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Commentary

Asbestos Litigation And Trust Transparency: An Update

By
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[Editor's note: Ms. Davis is a senior partner in the Atlanta office of Hawkins Parnell & Young, LLP where her practice focuses on asbestos litigation defense. Research support for this Article was provided by the Coalition for Litigation Justice, Inc. Any commentary or opinions do not reflect the opinions of Hawkins Parnell & Young LLP or LexisNexis®, Mealey Publications™. Copyright © 2020 by Evelyn Fletcher Davis. Responses are welcome.]

Asbestos liabilities drove three more companies to file bankruptcy petitions early in 2020: DBMP LLC, successor to the asbestos personal injury tort liabilities of the former CertainTeed, a manufacturer of cement and asphalt roofing products;[1] ON Marine Services Co. LLC,[2] successor of a company that manufactured a specialized insulation product used in steel mills; and Paddock Enterprises, LLC, successor of an entity that manufactured Kaylo insulation products from 1948 to 1958.[3] The new petitions add additional chapters to the already lengthy story that continues to be the asbestos litigation machine.[4] To date, there have been some 120 asbestos-related bankruptcies.[5]

Claimants today typically file claims with numerous trusts created during bankruptcy proceedings to pay for harms caused by the former asbestos producers' products.[6] Billions of dollars are available in the asbestos trust system to pay claimants.[7] The same claimants also typically file lawsuits against scores of solvent companies which in reality bear little to no responsibility for causing their injuries.[8]

As this article will explain, because of the way the bankruptcy trusts are set up and operated — primarily by attorneys who represent asbestos plaintiffs[9] — those same attorneys have been able to litigate cases against new or formerly peripheral asbestos defendants without accounting for the trust entities' responsibility for causing their clients' injuries or the amounts their clients recover from the trusts. This has resulted in duplicative recoveries for plaintiffs — and their attorneys — and forces the current generation of asbestos defendants to bear costs far out of proportion to their minimal or nonexistent share of responsibility.[10] While some jurisdictions have taken action to address those abuses of the tort system, they persist in most states, draining the resources of defendants and forcing some companies to file bankruptcy.[11]

This article will summarize the evolution of the asbestos trust system. It will then discuss how the trust system is being manipulated by plaintiffs' attorneys to disadvantage current asbestos defendants. In particular, plaintiff attorneys intentionally delay the filing of their clients' trust claims during the pendency of asbestos tort litigation to suppress information that defendants could use to apportion responsibility to bankrupt entities and to deny defendants the opportunity to obtain judgment setoffs for recoveries already obtained by plaintiffs from trusts. The article summarizes some of the well-documented instances of incomplete or inconsistent claiming activity by plaintiffs. The article shows how critical it is for solvent defendants to obtain information about the totality of a plaintiff's exposures as early as possible in a case. This information is essential for defendants to effectively depose plaintiffs, make informed decisions about settlement, and provide fact finders with complete information as to a plaintiff's history of exposure to asbestos when a case goes to trial. Next, the article discusses reforms that are being implemented to stem

trust claim abuses and fix the disconnect that exists in most states between the asbestos trust and tort systems. The article concludes with recommendations for defense counsel to help ensure that their clients are not paying for harms caused by others.

I. How the Bankruptcy Trust System Evolved

Back in the 1980s, asbestos manufacturing giant Johns-Manville Corporation entered bankruptcy and pioneered what was then a "radical new use of bankruptcy law"[12] - the creation of a trust that would resolve the company's liabilities to the thousands of people who developed asbestos-related diseases caused by Manville products, enabling a post-bankruptcy Manville to go about its business unencumbered. In 1994, Congress amended Section 524 of the Bankruptcy Code to add a new subsection that offered the Manville solution to other companies similarly burdened with asbestos liabilities.[13] By 2002, virtually every major producer of asbestos products had availed itself of that opportunity.[14] The trust system "answer[s] for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades."[15]

Meanwhile, asbestos personal injury litigation costs industry and insurers billions of dollars annually and shows no sign of slowing.[16] As a commentator explains:

> Asbestos personal injury lawsuits continue to be filed by the thousands against still solvent companies. The targets in the litigation today are often newer defendants or those remote from asbestos production, such as makers of pumps, valves, gaskets and automotive friction (brake) products. These products were associated with a type of fiber (chrysotile) that is far less potent than the highly toxic amphibole asbestos-containing thermal insulation sold by the major asbestos producers — and arguably not potent at all, except in very large doses not present in most occupations.[17]

Indeed, as one court said in a case against a gasket and packing manufacturer, the assertion that the plaintiff's exposure to asbestos from those products was a substantial cause of his mesothelioma was "akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume."[18]

The spread of asbestos litigation to such remote defendants is evident in the sheer number of companies being sued to "fill the gap in the ranks of defendants" created by the bankrupt defendants' exit from the tort system.[19] "In 2019, more than 10,000 individual entities were named as defendants in asbestos litigation."[20] In short, asbestos litigation in the era of the bankruptcy trusts is an "endless search for a solvent bystander."[21]

While the trust mechanism established by Bankruptcy Code § 524(g), on its face, may appear to envision an objectively neutral process of compensating injured claimants, the implementation of the statute has been anything but neutral.[22] A landmark study of asbestos bankruptcy trusts by RAND showed that a disproportionate number of key trust personnel positions were filled by plaintiff attorneys.[23] A more recent analysis revealed that the top five asbestos plaintiff firms had "significantly increased" their membership on Trust Advisory Committees ("TAC") since the RAND study.[24] As one commentator explains:

> The dynamics of the bankruptcy process tend to lead to trust agreements and TDPs [Trust Distribution Procedures] that are largely written by counsel for the asbestos claimants themselves. After the competing creditor constituencies reach agreement with the asbestos creditors on the broad terms of the division of the assets of a bankrupt company's financial estate, there is little incentive for them to become involved in deciding how asbestos claimants choose to divide their own piece of the economic pie. * * *
>
> The asbestos claimants and their contingency-fee attorneys have a strong incentive to design "user-friendly" TDPs that easily dispense funds in order to permit claimants to withdraw as much money as possible from the trusts as quickly as possible. Moreover, the selection of the trustees and members of the trust advisory committees (TACs) that oversee the operation of the trusts is heavily influenced, if not controlled outright, by counsel for the asbestos claimants.[25]

II. The Tort System Has Become Dysfunctional in Asbestos Litigation

Different states have different mechanisms for apportioning liability when more than one party is responsible for causing injury.[26] In a few states, liability is joint and several, which means that plaintiffs can collect their full damages from any responsible party, who can then seek contribution from other responsible parties.[27] In other states liability is several, meaning that a defendant can only be held liable for that portion of the damages for which it is responsible.[28] Other states apply joint and several liability in some situations and not others, such as for economic damages but not noneconomic damages,[29] or if the defendant's level of fault is above a certain threshold (e.g., above 50% at fault.).[30] Some states apply a combination of both approaches.[31] Other variations exist.

Juries apportion percentage shares of responsibility based on the evidence at trial. Some jurisdictions permit juries to apportion responsibility to parties not present at trial, including bankrupt entities; others do not.

State laws also vary with respect to how partial settlements are accounted for in assessing liability against nonsettling defendants. In some states, the defendant receives a credit for the amount of the settlement (*i.e.*, a pro tanto reduction), but the more common approach is to reduce the damages awarded against the nonsettling defendant by the settling defendant's share of the fault (*i.e.*, a pro rata reduction). Pro rata jurisdictions further vary as to whether the apportionment is by equal shares or by proportion of fault. In the latter context, the jury is tasked with assessing the comparative fault of the responsible parties.

In order for any apportionment method to work fairly, a defendant needs to be able to develop a complete factual record of causation and responsibility. In an asbestos case, that means identifying all the sources of the plaintiff's exposures to asbestos and their severity. The companies that were frequently named as asbestos defendants, but which have now filed for bankruptcy and are no longer in the tort system, should be allocated a large share of responsibility for most alleged harms.[32] Consequently, it is imperative for a solvent asbestos defendant to be able to require the plaintiff to provide accurate and complete information about all the bankruptcy trust claims the plaintiff has filed or is eligible to file.[33]

In a world where accurate and complete disclosures are made, bankruptcy trust claim information could be used to facilitate the resolution of tort claims in a timely and cost efficient manner. That is because, in order to recover from a bankruptcy trust, claimants must submit claims signed under penalty of perjury that include evidence of their exposure to the trust entity's asbestos containing products.[34] Thus, a defendant having access to all the trust claim information of the plaintiff suing it has what it needs to either settle the case for its reasonable value or present a fair and fact-based case for allocation of fault to a jury.

Asbestos litigation, for the most part, has been the opposite of such a world. Plaintiffs and their attorneys have acted in the ways described below to conceal their exposures to the products of the trust entities from defendants in the tort system, and thereby to foster a system rife with unfair allocations of responsibility, double recoveries and excessive costs.[35]

A. Lack of transparency: From Concealment to Misrepresentation

One unintended and particularly pernicious impact of the creation of bankruptcy trusts is to cloak those claims in secrecy. Trust distribution procedures ("TDPs") typically provide that claimants' trust claim submissions are confidential settlement communications that cannot be disclosed except pursuant to a subpoena issued by the bankruptcy court presiding over the case.[36] Thereafter, when solvent defendants in asbestos cases seek discovery of the submissions, they are met with objections under rules of evidence that typically prohibit communications and other information relating to compromise offers and negotiations from being admitted to "prove or disprove the validity or amount of a disputed claim[.]"[37]

A former Delaware Superior Court Judge explains the fallacy of such objections:

> The trust claims, and the payments resulting therefrom, are not the same as settlements with co-defendants and should not be treated as such. In a traditional tort suit the settlement privilege exists to prevent statements made in connection with negotiations from being used at trial, in order to promote free and frank discussions without the prospect that such admissions

> can be used against a party at trial. But that privilege is neither necessary nor appropriate where the amounts of most trust payments are fixed by schedule and where the claim forms more closely resemble a complaint than a bargained-for agreement. In this context, disclosure of claim forms cannot interfere with open discussions any more than filing a complaint can affect settlement in a tort case. A standard application made online by a plaintiff to a bankruptcy trust bears no resemblance to the negotiation process that results in an agreement. A plaintiff simply files and shortly thereafter receives cash.[38]

But even where disclosure is mandated, plaintiffs and their lawyers have acted to obstruct it. For example, the same former Delaware judge recounts a case where counsel for a mesothelioma plaintiff, despite the existence of a standing order that established mandatory disclosure requirements for asbestos trust claims, represented to the defendants and to the court until the eve of trial that no bankruptcy trust claims had been filed, when in fact the plaintiff's family was also represented by a law firm in a different state that had filed a total of twenty such claims with various trusts, some of which had already been paid. The trust claims painted a very different picture of the asbestos exposures that constituted the likely causes of the plaintiff's illness than that which the defendants had prepared to defend at trial, and which had prompted other defendants to settle.[39]

The Delaware example is typical. Many other cases have come to light wherein asbestos plaintiffs and their attorneys concealed or misrepresented trust claims or exposures to the products of trust entities.[40]

B. "Strategic" Timing of Filing Claims

Another common feature of asbestos trusts is to permit claimants to delay filing trust claims until several years after asbestos related disease has been diagnosed, because "most asbestos trusts have a three year statute of limitations from diagnosis to trust claim filing that allows a window for tort recovery prior to trust claim filing."[41] Thus, claimants and their attorneys are empowered to file suit against solvent defendants to obtain such recoveries; and, when asked in discovery in those lawsuits to disclose trust claims, to respond that there are none to disclose. Alternatively, claimants may file and then defer trust claims, during which time the statute of limitations is tolled. Either way, after obtaining recovery by judgment or settlement against solvent defendants, claimants can proceed to recover on claims with trusts — often multiple trusts. This conduct occurs regularly and is well-documented, including by studies in Philadelphia and Newport News, Virginia.[42]

C. Changing Filing Patterns Caused By Asbestos Bankruptcies

The Philadelphia study referenced above and another conducted by RAND in 2015 demonstrate that, after an asbestos manufacturer files bankruptcy, the number of lawsuits wherein its products are identified by plaintiffs as sources of their asbestos exposures declines markedly from what the number was before the bankruptcy.[43] The 2015 RAND study also found that, "the longer the time between a firm's bankruptcy and the date a tort case is filed, the lower the likelihood that the bankrupt firm's products will be identified in the tort case."[44] The study examined product identification in both interrogatory responses — which are typically prepared by attorneys or paralegals — and deposition testimony of plaintiffs, their family members, or their coworkers.[45]

As the Philadelphia study notes, the explanation for the foregoing findings is inherent in the "dual compensation system" that asbestos bankruptcy trusts have created. "It is no longer in a plaintiff attorney's economic interest to build or concentrate a case against [the trust entities] in the tort system. Rather, it is in the plaintiff attorney's economic interest to build a case in state court against the peripheral and new defendants and subsequently seek asbestos trust claim payments once they have reached settlement with a number of tort defendants."[46]

Moreover, there is evidence that plaintiff attorneys build their cases against solvent defendants in part by deflecting attention away from the products of bankrupt entities:

> To assist claimants to recall the asbestos-containing products they were exposed to twenty to forty years earlier, paralegals at law firms show claimants binders containing pictures of certain asbestos-containing products and ask them to

> identify the products with which they came in contact. There is evidence that one of the leading asbestos law firms went beyond mere memory enhancement and used the "picture book" and other techniques to "implant false memories" in clients; these witness preparation techniques were also used to steer clients away from identifying products of manufacturers such as Johns-Manville which had entered bankruptcy and were paying only a fraction of the value of claims.[47]

Indeed, the court in *In re Garlock Sealing Technologies, LLC*,[48] discussed below, found that "[o]ne 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."[49]

Thus, concealing evidence regarding the bankrupt entities goes hand in hand with other tactics used to prevent defendants — and consequently, factfinders — from learning the truth about high dose asbestos exposures those plaintiffs received from the products of trust entities.[50]

III. The Garlock Bankruptcy: A Game Changer

A Cleveland judge was the first to receive national attention for uncovering the abusive practices described above. In 2007, the judge barred a prominent California asbestos plaintiffs' firm from his court after he found that the firm's allegations in court conflicted with documents their client had submitted to bankruptcy trusts.[51] An order by the judge requiring the plaintiff to produce trust claims materials "effectively opened a Pandora's box of deceit."[52] The judge later said, "I never expected to see lawyers lie like this . . . . It was lies upon lies upon lies."[53] After the Cleveland case, abusive trust claiming practices largely remained hidden for years because of the lack of transparency with regard to the trust claim system.

The event that forced authorities to finally confront the reality of abusive asbestos trust claim practices was a 2014 decision by U.S. Bankruptcy Judge George Hodges in *In re Garlock Sealing Technologies, LLC.*[54] *Garlock* has been described as "a stunning exposé of the breadth of the practice of withholding exposure evidence concerning the products of bankrupt entities."[55] That exposé "clear[ed] the fog and document[ed] what appear[ed] to be a pattern of self-dealing and double-dipping in both the civil tort system and bankruptcy trust resources for recovery by some asbestos plaintiffs' firms,"[56] causing "courts, commentators, and other interested parties" across the country to take note.[57]

Garlock is a gasket and packing manufacturer which, after years of being targeted by plaintiff attorneys as a solvent asbestos defendant in the post-bankruptcy era, was finally forced into bankruptcy itself. The 2014 decision concerned the estimation of Garlock's current and future liability for mesothelioma claims. Two very different estimates were put forth: that of the Asbestos Claimants' Committee ("ACC") — *i.e.*, members of the asbestos plaintiffs' bar — and the Future Claimants Representative ("FCR"), which asked the court to estimate the liability at $1.0-1.3 billion; and that of Garlock itself, which placed the estimate at $125 million, roughly ninety percent less than claimants' counsel had sought.

On the basis of an exhaustive factual record that included the nature of Garlock's products, the history of asbestos litigation overall and against Garlock in particular, and the scientific evidence regarding causation of asbestos related disease, the court reached the following conclusions:

- Garlock's products "resulted in a relatively low exposure to asbestos to a limited population[,]" and "its legal responsibility for causing mesothelioma is relatively de minimis." But after the large thermal insulation companies filed bankruptcy and were no longer defendants in the tort system, "plaintiffs' attention turned more to Garlock as a remaining solvent defendant," and "evidence of plaintiffs' exposure to other asbestos products often disappeared."[58]
- Garlock's evidence showed 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[,]" which "had a profound impact on a number of Garlock's trials and many of its settlements such that the amounts recovered were inflated."[59]
- The disappearance of evidence of plaintiffs' exposures to the insulation companies' products resulted from the efforts of some plaintiffs and their lawyers "to withhold evidence of exposure"

to those products and "to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."[60] For example, in 15 sample cases — all of which Garlock had settled for "large sums" — Garlock demonstrated that "exposure evidence was withheld in *each and every one* of them."[61]

- "In contrast to the cases where exposure evidence was withheld, there were several cases in which Garlock obtained evidence of Trust claims that had been filed and was able to use them in its defense at trial. In three such trials, Garlock won defense verdicts, and in a fourth it was assigned only a 2% liability share."[62]
- "The withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock from 2000 through 2010."[63]

In light of these findings, the court determined that Garlock's settlement and verdict history during the 2000-2010 period — upon which the ACC and FCR based their estimate of Garlock's present and future liabilities at $1.0-1.3 billion — was "unreliable as a predictor" and did not reflect Garlock's "true liability for mesothelioma in the pending and future claimants."[64] Instead, the court found that the evidence presented by Garlock supported its estimate of the liability at $125 million.

IV. The Abusive Practices Revealed By Garlock Are Systemic and Ongoing

The evidence on which the Garlock decision was based, though under seal at the time the decision was issued, was subsequently made public. Statistical studies of the thousands of cases the record encompassed revealed that the "systemic practice" of withholding exposure evidence "was not isolated to Garlock and likely prejudiced any defendant who settled or paid a judgment in an asbestos case when trust exposure evidence was concealed."[65]

Indeed, the informational brief accompanying Bestwall LLC's 2017 bankruptcy filing recounts a history much like Garlock's.[66] Bestwall, an affiliate of Georgia-Pacific, LLC, described instances where "asbestos plaintiffs, at a minimum, inconsistently and selectively disclosed exposure evidence to support or strengthen their cases against non-bankrupt companies."[67]

For example, a Philadelphia plaintiff who sued Bestwall "identified no exposures to amphibole products" and "testified that he had no occupational exposure to asbestos whatsoever."[68] The plaintiff's asbestos trust and bankruptcy filings "told an entirely different story."[69] He "submitted no fewer than seventeen asbestos trust claims, all based on exposures not disclosed in his tort case, including claims against . . . trusts responsible for amphibole insulation."[70]

A Madison County, Illinois, plaintiff who only identified solvent defendants' products in an asbestos personal injury lawsuit against Bestwall and others nevertheless "submitted trust claims or bankruptcy filings claiming exposure to products from [twenty-eight] separate companies never identified in his Madison County case. . .."[71]

Most recently, these same types of abuses are discussed the informational brief accompanying DBMP's bankruptcy. The court filing describes how the claims against CertainTeed "exploded out of all proportion"[72] after the major asbestos bankruptcies of the early 2000s and explains how CertainTeed's defense was "complicated by the recognized practice of claimants withholding evidence of alternative asbestos exposures."[73] The DBMP court filing further explains that the suppression of evidence by plaintiffs included, in particular, exposures to products manufactured by companies that filed bankruptcy: "Many plaintiffs failed to disclose (and sometimes affirmatively denied) their exposures to bankrupt entities' products during their tort suits against [the former CertainTeed]. These same plaintiffs would then later submit claims to the section 524(g) trusts established by those bankrupt entities, expressly claiming exposure to those bankrupt entities' products".[74] DBMP's filing goes on to describe specific examples of cases against it wherein plaintiffs misrepresented or concealed exposures to the products of bankrupt entities.[75]

The recent bankruptcy filings also highlight another "systemic practice" of asbestos plaintiff attorneys which, while distinct from the issues regarding the bankruptcy trusts, likewise operates to drain resources from productive businesses and threatens to drive more of them into bankruptcy: the naming of scores of asbestos defendants by some plaintiff attorneys without proof that their clients were exposed to asbestos connected to those companies.[76] The defendants on the

receiving end of such meritless claims can eventually get them dismissed, but not without incurring the costs of hiring an attorney, conducting an investigation, and litigating the case to the extent necessary to obtain a dismissal. Obviously, when the same entities are "over-named" in case after case, those costs add up and can drive companies into bankruptcy. The practice also slows settlement discussions and may delay payments to claimants with viable claims.[77]

The statistical information reported in the DBMP and ON Marine bankruptcy filings provide clear examples of this "scourge of over-naming."[78] According to ON Marine, 95% of the over 182,000 asbestos tort claims were asserted against it since 1983 were dismissed without payment.[79] DBMP states that "[i]n recent years, plaintiffs have sued [CertainTeed] in the majority of all mesothelioma lawsuits filed annually in the United States[,]" and that "[m]ore than half of mesothelioma claims filed against [CertainTeed] after 2001 were dismissed — usually because the plaintiff could provide no evidence of exposure to a [CertainTeed] asbestos-containing product."[80]

V. Fixing the Disconnect Between the Tort and Trust Systems

A. State Legislation

In 2013, Ohio became the first state to enact legislation to allow "the tort system to properly account for all of a plaintiff's sources of exposure to asbestos and compensation."[81] Presently, 16 states — Alabama, Arizona, Iowa, Kansas, Michigan, Mississippi, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin — have enacted asbestos trust transparency laws.[82] The legislation gained considerable momentum following the *Garlock* decision and progress continues. An attorney who has testified in support of trust transparency legislation in many states had described how state asbestos trust transparency laws operate:

> These laws generally require trust claims now routinely submitted after trial to be filed before trial and disclosed. If a defendant believes a plaintiff is out of compliance and can file additional trust claims, the defendant may file a motion with the court. In response to the defendant's motion, the plaintiff may file and produce the additional trust claims, file a written response explaining why there is insufficient evidence for the plaintiff to file the additional trust claims, or request a determination that the cost to file the additional trust claims exceeds the plaintiff's reasonably anticipated recovery. Should the court find that there is a sufficient basis for the plaintiff to file the additional trust claims identified in the defendant's motion, the court shall stay the asbestos action until the plaintiff files and produces the trust claims. In the event that the court determines that the cost of submitting an additional trust claim exceeds the plaintiff's reasonably anticipated recovery, the trust claim does not need to be filed, but the court will stay the asbestos action until the plaintiff provides a verified statement of his or her history of exposure, usage, or other connection to asbestos covered by that trust. The legislation also provides that trust claims materials are admissible at trial.[83]

In addition to trust transparency reform, Iowa is poised to enact first-of-its-kind legislation to address over-naming in asbestos lawsuits.[84] When signed by the Governor, the legislation will require asbestos plaintiffs to provide a sworn information form with the initial complaint disclosing the evidence that provides the basis for each claim against each defendant.

B. Federal Initiatives

Legislative efforts in Congress have thus far been unsuccessful. A bill titled "Furthering Asbestos Claim Transparency (FACT) Act of 2013" passed out of the U.S. House of Representatives, but stalled in the Senate. That bill would have amended Section 524(g) of the Bankruptcy Code to require asbestos trusts to file quarterly public reports identifying paid claims by name, amount paid and source of exposure, and to provide that information upon request to parties in asbestos litigation.[85] More recently, in 2019, several Republican senators introduced a bill called the "PROTECT Asbestos Victims Act" which, among other things, would require the trusts to comply with state court subpoenas seeking claim information.[86] That bill failed to progress beyond the Senate Judiciary Committee.

However, the U.S. Department of Justice has begun to focus on the need for reform and oversight. In 2018, the Department took "unprecedented steps to combat the problematic lack of transparency in the operation and oversight of asbestos trusts" by filing a Statement of Interest in an asbestos-related bankruptcy proceeding, in which the Department asserted its concern that the existing plans for the trust "lack[ed] adequate safeguards against fraud, mismanagement, or abuse."[87] The Department also stated that it "found alarming evidence of fraud and mismanagement inside trusts[,]" and that it sought to protect "the interests of legitimate claimants and the United States, which may be entitled to reimbursement for medical treatments paid by Medicare if claimants collect from asbestos trusts."[88]

C. Judicial Developments

Inasmuch as the *Garlock* decision "provide[d] defendants with tangible evidence of the problems caused by the lack of transparency between the asbestos bankruptcy trust and tort systems[,]" it resulted in "modification of CMOs [case management orders], and orders and opinions handed down by judges across the country" seeking to address and combat those problems.[89]

However, progress on the judicial front has not been uniform or consistent. For example, a recent decision of the Pennsylvania Supreme Court in *Roverano v. John Crane, Inc.*,[90] might be said to take one step forward and one step back with respect to preventing plaintiffs whose injuries have been compensated in the bankruptcy trust system from pursuing duplicative recoveries from solvent defendants in the tort system.

The *Roverano* court considered two issues under the Pennsylvania Fair Share Act:[91] (1) whether the Act's provision for apportioning liability by share of fault applies in an asbestos product liability case; and (2) whether the Act's provision for apportioning liability to a nonparty who has entered into a release with the plaintiff applies to an asbestos bankruptcy trust. With respect to the latter issue, the court affirmed the intermediate appellate court's holding that the Fair Share Act permits a jury to consider the liability of a bankruptcy trust that has entered into a release with the plaintiff.[92] But with respect to the former issue, the court reversed the lower court's determination that liability in a strict liability asbestos case could be apportioned by share of fault, holding that it must instead be apportioned by equal shares. That result seems somewhat surprising, given that (1) the applicable provision of the Fair Share Act, on its face, supports a proportionate share allocation in strict liability cases;[93] (2) for all the reasons discussed above, asbestos defendants should be afforded the opportunity to prove that bankruptcy trust entities, whose products generally created significantly higher asbestos exposures, bear a greater share of the fault for causing injury; and (3) due to the timing of filing of bankruptcy trust claims, more often than not plaintiffs delay the receipt of funds from the bankruptcy trusts until after the court case is fully resolved, such that in most instances no release will have yet been entered by and between the claimant and the Trust.

D. Pushback By the Asbestos Plaintiff Bar

The state and federal legislative initiatives described above have encountered intense opposition from lawyers who represent asbestos plaintiffs. At the outset, plaintiffs' lawyers "denied that any problem existed, dismissing the experiences of Garlock and other asbestos defendants as anecdotal and unrepresentative."[94] But "[a]s the evidence mounted, plaintiffs' attorneys changed their strategy and developed more targeted and nuanced opposition to reform. Primary among the opposition talking points has been that mandating trust disclosures before a civil trial begins delays compensation to needy plaintiffs and gives defendants too much control over the pace and extent of compensation."[95]

Those "talking points," among others, have been debunked by studies now available from jurisdictions where bankruptcy trust reforms have been in place for several years. In summary:

> The data reveals that trust disclosures do not delay civil litigation and that defendants have not wrested procedural or substantive control of the trust or tort systems away from plaintiffs. Indeed, civil litigation has continued unabated, plaintiffs' lawyers continue to control its pace, and those lawyers continue to exercise significant influence over the decision-making of asbestos trusts. Thus, while the reforms have engendered more communication and fairness in the dual system of asbestos compensation, the timing and control of that system have not changed,

> despite the dire predictions of reform opponents. In this sense, although the reforms have generated needed change, much remains the same.[96]

Indeed, in states such as Texas where plaintiff attorneys testified that trust transparency legislation would "prevent dying mesothelioma victims from having their day in court," plaintiffs' lawyers now readily admit that those problems have not happened.[97] A partner at a significant asbestos plaintiffs' firm has even stated, "It doesn't really bother me that the act exists."[98]

The truth is that there are delays today with regard to plaintiff compensation because plaintiffs' attorneys routinely delay the filing of trust claims while tort cases are pending. The result is that dying claimants may not obtain substantial trust recoveries while they are still alive. Trust transparency laws speed trust claim payments to claimants and may make asbestos tort litigation more efficient.[99]

VI. The Progress That Remains To Be Made

The simple and common sense measures that 16 states have thus far enacted to curb the abuses of the bankruptcy trust system need to become the law of all 50 states. It is especially incumbent upon the legislatures of states where asbestos litigation is most highly concentrated — including California, New York, New Jersey, Pennsylvania, Illinois, and Washington, among others — to enact those measures. Legislative initiatives that have been made in those states to date have failed to progress.

It is imperative that such initiatives continue to be made and that their proponents work to educate lawmakers and constituents about the systemic abuses of the bankruptcy trust system and the unjust burdens they impose. Among other things, such efforts should emphasize the fact that those burdens are not confined to solvent defendants, but are visited as well upon overloaded state court systems, and significantly also to individuals who have not yet developed asbestos-related disease but will. Future claimants may find depleted resources inadequate to fully compensate them for their injuries. As one commentator explains:

> [B]ecause the reforms seek to prevent redundant recoveries for the same harm, they ensure that money will remain, in both the trust and tort systems, to fund future claims by veterans and others. Since 2008, 23 trusts have reduced their payments to claimants, and trusts today pay, on average, approximately 50% of what they paid only 7 years ago. The continuation of double recoveries will only further deplete trust resources.[100]

Further, when a company files bankruptcy, that event triggers an automatic stay that enjoins virtually all litigation against the debtor. Plaintiffs with claims that are pending at the time of the bankruptcy filing may see payments delayed for years until a bankruptcy reorganization plan is confirmed and any asbestos trust that is established begins paying claims.[101] Perhaps just as significantly, employees, retirees, communities, and other corporate stakeholders also suffer when companies are forced into bankruptcy due to asbestos liabilities.[102]

It is also critical at the "boots on the ground" level that asbestos defendants and their counsel enforce the lessons of *Garlock* in their own practices. As one practitioner elaborates, those efforts should include the following:

- "ask[ing] the right questions in pre-deposition discovery, at depositions, at hearings, at pretrial conferences, at trial, and even post-trial";
- "[e]liciting bankruptcy trust discovery and claim submissions" in every case, thereby "forc[ing] plaintiffs to play by the rules and disclose the exposures and recoveries" in every case;
- "ensure they are asking for all available information about a trust claim, which may include past claims, current claims, deferred claims, and even notice of intent to file a future claim";
- in cases where plaintiffs refuse to provide trust information and/or authorizations for the release of trust records, "counter that refusal in court"; and in jurisdictions where plaintiffs "routinely fail to comply" with case management orders requiring disclosure, address those deficiencies "promptly and regularly";
- in jurisdictions where courts update or amend their standard case management orders, "seize the opportunity to educate the court on *Garlock*, bankruptcy discovery, and how revisions to existing provisions will improve trust transparency";

- use the relevant trust information "in the tort system to depict the entire exposure, medical, causation and liability picture of each plaintiff[,]" including by "challenging a plaintiff's memory, providing alternate exposures, identifying additional worksites, and showing alternative causations[,]" and bringing to light any other issues which "may reduce a defendant's liability or prove that the injury was not in fact caused by the defendant being sued";
- when possible, using trust information "to educate the court on available recovery from trusts."[103]

Other examples of practices that asbestos defendants and their attorneys may wish to consider include: obtaining lists of bankruptcy trusts from which plaintiffs may be able to recover based on their work history; presenting plaintiffs at depositions with TDPs demonstrating the ability to recover from the trusts; showing plaintiffs and other product identification witnesses pictures of the products for which the trusts make payment; showing such witnesses transcripts of testimony in other cases that there was exposure to a given trust's products while working at the same work site or for the same employer as the plaintiff in the same time frame, and asking the witness if the testimony is accurate; and moving to compel the filing of all bankruptcy trust claims prior to the plaintiff's deposition, explaining to the court that recovery from such trusts is available to the plaintiff, and the reasons that the timely filing of trust claims is necessary to present the full story to the ultimate factfinder.

By consistently applying these best practices, defendants can achieve better results for themselves, collectively work to educate the courts, and possibly even exercise some deterrent effect on the abusive practices by plaintiffs and their counsel.

Further, it remains incumbent upon the courts in every jurisdiction to apply the rules of tort law in asbestos cases with cognizance of the realities of that unique species of litigation and the specific concerns it invokes. Defense counsel may educate courts in this regard by explaining to the court the potential availability of a bankruptcy trust recovery and the need to compel the filing of all bankruptcy trust claims so the full story can be told to the fact finder. This also can be accomplished through a case management order,[104] as Massachusetts has done.[105]

Conclusion

In the six years that have passed since the *Garlock* decision cast a spotlight on the abusive practices endemic in the asbestos bankruptcy trust system, some progress has been made to move asbestos litigation in the direction of justice. Much more needs to be done. This article highlights the serious problems flowing from the disconnect between the tort and trust systems. It also calls on defense counsel to fully utilize the tools at their disposal to obtain complete asbestos exposure histories from plaintiffs so that juries are not misled to impose disproportionate liability on newer or formerly peripheral defendants for exposure and injuries caused by bankrupt former asbestos producers.

Endnotes

1. *See* Informational Brief of DBMP LLC, *In re* DBMP LLC, No. 20-30080 (Bankr. W.D.N.C. Jan. 23, 2020), *at* https://www.law360.com/articles/1237452/attachments/0.

2. *See* Declaration of Kevin J. Whyte in Support of Chapter 11 Petition of ON Marine Servs Co. LLC, *In re* ON Marine Servs. Co. LLC, No. 20-20007 (Bankr. W.D. Pa. Jan. 2, 2020).

3. *See In re* Paddock Enter., LLC, No. 20-10028 (Bankr. D. Del. Jan 6, 2020).

4. See generally Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97 (2013); Edward Sherman, *The Evolution of Asbestos Litigation*, 88 Tul. L. Rev. 1021 (2014).

5. *See* List of Asbestos Bankruptcy Cases (Chronologically), *at* https://www.crowell.com/files/List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf.

6. *See* Mark A. Behrens, *Asbestos Trust Transparency*, 87 Fordham L. Rev. 107, 111 (2018).

7. *See* U.S. Gov't Accountability Office, GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts (Sept. 2011); Lloyd Dixon & Geoffrey McGovern, Asbestos Bankruptcy Trusts and Tort Compensation (RAND Corp. 2011).

8. *See In re* Garlock Sealing Techs., LLC, 504 B.R. 71 (W.D.N.C. Bankr. 2014) (describing how a gasket and packing manufacturer became a target of asbestos cases following the bankruptcy wave until the company was forced into bankruptcy); LLOYD DIXON & GEOFFREY MCGOVERN, BANKRUPTCY'S EFFECT ON PRODUCT IDENTIFICATION IN ASBESTOS PERSONAL INJURY CASES iii (RAND Corp. 2015).

9. *See* Thomas M. Wilson, *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, 13 MEALEY'S ASBESTOS BANKR. REP. 22 (May 2014).

10. *See* Peggy Ableman, et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 15 MEALEY'S ASBESTOS BANKR. REP. 21 (Nov. 2015).

11. *See* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299, 306 (2013).

12. Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. Rev. 583 (1996).

13. *See* Bankruptcy Reform Act of 1994 § 111(a), 108 Stat. 4106, codified at 11 U.S.C. § 524(g).

14. *See* Mark D. Plevin & Paul W. Kalish, *Where Are They Now? A History of the Companies That Have Sought Bankruptcy Court Protection Due to Asbestos Claims*, 1 MEALEY'S ASBESTOS BANKR. REP. 1 (Aug. 2001).

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16. *See* Best's Market Segment Report, *No Slowdown in Asbestos and Environmental Claims* 1 (Nov. 28, 2018) ("Asbestos losses have not slowed down. . .."); Jenni Biggs, et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* (Towers Watson June 2013) ("Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years.").

17. MARK A. BEHRENS, U.S. CHAMBER INST. FOR LEGAL REFORM, DISCONNECTS AND DOUBLE-DIPPING: THE CASE FOR ASBESTOS BANKRUPTCY TRUST TRANSPARENCY IN VIRGINIA (2016).

18. Moeller v. Garlock Sealing Techs., LLC, 660 F.3d 950, 955 (6th Cir. 2011).

19. Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 556 (2007).

20. KCIC, *Asbestos Litigation: 2019 Year in Review* 11 (2020).

21. *Medical Monitoring and Asbestos Litigation' – A Discussion with Richard Scruggs and Victor Schwartz*, 17 MEALEY'S LITIG. REP.: ASBESTOS 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

22. *See* S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537 (2013); S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841 (2008).

23. LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS (RAND Corp. 2010).

24. John J. Hare & Daniel J. Ryan, *The More Things Change: Bankruptcy Trust Reform and the Status Quo in Asbestos Litigation*, 85 DEF. COUNSEL J. 1, 8 (Oct. 2018).

25. William P. Shelley, et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. BANKR. L. & PRAC. 261 (2008); *see also* Marc C. Scarcella & Peter R. Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, 14 MEALEY'S ASBESTOS BANKR. REP. 25 (Feb. 2015).

26. *See* Laura Kingsley Hong & Robert E. Haffke, *Apportioning Liability in Asbestos Litigation: A Review of the Law in Key Jurisdictions*, 26 T.M. COOLEY L. REV. 681 (2009).

27. *See* Matkin v. Smith, 643 So. 2d 949 (Ala. 1994); DEL. CODE tit. 10, § 6301; Nat'l Health Labs., Inc. v.

Ahmadi, 596 A.2d 555 (D.C. App. 1991); ME. REV. STAT. tit. 14, § 156; MD. CTS. & JUD. PROC. CODE § 3-1401; N.C. GEN. STAT. § 1B-2; R.I. GEN. LAWS § 10-6-2; VA. CODE § 8.01-443.

28. *See* ALASKA STAT. § 09.17.080(d); ARIZ. REV. STAT. § 12-2506(A); ARK. CODE § 16-55-201(B); COLO. REV. STAT. § 13-21-111.5; FLA. STAT. § 768.81; GA. CODE § 51-12-33; IDAHO CODE § 6-803; IND. CODE § 34-20-7-1; KAN. STAT. § 60-258a(d); KY. REV. STAT. § 411.182(3); LA. CIV. CODE arts. 1804, 2323, 2324; MICH. COMP. LAWS §§ 600.6304(4), 600.6312; MISS. CODE § 85-5-7; N.D. CENT CODE § 32-03.2-02; Okla. Stat. tit. 23, § 15; VT. STAT. tit. 12, § 1036; W. VA. CODE § 55-17-13c; WYO. STAT. § 1-1-109(e).

29. *See* CAL. CIV. CODE § 1431.2 ; NEB. REV. STAT. § 25-21,185.10.

30. *See* MINN. STAT. § 604.02 Subd. 1; MO. REV. STAT. § 537.067; MONT. CODE § 27-1-703; N.H. REV. STAT. § 507:7-e; N.J. STAT. § 2A:15-5.3; 42 PA. CONSOL. STAT. § 7102; S.C. CODE § 15-38-15; S.D. CODIFIED LAWS § 15-8-15.1; TEX. CIV. PRAC. & REM. CODE § 33.013; WIS. STAT. §§ 895.045(1).

31. *See* IOWA CODE § 668.4; OHIO REV. CODE § 2307.22.

32. *See* James Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 237 (2006) ("As leading plaintiffs' counsel Ron Motley and Joe Rice observed some time ago, the first seventeen asbestos defendants to go into bankruptcy represented 'one-half to three-quarters of the original liability share.'").

33. A 2011 study by RAND examined "how tort cases take into consideration compensation paid by trusts and the evidence submitted in trust claim forms," based upon a study of a group of states that historically had a large number of asbestos filings, but varied with respect to their methods of apportioning liability. The researchers found that solvent defendants were likely to pay more in scenarios where "information on exposure to the bankrupt firms' products and practices is not developed and neither direct nor indirect claims are brought against some trusts," or where "the bankrupt firms are assigned less fault than would have been the case in the prereorganization scenario[.]" The researchers also found that both scenarios "[i]n the extreme" could result in the solvent defendant being required to pay the entire amount of the damages without regard to the compensation available to the plaintiff from the trusts or the fact that the plaintiff could receive a duplicative recovery from the trusts. DIXON & MCGOVERN, *supra* note 7, at iii, xii, xv.

34. *See* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299, 317-18 (2013); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 18.

35. *See In re Garlock Sealing Tech.*, 504 B.R. 71 at 96; Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TUL. L. REV. 1071 (2014).

36. *See* Mark A. Behrens & William F. Northrip, *Department of Justice Combats Asbestos Trust Abuse*, 86 DEF. COUNSEL J. 1, 10 (Jan. 2019); *Furthering Asbestos Claim Transparency (FACT) Act of 2012: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the Comm. on the Judiciary*, 112th Cong. 14 (2012) (statement of Leigh Ann Schell, Esq., Kuchler Polk Schell Weiner and Richeson, L.L.C.).

37. Fed. R. Evid. 408.

38. Peggy Ableman, "*Me Thinks the Lawyers Doth Protest Too Much*"*—A Response to "The Irony of Tort Reform*," 32 MEALEY'S LITIG. REP.: ASBESTOS 1 (Mar. 22, 2017).

39. Peggy L. Ableman, *A Case Study From A Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined By Lack of Access to Bankruptcy Trust Claims*, 88 TUL. L. REV. 1185 (2014).

40. *See*, *e.g.*, *In re Garlock Sealing Techs.,* 504 B.R. at 84-85 (discussed further in section III below).

41. Marc C. Scarcella, et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations From 1991–2010*, 12 MEALEY'S ASBESTOS BANKR. REP. 22 (OCT. 2012).

42. *See id.* at 9-11; Behrens, *Disconnects and Double-Dipping, supra* note 17, at 13; *see also In re Garlock Sealing Techs.*, 504 B.R. at 84-85.

43. Scarcella, et al., *supra* note 41; DIXON & MCGOVERN, *supra* note 8, at iii.

44. DIXON & MCGOVERN, *supra* note 8, at xii.

45. *Id.*

46. Scarcella, et al., *supra* note 41.

47. Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 845 (2005).

48. 504 B.R. 71 (W.D.N.C. Bankr. 2014).

49. *Id.* at 84.

50. *See* Andrew T. Berry, *Asbestos Personal Injury Compensation and the Tort System: Beyond "Fix It 'Cause It's Broke,"* 13 CARDOZO L. REV. 1949, 1951 n.9 (1992) (noting that "after Johns-Manville went bankrupt in 1982, plaintiff descriptions of Manville products . . . changed radically from a few months earlier"); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 138 (2003) ("Upon Manville's bankruptcy, the prospect of a long delay coupled with expectations of considerably reduced compensation created a financial incentive for claimants to minimize the percentage of Manville products that they claimed exposure to, and instead allege exposure to asbestos products sold by solvent companies with the financial capability to promptly pay the full value of judgments and settlements.").

51. Kananian v. Lorillard Tobacco Co., No. CV-442750, 2007 WL 4913164, at *19 (Ohio Ct. Com. Pl. Jan. 17, 2007).

52. James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit*, CLEVELAND PLAIN DEALER (Jan. 25, 2007), 2007 WLNR 1527886.

53. *Id.*; *see also* Editorial, *Cuyahoga Comeuppance*, WALL ST. J., Jan. 22, 2007, at A14 (describing the judge's ruling as "required reading for other judges, who can start asking whether similar dishonesty is destroying the integrity of their own courts").

54. 504 B.R. 71 (W.D.N.C. Bankr. 2014).

55. Peggy L. Ableman, *The* Garlock *Decision Should Be Required Reading for All Trial Court Judges In Asbestos Cases*," 37 AM. J. TRIAL ADVOCACY 479 (2014); *see also* Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp., 2015 U.S. Dist. LEXIS 105890, 2015 WL 4773425, at *5 (W.D. Pa. Aug. 12, 2015) ("The evidence uncovered in the Garlock case arguably demonstrates that asbestos plaintiffs' law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system.").

56. Mary Margaret Gay & Sarah Beth Jones, *The Billion Dollar Difference: The Value of Trust Transparency*, 14 MEALEY'S ASBESTOS BANKR. REP. 22 (AUG. 2014).

57. Hare & Ryan, *supra* note 24, at 2.

58. 504 B.R. at 73.

59. *Id.* at 82.

60. *Id.* at 84.

61. *Id.* (Emphasis in original.).

62. *Id.* at 86.

63. *Id.* at 86-87.

64. *Id.* at 87.

65. PETER KELSO & MARC SCARCELLA, U.S. CHAMBER INST. FOR LEGAL REFORM, THE WAITING GAME: DELAY AND NON-DISCLOSURE OF ASBESTOS TRUST CLAIMS 9 (2015); *see also* Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.,* 15 MEALEY'S ASBESTOS BANKR. REP. 21 (Nov. 2015); Peggy L. Ableman, *The* Garlock *Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 AM. J. TRIAL. ADVOC. 479 (2014); MARK A. BEHRENS, ET AL., ILLINOIS ASBESTOS TRUST TRANSPARENCY: THE NEED TO INTEGRATE ASBESTOS TRUST DISCLOSURES WITH THE ILLINOIS TORT SYSTEM, Ill. Civil Justice League (2017); MARY MARGARET GAY & SARAH BETH JONES, A MATTER OF TRUST: HOW ACCESS TO ASBESTOS TRUST CLAIMS INFORMATION AFFECTS CASES IN NEW YORK COURTS, N.Y. Civil Justice Inst. (Oct. 2019).

66. Informational Brief of Bestwall LLC, *In re* Bestwall LLC, No. 17-31795 (Bankr. W.D.N.C. Nov. 2, 2017), 2017 WL 4988527.

67. *Id.* at 11.

68. *Id.* at 14.

69. *Id.*

70. *Id.*

71. *Id.*

72. Informational Brief of DBMP LLC, *supra* note 1, at 16.

73. *Id.* at 20.

74. *Id.* at 20.

75. *See id.* at 22-24.

76. *See, e.g.*, Jessica Karmasek, *W.V. Firm Blames Almost 300 Companies in Each Asbestos Lawsuit*, LEGAL NEWSLINE, June 28, 2016, *at* https://www.forbes.com/sites/legalnewsline/2016/06/28/wv-firm-blames-almost-300-companies-in-each-asbestos-lawsuit/; Angelica Saylo Pilo, *Texas Man Alleges Dozens of Users of Asbestos Products Caused Mesothelioma*, MADISON – ST. CLAIR RECORD, Feb. 14, 2019, *at* https://madisonrecord.com/stories/511769260-texas-man-alleges-dozens-of-users-of-asbestos-products-caused-mesothelioma; Erianne Leatherman, *Son Alleges Dozens of Companies Caused Mother's Asbestos-Related Death*, MADISON – ST. CLAIR RECORD, Mar. 7, 2019, *at* https://madisonrecord.com/stories/512069340-son-alleges-dozens-of-companies-caused-mother-s-asbestos-related-death.

77. *See, e.g.*, Chris Dickerson, *Asbestos Judge Criticizes Plaintiffs Attorneys for Lack of Action, Suing Too Many Defendants*, W. VA. RECORD, Feb. 11, 2020, *at* https://wvrecord.com/stories/525269273-asbestos-judge-criticizes-plaintiffs-attorneys-for-lack-of-action-suing-too-many-defendants.

78. James Lowery, *The Scourge of Over-Naming in Asbestos Litigation: The Costs to Litigants and the Impact on Justice*, 32 MEALEY'S LITIG. REP.: ASBESTOS 22 (Jan. 24, 2018).

79. Declaration of Kevin J. Whyte in Support of Chapter 11 Petition of ON Marine Servs Co. LLC, *In re* ON Marine Servs. Co. LLC, *supra* note 2, at 5.

80. Informational Brief of DBMP LLC, *supra* note 1, at 1-2.

81. Behrens, *supra* note 6, at 118.

82. *See* ALA. CODE §§ 6-5-680 to 6-5-685; ARIZ. REV. STAT. § 12-782; IOWA CODE §§ 686A.1–.9; KAN. STAT. §§ 60-4912–.4918; MICH. CODE § 600.3010–.3016; MISS. CODE §§ 11-67-1 to -15; N.C. GEN. STAT. §§ 1A-1, Rule 26; 8C-1, Rule 415; and 1-75.12; N.D. CENT. CODE §§ 32-46.1-01 to -05; OHIO REV. CODE §§ 2307.951–.954; OKLA. STAT. TIT. 76, §§ 81–89; S.D. CODIFIED LAWS §§ 21-66-1 to -11; TENN. CODE §§ 29-34-601 to -609; TEX. CIV. PRAC. & REM. CODE §§ 90.051–.058; UTAH CODE §§ 78B-6-2001 to -2010; W. VA. CODE §§ 55-7F-1 to -11; WIS. STAT. § 802.025. In 2007, years before state asbestos trust transparency legislative efforts began, Georgia enacted a law that, among other things, requires all asbestos and silica claims to include with the complaint a sworn information form containing information about the plaintiff's exposure history and the "identify of any bankruptcy trust to which a claim has been submitted concerning any asbestos or silica injury of the exposed person, attaching any claim form or other information submitted to such trust respect to the exposed person." GA. STAT. § 51-14-7(a)(9). The Georgia law also requires the plaintiff "to identify any bankruptcy trust that the plaintiff believes is or may be liable for all or part of the injury at issue, even if a claim has not been submitted to that trust at the time the complaint is filed." *Id.*

83. Behrens, *supra* note 6, at 117-118.

84. *See* Iowa S.F. 2337 (2020), *at* https://www.legis.iowa.gov/docs/publications/LGR/88/SF2337.pdf.

85. H.R. 982, 113th Cong. (2013).

86. S. 766, 116th Congress (2019).

87. Mark A. Behrens & William F. Northrip, *U.S. Department of Justice Takes on Asbestos Trust Fraud, Abuse*, Legal Opinion Letter (Washington Legal Found. Oct. 19, 2018) (internal quotes and citations omitted). Mark A. Behrens & William F. Northrip, *Department of Justice Combats Asbestos Trust Abuse*, 86 DEF. COUNSEL J. 1 (Jan. 2019).

88. *Id.*

89. Mary Margaret Gay, et al., *Asbestos Litigation and the Bankruptcy Trust System: Mastering a Plaintiff's Game*, 15 MEALEY'S ASBESTOS BANKR. REP. 20 (Oct. 2015).

90. 2020 Pa. LEXIS 1035, 2020 WL 808186 (Pa. Feb. 19, 2020).

91. 42 Pa.C.S. § 7102.

92. The court also upheld the apportionment of liability to the Manville Asbestos Trust because the defendants had joined it as a party.

93. "Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2)." 42 Pa.C.S. § 7102(a.1)(1).

94. Hare & Ryan, *supra* note 24, at 4.

95. *Id.*

96. *Id*. at 5; *see also* John J. Hare & Daniel J. Ryan, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: Refuting the Myths About Transparency*, 15 MEALEY'S ASBESTOS BANKR. REP. 16 (Apr. 2016); MARYELLEN K. CORBETT & MATTHEW M. MENDOZA, U.S. CHAMBER INST. FOR LEGAL REFORM, WATCHING IT WORK: THE IMPACT OF OHIO'S ASBESTOS TRUST TRANSPARENCY LAW ON TORT LITIGATION IN THE STATE (2017); Edward Slaughter et al., *Two Years of Trust Transparency in Texas*, IADC COMM. NEWSL. (Int'l Ass'n of Def. Counsel, Chicago, Ill.), Feb. 2018, at 1, 4; Eric D. Carlson, et al., *Wisconsin Asbestos Bankruptcy Trust Legislation*, IADC COMM. NEWSL. (Int'l Ass'n of Def. Counsel, Chicago, Ill.), Oct. 2018, at 1; Jon B. Orndorff, et al., *A Three Year Retrospection on West Virginia's 2015 Asbestos Litigation Reform*, IADC COMM. NEWSL. (Int'l Ass'n of Def. Counsel, Chicago, Ill.), Sept. 2018, at 1.

97. Edward Slaughter et al., *Two Years of Trust Transparency in Texas*, IADC COMM. NEWSL. (Int'l Ass'n of Def. Counsel, Chicago, Ill.), Feb. 2018, at 1, 4 (quoting Bryan Blevins, Jr., a partner with asbestos plaintiffs' law firm Provost Umphrey in Beaumont).

98. *Id.* (alterations in original) (quoting Charles Siegel, a partner in the Dallas office of asbestos plaintiffs' firm Waters Kraus & Paul).

99. *See* Hare & Ryan, *supra* note 95, at 2 ("The expeditious filing of trust claims helps, not hurts, people suffering from asbestos disease because it puts money in their pockets more quickly than delaying the claims until after trial.").

100. Ryan & Hare, *supra* note 95, at 2.

101. *See* James Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 260-61 (2006) ("RAND looked at eleven major asbestos bankruptcies and found that the average duration between filing and plan confirmation (which is the earliest date payments could start) was six years. One case took ten years. During these periods the trusts pay no money to claimants. Furthermore, in the typical case plan confirmation itself can precede any payment by months, if not years, due to various startup delays.").

102. *See* Joseph E. Stiglitz, et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. BANKR. L. & PRAC. 51, 70-88 (2003) (exploring the effect of asbestos-related bankruptcies on employment, retirement security, government finances, and other economic factors).

103. Gay, et al., *supra* note 88.

104. *See* Peggy L. Ableman, *The Time has Come for Courts to Respond to the Manipulation of Exposure Evidence in Asbestos Cases: A Call for the Adoption of Uniform Case Management Orders Across the Country*, 30 MEALEY'S LITIG. REP.: ASBESTOS 28 (Apr. 8, 2015).

105. A case management order for all Massachusetts asbestos cases requires plaintiffs to certify within 30 days of trial that all known bankruptcy claims have been filed. *See In re Massachusetts State Court Asbestos Litig.*, Amended Pre-Trial Order No. 9, ¶ XIII(C)(7)(o)(2)(e) (Mass. Super. Ct. Middlesex County June 27, 2012). ■

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