

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 8:90-bk-10016-PMG

The Celotex Corporation and
Carey Canada, Inc.,

Debtors.

Chapter 11

**ORDER ON PROPERTY DAMAGE ADVISORY COMMITTEE'S REQUEST
FOR PAYMENT OF COUNSEL'S FEES AND COSTS**

THIS CASE came before the Court for hearing to consider the Request of the Property Damage Advisory Committee (PDAC) for Payment of Counsel's Fees and Costs. (Doc. 14215).

The PDAC is entitled to payment of the fees and costs that it incurs "in connection with the performance of [its] duties" under the Celotex Asbestos Settlement Trust Agreement. Under the Trust Agreement, a "core duty" of the PDAC is to "serve in a fiduciary capacity representing all holders of PD Claims."

In its Request, the PDAC seeks payment of the fees and costs that it incurred to monitor property damage (PD) proceedings that remained pending after August 12, 2009 (the post-Bar Date proceedings). The Trust disputes the request.

The disputed amounts should not be allowed because (1) the post-Bar Date proceedings are individual PD Claims, (2) the PDAC's duties under the Trust Agreement do not include the advocacy

of individual PD Claims, and (3) the PDAC's monitoring activities are not compensable acts within its fiduciary relation to all PD Claimants. Consequently, the PDAC is not entitled to payment of the fees and costs that it incurred to monitor the post-Bar Date proceedings.

Background

The PDAC filed its initial Motion to Compel Payment of Counsel's Fees on June 23, 2010. (Doc. 14084).

The Court subsequently entered an Order granting the Motion to the extent that the PDAC sought reimbursement of the legal fees that it incurred through August 12, 2009, but denying the Motion to the extent that the PDAC sought reimbursement of the legal fees that it incurred after August 12, 2009. (Doc. 14125). August 12, 2009, was the Bar Date for filing any proceeding related to Property Damage Claims that had been allowed by the Property Damage Claims Administrator (PDCA), but not promptly paid by the Trust.

In the Order on the initial Motion, the Court determined that the PDAC's duties under the Trust Agreement were "limited to the formulation and administration of the claims resolution procedures within the PD Facility, and to consultation with the PDCA as the officer responsible for processing all PD Claims." (Doc. 14125, p. 11). Because the processing of PD Claims concluded in 2006 and the PD Facility closed in that year, and because the claimants in the post-Bar Date proceedings are only seeking payment for alleged losses with respect to their particular claims, the Court concluded that the PDAC had no function with respect to the post-Bar Date claims, and no further duties to perform under the Trust after the Bar Date for filing the claims had expired. (Doc. 14125, p. 17).

The PDAC appealed the Order, and the Eleventh Circuit Court of Appeals entered an Order reversing and remanding this Court's Order on November 16, 2011. (Doc. 14197). The focus of the Eleventh Circuit's decision is found at pages 7 through 9 of the Order:

We turn next to the duties of the Committee under the Trust Agreement. Section 8.1, which is entitled, "Formation; Duties," identifies two core duties of the Committee. First, "[t]he Trustees must consult with the PD Advisory Committee on matters [concerning the APDCRP]." Trust art. 8.1; see also id. at art. 3.2(e)(i)-(ii). Second, "[t]he PD Advisory Committee . . . shall serve in a fiduciary capacity representing all holders of [property damage] claims." Id. at art. 8.1. Thus, under the clear terms of Article 8.1, in addition to its duties related to the APDCRP, the Committee has a duty to represent property damage claimants in a fiduciary capacity.

In reaching this conclusion, we have rejected the bankruptcy court's ruling and the Trust's argument that the Committee's duties were limited to the duties enumerated in the APDCRP. The Committee correctly points out that its duties are broader than facilitating the processing of new property damage claims under the APDCRP. For example, the Trustees are obligated to furnish the Committee with annual financial reports and reports regarding the number and type of claims disposed of during the previous fiscal year. See Trust arts. 3.2(c)(i)-(ii). The Trust Agreement thus appears to contemplate some level of review and approval of these reports by the Committee. See id. (referring to the Committee as a member of the "Approving Entities"). Indeed, the record supports that the Committee engaged in at least some review of these records in May 2010 when the Trustees served them with the annual report. Therefore, we cannot conclude that August 12, 2009 – the cut-off date for filing new claims against the Trust – is determinative of whether the Committee was performing its duties under the Trust Agreement. (Footnote omitted).

At this juncture, we need not delineate all the Committee's duties under the Trust Agreement. It suffices for now to say that at least some duties under the Trust Agreement were broader than those identified in the APDCRP, and that the Committee performed those broader duties even after the cut-off date for filing new claims against the Trust. (Footnote omitted).

(Doc. 14197, at pp. 7-9)(Emphasis supplied). Clearly, the only post-Bar Date duty expressly identified by the Eleventh Circuit is the PDAC's review of the annual report. The Eleventh Circuit deliberately

made no determination as to whether any other activity of the PDAC might also constitute a duty under the Trust Agreement.

Following the Eleventh Circuit's decision, the PDAC filed the Request for Payment of Counsel's Fees and Costs that is currently under consideration. (Doc. 14215). In the Request, the PDAC sought "the payment of \$64,432.59 in fees and \$7,746.54 for reimbursement of costs incurred from June 12, 2009 through January 31, 2013 for a total of \$72,179.13." (Doc. 14215, p. 2).

The Trust filed a written Response to the PDAC's Request. (Doc. 14218). In the Response, the Trust asserted that it did not dispute the amount of \$47,992.59 in fees, or the amount of \$7,377.55 in costs, and those amounts have been paid to the PDAC. (Transcript, p. 12). According to the Trust, however, it is not obligated to pay the legal fees and costs for the PDAC to monitor or provide assistance in the post-Bar Date proceedings, because "[a]dvocacy of individual property damage claims is not a duty of the PDAC." (Doc. 14218, ¶ 6). The total amount of the disputed fees and costs is \$16,808.99.

Discussion

Pursuant to the Trust Agreement, the Trust is authorized to reimburse the PDAC for the fees and costs that the PDAC incurs in connection with its duties under the Trust. (Trust Agreement, §§ 3.1(c)(xi); 8.6(c)). The Trust Agreement also provides:

8.1 **Formation; Duties.** The PD Advisory Committee shall be formed and shall exist from the Confirmation Date until the date the Trust pays the last Allowed PD Claim and all disallowed PD Claims have been disallowed by final, non-appealable order. . . . The Trustees must consult with the PD Advisory Committee on matters identified in Article 3.2(e)(ii). The PD Advisory Committee and its members shall serve in a fiduciary capacity representing all holders of PD Claims. Where provided in this Trust Agreement or the APDCRP, actions by the Trustees are subject to the consent of the PD Advisory Committee.

(Trust Agreement, §8.1). According to the Eleventh Circuit, this section establishes two “core duties” of the PDAC. (Doc. 14197, p. 7). The “core duty” at issue in the PDAC’s Request for Payment of Fees and Costs is the duty to “serve in a fiduciary capacity representing all holders of PD Claims.”

The Court finds that the fees and costs disputed by the Trust were not incurred in connection with the PDAC’s performance of its duty to serve in a fiduciary capacity representing all holders of PD Claims, because (1) the post-Bar Date proceedings are individual PD Claims, (2) the PDAC’s duties under the Trust Agreement do not include the advocacy of individual PD Claims, and (3) the PDAC’s monitoring activities are not compensable acts within its fiduciary relation to all PD Claimants.

A. The post-Bar Date proceedings are individual PD Claims.

In the Order on the PDAC’s initial Request for Payment of its fees, this Court determined that the post-Bar Date proceedings were only seeking damages for the delayed payment of the Claims and the allegedly unequal treatment of the Claims. The proceedings were not filed on behalf of all PD claimants, and the post-Bar Date Claimants only sought payment of the alleged losses with respect to their particular claims. (Doc. 14125, pp. 15-16). In other words, the post-Bar Date Claimants “do not seek to reopen the claims resolution process, but only seek payment of the specific losses related to their allowed claims.” (Doc. 14125, p. 17).

The Eleventh Circuit’s decision does not appear to disturb the finding that the post-Bar Date proceedings relate solely to specific losses asserted for individual PD Claims. The Eleventh Circuit states, for example, that the Property Damage Claims Administrator informed the Court in 2006 that “all property damage claims had been processed, although some issues remained as to the payment of

some approved claims,” and that the post-Bar Date Claims largely arose out of the payment of claims that had been allowed by the Claims Administrator. (Doc. 14197, pp. 4-5).

The processing of PD Claims concluded in 2006, and the Property Damage Facility closed in that year. (Doc. 14125, pp. 12-13). The post-Bar Date proceedings do not involve the processing of any claims under the APDCRP, and do not affect any PD Claims other than the particular claims involved in the proceedings. The Eleventh Circuit’s decision does not disturb the finding that the post-Bar Date proceedings involve only specific losses involving the individual Claims. The post-Bar Date proceedings are individual PD Claims.

B. The PDAC’s duties do not include the advocacy of individual PD Claims.

The Trust Agreement provides that the PDAC “shall serve in a fiduciary capacity representing all holders of PD Claims.” (Trust Agreement, §8.1).

The PDAC has conceded that its duties under the Trust Agreement and related documents “do not include the advocacy of individual property damage claims.” (Doc. 14197, p. 9, n. 2)(citing Section II of the APDCRP).

At the conclusion of its decision, the Eleventh Circuit recognized the PDAC’s admission that it has no duty to advocate on behalf of individual PD Claims. Specifically, the PDAC’s concession appears in a footnote following the Eleventh Circuit’s statement that the PDAC had performed “some duties” after the Bar Date for filing new claims against the Trust. Accordingly, even though the PDAC may have “some” post-Bar Date duties, it is clear that such duties do not include the advocacy of individual PD Claims.

C. The PDAC’s monitoring activities are not compensable acts within its fiduciary relation to all PD Claimants.

In its decision, the Eleventh Circuit acknowledges that a “core duty” of the PDAC is to serve in a fiduciary capacity representing all holders of PD Claims.

In its decision, however, the Eleventh Circuit also indicates that the PDAC’s fiduciary capacity should be interpreted with restraint for purposes of evaluating its request for reimbursement. In the decision, the Court states:

While we accept that the review of annual reports is a compensable duty under the agreement, we reject that the fact of being a fiduciary, standing alone, is compensable under the agreement. A fiduciary duty does not exist in a vacuum, but instead defines the relationship of the fiduciary to the principal as it acts pursuant to the terms of the agreement. See Restatement 2d Trusts § 2(b).

(Doc. 14197, p. 8, n. 1). Consequently, the Eleventh Circuit rejects the proposition that a fiduciary may be compensated based solely on its status as a “fiduciary.” In rejecting the notion of reimbursement based solely on the existence of “basic fiduciary duties,” the Eleventh Circuit cites a comment to the Restatement of Trusts which provides that a “person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation.” Restatement 2d Trusts, § 2, cmt. b(Emphasis supplied).

In this case, the PDAC supports its request for the disputed fees by asserting only that it monitored the post-Bar Date proceedings, and that it communicated with the Committee and the claimants regarding the proceedings. (Transcript, p. 14). In fact, the PDAC expressly represented that the tasks that it performed were “limited to monitoring and communicating, not advocating. We did not file or prepare a proceeding – a pleading in any of these ongoing proceedings. We have not appeared before the Court to argue any particular position. That’s not within our role and that’s not been what these activities have related to.” (Transcript, p. 15). The PDAC simply monitored the proceedings, and

“communicated” with the Committee members and the claimants regarding “developments” in the proceedings. (Transcript, p. 20).

The PD Facility is closed. The PDAC does not generate any reports, and its monitoring activities and communications do not produce any results for which the Committee is accountable. (Transcript, p. 19). Although the PDAC serves in a fiduciary capacity with respect to all PD Claimants, it has no duty to act on behalf of the individual PD Claimants involved in the post-Bar Date proceedings. It may not advocate on behalf of the individual claimants, and acknowledges that it has taken no position in the proceedings. The fees and costs that it incurs to monitor the proceedings and communicate with the Committee and the claimants are not compensable under the Trust Agreement.

Conclusion

In its Request for payment, the PDAC seeks payment of the fees and costs that it incurred to monitor the post-Bar Date proceedings, and to communicate with the Committee and the claimants regarding the proceedings. The Trust disputes the request.

The disputed amounts should not be allowed because (1) the post-Bar Date proceedings are individual PD Claims, (2) the PDAC’s duties under the Trust Agreement do not include the advocacy of individual PD Claims, and (3) the PDAC’s monitoring activities are not compensable acts within the PDAC’s fiduciary relation to all PD Claimants. Consequently, the PDAC is not entitled to payment of the fees and costs that it incurred to monitor and communicate regarding the post-Bar Date proceedings.

Accordingly:

IT IS ORDERED that the Request of the Property Damage Advisory Committee for Payment of Counsel's Fees and Costs is granted to the extent of \$55,370.14, and denied to the extent of the disputed amount of \$16,808.99.

DATED this 24 day of September, 2013.

BY THE COURT

Paul M. Glenn

PAUL M. GLENN
United States Bankruptcy Judge