

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS	:	MDL DOCKET No. 875
LIABILITY LITIGATION (No.VI)	:	(MARDOC)
	:	
	:	
	:	
THIS DOCUMENT RELATES TO	:	CIVIL ACTION NO.
ALL ACTIONS	:	2:02-md-875
	:	

ORDER REGARDING BANKRUPTCY CLAIMS

By previous order I acknowledged the parties' oral cross motions with respect to plaintiffs' obligation to respond to discovery requesting bankruptcy claim information, and directed the parties to file letter briefs. See Doc. 628 ¶ 4. Counsel on behalf of more than 450 shipowner defendants have responded, as have plaintiffs. See Docs. 662 & 680. I will grant defendants' motion to compel, and deny plaintiffs' motion for protective order.

The issue raised by the parties' letter briefs is this: Does the fact that claims against the shipowners arise under the Jones Act¹ alter a plaintiff's obligation to answer discovery relating to other claims made for recovery for the plaintiff's asbestos-related injuries, including claims submitted to bankruptcy trusts.² Plaintiffs argue that, because liability under the Jones Act is joint and several, the liability of third parties is irrelevant to the determination of any given defendant's liability. This argument ignores the fact that any claim a plaintiff submits for recovery for an injury may bear on the cause or causes for that injury and is therefore potentially relevant. Although a Jones Act plaintiff has a relaxed burden on the question of causation, such

¹46 U.S.C. § 30104 (formerly § 688).

²The parties do not argue the general discoverability of such claims, which I recently addressed in Ferguson v. Lorillard Tobacco Co., No. 09-91161, 2011 WL 5903624 (E.D. Pa. Nov. 22, 2011).

plaintiff must still prove causation. See generally Simeon v. T. Smith & Son., Inc., 852 F.2d 1421 1430 (5th Cir. 1988) (Jones Act “incorporates a featherweight standard of causation”) (citing Webb v. Ill. Cent. R.R. Co., 352 U.S. 512, 516 (1957)). Therefore, the Jones Act does not provide a basis upon which to prohibit this discovery.

Defendants anticipated that plaintiffs would rely on Lewin v. American Export Lines, Inc., 224 F.R.D. 389, 396 (N.D. Ohio 2004), in which Judge Dowd decided against compelling plaintiffs to provide bankruptcy claim information prior to trial, postponing such disclosure until after trial in the event a jury found liability.³ Plaintiffs have not relied on Lewin, and the reason is not difficult to divine. This matter is pending in the Asbestos MDL, and therefore will not be tried in this court, and I am not in the position of the trial judge as was Judge Dowd.

Additionally, Judge Dowd reached his decision in part by ruling that the matter before him was not controlled by the Supreme Court’s decision in McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994). In McDermott, the Court held, for purposes of joint liability under maritime law, that the settlement of one defendant should reduce the liability of a defendant after trial based on the jury’s allocation of proportionate liability, rather than simply by a dollar credit for the settlement amount. In Lewin, Judge Dowd determined that McDermott did not apply in the case of multi-defendant maritime asbestos cases because it would not be possible to reasonably apportion shares in such cases. 224 F.R.D. at 394. Instead, a defendant who believes it paid

³Defendants refer to the case as Bartel v. American Export Lines. The opinion was entered in two cases, and I have used the first-listed case title in the reporter.

more than its fair share of damages could seek contribution from other joint tortfeasors in ancillary litigation. Id. at 395.⁴

I am not so ready to reject the application of the Supreme Court's proportionality rule in McDermott simply because these are multi-party maritime asbestos cases, particularly in the context of a pretrial discovery motion. Nor do I think it reasonable to prevent the discovery of relevant claim information on the possible ground that at trial McDermott's proportionality rule will not be applied. In my judgment, the question of how shared or proportionate liability is presented to the jury cannot be made until the time of trial in each case, at which point the parties and the trial judge will be in possession of a complete record of potentially liable entities and evidence as to their potential liability.

Plaintiffs' other arguments are also insufficient to prohibit the discovery sought. Plaintiffs argue that they should be excused from discovery because they are providing exposure affidavits submitted to bankruptcy trusts as part of their initial disclosures. Although responding to discovery may to some degree be duplicative of these affidavits, this does not render the discovery irrelevant. Additionally, plaintiffs have offered no specific grounds in support of their assertion that production of the claims would be an undue burden.

Finally, plaintiffs argue that the claims records are impractical to redact in a manner consistent with Federal Rule of Evidence 408, which precludes the admission at trial of offers of compromise and settlement to prove or disprove a claim or liability amount. Without further information than plaintiffs' assertion, I cannot agree. Appropriately redacted information has been provided in multitudes of other cases, and no reason is offered why it cannot be done here.

⁴Judge Dowd's decision was not reviewed by the Fifth Circuit, as the case later settled.

Therefore, plaintiffs motion for protective order is denied and defendants' motion to compel is granted. Plaintiffs are directed to respond to discovery requesting information concerning other claims submitted for recovery for their asbestos-related injuries, including bankruptcy claim information, consistent with the time frames set forth in the scheduling orders entered in these cases. The parties shall confer with Mr. Lyding as soon as possible to address any disputes regarding the production of this information with appropriate protections for confidential information and settlement-related information.⁵

BY THE COURT:

1/27/12

/s/ Elizabeth T. Hey

Date

ELIZABETH T. HEY
UNITED STATES MAGISTRATE JUDGE

⁵To the extent defendants request that I compel plaintiffs to use the authorization forms they have submitted, the motion is denied. The parties shall address this issue first with Mr. Lyding.