

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- IN RE: NEW YORK CITY ASBESTOS LITIGATION	X : :	NYCAL Index No. 40000/1988
THIS DOCUMENT RELATES TO ALL ASBESTOS CASES	X	

RECOMMENDATION OF THE SPECIAL MASTER

Defendants claim that Weitz & Luxenberg (also Plaintiffs or “Weitz”) has not complied with its discovery obligations with respect to the disclosure of bankruptcy trust submissions and related information. Particularly at issue is (1) certain trust-related documents previously produced by Plaintiffs are incomplete and improperly redacted, and (2) the production of certain non co-worker affidavits that Weitz submits in connection with the trust submissions to establish the presence of a particular product at a worksite. On June 25, 2011 the Special Master issued a ruling in the Andrucki matter which was then pending before Justice Shulman. That case ultimately settled.

Because this discovery dispute regarding Proofs of Claim (“POCs”) is ongoing and is currently at issue in all clustered FIFO cases and in the upcoming April 2012 in extremis Cluster, I reiterate the recommendation set forth in Andrucki with respect to the current cases.

1. Incomplete and Redacted Documents

Although some redaction is appropriate, a review of the documents and redacted portions revealed that the redactions were largely impermissible and did not involve sensitive information. A comparison of many of the documents produced by Weitz and documents that defendants have been able to procure by other means revealed that the production by Weitz & Luxenberg was, in fact, incomplete. To its credit, Weitz does not dispute this and apparently agrees to produce the missing materials.

2. Non-Party Affidavits

Weitz & Luxenberg takes the position that these affidavits, which are largely from other workers (not necessarily co-workers of plaintiff) who worked at the same facilities as plaintiff, are confidential and are work product. These affidavits are offered as proof of exposure by the

plaintiff to the products of the bankrupt entity. They are highly relevant to the defense of these lawsuits.

The fact that a document may be “confidential” does not convert it into a privileged document. Confidential documents are often produced in litigation, sometimes subject to a protective order. The affidavits here are not of a sensitive nature and require no such protection. Moreover, work product is only a qualified privilege. Nevertheless, any privilege that might have attached to these non-party affidavits at the time they were prepared was vitiated once they were sent on, with the POCs, to the bankruptcy trust.

Weitz further argues that these affidavits are exempt from production because they are part of “settlement negotiations.” I disagree. The rule regarding non disclosure of materials offered in attempt to settle a claim is not intended to prevent co-defendants from using sworn testimony of non-parties that go to the heart of proof of exposure. The purpose of that rule is to prevent a party who attempts to settle a claim by making an offer (or demand) from having that number (or accompanying statement) used against it at trial as evidence of the true value of the claim. Nothing of that sort is at stake here. Weitz cannot, on the one hand, use these documents as a “sword” to obtain money from a bankrupt entity and then try to shield it from co-defendants who are required to put in proof at trial of said exposure to reduce their own liability. To the extent that Weitz argues that defendants have the plaintiff’s own testimony regarding exposure and does not “need” the affidavits to make its case, it is not Weitz’s decision as to how any defendant tries its case or what proofs it should use. Defendants are entitled to all the relevant evidence and may try their case relying on the evidence they choose to use.

Plaintiffs are required therefore to produce all materials submitted by or on behalf of plaintiffs with a bankrupt entity’s trust, including, but not limited to, affidavits (including those signed by plaintiffs, plaintiffs’ family members, or a non-party), sworn statements, proofs of diagnosis, extraordinary claim certificates, and signature/certification pages. These materials shall be produced in a manner that sufficiently identifies which documents correspond to which trusts. These materials shall be produced in their complete and unredacted form, except that plaintiffs may redact the trust claim identification number and the amount of settlement, if any.

Dated: December 12, 2011

/s/

Laraine Pacheco, Special Master