

from asbestos trusts with expected aggregate tort system recoveries, Bates White will be able to determine what portion of claimants' overall recoveries will come from trusts in the future.³ *Id.* at 7, ¶ 16. Debtors want to know what claims individuals who are asserting asbestos-related claims against Debtors "may have asserted or may in the future assert against the asbestos trusts, as well as the recoveries received or to be received in respect of those claims." *Id.* at 6, ¶ 15. Debtors seek this information so that its expert can compare the magnitude of recovery from asbestos trusts with the claimants' "expected aggregate tort system recoveries." *Id.* at 7, ¶ 16; 10-11, ¶ 26.

The information sought includes the state and jurisdiction in which the claim was asserted, how much was paid, the portion received from defendants in the tort system and the portion received from asbestos trusts. Debtors also want to know the month and year that suit was filed, the month and year the claimant received its first and last trust payments and the month and year of the claimant's first and last payments in the tort system. Debtors assert that the information is necessary because it will show that the value of mesothelioma claims against Debtors increased while the total or "whole claims" value of mesothelioma claims did not increase. Debtors concede that the largest number of claims asserted against them are mesothelioma claims. Debtors contend that this information will establish that, in the past, they settled prepetition claims on an inflated basis, even though they concede they investigated the

³The amount of money deposited into the trusts is publicly available information so the total amount that is available to pay tort claimants is already known. The trust funding is part of each confirmed plan. The trusts publish annual reports that detail, *inter alia*, the amounts paid on various types of claims in the prior year and how much money is left to be distributed. The RAND Institute for Civil Justice, among others, has published many articles on the subject of asbestos PI trusts. See www.rand.org.

claims before they settled. *See* Transcript of 4/18/2011, Doc. No. 1228, at 83-84. *See* Debtors' Amended Consolidated Reply in Support of the Whole Claim Value Motion, Doc. No. 1103.

Debtors' motion will be denied as follows:

(1) Debtors are seeking information they would not be entitled to in the tort system.

Their request is not limited to those who have asserted claims against Debtors, as evidenced by their inclusion of law firms that "had a financial interest in" asbestos personal injury lawsuits filed against either Debtor. Doc. No. 558 at 1. Debtors are not seeking the information from the asbestos plaintiffs but from the law firms that represent asbestos plaintiffs. Furthermore, not all the law firms' clients have claims against Debtors.⁴ A similar motion was denied by the court in *Garlock Sealing Technologies LLC*, Bankr. No. 10-31607, Doc. No. 1201 (Bankr.W.D.N.C., Charlotte Division, March 4, 2011), where Garlock's counsel sought discovery from attorneys who represented co-defendants of the debtors in the tort system. Here, Debtors' request is not that restricted.

Debtors' "whole claim value" theory with respect to mesothelioma claims presumes that once a claimant receives what Debtors would argue is the maximum value of such a claim, the claimant will simply cease pursuing payers, including Debtors, who have not yet settled. We agree with the objectors that a claim reaches a maximum value or "whole" value only by a verdict. Settlement amounts that a tort defendant pays represent only a negotiated sum that the defendant is willing to pay and the plaintiff is willing to accept to avoid the costs and risks of

⁴Counsel from Motley Rice so represented at a hearing on April 18, 2011, and this statement was not contradicted by Debtors' counsel. *See also* Doc. No. 558 at 1 (Debtor seek information from law firms that have or had a financial interest in lawsuits against either Debtor).

litigation. Moreover, the “whole claim value” (assuming without deciding that one could be calculated as a number applicable to all claimants, even though claims reach verdict or settle on an individual basis) requires consideration of innumerable factors, not the least of which are the claimant’s age, severity of disease, number of dependents, occupational and environmental history, location of injury and jurisdiction of suit. In addition, the value of any claim is determined based on unquantifiable variables such as the socio-economic make-up of the juries who determine that value. Additionally, Debtors’ whole claim value theory necessarily assumes that there is such a value for settlements as opposed to verdicts and that human behavior is such that all claimants would agree on what the maximum settlement value of each claim is and would cease pursuit of any amount beyond this hypothetical maximum value in the tort system. Thus, the further implicit assumption is that tort plaintiffs would accept Debtors’ offers (as revised) rather than assess the situation on their own behalf and either accept or reject those revised offers. Debtors are engaged in an effort to make projections of what their future payments to tort victims will be based on settlement numbers that Debtors have never offered in the past.

(2) Various law firms have objected to Debtors’ Rule 2004 request, asserting that it is not only burdensome but beyond what Debtors need in order to establish a §524(g) trust. Further, they object that the information is not relevant. The Jacobs & Crumplar, P.A. firm expressed its willingness to complete a proof of claim form. The Cascino Vaughan firm noted that, in addition to the expense of complying with Debtors’ request, it is required to keep client information confidential and, further, despite Debtors’ request to assess the entire universe of mesothelioma claims, whether or not the claims lie against these Debtors, this court has no

jurisdiction over those who will not be getting compensation from these Debtors.⁵ Further, it would have to find and search its closed files. Significantly, the documentation Debtors seek does not exist in a format that would directly answer the request - the firm would have to spend hundreds of hours collecting the information from various sources and would have to create a new document containing the information sought. For example, counsel for The Lanier Law Firm pointed out at the hearing on March 28, 2011, Doc. No. 1135 at 60 - 61, that it is not easy to sort out from electronic records the information Debtors seek and that it will cost over \$300,000 to comply with the discovery request. *See* Doc. No. 1025, Attachment 1, Declaration of Patrick N. Haines.⁶ The settlements accepted by the firms' clients with other asbestos producers is of no moment to Debtors' liability to those claimants if, in fact, they are or become

⁵Whether or not the firm's clients will seek or receive compensation from these Debtors cannot be determined. As noted on the record, the time to challenge a claim is when one is presented to the trust to be established under a confirmed plan. Moreover, the fact that an individual asserted a claim against another trust is not conclusive as to Debtors' liability to the individual.

⁶Patrick N. Haines is a partner at The Lanier Law Firm, one of the objecting firms. He submitted an affidavit in which he stated that Debtors seek four categories of documents regarding claims alleging mesothelioma for which the firm obtained, on behalf of any claimant, any form of recovery from 1995 until present. The request also seeks information regarding the aggregate recovery obtained from all sources for each claim, the month and year the lawsuit was filed, the month and year of the first and last payments made from a trust and the first and last payments made in the tort system as well as the state and jurisdiction in which the lawsuit was filed. Doc. No. 1025, Declaration at 1-2, ¶ 2. Mr. Haines noted that the information is not the firm's property under Texas law, *id.* at 2, ¶ 3, and compliance would take the firm's attorneys and staff approximately 3,350 hours to compile the data. The cost of those attorney and staff hours would be approximately \$371,680. *Id.* at ¶ 6. The number of hours required is so high because there are hundreds of thousands of pages that would have to be examined and from which data would have to be extracted, aggregated, and compiled in the manner Debtors request. *Id.* at 3, ¶ 8. Cost shifting would not alleviate the problem because the review and compilation of information would have to be done by attorneys and paralegals for the most part thereby preventing them from performing other work. The firm has approximately 20 attorneys and cannot properly staff its cases if required to comply with Debtors' request. *Id.* at ¶ 9.

claimants against these Debtors. Debtors acknowledged that 70 percent of dollars spent on asbestos claims were spent with respect to claims that Debtors actually litigated and that they assessed the relevant factors at the time they settled. *See* Transcript of 4/18/2011, Doc. No. 1228, at 83 - 84. We agree with objectors that Debtors' historical settlement payments reflect what they were willing to pay to avoid litigation and to satisfy their own share for a given asbestos claimant's injury. We also agree that the trusts pay only the several share of the entity for which the trust is working. What is more, each trust pays a fraction of what claims might be worth in the tort system to ensure that all present and future asbestos claimants can receive compensation on essentially similar terms over the entire life of the trust and no single claim can consume the trust assets. 11 U.S.C. §524(g)(2)(B)(ii)(V). But for the establishment of the trust, given the "first in time, first in right" collection system extant outside bankruptcy, an asbestos debtor's assets would be depleted long before all current claimants, much less future demand holders, were paid.

(3) The position taken by the Future Claimants' Representative ("FCR") is that the information sought has no relevance, particularly in light of the court's ruling that current claimant information regarding the amounts paid in settlements by co-defendants in the tort system and by other asbestos trusts is irrelevant to these Debtors' liability. Settlements, the FCR points out, are without the assessment of proportionate liability that verdicts provide. In the *Garlock* case, *supra*, the court denied a similar motion. In *Garlock*, the debtor sought information regarding aggregate tort and trust recoveries received by mesothelioma plaintiffs who also made claims against Garlock during a 15 year period. The bankruptcy court in *Garlock* denied the motion, concluding that (1) the discovery would be "an unprecedented intrusion into

attorneys' practices and files" inasmuch as the discovery was directed against the attorneys who were not parties in the bankruptcy or the tort system; (2) the information sought is that which generally is not discoverable; and (3) the information would not be available to the debtors outside of bankruptcy. *See* Doc. No. 1007 at Exhibit A. The same reasons apply to deny Debtors' motion with respect to the law firms in this case.

(4) The Asbestos Claimants' Committee ("ACC") also objected to the motion. In addition to the points made by the FCR, the ACC notes that the motion seeks confidential information⁷ concerning the attorneys' clients without providing for notice to those clients.⁸ The clients for whom the information is sought are not limited to those who claim against Debtors and the information as to non-creditors would not be admissible under Federal Rule of Evidence 408.⁹

⁷In their amended consolidated reply, Debtors contend that confidentiality assertions are without merit because some law firms post aggregate settlement information on their websites. Debtors cite as an example that of Gori Julian & Associates, P.C., which discloses the aggregate settlement payments received by approximately 40 mesothelioma claimants and the claimants' age and trade. Doc. No. 1103 at 4-5. However, the aggregate information is not client specific and is publicly available and, to the extent it is publicly available and fits Debtors' needs, Debtors have not made a case for discovery of individual private information.

⁸The ACC notes Model Rule of Professional Conduct 1.6 which provides, in part, that absent the client's informed consent, communications by the client and those relating to the representation regardless of source must remain confidential. *See* Doc. No. 1021.

⁹Fed.R.Evid. 408 provides:

(a) . . . Evidence of the following is not admissible . . . when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount . . .

(1) furnishing or offering or promising to furnish - or accepting or offering or promising to accept - a valuable consideration in compromising or attempting to compromise the claim; and

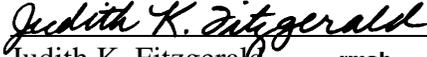
(2) conduct or statements made in compromise negotiations

(continued...)

(5) The objectors argue the relative burden or hardship if compliance with Debtors' request is ordered but, other than as addressed, *supra*, we do not need to examine that at this point. If Debtors can show a particularized need for information with regard to a particular individual who has claimed against them, then Debtors may file a new motion describing the circumstances and the court will consider the motion. At that time, those from whom Debtors seek the information will be able to raise the burden/hardship factor and the court will consider it as well.

Debtors' motion with respect to the law firms will be denied. An appropriate order will be entered.

DATE: October 7, 2011



Judith K. Fitzgerald **rmab**
United States Bankruptcy Judge

⁹(...continued)
regarding the claim . . .

Certain exceptions to the rule (*e.g.*, criminal cases in which the negotiations related to a claim by a public agency exercising its regulatory, investigative, or enforcement authority) do not apply in the instant matter.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:

Specialty Products Holdings Corp., *et al.*
Debtor(s)

Bankruptcy No. 10-11780
Chapter 11
(Jointly Administered)

Related to Doc. No. 558, Motion of Debtors for Order, Pursuant to Rule 2004, Directing Production of Information or Documents by Certain Law Firms that have Filed Asbestos-Related Lawsuits Against Debtors

ORDER

AND NOW, 7th day of **October, 2011**, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED** that Debtors' motion for order directing production of information or documents by certain law firms is **DENIED**.



Judith K. Fitzgerald **rmb**
United States Bankruptcy Judge