

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JESSIE SHORT, et al.,)	
)	
)	
)	
v.)	
)	No. 102-63
)	Judge Lawrence S. Margolis
UNITED STATES OF AMERICA,)	
Defendants,)	
)	
)	
and)	
)	
HOOPA VALLEY TRIBE)	
)	
Defendant-Intervenor.)	
_____)	

QUARTERLY CASE ASSESSMENT REPORT TO THE COURT BY CO-COUNSEL JOHN W. CORBETT

INTRODUCTION

There are an estimated 1300 Jessie Short Judgment Plaintiffs and heirs who may be entitled to monetary distributions. The case is difficult, detailed, and has a history of slow payments to plaintiffs. The case was filed March 27, 1963. Judgment was entered September 7, 1994.

After the 2,557 judgments awarded to the Short Plaintiffs or their Estates were affirmed by the Appellate Court on May 5, 1995, the General Accounting Office (the agency charged with the duty to pay judgments against the United States) advised this Court it was not staffed to pay within a reasonable time the 1,942 living plaintiffs and the multiple heirs or beneficiaries of the 615 who were deceased.

In response to the GAO report, the Trust was established on December 21, 1995.

Payments began in 1996 and are still ongoing after fourteen years.

There are still some deceased plaintiffs whose heirs have not been identified in Department of Interior probate proceedings. There now are a substantial number of instances in which direct heirs of deceased plaintiffs died by the time they were identified by the Department of Interior. Before the judgments of these plaintiffs can be completely distributed the heirs must be identified in Department of Interior probates. Additionally, by this time some heirs of the heirs of deceased plaintiffs have died and their heirs, in turn, must be identified in Department of Interior probates for complete distribution of these deceased plaintiffs' Short judgment. It is therefore necessary to further extend the time for termination of the trust agreement.

Trust Amendment Number 4 of the January 9, 2007 Trust Amendment

There has been a tragic lack of progress since these words were written. The following summarizes the primary case activity during the time since the trust extension: 1) the hiring of a probate specialist on behalf of the trust; 2) two approvals for rent; 3) one approval of attorney fees; and 4) approval of the 32nd and 33rd schedule of payments. The trust has expired and must be renegotiated with Citibank, N.A. before Jessie Short Plaintiff or heirs can receive distributions.

Citibank, N.A., (Citi) has contracted with Gilardi and company, a class action distribution firm, to actually distribute checks and account for their cashing. The authority to contract was provided for in Section 4.4 "Paying Agent" in the original January 1, 1996 Trust Agreement. "The Trustee may at its discretion employ a paying agent to effect the payments described ..."

The Gilardi contract with Citibank has also expired.

According to the 1996 tax returns filed by former Plaintiffs counsel, Heller, Ehrman, White & McAuliffe (Heller Ehrman), of the 2,557 original, qualified claimants who are entitled to receive funds from the settlement, approximately 500 had died by the time of that filing and roughly half of the resulting estates were still being administered. Since that filing there have

been 33 ordered Schedules of Distributions to Plaintiffs and Plaintiff heirs. Two of those court approved scheduled distributions, the 32nd and 33rd Schedule of Disbursements, cannot be paid until there is a revised trust agreement. The current estimated 1,300 remaining Jessie Short Judgment Trust payees are greater than 50% of the number of the original Judgment Plaintiffs.

An assessment of the case suggests that significant changes will have to be made to speed up the current process in order to prevent losing control of the case to an endless cycle of deaths and new heirs. In order to meet the Court intention of finishing the case by the end of 2011 current approaches will need to be improved upon.

CLIENT COMMUNICATIONS

Currently, the case suffers from the worst of all worlds in that client communications may be characterized as inadequate but nevertheless require significant amounts of time. Client communications in this case present an unusual challenge as often the work of the attorney and others is to find and locate the judgment beneficiary clients. Some are aware they are clients and some are not and are surprised they are a potential beneficiary. Eligible Judgment Plaintiffs or relatives are often calling in to check on the progress on the case. Pattern responses are being developed but there is a difficulty in being accurate as to all the different legal types of clients.

Forms for Plaintiff(s) to submit updated address and personal information both electronically and by U.S. mail have been developed. The content of these forms has been reviewed by Pamela West representing the U.S. Government and Tom Schlosser representing the Hoopa Valley Tribe.

Case management will require a greater use of technology. I am in the process of setting up a client website that will keep clients apprised of the progress in the case. Therein will be an

on-line form for Plaintiffs and their heirs to submit necessary personal information to assist Plaintiffs' counsel in the distribution process. This should provide a permanent and clear record. Considerable time has been spent working with other Counsel of record to assure that sufficient information is provided and that there is an agreement on the details of the on-line form.

The website will also list persons who may be a beneficiary, hopefully inspiring potential beneficiaries to contact Plaintiffs' co-counsel on their own initiative. I expect this approach to result in a significant time savings.

In the meantime a client e-mail list is being developed to provide mass messages once a week to Jessie Short Plaintiffs known to be interested in the case. This should greatly improve the attorney client communication system.

The above is intended to resolve communications difficulties while circulating proposed distribution schedules. There have been ongoing and significant differences of opinion between Counsel, on the burden of proof and level of information needed to establish the identity and address of the Plaintiffs. Such discussions have added considerable time to producing proposed orders and have still resulted in filed responses of opposition to applications for payment before the Court.

The Court is thanked for adopting an Electronic Case Filing, (ECF), in your December 2009 ruling. This will make filings more efficient and timely.

COLLEGIAL APPROACH

Regular conference calls are occurring between counsel to narrow issues and to determine efficient means of solving ongoing disputes. The goal is for a quicker more efficient decision making process. The cooperation of all legal counsel will be required to distribute the trust to Plaintiff and Plaintiff heirs by November 4, 2011. Such an approach has already been

provided for in the Court Order of December 21, 1995 in Section 4E. "Plaintiffs' counsel and defendant's counsel will seek to informally resolve any matters related to the calculation to be used to disburse monies..." All counsel retain the right to seek the assistance of the Court if matters cannot be resolved between the parties.

This process has been only partially successful. The collegial approach has saved significant amounts of court time, the conversations are very educational to Co-counsel, and there has been a reduction in the time to resolve issues. The principal problem has been as more issues are discussed, the documentation required of Plaintiffs attorney keeps increasing. This in turn negates a portion of the time saved.

TRUST FUND ISSUES

The current trust has expired and the top priority of the case is to complete the negotiation of a restated trust agreement between Plaintiff and Citi. Without such an agreement the current Court approved distributions for the 32nd and 33rd cannot occur. Negotiations are in an advanced stage between Citi and Plaintiff. A copy of the redrafted Trust Agreement has been forwarded to Defendant's counsel to review. Morgan Stanley exercised a purchase option to buy Citi. This has resulted in a change of Trust personnel. It is hoped that the existing negotiated Trust Agreement will be readily accepted by the new management. Plaintiff projects that an agreement and motion for court approval will occur within two weeks. Pamela West of the Department of Justice has agreed to a prompt review of the Trust Agreement.

In the past Citi has contracted with Gilardi & Co. LLC (Gilardi) to actually disburse the checks. The service agreement between Gilardi and Citi has also expired. Gilardi has indicated the need to amend the agreement with Citi. The primary change sought is to increase fees to

reflect inflation. Since the Citi trust agreements provides for a cost pass through, the negotiation with Gilardi should be completed quickly.

A greater problem is that Gilardi has changed software since the last distribution. The old information needs to be converted or loaded onto the new software. Gilardi is cooperating by starting this process even before the trust agreement with Citi and a new contract with Citi is negotiated.

The December 21, 1995 Court Order creating the original Trust is in need of revision and updating. Considerable thought has been given to how to expedite the growing number of small sum beneficiary disbursements.

UNCASHED CHECK RECONCILIATION ISSUES

The U.S. Government audited at considerable expense and effort all payments to Jessie Short Plaintiffs which had been authorized by the Court. This is titled the “Jessie Short Judgement Verification Reports.”, (Verification Reports). The Verification Reports was issued in December of 2005. Two checks were potentially issued for each Judgment Plaintiff. One was the Jessie Short Judgment check. The other check was for the judgment made under the Equal Access to Justice Act, (EAJA). According to the Verification Report, there are 359 uncashed checks that were authorized and issued for either the primary or the EAJA judgment. There has been no review of un-cashed checks or attempts to reconcile accounts since 2005. On the surface this would suggest that a simple address search be conducted and a check reissued to located plaintiffs. Gilardi estimates that there are less than 100 such uncashed checks. In summary there is a huge discrepancy of at least 259 uncashed checks. The Verification Reports must be reconciled with the records of Gilardi in order to determine whether the trust assets are adequate. While there are many possible explanations such as cut off dates between the records

and a second mailing of checks as authorized by Plaintiffs Counsel etc., this matter needs to be immediately resolved.

An accountant has been hired to reconcile the Verification Report with the records of Gilardi and the Trust accounts. An accounting approach has been taken since this is less a legal matter than a reconciliation of checks. These cases are not being actively managed legally as the report of the accountant needs to be received prior to determining eligibility. I have advised the accountant to keep careful records of different categories of un-cashed checks that may have future legal significance¹. Another benefit of this approach is that steady progress can be made on 359 cases while the attorneys can concentrate on original unpaid Judgment Plaintiffs and their heirs. I have made a crude estimate that due to deaths there will eventually be around 400 Judgment Plaintiffs in this category. The Accountant should be able to complete a report within four to five months. It seems prudent to begin now rather than waiting until next year or at the end of the case.

BUREAU OF INDIAN AFFAIRS DELAYS

At least thirty-six original Judgment Plaintiffs or Judgment Plaintiff heirs' cases are delayed by the slow progress of the Bureau of Indian Affairs (BIA) to research their probates records to see whether a probate exists for these 36 original Plaintiffs. I have estimated, due to the long passage of time, which typically there are on average 10 heirs of the original Judgment Plaintiffs. This means that an estimated 360 payments to individual payees are being held up by the Bureau of Indian Affairs (BIA). Some of these heirs revealed in the BIA probate orders will

¹ The December 21, 1995 order in 5. c states that "the U.S. Mail Return Receipt, executed by the recipient to whom the check was delivered, will be presumptive evidence of proper payment of the Short judgment entered by this Court." These trust provisions are necessary to protect Plaintiff Counsel from liability but suggest that any mailing in compliance results in a final decision. No one anticipated the large number of un-cashed checks that were recorded in the Government Verification Report.

now be deceased. This will generate additional requests for probate record searches from the BIA. In some instances this also results in the request for probates to begin. Currently there are around 74 probate record search requests that are pending. Probates are received and added to the Bureau of Indian Affairs request for probate orders all the time. I am working with the Department of Justice attorney to speed up the BIA research of existing probate records. Unless this process can be sped up, it is my estimate that it will require an additional two to three years beyond the time period established by your Honor to finish the case. Whenever possible, Judgment Trust Monies will be paid to open probate proceedings being conducted by the Bureau of Indian Affairs. This will greatly speed up the distribution of Judgments to Plaintiffs or their heirs. I am investigating distributions to I.I.M. accounts and other solutions.

At different times, different attorneys employed different payment approaches. While there are exceptions (especially in filings by legal counsel Duke of Duke Gerstal, Shearer and Bregante), by and large attorneys waited until they had data and information on each judgment heir before filing. This made a lot of sense ten to twenty years ago. Now there are sometimes over sixty judgment heirs for a single original Plaintiff. Additional delays invite still further delays due to additional deaths, which in turn require more probates, which in turn ever more fragmented payments. In order to speed up the process, there will be far more partial distribution filings. Proper documentation for auditors will prove essential. The solution is a very detailed Schedule of Payment attached to requests for distribution that provide sufficient documentation that a proper audit trail can be maintained.

UPDATE: On February 9, 2010, after many months, two banker boxes of probate records from the Bureau of Indian Affairs were delivered to Probate Specialist Andrea McCovey. The arrival of these records is good news and will allow a faster development of beneficiary

payment schedules. However, as the probate records were not provided in any particular order probate specialist is still in the process of reviewing, organizing and integrating these documents. A determination will be made as to what documents remain to be procured from the BIA.

ACCOUNTANT

An Accountant, Suzanne Dockal, has been hired to 1) reconcile the un-cashed checks records of the Government Verification Report of 2005 and the Gilardi company records; 2) ensure compliance with court orders for an accounting by Mr. Wunsch; 3) prepare the paperwork for the 2009 informational trust I.R.S. and California State Franchise Tax Board filing; 4) determine whether trust assets are sufficient to meet estimated Plaintiff payment liabilities; and 5) prepare and provide an annual updating of the Government Verification report at the conclusion of each year. Without such support services there is no way that the case can be completed within two years. Copies of the terms of engagement have been circulated to Counsel.

RECORDS

Jessie Short case records are a major management issue. The approach is to rapidly move records from Mr. Wunsch's former San Francisco law office to safe sites and begin a significant sorting process. Mr. Wunsch is in the process of closing up a law office with records of forty-seven years on the Jessie Short case. There is a basement full of records as well as case records in Mr. Wunsch's home office. The process of sorting and the proper filing of the records will be done in phases. The alternative would be six months of no case activity while the files are organized and scanned. Active case records are being stored at the home offices of Bill Wunsch, Esquire, some in the basement of the former law office; the law office of John W. Corbett, Esquire; Crescent City storage facilities; as well as the Klamath Office of the Yurok Tribe. The

Tribe is currently sorting through a small portion (61 banker boxes) of these records. At the conclusion of this process the records will be electronically stored in the "DocStar" software program. An unknown (majority) number of boxes are being sorted by Esther Jee, a long time secretary of Mr. Wunsch. I have concluded that it is unlikely that I will receive a complete set of case records in the near future. The current approach is to continue to work with Mr. Wunsch and his assistant Esther Jee to secure and possess as many of the original files as is possible. Esther Jee is working particularly hard to secure the records from Mr. Wunsch's former office. There is a fundamental difference between taking over a case pre Judgment and after Judgment. By and large, I only need the Judgment and post judgment orders and records. An after Judgment assumption of duties allows the more narrow legal focus to be on locating and paying Plaintiffs rather than litigating the case in Chief. Given the length of time of this case, many key Court documents have been archived and will take considerable time to obtain from the Court. I am happy to report that Legal Counsel for the Government and Hoopa Valley Tribe have been cooperative in supplying documents to Plaintiffs' counsel from their files. The plan is to incorporate files as received into an organized system.

SUFFICIENCY OF TRUST ASSETS

A key job of the accountant will be to determine that there are sufficient Trust Assets to pay off the expected amounts owed to Jessie Short Plaintiffs or their heirs. There is a common assumption by the attorneys working on this case that the Trust Assets of Four Million Four Hundred Eighty-One Thousand Two Hundred Fifty-Four dollars(\$4,481,254) dollars is sufficient. Given the time that this case has gone on, it would seem wise to confirm the assumption of sufficiency with actual figures. The Accountant will take the reconciled uncashed check sums due Plaintiffs, compile the dollars of un-paid Jessie Short Plaintiffs and

Plaintiff heirs, account for recent distributions, and an estimated trust administration expenses. The largest unknown is attorney fees.

INTERNAL REVENUE SERVICE AND STATE FRANCHISE TAX FILINGS

Tax Filings from 1996 to 2008 have been found and collated. Copies have been sent to the Department of Justice and Hoopa Valley Tribe attorneys. The accountant and I will supply the necessary information to Citibank who will prepare and file the actual I.R.S. and State Tax Franchise Board informational filing on behalf of the trust. These are the 1120 SF U.S. Income Tax Return for Settlement Funds (Under Section 468B) and the California Fiduciary Income Tax Return. Plaintiffs Co-Counsel expects to be able to file both returns on time.

TRUST ADMINISTRATION EXPENSES

In order to meet the expressed desire of the Court to have this case concluded by the end of 2011, it will require an across the board increase in resources being devoted to this case. I am in the process of reviewing what level of professional services will be required. The use of an accountant has been identified and the possible hiring of additional beneficiary finders is being considered.

Past payments for attorney fees have often been on a contingency basis or EAJA fee basis. At this point, the majority of such monies have been paid out and are gone. As a consequence, there is little choice but to develop hourly legal fee arrangements.

There is a large un-paid sum of attorney fees for Mr. Wunsch. His motion requested Six Hundred Thousand dollars (\$600,000) of additional attorney fees. The Court ordered an interim Twenty-One Thousand dollars (\$21,000) until documentation issues can be resolved. A legal fee resolution process needs to be developed to determine how much Mr. Wunsch is owed. Such a

final fee can then be booked as a trust liability. This is necessary before a determination can be made as to the adequacy of trust assets to pay all Plaintiffs.

BURDENSOME POST JUDGMENT PROCESS

One fundamental difference in this case from others is the extensive level of review by outside counsel that occurs with each distribution to Plaintiffs. Ordinarily, once it is clear that a client is owed money out of a trust account there is an immediate duty to pay the money. Plaintiffs' attorney is responsible for locating his client and forwarding the trust check promptly. By comparison the Jessie Short post judgment substitution of heirs payment process is slow and very detailed.

A simple difference of opinion on the correct address can lead to family interviews, client interviews, signed statements by clients, drivers license photo-copies, certified true and correct County Birth Certificates, production of utility bills to prove residence, tribal membership records etc. Again, the expectations of counsel for the Jessie Short post judgment payment proof standards are at a much higher level of proof than required in Department of Interior or State court probate proceedings and slow down distributions significantly. Protocols which were intended to speed up this process have since improved the speed of processing and Counsel of record are to be thanked for their cooperation. Nevertheless, the protocols have fallen short of their potential in speeding up the process. There is a balance between insuring that no fraud can ever occur and the need to pay plaintiffs in a timely fashion. Given a set date for completion, time may run out prior to payment of all eligible Plaintiffs or their beneficiaries. In summary, the different legal counsel by a good faith representation of their client have created in combination a slow payment system. We are also getting a net gain in speed as my skill level and legal counsel grow accustomed to working with each other. At our latest conference call other legal

counsel believed that the process was evolving to a more efficient one. Alternatives to this process are being actively researched and considered for future recommendation to the Court.

CONCLUSION

After careful consideration, I came to the conclusion that the Court would benefit from an appraisal of the case and a description of the unusual challenges that exist to resolving the case by the 2011 deadline. This report also conforms to the December 21, 1995 Court Order requiring quarterly reports.

Respectfully Submitted

Dated: February 26, 2010

/S/

John Corbett, Esquire
Co-counsel for Plaintiffs