FROM THE

EDITOR

The Federalist Society publishes *Class Action Watch* periodically to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention.

Defined as a civil action brought by one or more plaintiffs on behalf of a large group of others who have a common interest, the class action lawsuit is both criticized and acclaimed. Critics say that such actions are far too beneficial to the lawyers that bring them; in that the attorney fees in settlements are often in the millions, while the individuals in the represented group receive substantially less. Proponents of the class action lawsuit see them as a mechanism to consolidate and streamline similar actions that would otherwise clog the court system, and as a way to make certain cases attractive to plaintiffs' attorneys.

In this issue, Ted Frank looks at the issues surrounding "the Vioxx class actions" against the drug company Merck, which have continued to mestastasize since the recall this fall. Margaret Little considers the wider ramifications of the indictment of Milberg Weiss, the nation's largest class action firm. David Owsiany reviews the Ohio controversy, in which a class action firm was recently and for the first time barred from a court over deceitful representation in an asbestos litigation case. John Shu provides an overview of the late Verizon settlement, one of the largest in American history. Tara Fumerton weighs a possible trend in Illinois supreme court rulings, and two of our members ask whether the welding fume litigation has come to an end.

Future issues of *Class Action Watch* will feature other articles and cases that we feel are of interest to our members and to society. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

Fraud Ruling in Cleveland Asbestos Litigation

by David J. Owsiany

The asbestos liability crisis is well-documented. Hundreds of thousands of claims have been filed, billions of dollars have been paid out in settlements and judgments, and dozens of companies have been forced into bankruptcy. Critics have pointed to the unfairness of people without injuries being able to recover from companies that had little to do with producing or selling asbestos-related products.[1]

Proponents of the current system claim that these results are desirable as courthouse doors and bankruptcy trusts are now open to more workers who were exposed to asbestos during their lives.

Over the last two decades, as asbestos claims have burgeoned, many defendant companies have been forced to file for bankruptcy protection. These companies provide huge sums of money to asbestos bankruptcy "trusts" and then emerge from Chapter 11 largely clear of asbestos liability concerns. The trusts have transferred billions of dollars from companies and their insurers to plaintiffs, many of whom are not yet sick, and may never become sick, and their lawyers.[2]

The operation of these trusts potentially permits the filing of multiple inconsistent claims with trusts and civil courts for the same injury. The filing of multiple claims is not, in itself, necessarily problematic, since a worker may have been exposed to asbestos in multiple ways. However, because the claims and payments from the trusts are confidential, those claims that are contradictory and inconsistent are never exposed.

Kananian v. Lorillard

A recent Ohio case shines a light on the issues surrounding multiple, inconsistent claims of exposure in the context of asbestos liability. Ohio has become a magnet for asbestos litigation.[3] In Cuyahoga County, which includes the city of Cleveland, more than 37,000 asbestos related claims are currently pending.[4] One case involves a former Ohio resident, Harry Kananian, who died of mesothelioma, which is almost always the result of exposure to asbestos. Before his death in 2000, Kananian could not identify with any certainty how he had been exposed to asbestos; so, his lawyers filed several claims on his behalf with different trusts. Each claim apparently told a different story about Kananian's exposure to asbestos, trying to establish separately that each of the companies was responsible for Kananian's death. Kananian and his estate recovered as much as $700,000 from trust settlements.[5]

The multiple claims came to light when one of Kananian's lawyers, Christopher Andreas, from the firm of Brayton Purcell, filed a lawsuit against Lorillard Tobacco, claiming Kananian's exposure was from his smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s. Lorillard suspected that Kananian had already filed claims with various trusts arguing that his exposure occurred on the site of several jobs he held during his life. Lorillard urged Cuyahoga Common Pleas Judge Harry A. Hanna to permit any original claim forms filed with the various trusts on behalf of Kananian to be admitted into evidence for the jury to consider. In response, Andreas claimed that there was no evidence that any claim forms were actually submitted to the bankruptcy trusts. Judge Hanna ruled that the claim forms were only admissible if Lorillard could prove they were actually submitted.[6]

Andreas said he would "welcome" any documentation showing that claim forms were submitted to any trusts, and that his firm would not put up any roadblocks to their discovery.[7] During discovery, Andreas produced an unsigned copy of the original claim form filed with the Johns-Manville Trust, and, on February 23, 2006, contended that the form should be excluded from evidence because "[i]t's an unsigned document" that "wasn't even executed by an attorney at my office." He argued that he did not even know "whether that claim form was ever actually submitted or not."[8]

Andreas tried to create enough ambiguity over the Johns-Manville claim form to keep it from being admitted into evidence. After investigation, however, Lorillard verified that the Brayton Purcell firm had submitted the original Johns-Manville claim form in April 2000; that Alan Brayton, one of Andreas' partners, had signed the claim form; and that Johns-Manville had paid money on the claim. Judge Hanna concluded in his recently issued opinion that "Andreas represented to this Court that the original Johns-Manville claim form was unsigned when he knew that it was signed and submitted, and that his firm had collected money from the Johns-Manville Trust."[9] Once it was clear that the Johns-Manville Trust claim form was going to be admitted into evidence, Andreas acknowledged its existence and on March 23, 2006, told Judge Hanna that the claim form was "entirely accurate"

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The Milberg Weiss Indictment

by Margaret A. Little

Milberg Weiss Bershad Hynes & Lerach, one of the nation's largest class action firms, before it split in two in 2004, has been the subject of a long-running federal investigation. Over the years, the firm and its successors have secured billions of dollars in contingency and other legal fees by suing some of the nations largest corporations for defrauding investors and customers.

The Allegations of the Prosecution

News reports indicate that the firm's troubles began nearly seven years ago, when Steven G. Cooperman, one of the firm's frequent lead plaintiffs, was convicted on art fraud charges, and offered to provide evidence to prosecutors against Milberg Weiss in exchange for a reduced sentence. In 1999, federal prosecutors in Los Angeles launched an investigation into whether the firm paid clients to file securities fraud suits. In 2004, when William Lerach left to form his own San Diego law firm (Lerach Coughlin, Stoia Geller Rudman & Robbins LLP), he was the subject of federal interest that did not result in charges.[1] Then, in the summer of 2005, Seymour M. Lazar was indicted for fraud and conspiracy and accused of receiving more than $2.4 million in payments for appearing as the lead plaintiff in more than fifty Milberg Weiss cases over twenty-five years. That indictment alleged that it was illegal for a plaintiff to receive a portion of the legal fees, because lead plaintiffs in class actions cannot have incentives that are not in the best interests of the class as a whole. In early 2006, another former Milberg Weiss serial client, Howard J. Vogel, admitted that he or members of his family were paid more than $2.4 million by lawyers at Milberg Weiss from 1991 through 2005 to act as plaintiffs in more than forty class actions securities lawsuits, according to a plea agreement filed in April of 2006.[2] The government asserted that partners at Milberg Weiss assisted Mr. Vogel in receiving over a million dollars in kickbacks for initiating securities fraud actions against Oxford Health Plans, Inc. and Baan Co.[3]

In May of 2006, with an indictment of the Milberg Weiss firm looming, David J. Bershad and Steven G. Schulman, two of the firm's most senior attorneys, and members of its executive committee, agreed to take leaves of absence. Both men were expected to face individual criminal charges for their roles in the kickback schemes. In addition the firm hired a former Manhattan U.S. Attorney to monitor its procedures for paying referral fees. Despite these efforts, on May 18, 2006, Milberg

Weiss Bershad & Schulman, and partners Bershad and Schulman were charged with a twenty-year racketeering conspiracy, mail fraud, money laundering, filing false tax returns and obstruction of justice in making more than $11 million in secret payments to three individuals who served as plaintiffs in more than 150 lawsuits that generated more than $216 million in fees for the firm and its predecessors. This is the first time a law firm of national standing has faced criminal charges of this nature on this scale. The government alleges that the payments were moved as cash through casinos and in a credenza in Mr. Bershad's office.[4]

Mr. Lazar of Palm Springs

Some of the firm's most recent troubles date back to Milberg Weiss's association with an unusually colorful entertainment lawyer/securities trader/counterculture figure turned professional plaintiff named Seymour Lazar. Lazar has allegedly made his living for several decades working with Mr. Weiss and Willliam Lerach bringing lawsuits against corporations that they felt were defrauding shareholders or consumers. In January of 2006, Seymour Lazar came under federal investigation.

Lazar is described in news reports as an iconoclast lawyer who turned from an eclectic entertainment law practice in the 1960s to stock trading as a client of Cantor Fitzgerald in the 1970s, where he found more money could be made trading merger and acquisition stocks than practicing law. After an enforcement action by the SEC in 1969 accused Mr. Lazar and a secret group of investors of stock manipulation of Armour & Co. and General Host Co., a food company seeking to acquire Armour, resulting in a 1975 consent settlement with no admission or denial of guilt, Melvyn Weiss brought a 1973 class action on behalf of Armour's shareholders against the Lazar group. That lawsuit ultimately was dismissed, but was notable for having introduced Mr. Lazar to Melvyn Weiss, a founding partner of Milberg Weiss.

This encounter with the SEC and trading losses of $10 million on the deal led Lazar to move to Palm Springs to reconsider his mode of employment. After a flirtation with litigation with palimony tsar Marvin Mitchelson, involving the Howard Hughes estate, Lazar turned to Milberg Weiss and made his money in part from suing corporations such as Hertz for overcharging for gas, and other corporations for alleged misdeeds. In an indictment unsealed in June 2005, a federal grand jury accused him of criminal acts related to more than fifty lawsuits filed over more than twenty-five years in which he or a family

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New Trend in Illinois Supreme Court Rulings?

by Tara A. Fumerton

In December 2006, the American Tort Reform Foundation released its 2006 list of "Judicial Hellholes," an annual publication that identifies and ranks those jurisdictions across the country where, in their words, "scales of justice" tip heavily in favor of one party, usually plaintiffs.[1] Three Illinois jurisdictions (Cook County, Madison County and St. Clair County), known as havens for class-action plaintiffs' lawyers, again made the list.[2] What is surprising, however, is their ranking on it. Each of these counties moved down in the list of those jurisdictions exhibiting the worst judicial abuses from #2, #3 and #5 respectively in 2005 to #4, #5 and #6 in 2006.[3] In the past year and a half the Illinois Supreme Court has issued three major decisions that have significantly dampened plaintiffs' lawyers' enthusiasm to utilize Illinois as the jurisdiction of choice for nationwide class actions.

The first of the decisions, *Avery v. State Farm Mutual Automobile Insurance Company* (August 2005), invalidated a billion dollar class-action plaintiffs' verdict, holding that class certification was improper for numerous reasons and that, in any event, plaintiffs had failed to establish any damages.[4] While the eighty-one-page decision was a blow to the class action machine, of particular importance was the court's ruling that the frequently abused Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"),[5] could not be the basis of a nationwide class.[6] Out-of-state plaintiffs had frequently filed class actions in Illinois using that Act as their primary vehicle.

In *Avery*, five named plaintiffs (only one of which was a resident of Illinois) represented a nationwide class of State Farm Mutual Automobile Insurance Company ("State Farm") policyholders who alleged that State Farm breached their policy agreements and violated the Illinois Consumer Fraud Act.[7] This was in connection with State Farm's practice of specifying the use of car repair parts that were not affiliated with the original equipment manufacturers ("non-OEM" parts), as opposed to new parts from the automobile's original manufacturer ("OEM" parts), in approving claims for the repair of policyholders' vehicles. More specifically, plaintiffs alleged that State Farm's practice

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and that he would "stand by" its contents.[10]

E-mail messages subsequently obtained by Judge Hanna pursuant to court order reveal an entirely different story. In a March 10, 2006, e-mail message to his partners in the Brayton Purcell firm, Andreas wrote that, we "overstate Kananian's exposure by indicating he was exposed as some type of shipyard worker," when he was only actually present at the alleged location of the asbestos exposure for one day. Andreas also wrote that, "[t]hese inaccurate claim forms (filed with the Johns-Manville Trust and others) are now going into evidence at trial," and that, he is going to be forced "to try to explain them away as mistakes by clerks or attys (sic)." He concluded that a "jury is going to look down on this type of fabrication by lawyers" and may use the information to "dump plaintiffs." In the end, he asked his partners, "What do you want to do?… Give the money back and improve our chances at trial?" He then added, "amended claims could be submitted later to try to recoup something from the trusts."[11]

On March 22, 2006, Andreas received an e-mail message from a Brayton Purcell employee with an attached copy of an amended Johns-Manville claim form, correcting the errors in the original claim form. At three separate hearings between March 28 and June 13, 2006, Andreas stated that he was not aware of the amended claim form when he told the court that the Johns-Manville claim form was "entirely accurate" on March 23, 2006.[12] Andreas stated in a sworn deposition on June 28, 2006 that he did not read the e-mail message regarding the amended claim form until after his court appearance on March 23. In answering Lorillard's interrogatories on July 11, 2006, Andreas again indicated that he had not reviewed the amended claim form prior to March 23.[13]

Subsequent production of Brayton Purcell's internal e-mail messages, however, reveal that on March 22 Andreas had read and replied to the e-mail message with the amended claim form attached. Judge Hanna concluded, "[d]espite Mr. Andreas's repeated claims to the contrary, both under oath and before this Court, it is now crystal clear that he knew his office was amending the Johns-Manville claim form on March 22, 2006 at the very latest." The judge added, "Andreas lied to this court and testified falsely under oath" regarding his knowledge of the amended claim forms. Andreas "apparently never expected that the Court would order him to produce the e-mails that exposed his deceit."[14]

Judge Hanna also took note of Andreas' unwillingness to facilitate discovery requests related to the Celotex Trust, with which Kananian had also made a claim. When an employee of the Celotex Trust inquired as to whether Celotex should release the Trust's file related to Kananian, Andreas told a Brayton Purcell lawyer to "urge Celotex to resist." In an internal e-mail message, Andreas wrote that "I would love if Celotex gave these (expletive deleted) a hard time." Subsequently, Andreas told Judge Hanna that his firm was fully cooperating with discovery but could not control Celotex's actions. Judge Hanna concluded that Andreas did not provide the "full cooperation" he promised the court to obtain the various claim forms.[15]

Judge Hanna also raised several other concerns related to Andreas' conduct during the Lorillard case, including that he appeared for his videotaped deposition on June 28, 2006, wearing a T-shirt emblazoned with the message: "KILLER SMOKES—KENT CIGARETTES—1952-1956—MADE BY LORILLARD TOBACCO." Judge Hanna noted that if a lay witness wore such a shirt to a video deposition the court would certainly have been offended—perhaps even "moved to censure the witness." Hanna concluded that for an officer of the court, like Andreas, to "show such lack of respect is shocking."[16]

In light of Andreas' conduct throughout discovery, Lorillard made a motion to have the Brayton Purcell firm's privilege to practice law before the Cuyahoga Court of Common Pleas revoked and to dismiss the case.

In evaluating Andreas' conduct, Judge Hanna noted that Andreas "consistently and persistently obstructed" the court-ordered discovery relating to whether Kananian had filed other claims related to his asbestos exposure.[17] He stated that the system of discovery is "designed to increase the likelihood that justice will be served" and "not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins the case."[18]

Judge Hanna continued, "[i]f there is one singular characteristic of the American system of jurisprudence, it is the relentless pursuit of truth." Attorneys seeking admission to practice in Ohio must swear that they will conduct themselves with "dignity and civility" and to "honestly, faithfully, and competently discharge the duties of an attorney at law." He therefore concluded that "Brayton Purcell institutionally and Christopher

Andreas individually" have "not conducted themselves with dignity" and "have not honestly discharged the duties of an attorney in this case."[19] Accordingly, Judge Hanna concluded his January 18, 2007 opinion by revoking the Brayton Purcell firm and Chris Andreas' privilege to practice law before the Cuyahoga Court of Common Pleas. Because the Kananian family "did nothing improper," he did not grant the motion to dismiss.[20]

Significance of Judge Hanna's Actions

Judge Hanna's actions in this case are important. Andreas' conduct aside, Judge Hanna's willingness to explore the issues related to a plaintiff's filing of previous claims with asbestos bankruptcy trusts addresses a critical issue respecting the current asbestos liability system. Professor Lester Brickman, of the Cardozo School of Law at Yeshiva University, notes that the current system facilitates the filing of "inconsistent" exposure statements. According to Brickman, "they (plaintiff lawyers) are asserting exposure to certain products at a certain work location for a certain time period when making a claim to trust A, and then for the same plaintiff, they are asserting an inconsistent work history and exposure statement to trust B, and so on."[21] Because they are filed with bankruptcy trusts, the claims and subsequent payments are typically kept confidential. By permitting a defendant—in this case, Lorillard—to seek out prior claim forms and allowing them into evidence, Judge Hanna created a mechanism to expose what is potentially a significant and widespread tactic for fraud in the asbestos liability system.

Former Carter administration Attorney General Griffin Bell explained the importance of Judge Hanna's recent actions when he wrote:

> Judge Hanna's ruling may prompt courts to allow the discovery and admissibility of claim forms filed with asbestos bankruptcy trusts so that defendants can explore whether plaintiffs are attempting to tell one story to bankruptcy trusts and another story in civil litigation. Claim forms filed with asbestos bankruptcy trusts should be admissible so that juries can make fully informed decisions before assigning fault in asbestos cases.[22]

The example Judge Hanna has set may therefore prompt a trend to limit the filing of inconsistent claims and help restore accountability to an asbestos liability system under attack for being unfair.

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Endnotes

1 *See* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, (National Legal Center for the Public Interest, New York, NY) 2002, http://www.nlcpi.org/books/pdf/Vol6Number6June2002.pdf

2 *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality,* 31 Pepp. L. Rev. 33, 38 (2004) (finding that the substantial portion of asbestos litigation - upwards of 80 to 90 percent - consists of former industrial and construction workers "asserting claims of injury though they have no medically cognizable injury and usually cannot demonstrate any statistically significant increased likelihood of contracting an asbestos related disease in the future").

3 *See* David J. Owsiany, *Ending Asbestos Lawsuit Abuse*, (Buckeye Institute for Public Policy Solutions, Columbus, OH) November 17, 2003, http://www.buckeyeinstitute.org/article.php?id=179

4 *See* Thomas J. Sheeran, *Ohio Judge Bans California Lawyer in Asbestos Lawsuit*, Cincinatti Post, February 20, 2007.

5 *See* Kimberly A. Strassel, *Trusts Busted,* Wall St. Journal, December 5, 2006.

6 Kananian v. Lorillard Tobacco Co. (Ct. Com. Pl. Cuyahoga County) January 18, 2007, at 9.

7 *Id*. at 9-10.

8 *Id.* at 11.

9 *Id.* at 12.

10 *Id.* at 5-6.

11 *Id.* at 6.

12 *Id.* at 7.

13 *Id.* at 7-8.

14 *Id.* at 9.

15 *Id*. at 10.

16 *Id*. at 15.

17 *Id.* at 17.

18 *Id.* at 17 (quoting Cincinnati Bar Ass'n v. Marsick, 81 Ohio St.3d 551 (1998).

19 *Id*. at 18-19.

20 *Id.* at 19.

21 Lester Brickman, *Event Transcript*, (Center For Legal Policy at the Manhattan Institute, New York, NY), March 10, 2004, http://www.manhattan-institute.org/html/clp03-10-04.htm

22 Griffin B. Bell, *Judicial Leadership Emerging in Asbestos and Silica Mass Torts*, 17 Legal Opinion Letter No. 5 (Washington Legal Foundation, Washington DC), February 9, 2007, http://www.wlf.org/upload/2-09-07bell.pdf