

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE	§	
	§	
DOW CORNING CORPORATION	§	
	§	
Reorganized Debtor	§	CASE NO.: 00-CV-00005-DT
	§	
	§	Hon.Denise Page Hood
	§	
	§	
	§	

MOTION FOR REVERSAL OF DECISION OF SFDCT REGARDING KOREAN

CLAIMANTS

SFDCT sent a letter dated August 22, 2011 to all Korean claimants that SFDCT decided that SFDCT can no longer accept affirmative statements that all Korean medical records were destroyed after a ten year period, and for claimants who have yet to file a claim form, no affirmative statements will be accepted as proof of manufacturer, and of the 1,742 claimants who filed claim forms, any claimant previously paid based solely on an affirmative statement is not eligible for further benefits including Premium Payments. The decision by SFDCT is wrong and unlawful. Korean claimants request the Court to reverse the decision of SFDCT in the above letter.

I. INTRODUCTION

After around 2,600 Korean claimants waited for a long time, the attorney representing Korean claimants, Yeon-Ho Kim(hereinafter referred to as “Kim”), flew to Houston to meet the Claims Administrator, Elizabeth Wendy Trachte-Huber, on January, 2004 before the Effective Date of Dow Corning Reorganization Plan arrived.

Pursuant to subparagraph 5 of B(Proof of Manufacturer) of Part I of Schedule I of Annex A to Settlement Facility and Fund Distribution Agreement, the person making

an affirmative statement must provide the basis for conclusion(attesting that the claimant was implanted with a Dow Corning Breast Implant), must include a description of what steps were taken to secure the types of proof outlined subparagraphs 1 and 2(hospital records of the surgeon and medical records containing the implant package label) and why those records are not available.

Kim was not able to advise the claimants who did not have medical records how their implanting physicians should write affirmative statements pursuant to the above subparagraph 5 of B(Proof of Manufacturer). Especially since the plastic surgeons of Korea were generally not cooperative with the execution of breast implant product liability class action, Kim brought four or five kinds of the samples of affirmative statements of the claimants to the meeting with the Claims Administrator to see if the samples could be accepted as the proof of POM.

The Claims Administrator provided her opinions and Dianna Pendleton-Rodriguez, a member of Claimants Advisory Committee, added her opinions regarding the samples brought to them. They explained the requirements of an affirmative statement under subparagraph 5 above. Ellen Bearicks of Quality Management Department also attended the meeting.

Kim proposed whether the phrases included in the samples of affirmative statement, “The implanting physicians only used Dow Corning products during the period of operation and medical records were not available because they were destroyed due to the lapse of ten years from the operation date could be accepted”, to suffice the requirements of subparagraph 5.

The idea regarding the lapse of ten years was brought into play because the Medicine Law of Korea requires doctors or hospitals to keep the medical records of surgery for ten years.

The Claims Administrator nodded in the affirmative. Dianna Pendleton-Rodriguez did not object to Kim’s proposition about affirmative statement. Ellen Bearicks had no comment.

Kim flew back to Korea and drafted a sample of affirmative statement approved by the Claims Administrator through the meeting. The sample drafted by Kim was a single form thus affirmative statements applied to all claimants were identical.

The sample of affirmative statements included the clauses as follows:

“The undersigned physician attests that the above patient received breast implant surgery from our hospital and the product used for surgery is a Dow Corning product. * Basis: The medical records at that time were destroyed because a ten year period of keeping medical records passed by. However, this hospital only used Dow Corning products during a period of this operation thus the product used for the above patient can be attested as a Dow corning product. [Date] [Signature of implanting physician]”

In fact, the Claims Administrator approved only one form of affirmative statement. Kim intended to simplify the process for receiving affirmative statements from the implanting physicians because the implanting physicians were not cooperative.

Kim distributed the form of affirmative statements to the claimants who did not have medical records. The claimants were supposed to bring them back to Kim after their implanting physicians signed on them. Some doctors modified the clauses of the form of affirmative statement. Some doctors refused to sign on them.

Kim began to file POM claims for the claimants who had medical records of implanting physicians from September, 2004. However, Kim waited for filing POM claims for the claimants who did not have medical records of implanting physicians because it took a while until the claimants received affirmative statements which should be signed by implanting physicians.

Kim obtained around 1,350 affirmative statements from the implanting physicians. Kim began to file POM claims for the claimants who did not have medical records of implanting physicians from May, 2005 in order. Kim filed explant and rupture claims along with POM claims.

SFDCT began to send the letters of POM approval to the claimants from June, 2005.

Kim began to file disease claims for the claimants who had disease diagnosis. The original of disease diagnosis for Korean claimants who participated in Global Settlement Program had been submitted to MDL Claims Office in 1994 thus the photocopies of the disease diagnosis were submitted to SFDCT.

Hereinafter, when around 600 letters of POM approval arrived, SFDCT stopped sending the letters of POM approval and sent the letters of deficiency on the basis of various reasons. Ellen Bearicks of Quality Management Department notified Kim through a letter that all the files of Korean claimants including POM claims were under administrative hold thus no action could be taken for Korean claimants. Kim waited for almost two years since then.

Kim visited SFDCT to meet the new Claims Administrator, David Austern, on April, 2008. Kim asked the Claims Administrator to release the administrative hold. The Claims Administrator raised two issues; one for POM, the other for disease diagnosis.

He explained the problems of POM claims of Korean claimants. He also explained that Doctor Yong Park and Doctor Kwan Sik Kim who issued disease diagnosis to Korean claimants were not qualified medical doctors(QMD) under Schedule II of Annex A to Settlement Facility and Fund Distribution Agreement.

For resolution of QMD problem, the Claims Administrator proposed that a doctor in Korea certified by the American Board of Doctors examine ten(10) claimants who should be chosen by SFDCT as specified in EXHIBIT A & B. Obviously, his proposal succeeded to the Motion of Kim with the Court regarding QMD. Kim agreed.

After Kim returned home, Kim contacted Doctor Seung Hoi Park who was one of three doctors proposed by SFDCT. Doctor Park examined ten(10) claimants and sent his reports directly to SFDCT.

For resolution of POM, however, the Claims Administrator explained that Quality Management Department found many problems and would take long time to

audit the files of Korean claimants thus Kim should wait. The Claims Administrator detailed the findings by Quality Management Department as specified in Exhibit C[e-mail of Nov.25,2008].

After Doctor Seung Hoi Park completed the examination of ten(10) claimants and as the result, SFDCT approved Doctor Yong Park and Doctor Kwan Sik Kim who issued disease diagnosis as QMDs, the Claims Administrator notified attorney Kim in August 14, 2009 through an e-mail of EXHIBIT F that all POM review on 1,815 claims were completed and of those, 1,488(82%) were based upon affirmative statements. He added that SFDCT approved POM for 1,762 of claims, with higher percentage than average.

SFDCT began to send (new) letters of POM approval and award letters of explant, rupture and disease claims to the claimants from April, 2009. By the end of 2009, around 660 claimants received award letters and checks.

However, SFDCT stopped sending award letters and checks from the beginning of 2010. Kim could not find reasons for stopping because there was no notice from SFDCT.

Kim visited SFDCT in May, 2010 to meet the Claims Administrator. However, Kim was warned at the meeting that SFDCT had the limit of budget and the files of claims of Korean claimants and the payments to Korean claimants were carefully monitored by the inspector of insurance companies. The Claims Administrator added that he was going to take care of Brazilian claimants because the attorney who had represented the Brazilian claimants died. Kim was impressed that SFDCT paid no attention to Korean claimants any more.

Around October 26, 2010, SFDCT sent the letters of cancellation of POM to six(6) Korean claimants. The reasons for cancellation were identical in the previous e-mail of November 25, 2008 by the Claims Administrator (See EXHIBIT C). The e-mail of November 25, 2008 was the one sent before administrative hold was released and award letters and checks were sent to the claimants. Those cancellation letters included

that no payment would be made in the future and premium payments would not be made to the claimants who previously received rupture and disease payment.

The Claims Administrator reiterated the reasons for cancellation in an e-mail of December 2, 2010 as shown in EXHIBIT H. His explanation of the reasons for cancellation was almost identical to the explanation during administrative hold from 2006 to 2008 except one point: Medical records which were written more than ten years ago were submitted to SFDCT although the implanting physicians attested in affirmative statements that medical records were destroyed since a ten year period of keeping medical records from operation passed by.

The Claims Administrator concluded that Kim fabricated either affirmative statements or medical records. David Austern declared to disbar Kim from filing future claims and to remove Kim from pending claims. David Austern added that the Claims Administrator has the plenary authority and he received the comments from the Parties and the Finance Committee.

Kim patiently explained David Austern the points raised in his e-mail through e-mails. David Austern replied to Kim's e-mail in an e-mail of December 16, 2010[EXHIBIT I]. David Austern reiterated identical points to the previous e-mail. David Austern added that it would take a time to examine the 1,325 claims files. Since then, Kim did not receive any response and was refused a proposal for visiting SFDCT. Kim was informed through a newsletter of Claimants Advisory Committee that David Austern left the position of the Claims Administrator and the new Claims Administrator, Ann Phillips, was appointed.

Around June, 2011, the Finance Committee filed the motion for recommendation to make premium payments. Kim found the making of premium payments unacceptable from the standpoints of Class 6.2 claimants as well as Korean claimants. While Kim was preparing for the response to the motion, Kim informed the members of CAC through e-mails that Korean claimants would object the recommendation of the Finance Committee. It was a courtesy to inform CAC of any

objection influencing the interests of claimants.

After Dianna Pendleton-Rodriguez read the e-mail of Kim, she sent an e-mail to Sybil Goldrich, saying "This guy is a real piece of work, isn't he? He objects to EVERYTHING, even the recommendation to make premium payments to claimants!". Sybil Goldrich replied in her e-mail, saying "Indeed!"

The e-mails between two erroneously arrived at the e-mail box of Kim. Kim was shocked thus believed that the two members of CAC violated the duties and obligations under the relevant provisions of Settlement Facility Agreement and they could not perform as the members of CAC. It was obvious in view that the decision by David Austern to disbar Kim from filing future claims and to remove from pending claims was made on the basis of the comments from the members of CAC.

Kim sent an e-mail to the members of the Finance Committee and the Special Master, Professor Francis Mcgovern, to request the two members of CAC to be displaced by the Special Master. Kim did not receive a reply from the Special Master yet.

Kim filed the response to the motion of the Finance Committee to object the recommendation for premium payments on August 21, 2011. Before the filing of the response, Kim had sent an e-mail to the new Claims Administrator to visit SFDCT. Ann Phillips refused to meet Kim through her e-mail. At the same day of filing of the response by Kim with the Court, the Claims Administrator sent an e-mail where she wrote she was going to reply to the e-mail of December 18, 2010 that Kim sent David Austern. It was odd in that Kim sent it to David Austern plus it was sent eight months ago. The e-mail by the new Claims Administrator was written in a hurry to provide a message Kim about the filing of the response. It was obvious that the list attached to the e-mail was not completed at the time that the e-mail was dispatched.

The Claims Administrator declared Kim that the implanting physicians had no basis for concluding that Dow Corning products were used and the explanation by Kim is unreliable and further the destruction of Korean medical records explained by Kim is

false.

The Claims Administrator decided that no affirmative statement for the claimants who have yet to file claims shall be accepted and of the 1,742 claimants who filed claim forms, any claimant previously paid based solely on the affirmative statements is not eligible for further benefits including premium payments.

The regular letter version of the e-mail shown as EXHIBIT J arrived at Kim on September 20, 2011.

II. ARGUMENT

1. SFDCT DID NOT ESTABLISH SEPARATE PROCESSING FOR 6.2 CLASS

Section 7.02 (d) in Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to SFA provided;

(d) Processing Order. As a general rule, and to the extent consistent with efficient administration and the Plan, the Claims Office shall process Claims within each category of payment option in the order in which the Claims form(s) and supporting materials for that option are received. The Claims Office shall deem the date of such receipt as the "submission date". The Claims of Class 6.2 Claimants shall be processed separately in the order in which the Class 6.2 Claim submissions are received by the Claims Office.

Section 7.02(d) of Dow Corning Settlement Program and Claims Resolution Procedures ordered SFDCT that Class 6.2 claims be processed separately. The inclusion of this separate processing clause was to prevent the delay of claims processing from voluminous claims filing by Class 5 claimants. However, SFDCT failed in establishing separate processing for Class 6.2 claimants thus delayed the processing of Class 6.2 claims. Class 6.2 claimants including Korean claimants were damaged due to the backlog of the files of Class 5 claimants, which resulted that most Korean claimants lost a chance to file rupture claims due to the expiry of the deadline for rupture claims (3 years from Effective Date) as POM approvals by SFDCT were delayed.

2. CLAIMS ADMINISTRATOR DID NOT KEEP PROMISES

The previous Claims Administrator, Daivid Austern, who appeared largely concerned about the budget rather than the protection of the interests of the claimants, promised Kim that once a letter of POM approval by SFDCT was issued to a claimant, there should be no cancellation. The Claims Administrator committed it on several occasions: during the meetings of April and October, 2008 at SFDCT, and the meeting of May, 2010 at SFDCT.

His verbal promises that POM approval shall not be cancelled is supported in his e-mail dated August 14, 2009(EXHIBIT F). He wrote, "We did not take back the 'acceptable' POM determination". "Acceptable" POM determination means that POM was approved in notice letters by SFDCT to the claimants who filed POM claims.

The Claims Administrator declared in the e-mail, "We have approved POM for 1,762 of claims, an approval rate of 97% or approximately 8% higher than the average POM approval rate for all claims submitted to the Facility".

Following the e-mail, SFDCT sent letters of POM approval(In fact, these letters were the second POM approval letters) , award letters and checks to 660 claimants.

However, SFDCT thereafter sent POM approval cancellation letters dated October 26, 2010 to six(6) claimants, saying "The claimant is no longer to pursue her claim at SFDCT".

Further, the present Claims Administrator, Ann Phillips, sent an e-mail and letter dated August 22, 2011(EXHIBIT J) that of the 1,742 claimants who filed claim forms, any claimant previously paid based solely on the affirmative statements is not eligible for further benefits including premium payments.

The cancellation of POM approval and the decision by the new Claims Administrator broke the promises and commitments by the Claims Administrator.

3. SFDCT VIOLATED EXPECTATION OF CLAIMANTS

SFDCT sent the letters of POM approval to 1,488 claimants from 2005 to 2006. Afterward, SFDCT put the files of Korean claimants under administrative hold for two years.

And then, SFDCT released the administrative hold on August 14, 2009. SFDCT sent the letters of POM approval, and the award letter of explant, rupture and disease and checks to 660 claimants.

SFDCT sent, however, a letter on August 22, 2011, saying that of the 1,742 claimants who filed claim forms, any claimant previously paid based solely on the affirmative statements is not eligible for further benefits including premium payments. The other claimants of 1,742 claimants who did not receive award letters or checks will receive the letters of cancellation of POM approval from SFDCT soon.

All of 1,742 claimants received the letters of POM approval and around 660 of 1,742 claimants even received award letters and checks.

SFDCT shall not reverse its own decision. SFDCT is a quasi-judicial entity thus the change of previous decision shall be prohibited if it outcomes a detriment to claimants.

The claimants who received the letters of POM approval from 2004 to 2006 expected to receive payments from SFDCT pursuant to their claims for explant, rupture and disease. However, SFDCT put them under administrative hold for two years without a notice. The claimants will receive the letters of cancellation of POM approval from SFDCT.

The claimants who received the award letters and checks from 2009, after administrative hold was released, expected to receive premium payments from SFDCT when premium payments can be made. Premium payments are automatically assured to the claimants who received first payments. SFDCT decided, however, that any claimant previously paid based solely on the affirmative statements is not eligible for further benefits including premium payments.

Since SFDCT is quasi-judicial entity, it shall not reverse the notices of POM approval to the claimants or do away with the expectations by the claimants who either received the letters of POM approval or could receive premium payments. Expectations by the claimants are equivalent to a right.

SFDCT violated the expectations of the claimants by reversing its own decision arbitrarily.

4. AFFIRMATIVE STATEMENTS WERE NOT FABRICATED

SFDCT determined that affirmative statements of the claimants were fabricated.

Affirmative statements were drafted through consultation with the previous Claims Administrator, Elizabeth Wendy Trachte-Huber. The form of affirmative statement was approved by the Claims Administrator. Although the successor Claims Administrator, David Austern, questioned the affirmative statements of the claimants because all of them were identical, the claimants actually received the signature from their own implanting physicians. Thus affirmative statements were not fabricated.

The clause in affirmative statements that medical records were destroyed because a ten year period passed by for the basis of non-existence of medical records was included to suffice the requirements of affirmative statement under subparagraph 5 of B(Proof of Manufacturer) of Part I of Schedule I of Annex A to Settlement Facility Agreement pursuant to the approval of the Claims Administrator.

The clause of a ten year period was brought into play because the Medicine Law of Korea obliges the doctors to keep medical records(if surgery) for ten years. As Korean plastic surgeons routinely destroy implant medical records to avoid tax, the clause that a ten year period passed by was the best way to explain the reason why medical records of implantation did not exist.

SFDCT questions both Kim and the claimants how medical records older than ten years can be submitted to SFDCT although the doctors of Korea said in their affirmative statements that medical records did not exist because ten years passed by.

Kim explained David Austern that the clause of a ten year period for the reason of destruction of medical records was included through consultation with the Claims Administration and further, the inclusion of the clause was just a formality to meet the conditions for affirmative statements under Part I of Schedule I of Settlement Program and Claims Resolution Procedures.

Whether or not SFDCT opined that the above explanation unreliable, the non-existence of medical records of implantation to the claimants who submitted affirmative statements to SFDCT is true.

In reality, some doctors kept medical records over ten years and some doctors destroyed some of medical records(for example, implantation records) or kept some of medical records(for example, explantation records). It varied per doctor. In addition, the implanting physicians are frequently different from the explanting physicians.

Although SFDCT opined that the explanation by Kim as to the destruction of Korean medical records is false, the truth that the medical records of implanting physicians did not exist is not changed. SFDCT refused to accept the proposal to come to Korea to see if medical records are routinely destroyed by plastic surgeons.

5. SFDCT ABUSED POWER AND AUTHORITY

Even if SFDCT is accurate, which is impossible, that the clause about a ten year period in affirmative statements is unreliable because other medical records older than ten years were submitted to SFDCT, SFDCT shall not cancel POM approval of all of 1,742 claimants who had received the letters of POM approval from SFDCT.

The Decision reversing the previous decision as to POM approval shall apply to a particular claimant who was discovered that a medical record older than ten years was submitted. Other claimants who are more than 90% of 1,742 claimants are not subject to the cancellation of POM approval by SFDCT.

Although David Austern declared in his e-mail dated December 2, 2010[EXHIBIT H] that the Claims Administrator has the plenary authority in claims processing under Settlement Facility Agreement, the power and the authority of Claims Administrator have a limit. SFDCT shall not make a decision to influence other claimants who have no violation or have no flaw in their own affirmative statements. Either SFDCT or the Claims Administrator shall not execute the decision that POM approvals of all of 1,742 claimants are cancelled.

The decision included in the notice letter dated August 22, 2011[EXHIBIT J]

shall be reversed because SFDCT abused the power and the authority provisioned under Settlement Facility Agreement.

III. CONCLUSION

As stated above, the decision of SFDCT regarding Korean claimants is wrong and unlawful. Therefore, Korean claimants seek the following measures;

- (a) The decision that SFDCT can no longer accept affirmative statements that medical records were destroyed after ten year period shall be reversed:
- (b) The decision that SFDCT can not accept affirmative statements as proof of manufacturer for claimants who have yet to file a claim form shall be reversed:
- (c) The decision that any claimant of the 1,742 claimants who filed claim forms and who were previously paid based solely on affirmative statement is not eligible for further benefits including premium payments shall be reversed:
- (d) The decision that SFDCT will remove the claims where a determination will be made that documents have been altered from processing shall be reversed:
- (e) SFDCT shall not cancel POM approvals for 1,742 claimants and shall expedite the claims processing to pay explant, rupture and disease compensation by establishing separate processing for Class 6. 2 claimants:
- (f) SFDCT shall not enforce Korean claimants to participate in the Class 6. 2 Payment Option which provides USD600 payment for limited proof of manufacturer:
- (g) SFDCT shall restructure the employees involved in discriminatory measures including Quality Management Department of SFDCT against Korean claimants:
- (h) Korean claimants further request the Court to grant all other just relief to prevent SFDCT from disposal of the files of Korean claimants in biased view.

Dated: September , 2011

Respectfully submitted,

(signed) *Yeon-Ho Kim*

Yeon-Ho Kim

Yeon-Ho Kim Intl Law Office

Suite 4105, Trade Tower

159 Samsung-dong, Kangnam-ku

Seoul 135-729, Korea

Tel: 822-551-1256

Fax: 822-551-5570

yhkimlaw@unitel.co.kr

For Korean Claimants

CERTIFICATE OF SERVICE

I hereby certify that on September ,2011, this Motion has been electronically filed with the Clerk of Court using the ECF system, and same has been sent via e-mail to the following.

Claims Administrator

Ann M. Phillips

APhillips@sfdct.com

Finance Committee

Hon.Frank Andrews

fal@hctc.net

Francis McGovern

mcgovern@law.duke.com

Claimants Advisory Committee

Dianna Pendleton-Rodriguez

Dpend440@aol.com

Earnest Hornsby

ehornsby@fplw-law.com

Sybil Goldrich

Sybilg58@aol.com

Jeffery Trachtman

jtrachtman@kramerlevin.com

Dow Corning

Susan McDonnell

Sue.mcdonnell@dowcorning.com

Lamont Buffington

lbuffington@garanlucow.com

Debtor's Representatives

Deborah Greenspan

GreenspanD@dicksteinshapiro.com

Douglas Schoettinger

Doug.schoettinger@dowcorning.com

Eudio Gil

egil@dow.com

Kevin Scroggin

Kevin.scroggin@dowcorning.com

David Tennant

dtennant@nixonpeabody.com

John Donley

John_donley@kirkland.com

(signed) _____

Yeon-Ho Kim

LIST OF EXHIBIT

EXHIBIT A	e-mail of Apr. 3, 2008 from Ellen Bearicks
EXHIBIT B	e-mail of Nov.22, 2008 from David Austern
EXHIBIT C	e-mail of Nov.25, 2008 from David Austern
EXHIBIT D	e-mail of Dec.6, 2008 from David Austern
EXHIBIT E	e-mail of Dec.10, 2008 from David Austern
EXHIBIT F	e-mail of Aug.14, 2009 from David Austern
EXHIBIT G	e-mail of Nov.15, 2010 from Kim
EXHIBIT H	e-mail of Dec.2, 2010 from David Austern
EXHIBIT I	e-mail of Dec.16, 2010 from David Austern
EXHIBIT J	letter of Aug.22, 2011 from Ann Phillips