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Asbestos

Sides Fiercely Divided Over Impact Of Garlock Asbestos Bankruptcy Order

BY PERRY COOPER

A January decision in the U.S. Bankruptcy Court for the Western District of North Carolina that rejected asbestos claimants' $1.3 billion liability estimate in favor of Garlock Sealing Technologies LLC's $125 million estimate could be a ''game changer'' for asbestos manufacturers, a defense attorney told Bloomberg BNA in phone and e-mail interviews Feb. 25 and 26 (*In re Garlock Sealing Techs. LLC*, 2014 BL 9509, Bankr. W.D.N.C., No. 10-31607, 1/10/14).

''This decision shines a bright light on unethical practices in the plaintiff asbestos bar that may be a game changer particularly for manufacturers whose legal responsibility for causing mesothelioma, like Garlock, is relatively de minimis,'' William Ruskin, of Epstein Becker Green in New York said. ''It is the small players who are being pummeled by their involvement in these cases who should be seeking relief.''

But plaintiffs' attorney Jonathan Ruckdeschel of Ruckdeschel Law Firm LLC in Ellicott City, Md., told Bloomberg BNA in a Feb. 26 email that the preliminary order is an ''outlier that flies in the face of two decades of prior rulings by experienced judges and verdicts from juries throughout the country rejecting the very same analysis used by this judge.''

Judge George R. Hodges, writing for the bankruptcy court, rejected the claimants' estimate because of faulty methodology, finding that the ''withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock from 2000 through 2010.''

''After Judge Hodges' decision, no one can now legitimately claim lack of knowledge that mesothelioma litigation is permeated with fraud,'' Lester Brickman, professor of law at Yeshiva University in New York, told Bloomberg BNA in a Feb. 25 email.

Brickman is a vocal critic of asbestos litigation abuses. He was retained by Garlock as an expert witness on whether Garlock's settlement practice from 2005 to 2010 was a proper basis for determining the value of pending and future mesothelioma claims against Garlock.

Ruling in Garlock's Favor. Garlock filed for Chapter 11 bankruptcy protection after settling thousands of mesothelioma cases and exhausting its insurance.

The bankruptcy court asked Garlock and the asbestos claimant committees to propose their own reorganization plans based on their estimates of the aggregate amount of Garlock's asbestos liability.

After reviewing the proposals, the court sided with Garlock (29 TXLR 73, 1/23/14).

Hodges said that evidence of plaintiffs' exposure to other asbestos products, which could have offset Garlock's liability, ''often disappeared.'' The plaintiffs' lawyers ''used this control over the evidence to drive up the settlements demanded of'' Garlock.

Ruckdeschel said that some of Hodges's conclusions in the order ''are simply not supported by the facts or controlling law,'' and said he thinks the order will not stand.

Ruskin compared the decision to a John Grisham novel because of how it gained momentum. Hodges started out slow, discussing the science of asbestos exposure, he said. ''But then the suppression of evidence by plaintiffs' counsel is so well documented that the decision is overwhelming.''

''It is clear Garlock would have won or gotten good settlements if they had had the full information,'' Ruskin said.

Rampant Abuse? Hodges pointed to a ''startling pattern'' of abuse by plaintiffs' lawyers.

Ruskin described the kind of ''double dipping'' Hodges referred to. ''For example, a plaintiff denies any exposure to insulation products, but after the case is settled, files 23 trust claims,'' he said, and this abuse ''appears to be widespread.''

Ruckdeschel rejected the idea. ''That is simply a fallacious talking point of the asbestos industry that disregards controlling law and indisputable facts.''

''Virtually every asbestos victim was exposed to more than one asbestos containing product and each corporation responsible is legally and morally responsible for the harm,'' he said.

''To say that asbestos victims should not be able to hold multiple corporations accountable is the same as saying a person mugged by an angry mob should not be able to hold each person in the mob accountable. Moreover, when a victim settles their claim with one party, that settlement in no way means the other wrongdoers are not responsible.''

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'Corrupt Scheme.' Brickman called the plaintiffs' actions ''a corrupt scheme'' to suppress evidence.

''On the basis of extensive study of mesothelioma litigation, it is my view that plaintiffs engaged in inappropriate if not fraudulent conduct in claiming that Garlock's gaskets were the sole cause of their malignancy (or nearly so) while denying exposure to the products of the top tier asbestos-product manufacturers which declared bankruptcy during the 2000-2001 'Bankruptcy Wave,' '' he said.

Brickman defined the top tier reorganized companies to include Owens Corning (including Fiberboard), G-I Industries (GAF), Babcock & Wilcox, USG, W.R. Grace, Armstrong World Industries and Federal Mogul (Turner & Newell).

Brickman said the plaintiffs denied exposures in pretrial discovery and trial testimony, ''even though these plaintiffs and their counsel had filed claims with the asbestos bankruptcy trusts formed by these reorganized companies, asserting in sworn statements that these plaintiffs had 'meaningful and credible exposures' to the products of these companies.''

This false testimony must ''have been orchestrated by their counsel,'' he said.

''Judge Hodges' decision in the Garlock estimation proceeding is just as much an exposure of a corrupt scheme to defraud certain asbestos defendants being sued for causing mesothelioma as was Judge Janis Jack's exposure of the massively corrupt scheme to defraud defendants in nonmalignant asbestos litigation,'' Brickman said.

Brickman referred to Jack's blistering 250-page opinion in which she said the 10,000 claims pending before her were nothing more than a profit-oriented effort aimed at squeezing settlements out of silica suppliers, respirator makers and other defendants (20 TXLR 662, 7/21/05).

Full Discovery in 15 Cases. In December 2012, Hodges allowed Garlock to investigate what plaintiffs' law firms did after settling with Garlock in 15 cases.

Ruckdeschel was not surprised by the move, and rejected the court's conclusion that the results were persuasive.

''Out of thousands and thousands of claims, Garlock apparently only identified 15 that it claimed were allegedly unusual,'' he said. ''The Court specifically noted that there was no evidence or even any allegation that the 15 claims were representative or typical.''

Ruskin called the decision to allow full discovery ''creative.'' He said Garlock's investigations showed that having access to comprehensive asbestos exposure information can be the difference between winning and losing at trial.

''What made Garlock's post-settlement investigations truly significant, however, was how Judge Hodges used Garlock's findings in rendering his opinion,'' Ruskin said.

Brickman noted that Hodges denied most of Garlock's attempts to investigate suppression of evidence by the plaintiffs' counsel. ''It is only due to the brilliant and persistent efforts of Garlock's bankruptcy counsel that convinced Judge Hodges to allow some discovery that led to the unmasking of the scheme to suppress evidence of plaintiffs' exposures to the products of the reorganized companies.''

Adopted by Defendants. Hodges's decision has already been taken up by asbestos defendants in the month since it was filed (*Sweredoski v. Alfa Laval Inc.*, R.I. Super. Ct., 2014 BL 28854, No. PC-2011–1544, 1/30/14; *Yates v. Air & Liquid Sys. Corp.*, E.D.N.C., 2014 BL 26704, No. 12–752, 1/31/14).

Ruskin predicts that asbestos manufacturers will bring increasing pressure on asbestos courts to compel plaintiffs to produce comprehensive evidence of asbestos exposure. ''The cookie-cutter management of large asbestos dockets often sweeps the legitimate concerns of asbestos defendants, particularly the smaller players, under the rug,'' he said.

Ruckdeschel doubts the order ''will provide any refuge for the asbestos industry and the companies who poisoned hundreds of thousands of American workers and their families. At the end of the day, they will be held accountable for their actions and their deliberate decisions to put profits over people.''

''It is predictable that the asbestos industry has rushed to hold this preliminary order out as some global condemnation of injured persons and their lawyers to try and deflect from their deliberate decisions to continue making and selling deadly asbestos products in the face of overwhelming scientific evidence that those products would maim and kill thousands of Americans,'' Ruckdeschel said.

RICO Suits Filed. Garlock filed federal Racketeer Influenced and Corrupt Organizations Act suits against four of the plaintiffs' law firms, alleging they engaged in racketeering, fraud and conspiracy to conceal exposure evidence.

Ruckdeschel finds the ''use of RICO by a corporation that killed and injured thousands of Americans'' offensive.

''It seems highly unlikely that any such lawsuits will succeed,'' he said. ''Furthermore, I do not foresee that these lawsuits will have any effect on the struggle to provide compensation and justice for the thousands of Americans who die every year from asbestos poisoning.''

Ruskin said the RICO suits were not surprising, and he could also see the plaintiffs' attorneys being subject to attorney general investigation.

''Although RICO claims are vigorously defended, Judge Hodges' decision, and the underlying evidence upon which it is based, provides Garlock with strong ammunition to pursue these claims,'' Ruskin said.

Ruskin clarified that not all plaintiffs' firms engage in questionable practices. ''It is unfair to tar every plaintiffs' lawyer with this brush—the overwhelming majority of them play by the rules,'' he said.

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''However, the law firms identified by Judge Hodges may be subject to increasing scrutiny by the asbestos courts where they practice,'' he said. ''These well-heeled plaintiff law firms make for deep-pocketed defendants.''

Require Trust Forms? ''One hopes, if you put your cynicism aside, this could really be a sea change because it could open people's eyes to abuses that could put smaller fish like Garlock out of business,'' Ruskin said. ''I hope judges begin to wake up and make all plaintiffs submit trust claims. It is outrageous to literally lie to the court.''

He said trial courts should be encouraged to come up with a creative means of ensuring judicial fairness. For example, he said, trial courts could retain jurisdiction to reduce a verdict or settlement in light of claims brought against other companies after the verdict, or plaintiffs could be required to file trust claim forms before trial.

''Judge Hodges' decision should make ''business as usual'' in the asbestos courts impossible,'' he said.

Ruckdeschel said plaintiffs should not be required to file trust forms before trial. ''The law is clear that this is not required. Delayed justice is denied justice—this is especially true for mesothelioma victims who have only months to live and are facing astronomical medical bills,'' he said.

''With asbestos trusts only paying a tiny fraction of what those companies would have paid in verdicts or settlements in the tort system, for some it is in their family's best interest to focus on justice through the courts first, and for all victims it should be their decision how to spend the limited time and resources they have left. The various bankruptcy trusts provide rules for defendants for how they can seek compensation or credit from the trusts if they take a verdict and pay the injured person their damages,'' he said.

''Garlock's problem was that it knew that juries would not readily believe its tobacco-industry style defense that its asbestos was uniquely harmless.''

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The opinion is available at http://www.bloomberglaw.com/public/document/Garlock_Sealing_Technologies_LLC_Docket_No_310bk31607_Bankr_WDNC_.