

2018

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Recommended Citation

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

Available at: <https://ir.lawnet.fordham.edu/flr/vol87/iss1/7>

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ASBESTOS TRUST TRANSPARENCY

Mark A. Behrens*

INTRODUCTION

Originally and for many years, the primary defendants in asbestos cases were companies that mined asbestos or manufactured amphibole-containing thermal insulation.¹ Hundreds of thousands of claims were filed against the major asbestos producers, such as Johns-Manville Corp., Owens Corning Corp., and W.R. Grace & Co.²

By the late 1990s, asbestos litigation had reached such proportions that the U.S. Supreme Court noted the “elephantine mass”³ of cases and referred to the litigation as a “crisis.”⁴ Mass filings pressured “most of the lead defendants and scores of other companies” into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation.⁵

Following a 2000–2002 wave of bankruptcies among asbestos manufacturers,⁶ plaintiffs’ lawyers began “a search for new recruits to fill the gap in the ranks of defendants.”⁷ Many of today’s asbestos defendants are

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1. See James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 238 (2006) (noting “[a]s leading plaintiffs’ counsel Ron Motley and Joe Rice observed some time ago, the first seventeen asbestos defendants to go into bankruptcy represented” between 50 and 75 percent of the liability share).

2. See STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION xxiv (2005), https://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf [<https://perma.cc/GH43-275B>] (“Approximately 730,000 people had filed an asbestos claim through 2002.”).

3. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

4. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

5. CARROLL ET AL., *supra* note 2, at 67.

6. See Mark D. Plevin et al., *Where Are They Now, Part Eight: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 16 MEALEY’S ASBESTOS BANKR. REP., Sept. 2016, at 28, 40 chart 1 (demonstrating that there were nearly as many asbestos-related bankruptcies from 2000 to 2002 as in the previous two decades combined).

7. Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 556 (2007); see also CARROLL ET AL., *supra* note 2, at xxiii (“When increasing asbestos claims rates encouraged scores of defendants to file Chapter 11 petitions . . . the resulting stays

formerly peripheral or new defendants associated with chrysotile-containing products “such as gaskets, pumps, automotive friction products, and residential construction products.”⁸ One plaintiffs’ attorney described the asbestos litigation as an “endless search for a solvent bystander.”⁹

There is a remedy for workers and others with asbestos-related injuries caused by the former thermal insulation defendants and other companies that have exited the tort system through bankruptcy.¹⁰ As part of their reorganization, those companies established trusts that hold *billions* of dollars to pay asbestos claimants.¹¹ Filing an asbestos trust claim is similar to filing an insurance claim—it is easier and faster than bringing a lawsuit.¹²

in litigation . . . drove plaintiff attorneys to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.”)

8. Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991–2010*, 27 MEALEY’S LITIG. REP.: ASBESTOS, Oct. 10, 2012, at 1, 1. Chrysotile is “far less toxic than other forms of asbestos.” *In re Garlock Sealing Tech., LLC.*, 504 B.R. 71, 75 (Bankr. W.D.N.C. 2014); see also *Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839, 846 (D. Md. 2017) (“[C]hrysotile asbestos is classified in an entirely separate mineralogical family from *amphibole* asbestos and is widely considered less potent.”), *appeal dismissed sub nom.* *Rockman v. Georgia-Pacific, LLC*, No. 17-1883, 2017 WL 7135451 (4th Cir. Oct. 23, 2017); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) (“While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma.”), *aff’d sub nom.* *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488 (6th Cir. 2005).

9. Richard Scruggs & Victor Schwartz, ‘Medical Monitoring and Asbestos Litigation’—*a Discussion with Richard Scruggs and Victor Schwartz*, 17 MEALEY’S LITIG. REP.: ASBESTOS, Mar. 1, 2002, at 1, 5. More than 10,000 companies, including subsidiaries, have been named as asbestos defendants. See JENNI BIGGS ET AL., TOWERS WATSON, A SYNTHESIS OF ASBESTOS DISCLOSURES FROM FORM 10-KS—UPDATED 1 (June 2013), <https://www.towerswatson.com/en-US/Insights/Newsletters/Americas/americas-insights/2013/A-Synthesis-of-Asbestos-Disclosures-From-Form-10-Ks-Updated> [<https://perma.cc/3FAC-JYDR>].

10. See S. Todd Brown, *How Long Is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 537 (2013) (“Section 524(g) of the Bankruptcy Code authorizes the entry of an injunction that channels all of a debtor’s asbestos-related liabilities to a bankruptcy trust, which is established by the debtor to pay all valid current and future asbestos claims.”).

11. See Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12 MEALEY’S ASBESTOS BANKR. REP., June 2013, at 33, 33–34 (describing how scores of former asbestos producers “have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims”).

12. See John J. Hare & Daniel J. Ryan, *Unclinking Bankruptcy Trust Filings in Asbestos Litigation: Refuting the Myths About Transparency*, 15 MEALEY’S ASBESTOS BANKR. REP., Apr. 2016, at 1, 3 (“Plaintiffs’ lawyers routinely advertise their ability to file trust claims ‘quickly and easily,’ and tell potential clients that paralegals evaluate potential trust claims and undertake the filing process. The evidence also demonstrates that trust claims are paid much more quickly than tort claims.”); Marc C. Scarcella & Peter R. Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, 14 MEALEY’S ASBESTOS BANKR. REP., Feb. 2015, at 32, 39 (“Unlike lawsuits filed in the tort system, the trust compensation process is intended to avoid the time, expense, and resource burden often associated with litigation.”).

One might assume that asbestos plaintiffs would obtain quick payments from the trusts while pursuing lengthier tort actions against solvent asbestos defendants that may have contributed to their harm. Instead, many plaintiffs intentionally delay their asbestos trust claims until their tort cases are resolved.¹³ This tactic allows plaintiffs to suppress evidence of trust-related exposures that defendants could use to impeach plaintiffs, apportion fault to bankrupt nonparties, or prove that bankrupt entities were the sole cause of a plaintiff's harm.¹⁴

Further, “[i]n cases where defendants have been able to overcome the attempts to suppress evidence of other exposures, it has become apparent that the product exposures set forth in multiple trust claims differ markedly from, and are inconsistent with, the exposures being asserted by plaintiffs in the tort system.”¹⁵

As this Article will demonstrate, there is a wealth of evidence proving that delayed trust filings and inconsistent claiming activity by asbestos plaintiffs are routine.

Consequently, juries in asbestos personal injury cases are often misled to believe that the defendants taking part in a trial were responsible for all or most of the plaintiff's harm.¹⁶ Jurors do not hear about all of a plaintiff's

13. 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 LITIG. REP.: ASBESTOS, Nov. 2015, at 28, 34 (“[T]wo prominent plaintiff attorneys in Garlock's bankruptcy gave sworn deposition testimony that it is their practice to wait until the tort case has concluded to file bankruptcy trust claims.”); Joseph W. Belluck et al., *The Asbestos Litigation Tsunami—Will It Ever End?*, 9 J.L. ECON. & POL'Y 489, 511 (2013) (quoting a New York City asbestos plaintiffs' lawyer as stating, “we do not file the bankruptcy claims until after the case is resolved”).

14. See Daniel J. Ryan & John J. Hare, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock's Bankruptcy*, 15 MEALEY'S ASBESTOS BANKR. REP., Aug. 2015, at 1, 2 (“[Asbestos claimants] attempt to shield their trust recoveries from disclosure in tort suits by concealing their trust claims or not filing the claims until the tort suit has concluded.”).

15. Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TUL. L. REV. 1071, 1088 (2014); see also 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, 1196–97 (2014) (“The absence of transparency continues to create a loophole that allows claimants to present contradictory theories of exposure and to manipulate causation evidence to fit the specific defendants named in the complaint or who are left standing at trial.”); Ryan & Hare, *supra* note 14, at 2 (“[T]here has been a recent focus on ensuring trust transparency in order to avoid the potential for abuse. The abuse occurs most often when claimants allege certain facts to support their trust claims and then allege inconsistent facts to support their tort claims. For instance, claimants have alleged exposure to the products of bankrupt entities in their trust filings, but then ignore or flatly deny those exposures when they target solvent defendants in tort litigation.”); William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 WIDENER L.J. 675, 679 (2014) (noting that claimants “make trust submissions based upon alleged exposure histories that are at stark variance from the tales they tell in the tort system”).

16. See LLOYD DIXON & GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION xiv (2011), https://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1104.pdf [<https://perma.cc/MD89-7NZ3>] (“When trust claims are not filed

exposures to asbestos, such as exposures to amphibole-containing thermal insulation that countless plaintiffs claimed as their primary source of exposure until those companies went bankrupt.¹⁷

Because juries lack full information, solvent defendants end up paying inflated settlements and awards that disadvantage those defendants and future plaintiffs.¹⁸ Plaintiffs' attorneys have essentially crafted a way to hold solvent asbestos defendants liable for more than their "fair share," contrary to the policy decision of the many states that have abolished or modified joint liability.¹⁹

In other states, juries are not able to allocate fault to nonparties, such as settling defendants, but defendants that lose at trial are given credit for pretrial settlements received by a plaintiff.²⁰ This approach allows a plaintiff to obtain a full recovery from a judgment defendant without receiving a windfall due to settlements received from others before trial.

Here, too, asbestos plaintiff lawyers have perfected a way to "double dip." By delaying the filing of asbestos trust claims until after an asbestos-related tort case is tried, judgment defendants are denied setoffs for those trust

prior to trial, defendants . . . might not have the information they need to assign fault to bankrupt firms."); *see also id.* at 52 ("Submission of trust claims after termination of the tort case is desirable for the plaintiff because doing so can avoid disclosure of information that could aid in assigning fault to the bankrupt firms.").

17. *See* Sarah Beth Jones et al., *2017 Asbestos Update: Deposition Strategies for Developing Alternative Exposures*, FOR DEF., June 2017, at 50, 51 ("Those bankrupt companies accounted for the bulk of the asbestos market. In fact, one bankrupt company alone manufactured more than 50 percent of the asbestos-containing insulation sold worldwide."); Scarcella et al., *supra* note 8, at 11 ("The results from the study of the Philadelphia asbestos cases indicate that while exposures to thermal insulation products remain prevalent among today's plaintiff population, the identification of exposure to those products is greatly diminished compared to the claims filed prior to the Bankruptcy Wave that had comparable (or even identical) exposure histories.").

18. *See* DIXON & MCGOVERN, *supra* note 16, at xv ("If . . . bankrupt firms are assigned less fault than would have been the case in the pre-reorganization scenario, total plaintiff compensation and payments by the defendants that remain solvent can increase. In the extreme, the plaintiff can receive full compensation in the tort system and then receive additional compensation from the trusts."); *see also* Editorial, *The Double-Dipping Legal Scam*, WALL ST. J., Dec. 26, 2014, at A12 ("[N]ow we're getting a glimpse of what has become a widespread tort-bar con. Court documents show the ugly specifics of 'double-dipping'—in which lawyers sue a company and claim its products caused their clients' disease, even as they file claims with asbestos trusts blaming other products for the harm. This lets them get double or multiple payouts for a single illness, with a huge cut for the lawyers each time.").

19. *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, 682 (2009) ("Many jurisdictions have abandoned the doctrine of pure joint and several liability in toxic-tort cases and have instead enacted systems for apportioning liability.").

20. *See* DIXON & MCGOVERN, *supra* note 16, at 6 ("In tort litigation more generally, defendants often settle before trial, and, because those settlements are intended to compensate the plaintiff for the alleged harm, states often allow credit to be provided to verdict defendants for money the plaintiff has already received.").

payments.²¹ A plaintiff can recover in full from a judgment defendant, then file trust claims and recover again from multiple trusts for the same injury.²²

Why should people care if gamesmanship by asbestos plaintiffs causes defendants to pay more than their fair share to a person dying of mesothelioma or some other serious asbestos-related disease? The short answer is that it is unfair to those defendants, undermines the integrity of the civil justice system, and may hurt future claimants. As an NPR story explained, “No one argues that people suffering from mesothelioma shouldn’t get compensated. Instead, it’s a matter of the right companies paying the right amounts.”²³

This Article argues for legislation, such as that enacted in many states, that requires asbestos plaintiffs to pursue quick compensation from the trusts and allows trust-related exposures and compensation to be properly accounted for in asbestos-related personal injury cases.²⁴ States with substantial asbestos litigation, such as California, Illinois, New York, and Missouri, need the legislation the most.

I. THE ASBESTOS TRUST CLAIM SYSTEM

Over 120 companies have declared bankruptcy due, at least in part, to asbestos-related liabilities.²⁵ In bankruptcy, many of these companies created trusts to pay for asbestos-related harms caused by exposure to their products.²⁶ Approximately sixty trusts presently in operation collectively

21. *See id.* at 56 (“When trust claims are not filed prior to trial, defendants will not receive setoffs for trust payments . . .”).

22. *See id.* at 52 (“Submission of trust claims after termination of the tort case is desirable for the plaintiff . . . because, although there are no setoffs for trust payments received after the tort case has terminated, there are setoffs to varying degrees for pre-verdict trust payments in some of the jurisdictions examined.”).

23. Michael Tomsic, *Case Sheds Light on the Murky World of Asbestos Litigation*, NPR (Feb. 4, 2014, 4:00 PM), <http://www.npr.org/2014/02/04/271542406/case-sheds-light-on-the-murky-world-of-asbestos-litigation> [<https://perma.cc/BF6L-N8ZB>].

24. Courts can accomplish similar reforms through case management orders. *See* Amended Pre-Trial Order No. 9 ¶ XIII(C)(7)(o)(2)(e), *In re* Mass. State Court Asbestos Litig., (Mass. Super. Ct. June 27, 2012) (“Within thirty days of trial, Plaintiff will serve a certification with the [court] that all known bankruptcy claims have been filed.”); *see also* 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, Apr. 8, 2015, at 1, 6.

25. *See Chart 1: Company Name and Year of Bankruptcy Filing (Chronologically)*, CROWELL & MORING LLP, <https://www.crowell.com/files/List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf> [<https://perma.cc/78WH-PRFL>] (last visited Aug. 24, 2018).

26. Section 524(g) of the Bankruptcy Code provides a mechanism for such companies to reorganize, channel their asbestos liabilities into trusts, and emerge from bankruptcy with immunity from asbestos-related tort claims. *See* 11 U.S.C. § 524(g) (2012); *see also* Shelley, *supra* note 15, at 675–76 (“These trusts answer 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.”).

hold billions of dollars to pay claimants.²⁷ The reorganized companies are immune from asbestos lawsuits.²⁸

Asbestos trusts “compensate claimants expeditiously and at a minimal cost.”²⁹ Further, because trust payment procedures are voted on “by the claimants through their attorneys, and the trusts often do not contest liability, it is much easier to collect against a bankruptcy trust than a solvent defendant.”³⁰ One commentator has “even likened the trusts to a ‘piggy bank’ which asbestos attorneys can dip into at will.”³¹

“In practice, a claimant seeking compensation from a trust must file a claim form, which . . . requires a statement of injury; information sufficient to establish asbestos exposure attributable to the trust’s predecessor . . . under penalty of perjury; and a determination as to whether the claimant is seeking expedited or individual review.”³² Along with the claim form, claimants submit documented evidence of exposure, such as a “work history, Social Security records, invoices, employer records, or deposition testimony of [a] claimant or coworkers taken in asbestos litigation,” and “medical reports or records sufficient to support a diagnosis for the specific disease being claimed or, if applicable, a copy of a death certificate.”³³ Claimants may “electronically file bulk claim submissions against multiple trusts.”³⁴

If a trust determines that a claim meets the criteria for payment, the trust will make an offer based on a percentage of the “scheduled value” for the

27. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3 (2011), <https://www.gao.gov/assets/590/585380.pdf> [<https://perma.cc/G7HD-BSUD>] (stating that, as of 2011, sixty asbestos personal injury trusts held assets totaling \$36.8 billion among them); see also DIXON & MCGOVERN, *supra* note 16, at 2.

28. See LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 3 (2010), https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf [<https://perma.cc/L5ZT-Y2DC>].

29. Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12 MEALEY’S ASBESTOS BANKR. REP., June 2013, at 33, 41; see also Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J. (Mar. 11, 2013, 5:55 AM), <https://www.wsj.com/articles/SB10001424127887323864304578318611662911912> [<https://perma.cc/M3GB-77T7>] (“Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.”).

30. Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 ADVOCATE 80, 80 (2007).

31. *Id.* (quoting Cardozo School of Law Professor Lester Brickman); see also Thomas M. Wilson, *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, 13 MEALEY’S LITIG. REP.: ASBESTOS, May 7, 2014, at 1, 7 (“[T]he trusts, designed by the same individuals who are now submitting claims, contain ‘loopholes’ allowing for ease of payment, often without the need for any real proof.”).

32. S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299, 317–18 (2013).

33. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 27, at 18.

34. Scarcella & Kelso, *supra* note 29, at 42.

alleged injury.³⁵ The general counsel of the Manville Trust has testified that the trust has no backlog and that an offer can be made within days after submission.³⁶ After an offer is accepted, “payments tend to be made quickly.”³⁷

The U.S. Government Accountability Office (GAO) estimates that approximately 97–98 percent of trust claims are processed on this expedited basis.³⁸ Only a small percentage of claimants reject scheduled payment offers and seek individual review in the hopes of obtaining more compensation.³⁹ It is common for claimants to receive multiple trust payments since each trust operates independently and workers were often exposed to different asbestos products.⁴⁰

II. ASBESTOS TRUST CLAIM MANIPULATION AND INCONSISTENT CLAIMING

Plaintiffs can file claims with asbestos trusts and bring personal injury lawsuits against solvent defendants.⁴¹ In a bankruptcy case involving gasket and packing manufacturer Garlock Sealing Technologies, LLC., a typical mesothelioma plaintiff’s recovery was estimated to be “between \$1 and \$1.5 million, including an average of \$560,000 in tort recoveries and about \$600,000 from 22 Trusts.”⁴²

By delaying asbestos trust filings until a personal injury case is resolved, a plaintiff can suppress evidence of trust-related exposures that defendants could use at trial, including evidence that would attach fault to a former insulation defendant. Delayed trust claim submissions also can deny judgment defendants setoffs they would otherwise be entitled to receive for trust payments to plaintiffs. These practices were described in a watershed

35. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 27, at 17; *see also* Brown, *supra* note 32, at 318.

36. *See* Deposition of Jared Garelick at 33:10–13, Cummings v. Gen. Elec. Co., No. 13-CI-006374 (Ky. Cir. Ct. Dec. 14, 2015) (“Claims are processed as they are submitted [T]he trust doesn’t have a real backlog. Things are done in realtime [sic]. So as soon as a claim is submitted, it gets processed . . .”).

37. Brown, *supra* note 10, at 555.

38. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 27, at 20 (stating that most claims are processed on an expedited basis with only “[2] to 3 percent of claims . . . processed through the individual review process”).

39. *See* Brown, *supra* note 10, at 554; Deposition of Garelick, *supra* note 36, at 37:2–38:1.

40. Brickman, *supra* note 15, at 1078–79.

41. *See* LLOYD DIXON & GEOFFREY MCGOVERN, BANKRUPTCY’S EFFECT ON PRODUCT IDENTIFICATION IN ASBESTOS PERSONAL INJURY CASES iii (2015), https://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR907/RAND_RR907.pdf [<https://perma.cc/HP6P-3VZJ>] (“Plaintiffs now often receive compensation both from the trusts and through a tort case.”); *see also* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 27, at 15 (“Although 60 companies subject to asbestos-related liabilities have filed for bankruptcy under Chapter 11 and established asbestos bankruptcy trusts in accordance with § 524(g), asbestos claimants can also seek compensation from potentially liable solvent companies (that is, a company that has not declared bankruptcy) through the tort system.”).

42. *In re* Garlock Sealing Tech., LLC., 504 B.R. 71, 96 (Bankr. W.D.N.C. 2014).

opinion, *In re Garlock Sealing Technologies, LLC*,⁴³ by a federal bankruptcy judge in Garlock's bankruptcy.⁴⁴

Historically, Garlock was a relatively small player in the asbestos tort system and was "very successful in settling (and rarely trying)" asbestos personal injury lawsuits filed against it.⁴⁵ After virtually all thermal insulation defendants exited the tort system by the early 2000s, Garlock became a "focus of plaintiffs' attention" because it was still solvent.⁴⁶ Garlock faced challenges defending itself in this new environment because "evidence of plaintiffs' exposure to other asbestos products often disappeared."⁴⁷ The judge in *Garlock* said that this happened because of "the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."⁴⁸ The judge concluded that the missing evidence "had the effect of unfairly inflating the recoveries against Garlock."⁴⁹

For example, in a California case that resulted in a \$9 million verdict for a former Navy machinist mate, Garlock attempted to show that the plaintiff had been exposed to Unibestos amphibole insulation manufactured by Pittsburgh Corning.⁵⁰ The plaintiff "did not admit to any exposure from amphibole insulation . . . and claimed that 100% of his work was on gaskets," while his lawyer told the jury there was no Unibestos insulation on his ship.⁵¹ Post-verdict, however, the plaintiff's lawyers filed fourteen asbestos trust claims, including "several against amphibole insulation manufacturers."⁵² "And most important," said the judge in *Garlock*, "the same lawyers who represented to the jury that there was no Unibestos insulation exposure had, seven months *earlier*, filed a ballot in the Pittsburgh Corning bankruptcy that certified under 'penalty of perjury' that the plaintiff had been exposed to Unibestos insulation."⁵³

In a Philadelphia case that Garlock settled for \$250,000, the plaintiff "did not identify exposure to any bankrupt companies' asbestos products."⁵⁴ Further, in answers to interrogatories, the plaintiff's lawyers said the plaintiff

43. 504 B.R. 71 (Bankr. W.D.N.C. 2014).

44. *See id.* at 82–87; *see also* Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp., No. 13-1639, 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.").

45. *In re Garlock*, 504 B.R. at 73.

46. *Id.*

47. *Id.* at 73; *see also id.* at 84, 86.

48. *Id.* at 84.

49. *Id.* at 86; *see also id.* at 94 (stating that the withholding of exposure evidence by asbestos plaintiffs' counsel was "widespread and significant").

50. *See id.* at 84.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

had “no personal knowledge” of such exposure.⁵⁵ Six weeks earlier, however, “those same lawyers had filed a statement in the Owens Corning bankruptcy case, sworn to by the plaintiff, that stated that he ‘frequently, regularly and proximately breathed asbestos dust emitted from Owens Corning . . . asbestos-containing pipe covering.’”⁵⁶ In total, the plaintiff’s lawyers “failed to disclose exposure to 20 different asbestos products for which [the plaintiff] made Trust claims,” including fourteen claims supported by sworn statements that “contradicted the plaintiff’s denials in the tort discovery.”⁵⁷

The *Garlock* court also described a New York case that Garlock settled during trial for \$250,000.⁵⁸ The plaintiff denied any exposure to insulation products, but after his tort case was settled, his lawyers filed twenty-three trust claims on his behalf, including eight trust claims that were filed within twenty-four hours after the settlement with Garlock was completed.⁵⁹

In another California case that Garlock settled for \$450,000, a former sailor denied that he had ever seen anyone installing or removing pipe insulation on his ship.⁶⁰ After the plaintiff settled with Garlock, his lawyers filed eleven trust claims on his behalf, including seven claims “based on declarations that he personally removed and replaced insulation and identified, by name, the insulation products to which he was exposed.”⁶¹

Since the *Garlock* decision was issued, numerous reports have confirmed that “[w]e are now past the time when [the case examples in *Garlock*] can be referred to as mere anomalies.”⁶² For instance, a 2015 study of almost 1850 mesothelioma lawsuits resolved by industrial product manufacturer Crane Co. from 2007 through 2011 revealed “a similar pattern of systematic suppression of trust disclosures [as] was documented in the *Garlock* bankruptcy.”⁶³ Utilizing publicly available discovery data from *Garlock*’s bankruptcy case, the study found that in cases where Crane Co. was a codefendant with *Garlock*, plaintiffs filed an average of eighteen trust claims.⁶⁴ The study also found that “80% of these claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings.”⁶⁵

A separate 2015 report revealed additional instances of “inconsistent claiming behavior and allegations between the tort and trust systems” by

55. *Id.* at 85.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.*

60. *See id.*

61. *Id.*

62. Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 AM. J. TRIAL. ADVOC. 479, 488 (2014).

63. Ableman, *supra* note 13, at 28.

64. *See id.*

65. *Id.*

plaintiffs.⁶⁶ For example, a West Virginia plaintiff recalled the products of more than a dozen noninsulation defendants but could not remember the asbestos-containing thermal insulation products to which he alleged exposure.⁶⁷ Plaintiff's counsel eventually "filed claims against 20 trusts, a majority of which represent predecessor companies that once engaged in the manufacturing, distribution, or installation of asbestos-containing thermal insulation products."⁶⁸

A 2016 study documented similar issues in Newport News, Virginia.⁶⁹ The study found that plaintiffs' delayed trust filings in the cases sampled, which denied tort defendants access to "alternative exposure histories" present in the trust submissions.⁷⁰ Further, Newport News plaintiffs "routinely deny or are unable to recall many trust-related exposures during personal injury cases" but nonetheless later file claims with those trusts.⁷¹

A 2017 study of asbestos cases recently filed in Illinois provides further proof that "the failure by plaintiffs and their counsel to produce trust-related exposure evidence in a timely fashion in asbestos cases . . . appears to be systemic."⁷² The study analyzed a sample of one hundred cases and found that only eight plaintiffs disclosed having made trust claim submissions, even though the average plaintiff in the sample could have made sixteen trust claims and thirty-seven of the plaintiffs could have made more than twenty trust claims.⁷³

More recently, a November 2017 bankruptcy filing by Bestwall LLC, an affiliate of Georgia-Pacific, LLC, described other instances where "asbestos plaintiffs, at a minimum, inconsistently and selectively disclosed exposure evidence to support or strengthen their cases against non-bankrupt companies."⁷⁴ 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."⁷⁵ The plaintiff's asbestos trust and bankruptcy filings "told an entirely different story."⁷⁶ He

66. PETER KELSO & MARC SCARCELLA, U.S. CHAMBER INST. FOR LEGAL REFORM, *THE WAITING GAME: DELAY AND NON-DISCLOSURE OF ASBESTOS TRUST CLAIMS* 8 (2015), http://www.instituteforlegalreform.com/uploads/sites/1/TheWaitingGame_Pages.pdf [<https://perma.cc/P2B7-HMQB>].

67. *Id.* at 9.

68. *Id.*

69. See MARK A. BEHRENS, U.S. CHAMBER INST. FOR LEGAL REFORM, *DISCONNECTS AND DOUBLE-DIPPING: THE CASE FOR ASBESTOS BANKRUPTCY TRUST TRANSPARENCY IN VIRGINIA* (2016), http://www.instituteforlegalreform.com/uploads/sites/1/DisconnectsDoubleDipPaper_WebReady.pdf [<https://perma.cc/CB89-5U6E>].

70. *Id.* at 3.

71. *Id.*

72. MARK A. BEHRENS ET AL., ILL. CIVIL JUSTICE LEAGUE, *ILLINOIS ASBESTOS TRUST TRANSPARENCY: THE NEED TO INTEGRATE ASBESTOS TRUST DISCLOSURES WITH THE ILLINOIS TORT SYSTEM* 3 (2017), <https://lrany.org/wp-content/uploads/2017/06/Illinois-Asbestos-Trust-Transparency-Report.pdf> [<https://perma.cc/WF5S-EP6B>].

73. *Id.* at 12.

74. Informational Brief of Bestwall LLC at 20, *In re Bestwall LLC*, No. 17-31795 (Bankr. W.D.N.C. Nov. 2, 2017), 2017 WL 4988527.

75. *Id.* at 28.

76. *Id.* at 29.

“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.”⁷⁷

Additional inconsistencies regarding exposure history statements made by asbestos plaintiffs in tort cases and in trust claims have been uncovered in individual cases. For instance, a Cleveland judge barred a prominent California asbestos plaintiffs’ firm from his court after he found that the firm’s allegations in court conflicted with documents submitted to bankruptcy trusts as to how their client had developed cancer.⁷⁸ An order by the judge requiring the plaintiff to produce trust claims materials “effectively opened a Pandora’s box of deceit.”⁷⁹ The judge later said, “I never expected to see lawyers lie like this It was lies upon lies upon lies.”⁸⁰

III. STATE ASBESTOS TRUST TRANSPARENCY LAWS

Legislatures are responding to these problems by providing courts with greater information regarding plaintiffs’ trust-related exposures and claims. As of this writing, fifteen states have enacted asbestos trust claim transparency laws.⁸¹

These laws generally require trust claims now routinely submitted after trial to be filed before trial and disclosed.⁸² 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.⁸³ 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.⁸⁴ Should the court find that there is a sufficient basis for the

77. *Id.*

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

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

80. *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”).

81. *See* ARIZ. REV. STAT. § 12-782 (2018); IOWA CODE §§ 686A.1–9 (2018); MICH. CODE ANN. § 600.3010–.3016 (2018); MISS. CODE §§ 11-67-1 to -15 (2018); N.D. CENT. CODE §§ 32-46.1-01 to -05 (2018); OHIO REV. CODE ANN. §§ 2307.951–.954 (West 2018); OKLA. STAT. tit. 76, §§ 81–89 (2018); S.D. CODIFIED LAWS §§ 21-66-1 to -11 (2018); TENN. CODE §§ 29-34-601 to -609 (2018); TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.051–.058 (West 2018); UTAH CODE §§ 78B-6-2001 to -2010 (2018); W. VA. CODE §§ 55-7F-1 to -11 (2018); WIS. STAT. § 802.025 (2018); N.C. SESS. L. 2018-4; H.B. 2457 (Kan. 2018). In 2017, the National Conference of Insurance Legislators (NCOIL) adopted model legislation mirroring West Virginia’s trust transparency law. *See generally* ASBESTOS BANKRUPTCY TRUST CLAIMS TRANSPARENCY MODEL ACT (NAT’L CONFERENCE OF INS. LEGISLATORS 2017), <http://ncoil.org/wp-content/uploads/2017/07/FINAL-asbestos.pdf> [<https://perma.cc/MJ3L-WYLA>].

82. *See, e.g.*, IOWA CODE § 686A.3.

83. *See id.* § 686A.4.

84. *See id.*

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.⁸⁵ 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.⁸⁶ The legislation also provides that trust claims materials are admissible at trial.⁸⁷

By requiring trust claims to be filed before trial, the legislation allows the tort system to properly account for all of a plaintiff's sources of exposure to asbestos and compensation. Juries in states that permit apportionment of fault to nonparties have more information and can place responsibility for an injury where it belongs. In states that provide judgment defendants with setoffs for pretrial settlements, plaintiffs will continue to recover from defendants found liable at trial but will no longer obtain windfall recoveries by "double dipping."

Wrongdoers are held fully accountable for any harm they cause. The legislation does not let any defendant escape responsibility for a harm it caused.

Without reform, today's asbestos defendants will continue to pay inflated settlements and judgments in many cases. This is unfair and unsound. As the *Garlock* case demonstrates, excessive liability can lead to bankruptcy⁸⁸ and "diminish resources that must remain available to pay legitimate future claims."⁸⁹ Further, plaintiff recoveries are substantially delayed while companies are in bankruptcy.⁹⁰

Greater transparency with respect to asbestos bankruptcy trust claims would also benefit future claimants by helping defendants identify inconsistencies that may signal an improper claim.⁹¹

85. *See id.*

86. *See id.*

87. *See id.* § 686A.5.

88. *See In re Garlock Sealing Tech., LLC.*, 504 B.R. 71, 86 (Bankr. W.D.N.C. 2014); *see also* Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 386 (1993) (economic dislocation drives firms to bankruptcy with substantial burdens on the "shareholders, employees, pensioners, and communities of asbestos defendants"); 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 liabilities and bankruptcies on employment, retirement security, government finances, and other economic factors).

89. John J. Hare & Daniel J. Ryan, *Sunlight is the Best Disinfectant: Solutions to the Concealment of Asbestos Trust Filings in Tort Litigation*, FOR DEF., Apr. 2016, at 55, 71.

90. *See* Stengel, *supra* note 1, at 260–61 ("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.").

91. A *Wall Street Journal* review of trust claims and court cases of roughly 850,000 persons who filed Manville Trust claims since the late 1980s until as recently as 2012 "found

Finally, by accelerating the timing of trust claim filings, claimants will be able to obtain trust payments more quickly, rather than waiting, perhaps years, for a tort claim to settle or go to trial. Plaintiffs also avoid the risk that waiting to file a trust claim could lead to a smaller trust payment because of a reduction in the trust's payment percentage.⁹²

IV. OPPONENT MYTHS DEBUNKED

During debate on state asbestos trust transparency legislation, opponents have offered various myths that have been debunked in hearings and floor debate. Some of the most frequently heard arguments raised by opponents are discussed below along with responses to those arguments.

A. Transparency Legislation Does Not Cause Delays

When Ohio's 2012 first-of-its-kind asbestos trust transparency legislation was being debated, opponents claimed that the legislation would result in endless delays and deny living plaintiffs their opportunity to be heard in court.⁹³ These arguments have proven to be unfounded. The Ohio law has resulted in "no appreciable delay in the prosecution of cases."⁹⁴

When Texas considered similar legislation in 2015, plaintiffs' attorneys again raised concerns that the requirements placed on plaintiffs would cause significant delays. A partner with an influential asbestos plaintiffs' law firm testified that requiring plaintiffs to file trust claims before proceeding to trial would "prevent dying mesothelioma victims from having their day in court."⁹⁵

Texas plaintiffs' attorneys now readily admit that delays have not happened. At a September 2017 panel discussion held by the University of North Texas at Dallas College of Law, a partner of a significant asbestos plaintiffs' firm stated, "It doesn't really bother me that the act exists."⁹⁶ A founding partner in another major asbestos plaintiffs' firm described the

numerous apparent anomalies." Searcey & Barry, *supra* note 29. For instance, more than 2000 Manville Trust claimants claimed occupational exposure to asbestos before the age of twelve. *Id.* Hundreds of others claimed to have mesothelioma but alleged lesser cancers to other trusts or in court cases. *See id.*

92. Brown, *supra* note 10, at 577 (noting a "recent surge in payment percentage reductions"); Hare & Ryan, *supra* note 12, at 2 (stating that "trusts today pay, on average, approximately 50% of what they paid only 7 years ago").

93. *See* 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 6 (2017), http://www.instituteforlegalreform.com/uploads/sites/1/WatchingItWorkpaper_Web.pdf [<https://perma.cc/KS8P-BA3L>].

94. *See id.* at 17.

95. 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).

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

impact of the Texas law on the resolution of cases as “largely inconsequential.”⁹⁷

West Virginia enacted trust transparency legislation in 2015. Since that time, asbestos case filings have increased almost 25 percent in Kanawha County (which includes Charleston).⁹⁸ Almost 40 percent of West Virginia plaintiffs in 2017 were nonresidents.⁹⁹ One would not expect forum-shopping asbestos plaintiffs to choose the Mountaineer State in large numbers if arguments raised against trust transparency had merit.

In fact, rather than cause delays, trust transparency laws cure delays that exist today because of the tactics of asbestos plaintiffs’ lawyers. As discussed, plaintiffs’ attorneys routinely delay the filing of trust claims while tort cases are pending. This may produce a litigation advantage, but it can come at the expense of denying a dying claimant the opportunity to recover substantial trust claim payments while that person is alive. Trust transparency laws speed trust claim payments to claimants and, by streamlining discovery, may make asbestos tort litigation more efficient.¹⁰⁰

B. Alternative Exposure Histories Are Unavailable in Discovery

Another argument frequently heard in debates about trust transparency is that reform is unnecessary because information about a plaintiff’s exposures should be available through ordinary discovery. Theoretically, if plaintiffs were forthcoming in interrogatory responses and in deposition answers about all exposures to asbestos, trust claim information would simply reinforce those other admissions. But when plaintiffs are asked about nonparty exposures they routinely say, “I don’t recall.”¹⁰¹

97. *Id.* (quoting Jeffrey Simon, a partner in the Dallas office of asbestos plaintiffs’ firm Simon Greenstone Panatier Bartless, PC).

98. See KCIC, ASBESTOS LITIGATION: 2017 YEAR IN REVIEW 4 (2018), <https://www.kcic.com/asset/pdf/KCIC-2017-AsbestosReport.pdf> [<https://perma.cc/8PWQ-K27U>].

99. Chris Dickerson, *Kanawha Sees 24 Percent Increase in Asbestos Filings*, W. VA. REC. (Mar. 22, 2018), <https://wvrecord.com/stories/511368344-kanawha-sees-24-percent-increase-in-asbestos-filings> [<https://perma.cc/Q75F-MTDT>].

100. See Hare & Ryan, *supra* note 12, 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.”).

101. See DIXON & MCGOVERN, *supra* note 41, at xii (finding that bankruptcy reduces the likelihood that interrogatories and depositions in subsequent tort cases will identify exposure to the asbestos-containing product of the bankrupt entity); 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.”); Scarcella et al., *supra* note 8, at 11.

Since asbestos plaintiffs are often testifying about exposures that occurred many decades prior, they often rely on their lawyers to refresh their recollection.¹⁰² Because asbestos personal injury cases are focused on solvent defendants, those are the only exposures the plaintiff's lawyer has an incentive to discuss with the client.¹⁰³ The result is that discovery in tort cases often yields incomplete information about a plaintiff's trust-related exposures.¹⁰⁴

Further, the vast majority of asbestos trusts—65 percent according to one expert¹⁰⁵—have provisions that facilitate inconsistent claiming activity.¹⁰⁶ For instance, many trusts include language that “expressly authorizes claimants to assert exposure histories that are inconsistent with representations made in the tort system.”¹⁰⁷ Benjamin N. Cardozo School of Law Professor Lester Brickman has explained that this language “vitiates any consequences of failing to identify product exposures in responses to interrogatories, depositions, and trial testimony in tort cases.”¹⁰⁸

C. Wrongdoers Are Held Fully Accountable

Some opponents have called asbestos trust transparency legislation a “bailout” for the “asbestos industry.” This claim is particularly disingenuous because a purpose of trust transparency legislation is to properly account for the exit of the “asbestos industry” from the tort system. Companies that used to be seen as peripheral defendants and newer defendants are “now bearing the majority of the costs of awards relating to decades of asbestos use.”¹⁰⁹

Perhaps more importantly, the legislation leaves wrongdoers fully accountable for any harm they cause. Allowing a jury to hear about all of a

102. See Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 844–46 (2005) (discussing witness preparation techniques for product identification in asbestos cases).

103. See BEHRENS, *supra* note 69, at 16 (describing how an asbestos plaintiff admitted his lawyers showed him photographs of solvent defendants' products before his deposition but no photographs of insulation products made by bankrupt companies).

104. See *id.* at 14 (reporting on a plaintiff who reached settlements with “16 asbestos trusts—many more trust-related products than [he] recalled during three days of depositions”).

105. See *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.).

106. See Kimberly Strassel, Commentary, *Trusts Busted*, WALL ST. J. (Dec. 5, 2006), <https://www.wsj.com/articles/SB116527814374340591> [<https://perma.cc/H5EX-XCNB>] (“Many trusts are run by the very lawyers who created them; that is, once the trust is created, the defendant company is no longer involved with claims, and the trial lawyers divvy up the money.”).

107. Brown, *supra* note 10, at 562.

108. Brickman, *supra* note 15, at 1105; see also Scarcella & Kelso, *supra* note 12, at 45 (“[T]he trusts do not seem to be concerned with inconsistent allegations that may be made in the underlying tort case as evident by inclusion of ‘Sole Benefit’ clauses in many [Trust Distribution Procedures].”).

109. AM. ACAD. OF ACTUARIES' MASS TORTS SUBCOMM., OVERVIEW OF ASBESTOS CLAIMS ISSUES AND TRENDS 3 (2007), https://www.actuary.org/pdf/casualty/asbestos_aug07.pdf [<https://perma.cc/6TVP-CV8X>].

plaintiff's exposures to asbestos does not let any defendant off the hook for a harm it may have caused.

D. Trust Claims Are Not Settlement Agreements

Plaintiffs' attorneys sometimes assert that trust claims are settlement agreements and should, therefore, remain confidential.¹¹⁰ A former Delaware judge who supports asbestos trust transparency has explained the fallacy of this argument:

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.¹¹¹

An academic who is an expert on asbestos bankruptcy issues has also said that if a claimant submits the information the trust requests and is not pursuing an extraordinary claim value, the administrators of the trust "can take that information, they can process it, and they can assign a value according to a grid that has been established under the trust issue distribution procedures. Once that is done there is really no negotiation, there is no settlement discussion to take place."¹¹² Courts generally take the view that a trust claim submission is "more analogous to a complaint than an offer of settlement or compromise" for purposes of discovery.¹¹³

110. *Shepherd v. Pneumo-Abex*, MDL No. 875, Civ. No. 09-91425, 2010 WL 3431633, at *1 (E.D. Pa. Aug. 30, 2010) ("Plaintiff objects to production of the information based on Federal Rule of Evidence 408, which prohibits the admissibility of information regarding settlements and negotiations 'to prove liability for, invalidity of, or amount of a claim.'").

111. Peggy Ableman, "Me Thinks the Lawyers Doth Protest Too Much"—a Response to "The Irony of Tort Reform," 32 MEALEY'S LITIG. REP.: ASBESTOS, Mar. 22, 2017, at 20, 28–30 (footnotes omitted).

112. Belluck et al., *supra* note 13, at 505 (quoting S. Todd Brown, Professor, University at Buffalo School of Law).

113. *See Shepherd*, 2010 WL 3431633 at *2; *see also* *Sheppard v. Liberty Mut. Ins. Co.*, No. 16-2401, 2017 WL 318470, at *3 (E.D. La. Jan. 23, 2017) ("Federal and state courts have routinely held that claims submitted to asbestos bankruptcy trusts are discoverable."); *Volkswagen of Am., Inc. v. Superior Court*, 43 Cal. Rptr. 3d 723, 724, 733 (Ct. App. 2006) (stating that documents submitted to bankruptcy trusts by a plaintiff's attorney in support of claims for compensation for alleged asbestos-related injuries are normally discoverable in similar litigation against another entity).

E. Veterans Groups Have Supported Trust Transparency

Lastly, it is important to clarify mixed reactions by veterans groups to asbestos trust transparency legislation. Some veterans organizations aligned with the plaintiffs' bar have opposed such legislation. These groups might have the view that asbestos plaintiffs should grab everything they can get now, even if it means that a defendant pays more than its fair share.

On the other hand, other veterans organizations have supported trust transparency legislation. These groups take the longer view. They appreciate that if defendants are forced to pay more than their fair share, then some will join the over 120 companies that have declared bankruptcy due to asbestos-related liabilities.¹¹⁴ That is not sound long-term policy for defendants or plaintiffs.¹¹⁵

Veterans groups that support the legislation also appreciate that requiring the timely filing of trust claims means earlier trust payments to veterans and a lower risk that trust payment percentages may shrink over time.¹¹⁶

CONCLUSION

Delayed asbestos trust filings and inconsistent claiming activity by plaintiffs are routine in asbestos cases today. This occurs because of the disconnect that exists in many states between the tort and asbestos trust systems. Defendants pay more than their fair share as a result.

Reform is needed to provide fairness for defendant companies and help preserve assets for future asbestos claimants. Excessive liability in asbestos

114. See Brown, *supra* note 32, at 306 (“Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.”).

115. See Memorandum from Harold M. Burke Jr., State Adjutant, Veterans of Foreign Wars of the U.S., Dep’t of N.Y. Headquarters (on file with author) (“Thirty percent of mesothelioma victims are veterans. The practice of double dipping based on false asbestos exposure claims endangers not only the trust funds designed to compensate victims but it drains the assets of private businesses who are the subject of these false claims.”); Letter from Steve Chesna, State Commander, AMVETS Dep’t of Wis., to Senator Lasee (Jan. 28, 2014) (on file with author) (“Contrary to what has been claimed, [trust transparency legislation] will not harm veterans. AMVETS believe [the legislation] will help veterans by ensuring that valuable resources are not depleted by unscrupulous lawyers convincing clients to double and triple dip for one individual for one claim. This bill would also protect Wisconsin businesses from unfairly having to pay more than their fair share.”); Letter from Royce Loesch, State of S.D. Am. Legion, to Governor Dennis Daugaard (on file with author) (stating that trust transparency legislation “will help veterans obtain payments from asbestos trusts more quickly than they experience today. It will also help reduce improper claiming practices that deplete assets needed to compensate veterans.”); Email from Mark Sutton, State of Mich. Am. Legion, to Senator Jim Stamas (Mar. 17, 2018) (on file with author) (supporting legislation that “provides the transparency all parties are seeking”).

116. See Belluck et al., *supra* note 13, at 509 (reporting that some plaintiff lawyers believe that they “have a duty to file [trust claims] quickly because if [they] do not then the payment percentages are going to go down and [their] clients are going to get less money from the trusts”); Hare & Ryan, *supra* note 12, at 2 (“[T]he current system in which plaintiffs delay filing trust claims substantially harms veterans and other plaintiffs because it not only deprives them of the quick and easy compensation paid by trusts but it also risks reduced recoveries if an applicable trust reduces its payments while a veteran delays filing his or her claim.”).

cases has led to scores of bankruptcies, and the litigation shows no sign of abating.¹¹⁷ Further, when companies are driven into bankruptcy, asbestos claimants may have to wait years for the creation of a trust. The lack of transparency regarding potential inconsistent claiming activity also may hide fraud or other abuses that deplete defendant and trust assets.

Finally, when trust claim filings are delayed by plaintiffs' lawyers, plaintiffs with serious harms such as mesothelioma are deprived of what can be substantial trust recoveries while they are alive—money that could bring peace of mind to those persons and their families.

States should address these issues by enacting legislation—as many have done—to require asbestos plaintiffs' lawyers to obtain prompt compensation from the trusts and allow trust-related exposures and compensation to be properly accounted for in asbestos-related personal injury cases.

117. A 2016 review of asbestos-related liabilities reported to the U.S. Securities and Exchange Commission by more than 150 publicly traded companies found that “[f]ilings remained flat at the levels observed since 2007.” MARY ELIZABETH STERN & LUCY P. ALLEN, NERA ECON. CONSULTING, RESOLUTION VALUES DROPPED 35% WHILE FILINGS AND INDEMNITY PAYMENTS CONTINUED AT HISTORICAL LEVELS 1 (2016), http://www.nera.com/content/dam/nera/publications/2017/PUB_Asbestos_Litigation_Trends_0217.pdf [<https://perma.cc/6L3X-AB3B>]; *see also* BIGGS ET AL., *supra* note 9, at 1 (stating that mesothelioma claim filings have “remained near peak levels since 2000”).