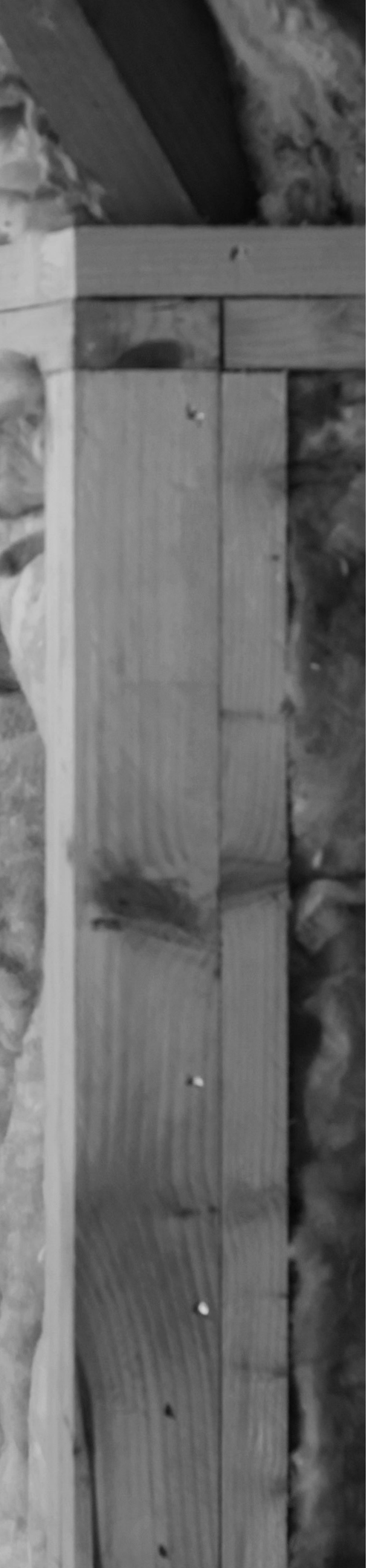

ASBESTOS LITIGATION:
New Order on Disclosure of Bankruptcy Filings Creates New Transparency

by Stephen J. Kelley

For over 40 years, courts nationwide have addressed claims for compensation by individuals and families alleging exposure and damages resulting from asbestos. In the 1970s to mid-1980s, the prime targets for this litigation were companies involved with the mining and processing of asbestos, and manufacturers of insulation products that predominantly contained amphibole forms of asbestos. The volume of cases led to bankruptcy filings for the majority of these companies. Trust money was set aside by the bankruptcy courts. While plaintiffs' lawyers continued to pursue recovery from the trusts, they also broadened their scope of defendants to include product manufacturers that were still solvent, but that made products containing only minimal amounts of less harmful forms of asbestos, as well as premises owners where asbestos-containing products may have been used, and employers whose workers used such products. Such claims are frequently asserted by plaintiffs who never used the defendant manufacturers' products but were only bystanders to use by others, or who never set foot on the defendants' premises but claim secondary exposure, through fibers brought home on the clothing of family members.

For many years, plaintiffs pursued recovery on parallel tracks, obtaining substantial sums from the trusts based on their own more significant direct exposures, while also seeking jury verdicts from solvent defendants for the same injuries. This was in part possible because claims against the trusts were held confidential, allowing plaintiffs not only to conceal the funds they received, but also to conceal contentions tailored to trigger trust payments while making flatly contradictory exposure source allegations in civil suits. However, recent challenges by defendants have resulted in court decisions that have added transparency to the bankruptcy claim process, to the benefit of companies that are currently defendants in asbestos litigation. For matters pending in Southern California, defendants received such a favorable ruling on April 7, 2015, when Judge Emilie H. Elias of the Los Angeles County Superior Court issued an order directing disclosure of bankruptcy trust claims information for plaintiffs in Los Angeles, Orange and San Diego counties.

continued on page 10

Asbestos – continued from page 9

This article traces the history of asbestos litigation and places into context the significance of the order issued by Judge Elias and jurists in other venues requiring transparency for bankruptcy trust claims.

On September 10, 1973, the United States Court of Appeals for the Fifth Circuit in New Orleans issued its landmark decision in *Borel v. Fibreboard Paper Products* (5th Cir. 1973) 493 F.2d 1076, affirming a judgment based on a verdict of strict liability against asbestos manufacturers. It has been said that the Borel decision triggered the greatest avalanche of toxic-tort litigation in the history of American jurisprudence. It is estimated that over 50,000 asbestos cases are filed each year.

On August 26, 1982, the Manville Corporation (formerly Johns-Manville Corporation), filed a petition for relief under Chapter 11 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 1101 et seq. (1982). At the time, Manville was one of the healthiest companies in America and was listed in the Fortune 500. Arising out of that bankruptcy was the creation of the first asbestos personal injury trust for the payment of asbestos claimants who allege injuries from exposure to Manville products. The trust was funded by a majority of Manville's stock and, after confirmation by the Court, the trust became the only recourse for asbestos claimants for claims against Manville. For many years, the Manville bankruptcy and trust creation became the model other asbestos product manufacturers followed when they were forced to seek Chapter 11 relief due to asbestos claims.

In 1994, Congress enacted section 524(g) of the United States Bankruptcy Code authorizing the establishment and funding of a trust to pay present and future asbestos exposure claims. (11 U.S.C. section 524(g).) Pursuant to section 524(g), upon emerging from bankruptcy, all liabilities for asbestos exposure against the bankrupt entity are assigned to the newly created trust and all asbestos-related liability is discharged. Currently there are over 60 such trusts. These trusts pay billions of dollars to asbestos claimants each year. Many of those claimants also sue solvent defendants in the tort system.

A 2011 Rand Corporation study examined, in part, the information link between the tort and trust systems related to filing, disclosure and timing of trust claims for six states, including California. (Dixon, Lloyd and Geoffrey McGovern (2011) Asbestos Bankruptcy Trusts and Tort Compensation, Santa Monica, CA: RAND Corporation, *www.rand.org/pubs/monographs/MG1104*.) The study found that many courts had begun requiring plaintiffs who had filed trust claims to disclose at the least the amount of any payments to defendants whom those plaintiffs were suing. Accordingly, defense attorneys interviewed for the study reported their understanding that plaintiffs often waited to file trust claims until after settlement or entry of judgment in the tort case, opening the possibility for compensation above the amount found by the jury to have been suffered. The study also reported that, in the view of most defense attorneys, plaintiff's attorneys controlled the testimony provided by the plaintiffs and coached plaintiffs not to mention the products of bankrupt firms. This impeded

continued on page 11

the defendant's ability to assign fault to bankrupt firms in the tort system.

In the same Rand study, some plaintiffs' attorneys said they routinely filed trust claims early in a case for reason of immediate availability of money, concern that trust payment percentages would drop over time, or statute of limitations requirements. Others, however, confirmed that they frequently delayed filing until after the tort case was resolved. Some indicated a belief that it was their ethical obligation to delay filing if the information would assist defendants in assigning liability to bankrupt firms. Although the Rand study was not intended to definitively prove these practices, this potential for abuse was identified.

On January 10, 2014, in the matter of *In Re Garlock Sealing Technologies, LLC,* et al., United States Bankruptcy Judge George R Hodges issued his "Order Estimating Aggregate Liability" in which the Court determined that the amount sufficient to satisfy Garlock sealing technologies, LLC's liability for present and future mesothelioma claims, for purposes of funding its asbestos personal injury trust, was $125 million. In reaching that conclusion, the court considered evidence presented over seventeen trial days, including 29 witnesses and hundreds of exhibits. The court determined that the best evidence of Garlock's aggregate responsibility was the projection of its legal liability, taking into consideration causation, limited exposure and the contribution of exposures to other products. The Court found that estimates of Garlock's aggregate liability based on its historic settlement values were not reliable because those values were "infected with the impropriety of some law firms and inflated by the costs of defense." In an unprecedented move, to determine Garlock's true liability, the Court allowed Garlock full discovery in 15 settled cases. For each of the 15 cases, through that discovery, Garlock demonstrated a pattern by plaintiffs and their counsel, represented by five major firms, of withholding exposure evidence and other abuses as follows:

a. One of the leading plaintiffs' law firms with a national practice published a 23-page set of directions for instructing their clients on how their testimony about certain exposures could be tailored to maximze recovery based on different entities' solvency status;

b. It was a regular practice by many plaintiffs' firms to delay filing trust claims for their clients so the remaining tort system defendants would not have that information. One plaintiff's lawyer justified this practice as based on an ethical duty to conceal the truth about such claims: "My duty to these clients is to maximize their recovery, okay, and the best way for me to maximize their recovery is to proceed against solvent viable non-bankrupt defendants first, and then, if appropriate, to proceed against bankrupt companies."

c. In the 15 settled cases, Garlock demonstrated that exposure evidence was withheld in each and every one of them. These were cases that Garlock had settled for large sums. Garlock's discovery showed what had been withheld in the tort cases – on average plaintiffs disclosed only about 2 exposures to bankrupt companies' products, but after settling with Garlock, they made claims against about 19 such companies' Trusts.

The Court cited specific egregious examples of cases where exposure evidence was withheld:

- In a California case, a plaintiff, who was a former Navy Machinist aboard a nuclear submarine, denied exposure to Pittsburgh Corning's Unibestos insulation, fought to keep Pittsburgh Corning off the verdict form, and affirmatively represented to the jury there was no Unibestos insulation on the ship. However, after a $9 million verdict, plaintiff's lawyers filed 14 Trust claims, including in the Pittsburgh Corning bankruptcy, certifying "under penalty of perjury" that the plaintiff had been exposed to Unibestos

continued on page 12

insulation. Plaintiff's lawyers failed to disclose exposure to 22 other asbestos products;

- In a Philadelphia case, the plaintiff did not identify exposure to any bankrupt companies' asbestos products, stating in answers to written interrogatories that plaintiff had "no personal knowledge" of such exposure. The defendant settled for $250,000. Six weeks earlier, however, plaintiff's lawyers had filed a statement in the Owens Corning bankruptcy case, sworn to by plaintiff, that he "frequently, regularly and proximately breathed asbestos dust emitted from Owens Corning Fiberglas's Kaylo asbestos-containing pipe covering." Plaintiff's lawyers in total failed to disclose exposure to 20 other asbestos products for which Trust claims were made, 14 of which were supported by sworn statements contradicting denials in tort discovery;

- A New York case settled for $250,000 during trial in which plaintiff denied exposure to insulation products. After settlement, plaintiffs' lawyers filed 23 Trust claims – 8 of which were filed within 24 hours after the settlement;

- In another California case, Garlock settled for $450,000 with a Navy technician. Plaintiff denied ever seeing anyone installing or removing pipe insulation on ship. After settlement, plaintiff's lawyers filed 11 Trust claims – 7 based on declarations that plaintiff personally removed and replaced insulation and identified, by name, the insulation products to which he was exposed;

- In a Texas case, plaintiff received a $1.35 million verdict upon claims that his only asbestos exposure was to Garlock crocidolite gasket material. In discovery responses, plaintiff disclosed no other product to which exposure was alleged, specifically denied knowledge of the name "Babcock & Wilcox," and attorneys represented to the jury there was no evidence injury was caused by exposure to Owens Corning insulation. The day before plaintiff denied knowledge of Babcock & Wilcox, plaintiff's lawyers filed a Trust claim against that entity on his behalf. After verdict, plaintiff's lawyers also filed a claim with the Owens Corning Trust.

Garlock identified 205 additional cases where plaintiffs' discovery responses conflicted with at least one of the Trust claim processing facilities or balloting in bankruptcy cases. Garlock's corporate parent's general counsel also identified 161 cases during the relevant period where Garlock paid recoveries of $250,000 or more. Further, the limited discovery allowed by the court demonstrated that almost half of those cases involved misrepresentation of exposure evidence. The court in Garlock noted that, while the 15 settled cases for which discovery was allowed were not purported to be a random or representative sample, the fact that each and every one of them contained demonstrable misrepresentation was surprising and persuasive. The court further commented that it appeared certain that more extensive discovery would show more extensive abuse.

The Garlock court contrasted those cases in which exposure evidence was withheld to several cases in which Garlock obtained evidence of trust claims and was able to use them in its defense at trial. In three of them, Garlock won defense verdicts and in a fourth it was assigned only a two percent liability share. The court in Garlock also considered persuasive, observations of Garlock's outside counsel who were involved in negotiating or trying cases, and of its general counsel involved in approving settlements. They observed that when the thermal insulation defendants were excluded from the tort system, evidence of exposure to their products disappeared. This was corroborated by the discovery allowed by the Garlock court.

In the wake of the Garlock order, many jurisdictions began pursuing in earnest greater transparency for asbestos personal injury settlement trusts to report on claims by legislation. (See, "Furthering Asbestos Claim Transparency (FACT) Act of 2015" (H.R. 526); West Virginia Senate Bill 411, also known as the Asbestos Bankruptcy Trust Claims Transparency Act and the Asbestos and Silica Claims Priorities Act.) Other jurisdictions have looked to the courts for solutions.

Judge Emilie H. Elias, the Coordination Trial Judge for asbestos cases in Los Angeles, Orange and San Diego Counties, on April 7, 2015, issued an order that goes far to ensure transparency in asbestos trust claims. Judge Elias' Order specifically provides that facts relating to a plaintiff's or a decedent's alleged exposures to asbestos are not privileged and are discoverable. Plaintiffs must disclose all facts relating to all alleged exposures to asbestos regardless of whether attributable to named defendants, bankrupt or other entities, and whether the facts have been or ever will be included in a claim to a third-party to obtain compensation for asbestos-related injury.

Judge Elias' Order specifically requires plaintiffs' disclosure of documents and other asbestos bankruptcy trust filings. Plaintiffs must execute and provide a signed Asbestos Bankruptcy Trust Authorization which comprehensively encompasses any and all documents and information submitted or communicated to a trust by a claimant or claim holder. Plaintiffs must respond to six additional interrogatories (73 - 78) appended to the LAOSD Standard Interrogatories to Plaintiffs. The interrogatories identify, but are not limited to, 61 Asbestos Bankruptcy Trusts. The interrogatories, in part, key off a revised interrogatory number 68 and require plaintiffs to identify facts supporting any claim identified in response to interrogatory number 68 (73) and all persons who have knowledge of facts about each product a plaintiff or decedent was exposed, which support their claim (74). However, the additional interrogatories then delve deeper. For each of the 61 identified Asbestos Bankruptcy Trusts, Plaintiffs are required to identify all facts (75), witnesses (76) and documents (77) that relate to any claimed exposure. Plaintiffs must supplement and update the responses to defendant's additional interrogatories and interrogatories 68 to 72 of the LAOSD Standard Interrogatories to plaintiffs no later than 5 days before trial, if new witnesses or documents have been discovered.

continued on page 13

Asbestos – continued from page 12

Plaintiffs in Southern California asbestos actions also must produce all documents sent to, received from, shown to, exchanged with, or otherwise disclosed to any established or pending asbestos trust for any purpose including, but not limited to, supporting a claim, providing notice of or reserving a place for, a future claim for compensation for asbestos-related injury. (In some situations, plaintiffs' counsel were known to file trust paperwork that stopped just short of actually asserting a completed claim, so that in discovery they could truthfully say they had not presented any claim.) In addition, plaintiffs must produce declarations and/or affidavits circulated to someone other than plaintiff and plaintiffs' counsel (or their law firm) and set forth facts regarding a plaintiff's and/or decedent's exposure to asbestos or asbestos-related injury. This production of bankruptcy trust related documents is required to be made at the same time that plaintiffs serve responses to Defendants' Standard Interrogatories. Further, plaintiffs are required to supplement the production no later than five days before trial. The Elias Order specifically provides plaintiffs may not object or refuse to produce information related to exposure facts in response to appropriate discovery requests on the grounds that no claims have been or will be made based on such facts or because such facts may also appear in otherwise privileged documents such as signed affidavits or un-submitted bankruptcy trust claim forms.

The Elias' Order was issued retroactively to apply on or after February 1, 2015, for a six month trial period. Thereafter the order is to remain in effect, unless amended, vacated or otherwise superseded by further order of the Court.

Judge Elias' Order goes a long way towards promoting transparency in Southern California asbestos litigation. Disclosure of claims relating to bankruptcy trust filings helps level the playing field for current asbestos defendants. Exposure of such claims allows defendants to identify inconsistent claims and argue for a proper allocation of fault among all potentially liable parties. The Elias Order does not go so far as to bar plaintiffs from holding off on any trust claim communications until after resolving claims against solvent defendants and does not provide a mechanism for offsetting a defendant's liability by trust payments received after trial (although a defendant could seek to introduce evidence of the reasonably likelihood of future payments for that purpose). And while the trusts have little interest in undertaking the administrative burden of cross-checking claims against contradictory allegations in civil actions (the trust forms do not require disclosure of such information from a claimant), nonetheless, this order is a most welcome change for defense counsel and defendants in the defense of asbestos lawsuits.

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