

The *Garlock* Estimation Decision: Why Allowing Debtors and Defendants Broad Access to Claimant Materials Could Help Promote the Integrity of the Civil Justice System

By Mark D. Plevin*

The January 10, 2014 decision by Bankruptcy Judge George R. Hodges in *In re Garlock Sealing Technologies, LLC*¹ is one of the most significant rulings in the annals of asbestos bankruptcies. The court resolved a litigation over the amount of Garlock's current and future liability for a certain type of asbestos claim (mesothelioma claims) by estimating such claims at only \$125 million, rather than the \$1.0–1.3 billion sought by the Asbestos Claimants' Committee ("ACC") and Future Claimants Representative ("FCR"). The low estimate benefits Garlock because it will allow it to retain a larger portion of its assets for the benefit of the reorganized debtor following confirmation, whereas the higher estimate sought by the ACC and FCR would have required Garlock to devote a much larger portion of its assets to paying mesothelioma claims. But the actual amount of the court's estimate pales in importance compared with the reasoning and the evidence Judge Hodges used to reach that holding.

The ACC and FCR had urged the court to base its estimate on a "settlement approach" that would have evaluated such claims based on an extrapolation from Garlock's history of resolving mesothelioma claims in the tort system.² The court, however, rejected the ACC-FCR position, finding — on the basis of voluminous evidence submitted by Garlock — that using the "settlement approach" would result in an unreasonably high estimate. The court said that evidence presented by Garlock during the estimation hearing showed that its tort system settlement and trial experience had been distorted by "demonstrable misrepresentation" that was so "sufficiently widespread" that it caused "a significant impact on Garlock's settlement practices and results."³ The court noted that in "each and every one of" the 15 closed cases as to which Garlock was permitted to have "full discovery" in the estimation proceeding, the discovery established "that exposure evidence

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was withheld.”⁴ Moreover, the court concluded, “[i]t appears certain that more extensive discovery would have shown more extensive abuse.”⁵ In sum, the court held, “Garlock’s evidence at the present hearing demonstrated that the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers.”⁶ As a result, the court concluded that it could not adopt the “settlement approach” advocated by the ACC and FCR.⁷

Instead, the court used the “legal liability” approach proffered by Garlock, finding that it was more appropriate to base an estimate on “the merits of the claims in aggregate by applying an econometric analysis of the projected number of claimants and their likelihood of recovery.”⁸ The court noted that Garlock “was a relatively small player in the asbestos tort system”⁹ and that Garlock “demonstrated that its products resulted in relatively low exposure of a relatively lower potency asbestos to a limited population and that the population exposed to Garlock’s products was necessarily exposed to far greater quantities of higher potency asbestos from the products of *others*.”¹⁰ Further, because “[o]ne of Garlock’s primary defenses was to deflect responsibility to other co-defendants . . . [e]vidence of the plaintiffs’ exposure to other co-defendants products was essential to its defense and its negotiating position.”¹¹ Thus, the suppression of evidence in the tort system of claimants’ exposure to the asbestos-containing products of other companies rendered Garlock’s tort experience an unreliable basis for estimating its liabilities.

This article begins by summarizing Judge Hodges’ decision and the “demonstrable misrepresentation” he found. Next, the article explains why, as an historical matter, evidence of such “demonstrable misrepresentation” was not presented earlier to courts in other asbestos bankruptcies, and how efforts to keep such evidence under wraps continues. The article will then discuss potential sources of evidence that other defendants seeking to replicate Garlock’s evidentiary presentation should examine. Last, the article argues that bankruptcy judges should generally permit access to such evidence in order to uphold and promote the integrity of the civil justice system.

I. The *Garlock* Estimation Ruling

Like judges presiding over other asbestos bankruptcies, Judge Hodges was asked to estimate the overall amount of Garlock’s current and future asbestos liabilities. Garlock requested this estimate pursuant to Sections 502 and 105 of the U.S. Bankruptcy Code for the purpose of formulating a plan of reorganization invoking the special asbestos trust/channeling injunction provisions of Code section 524(g).¹²

In previous asbestos bankruptcy estimation proceedings, the parties often started from opposing methodological corners. The asbestos claimants typically based their arguments on the debtor’s actual tort system settlement and judgment experience, contending that past experience was the best predictor of future liabilities. As defendants began exiting the tort system and seeking bankruptcy relief, debtors and other non-asbestos creditor constituencies

argued that the tort system experience became skewed because evidence of claimants' exposures to those now bankrupt co-defendants also disappeared, such that tort system experiences did not reflect the debtors' actual "legal liability" to current and future claimants. As the *Garlock* court explained, because Garlock defended claims largely on the basis that any injury was caused by exposure to other companies' allegedly more dangerous products, the disappearance of such evidence hampered both its defense and its negotiating position.¹³ Further, the costs of defending ever-increasing numbers of asbestos claims often provided an incentive for companies to settle early rather than attempt to vindicate their positions at trial. Generally, judges conducting asbestos estimations have relied on the "past experience" methodology rather than the actual "legal liability" method.¹⁴

The parties took these traditional positions in this case. The ACC offered a "settlement approach" that was "based upon an extrapolation from Garlock's history of resolving mesothelioma claims in the tort system."¹⁵ Using this method, the ACC estimated Garlock's current and future liability for mesothelioma claims at between \$1.0 and \$1.3 billion. Garlock, on the other hand, offered a "legal liability" approach that "considers the merits of the claims in aggregate by applying an econometric analysis of the projected number of claimants and their likelihood of recovery,"¹⁶ which was then reduced by other sources of recovery (i.e., monies available either from other companies or their asbestos trusts).¹⁷ Garlock argued that its past settlements were not an accurate predictor of its actual legal liability because tort claimants and their counsel had manipulated evidence of claimants' exposure to other companies' asbestos, causing Garlock (which did not know of the evidence at the time of those settlements) to pay inflated tort system settlement amounts. Based on this, Garlock estimated its current and future liability at \$125 million — a small fraction of the estimate urged by the ACC and FCR.

The estimation trial consumed 17 trial days and included 29 witnesses and hundreds of exhibits.¹⁸ Before trial, the parties "engaged in wide ranging discovery" which included "not only the normal discovery tools pursuant to the Federal Rules, but also multiple questionnaires directed at the claimants (and their law firms)."¹⁹ Beyond that, Garlock obtained access to "Rule 2019 statements" filed by claimants and their lawyers in myriad other asbestos bankruptcy cases.²⁰

At trial, Garlock argued that although it had been an active litigant in the tort system for thirty years, it properly should be regarded as only a "small player" with limited liability because "its products resulted in relatively low exposure of a relatively lower potency asbestos to a limited population."²¹ Garlock contended that its actual settlement and litigation history did not fully reflect that limited posture, however, because "the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers" which "had a profound impact on a number of Garlock's trials and many of its settlements such that the amounts recovered were inflated."²²

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The court recounted that after the first wave of asbestos bankruptcy filings by the “big dusties” and a second wave of bankruptcies by insulation manufacturers, “most of the funding for liability payments” had been “removed from the system.”²³ “Most significant to Garlock, though, was the fact that often the evidence of [a claimant’s] exposure to those insulation companies’ products also ‘disappeared.’”²⁴ This resulted from “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).”²⁵ The court concluded that “Garlock presented substantial evidence of this practice.”²⁶ The court pointed to the following examples:

- “One of the leading plaintiffs’ law firms with a national practice published a 23-page set of directions for instructing their clients on how to testify in discovery.”²⁷
- “[M]any plaintiffs’ firms . . . delay[ed] filing Trust claims for their clients so that remaining tort system defendants would not have that information.”²⁸
- Most significantly, in “*each and every one* of” the 15 cases as to which the court permitted Garlock to have “full discovery,” Garlock proved that plaintiffs and their lawyers had withheld exposure evidence in the tort cases — “on average plaintiffs disclosed only about 2 exposures to bankruptcy companies’ products, but after settling with Garlock made claims against about 19 such companies’ Trusts.”²⁹

The court gave more fulsome examples from five of the 15 cases as to which Garlock was permitted to have full discovery:

- In a California case, the plaintiff did not admit to any exposure from amphibole insulation, did not identify any specific insulation product, claimed that 100% of his work was on gaskets, and denied he had been exposed to Unibestos amphibole insulation manufactured by Pittsburgh Corning. But after the plaintiff obtained a \$9 million verdict against Garlock, the plaintiff’s lawyers filed 14 claims with asbestos bankruptcy trusts, including several against amphibole insulation manufacturers. “And most important, 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,” Judge Hodges found, “these lawyers failed to disclose exposure to 22 other asbestos products.”³⁰
- In a Philadelphia case that Garlock settled for \$250,000, the plaintiff’s lawyers stated in answers to interrogatories that the plaintiff had “no personal knowledge” of any exposure to any bankrupt companies’ asbestos products. “However, 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 Fiberglas's Kaylo asbestos-containing pipe covering.' ” In total, Judge Hodges found, “this plaintiff's lawyer failed to disclose exposure to 20 different asbestos products for which he made Trust claims. Fourteen of these claims were supported by sworn statements, that contradicted the plaintiff's denials in the tort discovery.”³¹

- In a New York case that Garlock settled during trial, the plaintiff denied any exposure to insulation products. But after the case was settled, the plaintiff's lawyers filed 23 Trust claims on his behalf — eight of them filed within 24 hours after the settlement.³²
- In another California case, which Garlock settled for \$450,000, the plaintiff denied that he ever saw anyone installing or removing pipe insulation on his ship. But after the settlement, the plaintiff's lawyers filed eleven Trust claims for him — seven of those were based on declarations that he personally removed and replaced insulation and identified, by name, the insulation products to which he was exposed.³³
- In a Texas case, the plaintiff received a \$1.35 million verdict against Garlock upon the claim that his only asbestos exposure was to Garlock crocidolite gasket material. The plaintiff specifically denied any knowledge of the name “Babcock & Wilcox,” and his attorneys represented to the jury that there was no evidence that his injury was caused by exposure to Owens Corning insulation. But Garlock's evidence showed that the day before the plaintiff denied any knowledge of Babcock & Wilcox, “his lawyers had filed a Trust claim against it on his behalf. Also, after the verdict, his lawyers filed a claim with the Owens Corning Trust. Both claims were paid—upon the representation that the plaintiff had handled raw asbestos fibers and fabricated asbestos products from raw asbestos on a regular basis.”³⁴

The court's emphatic conclusion deserves extended quotation:

These fifteen cases are just a minute portion of the thousands that were resolved by Garlock in the tort system. And they are not purported to be a random or representative sample. But, the fact that each and every one of them contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock's settlement practices and results. Garlock identified 205 additional cases where the plaintiff's discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases. Garlock's corporate parent's general counsel identified 161 cases during the relevant period where Garlock paid recoveries of \$250,000 or more. The limited discovery allowed by the court demonstrated that almost half of those cases involved misrepresentation of exposure evidence. It appears certain that more extensive discovery would show more extensive abuse. But that is not necessary because the startling pattern of misrepresentation that has been shown is sufficiently persuasive.³⁵

The court determined that this withholding of exposure evidence by plaintiffs and their lawyers “had the effect of unfairly inflating the recoveries against Garlock from 2000 through 2010,” and “was sufficiently widespread

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to render Garlock's settlements unreliable as a predictor of its true liability. Consequently, Garlock's settlement and verdict history during that period does not reflect its true liability for mesothelioma in the pending and future claimants."³⁶

At this point, only Judge Hodges and the parties to the estimation proceeding know what evidence was actually presented, and specifically considered and relied on, by the judge. During the estimation trial, Judge Hodges sealed the courtroom. A publication, Legal Newsline, moved to open the proceedings to the public, but its motion was denied. Legal Newsline's appeal of that ruling is now pending in the district court, along with appeals of several rulings issued after the estimation decision in which Judge Hodges denied various motions asking him to disclose the evidence he relied on for his ruling.³⁷

II. Why Evidence of the Type Relied on by the *Garlock* Court Was Not Presented Sooner, in Other Cases

Although there is no public indication of what specific evidence Judge Hodges relied on in his ruling, there are at least three potential sources of information arising out of the bankruptcy process that the court might have relied on: Rule 2019 statements in other asbestos bankruptcy cases; ballots in favor of or against confirmation of other debtors' section 524(g) plans of reorganization; and claimants' submissions to trusts.

Garlock waged a long battle for access to Rule 2019 statements, filing motions in 12 separate bankruptcy cases, but not gaining access until it succeeded on appeal in overturning bankruptcy court rulings denying access. Ironically, the chief bankruptcy court decision that barred Garlock from access to the Rule 2019 statements it sought to prove its allegations of widespread misrepresentations by certain members of the plaintiffs' bar did so on the basis that Garlock had not yet substantiated its allegations of abusive conduct by plaintiffs and their counsel in other cases. Later, after Garlock gained access to those materials and presented them during the estimation trial, Judge Hodges found that Garlock had proved it was the victim of widespread misrepresentations over a period of ten years.

A. Early Litigation Over Rule 2019 Statements

Asbestos claimants rarely participate in asbestos bankruptcy cases on an individual basis. Instead, plaintiffs' attorneys generally represent their "inventories" of claimants on a group basis during the course of the bankruptcy case. Rule 2019 of the Federal Rules of Bankruptcy Procedure requires any "entity" (which includes lawyers) representing more than one creditor in a case to file a verified statement listing each of the creditors they represent in the bankruptcy case and the nature and amount of each creditor's claim, along with a copy of the instrument (e.g., retention letters), if any, authorizing the lawyer to act on behalf of the creditors. Such statements are often referred to as "Rule 2019 statements." Failure to file a proper Rule 2019 statement can lead to sanctions, including refusing to permit the lawyer to be heard in the case and holding invalid any actions taken by the creditor

in the case.³⁸

In early asbestos bankruptcies, plaintiffs' lawyers generally did not comply with Rule 2019. Later, insurers and some debtors demanded that plaintiffs' lawyers comply with the rule.³⁹ Courts generally ordered compliance, and in at least one instance required plaintiffs' lawyers to disclose, as part of their compliance with the rule, information about their fee sharing, co-counsel, and referral relationships.⁴⁰

Among the bankruptcy judges who ordered compliance with Rule 2019 was Judge Judith Fitzgerald, who presided over at least nine asbestos bankruptcies in Delaware and several more in Pittsburgh.⁴¹ In each of her cases, however, Judge Fitzgerald ordered that the exhibits to the 2019 statements — i.e., the materials that identified the clients who the lawyers were representing — would not be filed on the public record, but instead archived in the clerk's office. The archived materials would be made available only if the court granted permission on motion of a party.⁴² Over time, Judge Fitzgerald regularly denied motions for access, including a motion by Garlock before it filed its own bankruptcy case.⁴³

B. Garlock Gains Access To Rule 2019 Statements In Other Cases

As part of the preparation for its estimation hearing, Garlock filed motions in twelve of Judge Fitzgerald's cases seeking access to the non-public exhibits to the Rule 2019 statements. Garlock argued "that it needs the information to be able to prove that asbestos plaintiffs' law firms were concealing clients' exposure to the asbestos products of other bankruptcy debtors for the purpose of inflating settlement values against Garlock in the tort system," and it claimed "that the 2019s show the law firms' knowledge of which clients were exposed to which debtor's products and constitute verification under penalty of perjury that the law firms' clients were creditors in these cases, not against Garlock."⁴⁴ In other words, Garlock wanted to know if a plaintiffs' lawyer listed as a client in a particular debtor's bankruptcy case a claimant who had, in his tort case against Garlock, denied having been exposed to that debtor's asbestos.⁴⁵ Judge Fitzgerald consolidated Garlock's twelve motions for decision and then denied them, finding that Garlock's "allegations of harm are entirely a matter of conjecture and speculation," that its alleged injury would not be redressed by access to the Rule 2019 statements, and that it lacked standing.⁴⁶

On appeal, both the Delaware and Western District of Pennsylvania district courts reversed and granted Garlock access to the 2019 exhibits. The Delaware court held that the exhibits were public records as to which there was a presumptive right of public access that had not been rebutted. The court further held that "Garlock's purpose in seeking access to the 2019 Exhibits—to permit its expert in its own bankruptcy to develop or rebut an opinion as to an estimate of Garlock's aggregate liability for asbestos claims—is a proper purpose for seeking access."⁴⁷ The district court summarized Garlock's argument regarding how it intended to use the 2019 statements as follows:

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The 2019 Statements, when combined with the 2019 Exhibits, contain admissions of exposure to other products that are relevant to estimating Garlock's asbestos liability in its bankruptcy case. Garlock can use evidence of asbestos claimants' exposures to other asbestos-containing products to show that it was not a proximate cause of the plaintiff's asbestos-related disease. Other exposures are also relevant to Garlock because they permit Garlock to show that other parties were at fault and allocate liability to them.⁴⁸

However, the Delaware district court restricted the use to which Garlock could put the 2019 Exhibits, stating that "Garlock is to be provided access to the 2019 Exhibits solely for the purpose of using them in connection with the estimation proceedings in its own bankruptcy case. Garlock may not publicly disclose information contained in the 2019 Exhibits except in an aggregate format that does not identify any individual."⁴⁹ The Western District of Pennsylvania district court adopted the opinion of the Delaware court as its own and imposed similar restrictions on Garlock's use of the 2019 Exhibits.⁵⁰

Thus, while the two district courts allowed Garlock to have access to the 2019 Exhibits in all of Judge Fitzgerald's cases, others wishing to access those exhibits will have to move individually for access and establish why they should be given access.

C. In Some Asbestos Bankruptcies, Rule 2019 Statements Are Already Available On The Public Record

In other asbestos bankruptcies, however, Rule 2019 statements and their exhibits are a matter of public record. In these cases, any member of the public can access the statements through the bankruptcy courts' CM/ECF system.⁵¹ The amount of information provided in those exhibits varies. Some contain such information as the name of the injured party, the name of the claimant, the case number and court in which an existing suit is pending, the year filed; some identify the claimants' diagnosis (e.g., malignancy, lung cancer, mesothelioma); some contain information about when the claimant acquired his or her claim; some contain the last four digits of the claimant's social security number; and some are just lists of names.

Because the *Garlock* bankruptcy court has denied all of the motions asking it to disclose the evidence it relied on in its estimation opinion, it remains unclear whether the 2019 Exhibits Garlock obtained from the twelve Delaware and Western District of Pennsylvania bankruptcies formed a significant part of the basis for the *Garlock* court's rulings in the estimation opinion.

III. Other Potential Sources of Evidence

A. Plan Ballots

Unlike Rule 2019 statements, which generally do not provide information about a claimant's disease, ballots cast in favor of or against a debtor's section 524(g) plan usually are required to provide such information. Moreover, unlike Rule 2019 statements, which are not typically filed under penalty of perjury, someone — either the claimant himself or, in the case of a "master ballot"⁵² filed on behalf of many claimants, the claimants' attorney — gener-

ally is required to declare or certify, under penalty of perjury, that the information provided in the ballot is true.⁵³

Confirmation of a section 524(g) asbestos bankruptcy plan of reorganization requires the affirmative vote of 75% of all of the asbestos claimants who cast votes.⁵⁴ In addition, the class of asbestos claimants must also satisfy the ordinary Chapter 11 requirement that a class vote by “at least two-thirds in amount” of the claims of such class that are voted.⁵⁵ Because most claims against an asbestos debtor are unliquidated as to amount, to determine if this “two-thirds in amount” requirement is met, it becomes necessary to decide how to weight the claimants’ votes.

Two different approaches have been used in asbestos bankruptcies to weight claimants’ votes.⁵⁶ In some early asbestos bankruptcies, all claimants’ votes were assigned a nominal value of \$1.00, meaning that the number-of-claimants voting requirement and the amount-of-value voting requirement were essentially merged.⁵⁷ But more recently, it has been the norm that claimants’ votes are assigned different values based on the claimants’ alleged impairment. The values are aligned with the trust distribution procedures (“TDPs”) appended to the proposed plan.⁵⁸ Thus, if a particular TDP assigns \$225,000 as the value for a mesothelioma claim and \$15,000 for a lung cancer claim, a mesothelioma claimant’s vote will be weighted much more heavily than a lung cancer claimant’s vote.⁵⁹ In order to weight the votes, each claimant must identify on his or her ballot the particular disease or condition he or she claims to have.

Further, ballots typically are required to contain a certification or declaration under penalty of perjury, with respect to each voting claimant, that the claimant has the condition claimed and that the claimant holds an asbestos claim against the debtor.⁶⁰ For example, the individual asbestos claimant ballot in *Plant Insulation* required the claimant or his authorized agent to attest to the following, under penalty of perjury pursuant to 28 U.S.C.A. § 1746:

(i) I am/the claimant is the holder of the Asbestos Injury Claim identified in Item 3 on this Ballot;

(ii) I have/he/she has full power and authority to vote to accept or reject the Plan on behalf of the Claimant;

(iii) I have/the claimant has the Compensable Disease asserted in Item 3 hereof based on medical records or similar documentation in the possession of the signatory or in the possession of the Claimant’s attorney or physician;

(iv) I have/the claimant has been exposed to an asbestos-containing product or material with the result that the Claimant has an Asbestos Injury Claim (as defined in the Plan) for which Plant has legal liability.

(v) If I/the claimant have/has a Claim of a Determined Amount, true and correct copies of the judgment, settlement or other document evidencing such claim and the amount of such claim are attached to this Ballot.

(vi) I have not, as to the Debtor, released my claim or dismissed my claim with prejudice; nor has my claim been disallowed in a final judgment of a court of competent jurisdiction.⁶¹

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Therefore, because ballots are required to assert, under penalty of perjury, that the claimant has a claim against the particular debtor in whose case the ballot is being cast, such ballots arguably provide better information than Rule 2019 statements regarding whether a particular claimant's assertions in the tort system are in conflict with assertions in bankruptcy cases.

C. Trust Submissions

Once a section 524(g) plan has been confirmed, claimants will submit claims to a trust for resolution and payment. The TDPs govern what information must be provided by each claimant in order to substantiate his or her claim. Claimants typically are required to identify their asbestos injury, provide medical records supporting their claim, provide information regarding their employer(s), job title(s)/occupation(s), where they worked and when, and provide product identification and exposure evidence. Finally, the claimant or his attorney must sign the claim under penalty of perjury, attesting that the claim information provided is true and correct.⁶²

The requirements for demonstrating exposure to a debtor's asbestos are common across trusts and typically require a claimant to "demonstrate meaningful and credible exposure" to "asbestos or asbestos-containing products supplied, specified, manufactured, installed, maintained, or repaired" by the debtor, which "may be established by an affidavit or sworn statement of the claimant," a co-worker, or a family member, or through other evidence.⁶³ Thus, if a claimant suing Company A in the tort system says that he was not exposed to Company B's asbestos but also submits a claim to the trust established in Company B's bankruptcy, the trust submission would likely be powerful evidence in Company A's defense against the claimant's tort claim.

Because they require sworn statements that the claimant was exposed to a particular debtor's asbestos, the trust submissions may be the most important documents for a defendant attempting to undermine the credibility of a plaintiff's tort system assertions. Indeed, Judge Hodges' *Garlock* estimation ruling repeatedly references claims filed against trusts even though the claimant in question had, in litigation against *Garlock*, denied having a claim against the companies that established those trusts. Perhaps because such evidence is so compelling, lawyers for asbestos claimants and official asbestos claimant committees routinely seek to prevent disclosure of trust submissions on various grounds, including that the information is private and/or constitutes settlement communications.⁶⁴ However, many courts have held that such trust submissions are appropriate subjects of discovery, some courts have adopted case management orders mandating that trust claim forms be disclosed in tort lawsuits, and several states have recently enacted legislation mandating trust transparency.⁶⁵

IV. Early Impact of the *Garlock* Estimation Ruling

Judge Hodges' estimation ruling has garnered significant media attention from such outlets as the New York Times, Wall Street Journal, Forbes, and National Public Radio.⁶⁶ In addition, it has already been cited by parties in

litigation pending in other courts. For example:

- A Rhode Island trial judge found that Crane Co. should be permitted discovery of claim forms a decedent's widow filed with various asbestos bankruptcy trusts. Crane Co. cited the *Garlock* estimation ruling as an example of how asbestos plaintiffs may present conflicting exposure evidence at trial and in claims submitted to asbestos trusts.⁶⁷ The court found that the claim forms could contain "inconsistent statements" that "would go directly to the credibility of [the decedent's] allegations that exposure to Crane's products caused his injuries."⁶⁸
- In their appeal from confirmation of the *Pittsburgh Corning* section 524(g) plan, two insurers cited *Garlock* to support their arguments that the bankruptcy court had erroneously denied their requests for discovery, which they had requested to attempt to show that the bankruptcy was the product of fraud and collusion by plaintiffs' attorneys.⁶⁹
- In a motion to reopen the *THAN* asbestos bankruptcy, several insurers argued that the court should order the debtor's section 524(g) trust to allow them to exercise audit rights granted under a settlement. The insurers argued that the information disclosed in the *Garlock* estimation decision, combined with the insurers' belief that many of the same plaintiffs' firms who submitted claims against *Garlock* also may have submitted claims to the *THAN* Trust, indicated that the audit rights could be a valuable tool to ferret out fraud.⁷⁰
- In a petition for review filed in the California Supreme Court, an asbestos defendant cited the *Garlock* estimation ruling to support an argument that the court should accept review of an appellate court decision that held the trial court properly denied an offset for potential future recoveries from asbestos trusts, even if the result was a double recovery. The petitioner noted that Judge Hodges had found that, "on average, tort plaintiffs disclosed only about two exposures to bankrupt companies' products, but after settling with *Garlock* (while it was still solvent), those same plaintiffs made claims against, on average, about 19 such companies' trusts."⁷¹

What these cases show is that the revelatory evidence of tort system manipulation detailed in Judge Hodges' estimation ruling has the potential for broad application not only in future asbestos estimations but in the tort system as well, where defendants who suspect that they have been subjected to the same type of manipulation documented by Judge Hodges will seek to reduce their tort system settlement costs by discovering such evidence and using it in motions, settlement discussions, and trials.

V. Bankruptcy Courts Should Allow Broad Access to Materials Submitted and Filed by Claimants

Until *Garlock* amassed the (still undisclosed) evidence that led the bankruptcy court to conclude that "the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers,"⁷² courts were skeptical of such claims by defendants. The

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Garlock estimation ruling hardly proves that every asbestos claimant and their lawyers manipulated evidence in every case. But *Garlock* does suggest that assertions of such behavior are not necessarily fanciful, and that courts should act to uphold the integrity of judicial proceedings by allowing broad access to the materials — such as Rule 2019 statements, plan ballots, and trust claim submissions — that a defendant can use to prove any manipulation that may have taken place.

Any legitimate privacy concerns of claimants can be adequately addressed through narrowly crafted protective orders and other mechanisms, such as redactions of social security numbers. But not only does the Bankruptcy Code mandate that the public have access to papers filed in bankruptcy court,⁷³ so do the First Amendment “and the common-law tradition that court proceedings are presumptively open to public scrutiny.”⁷⁴ As the U.S. Court of Appeals for the Fourth Circuit recently explained in overturning broad sealing orders entered by a district court, “public access promotes not only the public’s interest in monitoring the functioning of the courts but also the integrity of the judiciary.”⁷⁵

Ultimately, the key question is, as one scholar put it, “should the civil justice system condone a process where litigants may advance one set of facts under penalty of perjury in one forum and a contradictory set of facts under penalty of perjury in another”?⁷⁶ Allowing defendants broad access to the type of material discussed above — Rule 2019 statements, plan ballots, and trust claim submissions — will help to stop any such behavior on the part of some asbestos claimants and their attorneys, thereby helping to preserve and promote the integrity of the judicial system for the benefit of all.

NOTES:

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

²In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 74 (Bankr. W.D. N.C. 2014). The court explained that, “[b]ecause of the relative overwhelming magnitude of mesothelioma claims in comparison to claims based on other diseases, the parties have agreed and the court has ordered that this proceeding does not include any liability for non-mesothelioma claims.” In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 75 (Bankr. W.D. N.C. 2014).

³In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 85 (Bankr. W.D. N.C. 2014).

⁴In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 85 (Bankr. W.D. N.C. 2014).

⁵In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 86 (Bankr. W.D. N.C. 2014).

⁶In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 82 (Bankr. W.D. N.C. 2014).

⁷In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 94 (Bankr. W.D. N.C. 2014).

⁸In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 74 (Bankr. W.D. N.C. 2014).

⁹In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 82 (Bankr. W.D. N.C. 2014).

¹⁰In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 82 (Bankr. W.D. N.C. 2014) (emphasis added).

¹¹In re *Garlock Sealing Technologies, LLC*, 504 B.R. 71, 83 (Bankr. W.D. N.C. 2014).

¹²In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 74 (Bankr. W.D. N.C. 2014). See also In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 74 (Bankr. W.D. N.C. 2014) (“Garlock has proposed a Plan of Reorganization that would include a fund of \$270 million for resolution of present and future asbestos-related claims. This estimation is necessary to consideration of that Plan or any subsequent modification to it or a competing Plan filed by another party”).

¹³In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 83 (Bankr. W.D. N.C. 2014).

¹⁴Judge Hodges’ opinion discussed previous asbestos estimations at length. See, e.g., In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 87–94 (Bankr. W.D. N.C. 2014) (discussing the estimation proceedings in the *Eagle-Picher*, *USG Corporation*, *G-I Holdings*, *Owens Corning*, *Federal-Mogul*, *W.R. Grace*, and *Specialty Products* bankruptcy cases). Some of those courts, even in using the “legal liability” method, made adjustments to account for certain allegedly changed circumstances. For example, the court in *Owens Corning* “did not simply extrapolate from historical values” because the parties opposing the estimation sought by the asbestos claimants in that case “showed factors, such as the availability of punitive damages in the tort system, marketing for claimants that had already reached ‘its maximum impact,’ and pre-petition changes in asbestos litigation, that could have an impact on values in the future.” In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 89–90 (Bankr. W.D. N.C. 2014), discussing *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 722–25 (D. Del. 2005). Also, the court in *W.R. Grace* reviewed relevant epidemiology and regulatory standards to reach the conclusion that one of the debtor’s products did not create an unreasonable risk of harm. In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 91 (Bankr. W.D. N.C. 2014).

¹⁵In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 74 (Bankr. W.D. N.C. 2014).

¹⁶In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 74 (Bankr. W.D. N.C. 2014).

¹⁷In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 94 (Bankr. W.D. N.C. 2014).

¹⁸In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 94 (Bankr. W.D. N.C. 2014).

¹⁹In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 94 (Bankr. W.D. N.C. 2014). For example, Garlock deposed several fact witnesses, including some lawyers for asbestos claimants, and subpoenaed ballots submitted on behalf of asbestos claimants in 27 other bankruptcy cases. The court also required current mesothelioma claimants to respond to questionnaires that asked for information about their work history, diagnosis, sites of alleged asbestos exposure, litigation history, claims filed with asbestos trusts, and settlement payments received from trusts and tort system defendants. The questionnaires also asked claimants to provide copies of their trust claim forms and to sign a form authorizing trusts to disclose a copy of the claim form. See In re Garlock Sealing Technologies LLC, Orders Authorizing The Debtors to Issue Questionnaires, Dkt. Nos. 1390, 2337, and 2338 (Bankr. W.D.N.C.) (June, 2011 and June, 2012). Some discovery sought by Garlock was not permitted, such as production from plaintiffs’ law firms of information relating to payments received by asbestos plaintiffs from defendants in the tort system and from asbestos trusts. See In re Garlock Sealing Technologies LLC, Order Denying Motion For Production Of Information From Counsel Representing Garlock Claimants, Dkt. No. 1201 (Bankr. W.D.N.C. Mar. 4, 2011).

²⁰See, e.g., In re Motions for Access of Garlock Sealing Technologies LLC, 488 B.R. 281, 57 Bankr. Ct. Dec. (CRR) 178 (D. Del. 2013), as corrected, (Mar. 15, 2013) (reversing bankruptcy court orders entered in nine asbestos bankruptcy cases which had denied Garlock’s request for access to statements filed by claimants and their lawyers pursuant to Bankruptcy Rule 2019 but held under seal pursuant to earlier orders in those nine cases). This decision is discussed in greater detail below.

²¹In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 82 (Bankr. W.D. N.C. 2014).

²²In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 82 (Bankr. W.D. N.C. 2014).

²³In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 84 (Bankr. W.D. N.C. 2014).

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²⁴In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 84 (Bankr. W.D. N.C. 2014).

²⁵In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 84 (Bankr. W.D. N.C. 2014).

²⁶In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 84 (Bankr. W.D. N.C. 2014).

²⁷In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 84 (Bankr. W.D. N.C. 2014).

²⁸In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 84 (Bankr. W.D. N.C. 2014).

²⁹In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 84 (Bankr. W.D. N.C. 2014) (emphasis by the court).

³⁰In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 84 (Bankr. W.D. N.C. 2014).

³¹In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 85 (Bankr. W.D. N.C. 2014).

³²In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 85 (Bankr. W.D. N.C. 2014).

³³In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 85 (Bankr. W.D. N.C. 2014).

³⁴In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 85 (Bankr. W.D. N.C. 2014).

³⁵In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 85-86 (Bankr. W.D. N.C. 2014).

³⁶In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 86–87 (Bankr. W.D. N.C. 2014). See also In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 94 (Bankr. W.D. N.C. 2014) (“the settlement history data does not accurately reflect fair settlements because exposure evidence was withheld. While that practice was not uniform, it was widespread and significant enough to infect fatally the settlement process and historic data. It has rendered that data useless for fairly estimating Garlock’s liability to present and future claimants”).

The court also identified a second reason for rejecting the ACC-FCR “settlement” approach to estimation, namely that Garlock paid substantial settlement sums to avoid even more substantial costs of defending against asbestos claims. See, e.g., In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 94 (Bankr. W.D. N.C. 2014) (“Garlock’s settlement data represents insignificant part cost avoidance rather than its liability. The bankruptcy estimation process requires a pure (or more academic) analysis of Garlock’s ‘liability’ to claimants; whereas the tort system produced a settlement based [on] both liability and avoidable defense costs. Here, the court’s mission is to determine Garlock’s liability to claimants—and data that includes avoided defense costs does not prove that”).

³⁷See Legal Newsline v. Garlock Sealing Technologies, LLC (In re Garlock Sealing Technologies, LLC), Case No. 3:13-cv-464 (MOC) (W.D.N.C.), and Legal Newsline v. Garlock Sealing Technologies, LLC (In re Garlock Sealing Technologies, LLC), Case No. 3:14-cv-212 (MOC) (W.D.N.C.). See also Case Nos. 14-CV-210, 14-CV-214, 14-CV-215, 14-CV-216, 14-CV-217, 14-CV-221, 14-CV-237 (W.D.N.C.) (appeals filed by Ford, Garlock, Honeywell International, AIG Member Companies, Volkswagen Group of America, and Mt. McKinley Insurance Co.).

On June 4, 2014, the ACC filed a motion to reopen the record of the estimation proceeding, alleging that Garlock engaged in discovery improprieties that allowed it to present false testimony during the estimation hearing, tainting the court’s findings. The motion asks the court to reopen the record of the estimation hearing, allow further discovery, and receive supplemental proofs from the ACC. See In re Garlock Sealing Technologies, Inc., Motion of the Official Committee of Asbestos Personal Injury Claimants to Reopen the Record of the Estimation Proceeding, Dkt. No. 3725, Case No. 10-31607 (Bankr. W.D.N.C. June 4, 2014). At this writing, the ACC’s motion is scheduled to be heard on July 24, 2014.

³⁸Rule 2019 was amended effective December 1, 2011, but the changes do not substantially modify the rule as applied in the context of asbestos plaintiffs’ lawyers’ representation of their clients.

³⁹See, e.g., Baron & Budd, P.C. v. Unsecured Asbestos Claimants Committee (In re Congoleum Corp.), 321 B.R. 147, 53 Collier Bankr. Cas. 2d (MB) 1159, 61 Fed. R. Serv. 3d

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42 (D.N.J. 2005); *In re Muralo Co., Inc.*, 295 B.R. 512 (Bankr. D. N.J. 2003); *Quigley Co. v. Coleman (In re Quigley Co.)*, Motion of Quigley Company, Inc. and Pfizer Inc. For (I) An Order Under Fed. R. Bankr. P. 2019 . . . , Dkt. No. 161, Adv. Proc. No. 04-04262 (Bankr. S.D.N.Y. Nov. 9, 2004).

⁴⁰*Baron & Budd, P.C. v. Unsecured Asbestos Claimants Committee (In re Congoleum Corp.)*, 321 B.R. 147, 167, 53 Collier Bankr. Cas. 2d (MB) 1159, 61 Fed. R. Serv. 3d 42 (D.N.J. 2005).

⁴¹*In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281, 287 (D. Del. 2013).

⁴²*In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281, 289 (D. Del. 2013), citing *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 559, 54 Collier Bankr. Cas. 2d (MB) 1139 (D. Del. 2005), and *In re Pittsburgh Corning Corp.*, 260 Fed. Appx. 463, 465, 49 Bankr. Ct. Dec. (CRR) 78 (3d Cir. 2008) (both upholding Judge Fitzgerald's Rule 2019 orders).

⁴³See, e.g., *In re ACandS, Inc.*, 462 B.R. 88 (Bankr. D. Del. 2011 and Bankr. W.D. Pa. 2011) (describing the court's resolution of a motion for access filed by Garlock in *Pittsburgh Corning* before Garlock filed its own bankruptcy case), rev'd, *In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281, 57 Bankr. Ct. Dec. (CRR) 178 (D. Del. 2013), as corrected, (Mar. 15, 2013), and *Garlock Sealing Technologies, LLC v. Pittsburgh Corning Corp. (In re Pittsburgh Corning Corp.)*, Order of Court Resolving Appeals, Dkt. No. 33, Case No. 11-1406 (W.D. Pa. Mar. 19, 2013); *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 54 Collier Bankr. Cas. 2d (MB) 1139 (D. Del. 2005) (affirming Judge Fitzgerald's denial of insurers' request for access to Rule 2019 statements).

⁴⁴*In re ACandS, Inc.*, 462 B.R. 88, 93 (Bankr. D. Del. 2011 and Bankr. W.D. Pa. 2011). See also *In re ACandS, Inc.*, 462 B.R. 88, 93 (Bankr. D. Del. 2011 and Bankr. W.D. Pa. 2011). See also *In re ACandS, Inc.*, 462 B.R. 88, 100 (Bankr. D. Del. 2011 and Bankr. W.D. Pa. 2011) ("Garlock insists that if it compares the 2019 statements to discovery it received over the past decade it can prove the extent to which evidence was concealed and that the purpose of concealment was to inflate Garlock's settlement values in the tort system"). ("Garlock insists that if it compares the 2019 statements to discovery it received over the past decade it can prove the extent to which evidence was concealed and that the purpose of concealment was to inflate Garlock's settlement values in the tort system").

⁴⁵See, e.g., *In re ACandS, Inc.*, 462 B.R. 88, 97 n.9 (Bankr. D. Del. 2011 and Bankr. W.D. Pa. 2011).

⁴⁶*In re ACandS, Inc.*, 462 B.R. 88, 93 (Bankr. D. Del. 2011 and Bankr. W.D. Pa. 2011). See also *In re ACandS, Inc.*, 462 B.R. 88, 93-94 (Bankr. D. Del. 2011 and Bankr. W.D. Pa. 2011).

⁴⁷*In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281, 300 (D. Del. 2013).

⁴⁸*In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281, 300 (D. Del. 2013).

⁴⁹*In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281, 302 (D. Del. 2013).

⁵⁰See *Garlock Sealing Technologies, LLC v. Pittsburgh Corning Corp. (In re Pittsburgh Corning Corp.)*, Order of Court Resolving Appeals, Dkt. No. 33 at ¶¶ 1-5, Case No. 11-1406 (W.D. Pa. Mar. 19, 2013).

⁵¹See, e.g., *In re Lloyd E. Mitchell, Inc.*, Dkt Nos. 62, 63, 78, 109, and 297, No. 06-13250 (Bankr. D. Md.); *In re Plant Insulation Co.*, Dkt. Nos. 964, 1222, and 1249, No. 09-31347 (Bankr. N.D. Cal.); *In re Thorpe Insulation Co.*, Dkt. Nos. 1212, 1523, 1529, and 1530, No. 07-19271 (Bankr. C.D. Cal.).

⁵²See *In re Lloyd E. Mitchell, Inc.*, 373 B.R. 416, 424, 48 Bankr. Ct. Dec. (CRR) 227

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(Bankr. D. Md. 2007) (“The use of master ballots in mass tort cases is a long-standing procedural mechanism that has been employed almost as a matter of course;” citing eight asbestos bankruptcy cases).

⁵³See also *In re ACandS, Inc.*, 462 B.R. 88, 94 (Bankr. D. Del. 2011 and Bankr. W.D. Pa. 2011). (“2019 statements are representations by counsel to a court as to who their clients are. The statements are not claims, nor are they ballots cast with respect to a plan of reorganization, which are assertions of claims”); *In re Lloyd E. Mitchell, Inc.*, 373 B.R. 416, 424, 48 Bankr. Ct. Dec. (CRR) 227 (Bankr. D. Md. 2007) (“a claimant *is* required to certify under penalty of perjury that he or she holds a claim against *this Debtor*”) (emphasis in original).

⁵⁴See 11 U.S.C.A. § 524(g)(2)(B)(ii)(IV)(bb). This 75% “supermajority” requirement supersedes the normal “one-half in number” requirement contained in 11 U.S.C.A. § 1126(c).

⁵⁵See 11 U.S.C.A. § 1126(c). Section 1126(c) also requires that a class vote by “more than one-half in number of the allowed claims of such class.” 11 U.S.C.A. § 1126(c). However, section 524(g) supersedes that “one-half in number” requirement, providing that a class of asbestos claimants must vote in favor of a section 524(g) plan “by at least 75 percent of those voting.” 11 U.S.C.A. § 524(g)(2)(B)(ii)(IV)(bb).

⁵⁶*In re Quigley Co.*, 346 B.R. 647, 654–55, 46 Bankr. Ct. Dec. (CRR) 274, 56 Collier Bankr. Cas. 2d (MB) 847 (Bankr. S.D. N.Y. 2006) (describing the two methods and the rationale for each).

⁵⁷See, e.g., *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 646–48, 17 Bankr. Ct. Dec. (CRR) 695, Bankr. L. Rep. (CCH) P 72264 (2d Cir. 1988); *In re Lloyd E. Mitchell, Inc.*, 373 B.R. 416, 424, 48 Bankr. Ct. Dec. (CRR) 227 (Bankr. D. Md. 2007). See also *In re Quigley Co.*, 346 B.R. 647, 654, 46 Bankr. Ct. Dec. (CRR) 274, 56 Collier Bankr. Cas. 2d (MB) 847 (Bankr. S.D. N.Y. 2006) (noting that “the \$1.00 per vote method can be used when support is overwhelming and a different voting method will not change the result,” but ultimately approving weighted ballots based on severity of disease); *In re Burns and Roe Enterprises, Inc.*, 2009 WL 438694 (D.N.J. 2009) (in connection with plan confirmation, asbestos personal injury claims were valued at \$1 each for purposes of voting to accept the plan).

⁵⁸See, e.g., *In re Quigley Co., Inc.*, 437 B.R. 102, 123, 53 Bankr. Ct. Dec. (CRR) 170 (Bankr. S.D. N.Y. 2010) (noting that each vote “was weighed according to its maximum TDP value”); *In re Metex Mfg. Co., Order Approving Disclosure Statement, Exh. A, Dkt. No. 437-1 at 7–8, No. 12-14554* (Bankr. S.D.N.Y. Feb. 25, 2014) (providing that the amount of an individual claimant’s asbestos claim, for purposes of voting, is determined by the “scheduled values” for different diseases as set forth in the proposed trust distribution procedures); *In re Plant Insulation Co., Order Approving Disclosure Statement, Dkt. No. 1000 at 19, No. 09-31347* (Bankr. N.D. Cal. Feb. 1, 2011) (providing that the amount of an individual claimant’s asbestos claim, for purposes of voting, is determined by the “average values” for different diseases as set forth in the proposed trust distribution procedures); *In re Metex Mfg. Co., Order Approving Disclosure Statement, Exh. A, Dkt. No. 437-1 at 34–41* (form of ballot for asbestos claimants).

⁵⁹See, e.g., *In re Quigley Co.*, 346 B.R. 647, 654–55, 46 Bankr. Ct. Dec. (CRR) 274, 56 Collier Bankr. Cas. 2d (MB) 847 (Bankr. S.D. N.Y. 2006).

⁶⁰*In re Metex Mfg. Co., Order Approving Disclosure Statement, Exh. A, Dkt. No. 437-1 at 8–9, No. 12-14554* (Bankr. S.D.N.Y. Feb. 25, 2014) (a claimant submitting an individual ballot must certify, inter alia, that he or she holds an asbestos claim against the debtor and the claimed asbestos-related disease is based on medical records or similar documentation; attorney signing master ballots on behalf of multiple claimants must provide similar certifications for each claimant identified on the master ballot); *In re Plant Insulation Co., Order Approving Disclosure Statement, Dkt. No. 1000 at 40, No. 09-31347* (Bankr. N.D. Cal. Feb. 1, 2011) (requiring that a person submitting a ballot certify, under penalty of perjury, that he or she holds an asbestos claim against the debtor, was “exposed to an asbestos-containing product or material . . . for which Plant has legal liability,” and has the disease claimed on the

ballot).

⁶¹In re Plant Insulation Co., Order Approving Disclosure Statement, Dkt. No. 1000 at 41, No. 09-31347 (Bankr. N.D. Cal. Feb. 1, 2011). The *Plant Insulation* plan defined “Asbestos Injury Claim” as, inter alia, “[a]ny Claim *against the Debtor* seeking, directly or indirectly, recovery for damages for personal injury, bodily harm or wrongful death allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products . . .” In re Plant Insulation Co., Amended and Restated Second Amended Plan of Reorganization of Plant Insulation Co., Dkt. No. 2069 at § 1.8 (emphasis added), No. 09-31347 (Bankr. N.D. Cal. Apr. 2, 2012).

⁶²See, e.g., S. Todd Brown, *Bankruptcy Trusts, Transparency And The Future Of Asbestos Compensation*, 23 *Widener L.J.* 299, 317–18 (2013). See also Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 *N.Y.U. Ann. Survey of Am. Law* 163 (2006).

⁶³See, e.g., Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures at § 5.7(b)(3), available at www.ocfbasbestostrust.com; Kaiser Aluminum & Chemical Corporation Third Amended Asbestos Trust Distribution Procedures at § 5.7(b)(3), available at www.kaiserasbestostrust.com; Trust Distribution Procedures, Burns And Roe Asbestos Personal Injury Settlement Trust at § 5.7(b)(3), available at www.burnsandroetrust.com.

⁶⁴See, e.g., E. Inselbuch, A. McMillan & A. Sackett, *The Effrontery Of The Asbestos Trust Transparency Legislation Efforts*, Mealey’s *Litigation Report: Asbestos* (Feb. 20, 2013).

Many TDPs contain virtually identical provisions stating that “[a]ll submissions to the PI Trust by a holder of a PI Trust Claim or a proof of claim form and materials related thereto shall be treated as made in the course of settlement discussions between the holder and the PI Trust and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including, but not limited to, those directly applicable to settlement discussions . . .” See, e.g., Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures at § 6.5, available at www.ocfbasbestostrust.com; Kaiser Aluminum & Chemical Corporation Third Amended Asbestos Trust Distribution Procedures at § 6.5, available at www.kaiserasbestostrust.com; Trust Distribution Procedures, Burns And Roe Asbestos Personal Injury Settlement Trust at § 6.5, available at www.burnsandroetrust.com.

⁶⁵See, e.g., S. Todd Brown, *Bankruptcy Trusts, Transparency And The Future Of Asbestos Compensation*, 23 *Widener L.J.* 299, 322-27, 331-37 (2013); S. Todd Brown, *Bankruptcy Trusts, Transparency And The Future Of Asbestos Compensation*, 23 *Widener L.J.* at 299, 326 (2013) (“Most courts to consider the question have concluded that trust forms are, nonetheless, discoverable”); 2013 *Wisc. Act 154* (enacted Mar. 27, 2014) (requiring plaintiffs in asbestos tort suits to “provide to all parties a sworn statement identifying each personal injury claim he or she has filed or reasonably anticipates filing against an asbestos trust” and, “[f]or each personal injury claim he or she has filed against an asbestos trust, a copy of the final executed proof of claim, all trust documents, including trust claims materials, trust governance documents, any documents reflecting the current status of the claim and, if the claim is settled, all documents relating to the settlement of the claim”).

⁶⁶See, e.g., D. Fisher, *Manufacturer’s Lonely Quest To Open Asbestos Files Gains Strength*, *Forbes* (Mar. 27, 2014); *Busting the Asbestos Racket*, *Wall Street J.* (Feb. 7, 2014); M. Tomsic, *Case Sheds Light On The Murky World Of Asbestos Litigation*, <http://www.npr.org/2014/02/04/271542406/case-sheds-light-on-the-murky-world-of-asbestos-litigation> (Feb. 4, 2014, last visited May 1, 2014); J. Nocera, *The Asbestos Scam, Part 2*, *New York Times* at A27 (N.Y. edition Jan. 14, 2014).

⁶⁷*Sweredoski v. Alfa Laval Inc.*, Decision at 6, No. PC-2011-1544 (R.I. Super., Providence Cty. Jan. 30, 2014).

⁶⁸*Sweredoski v. Alfa Laval Inc.*, Decision at 6, No. PC-2011-1544 (R.I. Super., Providence Cty. Jan. 30, 2014).

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⁶⁹Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp. (In re Pittsburgh Corning Corp.), Appellants' Opening Brief, Dkt. No. 56 at 24, No. 13-1639 (W.D. Pa. Mar. 17, 2014).

⁷⁰In re T H Agriculture & Nutrition L.L.C., Memorandum of Law . . . , Dkt. No. 614-1 at 11 of 17, No. 08-14692 (Bankr. S.D.N.Y. Mar. 3, 2014).

⁷¹See Petition for Review at 4, Paulus v. Crane Co., No. S218222 (Cal. S.Ct. filed May 2, 2014) (seeking review of Paulus v. Crane Co., 224 Cal. App. 4th 1357, 169 Cal. Rptr. 3d 373 (2d Dist. 2014), as modified, (Mar. 24, 2014) and review denied, (June 11, 2014)).

⁷²In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 82 (Bankr. W.D. N.C. 2014).

⁷³See 11 U.S.C.A. § 107(a) (“a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge”). Sections 107(b) and (c) contain narrow exceptions to the general right of public access.

⁷⁴Company Doe v. Public Citizen, 749 F.3d 246, 265 (4th Cir. 2014).

⁷⁵Company Doe v. Public Citizen, 749 F.3d 246, 266 (4th Cir. 2014). See also In re Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001) (public access to court records “promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court [and] . . . diminishes possibilities of injustice, incompetence, perjury and fraud”); In re Orion Pictures Corp., 21 F.3d 24, 28, 25 Bankr. Ct. Dec. (CRR) 821, 30 Collier Bankr. Cas. 2d (MB) 1819, 22 Media L. Rep. (BNA) 1568, Bankr. L. Rep. (CCH) P 75826 (2d Cir. 1994) (public access to court records helps “safeguard the integrity, quality, and respect in our judicial system”).

⁷⁶S. Todd Brown, Bankruptcy Trusts, Transparency And The Future Of Asbestos Compensation, 23 Widener L.J. 299, 338 (2013).