2017 Asbestos Update

# Deposition Strategies for Developing Alternative Exposures

By Sarah Beth Jones, Mary Margaret Gay, Anna Beth Baker, and Joanna Kuhn

**The value of the resources now available to defense counsel to use during plaintiffs' depositions to develop alternative exposure testimony cannot be overstated.**

As it enters its fifth decade, asbestos litigation continues to evolve. The defendants who were targets at the inception of asbestos litigation are no longer involved, and new defendants are identified almost daily. Due to the continuing evolution of liability and causation theories, defendants and their counsel must identify new ways through innovation, legislation, and technology to explore the alternative exposures of a plaintiff. With fewer cases tried to verdict every year, the case value in asbestos litigation is nearly always set by the testimony obtained during a plaintiff's deposition. The failure to develop all possible exposures during a deposition can result in a higher case value and may leave a defendant with little or no leverage to negotiate a dismissal or a favorable settlement.

Many defendants have struggled with asbestos liabilities. More than 100 companies have sought bankruptcy protection, and the target defendants in the litigation have shifted to solvent companies distantly related to asbestos products. This shift of focus to solvent targets has also resulted in a change in the plaintiffs' deposition testimony. A broad review of asbestos litigation has revealed that the plaintiffs' exposures have not actually changed, but recollection of those responsible for them has changed drastically. *See generally* Marc C. Scarcella *et al.*, *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, Mealey's Asbestos Bankr. Rep., Oct. 2012,




■ Sarah Beth Jones, Mary Margaret Gay, Anna Beth Baker, and Joanna Kuhn are attorneys at Maron Marvel Bradley Anderson & Tardy LLC, where they focus their practice on asbestos litigation defense. As leaders of the firm's Trust Transparency and Strategic Counsel Practice Group, they work with defendants, their counsel, and insurers nationwide to maximize the development of alternative exposures and asbestos trust claims in litigation. They have substantial experience coordinating asbestos litigation joint-defense projects and developing innovative defense strategies. They also serve as local counsel for asbestos defendants in the Southeast.

at 1. In non-asbestos litigation, defendants question plaintiffs about their background, work history, and medical issues and may only need to question plaintiffs about products that they have identified during the course of their testimony. Defendants in non-asbestos litigation would gain no value in their case—especially monetary—by developing testimony of other exposures for the same injury. The same cannot be said for asbestos litigation. Because the majority of companies originally considered primarily responsible for plaintiffs' exposures are now bankrupt, defendants face a situation unique to asbestos litigation: a plaintiff can recover from solvent defendants in the tort case, while at the same time, and often unbeknownst to the tort defendants, the plaintiff also can receive compensation for the same injuries from other now-bankrupt companies. Those bankrupt companies accounted for the bulk of the asbestos market. In fact, one bankrupt company alone manufactured more than 50 percent of the asbestos-containing insulation sold worldwide. *See Matter of Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). Consequently, defendants are left with an exposure analysis that does not include those most responsible for the asbestos-related injury, resulting in a misleading snapshot or distorted picture of a plaintiff's exposures, and a skewed value of the case as it progresses.

For years, information about trust compensation and the alternative exposures related to bankrupt companies' products was limited by restrictions placed on the disclosure of information from bankruptcy trusts. However, over just the past three years, those limitations have begun to lift, after the landmark order in the recent *Garlock* bankruptcy, which illustrated the need for trust transparency, and the subsequent recognition of the value of the information by courts and legislatures. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014). As a result of this sea change in the litigation, and due to the advanced technology and the resources now available, defendants are beginning to use the necessary tools to investigate and develop alternative exposures during litigation. Defense counsel are now charged with finding the information and altering their discovery preparation to develop alternative exposure testimony.

## *Garlock*: A Distorted Picture of Exposure Unveiled

In his 2014 *Garlock* opinion, U.S. Bankruptcy Court Judge George Hodges received nationwide attention by exposing several asbestos plaintiffs' law firms' efforts to "game" the asbestos-recovery system through widespread "suppression of evidence." *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 86–87 (W.D.N.C. Bankr. 2014). The decision stated, "[W]hile it is not suppression of evidence for a plaintiff to be unable to identify exposures, it is suppression of evidence for a plaintiff to be unable to identify exposure in the tort case, but then later (and in some cases previously) to be able to identify it in Trust claims." *Id.* at 86. The court, in what it labeled "a startling pattern of misrepresentation," found that the plaintiffs' attorneys withheld key exposure information in *each and every* case that the court reviewed. *Id.* As a result of this lack of transparency, the court deemed Garlock's historical settlement values unfairly inflated and therefore unreliable as a basis for estimating Garlock's liability for present and future mesothelioma claims. Thus, *Garlock* revealed the reality that asbestos trust claims abuses are not merely isolated events, as contended by plaintiffs' counsel, and the liability attributed to solvent defendants often does not reflect a plaintiff's actual exposures. This revelation confirmed what asbestos defendants had long suspected and helped undergird a defense-wide demand for greater transparency between the asbestos bankruptcy trust and civil tort systems.

Before the investigations ordered by Judge Hodges, during Garlock's estimation trial, the defendants suspected that plaintiff attorneys were consistently, strategically, and inequitably taking advantage of the two separate systems of compensation for asbestos injuries, but the defendants could not prove it, due to a lack of transparency between the civil tort and bankruptcy trust systems. Information regarding bankruptcy trust claims was often withheld, and plaintiff attorneys seemingly instructed plaintiffs to refrain from identifying any bankrupt companies. After the plaintiffs would refrain from mentioning bankrupt products, and sometimes emphatically deny exposure to bankrupt products in a tort lawsuit against solvent defendants, the plaintiffs would subsequently file claims with the bankruptcy trusts, alleging exposures to the very same products that they denied having been exposed to in the tort lawsuits. This strategy often resulted in thousands upon thousands of dollars in additional compensation for the same injury and a skewed valuation of the lawsuit against solvent defendants. The ongoing manipulation and concealment of exposure evidence allowed plaintiff attorneys to reap the benefits of the tort system by suing solvent defendants, while also filing claims with bankruptcy trusts for additional compensation for the same asbestos-related injury.

***Garlock* revealed** the reality that asbestos trust claims abuses are not merely isolated events, as contended by plaintiffs' counsel, and the liability attributed to solvent defendants often does not reflect a plaintiff's actual exposures

*Garlock* revealed that the picture of a plaintiff's exposures developed in litigation is often distorted due to the lack of transparency between the bankruptcy trust and tort systems. *Garlock* became the bedrock for increasing trust transparency and was the catalyst for many of the recent changes. Judges and legislatures around the country have given great weight to the *Garlock* order and testimony and have begun allowing trust discovery in cases. As more trust information is being produced in asbestos cases, plaintiffs' alternative exposures are being brought to light, allowing the

courts and the parties in the litigation, including solvent defendants, to more accurately value and resolve cases.

### Modern Technology: Tools for Investigating and Developing Alternative Exposures

Asbestos litigation is a mature mass tort, the nature of which often results in repetitive litigation with a pattern or strategy that is used over and over through the years. Some of these patterns save time and money for plaintiffs, the courts, and defendants. However, as with anything repetitive, things become second nature and often outlive their value. The same holds true for asbestos litigation, specifically for defendants and their counsel, some of whom have defended asbestos cases their entire careers. Innovation is often lost, and the "this is how we have always done it" mentality becomes a badge of honor. In the age of technology, this mindset may result in missing opportunities to find new and improved ways to defend new defendants in the litigation. With plaintiffs' focus continuing to shift to solvent defendants, those defendants' focus must shift to developing new defenses and new technology.

**Many firms offer** joint ventures with other defense firms to share in technological advances, which assist defendants and their counsel to access information more easily.

Fifteen years ago, during depositions, lawyers' resources were limited to what they could carry in their briefcases: a hard-copy deposition outline or checklist and possibly an exhibit here and there, with the exception, of course, of the banker boxes of documents that they occasionally brought in. Unfortunately, today, you sometimes still see defense attorneys using the very same outlines that they carried with them years ago. On the other hand, some lawyers have their laptops and tablets with them, and literally a world (or rather worldwide web) of information available at their fingertips. With the tap of a finger, lawyers can do a quick Google search for information or log into their firm's library of information for needed data or case information. Lawyers are no longer limited by what they can physically carry into a conference room with them. A wealth of resources is now available at the mere tap of a finger.

Staying abreast of the available information can give you access to information literally capable of changing a case. However, the many resources available for asbestos litigants are so immense that without the expanded technology being created today, resources are nearly impossible to harness. Developing ways to index and to organize the data into searchable formats is necessary for it to be useful. It is not necessary, though, for every law firm to develop its own technology, which can be a costly endeavor and also create inconsistency in the litigation if done incorrectly. Defendants must find ways to create and to share these resources jointly. Many firms offer joint ventures with other defense firms to share in technological advances, which assist defendants and their counsel to access information more easily.

### Resources Worth Tapping Into

Historically, defendants could not easily access information about bankrupt companies, their products, and their claims information. The information made available or produced in litigation was incredibly voluminous and impracticable to use. The information produced often included bankrupt companies' trade names or product brand names—the very thing that a plaintiff may recall being exposed to during his or her lifetime. However, without an extensive, costly investigation, information about bankrupt company trade names or product brand names was simply unknown to most defendants. But today this is no longer the case. In the past two years alone, law firms and third-party processors have worked with defendants to create real-time, functional access to a wealth of bankrupt product information. The biggest source of information recently tapped is the information available on asbestos bankruptcy trust websites and the dockets. This information can be used to develop alternative exposures more accurately and to identify a plaintiff's potential bankruptcy trust claims further.

Another source of information is the trust claims themselves. Following the *Garlock* decision, a Crane Co. study utilizing the publicly available *Garlock* discovery data revealed that in cases where Crane Co. was a codefendant with Garlock, plaintiffs filed an average of 18 trust claims with asbestos bankruptcy trusts. Peggy L. Ableman *et al.*, *A Look Behind The Curtain: Public Release Of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.,* Mealey's Asbestos Bankr. Rep. November 2015, at 1. These trust claims provide information about compensation that a plaintiff may receive or has received for asbestos-related injuries. And it isn't small change: it is big dollars, which may dramatically alter the tort case value. Recent numbers provided in one report suggest that asbestos plaintiffs are able to apply for recovery from billions in trust funds. *See* Scarcella *et al.*, *supra,* at 1. In addition, "[a]s asbestos trust assets have grown over time, so have payments to asbestos claimants. Between 2006 and 2011, the trust system distributed over $14 billion in claim payments." *See* Ableman, *et al.*, *supra*, at 3. According to one estimate, an additional $15 billion in funding is possible from pending trusts. *Id.* Those numbers will only continue to grow as additional companies are forced into bankruptcy.

With the proper tools to quantify information, a trust's website grants you access to site lists; product information; trust distribution procedures, with a schedule of disease values; payment percentages; claim forms; and claim-filing instructions. Many trust websites publish approved site lists, and some even publish product lists. This information allows defendants to determine what compensation a plaintiff is entitled to from a trust, based on his or her work history or product exposure. Compiling this publicly available information in an easily accessible platform allows defendants and their counsel access to specific product and claim information to develop testimony regarding exposure to bankrupt products and potential trust claims and to estimate the money that a plaintiff may be entitled to receive from a trust. Again, this is all information that can substan-

tially change the way that you defend and value a case.

Bankrupt product information has always been available to defendants through public sources. Many in the litigation recall the "picture book," which was used by the Owens-Corning Fiberglass Company in its defense of asbestos claims. The "OCF picture book," as it was known to those in the litigation, allowed defense counsel for the company to "refresh" a plaintiff's memory with pictures of products manufactured by other (some still solvent) companies. Owens-Corning attempted various defense strategies, and ultimately the company hoped that developing those alternative exposures through a "picture book" would positively affect its defense spending in cases and reduce its share of the liability. Debtors' Pretrial Submission at 13, *Owens Corning, et al., v. Credit Suisse First Boston, et al.* No. 04-905(JPF) (D. Del. Jan. 10, 2005). This "refresh and identify" strategy is now being used for bankrupt products. Pictures of product packaging, pictures of the products themselves, and pictures of various brand names and labels are now being compiled and used again in the litigation.

Pictures of bankrupt products come from a number of sources. As part of the Asbestos Information Act of 1988, the Federal Register published a list of certain manufacturers and their asbestos products. *See* 55 Fed. Reg. 5144 (Feb. 13, 1990). This voluminous information regarding asbestos products includes specific product trade names of many now-bankrupt manufacturers and includes some pictures. The Federal Register information has been captured recently in an accessible digital platform available to defendants for real-time searching. Some defendants have even resurrected the OCF picture book, which is also now digitally available for searching. While a quick Google search of a product will return product photographs, defense counsel must proceed cautiously. If the picture is not credible, using the picture during questioning could result in implicating viable defendants. When using product pictures during a deposition, the defense attorney should be certain that the source is credible and the pictures are, in fact, of bankrupt companies' products. There are even subscription services available that have scoured the internet for asbestos-product pictures; again, these are mostly unverified.

Experience has shown that when witnesses and plaintiffs are questioned about specific trade names or product names, they will likely recognize the specific names and discuss the products, providing defendants with sworn testimony of possible alternative exposures for use in their valuation and defense of a case. Plaintiffs' attorneys routinely refresh a plaintiff's memory about a product before a deposition—typically, only the solvent defendants' products. Providing names and pictures during depositions is a way for defendants to refresh a plaintiff's memory about all potential alternative exposures.

## All Exposures Matter

Every exposure in a case matters. Throughout the years, asbestos defense counsel have solely focused on the exposures and time periods specifically related to their defendants. Before the *Garlock* opinion and recent legislative efforts, developing other exposures, especially to products of bankrupt manufacturers, made little difference in the value of a case, due to the unavailability of trust claims information. Today, in a post-*Garlock* world, trust claims information is obtainable, and alternative exposures often have a tangible effect on the value of your case. Accordingly, defense counsel now have the obligation to uncover information regarding *all* of a plaintiff's exposures. As seen time and time again, many of these questions are skipped when the allegations are focused on a single or sub-set of locations or products to which a plaintiff alleges exposure. Defense counsel seeking a complete exposure picture must not limit themselves to a plaintiff's allegations regarding where, when, and how asbestos exposure occurred.

### Location, Location, Location

Everywhere that a plaintiff has lived and worked matters. For many of the bankruptcy trusts, simply being present at a worksite or a location can qualify a plaintiff for trust compensation. The required proof of exposure is as simple as demonstrating a plaintiff's presence at one of thousands of "approved sites." *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation,* 88 Tul. L. Rev. 1071, 1098 (2014). Defendants must uncover detailed information in depositions about all of a plaintiff's exposures and work history, as well as any locations where the plaintiff may have been. Establishing a plaintiff's whereabouts throughout his or her lifetime is crucial, including locations where the plaintiff went to school, where the plaintiff attended college or vocational training, where the plaintiff was stationed during any time in the military, where the plaintiff has worked, regardless of whether the plaintiff is alleging asbestos exposure at that site in his or her lawsuit, and the time periods at each location. Obtaining this information and analyzing it against a trust's approved site lists can reveal that thousands upon thousands of dollars are available to the plaintiff, which otherwise would be lost if you had not explored all possible alternative exposure sites in addition to the alleged exposure sites.

For example, a plaintiff may have served in the United States Navy for a period of time, but disregards this exposure in his or her tort case. The plaintiff may only allege exposure from the 30 years that he or she was employed at an industrial site. The industrial site where he or she worked may entitle him or her to bankruptcy trust compensation; however, strict reliance on the single site of the plaintiff's allegations would omit the trust compensation available to the plaintiff for all of the naval stations where he or she was stationed and the multiple ships that he or she served aboard during his or her time in the Navy. Such an investigatory failure could skew the value of the case by hundreds of thousands of dollars, and it also would affect the information made available to defense experts such as industrial hygienists. Accordingly, every exposure location has the potential to affect a case in countless different ways. This worksite information may be developed from a number of often-produced resources, such as Social Security earnings records, military records, union records, employment records, medical records, and archived depositions from previous cases. In preparation of a plaintiff's deposition, these resources should be combed through for information that can be used to elicit testimony regarding all possible locations where the plaintiff may have lived, worked, or served. The more details about a plaintiff's possible exposures that defense counsel can elicit, the more effectively de-

fendants will be able to defend and value the case.

### Additional Exposures

Thoroughly developing all exposures may prove indispensable to building your defense of a case. Exposures outside of a plaintiff's "work," such as personal automotive work or home-remodeling work, as well as secondary or "take-home" exposures through contact with family members, should be investigated. Several bankruptcy trusts allow a plaintiff to file a claim for non-occupational exposure, such as automotive repair. These trusts only allow claims for work with or around particular manufacturers' vehicles or automotive components. Consequently, it is imperative for defense counsel to develop this testimony by questioning a plaintiff about specific makes and models of vehicles to which the plaintiff was exposed, what type of work the plaintiff performed, the locations where the work was performed, the identity of the manufacturer of the products removed and installed, and how often the work was performed, just to begin. A plaintiff may be entitled to payments from certain trusts, regardless of whether this work was performed professionally or only from time to time on his or her personal automobiles. However, payment is contingent on certain details, such as automobile models and brand names of any brakes, clutches, or gaskets encountered during any repair work; therefore, eliciting this detailed information is key.

Another sometimes discounted source of exposure may be home remodeling. A plaintiff may have remodeled his or her home and bought and used asbestos-containing products of bankrupt manufacturers. Plaintiffs should be questioned about all home remodeling, which materials and products were used, the frequency of their use, the clean-up process, and whether they were living in the home during the remodeling. A plaintiff's exposure to the asbestos-containing products of bankrupt manufacturers through home remodeling projects may result in identifying alternative exposures for causation defenses and thousands of additional dollars in trust claims by which settlement or verdict figures may be offset.

Additionally, secondary exposure cases are a growing concern because case filings related to a plaintiff's secondary exposure are expected to increase dramatically in the next decade. This secondary exposure to asbestos, via another member of a plaintiff's household, may be a wife exposed through laundering her husband's dusty work clothes, or children living with a parent who brought home asbestos from their daily work. Even a plaintiff directly exposed through his or her own work may have also been secondarily exposed earlier in his or her life through contact with a brother or father who worked in an industrial setting or repaired the family vehicles. Defense counsel should question plaintiffs regarding any potential exposures through contact with other members of their households to ensure the development of a comprehensive assessment of the plaintiffs' exposures, which will affect defendants' liability for the alleged injuries, as well as bankruptcy trust claims that can provide offsets or favorably affect fault allocation.

## Conclusion

The value of the resources now available to defense counsel to use during plaintiffs' depositions cannot be overstated because a deposition is often the last chance to obtain the information needed to value a case. Verified resources containing bankrupt product trade names, brand names, product pictures, labels, and site information should be used to examine a plaintiff thoroughly and to develop all possible alternative exposures. Developing alternative exposures is critical to bankruptcy trust claim investigations and industrial hygienist exposure analyses, and they provide considerable leverage during the settlement stage and potential verdict offsets. As asbestos litigation continues to evolve, and technology advances, defendants should not be left behind, clinging to the familiar, comfortable "way it has always been done." The information at our fingertips will only become greater and more easily accessible, and ultimately, it will become vital to defending an asbestos lawsuit properly. FD