Conversations With...

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# Why Transparency Is Imperative in Litigating Asbestos Liability Claims

**The Honorable Dick Thornburgh**
**The Honorable Peggy L. Ableman**

In this edition of Washington Legal Foundation's CONVERSATIONS WITH, former Attorney General of the United States and Pennsylvania Governor Dick Thornburgh discusses the need for increased transparency in the asbestos litigation process with former Delaware Superior Court Judge Peggy L. Ableman. Judge Ableman draws upon her nearly thirty years of experience as a state trial judge and her work as Special Counsel to the law firm McCarter & English LLP to explain how some lawyers' manipulation of the asbestos bankruptcy claims process undermines judicial integrity and courts' ability to make injured plaintiffs whole. The conversation will also focus on recent judicial actions that have exposed plaintiffs' fraudulent withholding of evidence, ongoing state and federal legislative efforts to require greater transparency in asbestos bankruptcy trusts, and what more judges can do to help.

**Governor Thornburgh:** Since asbestos bankruptcy trusts are central to this conversation, can you explain what these entities are and why they were created?

**Judge Ableman**: Now entering its fourth decade, asbestos litigation is the nation's longest running mass tort, with filings against asbestos manufacturers beginning in the early 1970s. Originally, and for many years, companies that manufactured asbestos-containing thermal insulation were among the principal targets of tort litigation. Their products were "friable" and far more toxic than chrysotile asbestos. As many of these manufacturers and suppliers sustained crushing losses, and saw their assets exhausted due to the sheer magnitude and volume of judgments against them, they were forced to file bankruptcy.

By the end of 2011, at least 96 companies with asbestos-related liabilities had declared bankruptcy. Through the bankruptcy process, entities that played a significant role in causing asbestos-related disease have been able to channel their asbestos liabilities into trusts pursuant to § 524(g) of the Bankruptcy Code, thereby insulating themselves from such claims in perpetuity. More than 60 trusts have been established to collectively form a $36.8 billion privately-funded asbestos personal injury compensation system that operates parallel to, but wholly independent from, the civil tort system.

**Governor Thornburgh:** If those manufacturers and suppliers with the most direct connection to asbestos are the ones funding the trusts, why are so many lawsuits still being filed in state and federal courts?

**Judge Ableman**: Interestingly, plaintiffs' attorneys recognized early on that the trust payments would be unlikely to provide the windfall compensation that a jury verdict from a sympathetic jury would be inclined to award, especially to victims of the deadliest of asbestos-related diseases, mesothelioma.

The bankruptcies of most of the major raw material providers and product

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manufacturers thus created an incentive for plaintiffs' lawyers to find "peripheral defendants" or "downstream users." These defendants are consumers of asbestos-containing products who incorporated the products into their manufactured goods, recommended use in conjunction with their products (furnaces or water heaters), owned premises where asbestos was present, or who acquired companies that previously manufactured asbestos-containing products.

The number of trusts grew rapidly over the years, and the ability of plaintiffs to recover from multiple trusts increased. Trust outlays have increased as well. Indeed, for the first time ever, it is estimated that trust recoveries may fully compensate asbestos victims.

Deterrence objectives are no longer served by asbestos tort litigation. The defendants who engaged in wrongdoing many years ago have disappeared from the scene. Indeed, asbestos itself disappeared from the marketplace nearly forty years ago. Plaintiffs' attorneys, ever resourceful, have discovered a large and expanding group of companies that had some role in using an asbestos component, selling or distributing such a product, or acquiring a company that brought with it some asbestos liability.

**Governor Thornburgh:** Alleged victims of asbestos exposure may file claims with one or numerous bankruptcy trusts and simultaneously sue solvent, "peripheral" defendants. Why are the claims filed with the trusts so important to those civil liability defendants?

**Judge Ableman**: Because of the dual compensation system that exists today, it is important for courts and defense counsel to be aware of *all* claimed sources of a particular plaintiff's exposure to asbestos. If courts and defendants cannot access the data contained in the bankruptcy trust claim forms, a plaintiff can present conflicting exposure evidence or inconsistent fact patterns to a court and one or more trusts so as to maximize recovery from both systems.

Trust data can provide evidence of where a plaintiff worked, his years of employment, years of exposure, smoking history, diagnosis data, and specific product references. All of this is relevant information that can easily be withheld from counsel and the court in litigation, but should be available in the tort case to depict an individual's entire exposure history, medical causation, and liability picture. For solvent defendants still in the asbestos tort system, transparency of trust information forces plaintiffs and their attorneys to play by the rules and disclose all exposures and recoveries.

Fraud on the trusts hurts legitimate claimants by depleting resources available to pay their claims in full. Solvent defendants in tort cases have a need for reliable information regarding all exposures during a plaintiff's lifetime in order to ensure that defendants are held responsible only for their fair share of liability through proper allocation of fault.

**Governor Thornburgh:** Why are defendants often unable to discover information about claims filed with asbestos trusts?

**Judge Ableman**: One of the major problems with the dual compensation system is that there are no failsafe means to cross-check if a plaintiff involved in litigation against solvent defendants has filed inconsistent claims with a trust. While many states have adopted case management orders that require full disclosure of trust claims made, defendants contend that plaintiffs do not, in fact, provide these materials in discovery. Setting aside the possibility that some lawyers choose to disregard applicable discovery orders, other attorneys or professionals who do not enter their appearance in the state court litigation are often responsible for handling the bankruptcy trust claim submissions. Those trial counsel who oversee the litigation may neglect to verify if any trust submissions have been made.

Many plaintiffs' attorneys have found that the way to avoid sanctions for disregarding discovery orders is by simply deferring trust submissions until after the state court litigation has concluded. After all, if nothing has been filed, there is nothing to disclose. In fact, some of these lawyers may not even investigate trust-related disclosure to any significant degree until the state court proceedings are concluded, and in the absence of such investigation, they can avoid an enforceable obligation to disclose these potential trust submissions.

Defendants are unlikely to find most trusts to be cooperative when they attempt to investigate plaintiffs' trust submissions. Although federal law does not bar discovery of trust information, the mechanisms available in discovery are insufficient to ensure that the information is, in fact, disclosed. Plaintiffs often argue that the trusts are akin to settling defendants, so that all communications should be subject to the settlement privilege.

While some trusts previously disseminated their claim information freely, most bankruptcy trusts today treat claim submissions and payments as confidential. Since 2006, new trusts include trust distribution procedures (TDP) language requiring the trusts to treat claim submissions, discussions, and payments as confidential "settlement negotiations," and some of the older trusts have amended their TDPs to include similar provisions. These provisions obligate trustees to take all necessary steps to resist disclosure unless authorized by the claimant or required under applicable law.

**Governor Thornburgh:** While on the bench in Delaware, you saw firsthand the negative impact this lack of transparency can have on litigants and the integrity of the judicial process. Can you talk about that?

**Judge Ableman**: Toward the end of my judicial tenure, I was scheduled to preside over an asbestos trial that, as circumstances unfolded, gave me an up-close understanding of and insight into the potential for unfairness associated with a system that permits a plaintiff's bankruptcy trust claims and payments to remain undisclosed to the defendants who have been sued by that same plaintiff in state court tort litigation. In essence, absent good-faith compliance with court mandates for full disclosure, there is no foolproof mechanism to eliminate fraud. Even in Delaware, where there is a Standing Order requiring full disclosure of all trust claims, deception can still occur, resulting in irreversible prejudice to one or more defendants.

The original plaintiff in the case, who was diagnosed with mesothelioma, retained Texas counsel through her son. That attorney, in turn, was to assist the plaintiff in finding counsel in Florida where plaintiff resided. Florida counsel ultimately filed the case in the Superior Court in New Castle County, Delaware, naming 23 defendants who were allegedly responsible for plaintiff's exposure to asbestos from her use of, or proximity to, their products. By the time of trial, however, all but one defendant had settled, leaving Foster Wheeler as the sole defendant remaining for trial.

Despite the Standing Order, and specific interrogatories that had been directed to the plaintiff for this information, at no time did she identify exposure from the products of any of the 20 entities to whom bankruptcy claims had been submitted on her behalf. Instead, the plaintiff consistently asserted that she was exposed to asbestos solely through her laundering of her husband's work clothes, as opposed to any work she personally performed.

Although plaintiff's husband had spent his entire career as an electrician working around a wide variety of products and materials at multiple locations throughout Florida, the distinct impression left by the plaintiff was that the bulk of her husband's work with asbestos occurred primarily during a short period of

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time at the Everglades Power Plant where—coincidentally—Foster Wheeler's boilers were located. Even as late as the pretrial conference just days before trial, plaintiff's counsel reported that absolutely no bankruptcy trust claims had been submitted and no monies had been received. That was the state of the record as of the weekend before the trial was to commence.

**Governor Thornburgh:** When and how did the plaintiff's other asbestos injury claims come to your attention?

**Judge Ableman**: Over the weekend before trial, plaintiff's counsel met the plaintiff's son from Texas (who was now her legal representative due to her death) for the first time when he arrived for trial. According to plaintiff's counsel, he first learned on Saturday night that the family had received two bankruptcy settlements from another law firm that had filed those claims on his behalf. Plaintiff's trial counsel claimed to have been completely unaware of these filings previously.

Plaintiff's counsel forwarded this information to defense counsel, who was understandably upset by the revelations as they were directly inconsistent with counsel's unequivocal representations at the pretrial conference. In fact, by late afternoon the following day (the day before trial was to begin) counsel for defendant was advised for the first time that a total of *20* bankruptcy trust claims had been submitted. Essentially then, at that late stage in the litigation, defense counsel was faced with the realization that he had prepared his case knowing even less than half of the truth and that the facts of the case were far different from what he had been led to believe. Counsel for Foster Wheeler had been told that plaintiff's claimed exposure was solely the result of take-home fibers on her husband's work clothing, not from plaintiff's own employment where she had worked in and around the very products that provided the basis for her bankruptcy trust claim submissions. The representations to the bankruptcy trusts had painted a much broader picture of her exposure to asbestos than either the plaintiff or her attorneys had acknowledged during the entire course of the litigation in Delaware. Plaintiff's failure to disclose or produce the trust claims precluded Foster Wheeler from investigating her exposure to asbestos from any of these additional entities or additional products, as they had not been developed in the Delaware case. That failure was manifestly prejudicial to defendant Foster Wheeler.

The court, of course, was the last to know the truth. After all of the resources and time that had been expended by the court to ready the case for trial, and with a jury that had been selected a week earlier waiting in the wings, the court had no choice but to continue the trial. Ultimately, the case was dismissed.

**Governor Thornburgh:** What were you able to do in reaction to these new developments? Was there any recourse available to the other defendants who settled based on incomplete information?

**Judge Ableman**: I recognized immediately that the trial could not possibly go forward as scheduled. And my initial reaction to the plaintiff or her attorneys' behavior was that it was so egregious, and the misrepresentations so fundamental, that I should dismiss the case with prejudice right then and there. Ultimately, I decided not to let my emotional response guide my decision-making. I explained to plaintiff's counsel that he had essentially created a situation where the defense had to begin its trial preparation anew since the facts now known presented a far different scenario from the one for which defense counsel had prepared. I asked for briefing on the question of whether dismissal was appropriate under the circumstances, and I explained that, in the event I decided ultimately not to dismiss the case, all of the expenses associated with the defendant's discovery and trial preparation the second time around would have to be borne by the plaintiff.

Probably the most unfortunate consequence of the misrepresentations and withholding of evidence in that case was that 22 other defendants had already settled the claims against them. Those co-defendants made their respective determinations regarding what settlement amounts would be "fair" based on insufficient data and an incomplete picture of the plaintiff's total exposure. Such a complete picture may have also led some defendants to remain in the case, rather than settle.

Undoubtedly, those defendants could have found some resourceful way to reopen the proceedings to adjust for the fraud, but that too is costly, and experience tells us that it is rarely done.

**Governor Thornburgh:** In the case you described, the trust submission information was potentially available but undisclosed. Are changes to federal bankruptcy law necessary to increase asbestos trusts' transparency?

**Judge Ableman**: Bankruptcy law does not seek to provide co-defendants with the information they may need to defend themselves in tort litigation. It is generally understood that any right of access to this information is a matter governed by state discovery rules, and the TDPs that govern the bankruptcy trusts' administration treat claims submissions and payments as confidential. The court overseeing the discovery—the state trial court, not the bankruptcy court—generally has exclusive jurisdiction over any discovery disputes.

Although federal law does not bar discovery of trust information, plaintiffs frequently argue that trusts are akin to settling defendants whose communications are thus privileged. Of course, by timing the trust submissions to occur after the tort case is resolved, plaintiffs can avoid any issues regarding discovery entirely by insuring that there is nothing to discover.

A bill introduced in Congress in 2013, the FACT Act, would impose obligations on the trusts to file quarterly reports to the bankruptcy court concerning each claim received, including the name and asserted exposure history of the claimant, as well as the basis for any payments made. While this will not solve the problem created by strategically timing the filing of trust claims until after the tort case is concluded, the prospect of public disclosure and openness may ultimately serve to curb the temptation on the part of some to "play fast and loose" with the truth and may have the effect of forcing plaintiffs to play by the rules.

**Governor Thornburgh:** What can be done at the state level that cannot be achieved through changes to the federal Bankruptcy Code?

**Judge Ableman**: The FACT Act, if enacted, will impose quarterly reporting obligations on the trusts. As I noted before, this will not solve the problem of strategic nondisclosure and trust submission timing, although it may discourage this practice to some extent.

Several states have passed legislation to create greater transparency between the trusts and the civil litigation. Ohio, Oklahoma, and Wisconsin have adopted statutes that require plaintiffs to file their trust claims before trial and to produce copies of those forms, thereby eliminating the incentive to delay trust claim submissions.

The primary purpose for state-level legislation is to fill the gaps in the current system that deny defendants access to the information to which they are entitled in discovery. If the information necessary to construct a complete picture of a plaintiff's exposure is within the sole possession of the plaintiff, and there is no disadvantage to concealing this information at trial, defendants—and juries—will have only a manufactured reality concerning plaintiff's exposure history that may bear little relationship to the underlying truth. The structure of the state statutes works not only

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to encourage the disclosure of trust forms but also to ensure that the information is shared in a timely manner.

*"Although federal law does not bar discovery of trust information, plaintiffs frequently argue that trusts are akin to settling defendants whose communications are thus privileged."*

**Governor Thornburgh:** Such calculated delays in seeking compensation from bankruptcy trusts came to light this year in a federal court case in North Carolina, *In re Garlock*. What is the factual situation in that case?

**Judge Ableman**: The *Garlock* case made national headlines recently and has had a tremendous impact on the asbestos litigation scene. It provides previously inaccessible, but long suspected, support for bankruptcy transparency as an essential component of the defense of every asbestos-related personal injury case in the tort system. In an exhaustive opinion, a federal bankruptcy judge in North Carolina concluded that the practice of withholding exposure evidence concerning the products of bankrupt entities was sufficiently widespread to justify disregarding Garlock's previous settlement history entirely as a basis upon which to measure Garlock's aggregate liability for current and future mesothelioma claims.

Garlock, a gasket and packing manufacturer, had been a relatively small player in the asbestos tort system. It had been successful in settling cases until the early 2000s, by which time the remaining solvent thermal insulation companies filed for bankruptcy and could no longer be sued. This circumstance caused the focus of plaintiffs' attention to turn to the remaining solvent defendants in the tort system. Not coincidentally, at the same time, evidence of exposure to other products began to disappear. As a result, Garlock had been forced to pay higher amounts to settle its cases and sustained a few big verdicts after trial. Garlock continued to settle cases until its insurance was exhausted, at which time it filed for bankruptcy in North Carolina to establish a § 524(g) trust.

Following a trial that lasted several weeks, Bankruptcy Court Judge George Hodges found that Garlock's settlements of mesothelioma claims in the tort system were "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." As a result, the court estimated Garlock's pending and future mesothelioma claims to be $125 million, about one billion dollars less than had been requested by plaintiffs' committees.

As is evident from the scope and detail of the opinion, Judge Hodges embarked on an extensive effort to understand fully the history of asbestos litigation in the United States, the scientific evidence relating to asbestos, and the evolution of the dual compensation system that exists today.

As part of the future liability estimation process, the court allowed the parties to conduct wide-ranging discovery, including an extensive review of fifteen randomly selected cases out of hundreds that had settled.

**Governor Thornburgh:** What did Judge Hodges discover in his investigation of those fifteen cases?

**Judge Ableman**: The court held that, in those fifteen cases, "Garlock demonstrated that exposure evidence was withheld in each and every one of them." In fact, the discovery revealed that plaintiffs disclosed on average only two exposures to bankrupt companies' products but then, only *after* reaching a settlement with Garlock, those same plaintiffs on average made claims against nineteen bankruptcy trusts. This calculated withholding of evidence was described as "surprising and persuasive." The court found further extensive discovery to be unnecessary because "the startling pattern of misrepresentation that has been shown is sufficiently persuasive."

An understanding of the specifics of the *Garlock* opinion is essential for all attorneys and judges involved in asbestos litigation because it brings to light one of the most troubling problems that has plagued this litigation—the lack of transparency across

the bankruptcy and tort systems—and the ease with which attorneys have been able to capitalize on this gap, so as to taint the truth-seeking function of the courts.

The decision represents a thoughtful and timely assessment, not only of Garlock's role in the tort system, but also of the overall status of asbestos litigation in general. For defendants who are solvent and are still susceptible to lawsuits in the tort system, the need for bankruptcy trust information is essential, and defense counsel should press hard for enforcement of case management orders that require disclosure. If plaintiffs routinely fail to comply with these orders, these deficiencies should be addressed with the court, and the *Garlock* decision should be used by counsel to educate the court about the need for full disclosure. In light of that decision, defense counsel have no excuse not to push for bankruptcy trust discovery. Likewise, it will now be hard for judges to turn a deaf ear to defendants' requests for critical case information from plaintiffs' bankruptcy claim submissions.

**Governor Thornburgh:** Have states other than those you mentioned previously taken action to address this strategic delay in submitting claims to bankruptcy trusts?

**Judge Ableman**: Other states, such as Pennsylvania, are in the process of considering legislation similar to that adopted in Ohio, Oklahoma, and Wisconsin, but the legislative process is often cumbersome and slow. In light of that reality, the trend is now for individual jurisdictions that have large asbestos-related dockets to include in their Case Management Orders provisions that mirror some of the key elements of the legislation.

Unfortunately, even in states where standing Case Management Orders require full disclosure of trust claims information, some counsel continue to employ methods to avoid production. In Delaware, where the Standing Order had been in effect for several years at the time that I encountered the problem, I was not aware of the ingenuity of plaintiffs' counsel in devising methods to withhold information without strictly running afoul of ethical standards. I suspect that judges who are new to the asbestos docket, or those who have not encountered the issue, as I had not, may still rely on the integrity of parties and their lawyers in assuming that their orders will not be subject to manipulation. At the very least, defense attorneys in these cases should aggressively insist upon obtaining *all* information about a plaintiff's claimed exposures so as to uncover the total picture of the cause of plaintiff's disease.

**Governor Thornburgh:** With federal bankruptcy law reform uncertain and the pace of change in the states expected to be slow, what can state and federal judges do in civil asbestos cases to deter and punish withholding of such vital information as trust claims?

**Judge Ableman**: First and foremost, state and federal judges should be aware of the intricacies of the dual compensation system and the lack of coordination between the bankruptcy trusts and the tort system. To the extent that they are not, defense attorneys should undertake to educate the court about the potential for their own cases to be tainted by fraudulent activity. Courts should be aware of the importance of mandatory full disclosure, and they should demand it from the very inception of the litigation. They should send a strong message to counsel that they will not ignore violations of these mandates and are prepared to sanction lawyers who fail to comply. They should also require that plaintiffs verify that no other attorney is involved in obtaining compensation from trusts. In the end, courts must lean strongly on the attorneys to act ethically, honestly and responsibly and send a message that the tactics I have just described will not be tolerated.

**Governor Thornburgh:** Judge Ableman, thank you for participating in this discussion.

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**The Honorable Dick Thornburgh** is a former Attorney General of the United States, two-term Governor of Pennsylvania, and Undersecretary-General of the United Nations. He is currently Of Counsel to the law firm K&L Gates LLP and Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

**The Honorable Peggy L. Ableman** is Special Counsel to the law firm McCarter & English LLP in its Wilmington, Delaware office. Prior to joining the firm, she served for nearly thirty years as a state trial judge in Delaware. During her tenure on the Superior Court, Judge Ableman presided over the asbestos litigation docket for nearly two years, a docket comprised of more than 500 cases. Before taking the bench, Judge Ableman served as the first female Assistant United States Attorney for the District of Delaware from 1979 to 1983.