Testimony of Judge Peggy L. Ableman (ret.)

Furthering Asbestos Claim Transparency (FACT) Act of 2013

March 13, 2013

Prior to my retirement in December 2012, I served for more than 29 years as a Trial Judge in the Delaware State Court system. During the last few years of my term on the Delaware Superior Court I was solely responsible for the asbestos litigation docket, which comprised approximately 500 to 600 pending cases filed by plaintiffs from all over the United States and even by foreign nationals.

My experience in one particular case gave me a unique insight into the inherent unfairness associated with a system that permits plaintiffs' filings of bankruptcy claims to remain secret and undisclosed while a plaintiff is also actively engaged in asbestos tort litigation.

Unquestionably, asbestos-related diseases, and particularly mesothelioma, are gruesome and frequently deadly and no amount of compensation can ever take the place of a loved one who succumbs to these diseases. I wholeheartedly agree that every defendant that has exposed an individual to asbestos should bear its share of responsibility. The problem that I came to recognize, however, is far more serious because it goes to the very heart and integrity of this litigation. Absent full disclosure,

the defendants cannot be informed of the full extent of an individual's exposure. They are therefore often led to believe- erroneously-that their products were far more responsible for the plaintiff's disease than what may have been the case, because they have no way of knowing the substance of an individual plaintiff's claims.

The irony of my encountering this problem in Delaware is that we actually impose a requirement in our state, by Standing Order, that within 30 days of the filing of an asbestos action plaintiffs are required to serve upon the Defense Coordinating Counsel "all claim forms and related materials related to any claims made by a Plaintiff to any...trust, entity, or person related to or in any way involved with asbestos claims." This is further defined to include specifically, "claims made to trusts for bankrupt asbestos litigation defendants." These disclosure requirements are ongoing under the Delaware Order and require plaintiffs to supplement the information up to the time of trial. Yet, even in a state where there is an express requirement of full disclosure of these claims early on in the litigation, deception can still occur, often resulting in irreversible prejudice to one or more defendants.

What transpired in the case before me is illustrative of the highly prejudicial effect upon defendants of any system where one or more defendants are not made aware of the full scope of a particular plaintiff's claims of exposure. A brief discussion of the case of *Montgomery v. A.W. Chesterton Co. Del. Super. Civil Action No. 09C-11-217 ASB,*

underscores the problem.

On April 3, 2009, June Montgomery was diagnosed with pleural mesothelioma. Her son, Brian Montgomery, a sheriff's deputy in Broward County, Florida, assisted his mother and father, Arthur Montgomery, to find an attorney shortly after she was diagnosed. Brian retained the Law Offices of Brent Coon several weeks later. He expressly understood that the Brent Coon firm would assist his parents in finding counsel in Florida where his parents lived. Ultimately, they hired Florida attorneys, Levin, Papantonio, Thomas, Echsner & Proctor. P.A. While Brian claimed at his deposition that no other law firms were involved, in fact he had both Delaware counsel when the decision was made to file in Delaware, and Virginia counsel was retained to perform the videotaped trial examination of plaintiff's proffered expert, Jacques Legier, M.D.

On November 25, 2009, Delaware counsel filed a lawsuit in the Superior Court in New Castle County, Delaware on behalf of June and Arthur Montgomery against 22 defendants, alleging that June's malignant mesothelioma was caused by exposure to asbestos from the products and/or conduct of the named defendants, the case was assigned to me in my capacity as the asbestos docket judge.

Delaware has already remedied the problem that this legislation seeks to address. Asbestos related suits in Delaware are governed by Standing Order No. 1, which sets forth mandatory disclosure obligations related to bankruptcy trust claims. Despite this

Order and specific interrogatories directed to plaintiffs requesting this information, from the outset of this case and up until the weekend before trial, nowhere did plaintiffs identify exposure through any of the twenty entities to whom bankruptcy claims were submitted. Instead, in their responses to interrogatories propounded by defendants, Plaintiffs claimed that Mrs Montgomery was exposed to asbestos solely through laundering of her husband's work clothing throughout his career, as opposed to any work she performed herself with or around products outside of the home. Specifically, Plaintiffs asserted that Mr. Montgomery brought home asbestos-containing dust on his clothing from his work as an electrician at the Everglades Power Plant. In response to an interrogatory asking Plaintiffs to identify all entities who were not defendants, but with whose asbestos-containing products June came into contact, Plaintiffs identified no additional entities.

Mrs. Montgomery died on April 3, 2010 and her son Brian, as Personal Representative of the Estate, was substituted as Plaintiff by Amended Complaint filed on October 21, 2010. The allegations of exposure to asbestos remained largely unchanged from the original complaint.

Arthur Montgomery was deposed on June 8, 2011. Although he had spent his entire career working as an electrician, with and around a wide variety of products and materials, at multiple locations throughout Florida, the impression garnered from the

Complaint, answers to written discovery, and Mr. Montgomery's sworn testimony was that the bulk of his work around asbestos occurred only during a short period at the Everglades Power Plant.

During discovery, Plaintiffs specifically denied submitting claims to Owens-Corning, United States Gypsum, Armstrong World Industries, Babcock & Wilcox, Plibrico, and ASARCO even though their state-of-the-art expert, Barry Castleman, addresses the conduct of many of these companies in his book, "Asbestos Medical and Legal Aspects" Fifth Ed. (2004). Nor did Plaintiffs' proffered causation expert, Dr. Jacques Legier, during his videotaped deposition, address exposures to many of the products manufactured by the entities that established the bankruptcy trusts, and from whom Plaintiffs made claims.

The parties had agreed that Florida law was applicable to the case. It permits jurors to allocate fault to parties not present at trial, including bankrupt entities. Because Foster Wheeler was aware of other cases where lawyers representing asbestos claimants had submitted conflicting work histories to multiple trusts, it filed a motion in advance of trial requesting that the Court order disclosure of all pretrial settlements, including monies received from bankruptcy trusts. Counsel for Plaintiff emphatically reported to me at the pretrial conference that no bankruptcy submissions had been made and no monies had been received.

On Saturday, November 5, 2011, two days before a two-week trial in this case was scheduled to begin, Plaintiff's counsel advised that his client had received two bankruptcy settlements of which he was previously unaware. This disclosure was directly inconsistent with his unequivocal representations to the Court and to opposing counsel at the pretrial conference. By late afternoon the following day - the day before trial was to commence- counsel for Foster Wheeler learned that a total of **twenty** bankruptcy trust claims had been submitted. Although Foster Wheeler 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 became obvious that one or more of Plaintiff's attorneys had been claiming exposure through Mrs. Montgomery's own employment. That is, she worked with and around these products herself. In essence, the representations to the bankruptcy trusts painted a much broader picture of exposure to asbestos than either Plaintiff or any of Plaintiff's attorneys had acknowledged during the entire course of the litigation in Delaware. Plaintiff's failure to disclose and produce the trust claims precluded Foster Wheeler from investigating Mrs. Montgomery's exposure to asbestos from those additional entities, or identifying additional exposures from products that were not developed in the Delaware litigation - which was severely prejudicial to Foster Wheeler.

On the first day of the scheduled trial, November 7, 2011, in preparation for which

the Court had devoted a huge amount of time and resources, with a jury already selected and waiting to serve, the Court learned of Plaintiff's failure to disclose the trust submissions. This circumstance dramatically affected the entire litigation, including the lengthy discovery process and trial preparation, which had been conducted without knowledge of the true facts, not to mention the waste of the Court's time and limited resources. Since I was understandably upset, I called counsel to a chambers conference room, because the withholding of critical information went to the very heart of the defense:

> This isn't something I could possibly fix after the trial is over. This deals with the verdict sheet. It deals with the way they present their defense. It deals with what information they have. It deals with how they cross-examine the witnesses. They have not been able to do any cross-examination or any discovery on the other aspects of disclosure that are listed in this letter because they were not made aware that there were these claims that were made. I just think that it's in such bad faith that I don't know that I can possibly remedy it any other way.

By the time of trial Foster Wheeler was the sole remaining defendant in the case, as all remaining 22 defendants had either settled or been dismissed. Plaintiff had litigated the case as though Foster Wheeler had predominant responsibility for Mrs. Montgomery's asbestos exposure. Literally on the eve of trial, however, twenty new entities surfaced that had neither been named nor disclosed. Had these claims been

timely disclosed by Plaintiff, Foster Wheeler would have taken steps towards developing discovery and defenses to explore these exposures at the depositions of Arthur Montgomery and of Plaintiff's experts. Foster Wheeler would have also retained its own experts to address these exposures but it was never given that opportunity.

In my opinion, the bankruptcy filings go to the core of what this litigation is about. The very crux of the Montgomery case, as in virtually all asbestos litigation, was a determination of responsibility for Mrs. Montgomery's exposure. I noted this emphatically at the conference where I determined that the trial could not go forward, noting that, in asbestos litigation:

> The most important thing is that a Plaintiff disclose what they think caused their disease. And if they don't disclose honestly when they're asking for money from another company and don't even let the defendant know about that, that's so dishonest. It is just so dishonest.

Where twenty manufacturers of asbestos and asbestos-containing products are removed from the equation, a true allocation of fault cannot occur. More importantly, the fact that Plaintiff denied exposures in this case, and yet submitted claims for exposures and accepted money for those claims, went directly to the issue of credibility.

In the final analysis, there can be no real justice or fairness if the law imposes any obstacles to ascertaining and determining the complete truth. From my perspective as a judge, it is not simply the sheer waste of resources that occurs when one conducts

discovery or trials without knowledge of all the facts, although that circumstance is indeed unfortunate and one that courts can ill afford in this day and age. What is most significant is the fact that the very foundation and integrity of the judicial process is compromised by the withholding of information that is critical to the ultimate goal of all litigation — a search for, and discovery of, the truth.