

PRODUCT LIABILITY

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In January 2014, a federal bankruptcy judge in Charlotte, North Carolina, held that asbestos personal injury settlements paid by gasket and packing manufacturer Garlock Sealing Technologies were “infected with the impropriety of some law firms.” The judge found that several leading asbestos plaintiffs’ law firms had suppressed evidence critical to Garlock’s defense of its cases. The ruling may result in greater transparency between the asbestos bankruptcy trust and civil tort systems and improve the asbestos litigation environment in the U.S.

Garlock Bankruptcy Judge: Asbestos Settlements “Infected With the Impropriety of Some Law Firms”

ABOUT THE AUTHORS



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ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership.

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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

A January 2014 landmark decision by a federal bankruptcy judge in Charlotte, North Carolina, is likely to have far-reaching consequences for asbestos defendants throughout the U.S. (*In re Garlock Sealing Tech., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014)). Following a lengthy trial, U.S. Bankruptcy Judge George Hodges concluded that gasket and packing manufacturer Garlock Sealing Technologies, LLC's settlements of mesothelioma claims with plaintiffs' law firms were "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." The judge said "[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock" He estimated Garlock's liability for mesothelioma claims to be \$125 million – about *one billion less* than the \$1–1.3 billion urged by lawyers representing plaintiff interests.

Judge Hodges' decision documents how plaintiffs' lawyers abuse the lack of transparency between the asbestos bankruptcy trust and civil tort systems to gain an unfair litigation advantage. Judge Hodges found the withholding of exposure evidence by asbestos plaintiffs' counsel to be "widespread and significant."

Garlock Litigation's History

Originally and for many years, companies that manufactured asbestos-containing thermal insulation were among the principal targets of asbestos plaintiffs' lawyers. These products were friable and contained long, rigid amphibole fibers, rather than the more common, but far less toxic, chrysotile form of fiber. The plaintiffs suing these companies worked in dusty environments with high concentrations of asbestos fibers, such as ship builders and insulators.

Over time the litigation morphed and plaintiffs' lawyers began to file hundreds of thousands of cases on behalf of plaintiffs who had little or no physical impairment. By the late 1990s, the asbestos litigation had reached such proportions that the United States Supreme Court called it a "crisis." Mass filings pressured many primary historical defendants into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation.

Until the bankruptcies of the thermal insulation defendants, Garlock was a relatively small player in the asbestos tort system and was successful in settling (and rarely trying) its cases.

Things changed in the early 2000s as the remaining thermal insulation companies filed bankruptcy and exited the tort system. In this new environment, where exposure evidence could be controlled by plaintiffs' counsel, Garlock suffered a few large verdicts and was forced to pay higher settlement values. Garlock continued settling cases with relative success, but at higher amounts, until its insurance was exhausted.

In June of 2010, Garlock and affiliates Garrison Litigation Management Group and The Anchor Packing Co. (collectively, Garlock) filed a voluntary petition in the U.S. Bankruptcy Court for the Western District of North Carolina to establish a trust to resolve all current and future asbestos claims against it pursuant to Section 524(g) of the U.S. Bankruptcy Code.

Bankruptcy Court's Order Draws Back Curtain on Plaintiffs' Practices

In the bankruptcy case, Judge Hodges ordered extensive discovery and conducted an

evidentiary hearing over several weeks to estimate Garlock's liability for mesothelioma claims.

First, the court conducted an extensive review of medical evidence. Judge Hodges said "it is clear under any scenario that chrysotile is far less toxic than other forms of asbestos." Judge Hodges also found that the "most reliable and probative" peer-reviewed scientific reports confirm that "exposure to asbestos from end users of encapsulated asbestos products is minimal." He concluded, "It is clear that Garlock's products resulted in relatively low exposure to asbestos to a limited population and that its legal responsibility for causing mesothelioma is relatively de minimus." Judge Hodges noted that the Sixth Circuit Court of Appeals said in an individual pipefitter's case that "the comparison is as a 'bucket of water' would be to the 'ocean's volume.'" (*Moeller v. Garlock Sealing Tech., LLC*, 660 F.3d 950, 954-55 (6th Cir. 2011)).

Second, and perhaps most importantly, the court found that evidence Garlock needed to attribute plaintiffs' injuries to insulation products "disappeared" once those companies filed bankruptcy. The judge said "[t]his 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 fifteen settled cases in which Garlock was permitted to have full discovery, "Garlock demonstrated that exposure evidence was withheld in *each and every one* of them."

For example, in a New York case which Garlock settled during trial for \$250,000, the plaintiff had "denied any exposure to

insulation products," according to Judge Hodges. After the case was settled, the plaintiff's lawyers filed twenty-three trust claims on the plaintiff's behalf – including eight trust claims that were filed within twenty-four hours of settling with Garlock.

In a California case that resulted in a \$9 million verdict against Garlock, the plaintiff "did not admit to any exposure from amphibole insulation . . . and claimed that 100% of his work was on gaskets." Discovery in the Garlock bankruptcy case revealed that the plaintiff's lawyers filed fourteen trust claims post-verdict, including several against amphibole insulation manufacturers. "And most important," said Judge Hodges, "the same lawyers who represented to the jury that there was no Unibestos insulation exposure had, seven months earlier, filed a ballot in the Pittsburgh Corning bankruptcy that certified under 'penalty of perjury' that the plaintiff had been exposed to Unibestos insulation." In total, the plaintiff's lawyers failed to disclose the plaintiff's exposure to twenty-two other asbestos products.

In a Philadelphia case which Garlock settled for \$250,000, the plaintiff "did not identify any exposure to bankrupt companies' asbestos products" in his tort suit. Further, in answers to written interrogatories, the plaintiff's lawyers said the plaintiff had "no personal knowledge" of such exposure. Discovery in the Garlock bankruptcy case revealed that "just six weeks earlier, those same lawyers had filed a statement in the Owens Corning bankruptcy case, sworn to by the plaintiff, that stated that he 'frequently, regularly and proximately breathed asbestos dust emitted from Owens Corning . . . asbestos-containing pipe covering.'" In total, Judge Hodges said, "this plaintiff's lawyer failed to disclose exposure to 20 different asbestos products for which he

made Trust claims.” Fourteen of the claims were supported by sworn statements, that contradicted the plaintiff’s denials in the tort discovery.

In a Texas case that resulted in a \$1.35 million verdict against Garlock, the plaintiff denied knowing the name “Babcock & Wilcox” and his lawyers told the jury in his tort case that there was no evidence that the plaintiff’s injury was caused by exposure to Owens Corning insulation. Discovery in the Garlock bankruptcy case revealed that the day before the plaintiff denied any knowledge of Babcock & Wilcox, his lawyers had filed a trust claim against it on his behalf. Post-verdict, the lawyers filed a claim with the Owens Corning Trust. “Both claims,” said Judge Hodges, “were paid – upon the representation that the plaintiff had handled raw asbestos fibers and fabricated asbestos products from raw asbestos on a regular basis.”

In contrast to the cases where exposure evidence was withheld, there were several cases in which Garlock did obtain evidence of trust claims that had been filed by plaintiffs and was able to use them in its defense at trial. “In three such trials, Garlock won defense verdicts, and in a fourth [Garlock] was assigned only a 2% liability share.”

Judge Hodges bluntly characterized Garlock’s tort litigation as infected by a “startling pattern of misrepresentation” that inflated plaintiffs’ recoveries against Garlock following the surge of asbestos bankruptcies by insulation defendants in the early 2000s.

Judge Hodges said that he could not accept the “settlement approach” to estimation offered by the plaintiff committees. Their approach sought to base pending and future estimates of liability on an extrapolation of Garlock’s history of resolving mesothelioma

claims in the tort system. Instead, Judge Hodges accepted Garlock’s “legal liability approach,” which considered the merits of claims in the aggregate by applying an econometric analysis of the projected number of claimants and their likelihood of success.

Judge Hodges concluded that Garlock’s aggregate liability for mesothelioma claims is \$125 million, not the \$1–1.3 billion requested by plaintiff committees.

Reaction to *Garlock* Decision

The frank language and documented abuses in Judge Hodges’ order are making waves.

The *Wall Street Journal* editorialized that Judge Hodges’ opinion is “a reminder to other judges that their courtrooms are supposed to be places that render justice, not rubber stamps for plaintiff scams.” *Bloomberg Businessweek* declared that asbestos litigation “has reached a truly repulsive phase” where “ever-more-troubling evidence emerges that influential members of the plaintiffs’ bar have lost their moral bearings.”

National Public Radio broadcast a story calling the *Garlock* decision a “watershed moment.” The *Huffington Post* said that plaintiffs who have played by the rules by honestly seeking compensation from the companies that actually caused them harm were losing out to plaintiffs willing “to become perjury pawns for those who would game the system.” A *New York Times* columnist offered three reasons that people should care about whether the right companies were being targeted: (1) future victims may wind up with less than they should; (2) the litigation “is an impediment to economic growth and job creation” by bankrupting innocent companies; and (3) plaintiffs’ lawyers have “clearly flouted” the rule of law.

***Garlock's* Meaning for Defendants**

The *Garlock* decision should be required reading for defense counsel and judges in asbestos cases. No matter what the final outcome will be in the *Garlock* bankruptcy, the facts uncovered and noted by Judge Hodges in his opinion after his detailed review of the evidence should not change.

Defense counsel should make a priority of finding ways to educate judges in asbestos cases and policymakers about the *Garlock* ruling.

Defense counsel can use the ruling seek discovery of plaintiffs' trust claims. Many courts have approved defendants' requests to compel the production of trust claims submissions to discover information such as plaintiffs' work histories and exposures to asbestos.

The *Garlock* ruling demonstrates how aggressively seeking information about plaintiffs' claimed asbestos exposures can more reliably uncover which asbestos products actually caused a plaintiff's harm. By uncovering a plaintiff's full exposure history, defense counsel are better able to cross-examine plaintiffs and uncover attempts by unscrupulous plaintiffs to tell inconsistent exposure histories to trusts and juries. Jurors are given the tools to reach fully informed decisions about which companies caused the plaintiff's harm. Settlements values will also better reflect a defendant's fair share of responsibility for the plaintiff's injury.

In addition, the *Garlock* ruling provides support for requiring plaintiffs to prove up their cases against low dose defendants to more accurately reflect the true liability in each case. Judge Hodges heard from several scientific experts and closely examined their

methodologies to determine which were inconclusive and which were persuasive. The studies he deemed persuasive may be useful for tort defendants in low dose exposure cases. Defendants also can use the court's rejection of certain plaintiffs' experts in their own cases.

On high-volume dockets, the *Garlock* decision should spur groups of defendants to ask courts to create standing rules to require plaintiffs to disclose trust claims. With the *Garlock* decision illustrating the failure of plaintiffs to properly disclose trust claims, defendants have more ammunition to convince courts to approve CMOs that require plaintiffs to file and produce all trust claims before trial.

In bankruptcy cases, the *Garlock* court's rejection of the settlement history model of estimating liability could help defendants demonstrate how the deck has been stacked against them in the past and to argue for liability models as a basis of estimating future trusts.

Garlock is having an impact in legislatures too. The decision is already fueling efforts to enact asbestos bankruptcy trust transparency laws, such as those enacted in recent years in Ohio and Oklahoma. These laws require tort system plaintiffs to file their trust claims and produce copies before trial. In the wake of the *Garlock* decision, Wisconsin enacted asbestos bankruptcy trust transparency legislation that was carried over from last year.

Garlock also provides support for federal Furthering Asbestos Claim Transparency (FACT) Act legislation. If the Senate changes hands in the November 2014 election, the *Garlock* decision should boost the bill's chance of success. The FACT Act would require asbestos trusts to compile and



release quarterly reports on claimants seeking payments for asbestos exposure.

More to Come...

More shock waves may be on the horizon. The day before Judge Hodges’ decision, Garlock filed four adversary complaints under seal in the North Carolina bankruptcy court alleging conspiracy, fraud, and Racketeer Influenced and Corrupt Organizations Act (RICO) claims against several law firms and attorneys. A Garlock spokesperson told *Forbes* that the complaints “allege that these firms concealed evidence about their clients’ exposure to asbestos products and concealed it in litigation against” Garlock. Earlier, Garlock had filed a lawsuit against another plaintiffs’ law firm alleging fraud, negligent misrepresentation, and civil conspiracy claims related to alleged withholding of exposure evidence in Garlock tort cases.

Other important developments relate to the *Garlock* trial and related exhibits. Key parts of the trial that addressed suppression of evidence by plaintiffs’ lawyers were closed to the public and are under seal pursuant to a confidentiality agreement. *Legal Newsline*, an Internet-based newswire dedicated to coverage of litigation, has asked a Charlotte federal district court to unseal the trial testimony and exhibits discussed in Judge Hodges’ decision. Asbestos defendants Ford Motor Co., Honeywell, International, Inc., Volkswagen Group of America, Inc., and Crane Co.; insurers Mount McKinley Insurance Co. and Everest Reinsurance Co. as well as Resolute Management, Inc. and the AIG Member Companies; debtors Specialty Products Holding Corp. and Bondex International, Inc.; and health insurer Aetna, Inc., and service provider The Rawlings Co.

LLC have also made efforts to obtain access to evidence in the case. While the district court will decide issues relating to the unsealing of misrepresentation evidence, Bankruptcy Court Judge Hodges has recently permitted access to so-called “Rule 2019” statements that plaintiffs’ lawyers filed in Garlock’s bankruptcy. The statements, named after a provision of the federal bankruptcy code, require lawyers to identify clients with claims against a bankrupt company as well as the nature of those claims.

It is uncertain how Judge Hodges’ ruling will affect the outcome of Garlock’s bankruptcy case.

Conclusion

The *Garlock* ruling should spark more intense judicial scrutiny of the relationship between plaintiffs’ asbestos trust fund claims and tort suits against solvent defendants. The decision is a must-read for asbestos defense counsel and should be brought to the attention of judges in asbestos cases and policymakers.

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Robinson, Bradshaw & Hinson, P.A. represented Garlock at the estimation trial that produced Judge Hodges’ order. Caplin & Drysdale, Chartered represented the Asbestos Claimants Committee; Orrick, Herrington & Sutcliffe LLP served as counsel for the Future Claimants Representative.



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