Case No.: 18-1040

United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

KOREAN CLAIMANTS

Interested Parties – Appellants

v.

DEBTOR'S REPRESENTATIVES; DOW SILICONES CORPORATION; CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE

Defendants – Appellees.

Petition for Panel Rehearing

Yeon Ho Kim

Yeon-Ho Kim International Law Office

Suite 4105, Trade Tower, 159 Samsung-dong, Kangnam-ku

Seoul 06164 South Korea

Tel: +82-2-551-1256

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Petition for Panel Rehearing

6 Cir. R. 27(g) prescribes that a party may seek rehearing of a judgment pursuant to Fed. R. App. P. 40, which prescribes that a petition for panel rehearing may be filed within 14 days after entry of judgment. 6 Cir. I.O.P. 40(a)(1) prescribes that the purpose of a rehearing is to bring a claimed error of fact or law in the opinion to the panel's attention. Pursuant to those Rules, appellants, the Korean Claimants, move for petition for panel rehearing for opinion issued on January 14, 2019.

The panel for appeal of the Korean Claimants (hereinafter "the Panel") issued opinion affirming the District Court's order granting Dow Corning's joint motion for mootness and dismissing the Korean Claimants' motion for reversal of decision of August 22, 2011 of the Claims Administrator and motion for re-categorization of Korea. The Panel misapprehended facts in both motions.

In addition, the District Court issued an order dismissing the Korean Claimants' motion for recognition and enforcement of mediation agreement, partly dismissing Dow Corning and the Finance Committee's argument that the mediation agreement was an unsigned draft and mediation was not an act of the Finance Committee on December 12, 2018.

I. Grounds for Petition

With respect to motion for reversal, the Panel decided that over **94%** of Kim's clients submitted affirmative statements as proof of manufacturer. The Panel added that almost every Korean Claimants appeared to be unable to locate her medical or hospital records. This decision of the Panel is not only untrue from the record of the Korean Claimants but a betrayal to the evidences presented by the Claims Administrator, who has filed a cross motion to dismiss the Korean Claimants' motion for reversal with the District Court.

Until now, from the records of Yeon-Ho Kim Int'l Law Office, around 1,500 Korean Claimants submitted their proof of manufacturer claims to the SF-DCT. Among those, around 200 Claimants submitted the SF-DCT their POM claims on the basis of medical or hospital records. The other Claimants, 1,300 Claimants, submitted affirmative statements for their POM claims instead of medical records.

The Claims Administrator sent an e-mail of August 14, 2009 to Yeon Ho Kim. It said, "With respect to the POM claims you sent, a few observations: We have performed a POM review on 1,815 claims you have submitted. Of these, 1,488 (**82%**) were based on affirmative statements; a hugely greater number than any

other group of claims submitted to us. Nonetheless, we have approved POM for 1,702 of the claims, an approval rate of 97% or approximately 8% higher than the average POM approval rate for all claims submitted to the Facility."(*See*, RE 810, Pg ID#12317) Because the Korean Claimants have never submitted a single POM claim to the SF-DCT since 2006, the e-mail of Claims Administrator of August 14, 2009 is still outstanding in contents. Where the Panel derived "over 94%" from is a question so the Korean Claimants petition a rehearing. *See*, *Berthelsen v. Kane*, 907 F.2d 617(6th Cir.1990).

In addition, the Panel decided that correction fluid was used by the Korean Claimants **on many forms**. The Panel depicted the Korean Claimants as they used correction fluid to hide the discrepancy between date and facility listed for procedure and date and facility on registration forms **widely**. From the records of Yeon Ho Kim Int'l Law Office, however, only less than twenty (20) Korean Claimants used correction fluid on their forms. Dow Corning attempted to portray the Korean Claimants fabricators in its response to motion for reversal and its motion for mootness. The Panel took the portrayal of Dow Corning as a fact.

The less than twenty Claimants could be interpreted as many but the size of the Korean Claimants, (1,815 claims filed and more than 2,600 Claimants

registered), cannot force the Panel to decide that the Korean Claimants used correction fluid **on many forms**. A rehearing is necessary.

The Panel also decided that whether one calls the original decision of the Claims Administrator a "hold", as all of the parties (including the Korean Claimants in their opening brief), or something else is of no consequence. The Panel added that the Claims Administrator categorically ceased processing certain claims, but then reversed that decision, making it appear, in hindsight, as though the original decision had been to place these claims on "hold". The Panel further added that semantics should not obscure the analysis of the Korean Claimants' contention and the Korean Claimants requested that the Claims Administrator reverse its decision, as stated in the August 2011 letter, to categorically stop processing Korean Claims that use particular affirmative statements.

From the beginning to the end, "administrative hold" was a term **created** by Dow Corning in response to motion for reversal and motion for mootness. Neither the SF-DCT nor the Claims Administrator ever used that term in the numerous correspondences with Yeon Ho Kim including the letter of August 22, 2011 which was the final notification letter of the decision of the Claims Administrator for the POM claims. The Korean Claimants filed motion for

reversal of the decision of August 22, 2011 in September 2011. The decision of the Claims Administrator that the Korean Claimants contended in motion for reversal was that the SF-DCT canceled the approved POM claims of ***all*** the Korean Claimants.

Even the District Court decided that the approved POM claims based upon affirmative statement had been canceled.

Therefore, the original decision, the decision of August 22, 2011, cannot be a "administrative hold". The original decision shall be a "cancel" of the approved POM claims.

The difference between "hold" and "cancel" is wider than the Pacific Ocean and semantics has a grave consequence for the analysis of what the meaning of the letter of August 22, 2011 of the Claims Administrator because Dow Corning alleged (accepted by the District Court) that the SF-DCT gave what the Korean Claimants wanted so motion for reversal became moot.

Canceling the approved POM claims would imply holding claims processing to the extent that the approved POM claims cannot step up to the next stage of processing, payments processing, but the lift of "hold", the given relief alleged

by Dow Corning, does not correspond to the relief that the Korean Claimants sought through motion for reversal of the Claims Administrator's decision, the cancelation of the approved POM claims.

Whether one calls the original decision of the Claims Administrator a "hold" bears a great consequence. The point is not what the Claims Administrator categorically ceased processing but what the Claims Administrator canceled the approved POM claims in the original decision through the letter of August 22, 2011. The Panel misapprehended facts in the correspondences between the Claims Administrator and Yeon Ho Kim (*See,* RE810, Pg ID#12301-12330) and the letter of August 22, 2011 of the Claims Administrator(*See, Id,* Pg ID#12329), and the Korean Claimants' motion for reversal and Dow Corning's motion for mootness. A rehearing is necessary.

Finally, the District Court issued the order dismissing motion for recognition and enforcement of mediation agreement December 12, 2018. The Korean Claimants argued in this Court that motion for mediation agreement must be heard together with motion for reversal because the two motions interwinded with each other. The Panel decided that this Court does not have jurisdiction. Because the Korean Claimants appealed, this Court has a jurisdiction. *See, Gilbert v. Ferry*, 413 F.3d (6th Cir.2005).

The District Court decided that a mediation agreement with Yeon Ho Kim has been executed by the Finance Committee. The District Court dismissed the allegations of Dow Corning and the Finance Committee that the mediation agreement was just an unsigned draft. The District Court also dismissed the allegation of Dow Corning that mediation offered to Yeon Ho Kim was an act of David Austern, not an act of the Finance Committee.

Because the District Court accepted the position of Yeon Ho Kim that the mediation agreement was executed as “agreement”, the Panel must look into motion for reversal again because it is closely related to motion for mediation agreement.

With respect to motion for re-categorization, the Panel decided, “Despite Mr.Kim’s earlier concession that the Claimants’ Advisory Committee was right (indicating that re-categorization must apply proactively), and he was ‘dropping’ the request, (however) the Korean Claimants responded in opposition, arguing that a re-categorization effective January 2015 did not grant full relief…. At oral argument on the mootness motion, Dow responded to this line of argument in part by stating, correctly, “That is not really in his original motion at all.”…. In the Korean Claimants’ motion for re-categorization, they had never, or even

suggested, anything other than that re-categorization apply to all claims filed by the Korean Claimants, regardless of when they were filed."

The decision of the Panel in the above paragraph is an error in fact. The Panel gravely misapprehended facts.

Yeon Ho Kim did not drop his request in full. Yeon Ho Kim dropped his request: (1) publication of re-categorization on the table of countries of Schedule III, Dow Corning Settlement Program and Claims Resolution Procedures, (2) re-categorization itself (category 3→category 2) on the basis of the change of GDP per capita of South Korea, and (3) payment of the balance up to 60 percents over 35 percents of domestic amount for applicable compensation level to ***all*** of the Korean Claimants who have already received compensation.

However, Yeon Ho Kim did not drop a relief for upgrading the payments of the Claimants who have not received upon filing motion. Yeon Ho Kim contended clearly in his response to mootness motion that GDP per capita of South Korea began to exceed sixty percents of that of the United States of America from the year 2012. The Claims Administrator determined in her e-mail, "The Plan

provides that the adjustment of categories shall occur no more that once per calendar year and any re-categorization shall apply to all claimants residing country whose claims are paid in the year of re-categorization or thereafter so **beginning in calendar year January 2015**. South Korea is re-categorized to Category 2." (*See*, RE1020-2, Pg ID#17050). Yeon Ho Kim emphasized in the response to mootness motion of Dow Corning that either the Finance Committee or the SF-DCT has no authority to **defer** the year of re-categorization in spite of the year of the exceeding of 60 percents of GDP per capita of the United States of America by Korea, which is 2012, **to 2015**, the Plan does not clearly specify **when** the re-categorization of country from shall be implemented, and accordingly, the issue in motion for re-categorization were not resolved in full through the letter by the SF-DCT and the e-mail of the Claims Administrator to him.(*See*, RE1025, Pg ID#18554)

The Korean Claimants insisted afterward in the hearing of the District Court, "Further, due to that South Korea GDP for 2010 (misspelled by a court reporter for transcript) was 60 percent of that of United States in 2010 (misspelled by the court reporter), the Finance Committee should have decided that South Korea became a category 2 **from 2012**", "The point to start should be decided to go forward. The Finance Committee decided that January 2015 should be it. But **it should be January 2012** because South Korean GDP for 60 percents of that of

the United States was from the year of 2012", "Since the decision of the Finance Committee is not correct, this Court must overrule it therefore the motion for re-categorization did not become moot", and "I request the Settlement Facility pay it (meaning the difference of 6.2 Class payment and 6.1 Class payment) to them (meaning the 481 Korean Claimants) because they should be the Class 6.1 Claimants **from 2012**."*See,* RE1401, Pg ID#23329. *Also See, Geisler v. Folsom,* 735 F.2d 991(6th Cir.1984)

Dow Corning presented oral argument in hearing of the District Court and confessed, "They also made some arguments about **when the payment should be effective** which seems to be inconsistent with the previous statements in their initial reply."(*See,* RE1401 Pg ID#23326)

Therefore, the Panel misapprehended facts such that the Korean Claimants "dropped" the request, "In oral argument in this Court, Dow stated correctly "that is not really in his original motion at all."", and "The Korean Claimants in motion for re-categorization that they had never, or even suggested, anything other than that re-categorization apply to all claims filed by the Korean Claimants, regardless of when they were filed."

The Panel has mistakenly believed a Dow Corning's attorney in the hearing of

December 4, 2018, "That is not really in his original motion at all." She also misrepresented that the SF-DCT sent two hundred thirty some checks to Yeon Ho Kim who actually received 481 checks in the late December 2014.

The Panel misapprehended in other aspects of fact too. The Panel decided, "To the extent the Korean Claimants seek relief beyond re-categorization, their requests are futile under the Plan, waived, or improperly raised…. But none of these dates (meaning 2012, 2010, April 7, 2014, and December 5 2014) were suggested in the Korean Claimants' original motion….Even if there were some reason to think re-categorization could apply retroactively or to hold that re-categorization must be effective from the date of the re-categorization request-and no clear reason has been presented-we would still decline to consider these unpreserved arguments."

The Korean Claimants raised the issue about **when** re-categorization must apply **from**, the issue of timing of re-categorization, as the Claims Administrator called it.

Because the clause for timing of re-categorization does not exist in the Plan and the documents, the Korean Claimants requested the Claims Administrator to apply re-categorization of South Korea from either 2012, the year that GDP per

capita of Korea exceeded 60 percents of that of the United States definitely, or 2014, the year that the Korean Claimants requested re-categorization.

Following the request of Yeon Ho Kim, the Claims Administrator forwarded her request for timing of re-categorization to the parties including Dow Corning. Dow Corning admitted it in the briefing of the District Court too. The Claims Administrator even wrote to Yeon Ho Kim that she forwarded his e-mail and issue (timing for re-categorization) to the parties and as soon as she has received their response, she would notify him through her e-mail of March 23, 2015. (*See*, RE1026-1 Pg ID#17224, Reply Brief of the Korean Claimants, p.15 footnote).

All of the parties including Dow Corning knew the issue that the Korean Claimants raised the issue of the timing of re-categorization.

The motion for re-categorization of the Korean Claimants included a request for not only re-categorization of South Korea itself but timing of re-categorization.

In addition, the Korean Claimants' appeal included the contention on not only the dismissal of motion for re-categorization but the grant of motion for mootness of Dow Corning. The Korean Claimants responded in response to

motion for mootnees that re-categorization must apply from 2012. During hearing for both motions in the District Court, Yeon Ho Kim raised the issue to the Court specifically. (*See,* RE1401, transcript, Pg ID#23329)

Therefore, the Korean Claimants shall not be blamed for lack of raising the issue in motion for re-categorization about whether re-categorization must apply from 2012 or later from 2014.

The Panel added that no clear reason for why re-categorization must be effective from the date of the re-categorization request has been presented. There is no clause in the Plan about **when** re-categorization must be effective **from**. Even the Claims Administrator was uncertain about when re-categorization must apply from and therefore forwarded the issue raised by Yeon Ho Kim to the parties including Dow Corning. In this case, the Court considering whether the decision of the Claims Administrator ("beginning from January 2015, South Korea is re-categorized from category 3 to category 2") is right and the motion for re-categorization became moot in Spring 2015, as stated in opinion, is responsible for giving an opinion on timing of re-categorization

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The Panel decided that the Korean Claimants presented no clear reason for

why re-categorization must be effective from such dates. Conversely, however, the Court must give an answer for a reason for why the decision of the Claims Administrator that re-categorization must be effective from January 2015, a date of re-categorization rather than a date of request for re-categorization, is right. This query also hinges on whether the Claims Administrator has discretion in re-categorization under the Plan, whether a Claimant requested or not. The Panel misapprehended law and a rehearing is necessary.

II. Reliefs Sought

Pursuant to 6 Cir. R. 27(g), the Korean Claimants seek a panel rehearing for opinion with respect to motion for reversal and motion for re-categorization, and motion for mootness. Pursuant to 6 Cir. I.O.P. 40(c), the Korean Claimants request the Panel to grant a rehearing and either to restore this case to the calendar for re-argument or resubmission in conjunction with the appeal for motion for recognition and enforcement of mediation agreement, or separately to enter other appropriate orders such as granting motion for re-categorization including a relief that the 481 Korean Claimants who received the checks of 6.2 Class payments from the SF-DCT in December 2014 shall be paid 2,500 dollars additionally because they must be 6.1 Class Claimants by re-categorization.

Date: January 21, 2019

Respectfully submitted,

/s/ Yeon Ho Kim
Yeon Ho Kim
Yeon Ho Kim Int'l Law Office
Suite 4105, Trade Tower
159 Samsung-dong, Kangnam-ku
Seoul 06164 Korea
Tel: +82-2-551-1256
yhkimlaw@unitel.co.kr
For Korean Claimants (Appellants)

CERTIFICATE OF COMPLIANCE

I certify that this document complies with length limits of Fed. R. App. P. 40(b)(2). This document has 2,861 words and 15 pages excluding a cover. This document also complies with form of Fed. R. App. P. 40(b)(2) and 32(5)(6). This document has proportionately spaced typeface in 14 point Times Roman style of Microsoft Office Word 2007.

Date: January 21, 2019

/s/ Yeon Ho Kim
Yeon Ho Kim
Yeon Ho Kim Int'l Law Office
Suite 4105, Trade Tower
159 Samsung-dong, Kangnam-ku
Seoul 06164 Korea
Tel: +822-551-1256
Fax: +822-551-5570

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2019, 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: January 21, 2019

/s/ Yeon Ho Kim
Yeon Ho Kim
Yeon Ho Kim Int'l Law Office
Suite 4105, Trade Tower
159 Samsung-dong, Kangnam-ku
Seoul 06164 Korea
Tel: +822-551-1256
Fax: +822-551-5570