IADC COMMITTEE NEWSLETTER

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

In January 2014, U.S. Bankruptcy Court Judge George Hodges concluded that asbestos personal injury settlements paid by gasket and packing manufacturer Garlock Sealing Technologies were "infected with the impropriety of some law firms." The ruling attracted national attention for exposing suppression of evidence by several leading plaintiffs' law firms that was critical of Garlock's defense of its cases. Very recently, RICO complaints filed by Garlock against several asbestos plaintiffs' firms have been unsealed and the trial evidence will soon be made public, a split has occurred within the plaintiff committees involved in the Garlock bankruptcy proceeding, and judicial and legislative reforms to promote greater transparency between the asbestos bankruptcy trust and civil tort systems continue to gain momentum. Garlock will be one of the topics covered during the Toxic and Hazardous Substances Litigation Committee's co-sponsored Major CLE at the upcoming Midyear Meeting -- When Plaintiffs Cross the Line: Unearthing Evidence of Professional Misconduct.

Garlock One Year Later

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ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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A year ago, U.S. Bankruptcy Court Judge George Hodges attracted nationwide attention after he exposed several asbestos plaintiffs personal injury law firms' efforts to game the asbestos recovery system through widespread "suppression of evidence." (*In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014)). Following a lengthy trial, Judge George Hodges concluded that gasket and packing manufacturer Garlock Sealing Technologies, LLC's settlements of mesothelioma claims with plaintiffs' law firms were "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." The judge said "[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock . . . ."

Defendants have long suspected manipulation of plaintiff exposure histories by asbestos plaintiffs' law firms but "smoking gun" evidence was previously inaccessible except for a handful of instances where courts had allowed the curtain to be pulled back.

For example, in perhaps the first widely reported instance of asbestos trust claims abuses, a Cleveland judge barred a prominent California asbestos plaintiffs' firm from his court after discovery of plaintiff's asbestos bankruptcy trust claim submissions "effectively opened a Pandora's box of deceit…."[1] Documents from plaintiff's counsel in *Kananian v. Lorillard Tobacco Co.*, No. CV-442750 (Ohio Ct. Com. Pl. Cuyahoga Cnty. Jan. 17, 2007), revealed conflicting versions about the cause of Mr. Kananian's cancer. Emails and other documents from the plaintiff's attorneys also showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was "completely fabricated."[2] The judge said later, "In my 45 years of practicing law, I never expected to see lawyers lie like this."[3]

When other instances of trust claims abuses subsequently materialized, plaintiffs' lawyers essentially chalked them up to a few "bad apples" or explained them away as clerical errors.

Garlock finally makes clear that asbestos trust claims abuses are not isolated events, as plaintiff's lawyers have contended since *Kananian*, but are in fact widespread.

Greater transparency between the asbestos bankruptcy trust and civil tort systems is needed to promote justice and honesty in asbestos litigation.

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[1] James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit*, Cleveland Plain Dealer, Jan. 25, 2007, at B1.

[2] Daniel Fisher, *Double-Dippers*, Forbes, Sept. 4, 2006, at 136, 137.

[3] McCarty, *supra*.

Reaction by Plaintiffs' Law Firms – Dodging and Clouding the Facts

Over the past year, plaintiffs' counsel have repeatedly tried to deflect attention away from Judge Hodges' findings. They attempt to focus attention on the fact that the Garlock's bankruptcy remains pending and argue that the full story of the Garlock litigation has yet to be disclosed.

Plaintiffs' attorneys withheld key exposure information in *each and every* tort case examined by the court. That is a fact. It is not going to change, regardless of what ultimately happens in the bankruptcy proceeding.

"Sunshine" Coming

The *Garlock* evidence has been unavailable to the public because it was under seal, including key parts of the trial that addressed suppression of evidence by plaintiffs' lawyers. That is about to change.

Following Judge Hodges decision, *Legal Newsline,* an Internet-based newswire dedicated to coverage of litigation, a number of asbestos defendants, and several insurers filed a motion to access information in the case and discussed in Judge Hodges' opinion. Judge Hodges initially denied their request, but in July 2014, the District Court instructed Judge Hodges to further consider the public's right to access under the First Amendment and common law. Subsequently, Judge Hodges entered an order outlining a protocol for release of the information.

Currently the parties, via a third-party vendor, are working through redaction of personal identifying information such as plaintiff social security numbers (with the exception of the last four digits), birth dates (except year), names of identifiable minors (except for initials), financial account numbers (except last four digits), and medical information (except disease diagnosis).

The *Garlock* bankruptcy case information will be unsealed soon, probably before summer. The documents and transcripts should provide hard evidence of the finding that Garlock's historical settlement values were elevated due to lack of transparency between the asbestos bankruptcy trust system and the asbestos tort system.

Plaintiff Firms Targeted in RICO Cases

The day before Judge Hodges' decision, Garlock filed four adversary complaints under seal in North Carolina federal court[4] alleging conspiracy, fraud, and Racketeer Influenced and Corrupt Organizations Act (RICO) claims against several law firms and attorneys, among them Simon Greenstone Panatier Bartlett, Waters & Kraus and

[4] Because the RICO cases are not core-bankruptcy claims, the Western District of North Carolina severed the claims from the bankruptcy and they are proceeding in the district court.

Stanley Iola, the Shein Law Center, and Belluck & Fox.[5]

The RICO complaints and voluminous exhibits to them were very recently unsealed, "providing a glimpse into information [Judge Hodges] likely relied on when he found those firms have committed 'a startling pattern of misrepresentation' through the years."[6] The complaints say that "[b]y concealing exposure evidence and telling different stories about what caused their clients' injuries to Garlock on the one hand and (bankruptcy) trusts on the other, Defendants obtained inflated settlements and verdicts from Garlock and committed fraud against Garlock." Each complaint lists a "prime example" of each firm's alleged fraud. The targeted plaintiffs' firms have filed motions to transfer venue and some have asked for the cases against them to be dismissed.[7]

The targeted attorneys and law firms account for a large piece of high profile asbestos litigation. Depending on the outcome of these cases, the impacts on asbestos litigation could be far-reaching.

Plaintiff Solidarity Fracturing

In an unprecedented development, Garlock very recently reached an agreement with the future asbestos claimants' representative on an amended bankruptcy plan, fracturing the allied front that normally exists with respect to current and future claimants' representatives in asbestos bankruptcy proceedings.

Garlock's agreement with the future claimants' representative includes a revised plan of reorganization that, if approved by the Bankruptcy Court and implemented, will resolve *all* current and future asbestos claims against Garlock. The future claimants' representative has agreed to support, recommend and vote in favor of the amended plan. The committee representing current asbestos claimants and their law firms is opposed to the new plan.

Applying Lessons Learned in *Garlock*

The *Garlock* decision provides defendants with tangible evidence of the problems caused by the lack of transparency between

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[5] Earlier, Garlock had filed a lawsuit against Williams Kherker Hart Boundas LLP alleging fraud, negligent misrepresentation, and civil conspiracy claims related to alleged withholding of exposure evidence in Garlock tort cases.

[6] John O'Brien, *Unsealed RICO Complaints Detail Fraud Allegations Against Asbestos Plaintiffs Firms*, Legal Newsline, Jan. 21, 2015.

[7] Simon Greenstone has asked the district court to dismiss the RICO case against it on statute of limitations grounds, arguing that Garlock was aware of the alleged RICO violations when it negotiated settlement of cases with the firm between 2006 and 2009. The Shein Law Center moved to dismiss on the grounds that the alleged fraudulent litigation activity "cannot serve as a predicate act under RICO." Garlock has issued subpoenas in the Belluck & Fox and Waters & Kraus matters, seeking review of documents from claims facilities, asbestos bankruptcy trusts, and other non-parties filed by the firms on behalf of their clients in cases against Garlock.

the asbestos bankruptcy trust and tort systems.

Defendants should ensure they are seeking all available information about a trust claim, which may include past claims, current claims, deferred claims, and potential future claims.[8] Every trust claim is different, but the trust data and documents can provide information regarding plaintiff's exposures, worksites, years of work, years of exposure, military service, trade, job title, specific product references, smoking history, diagnosis date, diagnosing doctor, screening company connections, previous counsel representing the plaintiff, past addresses, relatives, personal representative, death certificates and numerous other fields of information. Documents, including previously filed complaints, discovery and medicals, are also available from some of the trusts. This information is submitted to the trusts by the plaintiff and/or their counsel and sworn to under penalty of perjury. This information is relevant in the tort system and should be used to reveal the complete exposure, medical, causation and liability picture of each plaintiff.

In cases where plaintiffs refuse to provide trust information and authorizations for the release of trust records, the *Garlock* opinion equips defense counsel to counter that refusal in court. Judge Hodges' opinion now makes it difficult for judges to ignore defendants' requests for critical case information from plaintiffs' bankruptcy trust claims.

For those jurisdictions where case management orders or scheduling orders are in place, defense counsel should be evaluating whether trust discovery is being provided, and whether the case management orders are sufficient in light of the *Garlock* opinion. If plaintiffs fail to comply with case management orders, these deficiencies should be addressed with the court.

Occasionally, courts elect to update or amend their case management orders. Defense counsel should seize the opportunity to educate the court on *Garlock*, bankruptcy discovery, and how revisions to existing case management order provisions will promote justice.

Defense counsel must press for disclosure of bankruptcy trust claims prior to any trial setting, mediation, or settlement conference in the litigation. Many defendants find that plaintiffs' counsel are delaying or deferring the filing of bankruptcy trust claims until

[8] For instance, the federal asbestos multidistrict litigation court has permitted bankruptcy trust claim discovery, including form discovery requests, as well as a standard authorization to obtain trust records and claims information directly from the trusts. (*See* Pretrial Order: Rules and Procedures Relating to the Authorization for Release of Bankruptcy Records Relating to Plaintiffs in the Asbestos Products Liability Litigation, *In re: Asbestos Prods. Liab. Litig. (No. VI)*, No. 2:01-md-00875-ER (Dec. 14, 2011)). Similar discovery requests and form authorizations are now being used in asbestos cases around the country.

after the case in the tort system is resolved, thereby preventing transparency and allowing inconsistent plaintiff exposure histories to go undiscovered.

Additionally, trust information should be used, when possible, to educate the court on the availability of trust recoveries for plaintiffs. In the *Garlock* opinion, a typical mesothelioma plaintiff's total recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." (*In re Garlock Sealing Techs.,* 504 B.R. at 96). Counsel should determine what trust monies a plaintiff has recovered or is estimated to recover. Using this information when discussing settlement of a case or beyond in proving set-offs or responsible shares can be vital to the successful defense of a case.

Utilizing the trust information does not have to be expensive. Presumably, many defendants have routinely requested bankruptcy trust claims information for years. In that case, there should be no added costs, but possibly a reduction if cost-sharing is implemented. All defendants in a pending case should work together to obtain trust claims information. Defendants should look to key counsel for education on trust issues and assist them in creating standard processes to obtain and collect the information. Counsel should be charged with creating cost-sharing opportunities with the other defendants in the case who need the same information.

Garlock also provides support for legislative reforms, such as those enacted in Oklahoma, Ohio and Wisconsin to require plaintiffs to file all trust claims and produce copies prior to trial. (*See* OKLA. STAT. tit. 76, §§ 81-89 (2013); OHIO REV. CODE §§ 2307.951-.954 (2013); WIS. STAT. § 802.025 (2014)). At the federal level, Furthering Asbestos Claim Transparency (FACT) Act legislation would require asbestos trusts to compile and release quarterly reports on claimants seeking payments for asbestos exposure. The revelations from *Garlock*, and the new majority in the Senate, help the bill's chance of success.

Conclusion

The *Garlock* opinion is proof that greater transparency is essential to asbestos litigation, and without transparency, a case cannot be fairly adjudicated or resolved. Defense counsel should push for disclosure of all potential trust claims and ensure that credit is given for filed and potential trust payment values when possible.

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