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Commentary

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Introduction

Much has been written about the routine practice by which asbestos plaintiffs' lawyers pursue compensation from two sources—bankruptcy trusts and tort litigation—for the same asbestos related injury. This practice came under new scrutiny during the bankruptcy proceeding of gasket and packing manufacturer Garlock Sealing Technologies, LLC. In *Garlock*, U.S. Bankruptcy Judge George Hodges of the Western District of North Carolina found that "[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock. . . ."[1]

Judge Hodges' findings and the publicity surrounding his landmark decision have fueled legislative and judicial reforms that seek to bring about greater transparency with regard to asbestos bankruptcy trust claims. At the state level, these reforms generally provide a mechanism to require plaintiffs to file asbestos trust claims before trial so that trust-related exposures can be accounted for in the tort system. These reforms help ensure that juries can render more informed decisions about the causes of a plaintiff's alleged harm and apportion fault accordingly.

Indeed, laws to bring about greater transparency with respect to asbestos trust claims in the tort system were enacted in 2016 in Utah and Tennessee, in 2015 in Texas, Arizona, and West Virginia, in 2014 in Wisconsin, in 2013 in Oklahoma in 2013, and 2012 in Ohio.

Plaintiffs' attorneys and their allies have opposed, and continue to oppose, these reform efforts. Before Judge Hodges' findings, they flatly denied that any problems existed. After Judge Hodges' findings – and subsequent reports providing additional examples of the need for transparency – the plaintiffs' bar was forced to change its approach. Plaintiffs' attorneys have now moved from the macro approach of bold denials to more nuanced and politically-sensitive attacks on proposed reforms.

This article surveys the new attacks and reveals that they are in fact myths, more sophisticated but no more credible than the previous denials that any problem exists.

MYTH #1 – Transparency Reforms Harm Veterans

The most misleading of the new arguments is that transparency somehow harms veterans.

THE FACTS

Transparency reforms benefit veterans and other plaintiffs by ensuring that money remains available

to pay their claims. Experience shows that the reforms cause no systemic delay of tort litigation.

No past or present reform anywhere in the country would prevent veterans or anyone else from filings claims in both the trust and tort systems and recovering compensation from both systems. For instance, the federal FACT bill imposes obligations on the trusts themselves to disclose filing and payment information, but it never limits the filing of trust claims or litigation in any way. Moreover, the state transparency statutes that have been enacted to date simply require the filing and disclosure of trust filing information before trial, so that the information and any trust payments can be accounted for in the tort litigation. None of these statutes prevents the filing of trust claims or lawsuit by veterans or anyone else.

Equally important, because the reforms seek to prevent redundant recoveries for the same harm, they ensure that money will remain, in both the trust and tort systems, to fund future claims by veterans and others. Since 2008, 23 trusts have reduced their payments to claimants, and trusts today pay, on average, approximately 50% of what they paid only 7 years ago. The continuation of double recoveries will only further deplete trust resources. In this regard, the current system in which plaintiffs delay filing trust claims substantially harms veterans and other plaintiffs because it not only deprives them of the quick and easy compensation paid by trusts but it also risks reduced recoveries if an applicable trust reduces its payments while a veteran delays filing his or her claim. These facts demonstrate that the current practice, not transparency reform, harms veterans and other plaintiffs. Similarly, companies like Garlock employ veterans and countless other citizens, and nothing is gained by driving them into bankruptcy through concealment of trust payments and the resulting redundant recoveries in tort litigation. Not surprisingly, although the support is not unanimous, mainstream veterans organizations like AMVETS have supported reforms to ensure that money remains for future claims and employers are not forced to pay redundant compensation.[2]

Finally, experience has proven that reform does not harm veterans or other plaintiffs. States that have enacted the reforms have seen no outcries or repeal efforts supporting that the reforms have hurt veterans or others. Ohio's transparency statute, for instance, is the oldest such statute in the nation and there has been no showing that it has been unfair or unworkable. In fact, before the Ohio law was enacted, litigants routinely fought over the discovery of trust filings, but plaintiffs are now filing trust claims and producing the claim forms in a timely manner, and asbestos cases are proceeding more smoothly with less litigation costs to both sides. Indeed, a common perception among Ohio practitioners is that asbestos cases are resolving more quickly and efficiently since the statute was enacted because there are fewer discovery disputes.

Texas provides another useful example. In that state, cases are consolidated in multi-district litigation (MDL). The judge presiding over that MDL has considered stay motions and continued some cases pending the filing and disclosure of trust claims, but there have not been the widespread delays predicted by opponents of the Texas statute. The Texas transparency statute has effectively allowed the MDL judge to address nondisclosure on a case-by-case basis without bogging down the entire MDL.

MYTH #2 – Transparency Reforms Increase Costs And Delay Compensation

Plaintiffs' lawyers have argued that state reforms that seek to compel a plaintiff to file asbestos trust claims before that person's tort trial can begin are "designed to force asbestos victims to jump through expensive and time-consuming legal hoops before they can move forward with a state court claim."[3]

THE FACTS

Reforms expedite, rather than delay, the filing and payment of trust claims. Reforms at the state level generally require the filing of trust claims before trial, which ensures compensation more quickly than the current system in which plaintiffs' lawyers delay the filing of trust claims in order to conceal them from the tort system. The expeditious filing of trust claims helps, not hurts, people suffering from asbestos disease because it puts money in their pockets more quickly than delaying the claims until after trial.

Further, the administrative process for filing trust claims is neither expensive nor time-consuming.

Rather, because the trust system is not an adversarial system like civil litigation, it is efficient and user-friendly. Plaintiffs' lawyers routinely advertise their ability to file trust claims "quickly and easily,"[4] and tell potential clients that paralegals evaluate potential trust claims and undertake the filing process.[5] The evidence also demonstrates that trust claims are paid much more quickly than tort claims. In fact, the recent deposition of the general counsel of the Manville Trust established that there is no backlog and claims are routinely paid within a few days after submission.[6] Plaintiffs' lawyers are also paid on a contingency-fee basis, which means that the lawyers are not paid unless and until the plaintiffs are paid. As a result, the system is not more "expensive" to plaintiffs than any other type of civil litigation.

MYTH #3 – Transparency Reforms "Close The Courthouse Doors" To Plaintiffs

Plaintiffs' lawyers have argued that proposed reforms are so onerous that they actually prevent plaintiffs from pursuing lawsuits. For instance, *Forbes* quoted unnamed "plaintiff lawyers" opposed to the ultimately-successful Ohio asbestos bankruptcy trust transparency law as arguing that the law would "shut out the lights and close the courthouse door."[7]

THE FACTS

The clearest evidence that the courthouse doors remain open is the fact that tort lawsuits continue to be filed in jurisdictions that have enacted reforms. Compensation has been neither delayed nor denied in those jurisdictions.

Indeed, compensation is delayed only in jurisdictions that have *not* enacted transparency reforms. The reforms simply require a plaintiff to file available trust claims, which (as noted above) are quick, easy, and beneficial, before the tort lawsuit proceeds to trial. The critical purpose of these reforms is to ensure that civil juries learn of all of plaintiffs' asbestos exposures and account for those exposures in their verdicts. Fair compensation can be awarded only when all of plaintiffs' exposures are known and accounted for. Far from "closing the courthouse doors," the reforms specifically recognize plaintiffs' rights to compensation in tort suits.

Because the trusts pay claimants quickly, the only reason not to file all viable claims is to suppress information about alternative exposures or obtain a double recovery for an injury. The reforms prevent these tactics by promoting honesty in litigation and affording juries an accurate picture of a plaintiff's total exposure. It is simply unfair to heap the liability of the large and sophisticated companies that have gone bankrupt on innocent or less culpable solvent companies, many of which are smaller mom-and-pop type operations that cannot and should not bear more than their fair share of responsibility.

MYTH #4 – Trust Recoveries Are *De Minimis*

Plaintiffs' lawyers have argued that asbestos trusts pay only small awards that are not comparable to the recoveries in tort litigation.

THE FACTS

Trusts pay significant compensation – routinely in six figures – to claimants suffering from mesothelioma. In the recent *Garlock* bankruptcy proceeding, a typical mesothelioma plaintiff's total recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts."[8] In addition, a November 2015 analysis of the publicly available discovery data from Garlock's bankruptcy case in relation to asbestos defendant Crane Co. showed that in cases "where Crane was a codefendant with Garlock, plaintiffs eventually filed an average of 18 trust claim forms."[9] Another recent report showed that awards to asbestos claimants represented by a dominant plaintiffs' law firm in one of the most active asbestos "magnet" jurisdictions in the U.S. (Madison County, Illinois) have received on average more than $800,000 apiece, with a substantial portion of those funds (approximately 41%) from bankruptcy trusts.[10]

Therefore, contrary to the claim that trust payments are a small fraction of tort recoveries, the two sources of compensation are comparable and, when added together, they often approach or exceed one million dollars. It is simply not accurate for plaintiffs' lawyers to minimize trust recoveries in an effort to shield them from disclosure in tort litigation.

Perhaps more importantly, even if trust recoveries were *de minimis* (which they are not), that still would not justify suppression of evidence of trust-related exposures. Honesty in litigation and the integrity of the civil justice system are ends in themselves,

and should not be honored or ignored depending on the amount of money at stake.

MYTH #5 – Transparency Reforms Allow Defendants To Control Plaintiffs' Tort Suits

In a variation on the argument that reforms delay tort litigation, plaintiffs' lawyers have claimed that defendants can influence the timing of, and ultimately delay, plaintiffs' lawsuits.

THE FACTS

Transparency reforms allow plaintiffs, not defendants, to control the timing of tort lawsuits, and experience bears this out. Once plaintiffs file the trust claims, which benefit plaintiffs because they are paid quickly and easily, the tort lawsuit proceeds. As noted, this system has worked well in jurisdictions where the reforms have been enacted. In addition to the experiences of Ohio and Texas, plaintiffs' lawyers recently opposed a Pennsylvania transparency bill by pointing to West Virginia as a state in which reforms have worked well. Like most of its counterparts, the West Virginia law requires plaintiffs to file trust claims before trial.

MYTH #6 – Transparency Reforms Threaten Personal Privacy

Reform opponents have argued that disclosure of trust-related information will expose plaintiffs' sensitive, personally identifiable information.

THE FACTS

This argument fails to acknowledge the disclosures that necessarily occur in tort litigation and misrepresents the disclosures required by the reforms.

Disclosure of trust-related information exposes no information that is not already required in the tort litigation (absent suppression of evidence). By filing a lawsuit, plaintiffs necessarily consent to the disclosure of their personal-identification information, medical and financial records, employment history and related information. Disclosure of such information is necessary for courts and defendants to assess the veracity and value of plaintiffs' claims.

The privacy myth has surfaced in debates regarding the federal Furthering Asbestos Claim Transparency (FACT) Act. Unlike state legislation that focuses on getting trust claim information before juries in tort trials, the FACT Act would require asbestos trusts to file quarterly reports that will be available on the bankruptcy court's public docket. The reports would describe "each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant."

The FACT Act would actually shield information that is otherwise available in tort litigation. For instance, the bill specifically excepts from disclosure "confidential medical records" and a victims "full social security number."[11] It also empowers bankruptcy judges to take additional steps, including the issuance of protective orders, to protect claimants' privacy where appropriate.[12]

Protections built into the FACT Act and additional protections already existing in the law ensure that confidential information will not be released. This point was recently made by Robert M. McKenna, former Attorney General of the State of Washington and a national expert on consumer protection and privacy issues. In February 2016, General McKenna testified before the Senate Judiciary Committee in support of the FACT Act. In his written statement, General McKenna explained:

> The Furthering Asbestos Claim Transparency (FACT) Act of 2015 is common sense transparency legislation that will discourage fraud and abuse in the asbestos compensation system while protecting asbestos trust claimants' sensitive personal information and confidential medical records from disclosure and misuse.
>
> The FACT Act explicitly protects asbestos trust claimants' medical records and full Social Security Numbers, ensuring that such information will never be included in public reports. Trusts' disclosures will also be subject to all of the privacy protections afforded by bankruptcy law and rules. As a result, the bill and existing bankruptcy rules and statutes ensure that personally identifiable information will not become publicly available, even while ensuring that asbestos trusts will report enough information to deter fraud as they protect individuals' privacy.

> The asbestos trusts' reports will be subject to the bankruptcy code's existing privacy protections. Section 107 of the code, for example, allows courts to protect any information that would present an undue risk of identity theft or injury to a claimant if disclosed. Similarly, Rule 9037 of the Federal Rules of Bankruptcy Procedure, "Privacy Protections for Filings Made with the Court," would also apply to the trusts' public reports. The rule will allow courts to require redactions of personal and private information. Finally, Rule 9037 will allow courts to limit or prohibit electronic access to trusts' reports.
>
> Courts throughout the country already use these rules to protect the personal information of individuals who file claims during asbestos bankruptcies. For example, the court overseeing the Garlock bankruptcy redacted trust claims information that was introduced into a hearing record and later released to the public. Other courts have required anyone reviewing bankruptcy claims to agree to strict protective orders. In addition, witnesses at the House Judiciary Committee's hearings on the FACT Act explained that the bill does not threaten asbestos victims' privacy and that asbestos claimants already routinely disclose more information than trusts would be required to report in the course of tort litigation and bankruptcy proceedings. While the FACT Act's opponents falsely claim that the bill would require the release of an unusual amount of information about asbestos bankruptcy trust claimants, this is simply not true.[13]

So transparency reforms do not compel the disclosure of private information that is otherwise protected and not already available in tort litigation, and they extend certain protections that are not available in the tort litigation.

Conclusion

In the wake of Judges Hodges' stunning findings in Garlock's bankruptcy proceedings, plaintiffs' attorneys can no longer credibly deny that the concealment of asbestos trust filings and payments in tort litigation is a widespread and significant problem. As a result, a number of new arguments have been raised in an attempt to depict transparency reform as an enemy of veterans and other sympathetic individuals suffering from asbestos disease. Despite their dramatic tone, however, these new arguments have proven no more valid than the flat denials of the problem exposed by Judge Hodges. Rather, the truth is that the reforms operate in both intent and practice to expedite the payment of compensation to those who file trust claims, to preserve the resources of both trusts and tort defendants, and to ensure that juries know and account for plaintiffs' entire exposure histories so that defendants pay only their fair share of compensation, all without causing any discernible delay of the tort process. Given these laudable goals, transparency reforms can be resisted only by those who seek to benefit from the very abuses that spurred the reforms in the first place.

Endnotes

1. *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 86 (W.D.N.C. Bankr. 2014).

2. AMVETS Wisconsin letter, Jan. 28, 2014 ("Contrary to what has been claimed, AB 19/SB 13 will not harm veterans. AMVETS believe that AB 19/SB 13 will help veterans by ensuring that valuable resources are not depleted by unscrupulous lawyers convincing clients to double and triple dip for one individual for one claim. This bill would also protect Wisconsin businesses from unfairly having to pay more than their fair share.").

3. Statement of the Consumer Attorneys of California, *available at* https://www.caoc.org/ca/index.cfm?pg=issjustice.

4. http://mesotheliomaclaimscenter.info/access-mesothelioma-trusts. ("Access Trust Funds: By filing your claim through the Mesothelioma Claim Center, you can quickly and easily get the money you deserve.").

5. *Id.* ("[Y]ou'll receive a FREE case evaluation from an experienced paralegal who will start processing your form within 24 hours.").

6. Deposition of Jared Garelick, Esq., in *Cummings v. General Elec.*, No.:13-CI-006374 (Jefferson, Ky. Cir. Ct. Dec. 14, 2015) at 34-36.

7. Daniel Fisher, *No Double Dipping*, Forbes.com, Oct. 17, 2006, *available at* http://www.forbes.com/2006/10/17/asbestos-double-dipping-biz-cz_df_1017asbestos.html.

8. *In re Garlock Sealing Techs., LLC*, 504 B.R. at 96.

9. Peggy Ableman *et al.*, *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 30:19 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 4, 2015).

10. *See* Heather Isringhausen Gvillo, *Database Provides Insight Into How Much Asbestos Claims Are Worth*, Madison-St. Clair Record, May 14, 2015 (38 plaintiffs in Madison County had lawsuits with a total value of $21.7 million and also received $8,859,879 from various bankruptcy trusts).

11. *See* H.R. 526, Furthering Asbestos Claims Transparency Act of 2015, § 8(A)(ii).

12. *Id.*at § 8(B).

13. U.S. Senate Comm. on the Judiciary, *The Need for Transparency in the Asbestos Trusts*, Hearing, 115th Cong., 2d Sess., Feb. 3, 2016 (statement of Hon. Robert M. McKenna, Esq.), at 2-3, *available at* http://www.judiciary.senate.gov/imo/media/doc/02-03-16%20McKenna%20Testimony.pdf. ■

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