

Case No.: 15-2548

United States Court of Appeals for the Sixth Circuit

*The Claimants' Advisory Committee, Dow Corning Corporation and Debtor's  
Representatives*

*v. The Class 7 Korean Claimants*

Order Approving Consent Order to Establish Guidelines for Distribution from

the Class 7 Silicone Material Claimants' Fund

Brief of Appellant The Class 7 Korean Claimants

Yeon Ho Kim, +82-2-551-1256

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

## Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 15-2548

Case Name: In re: Settlement Facility Dow Corning

Name of counsel: Yeon Ho Kim

Pursuant to 6th Cir. R. 26.1, The Class 7 Korean Claimants

*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

### CERTIFICATE OF SERVICE

I certify that on March 11, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Yeon Ho Kim

Yeon-Ho Kim Int'l Law Office

Suite 4105, Trade Center Bldg., Seoul

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

I. Statement in Support of Oral Argument	pages 4-5
II. Statement of Jurisdiction	page 5
III. Statement of Issues	pages 5-6
IV. Statement of Case	pages 6-8
V. Summary of Argument	pages 8-9
VI. Argument	
1. The District Court does not have jurisdiction	page 10
2. Modification is not allowed	pages 10-13
3. Arguments of seventy one(71) Class 7 Korean Claimants	pages13-15
4. Conclusion	page 15
VII. Appendix	

TABLE OF AUTHORITIES

*(not cited)*

I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellees made the Consent Order to establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund. The District Court approved the Consent Order after having authorized the distribution of notice to the members of Class 7 Class.

The Consent Order should have included the Class 7 Claimants whose operation of breast implant was carried out after January 1, 1992. The Consent Order lowered the criteria of eligibility in terms of marshaling requirement. Since the Consent Order favors Class 7 Claimants who were not paid due to marshaling requirement, there should be no reason for excluding Class 7 Claimants who were not paid due to the cut-off date requirement. Both Class 7 Claimants of marshaling requirement and Class 7 Claimants of cut-off requirement are in the same situation where the Plan does not allow payment without modification. There is no basis that one group is favored and other group is not favored under the Consent Order.

Furthermore, the hearing in the District Court was largely occupied by the individual Claimants who do not have acceptable basis for attending the hearing.

The hearing was proceeded to persuade them by both the Court and the counsels of appellees. Appellants must have additional opportunity to argue before the Court.

## II. STATEMENT OF JURISDICTION

The Dow Corning Reorganization Plan which was approved by the Bankruptcy Court gave jurisdiction in relation to the Dow Corning Settlement Facility and all of its matters to the United States District Court Eastern District of Michigan. On December 3, 2015, the Court issued the Order Approving Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund. Appellants filed the appeal in a timely manner. The Order is a final order which cannot be contested in the United States District Court Eastern District of Michigan. Therefore, the United States Court of Appeals for the Sixth Circuit has jurisdiction over this appeal to the Order.

## III. STATEMENT OF ISSUES

The issues are; (1) whether the District Court has jurisdiction over the Consent Order Approving Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund under the circumstances that

appellees even admit that they are authorized to interpret the Plan documents and turn it over to the Claims Administrator who should respect the interpretation, and (2) whether the District Court can modify the Plan in terms of marshaling requirement even if it outcomes the increase of the value or settlement value of any Claim, causing the change of substantive criteria to the Class 7 Claimants, and (3) whether the Consent Order, approved by the District Court, is reasonable in that it excludes the Class 7 Korean Claimants including other Class 7 Claimants who are out of the cut-off date, January 1, 1992.

#### IV. STATEMENT OF CASE

On March 7, 2014, seventy one (71) Class 7 Korean Claimants filed the Motion for Extension of Deadline with the District Court to request the Court to extend the cut-off date(Motion for Extension of Deadline, RE958, Page ID15939-15945). They are not eligible for the benefits under the Plan because they received surgical operations after January 1, 1992.

On March 24, 2014, Debtor's Representatives and Dow Corning Corporation filed the Motion to Dismiss and Response to the Appeal Filed by Korean Claimants Styled as a "Motion for Extension of Deadline of Class 7 Claimants"(Motion to Dismiss and Response to the Appeal, RE 962, Page ID

15949-15968, Response to Motion for Extension of Deadline, RE 963, Page ID #16249-16258).

On May 22, 2015, appellees submitted the Proposed Consent Order to Establish Guidelines for Distributions from the Class 7 Silicone Material Claimants' Fund to the District Court(Proposed Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund, RE1027, Page ID 17325-17362).

On May 27, 2015, appellants submitted the reply to the responses of appellees(Reply to Response and Motion to Dismiss Motion for Extension of Deadline, RE1028, Page ID #17407-17419).

On June 2, 2015, the District Court entered an Order authorizing the distribution of the Notice to Class 7 Claimants(Order Authorizing Distribution of Notice, RE 1031, Page ID 17473-17474).

On July 22, 2015, two hundred eighty nine (289) Class 7 Korean Claimants including the seventy one (71) Claimants who filed the Motion for Extension of Deadline submitted the Objection to the Proposed Consent Order(Objection to Proposed Consent Order, RE1076, Page ID #17708-17716).



On September 15, 2015, appellees submitted the Omnibus Response to Objections and Submissions Responding to the Proposed Consent Order(Omnibus Response to Objections, RE1169, Page ID #18099-18128).

On September 30, 2015, the Class 7 Korean Claimants submitted the Reply to the Omnibus Response(Reply to Omnibus Response, RE1194, Page ID #18217-18222).

On October 20, 2015, a hearing was held before the District Court.

On December 3, 2015, the District Court overruled the Objection and approved the Proposed Consent Order(Order Approving Consent Order, RE1226, Page ID 18464-18473).

## V. SUMMARY OF ARGUMENT

Appellants argue that the District Court does not have jurisdiction over the Consent Order to establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund(Objection to Proposed Consent Order, RE1076, Page ID #18217-18218). Appellees do not have to come to the District Court for

approval of the Consent Order. Appellees even asserted that they agreed to the Consent Order to function that they can interpret the Plan documents and the Claims Administrator should respect it by citing the relevant clause in the Plan(Proposed Consent Order, RE1027, Page ID #17332-17334).

Appellants argue that the District Court should not have approved the Consent Order because it increases the value or the settlement value of a Claim in terms of marshaling requirement(Objection to Proposed Consent Order, RE1076, Page ID #17709-17711). Appellants point out that appellees are not allowed to modify the Plan documents.

Appellants argue in particular that seventy one (71) Class 7 Korean Claimants should have been included as eligible Claimants in the Consent Order because the Class 7 Claimants who were not paid due to marshaling requirement become eligible for payment from the Class 7 Silicone Material Claimants' Fund.

Appellants argue that the exclusion of seventy one (71) Korean Claimants including other Class 7 Claimants who received breast implant operation after the cut-off date is not reasonable(Objection to Proposed Consent Order, RE1076, Page ID #17711-17715, Reply to Omnibus Response, RE1194, Page ID 18219).

## VI. ARGUMENT

1. The District Court does not have jurisdiction

Standard of review of this issue is De Novo. Since appellees have no standing, the Order of the District Court should be reversed.

Appellees assert in the Paragraphs 13 - 19 of the Proposed Consent Order that Section 5.05 of the SFA provides that the Debtor's Representatives and Claimants' Advisory Committee are authorized to provide joint written interpretations and clarifications to the Claims Administrator and the Claims Administrator is authorized to rely on those joint written statements. Pursuant to Section 5.05 of the SFA, appellees have interpreted and clarified the marshaling requirement as follows; (*omitted*).

Appellees provided joint interpretation and clarification as to the marshaling requirement of Class 7 Claims. The Claims Administrator is authorized to rely on the joint interpretation and clarification. There is no provision in the Section 5.05 that the District Court can be involved in the joint interpretation. Therefore, the District Court does not have jurisdiction over the joint interpretation by appellees.

2. Modification is not allowed

Standard of review of this issue is De Novo. The District Court misinterprets the

relevant clauses of the Plan. The interpretation of the District Court contradicts the gist of Section 10.06 of the SFA.

Even if Section 6.04(h)(v) of Annex A to the SFA prescribes, "To be eligible to receive a payment from the Silicone Material Claimants' Fund, Silicone Material Claimants shall be required to marshal recoveries from the manufacturers of their breast implants", appellees reduce the marshaling requirement to the submission of all claims to the RSP.

The submission of all claims to the RSP is not equivalent to the marshaling of recoveries from the manufacturers of breast implant. The submission of all claims to the RSP is one of many ways to recover from the manufacturers. There should be other ways available to a specific claimant such as the filing of lawsuit or the sending of demand letter to manufacturers. Therefore, it is a modification of the Plan.

Appellees assert in the Paragraphs of 30 - 35 of the Proposed Consent Order that Section 10.06 of the SFA specifically contemplates and authorizes the Claimants' Advisory Committee and Dow Corning to amend the SFA upon agreement and the Plan reserves to the Claimants' Advisory Committee, Dow Corning Corporation and the Debtor's Representatives the right to jointly amend or modify the Plan "to remedy any defect or omission or reconcile any inconsistency in the Plan".

The District Court finds that the Proposed Consent Order is a proper modification of the Plan submitted by Dow Corning and the Claimants' Advisory Committee as set forth in Section 11.4 of the Plan. It is obvious that the reduction of the marshaling requirement to the submission of all claims to the RSP is a modification of the Plan.

Under Section 10.06 of the SFA, however, such modification shall require approval of the Court that would not approve if it would increase the value or settlement value of any Claim to a Claimant. The District Court opines that the Proposed Consent Order does not define the term "marshaling" therefore the interpretation set forth in the Proposed Consent Order and the corresponding procedures is reasonable.

However, the issue is not whether the interpretation set forth in the Proposed Consent Order is reasonable or unreasonable. The issue is whether the modification as to the marshaling requirement increases the value or settlement value of the Disputed Marshaling Claims.

The District Court did not examine it. In this respect, the Order of the District Court is arbitrary and capricious.

Conversely, appellees allege that the Proposed Consent Order does not change any of the substantive criteria governing Class 7 claims and none of the objecting Claimants will be affected adversely by the Consent Order.

It is incorrect. The remaining Class 7 Silicone Material Claimants' Fund should be allocated to all of the Class 7 Claimants eventually. Therefore, if the Eligible Disputed Marshaling Claimants take it, the other Class 7 Claimants will be adversely affected.

The District Court opines that the Proposed Consent Order does not specifically change the substantive criteria under Class 7. It is incorrect too. The Proposed Consent Order reduces the marshaling requirement to the submission of all claims to the RSP. It results the increase of the value or settlement value of the Eligible Disputed Marshaling Claims in violation of Section 10.6 of the SFA. Therefore, the modification of the marshaling requirement as set forth in the Proposed Consent Order should not be allowed.

3. Seventy one (71) Class 7 Korean Claimants are unreasonably treated

Standard of review of this issue is abuse of discretion and reasonableness.

Section C of Paragraph 43 of the Proposed Consent Order prescribes, "These claimants have submitted claims that do not meet the Class 7 eligibility criteria. The SF-DCT has reviewed each claim and determined that the claimant is not eligible for one or more of the following reasons;... (2) the claimant was implanted outside of the eligible date range". The Proposed Consent Order

excludes the eligibility of the seventy one (71) Class 7 Korean Claimants because they received breast implant surgery after January 1,1992. The District Court opines that they rather seek to alter the terms of the confirmed Plan as it relates to the Class 7 Korean Claimants.

The reasoning that they seek to alter the terms of the confirmed Plan should apply to the Eligible Disputed Marshaling Claimants in the same way because they seek to reduce the marshaling requirement to the submission of all claims to the RSP, which is not allowed through a modification of the Plan as set forth in the Proposed Consent Order.

To compare the seventy one (71) Class 7 Korean Claimants with the Eligible Disputed Marshaling Claimants, the Class 7 Korean Claimants should be sympathized.

Subsection (b)(ii) of Section 6.04 of Article VI of the Claims Resolution Procedures prescribes, "the Claimant must submit Proof of Manufacturer of a Qualified Implant Implanted after January 1, 1976 and before January 1, 1992".

The basis for the cut-off date for eligibility is that the manufacturers of Class 7 Claims discontinued producing implant. However, foreign Claimants who received implantation should have been accounted for the period of transportation of the goods. At the time of confirmation hearing, nobody cared about that provision. Appellees reached to the agreement of the Plan in

negligence because they were in a hurry for concluding the Plan documents.

The Proposed Consent Order excludes the seventy one (71) Class 7 Korean Claimants from eligibility by excusing that they were implanted outside of the eligible date range. But appellees should have corrected their old mistake by inserting in the Consent Order the seventy one (71) Class 7 Korean Claimants including other Class 7 Claimants who were not paid due to the cut-off date, just as the Class 7 Claimants who were not paid due to marshaling requirement. .

Applees assert that if the eligibility cut-off date is extended, it could well generate demands to re-open the filing period so that other individuals who received implants after January 1,1992 could seek compensation thus could result in the reduction of payments to other Class 7 Claimants. However, there are not many Class 7 Claimants who timely filed claims but unpaid. Therefore, the extension of the cut-off date for eligibility is reasonable. The exclusion of the seventy one (71) Class 7 Korean Claimants including other Class 7 Claimants in the same situation is unreasonable.

#### 4. Conclusion

Appellants request this Court to reverse the District Court's Order Approving Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund, and to send it back to the District Court for further consideration.



Date: March 11, 2016

Respectfully submitted,

(signed) Yeon Ho Kim

Yeon Ho Kim Int'l Law Office

Suite 4105, Trade Center Bldg.,

159 Samsung-dong, Kangnam-ku

Seoul 135-729 Korea

Tel: +82-2-551-1256,

HP:+82-10-5305-5570

[yhkimlaw@unitel.co.kr](mailto:yhkimlaw@unitel.co.kr)

For the Class 7 Korean Claimants

APPENDIX

- RE.958 Motion for Extension of Deadline of Class 7 Claimants Page ID #15939-15945
- RE.962 Motion to Dismiss and Response to the Appeal Filed by Korean Claimants Styled as a "Motion for Extension of Deadline of Class 7 Claimants Page ID #15949-15968
- RE.963 Response to Motion for Extension of Deadline of Class 7 Claimants Page ID #16249-16258
- RE.1027 Proposed Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund Page ID #17325-17362
- RE.1028 Reply to Response and Motion to Dismiss Motion for Extension of Deadline of Class 7 Claimants Page ID #17407-17419
- RE.1031 Order Authorizing Distribution of Notice Pursuant to Proposed Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund Page ID #1773-17474
- RE.1075 Sur-Reply to Response and Motion to Dismiss Motion for Extension of Deadline of Class 7 Claimants Page ID #17684-17686
- RE.1076 Objection to Proposed Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund Page ID #17708-17716

- RE.1169 Omnibus Response to Objections and Submissions Responding  
Consent Order to Establish Guidelines for Distribution from the  
Class 7 Silicone Material Claimants' Fund Page ID #18099-18128
- RE.1194 Reply to Omnibus Response to Objectors and Submissions  
Page ID #18217-18222
- RE.1226 Order Approving Consent Order to Establish Guidelines for  
Distribution from the Class 7 Silicone Material Claimants' Fund  
Page ID #18464-18473
- RE.1227 Consent Order to Establish Guidelines for Distribution from the  
Class 7 Silicone Material Claimants' Fund Page ID #18474-18503
- RE.1229 Notice of Appeal Page ID #18552-18555

**CERTIFICATE OF SERVICE**

I hereby certify that on March 11, 2016, I have electronically filed the above document with the Clerk of Court by ECF system that will notify to all relevant parties in the record.

Date: March 11, 2016

Signed by Yeon Ho Kim