Testimony of Judge Peggy L. Ableman (ret.)
The Need for Transparency in the Asbestos Trust
February 3, 2016

For the past six years or so, I have been a staunch advocate for legislation that will create greater transparency and openness between the two compensation systems available to plaintiffs who have been injured as a result of exposure to asbestos. While I have no current role in the judiciary and no specific sponsor urging me to continue to advocate for passage of the FACT Act, I do have experience in this area because I was a State Court trial Judge in Delaware for almost 30 years (I retired from the bench only 3 years ago). For the last few years of my tenure on the Superior Court I was solely responsible for the statewide asbestos docket, which consisted of approximately 600-700 cases.

In that capacity, I had an experience that deeply troubled me, and opened my eyes to the need for greater transparency between the two compensation systems. It has also led me to advocate for both state and federal legislation to eliminate the deceptive practices that the current system fosters.

I have seen this lack of transparency played out in my own courtroom, where I personally believed that I possessed all the power necessary to ensure a fair and just result in every case over which I presided. I was wrong. Even with standing judicial orders and rules requiring disclosure the problem persists.

The case that I will briefly describe precipitated my post-retirement interest in advocating for reform of the current system. And, as I have come to learn over the past few years, it was not an isolated or unique situation. It is a national problem that threatens the very integrity and fairness of our court proceedings. It is a problem that is so widespread that it has been addressed by an increasing number of state legislatures and has been the topic of dozens of scholarly legal articles and reviews.

The irony of my encountering this problem in Delaware is that we have (and had) a statewide standing case management Order requiring plaintiffs in asbestos cases to provide to defendants copies of all bankruptcy trust claim forms filed. But even in a state where an express requirement of full disclosure exists, withholding or suppression of vital information can still occur, often resulting in irreversible prejudice to one or more defendants.

The case to which I refer was called Montgomery v. A.W. Chesterton, but by the time of trial, all but one defendant, Foster Wheeler, had settled. The original plaintiff in the case, June Montgomery, was diagnosed in April of 2009 with pleural mesothelioma. Her son Brian first retained Texas counsel to assist his parents in finding Florida counsel where they resided. Florida counsel ultimately filed the case in Superior Court in New Castle County, Delaware in November

2009. The suit named 22 defendants and alleged that June's mesothelioma was caused by exposure to their products.

As I stated, asbestos-related lawsuits in Delaware are governed by a Standing Order that sets forth mandatory disclosure obligations related to bankruptcy trust claims. But despite this Order – and specific interrogatories directed to plaintiffs requesting this information from the outset -- up until the weekend before trial was to commence on Monday, at no time did plaintiffs identify the products of any of the twenty entities to whom bankruptcy trust claims had been submitted. Instead, they consistently asserted that Mrs. Montgomery was exposed to asbestos solely through her laundering of her husband's work clothes, as opposed to any work she personally performed with or around products outside the home.

Although Mr. Montgomery, her husband, was an electrician who had worked with and around a variety of products and materials at multiple locations in Florida throughout his entire career, the distinct impression from the Complaint, discovery responses, and his sworn deposition testimony was that the bulk of his work around asbestos occurred only during a short period of time at the Everglades Power Plant – where, coincidentally, Foster Wheeler boilers were located.

Because Foster Wheeler was aware of other cases where lawyers representing asbestos claimants had submitted conflicting work histories to

multiple trusts, it had filed a motion in advance of trial requesting that the Court direct the plaintiffs to disclose all pretrial settlements and any monies received from bankruptcy trusts. Plaintiff's counsel reported to me, unequivocally, that no trust submissions had been made and no monies received. But two days before trial was to begin – on Saturday night – defense counsel first learned from Plaintiff's counsel that Plaintiff had received two bankruptcy settlements of which he was previously unaware. The disclosure was directly inconsistent with counsel's representations to the Court.

By the following day, it was revealed that a total of twenty bankruptcy trust claims had been submitted. Although the defendant had been led to believe that Mrs. Montgomery's exposure was solely the result of take-home fibers on her husband's clothing, at this late point in the litigation, it was discovered that one or more of plaintiff's attorneys had been claiming exposure through Mrs. Montgomery's own employment, as she had worked in and around the products herself.

In essence, the representations to the bankruptcy trusts painted a much broader picture of exposure to asbestos than Plaintiff or her attorneys had acknowledged during the entire course of the litigation in Delaware. Under Florida law, jurors are permitted to allocate fault to parties not present at trial, including bankrupt entities. But plaintiff's failure to disclose and produce the trust claims

precluded Foster Wheeler from investigating Mrs. Montgomery's exposure to asbestos from these additional bankrupt companies or from identifying additional exposures from products that were not developed in the Delaware litigation. And that, of course, was severely prejudicial to defendant Foster Wheeler.

Plaintiff had been poised to try the case before a jury as though Foster Wheeler had sole, or at least predominant, responsibility for Mrs. Montgomery's exposure and disease. This is important because the crux of the Montgomery case, as in all asbestos litigation today, is a determination of who had responsibility for the Plaintiff's exposure and to what extent. When twenty manufacturers of asbestos are removed from the equation, an honest and fair allocation of fault simply cannot occur.

Perhaps 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 had made their respective determinations regarding what settlement amounts would be fair based upon insufficient data and an incomplete picture of the plaintiff's total exposure history. A full knowledge of all of the facts may even have led some defendants to remain in the case rather than settle.

Aside from the sheer waste of valuable resources, what was most disturbing to me was that I was completely unaware that I was depriving litigants before me

of a fair and level playing field. I had always been able to rely upon the attorneys in my court to act honorably, and I had no concept of the ingenuity of plaintiffs' counsel to devise methods to withhold this information without running afoul of ethical rules. In the end, it was disheartening to see firsthand how easily the judicial process could be manipulated by the withholding of information that was critical to the truth-seeking function of our courts.

When I first began advocating for greater transparency I was often led to believe that there was no such thing as widespread fraud in this dual compensation scheme. Three years ago, I appeared before the Committee on the Judiciary of the House of Representatives in support of this same FACT Act. When I related the circumstances of the *Montgomery* case, I was faced with vehement opposition from representatives of the Plaintiffs bar, insisting that there was not a shred of evidence of fraud, that my case was an aberration or an anomaly, that the FACT Act was nothing more than a "solution in search of a problem," and even a back-handed complement that "good judges like Judge Ableman are able to discover fraud and promptly act to impose sanctions against offending attorneys."

In the intervening three years since I last testified, extensive evidence has surfaced that demonstrates just how widespread and systemic these claiming abuses have become. We now have additional proof and many examples demonstrating that the *Montgomery* case was not an isolated or rare circumstance.

To be sure, a federal bankruptcy judge in North Carolina made national headlines two years ago after he wrote an exhaustive Opinion in the bankruptcy case involving gasket maker Garlock Sealing Technologies, LLC. The court in that case concluded that the practice of withholding exposure evidence concerning the products of bankrupt companies was sufficiently widespread that Garlock's prior settlements of mesothelioma claims in the tort system were "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." Characterizing the scheme as a "startling pattern of misrepresentation" Judge Hodges ultimately reduced the amount of money to fund the Garlock trust for pending and future claims from the $1 billion dollars plaintiffs were seeking to $125 million. Shortly thereafter, Garlock filed four adversary complaints against several leading plaintiffs' law firms and attorneys, alleging conspiracy, fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Unfortunately, the revelations of abuse in the *Garlock* case were just the tip of the iceberg. In July 2014, the Court granted access to the data in Garlock's bankruptcy case. The information that was made public comprises the most robust and extensive set of asbestos claims data ever assembled, and it was this database that played a crucial role in Garlock's ability to prove and quantify the systemic suppression of vital exposure evidence related to reorganized companies and their successor trusts.

We now have additional proof that evidence of manipulation exists well beyond Garlock's experience. The recent Mealy's article that I co-authored, based on the research and analysis of my colleagues from Bates White Economic Consulting, Marc Scarcilla and Peter Kelso, establishes the same systemic suppression of evidence against Crane Co., a solvent company still subject to suit in the tort system. The specific cases highlighted in that article expose a similar pattern of withholding, concealing, and misrepresenting the asbestos exposures upon which the trust claims were based.

My experience, then, can no longer be considered unique or unprecedented. The Opinion of Judge Hodges in the *Garlock* bankruptcy case, the research and analysis of Bates White involving Crane Co.'s settlement history, the increasing number of states that have passed or are considering specific legislation to increase transparency, as well as the growing number of jurisdictions that have implemented Standing Case Management Orders requiring early disclosure, all speak to the magnitude of the problem of inconsistent claiming patterns and fraudulent practices.

In fact, just last week, another solvent defendant, John Crane, Inc. (JCI) (not related to Crane Co.) filed motions to intervene in the RICO cases pending against Plaintiffs' law firms in North Carolina. These motions contain even more examples of the massive fraud that is routinely practiced in mesothelioma

litigation. The asbestos litigation landscape has changed dramatically since I testified three years ago. We should now be asking ourselves whether our legal system should continue this tolerance for fraud. In my opinion, we can no longer turn a blind eye to this ongoing assault to the integrity and fairness of our legal processes.

It is not necessary to single out any particular attorneys or plaintiffs to lay blame. The system as it is now structured encourages attorneys to wait until the litigation is concluded before filing trust claims. In my case, the lawyers were clearly not forthright when they concealed the trust filings in violation of the Case Management Order and when they failed to disclose the claims in discovery. Yet, the plaintiff could just as easily have waited to file trust claims until after the case was concluded. In that case, there would be nothing to disclose and therefore no fraud. Attorneys continue to take advantage of this loophole because they can justify their actions by asserting that they have a duty to maximize recovery for their clients. But when these claim filings are delayed, with the express purpose of deliberately concealing evidence of exposure to other products, the outcome is unfair to the remaining solvent defendants in the case as well as to those defendants who have settled. The practice also depletes the resources available to those claimants who honestly seek compensation.

Finally, I want to emphasize the difficulty in relying upon the courts to achieve greater transparency. Courts have scant resources and are extremely limited in their ability to police these fraudulent practices. The *Montgomery* case is a quintessential example of how difficult it is for judges to control this deliberate withholding of exposure evidence through Case Management Orders or even through disciplinary proceedings. Even after plaintiff's scheme was exposed, the real culpable lawyer turned out to be a Texas attorney, who had never entered his appearance in the Delaware Superior Court and who had filed trust claims on plaintiff's behalf without advising litigation counsel. He was beyond the reach of our Court's disciplinary powers.

When I first became a member of the judiciary in Delaware I truly believed that our system was so superior to any other that our procedures were able to ferret out fraud and deceit. I retired from the bench almost 30 years later with the sinking feeling that, at least in asbestos litigation, the civil justice system in our country is facing a real crisis. For too long, our courts have been manipulated by the withholding of vital evidence from judges and juries.

I am a passionate supporter of this legislation because I am convinced that it will help to restore integrity to asbestos tort litigation. From my perspective as a former judge, justice and fairness are compromised if the law imposes any obstacles to ascertaining and determining the complete truth. Indeed, the very

foundation of our judicial process is at great risk when we continue to tolerate the withholding of information that is critical to the ultimate goal of all litigation – a search for, and discovery of, the truth.