SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

IN re: Complex Asbestos Litigation: Patricia Anderegg, *et al.* Plaintiffs, vs. Center for Claims Resolution, Defendant.	Case No.: No. 828684 Statement of Decision After Trial

This matter was tried to the court without jury. Gilbert L. Purcell and Christina Skubic of Brayton & Purcell appeared for plaintiffs. Camille K. Fong and Lisa Oberg of McKenna, Long & Aldridge, LLP and William F. Sheehan and John Devlin of Shea & Gardner appeared for defendant Center for Claims Resolution.

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Summary of Contentions

These are actions for breach of written contracts. Plaintiffs settled lawsuits for asbestos related injury, and the settlement amounts have not been fully paid. Defendant Center for Claims Resolution (CCR) was the agent that negotiated and agreed to the settlements. The general rule is that an agent is not liable for breach of an agreement that it makes on behalf of a principal. Plaintiffs rely on an exception to the rule that provides that an agent is liable for breach of contract if it acts for an undisclosed or a partially disclosed principal.

Defendant's initial thrust was that all 53 claims were barred by collateral estoppel or res judicata. In 2000, a group of cases similar to these was filed in Superior Court in Marin. In October 2001, CCR won summary judgment. After expending a substantial amount of time in trial on the issue and filing detailed papers in support of the defenses, CCR was forced to abandon them post-trial because it could not establish the finality of the judgment obtained in 2001.

In addressing the merits of plaintiffs' claims, CCR argued that its role as agent for several principals is irrelevant. The pivotal fact is that, in any given settlement, CCR disclosed that it represented the defendant that plaintiff sued. As a secondary position, defendant asserts that the identity of its members, i.e. principals, was well known to plaintiffs' lawyers who were highly experienced in settling cases with the CCR.

Facts

The matter was tried largely on a set of stipulated or undisputed evidence summarized as follows.

Plaintiffs are fifty-three individuals who settled lawsuits for asbestos injuries between January 1998 and August 2000. Defendant CCR was an entity that acted as exclusive agent for various companies in the negotiation and settlement of asbestos injury claims. CCR settled claims with each plaintiff in this action. Each plaintiff was represented in the underlying claim by the firm of Brayton & Purcell. As to each plaintiff, the settlement check was less than the agreed settlement amount. In each case, the shortfall is attributable to the failure by one or more of CCR's principals to contribute its share. The parties have stipulated that plaintiff's exhibit 1 is a summary of the $1,019,092.43 unpaid on the agreements with plaintiffs, plus interest from date of breach. [1]

When a member or members of CCR failed to pay its share of a settlement, CCR sent a check for less than the total amount to plaintiffs' counsel. Each plaintiff performed under the settlement agreement by providing a Compromise and Release and a Request for Dismissal. Examples of these documents are plaintiff's exhibits 2-A and 2-B. When CCR suffered a shortfall in a settlement amount, it informed plaintiff's counsel by

letter. Exhibits 3, R, S, T, U and V are examples of such letters sent in 46 of these cases[2]. The letters accompany CCR's checks for less than the settlement amount and identify the defaulting parties and their shares of the settlement. The first such letter in evidence is dated February 12, 2000. Plaintiffs' answer to CCR's interrogatory No. 71 was read and establishes that the first such shortfall letter was received by the Brayton firm in approximately January 2000. Exhibit B is a March 22, 2000 letter addressed to Mr. Brayton from CCR's attorneys that reports on lawsuits by other plaintiffs to enforce CCR settlements that had suffered defaults by GAF. The letter states that CCR "is doing all that it can at this time to resolve the GAF nonpayment situation."

The parties stipulated that exhibit A, a copy of the Producer Agreement Concerning Center For Claims Resolution as amended effective Feb. 1, 1994, be admitted and also that the document had been in evidence in an earlier proceeding referred to as the *Georgine* case. Among other things, the Producer Agreement provides for the addition, withdrawal and termination of members; the right of the CCR to administer and settle claims for members as well as non-members; the formulas for allocation

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[1] The stipulation was made with the mutual reservation that mistakes in calculation would be corrected. Some such corrections appear on the face of the document.

[2] A different letter was sent in seven cases. CCR contends that this letter combined with the negotiation of its settlement

among members of settlement amounts for various categories of claims; and the method by which formulas for allocation could be adjusted.

Section IV, ¶ 2 of the agreement provides: "As sole agent, the Center shall have exclusive authority and discretion to administer, evaluate, settle, pay or defend all asbestos related claims . . . ." No claim would be settled without obtaining a settlement for all members whether named as a defendant or not. The agreement does not include a list of its members.

Plaintiffs' witness Donna Lee Peters is the settlement manager at Brayton & Purcell and she negotiated the 53 settlements in exhibit 1 with Jim McFadden of the CCR. Ms. Peters has settled hundreds of cases with CCR and, when she dealt with Mr. McFadden in general and specifically with the 53 cases at issue here, she was not told which members of CCR would contribute to the settlement amount. Mr. McFadden never gave her a comprehensive list of CCR members. Aside from letters such as exhibit 3, in which the CCR indicates the share of defaulting members, she has not seen any breakdown of contributions by CCR members. The complaints filed by the Brayton firm did not include all members of the CCR, but she understood that a settlement with CCR required that all CCR members be released. When as here Ms. Peters negotiated with Mr. McFadden concerning

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check constituted an accord and satisfaction. This defense is ruled upon *infra*.

a case in which more than one defendant was represented by CCR she settled the case for one aggregate sum. In agreeing to a settlement, CCR did not tell Ms. Peters how or even if the amount was apportioned among the CCR members. However, the settlement did include a long list of entities in addition to the named defendants and these were included in the Compromise and Release of Claims (exhibit AA is an example) and Request for Dismissal (exhibit 2A is an example).

Exhibit AA identifies the "Parties to be Released" as follows:

> "Amchem Product, Inc.; Armstrong World Industries, Inc. formerly know as Armstrong Cork Company; The Asbestos Claims Management Corporation (formerly known as National Gyspum Company) and the NGC Asbestos Disease and Property Damage Settlement Trust; CertainTeed Corporation; C.E. Thurston and Sons, Inc.; Dana Corporation, Ferodo America, Inc.; Gasket Holdings, Inc. (f/k/a Flexatallic, Inc.); GAF Corporation; IU North America, Incorporated; Maremont Corporation; National Services Industries, Inc.; NOSROC Corp.; Pfizer, Inc.; Quiqley Company, Inc. Shook & Fletcher Insulation Company; T&N plc; Union Carbide Corporation (f/k/a Union Carbide Chemicals & Plastics, Inc.) United States Gypsum Company and all their predecessors and successors, their parent and subsidiary companies and divisions, and distributors with express contractual indemnification for the distribution of any Releasees' products, and their current and former attorneys, liability insurance

carriers, to the extent of their liability for Center non-insurance company subscribers only, officers, directors, agents and employees."

For some companies included in such a release, e.g. C.E. Thurston and Sons, Inc., Ms. Peters knew the additional company was a member of CCR. In other cases, she did not know anything about the company, e.g. AmChem, NOSROC Corp., and IU North America. Ms. Peters knew nothing about the entities listed following the named companies and that include "predecessors and successors," "current and former attorney's" and "liability insurance carriers."

Bradley Drew, plaintiff's witness pursuant to Evidence Code §776, is a consultant employed by CCR to administer the allocation of claims and shares of settlements. He testified that the CCR membership changed over the years. He also testified that only CCR members named as defendants in a lawsuit paid into the settlement amount. The contribution was based on a ratio developed in part on the average of the members' prior settlements of claims. See, exhibit CC. Thus, in a hypothetical settlement of $75,000, in which the CCR members named as defendants were Maremont and A.C.M.C., CCR determined that Maremont's average historical payment was $1,000 and A.C.M.C.'s was $2,000. Applying that ratio, CCR would allocate $25,000 of the amount to Maremont and $50,000 to A.C.M.C. He testified that his company helped developed the ratios and they did not change between 1991 and 2000. The formula was proprietary and kept

confidential. It was not communicated to plaintiffs. Mr. Drew also testified that the members of CCR were not disclosed although the names may have become public in the course of the *Georgine* case in 1994. He did not recall ever disclosing member names. Defendant offered in evidence plaintiffs' interrogatory responses that established that as early as 1988, the Brayton firm obtained a release from CCR that included all of the members of CCR.[3]

CCR did not summon Mr. Brayton of Brayton & Purcell to testify in person. Instead, defendant moved into evidence two declarations from Mr. Brayton, exhibit G, a declaration filed in the Marin case and exhibit M, a declaration filed in this action. The declarations corroborate the testimony of Ms. Peters on all material points. Mr. Brayton settled cases with the CCR, but CCR did not reveal its membership or which of its members was obliged to contribute to a settlement.

CCR Was an Agent for Partially Disclosed Principals

The Restatement Second of Agency §321 provides, "Unless otherwise agreed, a person purporting to make a contract with

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[3] At trial, plaintiffs objected to the reading of their answers to defendant's interrogatories 69 and 70 on relevance grounds. No. 69 asked on what date the Brayton firm first received a release from CCR. The answer was 1988. No. 70 asked if that release listed all members of the CCR. The answer was yes. The objection was that a release sent in 1988 is not sufficiently relevant to the state of affairs in 1998. The objection is overruled.

another for a partially disclosed principal is a party to the contract."

Section 4 of the Restatement provides in relevant part,

"(1) If, at the time of a transaction conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity, the principal is a disclosed principal.

(2) If the other party has notice that the agent is or may be acting for a principal but has no notice of the principal's identity, the principal for whom the agent is acting is a partially disclosed principal."

An agent has an affirmative duty to disclose its principal. "The duty is on the agent to disclose not on the other party to investigate." *G.W. Andersen Construction Company v. Mars Sales* (1985) 2d. Dist. 164 Cal.App.3d 326, 332. See also W.*W. Leasing V. Commercial Standard Title Ins.* (1983)1st. Dist. 149 Cal.App.3d 792, president of corporation held personally liable on contract he signed for the corporation because he identified the corporate principal only by trade name.

In the settlement agreements at issue in this trial, CCR acted as agent for multiple principals, only some of whom were disclosed. Plaintiffs were represented by attorneys who were on notice of the existence of multiple principals and had some knowledge of their identity. CCR required that all of its members be included in the settlement agreement even though

plaintiffs had claims against only those named in the lawsuit. In addition to obtaining a release of claims in favor of its members, CCR obtained releases for additional entities. CCR kept secret the allocation of the settlement amount among the settling entities.

Defendants resort at the outset to the self evident, i.e. plaintiff's counsel knew that the defendants they settled with were represented by the CCR. If plaintiff sued A and B and settled with both A and B through CCR, then the relevant principals were fully disclosed. CCR argues that it is not relevant to this disclosure that CCR also represented companies C through Z who were not disclosed and unknown to plaintiff, who may have helped fund the settlement and who would be released as part of the settlement.

If it is relevant that CCR represented principals in addition to those named as defendants, then defendant asserts that plaintiffs knew the members of CCR because their lawyers at the Brayton firm had settled so many cases and had seen the list of released parties so many times before the settlements at issue here.

In addition, CCR puts great reliance on the fact that its Producer Agreement was publicly disclosed in the *Georgine* case in 1994, four years before the earliest of these settlements.[4]

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[4] At different times in the trial, defendant requested that the court take judicial notice of a transcript of the *Gerogine* fairness hearing and of other aspects of the *Georgine* case, apparently for the purpose of proving that

Although the Producer Agreement does not disclose the identity of the members of CCR, one learns from it that CCR members who have been named as defendants will be allocated a share according to the various formulas set forth. Other members do not contribute to settlement amounts.

CCR argues that even though CCR never disclosed to these 53 plaintiffs (who settled cases between January 1998 and August 2000) which of its members were responsible to pay the settlement the failure is harmless because their lawyers knew the mechanics of the Producer Agreement. To reach this argument the court must accept the subsidiary premise that plaintiffs' counsel had the Producer Agreement in 1994. It is not a premise supported by the record.

If there were sufficient evidence to conclude that plaintiffs' counsel had the Producer Agreement in 1994, and the court finds that there is not, it is speculation that plaintiffs who settled cases in 1998 and thereafter knew which CCR members were obligated to pay the settlement and in what proportions. The Producer Agreement is not immutable and by its own terms the liability shares may be adjusted. See exhibit A, Attachment A, Part B "Future Adjustment of Participating Producer Shares." Mr. Drew testified that in fact the allocation ratio did not

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Brayton & Purcell had a copy of the Producer Agreement. However, the court has not been supplied with the matter that defendant wishes to have noticed. In addition, defendant requested permission to call one Daniel Myer, a claims manager for CCR, to testify by telephone that in the early 90's the Producer

change over the relevant period, but this fact was not disclosed to plaintiffs.

CCR does not concede that it was required to disclose the allocation of the settlement amount among its members. However, in the event that the court finds that such disclosure was required, CCR points to the fact that as early as January 2000, the shares of defendant/CCR members were revealed to Brayton & Purcell when the first shortfall letters were sent. (Exhibits 3, R, S, T, U and V and interrogatory answer no. 71.) CCR asserts that once it disclosed the amount that a CCR member, e.g. GAF, had failed to contribute then the allocation among the members was revealed. Exhibit 1 shows that 47 of the 53 plaintiffs in this case settled after January 2000.

However, the disclosures in the shortfall letters give no more than a hint as to how the obligation to pay settlements is allocated among CCR members. The list of the entities required to pay and in what shares is not discernible.

The court finds that plaintiffs have proven that CCR did not disclose all the principals it represented. Rather, CCR made efforts to keep its membership confidential. The court also finds that plaintiffs' counsel did not learn the identity of all the CCR principals through a course of dealing. The release documents that plaintiffs' attorneys received may have named all CCR members, but the documents also included entities that were

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Agreement was sent to all plaintiff's asbestos counsel in the country.

not members. Even if plaintiffs' counsel could estimate at some given time the membership from settlement documents, from time to time the membership changed and the knowledge of membership would not be accurate at all times.

The aggregate settlements that CCR negotiated combined with the requirement that all CCR members and other entities be included in the settlement created the risk that a plaintiff placed reliance for payment on entities in addition to the defendants he sued, entities unknown to him and not disclosed by CCR. It is this sort of risk that obliges an agent to disclose its principals fully if the agent is to avoid becoming a party to the contract.

The court finds that at the time of negotiating each of the settlements at issue here, CCR did not fulfill its affirmative duty to disclose its principals. To avoid liability as a party to these settlement contracts, CCR was obliged to disclose the identity of its members who would be sharing in the payment of the settlement amount. That was not done, and plaintiffs were under no duty to guess or investigate. Furthermore CCR's affirmative duty to disclose was not obviated by the inclusion of all its members in release documents and the use of its Producer Agreement as evidence in litigation in 1994.

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Plaintiffs objected, and the witness did not testify.

Accord and Satisfaction

Defendant's exhibit D includes an example of a letter sent by CCR concerning the shortfall in seven of the settlements at issue. The letter starts out with CCR's statement that Armstrong World Industries has filed a petition in bankruptcy and "has stopped paying its share of previously negotiated settlements." The letter makes reference to two settlements, the Morehouse case for $165,000 and the Schweitzer case for $150,000. CCR explains that Armstrong has failed to contribute $66,832.19 to the Morehouse settlement and $45,563.05 to Schweitzer. CCR transmits a check for the reduced amount of $202,604.76.

In the letter's final two paragraphs, CCR attempts to limit liability for the unpaid amount to Armstrong and curtail joint and several liability on the part of other members:

> "In these circumstances, the CCR member companies other than Armstrong have no choice but to ensure that acceptance of their payment of funds under the settlement will be deemed both by your clients and by the CCR member companies, to constitute full payment and satisfaction of all amounts due under the settlement by the CCR member companies other than Armstrong."
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> "Accordingly, pursuant to the settlement negotiated by the CCR on behalf of its then-member companies who were defendants and your firm on behalf of its clients, enclosed please find a check in the

amount of $202,604.76. This check constitutes full and final payment of the amounts due under the settlement for each of the claims on the enclosed list by each of the CCR member companies other than Armstrong. This check is tendered in full settlement of any and all claims of any kind by your clients against all the CCR member companies other than Armstrong, including (but not limited to) claims for unpaid amounts under the settlement. Negotiation of the check will constitute a full and complete accord and satisfaction of all obligations owed to your clients by the CCR member companies other than Armstrong, and will forever release and discharge any and all claims against those member companies."
(Exhibit D)

Defendant's exhibits C-1 through C-7 are photocopies of CCR settlement checks negotiated by the Brayton firm following a letter such as Exhibit D. The checks are for the settlement of claims by plaintiffs Eagleton, Anderegg, Davis, Morrison, Luster, Grider and two unidentified plaintiffs. Each bore the notation on the endorsement "Full satisfaction and discharge of all claims against all CCR companies other than . . . ." and then listing the defaulting member(s), e.g. Armstrong.

Defendant asserts that its letter and limiting language on the endorsement line of the check are sufficient to constitute an accord and satisfaction with all the members of the CCR other than the defaulting member. Plaintiffs did not strike the

language on the check or take any other steps to protest the attempted compromise.

The defense by CCR misses the point. The accord and satisfaction, if any, can be enforced by the CCR members, none of whom are parties to this action.

Exhibit A discloses that CCR is a "non-profit organization" (exhibit A p.4) founded, among other things, to "resolve meritorious asbestos-related claims in a fair and expeditious manner and, where necessary, defend asbestos-related claims efficiently and economically." CCR is sued in this action in its capacity as agent. CCR is distinct from its member entities and cannot assert the defense that might exonerate all of its members except the defaulting member.

ORDER

It his hereby ordered that plaintiff and each of them shall have judgment for the unpaid settlement amounts set forth in exhibit 1 (as may have been corrected by the parties) together with interest thereon from the date of breach. Plaintiffs are awarded their costs.

Counsel for plaintiffs is ordered to prepare judgments that conform with this order.

Dated: December 12, 2003

James J. McBride
Superior Court Judge

Superior Court of California
County of San Francisco

In re: Complex Asbestos Litigation, Patricia Anderegg, et al., Plaintiff(s) vs. Center for Claims Resolution Defendant(s)	Case Number: 828684 **CERTIFICATE OF MAILING** (CCP 1013a (4))

I, Garth Sayers, a Deputy Clerk of the Superior Court of the City and County of San Francisco, certify that I am not a party to the within action.

On December 15, 2003 I served the attached STATEMENT OF DECISION AFTER TRIAL by placing a copy thereof in a sealed envelope, addressed as follows:

Gilbert L. Purcell, Esq.
BRAYTON PURCELL
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and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: December 15, 2003

GORDON PARK-LI, Clerk

By: GARTH SAYERS
Garth Sayers, Deputy Clerk