CLIENT UPDATE

COURT RULES THAT DUE TO MISREPRESENTATIONS BY PLAINTIFFS' FIRMS, GARLOCK'S SETTLEMENT HISTORY DOES NOT ACCURATELY REPRESENT ITS ACTUAL ASBESTOS LIABILITY

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On January 10, 2014, in a closely watched case, Judge George Hodges of the Bankruptcy Court for the Western District of North Carolina ruled that Garlock Sealing Technologies, Inc. is only liable for a fraction of the asbestos liability alleged against it by current and future mesothelioma claimants.[1] This noteworthy ruling highlights a disturbing pattern: **prominent plaintiffs' firms would sue Garlock and elicit testimony from their clients vehemently disclaiming knowledge of any other source of asbestos exposures while filing claims on behalf of the same plaintiffs seeking compensation from the bankruptcy trusts of the companies that made the products the plaintiffs denied ever encountering**. The result was to inflate Garlock's liability by making it appear that Garlock's product was the sole or major source of the plaintiffs' exposure. Defense counsel have long suspected this practice, but the unmistakable proof of what a recent New York Times editorial referred to as "The Asbestos Scam – Part 2"[2] should give asbestos defendants greater leverage in negotiations both inside and outside of bankruptcy. The *Garlock* case also provides a playbook for companies whose recent settlement or verdict experience overstates the true liability picture to estimate the

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1 *In re Garlock Sealing Technologies, Inc.*, No. 10-31607 (Bankr. W.D.N.C. Jan. 10, 2014).

2 Joe Nocera, *The Asbestos Scam, Part 2*, N.Y. Times, Jan. 13, 2014, available at http://www.nytimes.com/2014/01/14/opinion/nocera-the-asbestos-scam-part-2.html?_r=0

appropriate contribution to a bankruptcy trust based on black letter legal principles and the unique characteristics of the relevant products instead.

BACKGROUND

Since the 1980s, manufacturers of asbestos-containing products have faced overwhelming asbestos-related costs which have led the majority of these companies to seek protection under Chapter 11 of the Bankruptcy Code. Section 524(g) of the Bankruptcy Code authorizes a debtor to create a trust for present and future asbestos claimants as part of a reorganization plan. A bankruptcy court may then enjoin asbestos claimants from suing the debtor and certain third parties and "channel" their claims to the trust.

Garlock produced and sold asbestos gaskets, sheet gasket material and packing used in pipes and valves. These products were generally wrapped with asbestos thermal insulation produced by other manufacturers. Garlock was sued in the tort system by victims of various asbestos-related diseases and was extremely successful in settling these cases. However, by the early 2000s, the large thermal insulation defendants had already filed for bankruptcy, removing them from the tort system, and the focus of tort litigation had become mesothelioma wrongful death cases, which presented the risk of a huge adverse verdict and significant defense costs. Garlock ultimately filed for bankruptcy protection in June 2010.

The court held a seventeen-day estimation hearing, pursuant to 11 U.S.C. §§ 502(a) and 105(a), to determine the aggregate amount of Garlock's asbestos liability for the purpose of creating a sufficiently funded asbestos trust. Garlock argued that its liability for present and future mesothelioma claims was approximately $125 million, while the Asbestos Claimants Committee ("ACC") and the Future Claims Representative ("FCR") argued that the debtors' liability for the same claims was in the range of $1-1.3 billion.[3]

GARLOCK COURT REJECTS "SETTLEMENT" APPROACH IN FAVOR OF "LEGAL LIABILITY" APPROACH

The ACC argued that the court should apply a "settlement" approach to estimating Garlock's liability by way of statistical extrapolation from Garlock's history of resolving mesothelioma claims, but the court rejected this approach. It explained that Garlock's settlement history does not accurately reflect fair settlements because (1) evidence of plaintiffs' exposures to other products was consistently withheld by unscrupulous

[3] The debtors' proposed reorganization plan provides for a $270 million asbestos trust for all asbestos-related claims; this larger amount includes all categories of asbestos-related disease, including but not limited to mesothelioma.

plaintiffs' attorneys, who filed duplicate claims in cases, and (2) the data represents, in significant part, defense cost avoidance rather than actual liability.

Earlier in the case, Garlock had prevailed in a discovery dispute and gained access to trust applications made by a group of plaintiffs that had previously sued Garlock in the tort system. ***In every single instance***, the plaintiff who attested in the Garlock tort proceeding that he was not aware of exposure to any other defendants' products had in fact submitted claims against multiple asbestos trusts (thereby attesting to exposure to those companies' products). Some plaintiffs went even further and disclaimed knowledge of any other exposure in their tort case against Garlock *after* they had already submitted trust claims asserting exposure.

An overriding theme throughout the opinion is the court's dismay at the practices engaged in by plaintiffs' counsel. The decision is reminiscent of Judge Janis Graham Jack's 2005 opinion criticizing the pattern of fraud perpetrated by the plaintiffs' bar in the field of silica litigation.[4] In the silica multi-district litigation cases, the court, through discovery, learned that plaintiffs' counsel had submitted over 9,000 silicosis diagnoses that always came from the same twelve doctors (even though the fact sheets had initially listed over 8,000 different doctors) and were claiming that their clients suffered from silicosis when they had previously claimed in cases against the asbestos defendants that the very same plaintiffs were suffering asbestosis. Judge Jack's stinging rebuke effectively shut down silica litigation.

Because the "startling pattern of misrepresentation" employed by the plaintiffs' bar inflated Garlock's prior settlements and verdicts, the court applied Garlock's proposed "legal liability" approach, focusing on the merits of the claims at issue rather than Garlock's past settlement history.[5] The debtors' methodology provided an estimate based on an analysis of current data produced in discovery by the representatives of a sizeable sample of current claimants. Garlock's expert used information such as job history, exposure to asbestos, and claims made both in the tort system and to asbestos trusts, to estimate Garlock's share of liability. He testified that the typical claimant alleges exposure to products of 36 parties (13 defendants and 22 trusts), meaning that Garlock's liability needed to be reduced significantly to represent a fair distribution of liability. This approach also focused heavily on the fact that Garlock's product involved a less toxic fiber and was used in a way that made long-term, high levels of exposure to asbestos unlikely.

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4 *In re Silica Products Liability Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

5 *Id*. at 35.

IMPLICATIONS

Judge Hodges' decision recognizes the impropriety and misrepresentations that have plagued the asbestos field over the past fifteen years, and it has the potential to dramatically alter the negotiating landscape between defendants and claimants, both in and out of bankruptcy. At a minimum, defendants in asbestos litigation should be in a strong position to argue for discovery of duplicative claims filings – discovery that the plaintiffs have often successfully eluded in the past.

Garlock has taken the unusual step of suing certain prominent plaintiffs' firms for RICO violations, based on the "pattern of misrepresentation" that emerged in the estimation proceedings. It remains to be seen what will come of those cases, but Judge Hodges' decision should have plaintiffs' firms on the defensive in more ways than one.

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Please do not hesitate to contact us with any questions.

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