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Commentary

A 2021 Look At Bankruptcy Trust And Transparency Issues In Asbestos Litigation

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Asbestos liabilities have driven six more companies in the United States to file bankruptcy petitions since the beginning of 2020: ON Marine Services Co. LLC, Paddock Enterprises, LLC, DBMP LLC, Aldrich Pump LLC/Murray Boiler LLC, Garrett Motion Inc., and Cyprus Mines Corporation. The new petitions add additional chapters to the lengthy story that continues to be the asbestos litigation machine. To date, there have been over 130 asbestos-related bankruptcies.

Many of the companies that have declared bankruptcy due, at least in part, to asbestos-related liabilities have created trusts to pay for alleged harms caused by exposure to their products. Approximately sixty bankruptcy trusts are presently in operation, and claimants today typically file claims with numerous trusts for alleged harms caused by the bankrupt companies' asbestos products. Because of the way the bankruptcy trusts are set up and operate—primarily by attorneys who represent asbestos plaintiffs—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 share of responsibility. While some jurisdictions have acted 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.

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.” Manville sought to establish and fund a qualified settlement trust that would pay both current claimants and also future asbestos claimants that were exposed to Manville products and may seek compensation for their injuries over the next several decades. 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. By 2002, virtually every major producer of asbestos products had availed itself of that opportunity.

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. A landmark study of

asbestos bankruptcy trusts by RAND showed that a disproportionate number of key trust personnel positions were filled by plaintiff attorneys. A more recent analysis revealed that the top five asbestos plaintiff firms had “significantly increased” their membership on Trust Advisory Committees since the RAND study. 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 debtor and competing creditor constituencies reach agreement with the asbestos creditors on the broad terms of the division of the assets of the debtor'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.

In some instances, multiple bankruptcy trusts are administered by the same claims processing company, and, as a result, this consolidation has streamlined the process of submitting claims to multiple trusts at the same time. In addition, most bankruptcy trusts do not limit the ability of plaintiffs' attorneys to recoup their normal contingency fee percentage from trust payments despite the administrative nature of the claim submission process.

II. The Tort System Has Become Dysfunctional in Asbestos Litigation

States have different mechanisms for apportioning liability when more than one party is responsible for causing injury. A few states have joint liability,

which means that plaintiffs can collect their full damages from any responsible party, who can then seek contribution from other responsible parties. 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. Other states apply joint liability in some situations and not others, such as for economic damages but not noneconomic damages, or if the defendant's level of fault is above a certain threshold (e.g., above 50% at fault.). Some states apply a combination of both approaches. Other variations exist

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. 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.

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. 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.

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. 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[.]” In

most states, a claim filed with a bankruptcy trust is not an offer to compromise since the plaintiffs' sole legal remedy for their claims against bankrupt defendants is to submit their claims to the administrative processes of the bankruptcy trusts. Plaintiffs do not submit their claims to the trusts as an alternative to existing legal rights to file suits against the bankrupt defendants. They have no choice but to submit their claims to the trusts' administrative processes and to follow the trusts' procedures for pursuing their claims.

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." 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, such as in studies of Philadelphia and Newport News, Virginia.

C. Changing Filing Patterns Caused By Asbestos Bankruptcies

The Philadelphia study 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. As the Philadelphia study notes, the explanation for the findings is inherent in the "dual compensation system" that asbestos bankruptcy trusts have created.

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.

III. The Garlock Bankruptcy: A Game Changer

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*. *Garlock* has been described as "a stunning exposé of the breadth of the practice of withholding exposure evidence concerning the products of bankrupt entities." 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," causing "courts, commentators, and other interested parties" across the country to take note.

IV. The Abusive Practices Revealed in *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."

Indeed, the informational brief accompanying Bestwall LLC's 2017 bankruptcy filing recounts a history much like *Garlock's*. 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."

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.

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.” 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.

In addition to trust transparency reform, Iowa enacted first-of-its-kind legislation in 2020 to address over-naming in asbestos lawsuits. The legislation requires asbestos plaintiffs to provide a sworn information form with the initial complaint with supporting documentation disclosing the evidence that provides the basis for each claim against each defendant.

B. 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.

However, progress on the judicial front has not been uniform or consistent. For example, the Pennsylvania Supreme Court’s 2020 decision in *Roverano v. John Crane, Inc.*, 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: (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. 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.

C. Pushback by the Asbestos Plaintiff Bar

Asbestos litigation reform efforts have been strongly opposed by 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.” 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.”

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.

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, Washington, and Florida, 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.

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 pre-trial 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 re-

duce 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.”

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 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.

Conclusion

While the years that have passed since the *Garlock* decision have cast a spotlight on the abusive practices endemic in asbestos litigation, some progress has been made to move the 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. ON Marine Services Co. LLC is a successor of a company that manufactured a specialized insulation product used in steel mills. *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).
2. Paddock Enterprises, LLC is a successor of an entity that manufactured Kaylo insulation products from 1948 to 1958. *See In re* Paddock Enter., LLC, No. 20-10028 (Bankr. D. Del. Jan 6, 2020).
3. DBMP LLC is a successor to the asbestos personal injury tort liabilities (exclusive of workers' compensation claims) of the former CertainTeed Corporation, which historically manufactured asbestos cement pipe and asphalt roofing products *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>.
4. Aldrich Pump LLC and Murray Boiler LLC are subsidiaries of Trane Technologies plc. Aldrich Pump LLC is a successor to certain assets and liabilities of the former Ingersoll-Rand Company, a manufacturer of pumps and compressors, and Murray Boiler LLC is a successor to certain assets and liabilities of the former Trane US, Inc., a manufacturer of climate control (HVAC) equipment. *See* Informational Brief of Aldrich Pump LLC and Murray Boiler LLC, Declaration of Ray Pittard in Support of First Day Pleadings and Declaration of Allan Tananbaum in Support of Debtor's Complaint for Injunctive Declaratory Relief, Related Motions, and the Chapter 11 Cases, *In Re: Aldrich Pump LLC, et al.*, No. 20-30608 (Bankr. W.D.N.C. June 18, 2020), at <https://www.kccllc.net/aldrich/document/list/5247>.
5. Garrett Motion Inc. ("Garrett Motion") manufactures and sells turbocharger, electric boosting and connected vehicle technologies for original equipment manufacturers and the automotive aftermarket. *See* Declaration of Sean Deason in Support of the Debtor's Chapter 11 Petitions and First Day Pleadings, *In re* Garrett Motion Inc., *et al.*, No. 20-12212 (Bankr. S.D.N.Y. Sept. 20, 2020), at <http://www.kccllc.net/garrettmotion>. Garrett Motion was spun-off by its prior owner, Honeywell International Inc. ("Honeywell") in October of 2018. *Id.* Honeywell allegedly caused a subsidiary of Garrett Motion to enter into an indemnity contact to reimburse Honeywell for legacy asbestos exposure of Honeywell arising out an unrelated Honeywell business, which manufactured brake linings that contained asbestos. *Id.*
6. Cyprus Mines Corporation's chapter 11 filing relates to tort liabilities resulting from exposure to talc products that were manufactured and distributed by others using talc mined and sold by the debtor or its former subsidiaries. *See* Declaration of D. J. (Jan) Baker, Independent Director of the Debtor, in Support of Chapter 11 Petition and First Day Pleadings, *In Re: Cyprus Mines Corp.*, No. 21-10398 (Bankr. D. Del. Feb. 11, 2021).
7. *See* List of Asbestos Bankruptcy Cases (Chronologically), at <https://www.crowell.com/files/20201007-List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf>.
8. *See* Mark A. Behrens, *Asbestos Trust Transparency*, 87 *FORDHAM L. REV.* 107, 111 (2018).
9. *See id.* at 111-12.
10. *See* Thomas M. Wilson, *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, 13 *MEALEY'S ASBESTOS BANKR. REP.* 22 (May 2014).
11. *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).
12. *See* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 *WIDENER L.J.* 299, 306 (2013).

13. Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. Rev. 583 (1996).
14. See Bankruptcy Reform Act of 1994 § 111(a), 108 Stat. 4106, codified at 11 U.S.C. § 524(g).
15. 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).
16. 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).
17. LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS (RAND Corp. 2010).
18. 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).
19. 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).
20. For example, Verus LLC provides claims processing services for the following trusts: ABB Lummus, A-Best, AC&S, A&I, ARTRA, Brauer, Burns and Roe, CE, Christy, Congoleum, G-I Holdings, Garlock, H.K. Porter, Kaiser, Plibrico, Porter Hayden, Quigley, THAN, U.S. Mineral and Yarway. See <https://verusllc.com/trusts/>. The Claims Processing Facility, Inc. (CPF) provides asbestos claim processing services to the Eagle-Picher Industries Personal Injury Settlement Trust, the Keene Creditors Trust, the Raytech Corporation Asbestos Personal Injury Settlement Trust and the UNR Asbestos-Disease Claims Trust. See <https://www.cpf-inc.com/cpf/about-us/>. Claims Resolution Management Corporation (CRMC) provides asbestos claims processing services for the following clients: Manville Personal Injury Settlement Trust, C. E. Thurston & Sons Asbestos Trust, Durabla Manufacturing Company and Durabla Canada Ltd Asbestos Trust, Philadelphia Asbestos Corporation Trust (PACOR) and North American Refractory Company Trust. See <https://www.claimsres.com/about-us/services/claims-processing/>.
21. 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).
22. 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.
23. 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 § 3203.202; Okla. Stat. tit. 23, § 15; VT. STAT. tit. 12, § 1036; W. VA. CODE § 55-17-13c; WYO. STAT. § 1-1-109(e).
24. See CAL. CIV. CODE § 1431.2; NEB. REV. STAT. § 25-21,185.10.
25. 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; 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)

26. See IOWA CODE § 668.4; Ohio Rev. Code § 2307.22.
27. 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 pre-reorganization 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. LLOYD DIXON & GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION iii, xii, xv (2011).
28. See *In re Garlock Sealing Technologies, LLC.*, 504 B.R. 71, 96 (Bankr. W.D.N.C. 2014); Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TUL. L. REV. 1071 (2014).
29. 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.).
30. Fed. R. Evid. 408.
31. 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).
32. See *id.* at 9-11; MARK A. BEHRENS, U.S. CHAMBER INST. FOR LEGAL REFORM, DISCONNECTS AND DOUBLE-DIPPING: THE CASE FOR ASBESTOS BANKRUPTCY TRUST TRANSPARENCY IN VIRGINIA 13 (2016); see also *In re Garlock Sealing Techs.*, 504 B.R. at 84-85.
33. Scarcella, et al., *supra* note 29; DIXON & MCGOVERN, *supra* note 25, at iii.
34. 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.”).
35. 504 B.R. 71 (W.D.N.C. Bankr. 2014).
36. 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.”).
37. Mary Margaret Gay & Sarah Beth Jones, *The Billion Dollar Difference: The Value of Trust Transparency*, 14 MEALEY’S ASBESTOS BANKR. REP. 22 (AUG. 2014).
38. Hare & Ryan, *supra* note 16, at 2.

39. 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); *Golik v. CBS Corp.*, 2020 Ore. App. LEXIS 1005, 306 Ore. App. 202 (Or. Ct. App. 2020) (affirming the trial court's granting of a new trial based upon misconduct relating to the plaintiff's failure to turn over to a defendant during discovery some documents, including an exposure affidavit, submitted to bankruptcy trusts)
40. Informational Brief of Bestwall LLC, In re Bestwall LLC, No. 17-31795, 2017 WL 4988527 (Bankr. W.D.N.C. Nov. 2, 2017).
41. *Id.* at 11.
42. 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>.
43. Behrens, supra note 7, at 118.
44. 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.*
45. See Iowa S.F. 2337 (2020) (codified at Iowa Stat. § 686B.3).
46. 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).
47. 226 A.3d 526 (Pa. 2020).
48. 42 Pa.C.S. § 7102.

- 49. The court also upheld the apportionment of liability to the Manville Asbestos Trust because the defendants had joined it as a party.
- 50. Hare & Ryan, *supra* note 16, at 4.
- 51. *Id.*
- 52. *See* Hare & Ryan, *supra* note 16, 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.”).
- 53. Gay, et al., *supra* note 44. ■

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