

The *Garlock* Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases

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Abstract

As a Delaware Superior Court Judge formerly assigned to the asbestos docket, this author learned firsthand about the difficulties inherent in accounting for bankruptcy trust recoveries in asbestos personal injury lawsuits and the abusive practices facilitated by the lack of any coordination between the two compensation systems. The recent bankruptcy court decision in In re Garlock reveals just how widespread the tactics of strategic non-disclosure and trust submission timing have become. This Article explores the need for coordination between the bankruptcy trust and the civil tort systems and calls upon trial judges to institute procedures to identify the scope and real-world impact of fraudulent asbestos claiming upon the integrity of the judicial process.

Introduction

Before my retirement as a trial judge on the Superior Court of the State of Delaware, I was assigned to our state's growing asbestos litigation docket.¹ In that capacity, the circumstances of one particular asbestos wrongful death case over which I was to preside² unexpectedly thrust me at the center of one of the most controversial issues that has ever dominated asbestos litigation—the lack of any nexus, interface, or transparency between the two systems that currently exist for providing compensation to victims of asbestos exposure. Plaintiffs today can seek relief in two

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¹ See Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 541 (2009) (discussing the increase in filings in Delaware due to liberal *forum non conveniens* law).

² See generally *In re Asbestos Litig.*, No. 09C-11-217-ASB, 2011 WL 5395554 (Del. Super. Ct. Sept. 28, 2011).

ways: through the filing of a tort action against solvent manufacturers of asbestos-containing products and by filing claims with any of more than sixty asbestos bankruptcy trusts that have been established by the asbestos thermal insulation manufacturers who once played a central role in the asbestos industry, and more recently, by suppliers of encapsulated asbestos products.³ As these manufacturers and suppliers have seen their assets exhausted by the sheer number and magnitude of the judgments against them, they have been forced to file bankruptcy. The trusts established under section 524(g) of the Bankruptcy Code⁴ have become part of the overall framework and a significant source of compensation for asbestos personal injury plaintiffs, representing a \$30 billion-plus total fund.⁵ The gap between the trust and tort systems and the extent to which plaintiffs or their attorneys have taken advantage of it, has been the subject of both federal and state legislative reform efforts,⁶ as well as countless scholarly publications and articles.⁷

³ See LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS 25 (2010), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf.

⁴ 11 U.S.C. § 524(g) (2012).

⁵ Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, MEALEY'S ASBESTOS BANKR. REP., Oct. 2012, at 1, available at http://www.bateswhite.com/media/publication/11_media.617.pdf.

⁶ OHIO REV. CODE ANN. §§ 2307.951-2307.954 (2013); OKLA. STAT. tit. 76, §§ 81-89 (2013); Furthering Asbestos Claim Transparency (FACT) Act of 2013, H.R. 982, 113th Cong. (2013) [hereinafter FACT Act]; H.B. 153, 98th Gen. Assem., Reg. Sess. (Ill. 2013); H.B. 481, 2013 Leg., Reg. Sess. (La. 2013); H.B. 529, 128th Leg., Reg. Sess. (Miss. 2013); H.B. 1150, Reg. Sess. 2013-2014 (Pa. 2013); H.B. 2545, 83d Leg., Reg. Sess. (Tex. 2013); S.B. 19, 2013-2014 Leg., Reg. Sess. (Wis. 2013); A.B. 19, 2013-2014 Leg., Reg. Sess. (Wis. 2013).

⁷ Compare S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299 (2013); William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. BANKR. L. & PRAC. 257 (2008); LLOYD DIXON & GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION (2011), available at http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1104.sum.pdf; John B. Manning, *Impact of Bankruptcies on Asbestos Litigation*, ASBESTOS MED., Nov. 2009; Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. TRIAL ADVOC. 1 (2012); with Elihu Inselbuch et al., *The Effrontery of the Asbestos Trust Transparency Legislative Efforts*, MEALEY'S LITIG. REP.: ASBESTOS, Feb. 2013, available at http://www.capdale.com/files/8122_ASB022013cm.pdf.

In re Asbestos Litigation

In order to assure that defendants in the tort system have access to information contained in the trust submissions and to prevent litigants from advancing two different fact patterns to maximize recovery from both sources, there is a growing trend toward requiring plaintiffs in civil lawsuits to disclose trust submissions. Many state trial courts, including Delaware, require full disclosure of trust claims as part of their case management orders.⁸ The problem, I discovered, is that there exists no foolproof mechanism to enforce this requirement.⁹ Hence, on the morning I was scheduled to commence a two-week asbestos trial, I learned that the plaintiff or his attorneys, or both, not only failed to disclose a significant number of trust submissions, but was also able to withhold a substantial body of exposure evidence that had been presented to the trusts but not to the defendants in the litigation.¹⁰

Having wasted valuable judicial and administrative resources and with a pre-selected jury waiting to serve, I had no choice but to continue the

⁸ Delaware, Illinois, California, New York, Pennsylvania, West Virginia, and Texas require pretrial disclosure of trust claims that have been filed. *See* Standing Order No. 1 at ¶7(k), *In re Asbestos Litig.*, 911 A.2d 1176 (Del. Super. Ct. 2006) (No. 77C-ASB-2), available at <http://www.defenselitigationinsider.com/files/2013/11/New-SO-1.pdf>; DIXON & MCGOVERN, *supra* note 7, at 17-18. Montgomery County, Pennsylvania and New York City require the filing of trust claims before trial. *See id.* Ohio requires the submission of all anticipated trust claims prior to trial with procedures available to defendants to stay the trial to require a plaintiff to submit additional bankruptcy trust claims. OHIO REV. CODE ANN. § 2307.952 (2006). Oklahoma's statute requires the disclosure of claims forms materials within 90 days of the commencement of a case. OKLA. STAT. tit. 76, § 83 (2012).

⁹ *See* Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, MEALEY'S ASBESTOS BANKR. REP., June 2012, at 1, available at http://www.bateswhite.com/media/publication/17_media.580.pdf.

¹⁰ Just prior to opening statements before the jury, I was advised that the plaintiff had filed claims with a number of bankruptcy trusts, which information was directly contrary to the representations made by plaintiff's counsel at the pretrial conference and the sworn disclosure required under the court's case management order. The remaining defendant in the case, Foster Wheeler, had been led to believe that the decedent's only exposure was the result of laundering her husband's clothing. In fact, she had been exposed through her own occupational activities to the products of at least twenty additional insolvent defendants who were never previously mentioned and had, therefore, never been considered in assessing liability among all co-defendants. *In re Asbestos Litig.*, No. 09C-11-217-ASB, 2011 WL 5395554 (Del. Super. Ct. Sept. 28, 2011).

trial, which ultimately led to a dismissal of the case.¹¹ My reaction to the deceptive behavior caught the attention of those who were actively seeking greater transparency between the two compensation systems. As a result, upon my retirement, I was frequently asked to testify about my experience, unquestionably because the case presents a quintessential example of the abusive practices that members of the asbestos defense bar are actively seeking to curb.

My efforts to encourage reform by recounting the unfortunate saga of my aborted trial were always resisted by members of the plaintiffs' bar, who consistently and vigorously maintained that the case was an aberration, that there had been no fraud established in the trust-claiming process, or that any proposed reforms were a "solution in search of a problem."¹² A typical response to my description of the case was as follows:

Are there lawyers who may misbehave? I'm sure there are. I'm sure there are some. In 50 years of practice, I haven't seen many, but I am sure there are some that misbehave either as plaintiffs or defendants.

But Judge Ableman will catch them. That is the proof that when abuse occurs, the court system, the state court system around the country is perfectly able to find the abuse.¹³

In fact, one representative of the trusts and an outspoken opponent of any legislation to require greater openness between the two compensation systems has even stated categorically: "These laws [FACT Act and state legislative reforms] are not designed—nor intended—to address fraud in the trust system. Indeed, there is not a scintilla of evidence of any such problem."¹⁴

¹¹ Transcript of Pretrial Hearing at 13, *In re Asbestos Litigation*, No. 09C-11-217-ASB, 2011 WL 5395554 (Del. Super. Ct. Sept. 28, 2011) (No. 444).

¹² *Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 99 (2013) [hereinafter 2013 FACT Hearing] (statement of Rep. Steve Cohen), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg79879/html/CHRG-113hhrg79879.htm>.

¹³ *Id.* at 54 (statement of Elihu Inselbuch, Esq.).

¹⁴ Inselbuch et al., *supra* note 7, at 9.

The Impact of *In re Garlock*

Until recently, the defense bar pointed to only a smattering of reported instances of the type of deception that my case so clearly illustrated.¹⁵ In contrast, opponents of reform continued to assert that systemic fraud did not exist—or at least had not been established—and the few examples that I or others had identified were rare or anecdotal.¹⁶ In short, the rejoinder has always been that reforms to achieve transparency were wholly unnecessary.¹⁷ Ironically, because information contained in trust submissions was not readily available, the opponents of transparency legislation were able to continue to scoff against those who advocated reform without fear of being discredited by anything but the few examples of deception that judges had occasionally been able to uncover. In essence, the secrecy in the trust-claiming system became its own obstacle to reform.

The debate raged on at all levels, and perhaps continues today, but the decision of the United States Bankruptcy Court for the Western District of North Carolina in gasket-manufacturer Garlock Sealing Technologies, Inc.'s estimation proceeding is certain to have silenced to some extent the zealotry with which plaintiffs and their attorneys have resisted transparency reforms.¹⁸ The *Garlock* opinion represents a stunning expose' of the breadth of the practice of withholding exposure evidence concerning the products of bankrupt entities.

As is evident from the scope and detail of the opinion, the court in *Garlock* embarked on an extensive effort to understand fully the history of asbestos litigation in the United States, the scientific evidence relating to asbestos and asbestos-related disease, including epidemiology and industrial hygiene expert testimony, the social science relating to asbestos

¹⁵ See, e.g., *Kanianian v. Lorillard Tobacco Co.*, No. CV 442750 (Ohio Ct. C.P., Cuyahoga County 2007); Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, Abuse Concerns Follow Suit*, WALL ST. J., Mar. 11, 2013, at A1, available at <http://online.wsj.com/news/articles/SB10001424127887323864304578318611662911912>.

¹⁶ Inselbuch et al., *supra* note 7, at 2, 6, 7; 2013 FACT Hearing, *supra* note 12, at 55, 162, 165 (response to questions for the record).

¹⁷ Inselbuch et al., *supra* note 7, at 7-10; 2013 FACT Hearing, *supra* note 12 (written submission of Elihu Inselbuch).

¹⁸ *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014).

litigation practices, and its evolution into the dual compensation system that exists today.¹⁹ In undertaking this estimation effort, the court deviated from the usual practice of projecting the number of claims a trust anticipates receiving, and then determining the historic settlement value of those claims, so as to approximate what the trust's solvent predecessor would have paid to settle lawsuits.²⁰ In so doing, Judge Hodges unearthed what can best be described as a stunning pattern of fraud and misrepresentation that should provide new and powerful support for the defense bar's crusade for greater openness.²¹

Specifically, in order to estimate Garlock's liability for present and future mesothelioma claims relating to its asbestos-containing products, the Bankruptcy Judge authorized additional investigation to determine the legitimacy of using Garlock's settlement history as an accurate measure of its future liability. The evidence he found as a result of delving into the facts of only fifteen out of hundreds of settled cases resulted in the court's conclusion that "[i]t was a regular practice by many plaintiffs' firms to delay filing Trust claims for their clients so that remaining tort system defendants would not have that information."²² That finding also led to the court's scathing criticism "that the last ten years of [Garlock's] participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers."²³

In its exhaustive historical review of the shifting nature of asbestos litigation since the early 2000s, when the large thermal insulation defendants were no longer subject to suit as a result of their bankruptcies, the court described in detail how the plaintiffs' attention turned to more peripheral defendants like Garlock, who were not producing the more toxic thermal insulation products, but manufacturing items like gaskets, some asbestos-containing.²⁴ Not surprisingly, from about 2000 to 2005, as more and more of the "big dusties" sought bankruptcy protection, the settlements demanded of the solvent entities increased correspondingly.²⁵

¹⁹ *Id.* at 75-87.

²⁰ *Id.* at 94-97.

²¹ *Id.* at 84-87.

²² *Id.* at 84.

²³ *Id.* at 82.

²⁴ *Id.* at 73, 83-84.

²⁵ *Id.*

And, as insulation manufacturers exited the tort system for bankruptcy protection, the court found that the evidence of the exposure to the products of these same bankrupt insulation companies disappeared as well, through the deliberate efforts by some plaintiffs and their lawyers to withhold such evidence until after the conclusion of the tort litigation.²⁶

In the fifteen randomly selected cases where the court permitted Garlock to engage in full discovery, the court found that exposure evidence had been withheld in *each* of them.²⁷ The discovery revealed, on average, that plaintiffs disclosed only two exposures to bankrupt companies' products in the tort cases. These same plaintiffs, however, made claims on average against nineteen such companies' trusts, but only *after* reaching a settlement with Garlock.²⁸ Since this calculated withholding of evidence served to distort the level of responsibility on the part of Garlock and others, the court could not avoid reaching this disturbing judgment:

These fifteen cases are just a minute portion of the thousands that were resolved by Garlock in the tort system. . . . But, the fact that *each and every one of them* contains such demonstrable misrepresentation is surprising and persuasive. . . . It appears certain that more extensive discovery would show more extensive abuse. But that is not necessary because the startling pattern of misrepresentations that has been shown is sufficiently persuasive.²⁹

The widespread fraud brought to light by Judge Hodges in his foray into a deeper understanding of asbestos litigation does not come as a great surprise to those who have sought reforms. But, the court's findings as to the relative level of responsibility of Garlock and similar end users of encapsulated asbestos products should be equally troubling to many of the defendants still in the tort system, who have spent the last decade or so forced to settle the same type of cases, which, prior to the emergence of bankruptcy trusts, had summarily been dismissed or settled for well below their projected transaction costs.³⁰

²⁶ *Id.*

²⁷ *Id.* at 85-86.

²⁸ *Id.* at 85-87.

²⁹ *In re Garlock Sealing Techs.*, 504 B.R. at 85-86.

³⁰ *Id.* at 73, 83.

Garlock's story is typical of many of the remaining solvent co-defendants in the asbestos tort system who began being sued with increasing frequency beginning in the early 1980s, despite the fact that the products they sold exposed people to lower doses of a relatively less potent chrysotile asbestos and almost always in the context in which they were exposed to much higher levels of more potent amphibole asbestos from manufacturers who were no longer viable defendants in the tort system.³¹ These more remote defendants increasingly became lead defendants in the tort system, resulting in elevated shares of liability, notwithstanding that they, like Garlock, consistently maintained that their products did not cause asbestos disease.³² Judge Hodges' conclusions regarding the lower levels of toxicity of chrysotile asbestos, and those of Garlock's products, are significant because these are the factual findings of an experienced judge, rather than the determination of a jury.

It remains to be seen, after the court's troubling findings in the *Garlock* case, whether bankruptcy judges in the future will be reluctant to determine trust values by assessing settlement history alone. It is also too early to predict the impact of this decision on ongoing settlement practices of solvent defendants or to know whether the revelations in *Garlock* will have a chilling effect on future fraudulent practices. Notwithstanding the uncertain impact of the *Garlock* case, judges should view the decision as a wake-up call to acknowledge the very real possibility that asbestos lawsuits on their own dockets may be similarly compromised by the withholding of the same information in the court cases that is used to gain recoveries from the trusts.

While these transparency loopholes exist, trial judges can and should take steps to eliminate the opportunity for lawyers to game the system through strategies such as withholding trust claims until the tort case is concluded, or utilizing professionals not involved in the state court litigation to be wholly responsible for the submission of bankruptcy trust claims. I fell into the trap of relying upon the integrity of the parties or their lawyers to abide by the case management order requiring full disclosure. At the time, I was not aware of the methods routinely employed by plaintiffs to avoid disclosure of all of their exposure sources and of the evidence supporting them.

³¹ *Id.* at 75, 78, 82.

³² *Id.* at 75, 79, 82-83, 87.

Advice to Trial Judges

So long as the present system allows plaintiffs to leave out critical facts that later form the basis for recovery from bankruptcy trusts, judges need to send a strong message to the asbestos bar that full disclosure of all facts is mandatory from the very inception of the litigation, since even the settlement strategies of these defendants are profoundly affected by the factual circumstances of a particular plaintiff's *overall* exposure. Trial judges should also express a willingness to reopen cases post-trial if it is later discovered that relevant evidence was withheld, and they should make it known that they are not adverse to using the inherent power of the courts to sanction this type of fraudulent activity, including that of lawyers who deliberately, or out of neglect, fail to verify if any submissions have been made.

Even if the bankruptcy trusts are content to overlook inconsistencies, state courts should be unwilling to ignore instances of fraudulent activity, if for no other reason than to show respect for the truth-seeking function of the courts. Given the protracted pace at which legislative reforms can be accomplished, it is incumbent upon the civil justice system, and the individuals who are responsible for its administration, to refuse to tolerate a process where litigants may advance one set of facts under penalty of perjury in one forum, and a contradictory set in another. As the court aptly noted in *Garlock*, “while it is not suppression of evidence for a plaintiff to be unable to identify exposures, it is suppression of evidence for a plaintiff to be unable to identify exposure in the tort case, but then later (and in some cases previously) to be able to identify it in Trust claims.”³³

Importantly, trial judges who preside over asbestos cases also need to avoid the tendency to treat denials of summary judgment motions as non-dispositive rulings. As Judge Hodges' careful scrutiny and analysis of *Garlock*'s settlement strategies revealed, the transactional costs associated with pretrial discovery, motion practice, preparation, and trial of these cases are so enormous that a defendant who does not prevail on summary judgment is generally limited to negotiating a reduced amount to pay in settlement of the claim, no matter how weak the

³³ *Id.* at 86.

evidence of actual exposure.³⁴ Trial in these circumstances is almost always cost prohibitive. Judges should therefore be mindful that a denial of summary judgment does not, in reality, leave the parties free to prove their case at trial.

Conclusion

The pattern of misrepresentation described in detail in the *Garlock* opinion should serve to suppress somewhat the outcry from plaintiffs' lawyers that "there is no fraud." To continue to suggest that it is fair to maintain secrecy in the trust-claiming process, or that reform is unnecessary, is belied by the results of Judge Hodges' limited excursion into the factual circumstances of just a few of the cases in which *Garlock* was demonstrably prejudiced. We are now past the time when these cases can be referred to as mere anomalies or when we can view *Garlock* as the sole asbestos defendant which has been prejudiced by these practices. While the limited legislative measures to eliminate fraudulent claims may discourage some strategic nondisclosure and some manipulation of trust submission timing, it will be up to trial judges to fill the enforcement gaps not only by case management orders, but by leaning strongly on the attorneys to act ethically, honestly, and responsibly. And, there is always the additional risk that some defendants may find out about delayed after-the-fact filings, and then plaintiffs who may be manipulating trust claims and litigation settlements will have to deal with judges from a far more difficult perspective, as it is their credibility that will have been tarnished.

For my part, I am relieved to have been somewhat vindicated by the *Garlock* decision and to have some support for my own suspicions regarding just how widespread these deceptive practices have become. In the final analysis, there is no question that the *Garlock* decision, together with the startling findings recounted therein, should be required reading for all judges who preside over asbestos personal injury cases.

³⁴ *Id.* at 87.