The Time Has Come For Courts To Respond To The Manipulation Of Exposure Evidence In Asbestos Cases: A Call For The Adoption Of Uniform Case Management Orders Across The Country

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[Editor’s Note: A former Delaware Superior Court Judge, Peggy Ableman is Special Counsel in McCarter & English, LLP in Wilmington, Delaware. She has nearly thirty years of experience as a state trial judge and has testified before the U.S. House of Representatives, Wisconsin Senate and Pennsylvania House Judiciary Committees, and Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association’s Tort Trial and Insurance Practice Section. Copyright © 2015 by Peggy L. Ableman. Responses are welcome.]

As the longest running mass tort in our country’s history, asbestos litigation has seen more than its share of ethical scandals, widespread abuse, and by some standards fraud.¹ These problems continue, with the decision in the bankruptcy case of gasket and packing manufacturer Garlock Sealing Technologies, LLC taking center stage.²

In January 2014, a North Carolina federal bankruptcy judge set the asbestos plaintiffs’ bar reeling with his landmark opinion in In re Garlock Sealing Technologies, LLC (“Garlock”). The discovery done and subsequent decision in Garlock exposed widespread manipulation and abuse of asbestos bankruptcy trust claims and suppression of evidence of plaintiff exposures to asbestos from third-parties. These problems were facilitated by the existence of two separate but parallel compensation systems that are available to individuals who have sustained injury through exposure to asbestos or asbestos-containing products. The Garlock decision also served to lend credence to long-suspected fraudulent practices that had previously been randomly exposed in a smattering of individual cases.

From my perspective as a former state trial judge, the courts themselves share some of the blame by their failure to face up to the reality that the soundness of our civil justice system is in jeopardy as long as critical, highly relevant information about plaintiffs’ asbestos exposures is routinely suppressed in civil asbestos litigation. Indeed, the lack of transparency between the asbestos bankruptcy trust claim system and civil asbestos litigation has broader implications for how fairly and equitably our justice system operates.

The threat to the truth-seeking function of the courts posed by the absence of transparency between the trust compensation and tort systems had already informed my judicial sensibility as a result of an unfortunate, yet eye-opening experience during my tenure on the Superior Court of the State of Delaware.³ I was forced to continue and ultimately dismiss a scheduled, lengthy asbestos personal injury trial moments before it was to commence because I learned that evidence of twenty-two asbestos bankruptcy trust claims had been suppressed by plaintiffs or their counsel. As a result, the striking revelations in the Garlock opinion were hardly surprising to me. Instead, they served to validate my experience and provided added support for asbestos bankruptcy trust claim transparency as an essential component of the defense of every asbestos-related personal injury case. What is surprising, and even troubling, however, is the limited response or reaction from courts to date, even in the face of powerful, documented examples of the ease with which plaintiffs have been able to conceal asbestos exposure evidence in tort litigation, while asserting exposures in order to receive additional compensation from the bankruptcy trusts.
Given the broad media reporting following *Garlock*,
and the protracted efforts to achieve legislative reform, it is incumbent upon the courts to promulgate procedural mechanisms to eliminate the abuses described in *Garlock*.

### The Garlock Decision And Courts’ Reaction

Until the early 2000s, Garlock Sealing Technologies, LLC had been a relatively minor participant in the asbestos tort system. Garlock had relative success in settling cases for reasonable amounts consistent with the level of its possible culpability. But as companies exited the tort system for bankruptcy protection, plaintiffs’ lawyers began to target “peripheral defendants” like Garlock to replace “top-tier defendants” that had produced thermal insulation and refractory products and had accounted for a substantial share of the compensation paid by defendants in the tort system. “The payments by the peripheral defendants increased, even though the extent of their responsibility for exposure remained unchanged.” Defendants struggled to prove that alternative exposures were partly or entirely responsible for plaintiffs’ injuries because “evidence of plaintiffs’ exposure to other asbestos products often disappeared.” This occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants’ asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants). In this new environment, Garlock sustained a few hefty verdicts and was forced to pay higher values to settle cases. Garlock continued to settle cases until its insurance was exhausted and it filed bankruptcy in 2010 to establish a 524(g) asbestos trust.

Following a lengthy bankruptcy estimation trial, Bankruptcy Court Judge George Hodges issued an exhaustive opinion wherein he found that Garlock’s previous settlements of mesothelioma cases were “infected by the manipulation of exposure evidence by plaintiffs and their lawyers.” As part of the future liability estimation process, the court allowed the parties to conduct extensive discovery into the facts of fifteen randomly selected cases out of hundreds that had settled. In those fifteen cases, “Garlock demonstrated that exposure evidence was withheld in each and every one of them.” As such, any further extensive discovery was deemed unnecessary because “the startling pattern of misrepresentation that has been shown is sufficiently persuasive.”

Accordingly, Garlock’s pending and future mesothelioma claims were valued at $125 million, not a modest sum by any means, until it is juxtaposed against the approximately $1–1.3 billion that had been requested by the plaintiffs’ committees.

The *Garlock* decision generated a flurry of articles and commentaries by legal scholars, plaintiff and defense asbestos attorneys, and from mainstream media. Interest continues as the judge in *Garlock* has opened the previously sealed *Garlock* record to the public and Garlock pursues civil racketeering, fraud, and conspiracy suits against various asbestos plaintiffs’ law firms and individual attorneys that were involved in the dubious claim patterns and practices exposed by Judge Hodges.

Even with all the attention that the *Garlock* case has received, however, neither the courts nor defense attorneys in general have reacted in any large scale way to address the abuses detailed in the opinion. If the judicial response is merely to recognize the existence of the deception fostered by the dual asbestos trust and civil tort compensation schemes, or simply to decry the findings—without more—then those who care deeply about fairness in the judicial process bear equal responsibility for allowing the harmful effects of any continued fraudulent activity.

We now know that the secrecy of the trust claiming process has created a system rife with the potential for abuse, and we are aware of the existing loopholes that enable these practices to continue. It is the duty of judges—administrators of the rule of law and stewards of the principles of fairness and justice—to deal with these obstacles by implementing procedures or case management orders to avert this threat to the truth-seeking function of the courts.

Our judicial system cannot afford to solve this crisis with only a protracted and piecemeal legislative response or through the limited disclosure late in discovery (if at all) ordered on a case-by-case basis by individual judges in singular jurisdictions. A lesson of *Garlock* is that there are a myriad of opportunities to “game the system” in asbestos litigation and neither legislative nor judicial efforts have thus far been sufficient to stop such abuses. It is, therefore, a matter of urgency that the courts address abuses in asbestos personal injury litigation, and not wait for legislatures to act.
The Judiciary Represents The Most Immediate Path To Reform

Judges should not overlook the important role that the judiciary has had—and should have—in improving the asbestos litigation landscape. In the past, courts have addressed other crises in this area of the law. For example, when mass filings by unimpaired claimants were creating judicial backlogs and exhausting available resources, the courts generally responded by realizing that too much efficiency could interfere with fairness. Likewise, when mass filings by unimpaired claimants, largely through plaintiff lawyer-arranged screenings, caused some asbestos dockets to reach crisis proportions, a number of courts used their inherent power to manage their caseloads by implementing inactive asbestos dockets, also referred to as "pleural registries." These management tools gave priority to persons who were genuinely sick and suspended the claims of the non-sick.

When the federal judge responsible for multi-district litigation of silica claims exposed widespread fraud in the unreliable diagnoses of thousands of cases, the courts acted promptly by wholesale dismissal of those cases that were recruited by the attorneys, or at least by excluding the offending physicians from offering expert testimony. Other high-volume diagnosticians hired by plaintiffs' attorneys to perform screenings that would result in positive findings for disease were also banned from continuing their activities by courts who properly accepted their judicial gate-keeping function.

Just as these judicial responses to unfair practices were able significantly to curb them, it is reasonable to expect that courts should eliminate the fraudulent concealment of bankruptcy trust claiming activity and suppression of evidence of alternative exposures that was revealed in Garlock. Indeed, given the challenges inherent in the legislative process, the most immediate path to reform must be through the trial courts in this country where the fraud is actually occurring and where so much is at stake.

The judiciary’s responsibility to improve the administrative of justice can best be accomplished by the entry of a uniform case management order ("CMO") or "Order" that will address all of these transparency issues, including mandatory disclosure of all trust claims, the timing of filing of claims, the evidentiary issues regarding admissibility at trial and presumptions attributed to them, the responsibility of attorneys to monitor and disclose claims filed by other counsel, and the procedures for challenging non-submission of claims.

The CMO that I am urging courts to implement across the nation imposes obligations on plaintiffs to investigate, file, and produce all asbestos bankruptcy trust claims soon after an asbestos action is filed and before any evidence is preserved by deposition, so that defendants are given the opportunity to question the plaintiff and all witnesses with knowledge of the plaintiff’s total exposure history and facts supporting the lawsuit.

Production of trust claim submissions has consistently been opposed by the plaintiffs’ bar, which has long taken the position that trust forms are privileged settlement documents. Since that argument has been rejected in virtually every jurisdiction that has addressed it, the time is now ripe, especially in the aftermath of Garlock, for courts to address the urgent need for reform. The crucial role that the judiciary has had in the past in changing the asbestos litigation environment should not be overlooked in the face of such widespread fraud, and the task of convincing trial judges to account for bankruptcy recoveries so that defendants will have the information they need to defend tort litigation should no longer be an uphill battle.

Judges Have Broad, Inherent Authority To Actively Manage Their Caseload

Courts have broad, inherent authority to manage cases "to serve the interests of justice." Examples of case management techniques that have been used by courts to govern asbestos and other toxic tort claims include inactive asbestos dockets that set aside and suspend the claims of unimpaired claimants, as mentioned earlier, and Lone Pine orders that require plaintiffs to provide facts in support of their claims through expert reports or risk having their cases dismissed.

Many jurisdictions that historically experienced large numbers of asbestos filings have inactive asbestos dockets (also called deferred dockets or pleural registries) to give trial priority to the sick. Under these docket management plans, the claims of the non-sick are suspended and exempt from discovery. Claimants may petition for their case to be activated and removed to the trial docket when credible medical evidence of impairment is shown.
Numerous courts have held that inactive asbestos dockets represent a traditional exercise of a court’s inherent power to control its docket.\textsuperscript{28} For instance, in \textit{In re Asbestos Cases (Mulligan v. Keene Corp.).}\textsuperscript{29} an Illinois appellate court upheld Cook County’s (Chicago) inactive asbestos docket as “a tool whereby the court may prioritize the litigation of cases already filed and an example of the court exercising its inherent authority to control its docket.”\textsuperscript{30} An Ohio appellate court reached the same conclusion in \textit{In re Cuyahoga County Asbestos Cases}.\textsuperscript{31} There, plaintiffs sought the unimpaired docket “in order to give the more seriously impaired claimants quicker access to the courts while preserving the claims of the less impaired plaintiffs.”\textsuperscript{32} As in Illinois, the appellate court found that the inactive docket “demonstrates a traditional exercise of the court’s authority to control its docket.”\textsuperscript{33}

Federal asbestos cases under MDL-875 in the U.S. District Court for the Eastern District of Pennsylvania have become streamlined and organized under an administrative order similar to a \textit{Lone Pine} order.\textsuperscript{34} Amended Administrative Order No. 12 requires plaintiffs to submit a medical diagnostic report or opinion “based upon objective and subjective data which shall be identified and descriptively set out” and sufficient to withstand a dispositive motion.\textsuperscript{35} The order has proven successful at unclogging one of the largest and long-running asbestos dockets in the country by establishing a “toll gate at which entrance to the litigation is controlled.”\textsuperscript{36}

### The Proposed Uniform Case Management Order

The CMO that I propose would substitute the following language as an amendment to any existing CMO (or can be adopted in whole where no such order exists):

#### Asbestos Bankruptcy Trust Claim Disclosures

(a) Within 30 days after an asbestos action is filed (or within 30 days after entry of this Order, whichever is later) and before any evidence is preserved by deposition-

(1) The Plaintiff shall provide the Court and the parties with a sworn statement signed by Plaintiff and Plaintiff’s counsel, under penalties of perjury, indicating that an investigation of all asbestos-related bankruptcy trust claims (“trust claims”) has been conducted, that all trust claims that can be made have been filed, and, if applicable, that to the best of their information and belief there are no other law firms representing Plaintiff with respect to trust claims.

(2) Plaintiff shall indicate whether there has been a request to defer, delay, suspend, or toll any trust claim, and provide the disposition of each trust claim;

(3) Plaintiff shall provide all parties with all trust claims materials, including for conditions other than those that are the basis for the immediate asbestos action, and with respect to all law firms connected to Plaintiff relating to exposure to asbestos, including anyone at a law firm involved in the asbestos action, any referring law firms, and any other firm that has filed trust claims on the Plaintiff’s behalf. “Trust claims materials” includes all documents and information related to trust claims, including final executed proof of claim forms, supplementary materials, affidavits, deposition and trial testimony, work history, medical and health records, correspondence and documents reflecting the status of a trust claim, and if the trust claim has settled, all supporting documents and information relating to the settlement of the trust claim; and

(4) If Plaintiff’s trust claim is based on exposure to asbestos through another person (so-called “take home exposure”), Plaintiff shall produce all trust claims materials submitted by the directly exposed person to an asbestos-related bankruptcy trust if available to Plaintiff. The presumption is that Plaintiff has access to and shall provide all trust claims materials filed by his or her spouse, parent, or child.

(b) No initial trial date will be set until the requirements of paragraph (a) are met. Plaintiff has a continuing obligation to supplement the information and materials required under paragraph (a).

(c) If a defendant believes that Plaintiff is eligible to file one or more additional trust claims, then a defendant may move the Court for an Order to require Plaintiff to file said trust claims.
Within 10 days of receiving a defendant’s motion, Plaintiff shall file the trust claims identified by the defendant and produce all trust claims materials or file a written response with the Court stating why there is insufficient evidence to file the trust claim(s).

If the Court determines that Plaintiff is eligible to file the trust claim(s) identified by Defendant, the Court shall stay the civil action until Plaintiff files the trust claim(s) and produces all trust claims materials.

Not less than 30 days prior to trial, the Court shall enter into the record a document identifying each trust claim Plaintiff has made to an asbestos bankruptcy trust.

Trust claims materials are presumed to be relevant and authentic, and are admissible in evidence. No claims of privilege apply to any trust claims materials.

Trust claim materials that are sufficient for payment under the applicable trust governance documents may support a jury finding that Plaintiff was exposed to products for which the trust was established to provide compensation and that such exposure may be a substantial factor in causing Plaintiff’s claimed injury that is at issue in the civil action.

To ensure compliance with this Order, and as an exercise of its inherent authority to administer justice, this Court will retain jurisdiction over all asbestos personal injury cases and the parties thereto for a period of two years following resolution or entry of judgment. Counsel for Plaintiff is ordered to serve notice to the Court and all parties of record of the resolution of each case within 30 days of resolution. The court reserves the right to impose any and all remedies allowed by law in the event of noncompliance with this order, upon noticed motion.

[For jurisdictions that allow set-offs] If a Plaintiff proceeds to trial before a trust claim is resolved, there is a rebuttable presumption that Plaintiff is entitled to, and will receive, the compensation specified in the trust governance document applicable to the claim at the time of trial. The Court shall take judicial notice that the trust governance document specifies compensation amounts and payment percentages and shall establish an attributed value to Plaintiff’s trust claims.

The CMO first addresses the popular plaintiff strategy of deliberately delaying the filing of trust claims until the conclusion of tort litigation. The Order requires that all available trust claims be filed within thirty days of the filing of the asbestos action, or within thirty days of the entry of the CMO for cases already pending. This deadline will have a huge impact on the litigation because it will ensure that important factual information will be available to defendants before any evidence is preserved by deposition. Under these circumstances, deponents will be more likely to provide honest testimony because they will know that defendants will have better tools available to challenge the credibility of product identification evidence. The trust claim forms will also enable counsel to overcome the persistence of “I don’t recall” testimony, as the trust claims represent powerful admissions on the part of a plaintiff in a tort case.

As a practical matter, plaintiffs’ attorneys may be within the bounds of ethical conduct when the timing of bankruptcy trust claims is calculated to achieve maximum recovery for their clients. Plaintiffs’ attorneys may characterize delayed filings as zealous advocacy. What is not fair play, however, is for asbestos trust claims to be deliberately delayed so that inexplicable discrepancies between the positions taken in court and those presented in the trust claims can be hidden and not revealed.

Another feature of the proposed CMO is the requirement that the information produced by plaintiff be accompanied by a sworn statement, signed by both the plaintiff and his or her counsel under penalty of perjury, certifying that an investigation of all trust claims has been conducted and that all available trust claims have been filed. Importantly, plaintiff and counsel must also affirm that no other law firms have been retained for the purpose of submitting bankruptcy trust claims. This provision will eliminate the common practice of retaining a separate law firm to file the trust claims while deliberately withholding any information about the process from litigation counsel. The CMO further mandates the disclosure of any requests to defer
or toll any claims that have already been filed, thus requiring that delayed claims be specifically identified rather than withheld in discovery under the guise that they have not technically been docketed.

In addition to information sharing, the proposed CMO contains requirements for the production of all trust claim documents and materials. These must be produced from all law firms or attorneys that are in any way connected to a plaintiff relating to asbestos exposure, including settlement documents and related materials.

The proposed uniform CMO contains a provision specifically related to "take home exposure" cases, where the plaintiff’s exposure to asbestos was through an occupationally exposed family member or by handling that person’s work clothes. In those instances, the plaintiff will be required to produce all trust claim materials submitted by the family member who was directly in contact with the asbestos-containing products manufactured by the bankrupt entities. The requirement presumes that the plaintiff will be given access to a spouse, parent, or other resident’s employment and health-related records. Additional general provisions of the uniform CMO include a continuing obligation on the part of plaintiffs and their counsel to update production and a prohibition against the court reserving an initial trial date until all documents required by the CMO are produced.

Once a trial date is allocated, any defendant who believes that a plaintiff is eligible to file additional trust claims may file a motion with the court. If the trust claim materials are not produced within ten days, the plaintiff is required to file a written response to the motion explaining why the evidence is insufficient to support such a claim. If the court finds that the plaintiff is eligible to file that claim, the court must stay or suspend all further proceedings in the case until the claim or claims have been filed and produced.

The CMO also includes procedures that will govern the trial without the need for extensive motions in limine or other pretrial motion practice. For instance, the court is charged with entering into the record a list of each trust claim submitted by a plaintiff. Also, all trust claim materials are presumed relevant, authentic, and admissible in evidence. In addition, if payment is authorized under a trust’s governance documents, that circumstance will support a jury finding that a plaintiff was exposed to the products that are the subject of the trust compensation, and that the exposure was a “substantial factor” in the cause of the plaintiff’s injury.

Perhaps the most unique feature of the proposed CMO is the court’s exercise of its inherent authority to retain jurisdiction over the parties for a period of two years after either resolution or entry of final judgment. This measure, while perhaps inconsistent with a court’s natural inclination to clear its dockets in an efficient and speedy manner, will help assure that defendants can account for and be given credit for any post-trial submissions that were not revealed. Given the resourcefulness of the plaintiffs’ bar when faced with new obstacles to pursuing compensation for their clients, and the handsome percentage to which the attorneys are entitled as contingency fees, it is conceivable that they will continue to devise alternate methods of concealing or downplaying their clients’ claims about exposure to other sources of asbestos. This provision of the CMO should serve to eliminate these incentives after the tort case is concluded.

Finally, for jurisdictions that provide for set-offs, the Order mandates judicial notice of trust governance documents specifying compensation amounts and payment percentages in order to attribute a value to a plaintiff’s asbestos trust claims that are pending at the time of trial.

**Expected Impact Of The Proposed Uniform Case Management Order**

The proposed CMO should not dramatically alter the manner in which courts have been addressing the trust claim problem nor does the CMO demand radical modifications to the procedures already adopted in jurisdictions that have addressed the discovery of trust claim materials. A number of courts (and a few state legislatures) have already made some strides in eliminating incentives for fraudulent or purposefully delayed asbestos trust claiming activity.

A California Court of Appeal in *Volkswagen of America, Inc. v. Superior Court of San Francisco*, 37 was one of the first appellate courts to permit discovery of trust claims filed by asbestos tort plaintiffs. The court ordered discovery of trust claim forms and supporting information over plaintiffs’ objections on the ground that they were
protected settlement documents. The California Court declared the trust materials to be relevant and reasonably calculated to lead to admissible evidence, including admissions against interest.38 In Seariver Maritime, Inc. v. Superior Court of San Francisco,39 another California appellate division “agree[d]” with the Volkswagen court’s analysis.40

Following California’s lead, the vast majority of courts that have been called upon to determine the discoverability of trust claim submissions have ordered their production, generally reasoning that the information, such as plaintiffs’ work histories and medical data related to exposures to asbestos, are essential and highly relevant to defendants’ strategy.41 As one court commissioner noted in a Missouri case, “[t]here simply is no perceived basis to preclude a defendant from obtaining unprivileged factual information discussing work history, asbestos exposure and injury data allegedly attributable to it.”42 Similarly, the New York Supreme Court ordered production of bankruptcy trust proofs of claim in Drabczyk v. Amchem Prods., Inc.,43 reasoning that:

It seems likely that proof of claim forms submitted by plaintiffs in asbestos litigation to trusts established by bankrupt entities may contain information concerning product identification, the claimant’s work history and exposure to asbestos, causation and apportionment of fault. Such information is not presumptively privileged and is clearly relevant for disclosure purposes. . . . Even if a proof of claim is employed to encourage settlement discussions, admissions of fact made in it are admissible and therefore, discoverable. . . .44

Federal courts as well have ordered that bankruptcy trust claims and supporting documentation information be produced to defendants, and they have rejected the notion that a claim made to a bankruptcy trust is analogous to an offer of settlement or compromise and thus not discoverable.45

Several high volume asbestos litigation jurisdictions have gone even further by adopting standing Case Management Orders (“CMOs”) that require production of trust claims information. Perhaps the most all encompassing of these is the recent amendment to the CMO governing all asbestos personal injury actions in Massachusetts. The Massachusetts CMO provides that within thirty days of trial, the plaintiff will serve a certification with the court that “all known bankruptcy claims have been filed.”46 Also, several state legislatures have enacted legislation to promote honesty in litigation by requiring trust claims to be filed and produced before trial.47

All of these measures that are intended to resolve the persistence of trust claiming fraud have helped in a piecemeal fashion, but even considered collectively, will not have as significant an impact as can be achieved by sweeping adoption of the uniform CMO in jurisdictions that adjudicate asbestos personal injury cases.

There are a myriad of benefits to the concept of a uniform CMO. Beyond eliminating the opportunity for inconsistent filings between trusts and courts that was detailed by Judge Hodges in Garlock, the truth-seeking function of the courts will be served by more fully informed juries and greater fairness in the litigation of asbestos personal injury claims. Juries would have more information to determine whether a reorganized company’s product was partly or wholly responsible for the plaintiff’s disease, and will be able to identify exposure claims that are exaggerated or deceitful. Discovery of information submitted to an asbestos bankruptcy trust can even lead to correcting any misinformation provided at a deposition with regard to the plaintiff’s memory of the specific asbestos products to which plaintiff was exposed.

A uniform CMO will have the additional advantage of providing uniformity in procedures and processes across state lines, removing an incentive for forum shopping. Also, since a few high profile plaintiffs’ law firms account for the major proportion of asbestos litigation in courts that have substantial dockets, attorneys who appear in those venues will no longer have to abide by different sets of rules in different jurisdictions. Uniformity will assist defense counsel as well for the same reason.

Conclusion

The course of asbestos litigation over the past forty years or so would hardly be deemed the legal profession’s finest hour. The massive sums of money that are at stake in asbestos litigation, and the enormous windfall fees the litigation has generated for plaintiffs’ lawyers, have encouraged those lawyers to be resourceful in
finding new ways to recruit more clients. Indeed, they have succeeded in keeping the litigation alive and thriving no matter how tenuous the nexus is between the injured plaintiffs and the ever-growing number of alleged wrongdoers.

Many other circumstances have contributed to the pall that has for so long been cast over this litigation. In addition to the excessive amounts of money at stake, the diseases caused by asbestos exposure are so horrific that juries—and even judges—tend to be overly sensitive to plaintiffs’ needs, and this may account for some of the excessive damages awards. Or perhaps the special dockets that courts have set up under experienced judges have led to too much tolerance for fraud. At the same time, defendants’ attorneys in many high volume jurisdictions are equally loathe to upset an enterprise that has both contributed to their personal wealth and in some cases fueled their local economies. Despite the prevalence of ethical rules violations that have long been a hallmark of this litigation, the asbestos bar has been largely immune from judicial sanctions or discipline by state authorities. All of these factors collectively conspire to upset the scales of justice and threaten the integrity of the judicial process.

What has often been missing from the discussion and commentary in reaction to Garlock is any assessment of what this all means for the actual asbestos-exposed victims who turn to these trusts for compensation for their injuries. Most of the trusts are paying only pennies on the dollar of actual liability. When a claimant honestly identifies all sources of exposure, that individual ends up with only minimal compensation, while those willing to go from trust to trust and alter facts to suit the circumstances can unfairly amplify their recoveries. Plaintiffs who play by the rules have not only sustained physical injury from their exposures, but they are doubly victimized by those lawyers and their clients who are willing to play fast and loose with the truth.

In the face of increasing instances of specious claiming, and growing evidence of the illegitimacy of these practices, the failure of lawyers, disciplinary boards, and the courts to enforce fundamental ethical rules, and to ensure that procedures are administered fairly and even-handedly, stands as a glaring indictment not only of the legal profession, but also of the judges who are ultimately responsible for the administration of justice and adherence to the rule of law. Asbestos litigation does not have to continue along this trajectory if courts will take action to end this continued threat to the soundness of their legal processes created by the lack of transparency between the two compensation regimes. It is imperative that the trial courts act swiftly to adopt the Case Management Order that is proposed here, enforce it consistently upon promulgation, and do their part to restore fundamental fairness to this area of tort law.

Endnotes

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7. Id.

8. Lester Brickman, Testimony on H.R. 526, the “Furthering Asbestos Claim Transparency (FACT) Act of 2015, Hearing Before the House Judiciary Comm. Subcomm. on Reg. Reform, Com. & Antitrust L., Feb. 4, 2015, available at 2015 WLNR 3578295; see also O’Neil v. Crane Co., 2010 WL 2984322, at *11 (Cal. July 28, 2010) (Application and Amicus Curiae Brief of Bates White LLC Supporting Respondents) (“the defendants that remained in the tort system after the bankruptcy wave saw a dramatic increase in the frequency with which they were named, and new defendants, thousands of whom had never been named in an asbestos case, were brought into the litigation.”).


10. In re Garlock Sealing Tech., 504 B.R. at 73.

11. Id. at 84.

12. Id. at 82.

13. Id. at 84 (emphasis in original).

14. Id. at 86.

15. Id. at 74.

16. See supra nn. 1 & 5.


21. See id.


23. Lang v. Pataki, 674 N.Y.S.2d 903, 914 (Sup. Ct. N.Y. Cnty. 1998); see also Werner v. Miller, 579 S.W.2d 455, 457 (Tex. 1979) (stating that "the supervision of the trial docket is properly left to the discretion of the trial judge"); Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) (defining "inherent" judicial powers as those a court "may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity").


26. See Jeb Barnes, Rethinking the Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos, 28 JUST. SYS. J. 157 (2007).


28. See In re All Asbestos Cases, Order Establishing An Inactive Docket For Cases Filed By the Law Offices of Peter T. Nicholl Involving Asbestos-Related Claims, at 1 (Cir. Ct. Portsmouth, Va. Aug. 4, 2004) (entering unimpaired asbestos docket order based on "the Court's inherent power to control its docket.") (on file with the authors); In re All Asbestos Litigation Filed in Madison County, Order Establishing Asbestos Deferred Registry, at 1 (Cir. Ct., Madison Cnty., Ill. Jan. 23, 2004) ("This Court has the inherent power to control cases on its docket and to order the trial or disposition of these cases in a manner consistent with an economical allocation of judicial resources and the parties' interests.") (on file with the authors); In re Asbestos Cases, at 2 (Cir. Ct., Cook Cnty., Ill. Mar. 26, 1991) (Order Establishing Registry for Certain Asbestos Matters) ("This Court has the inherent power to control cases on its docket and to order the trial or disposition of these cases in a manner consistent with an economical allocation of judicial resources and the parties' interests.") (on file with the authors); In re Asbestos Pers. Injury and Wrongful Death Asbestos Cases, No. 92344501, 1992 WL 12019620, at *1 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992) (Order Establishing an Inactive Docket for Asbestos Personal Injury Cases) (stating that "the Court’s inherent power to control its docket" permitted the entry of an order to create an unimpaired asbestos docket).


30. Id. at 524.


32. Id. at 23.

33. Id. at 25.


40. Id. at *1.
41. See, e.g., Willis, 2014 WL 2458247, at *1 (“Federal and state courts have routinely held that claims submitted to asbestos bankruptcy trusts are discoverable. . . .”).


44. Id.


