

# Asbestos

## **A Look Behind The Curtain: Public Release Of Garlock Bankruptcy Discovery Confirms Widespread Pattern Of Evidentiary Abuse Against Crane Co.**

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# Commentary

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### Introduction

In February 2015, the discovery data from the Garlock Sealing Technologies LLC ("Garlock") bankruptcy case in North Carolina was released to the public. The significance of this data cannot be overstated. For the first time, any interested party has access to information regarding what claims asbestos plaintiff law firms have filed against bankruptcy trusts for a large sample of historical cases.<sup>1</sup> This data reveals the detailed evidence underlying the ruling by the federal judge in Garlock's bankruptcy case, who found that the long-running asbestos tort has been "infected with the manipulation of exposure evidence" by plaintiff law firms.<sup>2</sup> Thus, the data legitimize the concerns of defendants and insurers over the lack of trust and tort transparency.

For current asbestos defendant Crane Co. ("Crane"), the discovery data shows a similar pattern of systematic suppression of trust disclosures that was documented in

the Garlock bankruptcy. Specifically, Crane engaged economic consulting company Bates White LLC to analyze the public Garlock discovery data in relation to Crane cases, from which we observed the following:

- In cases where Crane was a codefendant with Garlock, plaintiffs eventually filed an average of 18 trust claim forms.
- On average, 80% of these claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings.
- Overall, nearly half of all trust claims were filed after Crane had already resolved the tort case.

Such an overall lack of consistent disclosure raises significant due process concerns and highlights the procedural ineffectiveness of current discovery protocols in jurisdictions across the country. Crane engaged former Delaware Superior Court Judge Peggy Ableman to expand upon these legal issues and offer her first-hand professional perspective on the issues of trust transparency and what is necessary for the proper adjudication of asbestos cases.

The following commentary will detail the systematic nature of the suppression of evidence against Crane. We demonstrate the suppression of evidence by comparing the underlying claimant exposure allegations against Crane in the tort system to disclosures of trust claim activity from the public Garlock discovery data.

Several exemplar cases highlight the stark contradictions between the exposure allegations made by plaintiffs and their law firms in tort cases against Crane as opposed to exposure allegations subsequently made against asbestos bankruptcy trusts. The commentary also expounds on due process concerns created by the non-disclosure of evidence and the current rules of the tort and trust compensation systems that enable this current practice of concealment by asbestos plaintiff law firms to continue.

### Garlock Analytical Database

The discovery data that was made public in Garlock's bankruptcy case includes the most robust set of asbestos claim data ever assembled.<sup>3</sup> In bankruptcy, Garlock sought to prove that asbestos personal-injury plaintiffs and their lawyers did not disclose in the tort system numerous exposures to the products of bankrupt companies. Garlock set out to establish this alleged suppression of evidence through discovery by obtaining filing and payment information, voting ballots, and other claim information from dozens of bankruptcy trusts and corresponding trust processing facilities. Garlock asserted that by examining the trust claim activity of the same plaintiffs that sued Garlock in the tort system it could establish the degree to which trust exposure evidence had been suppressed in tort cases it had defended. Ultimately, Garlock was granted discovery to the following data sources:

- **PIQ Data:** Approximately 4,000 responses to the mesothelioma Personal Injury Questionnaire ("PIQ") submitted by plaintiff law firms representing Garlock claimants, plus more than 30,000 supporting documents including deposition testimony, work histories, named defendants' information, and trust claim disclosures.
- **Total Recovery Data:** 845 pending mesothelioma claimants subject to the PIQ were asked to provide a Supplemental Settlement Payment Questionnaire, which included information on the total number and amount of trust payments and the total number and amount of payments received from tort defendants or other settling parties.
- **DCPF Trust Data:** Trust data from the Delaware Claims Processing Facility (DCPF) related to 9,600 mesothelioma claimants who settled with Garlock between 1999 and 2010.
- **Bankruptcy Ballots:** Voting ballots from approximately 30 bankruptcy reorganizations.

Garlock further supplemented the discovery with the following data:

- **Resolved Case Sample:** An exposure analysis on a sample of 1,000 mesothelioma cases that Garlock had resolved in the tort system prior to bankruptcy.
- **Lawsuit Naming Data:** A database of mesothelioma lawsuit defendant naming information compiled by Bates White.
- **Verdicts Data:** A database of mesothelioma verdict data compiled by Bates White.

Garlock and its estimation experts, Dr. Charles Bates and Dr. Jorge Gallardo-Garcia of Bates White, created and assembled the aforementioned information into an analytical database. According to the federal bankruptcy court, "the result was the most extensive database about asbestos claims and claimants that has been produced to date."<sup>4</sup>

The database was crucial to Garlock proving and quantifying the distinction between settlements and legal liability. The data documented systematic suppression of relevant exposure allegations related to reorganized companies and their successor trusts. As a result of that suppression of evidence and its high cost to defend cases, Garlock asserted it had paid more than its legal liability in the tort system. To support that allegation and quantify its impact, Garlock turned to Bates White to distinguish settlement payments made due to legal liability from payments made for other reasons such as the avoidance of litigation costs and the suppression of evidence. The robust trust discovery data facilitated the Bates White estimation of Garlock's legal liability. On Jan. 10, 2014 federal bankruptcy Judge George Hodges found that Garlock's claims history had been "infected with the manipulation of evidence" by plaintiff law firms. And, Judge Hodges accepted Dr. Bates' estimate of \$125 million to fund a trust for current and future mesothelioma claimants; an estimate only 10% of the billion-dollar forecasts by the representatives of current and future asbestos claimants.

### Analysis of Plaintiff Law Firm Suppression of Evidence with Regard to Crane

In bankruptcy, Garlock was able to prove the systematic suppression of evidence in the aggregate, over a period of time, and in thousands of cases. However, these findings were for cases filed years earlier and attained only after substantial discovery battles in

federal bankruptcy court. In contrast to bankruptcy, active tort defendants, such as Crane, lack access to this type of discovery in a timely manner. The current rules allow a bankruptcy trust claim to be filed three years after diagnosis. As a result, plaintiff law firms in many instances file trust claims after the resolution of their tort claim, which deprived Garlock, and now deprives Crane, of a complete record of the claimant's exposures. Defendants contend that establishing the complete and full exposure record for a claimant is critical to their defenses regarding whether they are liable (i.e. whether their products constitute a substantial contributing factor) and, if liable, the apportionment of damages among alternative exposures. Although this problem has existed since the Johns Manville bankruptcy in 1982, it became more pronounced when numerous asbestos defendants filed for bankruptcy in the early 2000s and the successor trusts to those bankrupt companies emerged in the late 2000s with substantial funding to pay current and future asbestos claims. In fact, since 2006 emerging trusts have been funded with nearly \$30 billion, and have paid more than \$18 billion to claimants through 2014.<sup>5</sup>

Though the bankruptcy trust system has been a substantial source of plaintiff compensation since the late 2000s, the lack of trust transparency and procedural integration with the tort system has resulted in an inconsistent level of timely trust claim disclosures in underlying tort lawsuits. Now, for the first time, the Garlock discovery data gives Crane and other defendants a robust data source from which to measure the level and impact of trust non-disclosures in the years leading up to Garlock's bankruptcy filing in June 2010. As such, the following analyses measure the level of evidentiary suppression in cases filed against Crane between 2007 and 2011; a historical period that overlaps with the emergence of a prominent trust compensation system prior to Garlock's bankruptcy. The analyses apply the same methodology regarding document review and data extraction protocols that were utilized in the Garlock bankruptcy and adopted by the federal bankruptcy court.

#### **Crane case match to public Garlock discovery data**

From 2007 through 2011, Crane resolved 1,844 mesothelioma lawsuits that could reliably be matched to the public Garlock discovery data. The following

summarizes the overlap between the 1,844 matched cases and the various sources of Garlock discovery data:

- **PIQ Data:** 571 of the 1,844 cases matched to a PIQ.
- **DCPF Trust Data:** 1,078 of the 1,844 cases matched to the DCPF Trust Data.
- **Bankruptcy Ballots:** 1,275 of the 1,844 cases matched to one or more bankruptcy ballots.

The PIQ data shows that an average of 18 trust claims per plaintiff were filed in Crane cases that matched to the Garlock data as of the date of the respective Garlock discovery responses. The Garlock discovery data also provide information regarding the timing of trust claim submissions and payments relative to Crane's tort resolution.<sup>6</sup> According to the Garlock discovery data, when compared to the Crane resolution date, nearly half (47%) of the trust claim submissions were filed by plaintiff law firms after Crane had resolved the case in the tort system.

#### **Suppression of Evidence in Crane Cases**

We independently quantified the magnitude of the suppression of evidence in Crane cases by comparing the data revealed to Crane in the tort system with the Garlock discovery data. We drew a random sample of 100 cases from the 571 Crane mesothelioma cases that matched to a PIQ in the Garlock bankruptcy.<sup>7</sup> We then reviewed those cases following the protocols developed in the Garlock bankruptcy and ultimately relied upon by Judge Hodges.

Figure 1 summarizes a data comparison between trust-related disclosures made to Crane in the tort system versus those trust disclosures revealed in the Garlock discovery data across the same sample of claims. In the table, asbestos bankruptcy trusts (named for their predecessor companies) are ordered sequentially based on the frequency of disclosure in the Garlock discovery data, which is displayed in the second column. Comparatively, the third column displays the frequency of trust disclosures provided to Crane in the underlying tort cases. Overall, only 18% (267 of the 1,548) of the Garlock discovery data disclosures were revealed to Crane in the tort system – i.e. slightly more than 80% of the trust claims were not corroborated by underlying tort disclosures. As displayed in the final column, Manville is the only trust for which plaintiffs informed Crane of their trust claims and related exposures more than 50% of the time.

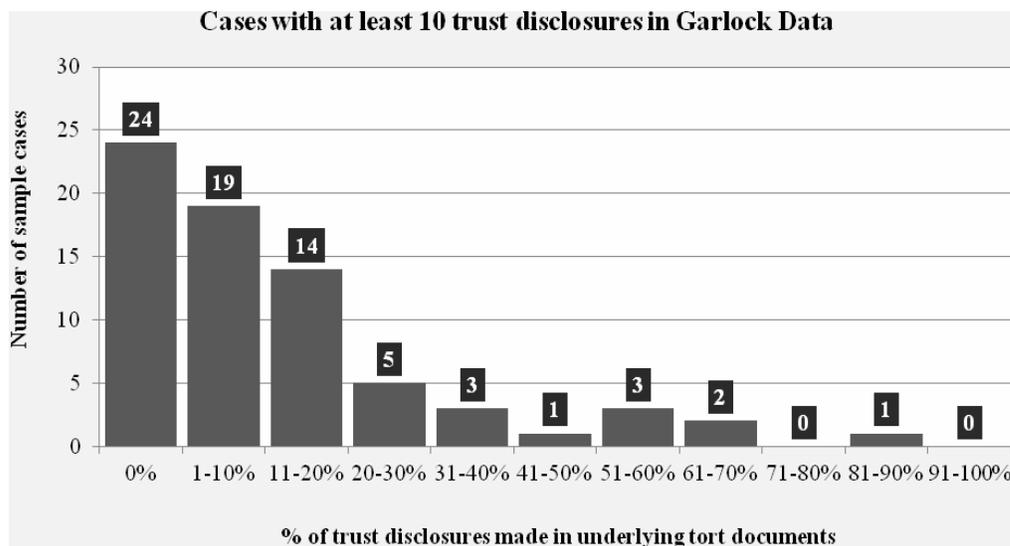
**Figure 1: Trusts with at least 50 claim disclosures in the Crane PIQ sample**

Asbestos bankruptcy trusts	Frequency of disclosure in Garlock discovery data	Frequency of disclosure to Crane in tort system	% Disclosure to Crane in PIQ Claims
BABCOCK & WILCOX	78	33	42%
US GYPSUM	77	16	21%
OWENS CORNING	76	27	36%
FIBREBOARD	76	10	13%
ARMSTRONG WORLD INDUSTRIES	75	24	32%
MANVILLE	73	39	53%
EAGLE PICHER	69	10	14%
COMBUSTION ENGINEERING	68	13	19%
CELOTEX	66	17	26%
KAISER ALUMINUM & CHEMICAL	59	8	14%
NATIONAL GYPSUM	57	8	14%
PLIBRICO	55	6	11%
AC&S	52	6	12%
RAYMARK INDUSTRIES	51	2	4%
<b>Total for Trusts with &gt; 50 disclosures</b>	<b>932</b>	<b>219</b>	<b>23%</b>
<b>Total for Sample</b>	<b>1,548</b>	<b>267</b>	<b>18%</b>

Figure 2 further illustrates the overall lack of trust disclosures to Crane in the tort system as summarized in Figure 1. Specifically, Figure 2 measures the rate of disclosure for the 100 PIQ cases sampled, for which at least 10 trust claim filings were disclosed as part of the Garlock discovery (72 of the

100). The distribution in Figure 2 shows that 60% of the 72 plaintiffs (43) disclosed trust filings or related predecessor company exposures in underlying tort proceedings less than 10% of the time, and nearly 80% (57) disclosed the information less than 20% of the time.

**Figure 2: Distribution of trust disclosures in the Crane PIQ sample**



### Contradictions in Tort and Trust Exposure Allegations

Judge Hodges' ruling in Garlock cites 15 exemplar cases that highlight the contradiction of evidence lodged against Garlock in the tort system versus the exposure allegations underlying bankruptcy trust claims by those same plaintiffs.<sup>8</sup> Crane was a co-defendant of Garlock in 13 of those 15 cases. The aggregate statistics from the Garlock discovery data show the systematic nature of the suppression of evidence against Crane in the tort system. Below are a few examples of specific cases from the Garlock discovery data that help crystallize the nature of non-disclosure experienced by Crane in the tort system, including one case that was settled (*Moors*) and one case that went to verdict (*Brewer*).

#### ***Gerald Moors v. A.O. Smith Water Products et al.***

The case of Gerald Moors is an example of allegations of exposure to bankrupt products being suppressed. After Moors denied exposure to products associated with numerous bankrupt companies, his law firm, Belluck & Fox, subsequently filed claims against the successor trusts for these same bankrupt companies.

On Oct. 22, 2009, Belluck & Fox filed a complaint in the New York City Asbestos Litigation (NYCAL) court on behalf of Moors, naming more than 100 solvent asbestos defendants and alleging Gerald Moors' mesothelioma was caused by his exposure to asbestos products from his career as a plumber and pipe-fitter around the New York city area.<sup>9</sup> According to answers to interrogatories, Moors alleged he was exposed to asbestos at several times and at several locations during his career, including:

- Plumber/pipefitter aboard the General RM Blatchford
- Plumber/mechanic at Ravenswood Powerhouse and other sites in New York City
- Residential and commercial locations in Brooklyn and Queens, NY
- Lead plumber at Beth Israel Medical Center
- Asst. Operating Superintendent, Peter Cooper Village<sup>10</sup>
- Shade-tree mechanic work.<sup>11</sup>

In deposition, Moors concentrated his testimony on his exposure to asbestos containing valves, pumps and boilers.<sup>12</sup> Moors acknowledged that he often

removed/repaired/installed asbestos thermal insulation materials during his plumbing and pipefitting duties but could not recall any specific products or manufacturers.<sup>13</sup> The only products of bankrupt companies he could remember were Celotex ceiling tiles and USG joint compound and tape.<sup>14</sup> In fact, Moors testified during deposition that he had never worked with asbestos containing products from 11 now-bankrupt companies including Combustion Engineering, H.K. Porter, Keene, Unarco (UNR), National Gypsum and Owens Corning.<sup>15</sup>

The trial began in NYCAL on Nov. 9, 2010. During opening statements, Moors attorneys severely downplayed any potential exposure he may have had to amosite asbestos stating that "a great majority, if not entirely, Mr. Moors' exposure involves chrysotile."<sup>16</sup> Moors attorneys even went as far as to convince the presiding judge in the case just prior to defense opening statements that the mention of Owens Corning's asbestos insulation product Kaylo by defense counsel would be prejudicial to Moors because Moors never affirmatively said he was exposed to the product.<sup>17</sup>

In contrast to the disclosures in the tort case, the Garlock discovery data tells a different story. In the court-ordered PIQ, Belluck & Fox disclosed 26 claim submissions that were filed on behalf of Moors, of which at least 14 disclosed explicit filing dates subsequent to Crane's settlement, and many of which were to trusts representing the indemnification of predecessor companies that once manufactured, installed, or distributed asbestos-containing thermal insulation products.<sup>18</sup> Moreover, Belluck & Fox filed claims against the bankrupt companies cited above despite Moors' sworn testimony that he did not work with the products from those (now bankrupt) companies.<sup>19</sup> One of those companies was Owens Corning; the same company defense counsel was precluded from mentioning in the trial's opening statements because Moors did not affirmatively claim exposure to Kaylo.

The Ravenswood Powerhouse provides another example of inconsistent exposure allegations between the tort and trust system. In trust filings, Belluck & Fox list the Ravenswood Powerhouse as a site where Moors was exposed to asbestos.<sup>20</sup> Belluck & Fox, however, knew that Moors had denied being exposed to asbestos at Ravenswood in his deposition.<sup>21</sup>

Q: When you were working at the powerhouse sir, was that full-time work?

A: Yes.

Q: Where was the Ravenswood powerhouse located?

A: Burnham Boulevard in Queens I think it is.

Q: And were you employed there as a journeyman mechanic?

A: Yes.

Q: What were your job duties at that site, sir?

A: Installing gas lines for the boilers and the drain lines for the roof drains and storm water drains.

Q: So with respect to the six months that you worked at the Ravenswood powerhouse, sir, do you believe you were exposed to asbestos in any way?

A: No.

The lack of transparency between the tort system and the trust system enables plaintiffs to maintain contradictory exposure profiles. As a result, several trust claims were made on Moors' behalf, in part or in whole, based on his employment at the Ravenswood Powerhouse, even though Moors denied any such exposure in his tort case.

The suppression of evidence in the Moors case is clear. Moors and his counsel suppressed evidence from Crane and 27 other settling defendants by the lack of production of 26 trust claims during the pendency of the case. The suppression persists despite the fact that NYCAL has had rules in place since 1996 mandating the disclosure of trust exposures in standard interrogatories and procedures requiring the production of bankruptcy trust claim forms prior to trial since 2003.<sup>22</sup>

#### **Chief Brewer v. Alfa Laval Inc. et al.**

The case of Chief Brewer exemplifies how the suppression of evidence of bankrupt exposures can affect a jury's allocation of liability in a case that goes to trial. On July 27, 2007 plaintiff law firm Waters & Kraus filed a complaint on behalf of Brewer in Los Angeles, CA Superior Court against 20 defendants who largely manufactured pumps, valves and gaskets for the U.S.

Navy.<sup>23</sup> Brewer alleged that exposure to asbestos as a machinist mate in the forward engine room of the USS Preble from 1961-1965 caused his mesothelioma.<sup>24</sup> Brewer alleged exposure to asbestos from blankets and packing that were put on pumps, gaskets, valves and turbines during work in the engine room; positively identifying the names of eight component-part manufacturers of pumps, valves, gaskets, packing and turbines, including Crane and Garlock.<sup>25</sup> A co-worker additionally testified that he saw Brewer work with Johns Manville dry putty insulation during his work maintaining pumps on the ship.<sup>26</sup>

Brewer further testified that the USS Preble would vibrate "something fierce" on a routine basis during operations, showering the engine room with dust that would fall like "snow" from overhead thermally insulated pipes down to engine-room equipment that Brewer maintained.<sup>27</sup> During deposition and trial, Brewer could not recall any of the manufacturers or suppliers of the thermal pipe insulation.<sup>28</sup>

On May 16, 2008, a Los Angeles jury awarded Brewer \$9.7 million in damages and apportioned 50 percent of the liability to the U.S. Navy, 35 percent to 12 valve, pump, turbine and gasket defendants (including Crane), and 15 percent to Johns Manville.<sup>29</sup> Absent product identification by Brewer of the thermal pipe insulation, no liability was allocated to any specific thermal insulation manufacturers or suppliers, except for Johns Manville, based on any of Brewer's repeated thermal insulation exposures. Had such product identification been present, the jury could have allocated liability to the now-bankrupt manufacturers of those products, just as it allocated liability to bankrupt Johns Manville for the dry putty insulation exposures.

In contrast to the disclosures in the tort case and trial, the Garlock discovery data again tells a much different story. The Garlock data reveal that Brewer was able to identify thermal insulation exposure to multiple companies. The DCPF trust data show that beginning six months after the verdict, Waters & Kraus filed claims against asbestos bankruptcy trusts including Armstrong World Industries, Fibreboard, Halliburton, Harbison Walker, Owens Corning, and U.S. Gypsum. Moreover, the data show that six of the trust claims have been paid with one claim pending payment. In addition to the trust claims, the data show that Brewer also cast ballots to vote in the pending (at that time) bankruptcy reorganizations of Pittsburgh Corning, Flintkote and

W.R. Grace. Given that the DCPF facility handles operations for only a limited number of the nearly 50 confirmed trusts, the results of the Garlock data represent only a small subset of the potential trust claims activity of Waters & Kraus on behalf of Brewer.

A California appellate court overturned the Brewer verdict against Crane for reasons unrelated to the then unknown suppression of evidence.<sup>30</sup> Despite the ultimate outcome, the case raises important issues regarding the impact of evidence suppression on the jury's apportionment of liability. In Brewer's case, the fact that Johns Manville was apportioned 15 percent of the liability based on testimony from Brewer's co-worker opens legitimate questions as to how much of the liability may have been allocated to bankrupt thermal insulation companies if those trust claims were produced before, and not *after*, trial.

**The Discovery Process is Significantly Compromised by the Suppression of Exposure Evidence Related to Bankrupt Companies**

Essential to the litigation of a personal injury action in our courts of law is the right of all parties to have access to, and knowledge of, all of the facts relevant to the dispute. Rules of procedure require disclosure of all types of evidence that could have an impact upon the ultimate resolution of a case, either by pretrial settlement or by verdict after trial. Availability of only a portion of the facts, or a fraction of the truth, promotes distortion of the fact-finding process.

This extensive suppression of exposure evidence to Crane and other defendants could have been highly probative in the defense of thousands of personal injury actions in this mass tort environment and has undoubtedly tainted the fact-finding function in every court where asbestos cases are litigated. Despite prolonged efforts to restore integrity to this area of the law, either through legislation, case management orders, or procedural rules, the data presented in this paper demonstrates not only the magnitude of the harm that the absence of interface between the tort and trust systems has fostered, but also the urgency of the need for heightened transparency between these dual compensation sources.

The rules of civil procedure generally applicable in state and federal courts are designed to provide full disclosure of all information through the discovery process. But when that evidence is carefully guarded by trust

procedures crafted by the same law firms that represent the large majority of asbestos claimants, gaining access to exposure and other vital information has been an expensive, uphill battle. Approximately two-thirds of the asbestos trusts have modified their trust distribution procedures to include provisions designed to prevent tort defendants from gaining access to factual data included in the proofs of claim.<sup>31</sup> Solvent defendants such as Crane must then rely on trial court discovery rules and procedures to obtain this information. Frequently, due to plaintiffs' strategic delays in the filing of trust claims, much of this information does not even exist until after the lawsuit is concluded; a strategy that is aided by a statute of limitations provision adopted by most trusts that allow claims to be filed up to three years from the date of diagnosis without the risk of being time barred for trust compensation.

This significant timing disconnect between the tort and trust systems allows plaintiff attorneys to delay the filing of trust claims until after settlements with tort defendants have been reached, and renders basic discovery procedures in most asbestos courts ineffective because plaintiff attorneys are not required to disclose trust claims that they have not yet filed.<sup>32</sup> In fact, two prominent plaintiff attorneys in Garlock's bankruptcy gave sworn deposition testimony that it is their practice to wait until the tort case has concluded to file bankruptcy trust claims.

*Peter Kraus, Waters & Kraus, Jan. 14 2013 Video Deposition*

"If in my judgment it would benefit the litigation case to delay the filing of a claim, and it was lawful to delay filing the claim, then we would do that."

*Benjamin Shein, The Shein Law Center, Jan. 16, 2013 Video Deposition*

"We file trust claims after the completion of tort litigation."

The discovery process in litigation operates in part by the "honor system," much like the filing of tax returns with the Internal Revenue Service. Counsel are responsible for producing all documents and evidence relevant to the subject matter of a case. Even if the information is ultimately inadmissible, if the information is "reasonably calculated to lead to the discovery of admissible evidence"<sup>33</sup> it must

be disclosed. When it is deliberately withheld as a litigation tactic, the honor system breaks down.

It is particularly important to the companies that are named as defendants in asbestos tort cases to have a complete record of exposure information. They need this information to determine whether a reorganized company's product was partly or wholly responsible for the plaintiff's disease. It also enables them to identify exposure claims that are exaggerated or inaccurate. The facts provide a basis to challenge deposition testimony when plaintiffs frequently fail to recollect product names and they enable defendants to expose self-serving memory losses. For defendants like Crane and Garlock, the discovery process has been greatly distorted because of the widespread suppression of evidence perpetrated by plaintiffs and their law firms, depriving defendants of relevant facts or rendering such facts prohibitively expensive or impossible to acquire.

The suppression of evidence in discovery is further exacerbated for Crane because the specific evidence being concealed from defendants and omitted from the jury's consideration is information regarding the most potent exposures to asbestos. The roster of bankrupt companies and successor trusts includes many large companies that once engaged in the manufacturing, distribution, and installation of thermal insulation products. These thermal insulation products, such as asbestos pipe coverings, presented the greatest asbestos-related risk to exposed workers. A significant majority of today's claimant population, especially if they are alleging exposures from service in the U.S. Navy or other industrial locations, are occupationally exposed to asbestos thermal insulation products.

According to Judge Hodges in his Garlock estimation ruling, "*Garlock's gasket and sealing products exposed people to only a low-dose of less potent chrysotile asbestos and almost always in the context where they were exposed to much higher doses of more potent amphibole asbestos.*"<sup>34</sup> In support of his findings, Judge Hodges cited the 6th Circuit in *re Moeller v. Garlock Sealing Techs., LLC*,<sup>35</sup> stating, "*It is clear that Garlock's products resulted in a relatively low exposure to asbestos to a limited population and that its legal responsibility for causing mesothelioma is relatively de minimus. The Sixth Circuit has noted in an individual pipefitter's case that the comparison is as a 'bucket of water' would be to the 'ocean's volume.'*"<sup>36</sup>

Absent a proper level of consistent trust disclosures in the underlying tort, courts and juries will continue to be left to decide fault and allocate liability based on an exposure history put forth by plaintiffs and their counsel that is strategically designed to represent a fraction of a claimant's overall exposures, and importantly, excludes the very exposures that are the greatest cause of asbestos related disease.

### Suppression of Evidence is a Denial of Crane's Due Process Rights

The concealment of product exposure information relating to the most potent asbestos exposures (i.e. amphibole asbestos from the now bankrupt thermal insulation companies) and the concomitant focus of the judicial system on solvent defendants whose potential culpability is *de minimis* in the context of the claimant's real exposure history should be a matter of grave concern to all members of the judiciary. A fundamental precept of the civil justice system is that it permits a jury of ordinary citizens to assess a defendant's conduct in light of all of the relevant facts. When those jurors are deprived of information that is critical to the assessment of the true cause of an asbestos claimant's injuries, that system fails in its essential purpose, and the participants in that system lose confidence in that system's ability to provide a fair outcome.

The Fourteenth Amendment to the United States Constitution mandates that no person be deprived "of life, liberty, or property, without due process of law."<sup>37</sup> This provision of the Constitution, commonly known as the "due process clause" includes the right to a fair trial as a fundamental liberty. Indeed, so basic to our jurisprudence is the right to a fair trial that it has been called "the most fundamental of all freedoms."<sup>38</sup> State constitutions generally mirror the Fourteenth Amendment's due process guarantee of the right to a fair trial.<sup>39</sup> They speak to the importance of providing a neutral, dependable, and fair judicial process that complies with the mandates of the Constitution of the United States.

Plaintiff counsels' effective control over the production of evidence of exposure to asbestos-containing products, and their use of that control to suppress evidence of exposure to the products of reorganized companies, constitutes a practice that is a fundamental violation of due process. Unless and until all factual statements made in proofs of claims are made available to defendants, and the deadlines for trust claim submissions are sufficiently in advance of the completion of discovery in

tort cases, the statistics herein demonstrate that jurors continue to receive incomplete pictures of a claimant's true asbestos exposure history, and this deprives jurors of an ability to assess fairly the respective responsibility of all potentially responsible parties, not just those from whom plaintiffs can recover a civil judgment.

In the final analysis, what is important to solvent defendants in tort cases is not the amount that a trust must pay to a particular claimant, but the factual assertions of exposure to bankrupt defendants' products. These essentially constitute admissions that are highly probative pieces of evidence and enable personal injury liability to be fairly distributed based on culpability rather than solvency. So long as suppression of "credible and meaningful" exposures prevails, due process will continue to be denied to litigants.

### **A Contemporary Look at the Issue of Non-Disclosure in Asbestos Litigation**

As previously noted, our analysis for this commentary measured the level of non-disclosure in Crane cases from 2007 through 2011. It made sense to examine cases from that time period because it predominately predates Garlock's June 2010 bankruptcy filing and is during a time in which a substantial number of well-funded trusts first became operational. In their bankruptcy, Garlock collected virtually all of the PIQs, ballots, and other trust discovery materials in 2011-2012, thus the recently released Garlock discovery data lags the current inventory of cases in the tort system by several years. However, evidence of plaintiff law firm non-disclosures from more recent cases illustrate that the practice has and will continue absent judicial or legislative intervention. Examples of the continued inequities against Crane include three verdicts, two of which are currently pending appeal for issues that include but are not limited to, trust disclosures and related recoveries.<sup>40</sup>

Multiple other cases that illustrate the continued suppression of evidence exist as well and can be found in recent cases where Crane was not a named tort defendant. These cases are summarized below:

**Montgomery v. A.W. Chesterton Co.**<sup>41</sup> — Despite a standing order to produce bankruptcy trust claims, evidence of 20 bankruptcy trust claims forms were produced to the defendants and the Delaware court on the very morning that trial was set to begin. When questioned regarding the lack of disclosure, the plaintiff counsel bringing the tort action in *Montgomery* claimed

he was unaware of the trust claims and payments made to the plaintiff because they were filed by another plaintiff law firm handling that aspect of the case.

**Warfield v. AC&S, Inc.**<sup>42</sup> — Bankruptcy claim forms were produced on the eve of trial which directly contradicted the exposure evidence given to tort defendants; the exposure period alleged in the tort case was materially different than the exposure period given to bankruptcy trusts. The bankruptcy claims were not disclosed despite repeated discovery requests during the pendency of the case. Eight of the nine bankruptcy claims were submitted to the trusts, but not disclosed in the tort system, prior to the plaintiff testifying in court.

**Edwards v. ACandS, Inc.**<sup>43</sup> — Prior to trial, the plaintiff amended his discovery responses to allege that his sole exposure to asbestos containing products came from products manufactured by the last remaining solvent defendant in the tort case. However, despite repeated discovery requests, no bankruptcy claim forms were produced in the case until two weeks before trial when the plaintiff law firm disclosed claims made against 16 trusts. Most of the trust claim forms had been previously filed before any discovery requests were made.

**Golik v. CBS Corp.**<sup>44</sup> — Following a \$4 million verdict that was rendered in favor of the plaintiff, an Oregon Circuit Court judge ordered a new trial upon finding out that the plaintiff law firm failed to disclose all claims against bankruptcy trusts. After trial, defendants found that the plaintiff firm had failed to timely disclose the existence of the bankruptcy trust claims, some of which outlined additional plaintiff exposures that were relevant and directly responsive to the defendants' discovery requests.

**Cummings v. General Electric Co.**<sup>45</sup> — A Kentucky Circuit Court judge called the behavior of the asbestos plaintiff law firm in the case "disingenuous" and "disturbing" for failing to disclose and acknowledge the existence of bankruptcy trust claims. In a dispute over what constitutes a valid bankruptcy trust filing, the judge commented, "You know, you're pregnant or you're not. You submitted a claim or you didn't. And that's the problem I have." The judge declared a mistrial based on the lack of disclosure by the plaintiff firm.

### **Conclusion**

This commentary provides further evidence of the abuse that is being perpetrated on the U.S. civil justice

system through the strategic suppression of exposure evidence by plaintiff law firms in asbestos litigation. It is clear from the Garlock discovery data that Garlock, Crane and other tort defendants have been denied constitutional rights to due process. To the extent that judges or other principal players involved in national asbestos litigation remain unconvinced of the magnitude of the abuse, or simply choose to ignore it, the findings revealed by this analysis of the Garlock data should serve as powerful evidence of the urgent need for enhanced transparency and more open interface between the two available sources of payment.

Crane's statistics explicitly demonstrate that Garlock's experience is not a random or isolated situation. The practices revealed in the Garlock case have now been shown to have had a similar prejudicial impact on at least one other solvent defendant and it is likely that these schemes have affected many more, if not all, defendants who have been immersed in this litigation, for years or even decades. We now know with greater certainty that the practice of withholding highly relevant information has resulted in a system rife with evidentiary abuse affecting every major asbestos jurisdiction nationwide. And importantly, it is difficult to overlook or discount the fact that this abuse, which amounts to a denial of due process, is largely facilitated by the secrecy in the trust claiming process.

What is even more disturbing about these statistics is that even now, with additional documented examples of widespread manipulation and gamesmanship, the legislative process in most states, and nationally, has had only modest success in addressing or remedying the problem. To date only a handful of states have enacted transparency legislation and a federal bill sits pending in Congress.<sup>46</sup> In the absence of legislative reform, it is imperative that judges, through the exercise of their inherent powers, step up and do their part to improve the asbestos litigation landscape. Indeed, it is the duty of the members of the judiciary - administrators of the rule of law and stewards of the principles of justice - to deal directly with this crisis by implementing case management orders or procedural rules to avert this threat to the truth-seeking function of the courts.

## Endnotes

1. *In re Garlock Sealing Technologies*, No. 10-31607, 2014 Bankr. LEXIS 157 (Bankr. WDNC.), Feb. 2, 2015.
2. *In re Garlock Sealing Technologies*, No. 10-31607, 2014 Bankr. LEXIS 157 (Bankr. WDNC. January 10, 2014), Judge Hodges estimation ruling, pg. 26.
3. *In re Garlock Sealing Technologies*, No. 10-31607, 2014 Bankr. LEXIS 157 (Bankr. WDNC. January 10, 2014), Judge Hodges estimation ruling, pg. 59-60.
4. *In re Garlock Sealing Technologies*, No. 10-31607, 2014 Bankr. LEXIS 157 (Bankr. WDNC. January 10, 2014), Judge Hodges estimation ruling, pg. 59-60.
5. These trust statistics are derived from the publicly available documentation produced by various asbestos bankruptcy trusts established pursuant to Section 524(g) of the U.S. bankruptcy code and the publicly available documentation produced during the proceedings of various Section 524(g) bankruptcy reorganizations.
6. In order to properly calculate the relevant timing statistics, the timing analysis based on those trust disclosures in the Garlock DCPF Data since those records include trust claim filing, approval, and payment dates when applicable. Moreover, we only considered trusts that were confirmed and operational as of 2007 and tort cases that were filed after 2007.
7. Of the 100 cases in the PIQ sample, 9 of the submissions were non-responsive to the PIQ section regarding trust disclosures (Table B), and 88 disclosed filing at least one trust claim as of the date of the PIQ submission, while 72 disclosed filing at least 10 trust claims.
8. *In re Garlock Sealing Technologies*, No. 10-31607, 2014 Bankr. LEXIS 157 (Bankr. WDNC. January 10, 2014), Judge Hodges estimation ruling, pgs. 31-35.
9. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL), Complaint, Oct. 22, 2009.
10. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL), Plaintiffs' Response to Defendants' Interrogatories and Request for Production of Documents, Dec. 2, 2009, Chart A.
11. Moors additionally alleged exposure to asbestos friction brake products during automotive repairs and installation, Deposition under Oral Examination of Gerald Moors Volume II, Dec. 23, 2009, Pgs. 259-260.

12. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL); Plaintiffs' Response to Defendants' Interrogatories and Request for Production of Documents, Dec. 2, 2009, Chart A; Videotaped Deposition under Oral Examination of Gerald Moors, Feb. 3, 2010, Page 34.; Deposition under Oral Examination of Gerald Moors, Dec. 22, 2009, Page 157; Deposition under Oral Examination of Gerald Moors Volume II, Dec. 23, 2009, Page 192; Deposition under Oral Examination of Gerald Moors, Volume 4, Jan. 13, 2010, Pgs. 68, 486-487, 524, 551; Deposition under Oral Examination of Gerald Moors Volume II, Dec. 23, 2009, Pgs. 189, 194-196.
13. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL); Deposition under Oral Examination of Gerald Moors Volume II, Dec. 23, 2009, Pgs. 194, 3-7; 197, 6-13; 201, 13-21, 206, 17-22; 220, 4-8; 221, 22-25., 222, 1; 224, 20-24; 226, 13-17;. 227, 2-6; 230, 3-7; 239, 5-9; 238, 12-16; 240, 4-7; 242, 14-18; 244, 20-25; 245, 5-9; Deposition under Oral Examination of Gerald Moors, Dec. 22, 2009, Pgs. 88-89, 91-94.
14. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL), Plaintiffs' Response to Defendants' Interrogatories and Request for Production of Documents, Dec. 2, 2009, Chart A; Deposition under Oral Examination of Gerald Moors, Dec. 22, 2009, Page 116, 21-25, Page 117, 1; Page 43, 21-25; Videotaped Deposition under Oral Examination of Gerald Moors, Feb. 3, 2010, Pg. 109; Deposition under Oral Examination of Gerald Moors, Volume V, Pgs. 574-578.
15. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL), Deposition under Oral Examination of Gerald Moors Volume III, Jan. 12, 2010, Pages 321-327.
16. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL), Trial Day 2, Opening Statements by Bel-luck and Fox, Nov. 10, 2010, Page 115, 10-11.
17. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL), Trial Day 2, Opening Statements by Bel-luck and Fox, Nov. 10, 2010, Page 179-194.
18. Crane settled the Moors case on Nov. 18, 2010. After the date Crane settled the case, bankruptcy trust claim forms were subsequently submitted to trusts representing predecessor companies Federal-Mogul (T&N), Raytech, Owens Corning, National Gypsum, Keene, Harbison-Walker, Halliburton (DII), Federal-Mogul (Flexitallic), Federal-Mogul (Ferodo), Owens Corning,, Fibreboard, Eagle-Picher, Babcock & Wilcox and Armstrong.
19. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL), Deposition under Oral Examination of Gerald Moors Volume III, Jan. 12, 2010, Pages 321-327.
20. The Ravenwood Powerhouse was listed as an approved site for trust claims filed against Owens Corning, Fibreboard and Federal-Mogul (T&N). The Ravenwood Powerhouse site was also listed as a place of Moors' asbestos exposure to support trust claims against UNR, Raytech, Ascarco, ABB Lummus, Keene, H.K. Porter, GAF, Federal-Mogul (Flexitallic), Federal-Mogul (Ferodo), Eagle-Picher, Combustion Engineering and Armstrong.
21. *Gerald Moors and Joan Moors v. A.O. Smith Water Products, et al.*, No. 190363/09, N.Y. Sup. Ct. (NYCAL), Deposition under Oral Examination of Gerald Moors, Dec. 22, 2009, Page 143, 1-18.
22. *In re New York City Asbestos Litigation* (NYCAL), Index No. 40000/88, Motion Seq. 004, Decision and Order by Judge Sherry Klein Heitler, Nov. 15, 2012, Page 4-5.
23. *Chief Y.R. Brewer and Gale Brewer v. Alfa Laval Inc., et al.*, Case No. BC374988, Calif. Super., Los Angeles Co., Complaint, July 27, 2007.
24. *Chief Y.R. Brewer and Gale Brewer v. Alfa Laval Inc., et al.*, Deposition of Chief Brewer, Deposition Volume 1, Sept. 25, 2007, Pgs. 24-28; Plaintiffs Case Report, Dec. 14, 2007.
25. *Chief Y.R. Brewer and Gale Brewer v. Alfa Laval Inc., et al.*, Deposition of Chief Brewer, Deposition Volume 1, Sept. 25, 2007, Pgs. 27-,29; 34; 40-44; 56-58; 110; 207; Plaintiffs Case Report, Dec. 14, 2007.

26. *Chief Y.R. Brewer and Gale Brewer v. Alfa Laval Inc., et al.*, Deposition of John Dill, March 18, 2008, Page 133.
27. *Chief Y.R. Brewer and Gale Brewer v. Alfa Laval Inc., et al.*, Deposition of Chief Brewer, Deposition Volume 1, Sept. 25, 2007, Pg. 223-225; Deposition of Chief Brewer, Deposition Volume 2, Sept. 26, 2007. Pgs. 396-397.
28. *Chief Y.R. Brewer and Gale Brewer v. Alfa Laval Inc., et al.*, Deposition of Chief Brewer, Deposition Volume 2, Sept. 26, 2007. Pgs.394-396; Videotaped Oral Deposition of Chief Brewer, Volume 2, Sept. 27, 2007, Pgs. 584-585.
29. *Chief Y.R. Brewer and Gale Brewer v. Alfa Laval Inc., et al.*, Case No. BC374988, Calif. Super., Los Angeles Co., Jury Verdict Form, May 16, 2008; Mealey's Litigation Report: Asbestos, Vol. 23, Issue #8, "Los Angeles Jury Awards \$9.7 Million to Meso Sufferer, Wife."
30. *Chief Brewer v. Crane Co.*, California 2nd Appellate District, Division Two, Case No. B213096, Opinion, Aug. 12, 2012; Mealey's Litigation Report: Asbestos, Vol. 27, Issue #14, "Court Reverses \$9.7M Award, Finds O'Neil Bars Liability," Aug. 29, 2012.
31. See, Wilson, Thomas M., *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, Mealey's Litigation Report, Asbestos Volume 29, Issue #7 (May 7, 2014); Brickman, Lester, "Fraud and Abuse in Mesothelioma Litigation" 88 Tulane L. Rev. 1071, 1099 (2014).
32. See testimony of Judge Peggy L. Ableman (ret.), Hearing testimony on H.R. 982, the "Furthering Asbestos Claim Transparency (FACT) Act of 2013", U.S. House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law, March 2013.
33. Rule 26(b)(1) Federal Rules of Civil Procedure.
34. *In re Garlock Sealing Technologies*, No. 10-31607, 2014 Bankr. LEXIS 157 (Bankr. WDNC. January 10, 2014), Judge Hodges estimation ruling, pg. 8.
35. *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 954-55 (6th Cir. 2011).
36. *In re Garlock Sealing Technologies*, No. 10-31607, 2014 Bankr. LEXIS 157 (Bankr. WDNC. January 10, 2014), pg. 2.
37. United States Constitution Amended XIV, Section 1.
38. *Bailey v Systems Innovation, Inc.*, 852 F.2d 93, 98 (30 Cir. 1988) (citing, *Estes v. Texas*, 381 U.S. 352, 340, (1965).
39. See, e.g., New York Constitution, Article I, Section 6, Constitution of the State of Delaware, Article 1, Section 7; North Carolina Constitution, Article I, Section 17; California Constitution, Article I, Section 3(b)(4).
40. *James Hellam v. Crane Co.*, No. A140326, Calif. App., 1st District, Div. 4; *Elaine Paulus v. Crane Co.*, No. 5218222, Calif. Sup.; *Jeanette Poage v. 3M Co., et al.*, No. 1322-cc00059.
41. *Montgomery v. A.W. Chesterton Co.*, No. 096-11-217, Del. Super.
42. *Warfield v. AC&S Inc.*, No.'24X06000460, Consolidated Case No. 24X09000163, Md. Cir. Ct., Baltimore City.
43. *Edwards v. John Crane-Houdaille, Inc.*, No.'24X06000460. Md. Cir. Ct., Baltimore City; See Problems with Asbestos Compensation System, Hearing Before The Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 111th Cong. (Sept. 9, 2011) (statement of James L. Stengel), at 2011 WLNR 24791123.
44. *Golik v. CBS Corp.*, No. 1308-11192, Ore. Cir., Multnomah Co.
45. *David Cummings, Executor of the Estate of William Gale Cummings v. General Electric Co., et al.*, No. 13-CI-6374, Ky. Cir., Jefferson Co., Division Nine.
46. Ohio - H.B. 380, March 18, 2015; Oklahoma S.B. 404, - May 7, 2013; West Virginia, S.B. 411 - March 18, 2015; Wisconsin - A.B. 19, May, 27, 2014; Arizona - H.R. 4369, April 19, 2015; Texas - H.B. 492, June 16, 2015; H.R. 526, Furthering Asbestos Claims and Transparency (FACT) Act. ■



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