

1 SUPERIOR COURT OF CALIFORNIA  
 2 COUNTY OF SAN FRANCISCO  
 3 BEFORE THE HONORABLE HAROLD KAHN, JUDGE PRESIDING  
 4 DEPARTMENT NUMBER 220

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6 JOSEPH GARZA, MARY GARZA, )  
 7 Plaintiffs, ) CGC-05-438114  
 8 vs. )  
 9 ASBESTOS CORPORATION LIMITED )  
 10 Defendant. )  
 11 \_\_\_\_\_)

12 **Reporter's Transcript of Proceedings**

13 WEDNESDAY, NOVEMBER 23rd, 2010

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15 **APPEARANCES OF COUNSEL:**

16 For Plaintiffs:

17 BY: **DAVID J COOK, Attorney at Law**  
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19 For Defendant:

20 BY: **MARY ELLEN GAMBINO, Attorney at Law**  
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28 Reported By: Gordon F. Aiavao, CSR #11216

1 Department 220

2 Tuesday, November 23rd, 2010

3 Joseph Garza and Mary Garza v. Asbestos Corporation Ltd.

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5  
6 **THE COURT:** All right. Let's go on the record. Line two of  
7 the calendar. Counsel state your appearances.

8 **MR. COOK:** David Cook on behalf of the creditors.

9 **MR. DUNN:** Good morning, Your Honor. Nathaniel Dunn also on  
10 behalf of the Garzas.

11 **MS. GAMBINO:** Good morning, Your Honor. Mary Ellen Gambino  
12 for Asbestos Corporations limited.

13 **THE COURT:** It seems to me like, particularly the motion to  
14 compel, it's asking me to get into foreign relations. Issues  
15 that I'm not familiar with. I spent a lot of time trying to  
16 become familiar with them.

17 It was distracting, Mr. Cook, the way you have set this up.  
18 It seems to me you're asking for things now that you couldn't  
19 possibly be entitled to now, but that maybe down the road you'd  
20 be entitled to. This \$25,000 a day?

21 If you're going based on the Ninth Circuit decision, wasn't  
22 that, those daily damages, the coercive contempt, that was a  
23 result of contempt proceedings, right?

24 **MR. COOK:** That's correct, Your Honor. It was undeniably  
25 contempt. That's correct.

26 **THE COURT:** So why are we even dealing with that now?

27 **MR. COOK:** Well, we're dealing with that because ACL has  
28 made it enormously clear that they have no intention of ever

1 complying. There's been nothing in the meet and confer, nothing  
2 in the papers, and it's true I might be conflating a step or two  
3 in between, that's true, but nonetheless, they said no they're  
4 clear. We're never going to provide you this information.

5 **THE COURT:** So I'm going to ask that you not do that.

6 **MR. COOK:** Okay.

7 **THE COURT:** Let's focus on the step today.

8 **MR. COOK:** Okay.

9 **THE COURT:** The step today seems to me to be a pretty  
10 straightforward motion to compel.

11 **MR. COOK:** I would agree with it.

12 **THE COURT:** And it's only complicated because we have a  
13 Quebec blocking statute which requires the analysis of the  
14 comity rules as set forth by the U.S. Supreme Court in the 1987  
15 case, is that right?

16 **MR. COOK:** Absolutely.

17 **THE COURT:** That's all we have today on that motion to  
18 compel.

19 **MR. COOK:** That's absolutely correct. I would add, I would  
20 not bicker with Your Honor, but the, one of the issues in the  
21 blocking statute is that the invocation of the blocking statute  
22 is sometimes self made or self created by the defendant.  
23 Because the option, of course post judgment, not prejudgment,  
24 post judgment is paying the judgment.

25 Now as they seek to invoke the blocking statute to avoid  
26 payment, most of the cases arising out of blocking statutes are  
27 prejudgment where there is an issue of discovery and somebody  
28 saying, "I'm involuntary defendant. I don't want to provide

1 this information," etc. But here they don't have to invoke  
2 that. They can simply write a check. And that's what Richmark  
3 said.

4 **THE COURT:** Right. I saw that or Richmark said post an  
5 appeal bond. I read Richmark. I read the U.S. Supreme Court  
6 decision and I read the American Home decision. I read a lot  
7 more. I've become modestly informed on this little area of the  
8 law. So let me turn to your second motion because I really want  
9 to focus on what's before us today. I'll take a break and I'll  
10 come back.

11 **(Whereupon the proceedings were in recess and recalled.)**

12 **THE COURT:** So let's go back on the record. So the other  
13 step that seems to me you're a little ahead of yourself is on  
14 this assignment motion. The assignment motion is predicated on,  
15 if I got it right, and that's why I'm asking and this is why I  
16 had a hearing required, it's predicated on the belief that  
17 there's been a change of circumstances from the last time we  
18 talked about --

19 **MR. COOK:** True.

20 **THE COURT:** -- I think you called it an all rights  
21 assignment.

22 **MR. COOK:** Correct.

23 **THE COURT:** As distinct from a more narrow assignment or  
24 motion. The purported change of circumstances is that ACL is  
25 saying we won't respond.

26 But wouldn't I be in a better position to know if ACL  
27 responds if I order them to respond? So what I'm inclined to do  
28 if I hear reason to do it, which means I think it's the five

1 factors from the supreme court case, is to issue an order to  
2 respond as to non-US assets, and hold everything else in  
3 abeyance. Hold the daily sanctions in abeyance. Hold the  
4 further assignment of rights in abeyance. Save and except  
5 possibly those three south American entities which you have  
6 identified, but you haven't told me why you identified them and  
7 it's a great mystery as far as I can tell.

8 **MR. COOK:** I'll get there in a second.

9 **THE COURT:** That's how I've approached this that you're, it  
10 looks like you're ahead of yourself and you've told me in your  
11 papers and I think you told me orally this is a game of inches.  
12 Game is not a right word.

13 **MR. COOK:** It was --

14 **THE COURT:** This is a program of inches. But it seems to me  
15 you're several inches ahead of where we are presently in how I'm  
16 looking at these motions.

17 **MR. COOK:** Well, okay. I'm not the court's view of this is  
18 not unsurprising how's that? I do want to say that the premise  
19 of this reincarnation of the prior motion was the ruling on the  
20 7th, I'm sorry, on September 14th, just for the record if you  
21 please, the court stated, "However, comma, if the Garzas have  
22 sought through post judgment discovery means to obtain  
23 information to enable them to file a more narrowly tailored  
24 motion and are precluded from doing so by nonresponsive or  
25 evasive answers, comma, I will reconsider the motion as phrased  
26 now." Which is on the transcript at page 17 lines 4 through 8.

27 **THE COURT:** But it seems.

28 **MR. COOK:** I use that as my kick off so to speak here.

1           **THE COURT:** And I think that's a wonderful kick off point.  
2 But I don't think we're there. I think the answers from ACL are  
3 two fold. We have nothing in this country and we're subject to  
4 civil and criminal sanctions under the Quebec blocking statutes  
5 if we answer further. And we recognize that those statutes  
6 don't control here and there has to be an analysis under the  
7 supreme court case and perhaps you're right.

8           Perhaps if I issue an order to compel they'll still say no  
9 we won't participate. But perhaps you're wrong. And if you're  
10 wrong, then it seems to me we don't get to all the other stuff  
11 you're talking about. And I'm not really in a position today to  
12 know whether or not you're right or wrong. I might have my own  
13 gut hunch.

14           **MR. COOK:** Yes. Yes. I think I know, I can predict well  
15 where the next few hearings are going to go I'm somewhat  
16 familiar with the road ahead here.

17           If the court's inclination, just reading my tea leaves this  
18 morning here, if the court grants essentially my discovery  
19 motion providing for complete disclosure after sets whether  
20 they're here in Canada or otherwise, and we have a very short  
21 fuse on that, you know, reasonably short fuse on responding,  
22 then what I would do is either, as the court doesn't appear too  
23 inclined to grant my broad based assigned motion at this time  
24 given the current setting, is to either continue that or for the  
25 court to defer that and we can come back with the responses.

26           If the responses continue to be I'm not going to tell you  
27 whatever, whatever you that mix here then the court would say,  
28 "Okay. We gave you one chance. We gave you a second chance.

1 I'll grant this broad based assignment motion."

2 **THE COURT:** I agree with everything you said except the  
3 premise I'm not necessarily decided that I'm going to grant the  
4 motion to compel. If I decide to deny the motion to compel,  
5 based on the evaluation of the comity factors C-O-M-I-T-Y, then  
6 it seems to me that I would have to deny the request for the  
7 broad based assignment order because it wouldn't have been  
8 evasive or incomplete discovery. It would be because of the  
9 respect accorded to Quebec's laws under a comity analysis. ACL  
10 is not required to go any further.

11 So it seems to me, however you look at it, today's hearing  
12 needs to begin and end at the five comity factors as identified  
13 by the U.S. Supreme Court. And I either grant or deny the  
14 motion to compel in whole or in part and put everything else  
15 off. And so that's what I want to do. I want to get to those  
16 factors right now.

17 Does anybody disagree with the statement in Richmark that  
18 the balance of national interest is the most important factor?

19 **MR. COOK:** US national interest here and the interest of the  
20 US in seeking its judgments enforced.

21 **THE COURT:** No. It's the balance. It's the comparing.

22 **MR. COOK:** Oh, yes. Your Honor, of course we agree to that.

23 **THE COURT:** So you don't disagree with that.

24 **MS. GAMBINO:** No. I do not disagree with that. I don't  
25 disagree.

26 **THE COURT:** Okay. I want to get to that first. That seems  
27 to me to be the punch line. All the other ones I'm reading, the  
28 Richmark case directly, they are important but they're

1 subsidiary.

2 Ms. Gambino. Why isn't it a situation that the US or the  
3 California interest is generalized to a United States interest  
4 extremely important here to see that judgments are carried out?  
5 What's the point of a trial? What's the point of a judgment if  
6 it's not going to be executed on? It just seems to me that  
7 Richmark has it right. That the interest here of the California  
8 courts and the US government is that the Garza judgment should  
9 be enforced. In full. Paid up. One hundred percent.

10 And that no matter how strongly the interest of Quebec is in  
11 its blocking statutes, and frankly I now have a much better  
12 understanding of it, it looked to me like protectionist  
13 legislation pure and simple without any basis.

14 Now I understand what's the thinking behind this kind of  
15 statute. And I realize it's not just an invention of some  
16 legislators in Quebec. It is a worldwide phenomena that has  
17 been going on very, very, long time. And it's a clash between  
18 two civil litigations systems and it's a very fascinating clash.

19 But putting the theory aside, however one looks at it, I  
20 don't see how Quebec's interests ever becomes as important as  
21 the US slash California interest.

22 **MS. GAMBINO:** And you're correct, Your Honor. Blocking  
23 statutes are very common. This is not a procedure that's unique  
24 to Quebec. And of course the interests of the California courts  
25 and of the United States are very important in this situation.

26 The difference between this case and the Richmark case is  
27 that in Richmark the court was dealing with a country that was  
28 Communist and state run. In Quebec the government is a

1 democracy. Plaintiffs have the ability to go to Quebec to  
2 enforce their judgment. And they have not done so. And that is  
3 really the bottom line here. That is what the problem is.  
4 They've had many years to do this.

5 **THE COURT:** But why should they have to do it? There's an  
6 interesting line in the restatement on foreign relations that  
7 nobody really has picked up on here. So I'm going to raise it.  
8 There's something about the and it's almost always in the  
9 context of a recipient of discovery request. Not a judgment  
10 debt or as we have here. The recipient of the discovery request  
11 can go to its own government and seek leave to respond to the  
12 discovery so that they won't find themselves in the rock and a  
13 hard place situation discussed in all these cases. They would  
14 get either the leave from the lead law enforcement officer,  
15 somebody akin to a attorney general, or from the courts.

16 So you say, I give this as preface, you say Garzas have to  
17 go to Quebec. But isn't it equally true ACL could have gone to  
18 Quebec themselves and say to the Quebec authorities and say we  
19 think that the California courts got it wrong but nonetheless we  
20 went through the California courts got a judgment against us and  
21 affirmed on appeal we have no other basis to appeal it. And now  
22 it's our obligation to provide information in aid and support of  
23 execution of a judgment. Please allow us to do that without  
24 running the risk of criminal or civil sanctions.

25 **MS. GAMBINO:** Your Honor, I don't know the entire procedural  
26 history of the equal pitcher case but it was very similar to  
27 what Your Honor is suggesting.

28 In that case I know for a fact that ACL provided a proponent

1 who answered questions based on review of ACL documents. This  
2 man had the documents in his possession and he told, I mean he  
3 testified as to what was in the documents. That case went up to  
4 the court of appeal and the court of Quebec and the court said,  
5 "No. You cannot do that." That's just the same as providing  
6 summary. That's still dissemination of information that's not  
7 allowed. It would not make sense for ACL now to go and try and  
8 get relief when there's a court of appeal decision that states  
9 they cannot do this.

10 And the court has read the Quebec case law. They are very  
11 strict about this. It's a, you know, it is a blocking statute.  
12 There are differences in civil law, between civil law and Common  
13 Law. There's a very different philosophical opinion as to  
14 whether a defendant has to provide discovery to a plaintiff and  
15 vice versa.

16 **THE COURT:** There's a separate set of Quebec statutes that  
17 are at play if the Garzas were to try and collect in Quebec,  
18 isn't that right?

19 **MS. GAMBINO:** That's correct. That would be the Quebec  
20 Civil Code.

21 **THE COURT:** Right. And on its face that would block, those  
22 statutes would block the Garzas as well, right? It would  
23 nullify, wouldn't it, in effect nullify what this court had  
24 done. It would require the Garzas at a minimum to start from  
25 scratch.

26 **MS. GAMBINO:** That appears to be, yes, Your Honor. That's  
27 probably correct. We don't have a decision on that. There's no  
28 higher court decision that tells us the answer to that question.

1           **THE COURT:** It's true. As far as I can tell there is no  
2 Canadian supreme court decision on that, but everything I have  
3 seen suggests that that is the law in Quebec. And that it would  
4 be at least until the ultimate appeal, futile for the Garzas to  
5 do anything and it would, and this is what really bothers me, it  
6 would in essence be saying that all the proceedings in this  
7 court, the San Francisco Superior Court and all the proceedings  
8 in the court of appeal were for not.

9           And whoever interest we're talking about, whether United  
10 States or California, has a very very strong interest in making  
11 sure the proceedings in this court and the California court of  
12 appeal mean something. Because if they don't mean anything, I'm  
13 wasting my time. All of you are wasting your time coming here  
14 day in and day out. So to me that's a show stopper.

15           **MS. GAMBINO:** Well, but, Your Honor, there's no decision on  
16 that. The plaintiffs have not attempted to do that. They have  
17 not gone there to enforce their action. They have not tried  
18 filing their action in Quebec. So we don't know what the  
19 outcome of that would be.

20           **THE COURT:** So there's a thin --

21           **MS. GAMBINO:** One of the reasons why ACL participates in  
22 litigation in the United States is because they know that the  
23 court may review the proceedings in the United States and say,  
24 "Well, yes. ACL had a fair trial and we will enforce this  
25 judgment." Otherwise ACL would not be involved in this  
26 litigation in California. They just would, as the plaintiffs  
27 like to say, take their toys and go home. But for the last 30  
28 years they have been involved and paid millions of dollars in

1 settlements and they have participated in trials.

2 **THE COURT:** I understand that. It's a mystery to me quite  
3 frankly. It's a little bit of kind of wanting your cake and eat  
4 it too, it seems to me, I guess all of us when you come down to  
5 it want to have it both ways and want everything possibly in our  
6 favor and I shouldn't fault ACL for doing that. I am, as you  
7 can hear, highly inclined to grant this motion to compel.

8 On the fifth factor identified by the U.S. Supreme Court  
9 which the Ninth Circuit tells us is the most important factor.  
10 All the other factors it seems to me are of either limited  
11 consequence such as the location of the information and the  
12 parties. You wouldn't be in this situation unless the location  
13 of the information was in Quebec or they weigh in favor of the  
14 motion to compel. So I'm going to give you one last shot Ms.  
15 Gambino to try and tell me why I shouldn't grant the motion to  
16 compel.

17 **MS. GAMBINO:** Well, Your Honor, this is about the most  
18 extreme burden that a court can place on a litigant. And that  
19 is the burden of having them have to violate the laws of their  
20 own. Their domicile country. And the Code of Civil Procedure  
21 section 2019.030 provides that the court shall restrict the  
22 frequency or extent of use of a discovery method provided in  
23 section 2019.010 if it determines either of the following. And  
24 the court is probably well aware of this section so I won't read  
25 the entire thing.

26 But subsection two says the selected method of discovery is  
27 unduly burdensome or expensive. In this case it could not be  
28 more burdensome to ACL than to have, to make a decision between

1 violating a court order in the United States versus violating a  
2 court order in their own country.

3 And in this situation ACL has provided the information that  
4 it can provide which is it has no assets in the United States.  
5 And we've already had hearings on that issue. And that is  
6 really the most important information for the plaintiffs to know  
7 at this point. That they will have to go to Quebec in order to  
8 try to enforce their judgment.

9 **THE COURT:** Everything you say is right. It's probably the  
10 only time in my career as a judge where I am about to issue an  
11 order that would require, compliance would require violation of  
12 law of another jurisdiction.

13 That is, however, the nature of these issues as set forth by  
14 the U.S. Supreme Court. And apparently it's been going on for  
15 decades and decades. I have no clue. But I found cases going  
16 back to the 1910s on this. So almost a hundred years.

17 But more importantly, in so as far as this case, the Garza  
18 case is concerned, it was inevitable that you would get here if  
19 there would be an unfavorable judgment against ACL, which ACL  
20 chose not to pay. So this clash that we have of jurisdictions  
21 took a long time to get here. Took years since the case was  
22 first filed. But it was actually foreseeable on day one or at  
23 least foreseeable on the day that ACL chose to appear and defend  
24 itself.

25 And embedded in that issue, at all times, is, is this court  
26 going to uphold what it does. Its own proceedings. And I think  
27 we've gotten there today.

28 I'm going to give you a reasonable amount of time to respond

1 Ms. Gambino which, if you want, you can take also to do a writ  
2 because my guess is the answers to the decision, whether to  
3 provide responses here or not that is to comply with my order.  
4 It's probably already been made. In that respect I tend to  
5 agree with Mr. Cook's view that we probably can anticipate the  
6 future, but I'm not going to say that with certainty.

7 So, 30 days? To respond.

8 **MS. GAMBINO:** That's fine. Thank you, Your Honor.

9 **THE COURT:** So I'm going to require that ACL respond to all  
10 of the interrogatories and request for production within 30 days  
11 without objections and in particular without any objections  
12 based on procedure or substantive law of the province of Quebec.

13 **MS. GAMBINO:** Thank you, Your Honor. But actually there  
14 were some objections based on the form of the questions.

15 **THE COURT:** You know, I think I saw glimmers of that. That  
16 really seems to be a side issue and I kind of got lost in the  
17 global consequence of this.

18 **MS. GAMBINO:** I think we all did, Your Honor.

19 **THE COURT:** I'm going to ask you to meet and confer. If  
20 there are some issues like that, I think you can handle it, but  
21 my punch line is ACL is required to disclose what assets it has  
22 and the whereabouts of those assets.

23 **MR. COOK:** Your Honor, I have a form of order here --

24 **THE COURT:** I'm not done.

25 **MR. COOK:** I'm sorry.

26 **THE COURT:** There was also a request for sanctions.

27 **MR. COOK:** Yes.

28 **THE COURT:** Request for sanctions is denied. This is a

1 weighty issue of international law. I have no basis to believe  
2 that ACL is making up the Quebec law. It looks to me like it  
3 exists. It looks to me like there's lots of decisions about it  
4 and lots of discussion about it.

5 And as much as I am ruling against them, I cannot say that  
6 their position is in bad faith or for cause for delay or  
7 otherwise not substantially justified.

8 Now I'm done. Now, Mr. Cook?

9 **MR. COOK:** Just for the record I have a proposed form of  
10 order here that I am going to hand to Ms. Gambino I've Xed out  
11 the sanctions provisions, I'll show her, and move compliance of  
12 30 days. I'll hand a copy for her to look at.

13 **THE COURT:** So you two will work out the procedural, other  
14 procedural objections like the vagueness ones.

15 **MR. COOK:** As to?

16 **THE COURT:** Is that correct, Mr. Cook?

17 **MR. COOK:** Yes. We'll work that out. Yes, sir. As to the  
18 assignment motion, my preference is that given the court's prior  
19 statements is either I simply take it off calendar or we just  
20 defer it to another date. I'd like to avoid the court denying  
21 it a second time.

22 **THE COURT:** I'm going to take it off calendar.

23 **MR. COOK:** Thank you. Without prejudice.

24 **THE COURT:** So what I'd like to do, and if you're not  
25 prepared to do this, it's okay. I think I saw that there's  
26 another motion next week.

27 **MS. GAMBINO:** That's correct, Your Honor. December 1st.

28 **MR. COOK:** Yes.

1           **THE COURT:** If anything that I have said today bears on that  
2 motion, and my guess is a lot of what I said today bears on that  
3 motion, I'd like to address it quickly now so we don't have to  
4 come back and rehash everything.

5           **MR. COOK:** Well let me just encapsulate the motion for next  
6 week. The court gave me an assignment order of the five largest  
7 banks. So far I have to advise the court that we have not  
8 collected any money out of those five largest banks, obviously,  
9 or we wouldn't be here. I have taken it one inch further and  
10 named every bank in Canada that we can find. So it's  
11 essentially the recycling of the 5 banks now to 160 banks.

12           **THE COURT:** I'll see you next week on that. I didn't  
13 realize it was that kind of a nonglobal issue. It's very  
14 different than what we are doing today.

15           **MR. COOK:** Yes.

16           **THE COURT:** Okay.

17           **MR. COOK:** Thank you, Your Honor.

18                   **(Whereupon the proceedings were concluded.)**  
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1 State of California )  
2 County of San Francisco )

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5 I, Gordon F. Aiavao, Official Reporter for the Superior  
6 Court of California, County of San Francisco, do hereby certify:

7 That I was present at the time of the above proceedings;

8 That I took down in machine shorthand notes all proceedings  
9 had and testimony given;

10 That I thereafter transcribed said shorthand notes with the  
11 aid of a computer;

12 That the above and foregoing is a full, true, and correct  
13 transcription of said shorthand notes, and a full, true and  
14 correct transcript of all proceedings had and testimony taken;

15 That I am not a party to the action or related to a party  
16 or counsel.

17 That I have no financial or other interest in the outcome  
18 of the action.

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20  
21 Dated: DECEMBER 3RD, 2010

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24 Gordon F. Aiavao, CSR No. 11216  
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