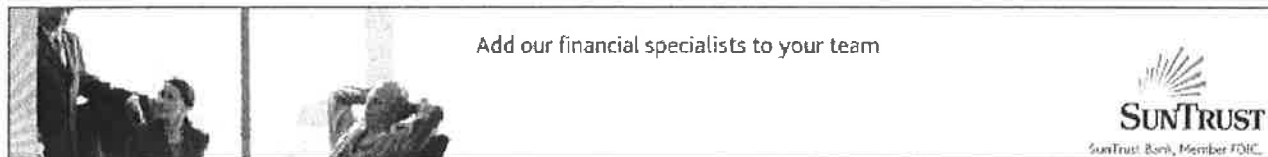


NORTH CAROLINA LAWYERS WEEKLY

www.nclawyersweekly.com

Lawyers Weekly, Inc.

[Try 3 Free](#) | [Subscriber Services](#) | [Our Newspapers](#) | [Other Products](#) | [Advertise](#) | [Help](#)



Add our financial specialists to your team

SUNTRUST
SunTrust Bank, Member FDIC.

From the January 01, 1993 North Carolina Lawyers Weekly.

Order a REPRINT
of this Story

Front Page Stories

Hamlet: The Story Behind The Settlement

An unprecedented team effort by plaintiff and defense lawyers, insurance adjusters and judges at four levels of the judiciary has led to a \$16.1 million settlement of the largest mass tort in North Carolina's history.

Late last month, checks began arriving for 102 victims of the 1991 fire at the Imperial Foods plant in Hamlet. The settlements' paid by three insurance companies that provided liability coverage for the employer' came 15 months after flames swept through the chicken processing facility, killing 25 and injuring 77.

ADVERTISEMENT

Individual payments ranged from a high of \$1 million to the family of a Lance Foods employee who was stocking snack machines when the fire broke out, to \$875 for another victim's emotional distress.

Now that the appeals clock has wound down, Lawyers Weekly talked with lawyers and judges involved in the case, who gave behind-the-scenes insights into the many twists and turns of the litigation.

Mass Tort

The Hamlet fire occurred Sept. 3, 1991, when a flammable fluid from a hydraulic line being repaired sprayed into burners beneath a deep-fat fryer. Fire and toxic smoke engulfed the building. Some workers were apparently trapped behind padlocked exit doors. Later reports revealed other safety violations at the plant.

The first plaintiffs' lawyer on the case was Charles Becton of Raleigh, retained by the family of an employee killed in the blaze. Becton moved quickly in filing a Superior Court suit based on *Woodson v. Rowland*. That 1991 Supreme Court decision said employers may be liable in tort for workplace conditions known to be 'substantially certain' to cause injury or death. Becton also obtained a court order allowing inspection of the Imperial Foods plant.

Eventually, 102 claims were brought. All of the plaintiffs had workers' compensation claims. Most of them also asserted *Woodson* claims. Most of the suits were filed in Superior Court.

'We wanted to sue in state court so we would have greater control over the litigation,' said Raleigh lawyer Jay Trehy, who represented three plaintiffs.

The defendants, however, had the suits removed to federal court. On Feb. 12, 1992, a pretrial conference was held before Magistrate Judge Russell Eliason in Greensboro. After that meeting, the parties agreed the suits would go back to state court.

But the real significance of the February conference was that it brought the 34 separate law firms representing the fire victims and their families together for the first time. Afterwards, the attorneys formed a plaintiffs' litigation committee. Trehy became chairman of the group.

'Suddenly we presented a united front,' he told Lawyers Weekly. 'United we were much stronger than divided. Defendants can't join together, but plaintiffs can. As a result, when I spoke with insurers, I wasn't just speaking for my law firm. I was speaking for 34 law firms. That carried more weight.'

Three Insurance Policies

The plaintiffs sought recovery from three employer liability policies:

Crum & Forster/U.S. Fire ' This was the primary commercial liability policy covering Imperial Foods. It provided limits of \$15 million per occurrence and \$30 million aggregate.

Liberty Mutual ' This was essentially a workers' compensation policy that also included \$100,000 in liability coverage.

American International Group ' This policy provided excess liability coverage of up to \$1 million.

Bankruptcy Blow

After months of negotiations, the parties reached a tentative agreement whereby the three insurance companies would pay their combined liability limits to the pool of plaintiffs. Before that could happen, however, the case took an unexpected twist ' the state Department of Labor fined Imperial Foods \$800,00 for safety violations, which pushed the company into bankruptcy.

'It was a tremendous blow,' said Trehy. 'It stayed all litigation. You couldn't file a new lawsuit and you couldn't litigate your pending suit. The insurance companies were about to pay the victims; it was just a matter of allocating the money. Suddenly we couldn't get at it because it was tied up in bankruptcy.'

As it turned out, Imperial's bankruptcy may have been a blessing in disguise for the plaintiffs. Absent the bankruptcy proceeding, there could have been a plaintiffs' race to the courthouse. Theoretically, the first case to go to trial could have gotten all the money.

'In one sense, the bankruptcy was bad,' said Trehy. 'But it was also good in that it made us focus on the money that was available and how we could get it to our clients.'

Power Adjustment

Bankruptcy Judge James Wolfe agreed to lift the automatic stay so that the parties could try to settle the claims. On the defense side, a team of adjusters and attorneys was assembled to make a 'power adjustment' of all claims. The group was supervised by Raleigh lawyer Walter Brock, who represented U.S. Fire.

'In my experience, this was extraordinary,' said Brock. 'You can imagine going through 102 claims. We sat down for several days and categorized every single claim so that we felt each claimant was treated fairly with respect to the others. Then we prepared a list with all of the claimants on the left-hand side of the page and the money for each listed on the right-hand column, with a total of \$16 million at the bottom. We sent the list out to all the lawyers with a cover letter saying, 'We've come up with the best way we can to divide this money. Here's what we've got. If you've got a better way, do it.'"

Trehy said the plaintiffs greeted the settlement offer with chagrin.

'Many people were unhappy with the original offers,' Trehy said. 'The defense said either we could accept their adjustment of these claims, or we could try. But there was no way we could do it. The pie was too small and the interests of the claimants too divergent. It had to be done either by the insurance companies themselves or by a third party. If done by a third party, you'd have to pay them and you couldn't look over their shoulder, plus it might end up worse.'

'Because it was done on a group basis, there were inequities,' said Trehy. 'The adjusters could only consider objective factors like income, earning history, nature of the injury and number of dependents. Lost were subjective things like whether the claimant was a choirmaster or a drunk who wasn't supporting children. One litigant was a sole provider for his disabled grandmother, but he didn't get the same money as one who had a dependent child. There were also differences based on socio-economic factors. Those who made more money got more money. Emotional distress claims weren't given much value at all.'

The offer was contingent on global acceptance, which meant every claimant had to agree to it ' or the deal was off.

'The proposal was straightforward,' Trehy said. 'Every claimant had to say 'Yes.' The insurance companies wanted to pay all their money and never have to look at this again. They were not going to pay millions and still have to try one case. I'd say it was a minor miracle all of the plaintiffs eventually came together.'

Another critical aspect of the settlement was that Liberty Mutual ' which had already paid more than \$2 million in workers' comp benefits ' agreed to waive its subrogation lien. This meant that in addition to the tort settlements, the claimants would also get their full statutory comp benefits.

In two days of hearings, Superior Court Judge Fetzer Mills approved settlements in the 25 wrongful death actions. The recoveries ranged from \$175,000 to \$1 million. The 77 injury claims, which did not require court approval, were settled in sums ranging from \$875 to \$1.1 million.

The Woodson Dilemma

At first blush, it would appear that the plaintiffs had open-and-shut Woodson claims. But Trehy said it was not that simple.

'It is hard to establish a true Woodson claim,' he said. 'You have to show intentional misconduct by an employer, as well as knowledge that there is a substantial certainty of injury or death. That is a high burden of proof.'

The catch-22, Trehy pointed out, is that the insurance policies in the case at hand ' like most commercial liability policies ' excluded coverage for intentional torts.

'You've got a real dilemma,' Trehy said. 'You have to prove a lot but not too much. If you prove the injury was intended, the insurance excludes coverage. So you have to show the injury was not expected or intended, but that the conduct was intended and that there was knowledge of substantial certainty of death or injury.'

'You wind up having to prove the difference between substantial certainty versus absolute certainty,' Trehy said. 'That's a fine line.'

To get around the Woodson dilemma, Trehy came up with other theories of liability coverage. He brought a claim under *Pleasant v. Johnson*, by which workers can sue co-employees for willful and wanton conduct. He also argued that a clause in the U.S. Fire policy covering 'executive officers, directors and shareholders' was applicable.

'The policy did not cover employees, but as additional coverage it covered executive officers, directors and shareholders in their capacity as such,' Trehy said. 'The modern trend is to consider executive officers to include all managers. My argument was that when I sued Brad Roe, the plant manager, for his activities as an executive officer, he was covered by the policy. That would get me out of the Woodson dilemma, and the claim would carry a lower burden of proof than Woodson's 'substantial certainty' standard.'

'That coverage question has not been litigated in this state,' said Trehy. 'It will wait for another day.'

Lawyers and Judges At Their Best

All of the sources contacted by Lawyers Weekly agreed the settlement came about only through hard work and cooperation by attorneys on both sides. 'Frankly, I was very skeptical that a settlement of this magnitude could be pulled off,' said Brock. 'But from the outset I said in light of this horrible human tragedy, we had an opportunity to improve the image of lawyers. To do that, however, we all had to sit down, put aside gamesmanship and get the job done for these people and their families.'

Finalizing the settlement required coordination between state and federal courts and the Industrial Commission.

'In the end it got done because the key focus remained on seeing that the money got to the victims as quickly as possible,' said Industrial Commissioner J. Randolph Ward, who added that he pulled several 'all-nighters' signing disbursement orders so that claimants would get checks before Christmas.

© Copyright 1993 Lawyers Weekly Inc., All Rights Reserved.

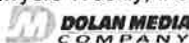
**Order a REPRINT
of this Story**

[User Agreement For Subscriber-Only Online Benefits](#) | [Help](#) | [Our Privacy Policy](#)

Send any questions or comments to comments@lawyersweekly.com

Subscriber Services: 1-800-451-9998 **Technical Support:** 1-800-451-9998

© Copyright 2008 Lawyers Weekly, Inc. All Rights Reserved



Lawyers Weekly does not use spyware; however, we link to a number of other sites and do not take responsibility for any spyware they may use.

This site is best viewed with Internet Explorer 6 ([click here to download](#))