UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Settlement Facility Dow Corning Trust.

Case No. 00-00005
Honorable Denise Page Hood

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RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE TO DOW CORNING'S MOTION TO STAY THE COURT'S RULINGS ON THE DISABILITY LEVEL A AND TISSUE EXPANDER ISSUES PENDING APPEAL

The Claimants' Advisory Committee ("CAC") respectfully submits this response to Dow Corning's motion (the "Motion") to stay this Court's recent rulings on the Disability Level A and Tissue Expander issues (the "Interpretation Rulings") pending appeal to the Sixth Circuit.

Dow Corning's stay application focuses primarily on the fundamentally false premise that amounts paid out pending appeal as a result of the Interpretation Rulings could have a material effect on the Trust's ability to pay other claimants, including those now entitled to Premium Payments. Dow Corning's allegation is unsubstantiated and contradicted by the fact that the Trust is substantially over-funded — with nearly a half billion dollars in the bank and more than $1.3 billion in payment ceilings available in the coming years — and there is thus no reasonable prospect that the marginal payments resulting from the Interpretation Rulings could interfere with the Trust's ability to make any other payments.

The only so-called "harm" that Dow Corning reasonably projects is the possibility that some claimants will be paid pending appeal; that the Trust might be unable to recover those funds if this Court's decisions were to be reversed; and that this might result in Dow Corning having to contribute additional amounts to the Trust years down the road. Against that limited,

speculative pecuniary harm, the Court must weigh (1) Dow Corning's failure to satisfy its threshold burden of showing a likelihood that the Interpretation Rulings will be reversed and (2) the undeniable harm to claimants of further delaying their receipt of settlement amounts for which they have waited through more than a decade of bankruptcy proceedings and subsequent plan interpretation litigation.

Fairness, equity, and the balance of hardships thus counsel against the granting of a stay of pending appeal. In the alternative, any stay should be conditioned on (1) the Settlement Facility being directed to process all claims in the disputed categories up to the point of cutting checks, so as to minimize any further delay following affirmance, and (2) Dow Corning being directed to pursue an expedited appeal to minimize the harm to claimants of any further delay.

Argument

To obtain a stay pending appeal under Fed. R. App. P. 8(a)(1)(A), Dow Corning must carry the burden of demonstrating a balance in its favor as to four traditional stay factors: (1) its likelihood of success on appeal; (2) that it will suffer irreparable harm absent a stay; (3) lack of harm to other parties if the stay is granted; and (4) the public interest. See *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) ("*Michigan Coalition*").

In seeking to meet this burden, Dow Corning fails to show any likelihood of reversal; dramatically exaggerates the potential harm that could occur pending appeal; and gives no weight to the significant harm to claimants (and the public interest in resolving claims) that would be inflicted by a stay. Where injured claimants have waited years to have their claims addressed, further delay constitutes significant harm that weighs strongly against a stay. "The fact that claimants have been dying for some time in no way undermines the very real harm they continue to suffer. . . . [J]ustice deferred may well be justice denied." *W.R. Grace & Co. v.*

Libby Claimants (In re W.R. Grace & Co.), No. 08-246, 2008 WL 5978951, at *8 (Oct. 28, 2008).

Each of the relevant factors weighs against the granting of a stay here:

First, "a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a *likelihood* of reversal." *Michigan Coalition*, 945 F.2d at 153 (emphasis added). The district judge's decision is entitled to significant deference because "a motion for a stay pending appeal is generally made after the district court has considered fully the merits of the underlying action and issued judgment." *Id.* Here, Dow Corning has shown no likelihood of reversal. While Dow Corning maintains that the issues involved in these appeals are complex, the CAC believes that the Court's decisions are straightforward, logical, and highly likely to be affirmed on appeal. Moreover, the parties have stipulated that appeals from this Court's rulings interpreting plan provisions are to be governed by a "clearly erroneous" standard — making reversal even less likely. *See* Exhibit A to Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan, dated June 10, 2004, at § 2.01(d)(5).

Dow Corning notes that the likelihood of success it must show is inversely proportional to the amount of irreparable harm that will be suffered absent the stay. *See Michigan Coalition*, 945 F.2d at 153. But that standard does not help Dow Corning in view of the weakness of its irreparable harm argument (see immediately below), and in any event does not excuse Dow Corning from demonstrating "more than the mere 'possibility' of success on the merits." *Id.*; *see also Mason County Med. Ass'n v. Knebel*, 563 F.2d 256, 261 n.4 (6th Cir. 1977) ("[W]e reiterate that the [movant] must demonstrate a strong or substantial *likelihood* or *probability* of success on the merits.") (emphasis added). Dow Corning has not done so.

Second, Dow Corning fails to establish that it would suffer immediate and irreparable harm in the absence of a stay. At the outset, monetary harms are generally not deemed irreparable. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough."); *see also S&M Brands, Inc. v. Summers*, No. 3:05cv0171, 2006 WL 1804606, at *2 (M.D. Tenn. June 28, 2006) (cited by Dow Corning) (denying defendant's motion for stay of order requiring release of funds held by defendant because "mere economic injury is not considered under the law to be irreparable").

Dow Corning cites *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986), for the proposition that "[d]ifficulty in collecting a damage judgment may support a claim of irreparable injury." However, that principle has no relevance here because Dow Corning is not trying to collect a damage judgment. Dow Corning further cites *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 236 F. Supp. 2d 445 (E.D. Pa. 2002), to support its point that "money once paid to improper recipients is unlikely ever to be recouped." *See id.* at 463. But in that case, the court had made a finding that the claims in question were medically unreasonable and the settlement trust itself had sought and obtained an order preventing it from having to pay out nearly $50 million of ineligible claims. *Id.* at 448-49. Here, in contrast, Dow Corning seeks to prevent the Settlement Facility from paying out claims that have been found to be *valid*.

Dow Corning attempts to enhance its "irreparable harm" showing with a wholly unsubstantiated claim that paying this limited universe of claims will somehow impair the Trust's ability to pay other claims, including Premium Payments to which thousands of claimants are now entitled. Dow Corning's suggestion that there is a "significant risk" of reduction in

Premium Payments absent a stay (Motion at 1) is utterly unsubstantiated and contradicted by simple mathematics:

- The Trust currently holds approximately $460 million in cash and securities. Based on the Trust's current cash flow projections, this is more than enough to pay the claims (likely to total no more than $50-60 million) flowing from the Interpretation Rulings, *plus* $200 million in projected Premium Payments, *plus* all other ordinary claims and expenses of the Trust over the next two to three years.
- Once the current Trust balance is dispersed down to the level of three months projected expenses plus $1 million, Dow Corning will be obligated for the first time to make additional payments to the Trust as needed to pay claims, based on available payment ceilings totaling more than *$1.3 billion* in nominal dollars.
- Of that total, hundreds of millions of dollars could be drawn before the total paid into the Trust by Dow Corning (in addition to amounts spent to fund the Litigation Facility) approaches the Settlement Fund cap of $1.935 billion (even assuming that Dow Corning were to prevail in pending disputes regarding Time Value Credit calculations).

At an appropriate time, the CAC will demonstrate that this available funding will provide a more than adequate cushion to ensure full payment of the rapidly dwindling pool of new claims that will come into the Settlement Facility in the last few years of its operation, and thus that Premium Payments may be issued now. Indeed, the cushion is even larger because the Trust's actual claims experience has been dramatically *lower* than the highly conservative 2007 projections of the Independent Assessor on which the current cash flow projections are based.

It suffices for present purposes to observe that Dow Corning does not even *attempt* to make any numerical showing that the marginal impact of paying valid Level A or tissue expander claims threatens the solvency of the Trust or could remotely affect the Trust's ability to make Premium Payments. Mere speculation of harm cannot justify a stay. *See Zurich American Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 371 B.R. 210, 239 (E.D. Ky. 2007) (denying stay sought based on "speculative" claim that pool of money might be entirely depleted if court's order were not stayed), *aff'd*, 536 F.3d 683 (6th Cir. 2008), *cert. denied*, __ S. Ct. __ 2009 WL 969707 (June 29, 2009).

Third, in contrast to the lack of harm to any other claimant flowing from the payment of claims, those claimants subject to the Court's rulings should not be prejudiced by having the processing and payment of their claims delayed further. These claimants have already endured many years of bankruptcy proceedings and litigation before this Court. Many of them are dependent on their Settlement Facility recoveries to meet basic living expenses or pay medical bills; others have died while awaiting payment. All will be prejudiced because every year of additional delay means more claimants will die, will be unable to obtain or reconstruct medical records, or will be unable to be located by the Settlement Facility — meaning that Dow Corning has already benefited greatly from delay and will benefit more from further delay. It is simply unfair to inflict *further* harm upon these claimants as Dow Corning drags out the litigation process even further, with limited hope of success as noted above.

Dow Corning's suggestion that maintenance of the "status quo" inflicts no harm is simply incorrect. Where parties that would be harmed by a stay have toiled under a status quo that has prejudiced their rights, the third prong of the *Michigan Coalition* test directs that a stay be denied. *See Battle v. Anderson*, 564 F.2d 388, 398 (10th Cir. 1977) (denying stay of order

requiring state to reform prison system, finding that "[t]he evidence of existing environmental health and safety problems in the system [was] overwhelming" and that defendants' motion "largely ignore[d]" the requirement that "no substantial harm will come to the other interested parties if the stay is granted").

The same principle has been applied in cases involving the adjudication of personal injury claims. In *Arnold v. Garlock, Inc.*, 278 F.3d 426 (5th Cir. 2001), the court denied defendant's petition for a stay of district court proceedings, noting that a stay would cause substantial harm to injured plaintiffs. *See id.* at 441 ("What is certain is that delay where plaintiffs have mesothelioma, asbestosis, or pleural disease, or where decedents' survivors await compensation for support substantially harms those parties."). Similarly, in *In re W.R. Grace & Co.*, the court rejected the argument that the claimants in that case would not be substantially harmed by a stay because claimants "have been suffering and dying as a result of asbestosis for some time." 2008 WL 5978951, at *8. The court held that, notwithstanding past delays, "[t]he fact that claimants have been dying for some time in no way undermines the very real harm they continue to suffer. In the case of [these] Claimants, justice deferred may well be justice denied." *Id.* Here, as in the cases discussed above, "staying the proceedings will only serve to delay a distribution to . . . claimants who have been waiting years for some type of resolution." *Reaves ex rel. GTI Capital Holdings, LLC v. Comerica Bank-CA (In re GTI Capital Holdings, LLC)*, No. 03-07923-SSC, 2008 WL 961112, at *10 (Bankr. D. Ariz. Apr. 4, 2008).

Fourth, Dow Corning's failure to establish that the absence of a stay could possibly jeopardize the Trust's ability to make Premium Payments destroys any suggestion that the "public interest" weighs in favor of a stay. This case stands in stark contrast to those in which serious evidence was presented that available funds could be "wiped out" before a final

decision was rendered. *See Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 924 (6th Cir. 1978). Dow Corning has made no such showing here. If anything, the public interest favors permitting the Trust to continue its work to process and pay as many of these long-delayed claims as possible while claimants are alive and able to benefit from the funds disbursed.

Finally, if this Court is inclined to grant a stay at all, it should condition the stay on two provisos:

(1) the Court should direct the Settlement Facility to continue processing all claims affected by the Court's rulings, up to the point of cutting checks, so that such claims may be paid promptly upon affirmance by the Sixth Circuit. We believe that Dow Corning does not object to this procedure.

(2) the Court should condition the granting of any stay on Dow Corning's representation that it will seek expedited review in the Sixth Circuit, to minimize the harm to claimants of further delay as a result of the appeals.

Conclusion

For the foregoing reasons, the CAC respectfully requests that the Court deny Dow Corning's Motion or condition the granting of a stay as described above.

Dated: New York, New York
June 30, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2009, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following: Debtor's Representatives and Finance Committee.

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