

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

In Re:

DOW CORNING CORPORATION,

Debtor.

**Case No. 00-CV-00005-DT
(Settlement Facility Matters)**

HON. DENISE PAGE HOOD

ORDER REGARDING CLAIM FORMS

This matter was brought before this Court upon the request of the plan proponents to determine the timing of the mailing of claim forms to claimants under the terms of the Settlement Facility Agreement and Annex A of the Amended Plan of Reorganization in the above-captioned case.

Generally, the “filing of a Notice of appeal confers jurisdiction on the court of appeals and divests the district court [or bankruptcy court] of control over those aspects of the case involved in the appeal.” *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985); *In re Iris June Davis*, 160 B.R. 577, 581 (Bankr. E.D. Tenn. 1993); *In re Bialac*, 15 B.R. 901, 903 (9th Cir. 1981). If a matter is specifically involved in the appeal, the Bankruptcy Court or District court has no jurisdiction over the issue. *In re Dorothy C. Hardy*, 30 B.R. 109, 111 (Bankr. S.D. Ohio 1983). In the absence of a stay pending appeal of the plan confirmation, the bankruptcy court is entitled to implement the plan. *See In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981)(In absence of stay pending appeal of a plan, notice of appeal did not deprive bankruptcy court of jurisdiction to make technical modification to plan to permit it to go into effect only if no stay was issued); *In re AOV Industries, Inc.*, 46 B.R. 190 (D.D.C. 1984)(in absence of stay pending appeal of confirmed plan, bankruptcy judge is entitled to

implement plan); *Matter of Davison*, 95 B.R. 665, 666 (Bankr. W.D. Mo. 1988)(bankruptcy court had jurisdiction to enter order distributing funds of estate, including payment of attorney’s fees, despite pending appeal from prior order of the court partially denying attorney’s fees).

“Retention of jurisdiction in the confirmed plan is not dispositive on the issue of the bankruptcy court’s jurisdiction.” *Vergos v. Uncle Bud’s Inc.* 1998 WL 652542 * 14 (M.D. Tenn. 1998), citing *United States Trustee v. Gryphon at the Stone Mansion, Inc.*, 216 B.R. 764, 769 (W.D. Penn. 1997). “Similarly, the absence of a provision retaining jurisdiction in a confirmed plan does not deprive a bankruptcy court of jurisdiction.” *Id.* Subject matter jurisdiction is analyzed under 28 U.S.C. §1 1334 and 157. *Vergos*, 1998 WL 652542 at * 13; *Gryphon*, 216 B.R. at 767. In *In the Matter of the Commodore Corp.*, 87 B.R. 62 (Bankr. N.D. Ind. 1987), the bankruptcy court found it had jurisdiction to change the effective date and distribute the assets pursuant to the plan because there was no stay of the confirmed plan and the changes were technical modifications. *Id.* at 64.

In this case, because there is no stay, the bankruptcy court has the authority to implement the Plan. Because the Plan gives the District Court authority over the Settlement Facility, this Court has jurisdiction to interpret the disputed language in Annex A in order to implement the Amended Plan, given there is no stay of the Amended Plan and it does not affect the matters on appeal.

The Amended Plan of Reorganization provides in Section 8.7, “Notwithstanding entry of the Confirmation Order or the occurrence of the Effective Date, the Court and *as applicable, the District Court*, will retain exclusive jurisdiction on a number of matters (Section 8.7.1 to 8.7.12 of the Amended Plan),” including, “to resolve controversies and disputes regarding interpretation and implementation of this Plan and the Plan Documents (Section 8.7.3).” The “Court” in this context means the Bankruptcy Court.

(Section 1.38 of the Amended Plan). Unless specifically stated otherwise, the Bankruptcy Court has the authority to interpret and implement the Plan and Plan Documents.

As to the Settlement Facility, the MDL 926 Court, originally, and now the District Court, is charged with the supervision of the resolution of claims under the terms of the Settlement Facility Agreement, the Claims Resolution Procedures, and the functions in Articles IV, V, and VI of the Settlement Facility Agreement (SFA Section 4.01). The District Court has the authority to act in the event of disputes or questions regarding the interpretation of claim eligibility criteria, management of the Claims Office, the investment of funds by the Trust, the distribution of funds and all determinations regarding the prioritization or availability of payments, including functions related to Articles III, VII and VIII of the Settlement Facility Agreement. (SFA Section 4.01) In addition, “[e]xcept as specifically provided herein, all matters relating to the validity, interpretation and operation of this Settlement Facility shall be under the exclusive jurisdiction of the District Court.” (SFA Section 10.08). Basically, the District Court has jurisdiction over the Settlement Facility.

At issue is the timing of the mailing of the claim forms. Section 7.4 of the Amended Plan of Reorganization states, “[d]uring the pendency of the appeal, the Settlement Facility shall commence those operations necessary and appropriate to begin processing claims promptly *after* the Effective Date.” Annex A to the Settlement Facility Agreement, Section 3.01(b) states, “[w]ithin *thirty (30) days following* the Effective Date, the Claims Office shall mail to each Personal Injury Claimant (including those Rule 3005 Claimants who have timely filed a Notice of Intent under Section 2.02(b)(i) above) a package of materials. Section 3.01(b) goes on to state what the package “shall” contain, including the Participation Form.

Section 3.02(g) states, “[i]n the event that an appeal is filed from the Confirmation Order that raises a Release/Funding Issue but does not result in a stay, the Claims Office *shall commence distribution of Participation Forms and other materials as set forth at Section 3.01(b) to Personal Injury Claimants and processing of the submitted Participation Forms and operations necessary and appropriate to begin processing Claims promptly after the Effective Date.*” Section 3.01(c) of Annex A states, “[t]o the extent feasible and consistent with efficient processing, all claim forms and instructions shall be provided to Claimants together in a single package to minimize the need for multiple submissions.”

The language at issue is Section 3.02(g) of Annex A. The Tort Claimant’s Committee’s (“TCC’s”) position is that this language means the Claims Office is to distribute the materials *before* the Effective Date. The Debtor’s position is that this language means that the Claims Office may merely make preparations so that the materials can be sent out within 30 days following the Effective Date.

The language in 3.02(g) does not expressly state that the materials must be distributed *before* the Effective Date. Rather, it states that the Claims Office *shall* commence distribution of Participation Forms *and* processing of the submitted Participation forms *and* operations necessary and appropriate *to begin processing* claims promptly after the Effective Date. Although not expressly stated, the language could be construed to mean that the materials be distributed before the Effective Date. This language would seem to conflict with Section 3.01(b) which states that the package shall be mailed within 30 days of the Effective Date. However, 3.02(g) specifically contemplates an appeal and would render the 30-day language in 3.01(b) ineffective.

The interpretation of this language by the TCC is supported by Section 3.01(c) which sets the election deadline. Section 3.01(c)(i) states that the claimants “must make their election by completing,

signing and returning the Participation Form to the Claims Office on or before the six (6)-month anniversary of the Effective Date (“Election Deadline”).” The next language then states that “in the event that an appeal is filed from the Confirmation Order that raises a Release/Funding Issue, the Election Deadline shall be one hundred eighty (180) calendar days *after the date the Participation Form is mailed* to the Personal Injury Claimants.”

Reading Annex A, Article III as a whole, it appears that the Plan Proponents contemplated two scenarios as to when the claim packages should be mailed. Section 3.01(b) contemplates no appeal. Section 3.01(g) contemplates an appeal. The election deadline language found in Section 3.01(c)(i) also contemplates the two scenarios.

Having reviewed the submissions of and having heard the concerns of the Plan Proponents (The Tort Claimants Committee and representatives of the Debtor) and the submission of the Claims Administrator, the Court finds that the claim forms should not be mailed at this time. However, the claim forms must be prepared by January 8, 2002 and ready for mailing at the direction of the Court. In the interim the Claims Administrator shall send an informational piece or newsletter to all unrepresented claimants and to all represented claimants and/or their attorneys by September 17, 2001.

The Tort Claimants Committee strongly advocated the sending of claim forms prior to the Effective Date, citing not only the language of the SFA, but also the concern for the preservation of medical records of dying or deceased claimants and retired or deceased treating physicians, as well as the prevention of scheduled destruction of medical records. The TCC also argued that claimants were eagerly awaiting the production of the claim forms having been told that the claim forms would be sent to them this fall. The debtor’s representatives argued that the claimants would only be frustrated receiving claim forms in advance

of the Settlement Facility's ability to pay claims and that the SFA did not allow for mailing of the claim forms prior to the Effective Date.

The Court has carefully considered the competing frustrations that claimants must feel as the bankruptcy plan negotiations, confirmation and appeal processes have proceeded. The Court has concluded that the claim forms will not be ready for mailing prior to November and that a mailing closer to the time claimants might receive payment is more appropriate. The Court also notes that any mailing may raise the expectations of claimants. However, given the TCC's concern regarding the frustration of the claimants at having received no information from the Settlement Facility and the concern about preservation of medical records, some communication is necessary. The Claims Administrator shall send an informational mailing to claimants and/or their attorneys which may also include documents to verify claimant information needed by the Settlement Facility.

IT IS SO ORDERED.

DATED: July 27, 2001

_____/s/_____
DENISE PAGE HOOD
United States District Judge