Bennett Bricklin & Saltzburg LLC

SUPERIOR COURT TO HEAR APPEAL OF PHILADELPHIA CASE HOLDING DEFENDANT ENTITLED TO A *PRO TANTO* REDUCTION OF VERDICT BY BANKRUPTCY TRUST SETTLEMENTS

February 24, 2011

The Superior Court of Pennsylvania is set to hear appeals of the verdict rendered in the case, Marlene Reed, Personal Representative for the Estate of Frederick Lewis and Margaret Lewis, in her own right v. Allied Signal, et. al, November Term 2006, Number 1720, in the Court of Common Pleas of Philadelphia County.

The Common Pleas opinion written by the Honorable Stephen Levin, notes that Frederick Lewis testified at a deposition prior to his death caused by mesothelioma, that he had worked for approximately 22 years as a brake mechanic, removing old brakes, installing new brakes, and grinding, sanding, and riveting brakes under repair, thereby releasing asbestos dust into the air on a regular basis. Mr. Lewis worked as a brake mechanic between 1933 and 1955. Plaintiffs presented expert testimony to the jury that mesothelioma has a lengthy latency period and that Mr. Lewis died as a result of his exposure to asbestos.

During the Phase I damages portion of the trial the jury found that asbestos exposure was a factual cause of Mr. Lewis' death and awarded damages in the amount of

$492,007. The jury found against defendant Honeywell International, Inc., formerly known as Allied Signal, Inc. (the successor in interest to the Bendix Corporation) during the Phase II liability portion of the trial.

Numerous post trial motions were filed by the parties.[1] The defendant filed motions for judgment not withstanding the verdict ("judgment NOV") and, in the alternative, a motion to mold the jury verdict to reflect settlements that plaintiffs received from five different section 524(g) bankruptcy trusts. The court denied the motion for judgment NOV but granted the motion to mold the verdict and to provide a *pro tanto* reduction of the verdict for the amounts paid by the trusts. The court then awarded delay damages based on the net award, not on the un-molded award as requested by the plaintiffs.

Plaintiffs opposed both the *pro tanto* reduction of the verdict and also the court's calculation of delay damages. It should be noted that plaintiffs received settlements from five different bankruptcy trusts and that plaintiffs did not object to the reduction of the verdict by two of five of the settlements. (Plaintiffs' settlements were disclosed to the defendant pursuant to an Order issued by The Honorable Sandra Moss, coordinating Judge of the Mass Tort Section of the Complex Litigation Center, which required the plaintiff to disclose the amounts received from bankruptcy trusts.)

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[1]One of defendant's post trial motions dealt with the court's refusal to include bankrupt manufacturers on the verdict sheet. Judge Levin's decision, in rejecting that motion, noted the Superior Court's decision in Ball v. Johns-Manville Corporation, 425 Pa.Super. 369 (Pa. Super 1993) and likewise referred to case law that holds "bankrupt asbestos manufacturers are not to be placed on the verdict sheet in asbestos cases, period."

Plaintiff argued that, based on the releases obtained by the three bankruptcy trusts, that contribution was the proper remedy for defendant, not reduction of the verdict. Judge Levin rejected that argument, first noting that the Supreme Court of Pennsylvania has held that the Uniform Contribution Among Joint Tortfeasors Act allows reduction of a verdict based upon the trust distribution process. Judge Levin then discussed the fact that it is “not uncommon” for a person who can show exposure to asbestos to apply to several or more bankruptcy trusts.

Given the “haphazard reporting, if at all by plaintiffs” of funds received from the trusts, there was a potential of double recovery or a total recovery that exceeds the damage amounts set by the jury during Phase I asbestos trials. Moreover, the releases signed by the plaintiffs, in favor of the three trusts, contained hold harmless and indemnification language. Requiring the defendant to seek contribution from the trusts would be a waste of time and resources. The plaintiffs, who had already received payments from the three trusts, would have to return the money to the trusts, which in turn would return the money to defendant in order to pay the verdict. The more efficient way to account for the payments was a *pro tanto* reduction of the awards.

Plaintiffs also had the temerity to argue that evidence was not presented at trial as to the exposure of Mr. Lewis to the asbestos containing products of the five bankrupt manufacturers. Judge Levin found that argument to be without merit on its face, since plaintiffs had applied to the five trusts based on the contention that the manufacturers were liable for Mr. Lewis’ mesothelioma and had accepted bankruptcy trust settlement

funds as a result. Again, Judge Levin's opinion stated to countenance such an argument would allow for a double recovery.

Likewise, since plaintiffs had already received the settlement funds from the bankruptcy trusts, and therefore had use of those monies, delay damages should be calculated on the reduced amount. Delay damages, according to Judge Levin, are pre-judgment interest on what is essentially plaintiffs' money that defendant had use of prior to a verdict. Since the plaintiffs in Reed had use of the bankruptcy trust monies prior to the verdict, fundamental fairness dictated that no delay damages would be charged on those settlements.

The issue of payments received by a plaintiff, from bankruptcy trusts, is obviously important in every case. Judge Levin's opinion, if upheld by the appellate courts of Pennsylvania, is important to all mass tort defendants since the opinion recognizes that defendants are entitled to a reduction of monies already received from bankruptcy trusts and that further recognizes that plaintiffs are not entitled to a double recovery of those monies.

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