UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-2435

JOSEPH J. CABASIN and wife,
DOROTHY C. CABASIN,

Plaintiffs-Appellants,

versus

ARMSTRONG WORLD INDUSTRIES, INC., ET AL.,

Defendants-Appellees.

* * * * * * * *

No. 91-2436

PHYLLIS MARY REHM, Individually and
Representing The Estate of
EDWARD JOHN REHM,

Plaintiff-Appellant,

versus

ARMSTRONG WORLD INDUSTRIES, INC., ET AL.,

Defendants-Appellees.

* * * * * * * *

No. 91-2437

EDWARD THEODORE KUPKA and wife,
MARY W. KUPKA,

Plaintiffs-Appellants,

versus

ARMSTRONG WORLD INDUSTRIES, INC., ET AL.,

Defendants-Appellees.

* * * * * * * *

No. 91-2438

JOSEPH CINCOTTA, Executor of the
Estate of RUTH CINCOTTA, Deceased,

Plaintiff-Appellant,

versus

ARMSTRONG WORLD INDUSTRIES, INC., ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the
Southern District of Texas
(CA H 86 1728, CA H 86 2141, CA H 86 2143 & CA H 86 2285)

(October 13, 1994)

Before JOHNSON, GARWOOD, and WIENER, Circuit Judges.*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

GARWOOD, Circuit Judge:

Plaintiffs-appellants' personal injury and wrongful death suits were dismissed in March 1987 as a sanction for failure to comply with a standing discovery order governing asbestos suits in the Southern District of Texas. This Court vacated the dismissal, concluding that the district court had not made the requisite findings to sustain, and the record did not otherwise support, the sanction of dismissal with prejudice. On remand, the district court held another hearing, issued findings of fact and conclusions of law, and again dismissed with prejudice. Concluding that the district court abused its discretion, we modify its order to make the dismissal without prejudice, and make provision for payment by plaintiffs under certain circumstances of specified attorneys' fees to the defendants.

Facts and Prior Proceedings

Plaintiffs-appellants Joseph J. Cabasin and Dorothy C. Cabasin, Phyllis Mary Rehm, Edward Theodore Kupka and Mary W. Kupka, and Joseph Cincotta are New York residents who commenced separate personal injury or wrongful death actions in the Southern District of Texas between late April and early June 1986. All four complaints, which were filed by Houston attorney Thomas J. Pearson (Pearson), alleged exposure to asbestos products manufactured or distributed by seventeen defendants: Armstrong World Industries, Inc., Standard Industries, Inc., The Celotex Corporation, Combustion Engineering, Inc., Eagle-Picher Industries, Inc., Fibreboard Corporation, GAF Corporation, Keene Corporation, Owens-Corning Fiberglas Corporation, Pittsburgh Corning Corporation,

Raymark Industries, Owen-Illinois, Inc., Johns-Manville Sales Corporation, The Flintkote Company, Unarco Industries, Inc., H.K. Porter Company, Inc., and Rockwool Manufacturing Co. (except that the Cincotta complaint omitted Unarco).

The asbestos actions were subject to a standing order in the Southern District requiring that the plaintiff's attorney attach to the original complaint an affidavit certifying that the following information (called for in Paragraphs 1(a)-(h) of the standing order) had been compiled and would be served on each defendant with the complaint: (a) the names and addresses of all consulting, treating, or diagnosing physicians, as well as the names and addresses of any physicians the plaintiff had seen for any reason in the last fifteen years, and an authorization allowing those physicians to release the plaintiff's medical records; (b) a copy of all medical or hospital records relied upon by the plaintiff to establish an asbestos-related injury; (c) copies of, or authorizations to obtain, the plaintiff's income tax records for the previous five years; (d) an authorization for the defendants to obtain Social Security records and claims records; (e) complete answers to the defendants' joint Master Set of Interrogatories; (f) the full docket number, style, and date of filing of any suit or worker's compensation claim filed by the plaintiff in any jurisdiction containing similar allegations against any of the defendants; (g) the time and place of filing of any Social Security disability claim, a copy of the claim, and authorization for the defendants to obtain the report; and (h) an affidavit of the plaintiff's residency. Notwithstanding that none of the four suits

was in compliance with the standing order at the time of filing, Pearson filed the required affidavits falsely representing that the discovery materials had been compiled.

After several motions by the defendants to dismiss for failure to comply with the standing order, Pearson responded on July 11, 1986, by admitting that out of concern that the statute of limitations was about to expire in some of the cases, he had filed the suits first and then begun to work on compliance with the standing order. Between July 11 and July 14, Pearson submitted the first responses to the Master Set of Interrogatories for all four plaintiffs.

At a hearing on July 16 before Special Master Ronald Blask (Blask) on the motion to dismiss, the defendants illustrated Pearson's continued noncompliance by identifying defects in standing order Cabasin responses. The responses evidently failed to answer Paragraphs 1(a)-(d),(f)-(h) except by referring to some of the interrogatory answers. The answers to the Master Set of Interrogatories, in addition to several minor omissions, failed to fully identify the circumstances of exposure to particular products and to identify the co-workers who would be relied on as exposure witnesses (product and co-worker identification).[1] Blask entered

[1] Interrogatory No. 16 asked the plaintiff to describe in detail his employment history, to indicate whether he was exposed to asbestos products with each employer, and to identify each asbestos product and the manner in which he was exposed to it. Cabasin's answer listed each employer (without dates) and beneath each listed anywhere from 2 or 3 to several dozen asbestos products. Interrogatory No. 17, asking for the names and addresses of all witnesses the plaintiff intended to rely on to establish exposure, was answered only by a statement that exposure witnesses had not been determined.

an interim order directing Pearson to comply fully with the standing order by August 14, 1986, with a hearing to be held on August 18 to assess his compliance.

On August 14, Pearson submitted supplemental answers to the interrogatories for Cabasin and Cincotta. Though some additions were made, there were still areas of noncompliance with the standing order. Along with the supplemental answers, Pearson moved for a further extension, asserting that while he had obtained most of the information, forces beyond his control such as shipping delays had prevented full compliance. After the hearing on August 18, Blask entered a second interim order on August 21, ordering full compliance by August 25. The order identified the following information as still missing: (1) Cabasin - all information required by Paragraphs 1(a)-(h) of the standing order; (2) Rehm - all information required by Paragraph 1(a) and co-worker and product identification as required by Interrogatories 16 and 17; (3) Kupka - product and co-worker identification; and (4) Cincotta - all information required by Paragraph 1(a).

On August 19, 1986, the defendants moved to dismiss for improper venue, or in the alternative to transfer the case to New York because venue was improper in the Southern District of Texas, or in the further alternative to transfer the case to New York based on *forum non conveniens*. Pearson opposed this motion on September 5, 1986, but on November 12, 1986, filed his own motion to transfer the Cabasin case to the Southern District of New York.

On August 26, 1986, Pearson filed further supplemental responses for Cabasin, Rehm, and Kupka, which he claimed in a cover

letter to Blask brought him into full compliance, except that he still needed to obtain the various authorizations from Mr. and Mrs. Cabasin. The supplemental responses for Cabasin addressed the Paragraph 1(a) omissions and gave improved employment history and product identification relating to Cabasin's 42 places of employment as an insulator. They also included a list of co-workers who would testify to exposure, and what was known of their anticipated testimony. The Rehm response added Paragraph 1(a) information, a more complete employment history (although it stated that Mrs. Rehm was still unable to determine which asbestos products her late husband was exposed to at each of the two jobs for which asbestos exposure was alleged), and one co-worker to be used as an exposure witness. The supplemental Kupka information included the Paragraph 1(a) information and a list of co-workers relied upon as exposure witnesses.

On August 29, 1986, the defendants filed their Third Amended Motion to Dismiss, alleging flagrant disregard by Pearson of the standing and interim orders, and asking that the court dismiss the cases with prejudice, enter monetary sanctions against Pearson, and remove his license to practice in the Southern District. The defendants argued that there had been no genuine statute of limitations problem, because the statute would not have run until several months after the filing of the complaints, and also relied heavily in the motion on past instances of misconduct by Pearson in other suits in other jurisdictions. On January 20, 1987, the defendants filed their Fourth Amended Motion to Dismiss, making substantially the same allegations and requesting the same relief.

The district court held a hearing on March 12, 1987. Pearson indicated at the outset that he did not realize that "a full blown hearing" was to be conducted on his compliance with the standing order. Taking up the Cabasin case first, the court attempted to ascertain Pearson's basis for suing these particular defendants (*i.e.*, product identification). Pearson gave the court a list of the defendants and their products, on which Cabasin had circled the products to which he was exposed. When the court pointed out that several of the named defendants had no products circled, Pearson replied that his basis for suing them was probably oral testimony from a co-worker rather than Cabasin's personal recollection, but that if a defendant was convinced that it did not belong in the case and communicated that to him, he would be willing to dismiss. The court then pointed out to Pearson that Interrogatory 17, which should contain the names of any such witnesses whose oral testimony would be relied upon, stated simply that "[e]xposure witnesses have not yet been determined." The court was apparently relying on the original Cabasin responses rather than the supplemental responses filed on August 26, 1986, which did list five exposure witnesses. Pearson, however, did not point this out, and indeed sought to defend his failure to supplement his responses by noting that he believed that the case was going to be transferred to New York. His responses indicated that he was poorly acquainted with the details of his cases (*e.g.*, "I would suspect that if the Court looks at our last supplementation and there are no witnesses there, we do not yet have them.") Pearson further argued that any delay had not been prejudicial to the defendants, because they had not

yet conducted any discovery in the cases.

Regarding the defendants' allegation that there was no genuine statute of limitations problem excusing initial noncompliance with the standing order, Pearson explained that a law firm in Buffalo, New York had referred nine cases (including these four) to him in bulk with a warning that the statute of limitations was about to expire. He further explained that the statute of limitations in New York required suit to be filed within three years of exposure, which would have barred these plaintiffs' suits, and that the cases were referred to him for a protective filing when it appeared that New York legislation to change the statute would not pass. The court nevertheless expressed irritation at the cases having been filed in federal court in Texas.

At the conclusion of the March 12, 1987, hearing, the court rendered a summary oral dismissal of the cases as a sanction for failing to follow the court's rules, and also assessed Pearson personally a sanction of $1,000 per case (amounting to $7,000, since some of the cases originally filed had been settled or transferred).

The four plaintiffs involved in this appeal discharged Pearson on May 28, 1987, and retained the Buffalo firm of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria (Lipsitz). On June 29, 1987, Lipsitz made a motion to the district court for relief from the dismissal under FED. R. CIV. P. 60(b). The motion argued that, but for Pearson's unpreparedness, all of the district court's concerns raised at the March 12 hearing could have been addressed. Summaries for each of the plaintiffs showing compliance to date

with the standing order were included with the motion. These charts applied more exacting standards than Blask had in his second interim order of August 21, 1986, and identified defects not mentioned in that order;[2] even so, Lipsitz argued, a substantial portion of the requested material was provided and the omissions were not indicative of contumacious conduct warranting dismissal. The motion also asserted, with supporting affidavits from the plaintiffs, that the plaintiffs had responded promptly and fully to all requests by Pearson for information, and had never been notified that the suit was in jeopardy for failure to provide discovery information.

The motion asked either that the actions be reinstated and transferred to federal district court in New York, or that they be dismissed without prejudice to the plaintiffs' right to pursue their causes of action in New York. It noted that New York had

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[2] The charts identified the following items as having not yet been submitted. The Cabasin responses lacked original authorizations for medical records (Paragraph 1(a)), income tax records or authorizations (Paragraph 1(c)), Social Security disability claim information (Paragraph 1(g)), an affidavit of residency (Paragraph 1(h)), and an address for the Cabasins' daughter, in response to the interrogatory asking for the names and addresses of all dependents (Interrogatory 3). The Rehm responses lacked income tax records or authorizations (Paragraph 1(c)), an affidavit of residency (Paragraph 1(h)), a compliance affidavit, an attestation for the answers, and proof of legal authority to bring suit. The Kupka responses lacked income tax records or authorizations (Paragraph 1(c)), authorization for Social Security records (Paragraph 1(d)), Social Security disability claim information (Paragraph 1(g)), an affidavit of residency (Paragraph 1(h)). The Cincotta responses lacked hospital names in the medical history (Paragraph 1(a)), income tax records or authorizations (Paragraph 1(c)), authorization for Social Security records (Paragraph 1(d)), Social Security disability claim information (Paragraph 1(g)), an affidavit of residency (Paragraph 1(h)), and evidence of Cincotta's authority to bring suit on behalf of his late wife.

passed legislation giving all previously time-barred claimants a one-year windowSQfrom July 30, 1986, to July 30, 1987SQin which to bring suit. The district court denied the Rule 60(b) motion on July 30, 1987, again without findings or discussion.

On appeal by the plaintiffs, this Court vacated and remanded. *Nita Brooks, etc., et al. v. Armstrong World Industries, Inc., et al.*, No. 87-2480 (5th Cir. Dec. 28, 1988). In its decision, this Court focused on the five factors governing review of dismissals for failure to comply with discovery orders, as stated in *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 749 (5th Cir. 1987): (1) dismissal with prejudice is normally appropriate only if its deterrent value cannot be substantially achieved by less drastic sanctions; (2) dismissal is almost always an abuse of discretion if the noncompliance is due to a sincere misunderstanding of the order, an inability to comply, or the assertion of a nonfrivolous constitutional privilege; (3) a court may generally resort to dismissal only where there is a clear record of delay *or* contumacious conduct by the plaintiff; (4) dismissal is usually too severe a sanction when the blame for noncompliance lies with the attorney rather than the client; and (5) dismissal may be inappropriate if the other party has not been substantially prejudiced in its trial preparation.

Applying the five *Brinkmann* principles, this Court found that the first called the dismissal into question, because there was no finding that lesser sanctions would be ineffective and, given the substantial compliance that had been achieved in the past several months and the short time that the case had been pending, no basis

in the record from which to infer that lesser sanctions would be futile. On the second principle, this Court expressed concern about the absence of a finding that the delay was not attributable to inability to respond. On the third, the Court observed that the delay was not as long as in most cases where dismissals were ordered, and did not appear to have upset the district court's pretrial schedule, as no trial setting had been aborted. Although there was some contumacious conduct by Pearson, it consisted mainly in being less than candid with the district court, and was not necessarily the *cause* of the delay and noncompliance. The fourth factor, the Court found, cut strongly against dismissal, because there was no indication that any of the plaintiffs were personally aware of the standing order. On the fifth factor, the Court noted that there was no showing of prejudice to the defendants that could not be remedied by monetary sanctions.

Additionally, this Court indicated that the district court should have given separate consideration to the particular plaintiffs and defendants, noting that the deficiencies in compliance with the standing order were not all the same, that the ability to procure information from the various plaintiffs was not identical, and that failures in product identification applied only to some defendants. This Court remanded for further consideration in accordance with the *Brinkmann* principles, stressing the need for findings about the insufficiency of lesser sanctions and the basis for that conclusion. We also noted that "forum shopping" concerns were not relevant.

The district court reopened the case and ordered a hearing for

February 13, 1989SQa hearing of which the Lipsitz firm alleges it received only several days' notice. At the hearing, after questioning Pearson about the cases for which he remained the attorney of record, the district court moved to the Cabasin case and asked the Lipsitz attorney about product identification in that case. The Lipsitz attorney noted that the standing order provided that summary judgment motions would be entertained from defendants whose products were not identified, and he argued that following this procedure after the exposure witnesses had been deposed, rather than entering a preemptive blanket dismissal, was the appropriate way to address any shortcomings in product identification. He acknowledged that he was not intimately familiar with the complaints, because he had been sent as a last-minute substitute when the Lipsitz firm received belated notice of the hearing, but stated that he would furnish written answers to the court's specific questions within a short time after the hearing. He also stated that although if the court reinstated the cases he was prepared to file information to cure all remaining defects in compliance with the standing order, his primary interest was in getting the cases transferred to New York, and he affirmed that the plaintiffs no longer opposed the defendants' August 1986 motion for a transfer.

The defendants argued that the various responses to the standing order questions and interrogatories were not yet complete. They relied on the identical shortcomings contained in Lipsitz's charts accompanying the Rule 60(b) motion, with the single addition of also arguing that the product identification was inadequate.

The district court refused to dissociate Lipsitz from Pearson's failures to provide timely information, in the belief that an attorney from the Lipsitz firm had been involved in referring the cases to Pearson initially. Upon learning that parallel suits had been filed by these plaintiffs in the Eastern District of New York, the district court demanded that the Lipsitz attorney submit by "noon Wednesday" a list of all cases that his firm had filed for these plaintiffs in any district. When the defense attorney indicated that he had not previously been aware of any of the parallel New York filings other than the Cabasin case, the district court accused the plaintiffs of misrepresenting to this Court the status of the litigation. At the conclusion of the hearing, the district court stated: "These cases will be dismissed, they are continued SQ I'm not sure they are continued to be dismissed, and I will provide some additional findings as soon as I can get to it."

Between approximately February 22 and 24, 1989, Lipsitz sent to the defendants additional discovery information that apparently remedied all of the remaining deficiencies in compliance with the standing order identified by the defendants at the February 13 hearing.

On February 13, 1990, the district court issued a joint set of Findings of Fact and Conclusions of Law for the seven cases, including the four at issue in this appeal. On April 3, 1991, the district court dismissed all seven cases and assessed $75,126.17 in attorneys' fees against the plaintiffs jointly and severally. Lipsitz thereafter submitted a motion under Rule 60(b) requesting

modification of the order to make the dismissal without prejudice, and elimination of the monetary sanctions against the individual plaintiffs. On April 29, 1991, the district court entered an amended order of dismissal, making the attorneys' fees payable only by Pearson personally. The 60(b) motion was denied on May 17, 1991.[3] The plaintiffs bring this appeal from the dismissal with prejudice and from the denial of the 60(b) motion.

Discussion

I. Review of the District Court's Dismissal

The district court has discretion in imposing sanctions for the disregard of its orders. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 96 S.Ct. 2778, 2780 (1976) (per curiam). However, because of the severity of the sanction of dismissal with prejudice, this Court has enunciated general principles, summarized in *Brinkmann*, *supra*, to guide the district court's discretion with respect to this sanction. In our December 1988 opinion in this case, we concluded that, at least without more specific findings as to why so severe a sanction was appropriate, the district court's dismissal was an abuse of discretion. The question now before us is whether either the findings entered by the district court on February 13, 1990, or events subsequent to our remand, establish an adequate basis for that sanction. We conclude that they do not.

The Findings of Fact and Conclusions of Law entered on

[3] All the district court orders, rulings, and findings recited herein, commencing with those of March 12, 1987, were by the same district judge.

February 13, 1990, reveal several clearly erroneous factual premises, and also reflect reliance on legally irrelevant considerations. For instance, Findings #74, 76, 79, and 81 state that Cabasin, Rehm, Kupka, and Cincotta have not complied with the standing order, and list the exact deficiencies cited by Lipsitz in its first 60(b) motion and reiterated by the defendants in the February 13, 1989, hearing. Though not entered until February 1990, the court's findings thus disregard the plaintiffs' submissions in late February 1989. This is confirmed by Finding #53, which states that "[t]he plaintiffs have not filed any additional discovery responses since the filing of the mandate of the . . . Fifth Circuit." By the time judgment was entered in April 1991, the information identified as missing in Findings #74, 76, 79, and 81 had apparently been in the defendants' possession for approximately twenty-six months (since late February 1989). Other than the somewhat ambiguous statement at the conclusion of the February 13, 1989, hearing, the district court gave no indication that the court was closing the record as of that date; indeed, the court's request of certain information from the plaintiffs about their filings in other districts suggests the contrary.

Also, this Court in its prior opinion expressed particular concern that from the record it was not clear that lesser sanctions would not have achieved the result sought by the district court, and we directed the district court on remand to give special attention to "whether lesser sanctions than dismissal would suffice and the basis for any such conclusion." *Nita Brooks, etc., et al.*,

No. 87-2480, at 14. Conclusion of Law #5 states that "[t]he court considered whether the continued imposition of lesser sanctions would serve any purpose and by imposing greater sanctions found that further lesser sanctions would not be appropriate." No further explanation of the court's reasoning was given, and the reasoning contained in Conclusion of Law #5SQthat the failure of lesser sanctions to that point made their "continued" imposition pointlesssSQrests on the premise that the setting of deadlines by Special Master Blask, and a warning given by Blask, were themselves sanctions (Findings of Fact #29, 30, Conclusion of Law #4).[4] This characterization is at best questionable, and in any event Pearson's failure to meet those deadlines was evident in the record when we first considered the case and concluded that the record did not clearly support dismissal. The only lesser sanction that was imposed was the order requiring Pearson to pay $7,000 in attorneys' fees, and this was imposed concurrent with the original dismissal, not as a preliminary step that failed to achieve satisfactory

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[4] Relying on *Callip v. Harris County Child Welfare Department*, 757 F.2d 1513, 1521 (5th Cir. 1985) (per curiam), the defendants argue that Blask's warning to Pearson that continued noncompliance could result in dismissal with prejudice was itself a lesser sanction. In *Callip*, we indicated that a situation in which the plaintiff had been "'fully and repeatedly apprised'" of the possibility of a dismissal with prejudice could be an exception to the general rule that we *cannot* affirm a dismissal with prejudice unless the district court expressly considered lesser sanctions or employed such sanctions prior to dismissal. *Id*. at 1521 (quoting *Ramsay v. Bailey*, 531 F.2d 706, 709 n.2 (5th Cir. 1976), *cert. denied*, 97 S.Ct. 1139 (1977)). Our discussion in the present case is not contrary to *Callip* because our point is not that we *could not* affirm the district court; it is merely that the district court's Conclusions of Law #4 and 5SQstating that lesser sanctions had been attempted and found futilesQis erroneous.

results. The district court did rely in its February 1990 findings on the fact that Pearson had apparently still not paid the fine (Conclusion of Law #28). However, the four plaintiffs involved in this appeal discharged Pearson in May 1987, shortly after the fine was imposed; absent unusual circumstances not shown to be present here, Pearson's subsequent delay in paying should not subject these plaintiffs to additional sanctions.

In other respects as well, the district court does not appear to have heeded this Court's admonition to give particularized consideration to the individual cases. For instance, the court's Findings of Fact and Conclusions of Law reflect a heavy reliance on the lack of complete product identification (Findings #26, 36, 45, 64-73). Those findings reflect, however, a wide range of success among the four plaintiffs: whereas Rehm evidently identified products of only four of the seventeen named defendants (Finding #70), Cabasin lacked products of only two defendants (Finding #73). The district court apparently regarded such differences as inconsequential because they were the result of post-filing investigation, and in all four cases Pearson initiated the suits before determining which defendants might be responsible in the particular case (Conclusion #26). Even so, the district court's conclusions do not support dismissal as to those defendants whose products were identified, particularly since the standing order's provision for summary judgment in such a situation implies a preference for that approach. The district court's findings do not even reflect that it considered whether summary judgment as to some defendants, perhaps coupled with a monetary assessment against the

plaintiffs for the defendants' expenses in defending suits in which they were improperly named, would have been an adequate sanction instead of a blanket dismissal.

Another aspect of the district court's decision that renders it suspect is the court's continued reliance on "forum shopping" considerations. In our previous opinion we noted that forum-shopping, "though a proper consideration in connection with a possible transfer under 28 U.S.C. § 1404, is not an appropriate ground for dismissal with prejudice for noncompliance with the discovery standing order." *Nita Brooks, etc., et al.*, No. 87-2480, at 14 n.3. Nonetheless, the district court's findings demonstrate that its decision to dismiss was again driven to a significant degree by just such concerns. *See* Findings #4, 8-10, Conclusions #22-25, 30 especially #24 ("The court cannot and will not condone blatant forum shopping."). Moreover, the district court's findings reflect a misunderstanding about the reason for the plaintiffs' initial decision not to file suit in New York. Although the court observed that "the choice of Pearson and this forum was based on the plaintiffs' attempt to evade responsibility for their failure to act promptly in New York for the most part" (Conclusion #30), in fact the situation for several if not all of these plaintiffs appears to have been that their asbestos injuries manifested themselves at a time when their causes of action had long since been barred by New York's statute requiring suit within three years of exposure. Moreover, the district court's emphasis on forum shopping is particularly inappropriate in the present case, where once the plaintiffs' causes of action were legislatively revived in

New York, they consistently (at least since June 1987) sought to return there to pursue their claims.

Finding #87 states that the "plaintiffs for the first time informed this court and counsel for the defendants of the refiling of the Rehm, Kupka, Cincotta, and Cabasin cases at the hearing on remand held on February 13, 1989." This finding also turns out to be at least partially incorrect, as does the district court's assertion at the February 13 hearing that the plaintiffs had misled this Court (although the plaintiffs never pointed out this error until their second appearance before this Court). On page 26 of their November 1987 brief to this Court, the plaintiffs notified this Court (and necessarily defense counsel) that if we reversed the district court's dismissal they would renew their request for a transfer "since the actions have recently been sued [sic] in the State of New York."

Yet another area of improper reliance by the district court was its focus on Pearson's history of misconduct in other jurisdictions (Findings #55-63). Limited reliance on this background might have been proper in the sense that it might be evidentiary of the willfulness of Pearson's delay in the present case, and indeed the district court did rely on it partly for this purpose, finding that the history of discovery sanctions "eliminat[es] any suggestion of simple mistake" (Finding #63). However, the district court went considerably further, noting also in Finding #63 that "[t]his pattern of discovery abuse and 1contumacious conduct has caused harm to these defendants while not punishing him [Pearson] for their other cases." *See also* Finding

#57. It is manifestly improper for the severity of a sanction to be influenced by an effort to balance the scale from previous encounters in other cases between the attorney and the defendants, certainly where, as here, the plaintiffs were not involved in those prior cases.

The overall picture that emerges from these findings is one of an order that is purely punitive against Pearson and not driven by considerations of docket management. We indicated in our previous opinion that although the district court would be justified in regarding Pearson's conduct in the early stages of the case to be contumacious and worthy of some form of sanctions, no serious prejudice to the defendants had resulted, as there had been no trial settings and no need for continuances. *Nita Brooks, etc., et al.*, No. 87-2480, at 10, 12. Accordingly, we concluded that any prejudice to the defendants was remediable by monetary sanctions. *Id*. at 12. When the cases were remanded to the district court, the situation as regards these four plaintiffs had changed only in ways counseling even more strongly against resort to a dismissal with prejudice. The threat that these cases would continue to interfere with the expeditious management of the district court's docket was lessened by the fact that Pearson was no longer involved in them, but had been replaced by the Lipsitz firm, as to which there is nothing in the court's findingsSQor in the recordSQto suggest contumacious or dilatory conduct. Moreover, parallel actions had already been filed in the Eastern District of New York, and these plaintiffs' primary request was for a transfer or a dismissal that would allow them to proceed in New York. This leaves only the goal

of punishing Pearson for the conduct in which he had already engaged. Although some punitiveness is appropriate for the purpose of deterrence, here the punishment of plaintiffs was grossly disproportionate to the harm caused to the defendants, and fell on plaintiffs who had not been shown to be involved in Pearson's misconduct and who had since discharged him.

II. Modified Disposition

For the foregoing reasons, we conclude that the district court's proceedings and findings following our remand did not address the concerns expressed in our previous opinion, and its decision again to dismiss these four cases with prejudice was an abuse of discretion. However, the time and money that have already been spent on these cases counsel against a remand for further proceedings in the district court, and indeed the plaintiffs do not seek that remedy; they ask instead that this Court modify the district court's disposition to make the dismissal without prejudice.

We are inclined to grant this relief provided the plaintiffs are willing to compensate the defendants to some extent for the delay that Pearson's handling of the case occasioned them. Although, as noted above, the defendants were not significantly prejudiced in their trial preparation by Pearson's delay, they did have to pay their attorneys for the time spent in documenting Pearson's noncompliance and seeking relief from the district court.

The district court found that the attorneys' fees incurred by the defendants before the March 1987 dismissal totalled $39,394.29,

although no basis for this figure appears in the record other than the defendants' Additional Requests for Findings of Fact and Conclusions of Law, filed on February 13, 1989. In those Requests, the defendants alleged that they had incurred pre-dismissal attorneys' fees of $39,294.29, but did not attach any supporting documentation.

In order to, in effect, condition the modification of the dismissal with prejudice to one without prejudice on some payment of attorneys' fees by plaintiffs to defendant, we include in our judgment the provisions of paragraph (b) below, which are designed to have in substance that effect, while still allowing these cases to be concluded at this time.

Accordingly, the district court's judgment in each of these four cases is REVERSED and in each case judgment is HERE RENDERED as follows, *viz*:

(a) The suit of each plaintiff-appellant is dismissed without prejudice;

(b) It is further ordered, adjudged, and decreed that each plaintiff-appellant shall pay each party defendant-appellee to the particular suit of said plaintiff the sum of $3,000, together with legal interest thereon from and after the date of this Court's mandate herein until paid; provided, however, any plaintiff-appellant may entirely discharge his or her said obligation as to any one or more particular said defendant or defendants (or all of them) by delivering to said defendant (or defendants) executed and notarized written release wholly releasing and discharging said particular defendant (or defendants) from any and all liability to

said plaintiff (or any attorney for said plaintiff or anyone holding by, through, or under said plaintiff) on account of any of the claims, causes of action, or matters alleged or sought to be alleged by said plaintiff in said suit, provided said release is so delivered not later than the later of (i) and (ii) following, *viz*: (i) the expiration of 30 days following the issuance of the mandate herein; (ii) 30 days following written demand therefore by the particular defendant. For purposes of this paragraph (b), husband and wife, or spouse and estate of deceased spouse, shall be treated as a single plaintiff.