Case No. 15-2548

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 CORNING CORPORATION, CLAIMANTS' ADVISORY COMMITTEE,
Interested Parties – Appellees.

MOTION TO DISMISS CERTAIN APPELLANTS FOR LACK OF STANDING

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Rule 27(d) of the Sixth Circuit Rules, Appellees Dow Corning Corporation ("Dow Corning"), the Debtor's Representatives, and the Claimants' Advisory Committee (collectively, the "Movants") move to dismiss certain Appellants from this appeal. Movants submit that this Court lacks jurisdiction as to those Appellants because they have no standing to challenge the district court order at issue here.

STATEMENT OF MATERIAL FACTS

The background facts are extensively detailed in Appellees' Response Brief, filed contemporaneously with this motion.

The appeal in this matter arises from a consent order (the "Consent Order") entered by the District Court for the Eastern District of Michigan relating to the Amended Joint Plan of Reorganization of Dow Corning (the "Plan") and the operations of the Settlement Facility-Dow Corning Trust (the "SF-DCT") pursuant to the Plan. *Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Material Claimants' Fund*, RE 1227. The Consent Order provides for the prompt distribution of payments to over a thousand "Class 7" claimants, sets forth guidelines for processing over 5,000 Class 7 claims that had been on hold, and provides for the orderly conclusion of Class 7 claims under the Plan.[1] The Consent Order has no effect on any claims in any of the other Classes created by the Plan. *Consent Order*, RE 1227, Page ID # 18502 ("This Consent Order shall not be construed as affecting any provision of any Plan Document, including the SFA, with the exception of those provisions applicable to Class 7. Nor does the Consent Order provide a basis for interpreting any other provision of the SFA or other Plan Document").

The Appellants are 289 claimants from Korea (the "Korean Claimants"), all of whom allege they are Class 7 claimants. *See Brief of Appellant the Class 7*

[1] Class 7 consists of claimants whose breast implants were 1) implanted during a specific, defined time period, and 2) were made by companies other than Dow Corning that used silicone gel fluid sold by Dow Corning to make gel implant filling. *Amended Joint Plan of Reorganization of Dow Corning Corp.*, RE 1239-2, Page ID ## 18656-57, § 5.4.1.3.

Korean Claimants, App. RE 18; *Reply to the Omnibus Response to Objection to the Proposed Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund* ("*Korean Reply*"), RE 1194, Pg. ID # 18217 ("[I]t must be clarified that the number of objectors to the Consent Order is 289 Korean Claimants. *All of them* are Class 7 Claimants.") (emphasis added). Shortly before this filing, the Appellees received information from the SF-DCT demonstrating that this statement is incorrect. As set forth in Exhibit 1, the Declaration of Ann M. Phillips in Support of Appellees' Motion to Dismiss (the "Phillips Dec."),[2] 152 (more than half) of the Appellants are not Class 7 claimants, but in fact have filed claims that fall within other Classes established by the Plan; either Class 5 (Domestic Breast Implant Personal Injury Claims, *see Plan*, RE 1239-2, Page ID # 18649, § 3.2.7), Class 6.1 (Category 1 and 2 Foreign Breast Implant Personal Injury Claims, *id*. at § 3.2.8) or Class 6.2 (Category 3 and 4 Foreign Breast Implant Personal Injury Claims, *id*. at § 3.2.9). In other words,

[2] Although appellate courts generally are limited to the review of facts developed in the district court, appellate courts may receive facts not previously adduced in the district court where relevant to verifying the appellate court's jurisdiction. *See, e.g.*, *Stockman v. LaCroix*, 790 F.2d 584, 587 (7th Cir. 1986) (citing 28 U.S.C. § 1653, appellate court considered new evidence pertaining to jurisdiction); *cf. Clark v. K-Mart Corp.*, 979 F.2d 965, 966-967 (3rd Cir. 1992) (holding that the court can receive new facts related to mootness on appeal). Appellees were not aware of the information set forth in this Motion when Appellees submitted their Omnibus Response to Objections and Submissions Responding to Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund. RE 1169, Page ID # 18112 at n.4.

these Claimants did not have breast implants made by companies other than Dow Corning that used silicone gel systems sold by Dow Corning during the relevant time period, and thus are not Class 7 claimants. In fact, contrary to the assertion in the Appellants' brief, more than half of the Korean Claimants have filed claims in other classes under the Plan.

Further, none of the remaining Korean Claimants has an active Class 7 claim that is still pending processing or evaluation: 1) 71 have implants that were implanted outside the date range for eligibility for Class 7 (as conceded by the Appellants); 2) 50 had Class 7 claims but their claims have already been paid and closed; 3) 14 have had their claims processed and are eligible for payment but, because the claimant has failed to provide address information, the SF-DCT cannot issue the payment; 4) one claimant was paid an Expedited Release payment but then sought to change her settlement option (the Claims Administrator has denied that request as impermissible under the Plan, and the claim was closed); and 5) one claimant failed to respond timely to the SF-DCT's notice of deficiency and thus the claim was closed. *Phillips Dec*. at pp. 2-3. Of the 289 Korean Claimants, therefore, only 14 have Class 7 claims that have not been finally closed, and all of those claims have been fully processed and merely await payment once they provide the SF-DCT with the appropriate address information.

ARGUMENT

In order for a federal court to exercise jurisdiction over a matter, the party seeking relief must have standing. *Harker v. Troutman* (*In re Troutman Enter., Inc.*), 286 F.3d 359, 364 (6th Cir. 2002) ("Standing is a jurisdictional requirement"); *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996). Appellate courts are under a continuing obligation to verify their jurisdiction over a particular case. *Pedreira v. Sunrise Children's Services, Inc.*, 802 F.3d 865, 869 (6th Cir. 2015) (courts have a duty to ensure that appellant has standing to appeal) (*citing City of Cleveland v. Ohio*, 508 F.3d 827, 835 (6th Cir. 2007)); *Harker*, 286 F.3d at 364.

A party has standing to appeal a judgment or order of the district court if the party is "'aggrieved' by the judgment or order from which the appeal is taken." *City of Cleveland*, 508 F.3d at 836.[3] A party may appeal any judgment that

[3] The analysis is similar when the district court's jurisdiction arises in the bankruptcy context. Under those circumstances, under the "person aggrieved" doctrine, a party does not have standing to appeal a bankruptcy order unless that party is "directly and adversely affected pecuniarily by the order." *Marlow v. Rollins Cotton Co.* (*In re Julien Co.*), 146 F.3d 420, 423 (6th Cir. 1998). That is, to appeal, a party must have a direct financial stake in the order such that it "diminishes [their] property, increases [their] burdens, or impairs [their] rights." *Fidelity Bank, Nat'l Ass'n v. M.M. Group, Inc.*, 77 F.3d 880, 882 (6th Cir. 1996). These requirements are designed to "limit[] standing to persons with a financial stake in the bankruptcy court's order." *Id.*

imposes "some detriment" on that party. *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484 (6th Cir. 1985).

Of the 289 Korean Claimants that comprise the Appellants, 152 of them have filed claims in other Plan Classes and have not filed (and cannot file) Class 7 claims (the "Non-Class 7 Korean Claimants"). *Phillips Dec.* at p.2.

As such, these Non-Class 7 Korean Claimants' claims will be processed (or already have been processed) according to the various requirements of the Plan Classes in which their claims fall. The Consent Order has no effect whatsoever on their claims, their eligibility for payment or their payment. *Consent Order*, RE 1227, Page ID # 18502. The Non-Class 7 Korean Claimants have not suffered and will not suffer any detriment as a result of the Consent Order. *Vanguards of Cleveland*, 753 F.2d at 484. Consequently, they have no standing to appeal the Consent Order and this Court has no jurisdiction over their appeal. *Kardules*, 95 F.3d at 1346.[4]

[4] As the facts demonstrate, many of the remaining Korean Claimants also are not affected by the Consent Order. Their claims either are closed (52 claimants), *Phillips Dec.* at p. 2, or have been fully processed and their payment status is unchanged by the Consent Order (14 claimants), *id*.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court dismiss the 152 Non-Class 7 Korean Claimants from this appeal for lack of jurisdiction.

Dated: April 11, 2016

Respectfully submitted,

On Behalf of Dow Corning Corporation and Debtor's Representatives

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EXHIBIT 1

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DECLARATION OF ANN M. PHILLIPS IN SUPPORT OF APPELLEES' MOTION TO DISMISS

I, Ann M. Phillips, declare as follows based upon my recollection and review of certain data and documents:

1. I am the Claims Administrator for the Settlement Facility-Dow Corning Trust ("SF-DCT").

2. As Claims Administrator, I have reviewed, am familiar with, and have personal knowledge of the:

   a. Objection to the Proposed Consent Order to Establish Guidelines for Distributions from the Class 7 Silicone Material Claimants' Fund (the "Objection"), RE 1076, Page ID ## 17708-16, filed by what appeared to be 71 purported Class 7 Korean claimants;

   b. Exhibit to the Objection, listing 289 Korean claimants, but not referring to or defining such claimants, and including a statement that there were over 2,670 claimants, RE 1076-1, Page ID ## 17717-23; and

   c. Brief of Appellants the Class 7 Korean Claimants, App. RE 18.

3. I understand that the Korean Claimants have represented that this appeal was filed on behalf of 289 individual claimants that are listed in the Exhibit to the Objection, and that the Korean Claimants have asserted that they are all Class 7 claimants.

4. The SF-DCT maintains a comprehensive claims database that contains information about each claimant and the status of each claimant's claim submissions.

5. That database contains information that enables me to examine and conclusively determine the filing status of each of the 289 Korean Claimants (*i.e.*, the particular Class (as set forth in the Amended Joint Plan of Reorganization of Dow Corning Corporation (the "Plan")) into which each claimant falls) and the status of processing, evaluation and payment.

6. Based on that examination, I was able to determine that:

   a. 152 of the Korean Claimants have filed claims in Classes 5, 6.1 or 6.2. They are not Class 7 claimants;

   b. 71 of the Korean Claimants assert that they fall into Class 7, but their implants were implanted outside the date range for eligibility for Class 7 established by the Plan and they are not eligible for Class 7;

   c. 50 of the Korean Claimants were Class 7 claimants who were paid and whose claims now are closed; and

   d. The remaining 16 Korean Claimants are Class 7 claimants and their status is set forth below:

      i. 14 claimants are eligible for payment, but the SF-DCT does not have a valid address on file and the claimant's attorney has not responded to requests for an updated address;

      ii. One claimant was paid an Expedited Release Payment but returned the payment and requested another settlement option, which request was denied and the claim now is closed (the approved settlement option remains open to the claimant); and

      iii. One claimant's submission was deficient, and the claimant did not cure the deficiency by the deadline and thus the claim now is closed.

7. Based on the foregoing, of the 289 Korean Claimants:

   a. 274 have no pending claims under Class 7 because: i) they fall into another Class; ii) they do not meet the eligibility requirements; iii) their claims were paid in full and were closed; or iv) their claims were closed for other reasons;

   b. One claimant remains eligible to have the approved settlement option reissued; and

   c. The 14 remaining claimants have had their claims analyzed and processed and the SF-DCT is awaiting only valid address information to pay the claims.

8. The foregoing accurately states the current status at the SF-DCT of each of the claims of the 289 Korean Claimants.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of April, 2016.

Ann M. Phillips

CERTIFICATE OF SERVICE

I certify that on April 11, 2015, I electronically filed a copy of the foregoing Motion to Dismiss Certain Appellants for Lack of Standing with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

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