

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

Settlement Facility Dow Corning Trust,
[REDACTED],

Case No. [REDACTED]
Honorable Denise Page Hood

Appellant.

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

Claimant [REDACTED] is a rupture claimant before the Settlement Facility–Dow Corning Trust (“SF-DCT”) pursuant to the Amended Joint Plan of Reorganization (“Plan”) in the Dow Corning Corporation (“Dow Corning”) bankruptcy action. On July 7, 2008, Ms. [REDACTED] through counsel, submitted a “Motion Submitting Letter of Support” which the Court considered as an appeal from the Appeals Judge’s decision denying Ms. [REDACTED]’s claim.

Dow Corning filed a Motion to Dismiss the Appeal on July 28, 2008. A response was filed on August 12, 2008 on behalf of Ms. [REDACTED]. On August 22, 2008, Dow Corning filed a Reply. Ms. [REDACTED] filed an “Answer to Reply” on October 6, 2008.

Ms. [REDACTED] states she does not have contemporaneous medical records of the implant removing surgeon indicating that he saw the implants ruptured. The implants were removed on June 10, 1993. Ms. [REDACTED] claims that the implants were removed because she was complaining of stiffness and fibrosis. She further claims that at the time of explantation, the surgeon was not aware of any information as to leakage or breakage and simply removed the implants for the benefit of the patient. (Letter of Support, ¶ 2) Ms. [REDACTED] indicates that the

contemporaneous pathology report on the tissue explanted revealed that the fibrosis was caused by the appearance of a substance consistent with silicone. (Letter of Support, ¶ 3) On November 7, 1993, Dr. Saul Puszkin rendered a pathology report indicating that the initial evaluation on the implants showed ruptures on both implants, that the ruptures were clearly noted in the last elastomer membrane through which silicone clearly noted in the last elastomer membrane through which silicone gel protruded under gentle hand pressure. (Letter of Support, ¶ 3) The pathology section of the tissue examined revealed the presence of moderate amount of silicone particles infiltrating the breast capsule tissue. (Letter of Support, ¶ 3). In 1997, ██████████ underwent major surgery to remove the nodules caused by the leakage of silicone. (Letter of Support, ¶ 4) Ms. ██████████ seeks an order from the Court directing the Claims Administrator to consider the expert's report as proof of rupture.

II. ANALYSIS

A. Appeal Rights Under the Plan

Dow Corning argues that appeals to this Court are expressly and unambiguously barred by the Plan. Dow Corning cites cases issued by the Court holding that the Plan language does not permit individual claimants to appeal the decisions of the Claims Administrator or the Appeals Judge to this Court.

In response, ██████████ claims she is not appealing the decision of the Claims Administrator and the Appeal Judge but seeks to join other motions submitted by other claimants for an order directing the SF-DCT to accept non-contemporaneous evidence to support a rupture claim under the Rules of Evidence. Ms. ██████████ specifically cites to the motion filed by Siegel, Kelleher & Kahn requesting the Court to allow expert reports as proof of rupture.

Dow Corning claims that although Ms. [REDACTED] may not be appealing the denial of her claim to this Court, Ms. [REDACTED] also does not have the individual right to request a Plan interpretation on this issue.

Section 8.7 Amended Plan of Reorganization states that this Court retains jurisdiction to resolve controversies and disputes regarding the interpretation and implementation of the Plan and the Plan Documents, including the SFA, and, to enter orders regarding the Plan and Plan Documents. (Plan, §§ 8.7.3, 8.7.4, 8.7.5) The Plan provides for the establishment of the SF-DCT, which is governed by the SFA. (Plan, § 1.131) The SF-DCT was established to resolve Settling Personal Injury Claims in accordance with the Plan. (Plan, § 2.01) The SFA and Annex A to the SFA establish the exclusive criteria by which such claims are evaluated, liquidated, allowed and paid. (SFA, § 5.01) Resolution of the claims are set forth under the SFA and corresponding claims resolution procedures in Annex A. (SFA, § 4.01)

The Plan establishes administrative claim review and appeals processes for Settling Personal Injury claimants. Any claimant who does not agree with the decision of the SF-DCT may seek review of the claim through the error correction and appeal process. (SFA, Annex A, Art. 8) A claimant may thereafter obtain review by the Appeals Judge. (SFA, Annex A, Art. 8) The Plan provides that “[t]he decision of the Appeals Judge will be final and binding on the Claimant.” (SFA, Annex A, § 8.05) Claimants who seek review under the Individual Review Process also have a right to appeal directly to the Appeals Judge. The Plan provides that “[t]he decision of the Appeals Judge is final and binding on both Reorganized Dow Corning and the claimant.” (SFA, Annex A, § 6.02(vi))

The Plan provides no right to appeal to the Court. The Plan expressly states that the decision

of the Appeals Judge is final and binding on both the Reorganized Dow Corning and the claimants. Allowing the appeal to go forward and directing the Claims Administrator to pay the rupture claim would be a modification of the Plan language. Generally, the provisions of a confirmed plan bind the debtor and any creditor. 11 U.S.C. § 1141(a). Section 1127(b) is the sole means for modification of a confirmed plan which provides that the proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of the plan. 11 U.S.C. § 1127(b).

“In interpreting a confirmed plan courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors.” *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006); 11 U.S.C. § 1141(a). “An agreed order, like a consent decree, is in the nature of a contract, and the interpretation of its terms presents a question of contract interpretation.” *City of Covington v. Covington Landing, Ltd. P’ship*, 71 F.3d 1221, 1227 (6th Cir. 1995). A court construing an order consistent with the parties’ agreement does not exceed its power. *Id.* at 1228.

The Plan’s language is clear and unambiguous that the decision of the Appeals Judge is final and binding on the claimants and the Reorganized Dow Corning. The Court has no authority to modify this language. Although bankruptcy courts have broad equitable powers that extend to approving plans of reorganization, these equitable powers are limited by the role of the bankruptcy court, which is to “guide the division of a pie that is too small to allow each creditor to get the slice for which he originally contracted.” *In re Dow Corning*, 456 F.3d at 677-78 (quoting *In re Chicago*, 791 F.2d 524, 528 (7th Cir.1986)). “A bankruptcy court’s exercise of its equitable powers is cabined by the provisions of the Bankruptcy Code.” *Id.* at 678 (citing *In re Highland Superstores, Inc.*, 154 F.3d 573, 578-79 (6th Cir.1998)). Ms. ██████████ has not shown that the Court has the

authority to exercise its equitable powers outside the clear and plain Plan language. Although Ms. ██████████ claims she is not appealing the Appeals Judge's decision denying her claim, even if she did, the Court cannot consider her request to review the Appeals Judge's decision.

B. Expert Report

As to Ms. ██████████'s request to direct the Claims Administrator to consider an expert report to support her rupture claim, the Court notes that in the Siegel, Kelleher & Kahn ("SKK") motion cited by Ms. ██████████, the Court ruled that SKK, on behalf of its clients, does not have the authority under the SFA or the Procedures to raise an interpretation issue before the Court. (See, Case No. 00-00005, Doc. No. 627, Memorandum Opinion dated March 31, 2008).

Section 5.05 of the SFA provides that the Debtor's Representatives and the CAC may submit joint interpretations and clarifications regarding submissions of claims to the Claims Administrator. If there is a dispute between the Debtor's Representatives and the CAC, the Claims Administrator may resolve the issue or the issue may be raised before the Court by way of a motion pursuant to the June 11, 2004 (Doc. No. 53) Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan ("Procedures"). Section 2.01 of the Procedures provides that "these procedures will apply to disputes arising out of the interpretation or application of the Claims Resolution Procedures—Annex A to the Settlement Facility Agreement—and any claims operations functions set out in the Settlement Facility Agreement." (Plan Interpretation Procedures, § 2.01(a)) After a meet and confer period and submitting the issue before the Claims Administrator, either party may bring the matter before this Court. (Plan Interpretation Procedures, § 2.01(c) and (d)) The SFA and the Procedures authorize only the Debtor's Representatives and the CAC to file a motion to interpret a matter under the SFA. There

is no provision under the SFA or the Procedures which allows a claimant to submit an issue to be interpreted before the Court.

Because Dow Corning and the CAC have not raised the issue of expert opinions to support a rupture claim, the Court will not interpret the expert opinion issue raised by Ms. [REDACTED]. Ms. [REDACTED] request that the Court direct the Claims Administrator to consider an expert's report to support a rupture claim is denied.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Dow Corning's Motion to Dismiss the Appeal of [REDACTED] [REDACTED] (Doc. No. 4, 7/28/2008) is GRANTED.

IT IS FURTHER ORDERED that the "Motion Submitting Letter of Support" explained by Ms. [REDACTED] as a motion to direct the Claims Administrator to consider an expert's report to support a rupture claim (Doc. No. 1, 7/7/2008) is DENIED.

IT IS FURTHER ORDERED that this matter is DISMISSED with prejudice.

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: March 27, 2009

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on this date, March 27, 2009, by electronic means and/or first class U.S. mail.

S/Sakne Srour

Deputy Clerk