial Payment, Dow Corning's counsel wrote to the Court to explain its reasons for delay. *See* Letter from George H. Tarpley to Honorable Denise Page Hood, dated August 29, 2001, attached hereto as Ex. A (under seal). The August 29 letter did not deny Dow Corning's legal obligation

to transfer the entire Initial Payment into escrow, but argued that funds already transferred were sufficient for start-up operations of the Settlement Facility; that the rest of the money was already held in managed escrow accounts; and that transferring the additional \$700 million to the Trust would create additional investment and reporting expense. *See id.* at 1-2.

After several more weeks of negotiations, Mr. Tarpley wrote to Mr. Eckstein on September 19, 2001 to propose a schedule on which Dow Corning would perform its existing obligation to fund the balance of the Initial Payment. *See* Letter from George H. Tarpley to Kenneth H. Eckstein, dated September 19, 2001, attached hereto as Ex. B (under seal). Among other things, the September 19 letter proposed to *change* the Plan documents to provide for the first time that “[t]he pre-Effective Date funding of the Initial Payment and the interest and net earnings thereon (excluding the interest and net earnings [on \$905 million of the Initial Payment]) shall be counted as part of the Net Present Value Calculation under the Plan.” *See id.* at 3. The TCC rejected this attempt to renegotiate the deal by taking back the time value of the Initial Payment, as shown by the simplified draft replacement letter that Dow Corning submitted a few days later, on September 24, 2001, which set forth a payment schedule without purporting to alter the TVC provisions. *See* Letter from George H. Tarpley to Kenneth H. Eckstein, dated September 24, 2001, attached hereto as Ex. C (under seal). This schedule was eventually incorporated in substance in the amended Depository Trust Agreement (“DTA”). *See* Motion, Ex. 14, DTA, § 4.01(a).

As explained further below, Dow Corning’s persistent reluctance to fund the Initial Payment confirms its contemporaneous understanding that transfers into conditional escrow did not trigger a TVC and that the time value of the funds involved had in any event already passed to the tort claimants and would not be restored to Dow Corning as a result of transferring the

funds from its own escrow account to one held by the Trust. Moreover, Dow Corning's attempt to negotiate a *change* in the Plan documents to provide it with a TVC for transferring the Initial Payment prior to the Effective Date confirms Dow Corning's understanding that it did not already have that right under the existing Plan documents.

As the Court knows, appeals challenging the Plan's release provisions spanned several years, and the Plan ultimately went effective on June 1, 2004. Dow Corning reaped a huge benefit from this delay: \$2.35 billion paid on June 1, 2004 has an NPV of only approximately \$1.68 billion discounted back to December 31, 1998. In other words, if Dow Corning were now required to fund \$2.35 billion NPV *as of December 31, 1998*, it would be obligated to supply vastly more nominal dollars before hitting the funding cap. Dow Corning's attempt to augment this benefit by claiming a TVC merely for transferring funds into a restricted pre-Effective Date escrow, and to re-trade the compromise that assigned the earning power of the Initial Payment to the tort claimants as of a date certain, should be rejected.²

² The CAC has reviewed the Declaration of Paul J. Hinton submitted in support of the Motion and does not object to its introduction as his direct testimony, subject to cross-examination at the hearing on the Motion, to the extent it is offered to explain the concept of the time value of money and to provide numerical computations of the potential TVC adjustments. However, the CAC objects to Mr. Hinton's Declaration, and any potential related testimony, to the extent it purports to state what the Plan documents mean or require, as those issues are solely the province of the Court. *See Thomas Noe, Inc. v. Homestead Ins. Co.*, 173 F.3d 581, 584 (6th Cir. 1999) (expert may not testify on legal issue "within the competence of the court"). The CAC reserves the right to move to exclude portions of Mr. Hinton's declaration if the parties are unable to agree on the appropriate scope of his testimony.

ARGUMENT

I.

DOW CORNING'S ATTEMPT TO CLAIM A TIME VALUE CREDIT FOR ITS CONDITIONAL TRANSFER OF THE INITIAL PAYMENT INTO ESCROW IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE PLAN DOCUMENTS, ATTEMPTS TO RE-TRADE A KEY COMPROMISE UNDER THE PLAN, AND IS BELIED BY ITS OWN CONDUCT IN PERFORMING UNDER THE PLAN

Dow Corning's attempt to claim a TVC based on having funded the Initial Payment ahead of the Effective Date, as required by the Plan, fails on multiple grounds.

A. The Plan Documents Provide No TVC For Transferring the Initial Payment Into Conditional, Restricted Escrow Prior to the Effective Date

Interpretation of a confirmed reorganization plan is analogous to construction of a contract and governed by similar principles. *See In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006). Thus, the Plan and related documents should be interpreted according to their plain language consistent with their purposes and in a manner that harmonizes all terms. *See, e.g., Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009) (contract interpreted consistently with relative positions and purposes of parties); *Diversified Energy, Inc. v. TVA*, 223 F.3d 328, 339 (6th Cir. 2000) (contract should be read as coherent and consistent whole that gives meaning to all terms).

Dow Corning is not entitled to a TVC in connection with the Initial Payment for the simple reason that the plain language of the Plan and Plan documents do not provide for it. As discussed below at 13-16, the Plan documents reflect several reasons why the parties could not have intended to provide for the claimed credit in light of the agreement in the FPA to assign the earning power of the Initial Payment to the Trust as of the Interest Accrual Date.

More fundamentally, however, the concept of a TVC for payments made into escrow prior to the Effective Date is simply illogical, because as a matter of bankruptcy law no payment

could be made for the benefit of tort claimants until the Effective Date. *See Ohio Dep't of Taxation v. Swallen's, Inc. (In re Swallen's, Inc.)*, 269 B.R. 634, 638 (B.A.P. 6th Cir. 2001) (Bankruptcy Code “does not authorize the payment in part or in full, or the advance of monies to or for the benefit of unsecured claimants prior to the approval of the plan of reorganization”) (quoting *Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987)).

Pursuant to Plan § 7.4, the Plan was not implemented or consummated, within the meaning of 11 U.S.C. § 1142, until all appeals were resolved and the Effective Date occurred. Before then, Dow Corning was not a Reorganized Debtor and the Plan and its accompanying documents were not yet operative. Dow Corning transferred the Initial Payment into escrow in *preparation* for the Effective Date, subject to the condition that the funds be returned (with all interest) if Plan confirmation were overturned. Crucially, the funds were not made available to the Trust to pay tort claimants, but had to be maintained pending the Effective Date in restricted, segregated escrow accounts (with only minimal agreed upon amounts drawn to fund start-up operations of the Settlement Facility). This escrow structure was necessary to avoid making illegal payments for the benefit of creditors prior to final approval of the Plan.

Thus, only on the Effective Date, when the Plan was finally implemented, the conditions attached to the escrow were satisfied, and the funds were finally released to the Trust unconditionally for its use, could the Initial Payment be considered “*paid*.” This is one reason why the Plan documents made no mention of any TVC for pre-Effective Date transfers into escrow. Indeed, the “payment” for which Dow Corning here claims credit represented merely the shifting of funds from escrow accounts managed by Dow Corning to others managed by the Trust — an event without economic significance, since the funds were already isolated from Dow Corning’s operating cash and the earning power of the funds had in any event been

assigned to the Trust. *See* above at 7. Unlike the post-Effective Date funding of insurance proceeds, this transfer did not make funds freely available to the Trust for the earlier use and benefit of tort claimants. In any meaningful sense, the Initial Payment was not *paid* until the Effective Date, and thus no TVC adjustment is warranted.³

B. Providing Dow Corning With a TVC for the Initial Payment Would Undo a Specific Bargain Embodied in the Plan

Even if the transfer of the Initial Payment into restricted escrow constituted a “payment” for Plan funding purposes, providing Dow Corning with a TVC for this transfer would undo a core bargain reflected in the basic terms of the Plan documents. As described above, Dow Corning received the benefit of having the date used to determine the NPV of its settlement payments float forward until the Effective Date, thereby dramatically reducing the total value of the settlement to tort claimants, who also agreed to accept fixed settlement amounts that would not be increased to reflect that delay. In return, the parties agreed in FPA § 2.01 that the Trust, not Dow Corning, would have the benefit of the earning power of the Initial Payment after the Interest Accrual Date in 1999 — by obtaining the actual interest that Dow Corning earned prior to the transfer of the Initial Payment (with such amounts *excluded* from the \$2.35 billion NPV calculation) and by having the money to invest itself thereafter. This benefit would be largely wiped out if Dow Corning separately received a TVC for escrowing the Initial Payment in advance of the Effective Date.

³ This reading of the Plan is consistent with New York law, which governs the FPA. *See* FPA § 5.08. For property to be transferred into trust, there must, among other things, be “actual delivery of the fund or property, with the intention of vesting legal title in the trustee.” *In re Doman*, 890 N.Y.S.2d 632, 634 (App. Div. 2009). In contrast, placing property in escrow subject to conditions does not convey title; ownership does not pass until the condition is satisfied. *See Mizuna v. Crossland Fed. Sav. Bank*, 90 F.3d 650, 659 (2d Cir. 1996).

Dow Corning's misleading suggestion that the Plan did not originally contemplate transfer of the Initial Payment pending appeal (DCC Br. 10 n.9) appears intended to set up an argument that the anomalous relief Dow Corning now seeks is merely an artifact of an unanticipated demand by the TCC. However, because § 7.4 was always in the Plan, it must be read in harmony with the FPA provisions shifting the time value of the Initial Payment to the Trust after the Interest Accrual Date. Plan § 7.4 cannot have been intended to undo the bargain struck in FPA § 2.01.

If the parties had intended for the limited, insurance-related TVC provisions to apply to the Initial Payment in the (anticipated) event the Effective Date were delayed, they would have expressly said so in the FPA. Having specifically included carefully worded provisions to govern the other circumstances in which large early payments might trigger a significant TVC, the parties should be presumed to have acted intentionally in excluding similar language providing a TVC based on early transfer of the Initial Payment. *See Imation Corp. v. Koninklijke Philips Elecs. N.V.*, 586 F.3d 980, 989 (Fed. Cir. 2009) ("Where one provision of an agreement contains a particular reference, the omission of this reference from any similar provision 'must be assumed to have been intentional under accepted canons of contract construction.'") (citation omitted).

Moreover, the TVC provisions have a specific purpose inapplicable to the Initial Payment: to compensate Dow Corning for the time value of funds provided earlier than the funding schedule required. There is no corresponding reason to provide a TVC based on the timing of the Initial Payment, because Dow Corning had *already given up* the right to the time value of the Initial Payment as of the Interest Accrual Date, *whether or not the Initial Payment had yet been paid to the Trust*.

Had Dow Corning's current argument been anticipated, the TCC obviously would never have agreed to permit a TVC based on the timing of receipt of the Initial Payment. Moreover, given the potentially devastating impact on the Settlement Facility's ability to draw down needed funds, if such a credit had been contemplated, it would have been postponed until later funding periods, as in the Excess Insurance Proceeds provision, FPA § 2.03(b). The absence of any such provision demonstrates that the parties simply never contemplated that Dow Corning could claim a massive TVC based on the timing of the Initial Payment, even if pre-Effective Date transfers could *ever* be considered "payments" in this regard.

Imposing such a credit now would be grossly unfair. The long delay in implementing the Plan relieved Dow Corning of the obligation to make scheduled payments for five years. The delay of the Effective Date also meant money out of the pocket of every claimant because the Plan does not adjust individual settlement amounts to account for cost of living increases. The passage of time further benefited Dow Corning by making it more difficult for aging claimants to assemble medical records and establish their entitlement to benefits, and indeed many claimants have died in the interim. The five-year delay in the Effective Date no doubt is one reason why claims experience is running far below the projections of Dow Corning's expert Frederick Dunbar that were relied upon at confirmation. The TCC bargained to offset the harms of delay by ensuring that the Trust would own the time value of the Initial Payment after the Interest Accrual Date, *whenever* the funds were transferred — thereby creating a larger pool of funds to assure payment of all base and premium claims. Giving Dow Corning a TVC on the Initial Payment would largely eliminate that bargained-for benefit.

Under Dow Corning's construction of the FPA, the tort claimants would have been better off *waiving* Dow Corning's obligation to fund the Initial Payment prior to the Effective Date —

allowing interest to accrue for the claimants' benefit while the funds remained in Dow Corning's possession. For example, had interest accrued on the funds in Dow Corning's hands at 5% per year over the five years, the Initial Payment transferred on the Effective Date would have included some \$225 million in interest expressly *excluded* from the NPV calculation, considerably augmenting the value of the settlement. In such circumstances, Dow Corning could not conceivably have claimed a TVC. It cannot be that, by funding the Initial Payment as required by the Plan, Dow Corning *regained* the right to the earning power of these funds that it had already given up.

In short, the provision requiring transfer of the Initial Payment pending the Effective Date could not have been intended to have economic significance, since the tort claimants already had the right to the time value of the funds. Dow Corning's attempt to leverage § 7.4 for its economic benefit would destroy a key element of the parties' bargain and should be rejected.⁴

C. Parol Evidence of Dow Corning's Contemporaneous Conduct Confirms the Plain Language of the Plan Documents

As demonstrated above, a rational reading of the Plan documents consistent with the parties' purposes bars Dow Corning from claiming a TVC based on the timing of the Initial Payment. But even if the Court were to determine that the applicable Plan provisions were ambiguous, requiring consideration of extrinsic evidence of intent to establish their meaning, the understanding expressed by Dow Corning's conduct under the Plan would lead to the same

⁴ Dow Corning suggests that had funding of the Initial Payment been delayed until *after* the Effective Date, the CAC would now be claiming its own TVC, to *discount* the Initial Payment before applying it to the funding cap. *See* DCC Br. 14 n.10. But under this hypothetical, the tort claimants would have continued to receive the benefit of the actual interest earned by Dow Corning from 1999 until the day the Initial Payment was transferred. The CAC would therefore *not* be claiming a TVC adjustment in addition to that interest, because that would be double counting. The Trust is entitled to the time value of the Initial Payment — once — from 1999 on. It should neither be credited twice nor taken back.

result. *See Bank of N.Y. v. Janowick*, 470 F.3d 264, 270-71 (6th Cir. 2006) (contract construed to effectuate expressed intent of parties in light of circumstances and object of contract). Moreover, contemporaneous evidence of the parties' understanding in performing the contract is persuasive in establishing its intended meaning. *See, e.g., Roger Miller Music, Inc. v. SONY/ATV Publ'g LLC*, 477 F.3d 382, 392 (6th Cir. 2007) (court will adopt interpretation of contract placed on it by parties' acts); *A. L. Pickens Co. v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 120 (6th Cir. 1987) (parties' construction of contract "best evidenced by their conduct" (citation omitted)).

Here, Dow Corning's actual conduct following Plan confirmation is consistent with the CAC's reading of the Plan, but would be utterly irrational if Dow Corning believed that it was entitled to a TVC based on the timing of the Initial Payment. Such evidence of the construction placed upon a contract before the controversy as to its meaning arose is highly persuasive. "The terms of any agreement are better shown by the parties' acts thereunder while harmonious and practical construction reflects their intention, than by inconsistent construction contended for when subsequent differences have compelled the parties to resort to law." *Pyramid Operating Auth., Inc. v. City of Memphis (In re Pyramid Operating Auth., Inc.)*, 144 B.R. 795, 817 (Bankr. W.D. Tenn. 1992). Two aspects of Dow Corning's conduct demonstrate its contemporaneous understanding.

First, as described above at 8-9, Dow Corning resisted literally for months the TCC's repeated calls for it to escrow the full Initial Payment, even after any doubt as to its obligation was eliminated by this Court's November 2000 decision upholding the release provisions. Dow Corning never offered a legal ground for its foot-dragging; it merely argued that the transfer was unnecessary and would give rise to extra costs. Had Dow Corning believed at the time that it would receive a TVC of more than \$65 million per year pending the Effective Date, it would

have cheerfully transferred the funds — indeed, it would have insisted on paying the money promptly after Plan confirmation, because the Interest Accrual Date, the point at which it could no longer derive any benefit from holding and investing the funds, had already passed. It is obvious that, to the contrary, Dow Corning understood that the full time value of the Initial Payment belonged to the tort claimants and that it would reap no benefit from an early transfer of the funds to the Trust's escrow accounts.

Second, Dow Corning's attempt to renegotiate the FPA in 2001 to include a TVC based on early transfer of the Initial Payment further confirms that it understood that the Plan documents did not already provide for such a credit. When the TCC rejected this attempt to renegotiate the deal, Dow Corning funded the balance of the Initial Payment without obtaining any material change in the Plan documents. *See* above at 9. Dow Corning's second attempt to re-cut the deal and give itself a TVC for the Initial Payment should similarly be rejected.

II.

CERTAIN OTHER OF DOW CORNING'S CLAIMED CREDITS SHOULD BE REJECTED BECAUSE THEY ARE NOWHERE PROVIDED FOR IN THE PLAN DOCUMENTS

Contrary to Dow Corning's suggestion, the Plan documents contain no general statement that *all* payments made ahead of the funding schedule automatically trigger a TVC. To the contrary, the FPA sets out, in §§ 2.02 and 2.03, the only two specific circumstances in which a TVC is to be calculated and applied: 1) with respect to insurance received prior to but paid *after* the Effective Date, and 2) with respect to Excess Insurance Proceeds received through Funding Period 2. The principle of contract construction *expressio unius est exclusio alterius*, which Dow Corning itself invokes (*see* DCC Br. 11), strongly suggests that these specific provisions were meant to *exclude* TVCs in other circumstances. Dow Corning argues that all "Advance Payments" trigger TVCs, but the Plan documents contain no such global definition; "Advance

Payments” is simply a defined term in the Motion. *See* DCC Br. 1-2. Dow Corning repeats *ad nauseum* that funding is capped at \$2.35 billion NPV but ignores that the Plan clearly specifies which early payments do (and, by necessary implication, which *do not*) receive a TVC against the funding cap.

Thus, several of Dow Corning’s claimed TVCs should be rejected:

First, the CAC objects to Dow Corning’s attempt to claim a TVC for the \$18.4 million paid by American International Underwriters (“AIU”) to fund the Class 6D Settlement pre-Effective Date. *See id.* item 2. This payment was made as the result of a settlement between AIU and Australian counsel to which the TCC was not a party and, unlike early-funded insurance paid *into* the Settlement Facility *after* the Effective Date, this payment did not generate interest income for the benefit of tort claimants. The provision Dow Corning cites as supposed authority for a TVC in these circumstances (FPA § 2.10(c)) is inapposite; it concerns a situation in which the Settlement Facility is unable to meet its funding obligations to the Class 6D trust and Dow Corning is required to make up the shortfall *post*-Effective Date.

Second, the CAC objects to Dow Corning’s calculation of the TVC for insurance received prior to the Effective Date to the extent that it carries forward the TVC beyond the beginning of Funding Period 1. *See* DCC Br. 2, item 3. While FPA § 2.01(a)(ii) provides that insurance amounts in excess of the Funding Period 1 ceiling are credited against Period 2, it provides for a TVC on the amount to be credited only to the beginning of Funding Period 1.

Third, the CAC objects to Dow Corning’s claim for a TVC in connection with non-insurance payments, *i.e.*, the \$2.9 million paid to the MDL 926 Settlement Fund (*see* DCC Br. 2, item 4); the more than \$2 million net amount transferred from MDL 926 (*id.* item 5); and the \$7.2 million paid directly to Class 4A claimants in June 2004 (*id.* item 6). Again, there is no

provision in the FPA or any other Plan document authorizing a TVC in connection with the payment of these funds. Had the parties intended for such TVCs in connection with non-insurance payments, they would have provided for them in the FPA.

Finally, the claimed TVC for insurance proceeds received in Funding Period 3 (*see* DCC Br. 2, item 8) is not supported by any Plan or FPA provision. The definition of Excess Insurance Proceeds is expressly limited to proceeds received before the end of Funding Period 2. *See* FPA § 2.03(a).

CONCLUSION

For the foregoing reasons the CAC respectfully requests that Dow Corning's motion be denied in part as described above.

Dated: New York, New York
February 12, 2010

Respectfully submitted,

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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**

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010 a true and correct copy of the following response was served via electronic mail or first class mail upon the parties listed below:

**RESPONSE TO DOW CORNING CORPORATION'S MOTION
TO ENFORCE APPLICATION OF TIME VALUE CREDITS**

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