

The Need For Transparency Between the Tort System and Section 524(g) Asbestos Trusts

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Since 2000, dozens of companies have sought to use the trust provisions of §524(g) of the Bankruptcy Code to globally resolve their asbestos liabilities.¹ At this point, the litigation has forced over 85 employers into bankruptcy,² “including nearly all major manufacturers of asbestos-containing products”³—the companies that historically were considered to be the most culpable by reason of the types of products that they sold (i.e., thermal insulation products).⁴

As the recent bankruptcy proceedings conclude, 524(g) trusts with assets exceeding \$30 billion have begun (or will soon begin) receiving, evaluating, and paying claims.⁵ Together with trusts created through earlier bankruptcies in the 1980s and 1990s, these trusts collectively represent a major source of funding for asbestos claimants that exists outside the tort system. Trusts already are paying hundreds of thousands of dollars to the most seriously injured victims, those suffering from mesothelioma,⁶ and will pay even more as additional trusts begin operating.⁷

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In response to the departure of the major asbestos product manufacturers from the tort system, plaintiffs' counsel began targeting defendants whose involvement with asbestos was increasingly peripheral with regard to market share and/or the types of products manufactured (such as products where only minor amounts of asbestos was used or where any asbestos ordinarily was completely encapsulated).⁸ Notwithstanding these defendants' often de minimus contribution to claimants' exposure, claimants have argued, with great success, that they should face liability because their conduct was a "substantial contributing factor" in causing the claimants' injuries.⁹ Claimants have further sought to use the joint and several liability rules of a number of states to hold these defendants liable for their entire award, even where such defendants' respective shares of liability were comparatively minor in terms of dust exposure. Recent tort reform efforts have resulted in some limitation on these unfair joint and several liability rules in a number of key states,¹⁰ but the plaintiff bar's leverage against de minimus defendants through the use of joint and several liability principles has by no means disappeared.

Given that the 524(g) trusts are answering for the liability of many of the most culpable companies and are, in fact, paying significant sums, the emergence and expansion of these alternative compensation mechanisms should result in a significant reduction in the liabilities of the remaining solvent defendants in the tort system. Yet, as has been the case throughout much of the history of asbestos litigation in the U.S., attempts to "game the system" are inhibiting efforts to achieve fairness in allocating liability to defendants.

The asbestos plaintiffs' bar has gone to significant lengths to try to prevent defendants in the tort system from obtaining information concerning both the claims that plaintiffs are making against the trusts and the details of those trust claims, as well as the amounts that these plaintiffs have received or will receive from the trusts. A clear goal of such efforts is to hamper the ability of defendants in the tort system to obtain judgment reductions, credits, and/or offsets that they should in all fairness receive in light of the relative culpability of the bankrupt entities and the payments being made to victims by their trusts.

Another effect of this lack of transparency is to encourage dishonest claiming practices such as those uncovered by an Ohio trial court in *Kananian v. Lorillard Tobacco Company*,¹¹ discussed below. There, discovery from 524(g) trusts demonstrated a pattern of repeated trust submissions that asserted claims about the plaintiff's exposure history that were inconsistent, indeed mutually contradictory, with each other and with the claims that were being asserted in the tort system.¹² The ap-

parent motive for these false representations was to induce each 524(g) trust to conclude that the victim had been exposed to products manufactured or distributed by the trust's predecessor company and therefore was qualified to receive compensation as a beneficiary of that trust.¹³ Such behavior becomes more tempting given trust provisions permitting increased recovery where a claimant alleges that his injury was primarily induced by exposure to one company's products.

This article analyzes the causes of the disconnect between these parallel systems of compensation for asbestos victims from both the 524(g) trust and the tort sides of the divide, the resulting repercussions for defendants in the tort system, and the steps that should be taken to prohibit, or at least minimize, overpayments by solvent tort defendants and double recoveries by current claimants (all of which ultimately threatens the ability of future claimants to receive full compensation for their claims). The first section explores the ways in which many trusts are purposefully designed and operated to stymie efforts to obtain claims and payment information concerning claimants who are also suing solvent defendants in the tort system, thereby undermining the integrity of the judicial process. This section shows how this lack of transparency is used not only to unfairly increase the financial burden upon solvent defendants but to shield dishonest claiming practices where claimants try to recover seriatim from trusts and tort defendants based upon falsified claims of exposure history.

While the 524(g) trusts operate in a privately managed system outside the tort arena, plaintiffs' lawyers are able to exploit the peripheral asbestos defendants in the civil tort system. The second section of this article examines the joint and several liability rules of several key asbestos jurisdictions, highlighting recent tort reforms designed to normalize the apportionment of liability between solvent asbestos defendants and those in bankruptcy. This section also addresses the right of tort defendants to seek and obtain a reduction of their own liabilities by taking into account the relative fault of bankrupt companies as well as the substantial payments that are being made by trusts established to answer for these entities. The various means by which such reductions are being or could be accomplished are discussed, including inclusion of bankrupt entities on verdict sheets for purposes of assessing fault, judgment reduction credits for amounts paid by trusts, and whether a tort defendant's putative ability to pursue an indemnity or contribution claim against a trust constitutes a realistic avenue for reallocating liability.

After shedding light on the apparent disconnect between the civil liability and 524(g) trust compensation systems, the third section focuses on efforts by tort defendants to bridge the information gap. Defendants

frequently attempt to obtain discovery concerning claims that tort plaintiffs have made or will make against trusts and the amount of payments from the trusts. This section analyzes decisional law as well as the salutary emerging trend of courts requiring disclosure of such information by asbestos claimants.

The final section of this article proposes a number of reforms to improve transparency between the trust and the tort systems. This section addresses ways to remedy the lack of communication between and among trusts and the courts to ensure that the tort liability of solvent defendants is not artificially inflated by the absence of the bankrupt companies from the tort system. This section further proposes that additional steps be implemented to discourage attempts by plaintiffs to improperly collect from defendants and trusts by embellishing or falsifying their asbestos exposure histories. Lastly, this article shows why it is inappropriate for bankruptcy courts to interfere in issues concerning state court discovery from 524(g) trusts by purporting to retain postconfirmation jurisdiction over the issuance of subpoenas to such trusts in violation of fundamental limitations upon the scope of bankruptcy jurisdiction.

I. FOXES IN THE HENHOUSE—HOW CONTROL OF THE TRUST FORMATION PROCESS BY CLAIMANTS' COUNSEL LEADS TO INSCRUTABLE TRUSTS AND TDPS

A. THE DEVELOPMENT OF TDPS AND THEIR CONFIDENTIALITY PROVISIONS

A 524(g) trust is intended to address a bankrupt company's asbestos tort liabilities. The aims and operations of trusts, however, are fundamentally different from those of companies defending themselves in the tort system. Corporations are run by managers whose goal is to maximize profit for the company's shareholders. Corporate defendants view asbestos claimants as adversaries. They seek whenever possible to defeat their claims or at least to minimize the amounts paid as compensation. This adversarial system encourages the rigorous testing of the validity of claims. This, in turn, discourages the assertion of marginal or spurious claims.

Trusts, on the other hand, do not have officers or shareholders. They instead have trustees and beneficiaries. A trust is charged with: (1) maximizing the value of its assets (typically comprised of a majority ownership stake in the reorganized debtor, proceeds of insurance settlements, and other contributions of cash or securities) and (2) compensating qualified beneficiaries as completely as practicable, while (3) seeking to ensure that the trust has sufficient assets to compensate current and

future claimants in a substantially similar manner. Claimants are not adversaries but potential beneficiaries. Once a claimant satisfies certain threshold criteria for demonstrating entitlement to compensation, he is recognized as a beneficiary to whom the trustees have a fiduciary obligation as well as a duty to compensate.

Trusts operate on the basis of trust distribution procedures (TDPs). Each TDP has a schedule of diseases, along with exposure and medical criteria. Once a claimant establishes that he is a trust beneficiary by satisfying the TDP's disease and exposure criteria, the claimant is entitled to have his claim valued at a pre-established presumptive compensation amount.¹⁴ If a claimant believes that he is entitled to special treatment, he may request an individualized evaluation. If the claimant can demonstrate, for example, that the majority of his exposure was to asbestos-containing products manufactured by Celotex Corporation, the Celotex Trust might offer him a multiple of the presumptive compensation amount, up to the maximum authorized by the TDPs for that disease.¹⁵

The dynamics of the bankruptcy process tend to lead to trust agreements and TDPs that are largely written by counsel for the asbestos claimants themselves.¹⁶ After the competing creditor constituencies reach agreement with the asbestos creditors on the broad terms of the division of the assets of a bankrupt company's financial estate, there is little incentive for them to become involved in deciding how asbestos claimants choose to divide their own piece of the economic pie. If anything, since 75% of asbestos claimants must vote to approve a 524(g) plan, other parties are far more concerned about getting the needed votes than about whether TDPs are too lenient or seek to give the claimants advantages over tort system defendants by seeking to prevent discovery of claims information.

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.¹⁷ 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.¹⁸ While, in theory, court-appointed future claimants' representatives (FCRs) should push for more stringent TDPs and anti-fraud protections to help ensure that sufficient monies remain to pay anticipated future claims, in practice, FCRs possess relatively weak bargaining power and have proven an unsatisfactory counterweight to the current claimants' influence.¹⁹ Bankruptcy courts and the U.S. Trustees thus far have taken a largely hands-off approach to these matters.

Predictably, when asbestos claimants and their attorneys write their own compensation rules, the results are TDPs containing lax medical and exposure criteria that pay claims that would not be compensable in the tort system, such as those brought by asymptomatics who likely will never become sick and those whose claims otherwise would be barred by the statute of limitations.²⁰ Notably absent from TDPs is any regimen for obtaining or sharing claiming information with other trusts or with defendants in the tort system. Of course, such lowered qualifications for payment and reduced scrutiny of claims also invites fraudulent “double-dipping” and other abuses.²¹

More recently, efforts have been made by asbestos claimants and trusts to affirmatively shield information concerning claims to the trusts and payments made to these claimants from outside scrutiny—especially from disclosure to solvent defendants in the tort system. Thus, in several cases, asbestos constituencies have drafted TDPs that attempt to prevent discovery of such information in connection with other proceedings. These TDPs purport to deem all of the claimants’ submissions to and communications with the trusts, including medical and exposure evidence and payment information, to be confidential and provided in the context of settlement discussions. The TDPs rely on this language and other privilege theories (such as work product, attorney-client, claimants’ federal Health Insurance Portability and Accountability Act (HIPAA) rights, claimants’ state law physician-patient privilege as to medical records) to provide bases for trusts’ refusal to produce information requested by other asbestos defendants—even though the claimant himself has placed such information at issue by suing the tort defendants.

Some TDPs go so far as to attempt to foreclose state courts from ordering disclosure of information by trusts. These TDPs instead purport to reserve jurisdiction in the bankruptcy court and require parties seeking discovery of such materials to seek and obtain a subpoena from the bankruptcy court.

The TDPs proposed by the plan proponents in the *Federal Mogul* bankruptcy case are typical of this trend. They provide that all trust submissions “shall be treated as made in the course of settlement discussions between the holder and the U.S. Asbestos Trust and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including, but not limited to, those directly applicable to settlement discussions.”²² The trust is directed to:

preserve the confidentiality of such claimant submissions, and [to] disclose the contents thereof only, with the permission of the holder, to another trust established for the benefit of asbestos personal

injury claimants pursuant to section 524(g) of the Bankruptcy Code or other applicable law, to such other persons as authorized by the holder, or in response to a valid subpoena of such materials issued by the Bankruptcy Court.²³

Further, the Trust is directed to “take all necessary and appropriate steps to preserve said privilege before the Bankruptcy Court and before those courts having appellate jurisdiction related thereto.”²⁴ The confidentiality provisions in certain other TDPs already approved by bankruptcy courts are almost identical to the language quoted above.²⁵

Significantly, certain tort system defendants have begun to raise objections to these efforts to stymie discovery from 524(g) trusts. As a result of such objections in the *Federal Mogul* bankruptcy case, the above-quoted provisions were modified somewhat in the TDPs that ultimately were approved in November 2007 as part of the confirmed plan of reorganization. Under these modified provisions, the bankruptcy court no longer purports to exercise exclusive control over the issuance of subpoenas to the trust. Instead, the trust now is expected to comply with valid subpoenas “issued by the Bankruptcy Court, a Delaware State Court or the United States District Court for the District of Delaware.”²⁶

B. ABUSE OF TRUSTS UNMASKED: THE KANANIAN CASE

The potential for abuse of an easy-pay system that is sparsely policed and cloaked in secrecy should be self-evident. The dangers are well-illustrated by recent events in the case of *Kananian v. Lorillard Tobacco Company*.²⁷

Harry Kananian died of mesothelioma in 2000. His estate sued Lorillard Tobacco in Ohio state court, alleging that his mesothelioma was caused by asbestos-containing “Micronite” filters in Kent cigarettes that Kananian allegedly smoked in the 1950s. The estate also lodged claims with a number of asbestos bankruptcy trusts alleging that their products caused Kananian’s disease.

When Lorillard sought the discovery of Kananian’s submissions to the trusts in order to determine Kananian’s work history, exposure, pathology, and the amount of any recoveries from those trusts, Kananian’s attorneys, from California’s Brayton Purcell firm, embarked on a campaign to prevent Lorillard from obtaining or using this information.²⁸ Among other tactics, Kananian’s counsel encouraged the Celotex Trust to object to Lorillard’s discovery requests while simultaneously telling the court that he would “welcome” disclosures from the trusts.²⁹ Kananian’s counsel further objected to the admissibility of claim forms by questioning their accuracy.³⁰

As it turns out, Kananian's lawyers had submitted contradictory claims information to different trusts to maximize the estate's recoveries. They told the Manville Trust that Kananian had been a shipyard worker in World War II and the Eagle-Picher Trust that he was exposed to asbestos insulation as a pipe welder for a year. Kananian's lawyers told the UNR Trust that Kananian handled Unibestos insulation at the San Francisco Naval Shipyard. In actuality, the only time that he had passed through that shipyard was as a rifleman on his way to board a troopship to Japan. They even claimed to the Celotex Trust that Kananian "made and handled tools of asbestos." The trusts already had paid the estate as much as \$700,000 on the basis of these wildly inconsistent claims. Privately, Brayton Purcell attorneys admitted that these trust submissions, including those prepared by another law firm, Early Ludwick & Sweeney of Connecticut, were "rife with outright fabrications."³¹ To the court, Kananian's lawyers conceded that the trust forms were inaccurate and misleading. Ironically enough, they sought to keep the trust claim forms from being considered by a jury on those grounds, an argument that the court flatly rejected unless the Kananian family agreed to return all of the money that it had obtained from the trusts on the basis of these bogus claim forms.

Eventually, the Ohio court began to choke on counsel's brazen conduct and revoked the pro hac vice privileges of Kananian's California lead counsel.³² The court, however, declined to dismiss Kananian's case, stating that there was no evidence that the Kananian family itself had taken part in its attorneys' misconduct.³³

Kananian represents a remarkable lesson on the mischief that inevitably results from the lack of transparency between and among trusts and the tort system.³⁴ Especially with the recent proliferation of new trusts flush with cash, there is a significant economic impetus for claimants and their lawyers to assert inconsistent claims against different trusts in order to be qualified by each trust for payment. Likewise, the incentive exists to conceal the existence of actual or pending trust payments—or delay submitting trust claims altogether—while claimants prosecute civil tort claims against solvent defendants and argue that all trust-related information is protected from discovery as confidential settlement communications.

Fortunately, *Kananian* has a silver lining in addition to the sanctioning of plaintiff's counsel. There, the court approved the requested discovery from trusts and demonstrated a willingness to permit the defendant to introduce evidence of the Kananian estate's inconsistent claiming history and trust recoveries before the jury at trial.

Beyond the paramount danger of undermining the judicial process through misrepresentations and fraud, the effective concealment of claims to, and payments by, the 524(g) trusts prejudices tort defendants

by depriving them of information that they need to effectively invoke their state-law rights to apportionment of fault and/or judgment reduction credits. As a result, the burden upon solvent defendants is increased. This is unfair not only to current tort defendants but also encourages the trend of seeking out ever more peripheral companies to add as new defendants in asbestos lawsuits.³⁵

II. STACKING THE DECK—THE INTERPLAY BETWEEN THE LACK OF TRANSPARENCY AND THE CIVIL TORT SYSTEM CREATES INEQUITIES FOR PERIPHERAL DEFENDANTS

While the 524(g) trusts operate in a privately managed system outside the tort arena, plaintiffs' lawyers historically have been able to exploit the peripheral asbestos defendants in the civil tort system through joint and several liability.³⁶ Full compensation of victims has always been a primary goal of the tort system. In the context of multiple tortfeasors, historically there has been a tendency by courts to ensure full compensation for plaintiffs even if that may mean that some tortfeasors are forced to pay more than their allocable share of damages. In many states, this led to imposition of joint and several liability without consideration of the comparative fault of each defendant. As a result, defendants could be held liable for 100% of the total award irrespective of whether they were 99% responsible or only 1% responsible for the claimant's injuries. In those situations, the existence of other responsible but insolvent parties would not diminish the liability of the solvent defendants.

Standing alone, joint and several tort liability has always been something of a blunt instrument for achieving societal goals of victim compensation. This especially is the case in asbestos litigation, where arguments prevail for expansive interpretations of when exposure to a company's asbestos-containing products constitutes a "substantial contributing factor" of a plaintiff's injuries (with some plaintiffs' attorneys asserting that even a single asbestos fiber can trigger injury and therefore liability).³⁷ As a result, joint and several liability has led to manifestly unjust results in the context of asbestos litigation.³⁸ Moreover, the combination of joint and several liability with lax standards (real or perceived) for imposition of tort liability has encouraged the asbestos plaintiffs' bar to drag ever more peripheral companies into mass tort litigation as the main players exited the tort arena for bankruptcy.³⁹

Fortunately, the pendulum is swinging back toward the center with the enactment of tort reform in a number of key states. As a result, while joint and several liability still remains the rule in some jurisdictions, most states have either eliminated the doctrine of joint and several liability altogether or at least modified it to eliminate its most oppressive

applications. In states that completely eliminated joint and several liability, defendants must only pay the percentage of liability assigned to them by the jury.

Many states have chosen a middle ground where a finding of a threshold percentage of responsibility triggers joint and several liability. Even then, some states limit imposition of joint and several liability to objectively measurable economic losses. For instance, in the asbestos litigation hotbed of Ohio, the legislature enacted tort reform in 2003 barring joint and several liability for defendants found to be less than 50% liable and barring joint and several liability altogether for the recovery of noneconomic losses.⁴⁰ In light of these reforms, access to claiming and settlement information from trusts is more important than ever to defendants in the tort system.

The following is a summary of tort reforms in some of the most significant asbestos litigation forums.⁴¹

Mississippi:⁴² In Mississippi, the legislature passed tort reform in 2004 that eliminated joint and several liability altogether and adopted what can be termed as a rule of “pure proportional liability.” No defendant is liable for more than its share of responsibility (with an exception for intentional tort claims and conspiracy claims), and all potentially responsible tortfeasors appear on the verdict sheet.⁴³ Under the current statute, therefore, a defendant is not responsible for more than its direct percentage of fault, and fault must be allocated to all responsible parties, even if one or more of the parties’ liability may be barred or limited under the law. Under Mississippi’s “pure proportional approach,” a defendant may not bear more than its proportionate share of liability for a claimant’s asbestos-related injuries.

On the flip side, it appears that Mississippi’s proportional liability rule may have displaced its prior judgment reduction rules such that solvent defendants would receive no further judgment reduction on the basis of a claimant’s larger-than-expected recoveries from various bankruptcy trusts. As Mississippi’s court of appeals held, the “pure proportional liability” rule is absolute.

[While i]t has long been the practice in Mississippi that... defendants who proceed to trial and suffer a judgment against them are entitled to credit on that judgment for those amounts received in settlement from entities not party to the litigation... the law now contemplates that the jury will apportion liability on a formula that includes consideration of the percentage of ‘fault’ attributable to the various entities, whether or not some particular entity is a party to the litigation and without regard to the terms of any pre-trial settlement.⁴⁴

While the amount of a settlement may not be used to effect a judgment reduction, the fact and amount of such a settlement nevertheless may provide important evidence for a jury's consideration on the issue of comparative fault.⁴⁵

Ohio: In 2003, Ohio barred imposition of joint and several liability for economic losses on defendants found to be less than 50% liable (unless the defendant committed an intentional tort) and entirely barred joint and several liability for noneconomic damages.⁴⁶ Ohio law also allows a jury to allocate responsibility to nonparties.⁴⁷ A solvent asbestos defendant can identify absent potential tortfeasors through affirmative defenses and can continue to do so at any time before trial.⁴⁸

Although there are no published Ohio cases interpreting these particular provisions, at least one trial judge has rejected a bid by an asbestos plaintiff to strike the defendant's identification of 120 other entities potentially responsible in its affirmative defenses.⁴⁹ The plaintiff argued that the defendant was required to designate specific percentages of fault attributable to each such entity.⁵⁰ The trial judge orally denied the plaintiff's motion to strike the affirmative defenses, ruling that the specific percentages would be borne out by the evidence presented by the defendant at trial. Moreover, the judge ruled that the bankrupt entities would be included on the apportionment form presented to the jury.⁵¹ As demonstrated by the discovery rulings and standing orders discussed in the next section, Ohio courts have already recognized the importance of the discovery of trust claiming information to assist tort defendants in identifying other potentially responsible parties and demonstrating their relative culpability.

Texas:⁵² The Texas Legislature passed House Bill 4 in 2003 specifically to target the inequitable results produced by its joint and several threshold of 15% in toxic tort cases (including asbestos).⁵³ The new statute implemented two critical changes. First, the threshold for joint and several liability for toxic tort defendants was increased to 50%.⁵⁴ Second, a jury can consider the culpability of bankrupt entities when allocating liability to "any responsible third parties."⁵⁵

In addition to limiting a solvent asbestos defendant's liability to its proportionate share (if less than 50%), the Texas statute also allows defendants a dollar-for-dollar settlement credit to reduce the plaintiff's total verdict.⁵⁶ When applying these two provisions together, the Texas Supreme Court has recognized that, "although related, the two sections pose separate inquiries. Section 33.012 controls the claimant's total recovery, while Section 33.013 governs the defendant's separate liability."⁵⁷ For example, if the jury awarded damages of \$1 million but found that the plaintiff was 10% at fault, the total recoverable amount would be

reduced to \$900,000, and if the plaintiff had received \$400,000 in settlements, the recoverable amount would further be reduced to \$500,000. However, a defendant found 10% liable could still be forced to pay up to \$100,000 of the total recoverable amount of \$500,000 since that defendant is liable for “the percentage of damages found by the trier of fact,” i.e., the total \$1 million found as damages by the jury prior to reductions. Contribution among the remaining defendants thus may reduce each defendant’s share if there are multiple nonsettled defendants. However, where a single defendant goes to trial, settlement credits will have no impact on that defendant’s liability until the sum of all reductions reduces the total recoverable amount below the remaining defendant’s proportionate share of the damages found by the jury pursuant to section 33.013.66.⁵⁸ In such a case, a further credit would be required to reduce the remaining defendant’s ultimate liability.

West Virginia: In April 2005, West Virginia eliminated joint and several liability for defendants who are found to be 30% or less at fault.⁵⁹ In such situations, defendants pay only the percentage of fault as determined by the jury. Unlike many other tort reform states, West Virginia’s law allows a court to reallocate any uncollectible damages among all defendants whose proportional share of liability exceeds 10% according to their respective percentages of fault.⁶⁰ If a defendant falls below the 10% reallocation threshold, then its share of the reallocation likewise is reallocated to the remaining defendants.⁶¹

The West Virginia statute instructs the jury to determine “the proportionate fault of each of the parties in the litigation.”⁶² This is potentially problematic because the statute fails to account on its face for the apportionment of liability to absent tortfeasors. Nevertheless, prior West Virginia caselaw held that a jury could allocate fault among all persons contributing to an injury, irrespective of whether they are a party to the action,⁶³ and nothing in the legislative history of the new statute suggests an intention to alter this result. This issue has not yet been definitively addressed by West Virginia courts.

In addition, solvent asbestos defendants may be able to obtain significant relief from the potential harshness of the “thirty percent joint and several liability/ten percent reallocation” thresholds through verdict reductions. West Virginia courts allow verdict reductions to reflect good faith settlements with any liable parties.⁶⁴ This includes settlements with bankrupt asbestos entities who are not parties to the lawsuit.⁶⁵

New York: Joint and several liability was partially eliminated by statute, CPLR §1601, in 1986. Defendants found to be less than 50% liable are jointly liable for economic damages but are only severally liable for noneconomic damages. The statute, however, contains a potentially sig-

nificant limitation that threatens to swallow the rule in asbestos litigation: “[T]he culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state).”⁶⁶ Thus while Rule 1601 permits asbestos-supplying tortfeasors to be included on the verdict sheet for purposes of allocating shares of responsibility, if a bankrupt entity were considered to be a culpable party over which the plaintiff could not obtain jurisdiction, solvent defendants might not be permitted to factor in the shares of the bankrupt entities’ responsibility and might be forced to effectively reallocate those shares among themselves. With large shares of responsibility often attributable to bankrupt entities in the asbestos industry, an inability to include them on verdict sheets could result in a large increase of the responsibility of otherwise minor defendants and could even result in the solvent defendants’ shares being artificially inflated beyond the 50% threshold for joint and several liability for noneconomic damages.

While earlier cases appeared to favor this plaintiff-friendly result,⁶⁷ in 2002, the New York trial court presiding over New York City’s asbestos litigation ruled that, for purposes of CPLR §1601(1), “the culpability of a bankrupt, nonparty tortfeasor will be included when calculating the defendant tortfeasors’ exposure” (unless the plaintiff proves that she was unable to obtain personal jurisdiction over the bankrupt entity).⁶⁸ In issuing its ruling, the court was cognizant that it was addressing a “critical issue about judgment molding that affects... tens of thousands of cases now pending before [it]” and was specifically concerned about “the noteworthy differences between the bankrupt defendants and those that are still solvent,” namely that the bankrupt entities represented the “traditional” asbestos defendants who bear the largest share of responsibility.⁶⁹

New York’s judgment reduction system is also quite important to the analysis. While CPLR §1601 introduced proportionality into the allocation of liability for noneconomic losses, New York General Obligations Law §15-108 requires a reduction of the judgment against nonsettling tortfeasors of the *greater* of: (1) the amount stipulated in the release, (2) the amount actually paid for the release, or (3) the amount of the settling defendant’s equitable share of the damages.⁷⁰ Therefore, to the extent that a claimant settles with a bankruptcy trust for more than that entity’s proportionate share, the verdict will be reduced accordingly. In the case of multiple recoveries from asbestos defendants, New York courts follow an aggregate approach, reducing the verdict by the greater of all settlement payments received by plaintiff or the total dollar value of percentage of fault allocated to all settling tortfeasors.⁷¹

While Mississippi, Ohio, Texas, and New York represent state-level efforts to remedy the inherent unfairness of joint and several liability in a mass tort situation where the majority of targeted defendants are in bankruptcy, there remains a minority of states, including some significant asbestos litigation jurisdictions, where tort reform has not been implemented. Pennsylvania, for instance, remains a joint and several liability state. Pennsylvania's legislature enacted legislation, the Fair Share Act of 2002, that would have abolished joint and several liability in the recovery of damages against all defendants found to be less than 60% liable (with an exception for intentional torts and environmental hazards).⁷² The Commonwealth Court of Pennsylvania, however, ruled the Fair Share Act unconstitutional in 2005.⁷³ Therefore, Pennsylvania law, for now, has reverted to joint and several liability, a large step back for a state much in need of tort reform.⁷⁴

With the demise of the Fair Share Act, the only relief for solvent asbestos defendants from joint and several liability in Pennsylvania is through verdict reductions to reflect recoveries from bankruptcy trusts. In Pennsylvania, a release of one tortfeasor does not discharge the others but "reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid."⁷⁵ In the asbestos context, a Pennsylvania court has applied a settlement with the Manville Trust to set-off a claimant's verdict against solvent asbestos defendants.⁷⁶ Moreover, in *Andaloro v. Armstrong World Indus., Inc.*, the Pennsylvania Superior Court extended the set-off rule to instances where the underlying asbestos exposure case reached a verdict prior to the plaintiffs' settlement with the Manville Trust.⁷⁷ *Andaloro* is the only decision to allow for a set-off of amounts that plaintiffs have yet to recover from bankruptcy trusts. In that case, the Superior Court held that tort defendants were entitled to pro tanto judgment reduction in the amount of the presumptive award for the plaintiff's disease category as prescribed by the Manville Trust TDPs multiplied by the payment percentage in effect at the time that the state court judgment was entered. The court rejected the defendants' argument for pro rata judgment reduction as contrary to the full compensation goals of Pennsylvania's joint and several liability regime. The Manville Trust's TDP is particularly amenable to such a holding because it provides a specific formula to determine the set-off for unresolved claims. In principle, there is no reason why the *Andaloro* holding should not apply with equal force to unresolved claims against other trusts, although determining the amount of the set-off may not be as clear cut.

Perhaps the worst state for defendants is Illinois. The Illinois statute that modified joint and several liability specifically excludes asbestos cases, and therefore solvent asbestos defendants can still be held joint and severally liable despite minimal responsibility for the plaintiff's injuries.⁷⁸ To make matters even worse, under the *Lipke* Rule,⁷⁹ Illinois currently is the only state where a defendant cannot introduce evidence of exposure to other asbestos products in the defense of its claim to establish a lack of proximate cause. While *Lipke* is currently under review by the Illinois Supreme Court after both a trial court and a justice of the Illinois Appellate Court criticized the rule,⁸⁰ for now, designations of Illinois as a "judicial hellhole"⁸¹ remain particularly apt for asbestos defendants.⁸²

Even in Illinois, however, peripheral asbestos defendants may be entitled to an appropriate set-off for recoveries from bankruptcy trusts. According to the Joint Tortfeasor Contribution Act, a good faith settlement "reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater."⁸³

Another potential avenue of relief for peripheral asbestos defendants that are unable to apportion damages to a culpable bankrupt entity or otherwise receive a proper settlement credit is to pursue a contribution claim against the 524(g) trusts. The pursuit of contribution claims against various culpable trusts, however, does not appear to be a viable option. A peripheral defendant will find the process of submitting contribution claims to numerous trusts in accordance with each trust's TDPs time consuming and expensive, and most of the TDPs require these "indirect claimants" to prove that they have fully satisfied the trust's obligation to the claimant and obtained a signed release from the claimant forever releasing the trust from future liability.⁸⁴ The release condition is especially troublesome, as many claimants who have not fully resolved their trust claims or who intentionally delayed the submission of trust claims will not provide the requisite release.

Only the Manville Trust has TDPs containing express provisions regarding contribution claims of codefendants and the valuation thereof.⁸⁵ The Manville TDPs provide that the Manville Trust may be listed on a verdict form and that a codefendant may file a third party complaint against or join the Manville Trust in an asbestos personal injury action pending in the tort system.⁸⁶ In exchange for limiting the contribution claims of codefendants against the Manville Trust to the procedures set forth in the TDPs, the Manville Trust consents to being treated as a "legally responsible tortfeasor under applicable law, without the introduction of further proof."⁸⁷ A codefendant can choose one of two ways to resolve its contribution claim against the Manville Trust: (Option 1) the codefendant can file a contribution claim against the Trust, which

will then be processed and paid by the Trust in accordance with the Manville TDPs or (Option 2) the codefendant can opt to receive a credit at trial for the amount of its contribution claim.⁸⁸ The Manville Trust prefers the trial credit as opposed to having to evaluate and liquidate a contribution claim filed against it.⁸⁹ The trial credit option is also more beneficial to the codefendant, because, rather than pay the amount of its contribution claim to the plaintiff and avail itself of the claims process with the trust, the codefendant instead can essentially get paid on its contribution claim right away and reduce the amount of cash that it must pay to the plaintiff.

Outside of the Manville Trust, however, it is quite burdensome and difficult for a peripheral defendant to seek relief from the trusts through contribution claims.

III. CREATING TRANSPARENCY THROUGH DISCOVERY TO PREVENT WINDFALL RECOVERIES AND PROTECT TORT DEFENDANTS FROM DISPROPORTIONATE LIABILITY

Asbestos claimants regularly sue a literal A-to-Z list of companies that allegedly manufactured or sold asbestos-containing products for use in a variety of different industries and likewise present claims to numerous bankruptcy trusts.⁹⁰ Assuming that a plaintiff has genuinely suffered an asbestos-related injury, he still must prove that the defendants that he has sued are culpable for his injuries, which, at a minimum, requires proving that he was meaningfully exposed to a defendant's products.

To properly defend itself, or at least attempt to obtain proper allocation of liability among codefendants or appropriate judgment reduction credits, it is imperative that a defendant have full access to information concerning the plaintiff's claims against and recoveries from codefendants or other potentially culpable parties like the trusts. However, the current disconnect between the trusts and the civil tort system, and even among the trusts themselves, is facilitating claimants' efforts to collect compensation from a number of different sources without disclosing those recoveries. To combat improper "double-dipping," tort system defendants increasingly are seeking this information through discovery, both directly from the plaintiffs and from the trusts. In both cases, these efforts are meeting substantial resistance.

A. COMPELLING DISCOVERY FROM CLAIMANTS

Predictably, the plaintiffs' asbestos bar has heavily mobilized in a concerted effort to prevent tort defendants from obtaining discovery, even from the plaintiffs themselves, about their claims against and re-

coveries from 524(g) trusts. Thus far, however, it seems that many courts are inclined to permit such discovery from the plaintiffs, although experiences such as the *Kananian* case teach that discovery of claiming information directly from the trusts provides an important check on the veracity and completeness of plaintiff self-disclosures.

Around the time that the Brayton Purcell firm was seeking to prevent discovery of claiming information from trusts in the *Kananian* action in Ohio, the same firm represented a California plaintiff seeking to stymie discovery of similar information from the plaintiff in *Volkswagen of America, Inc. v. Superior Court*,⁹¹ an effort that was flatly rejected by California's Court of Appeal. In this bellwether opinion, the court framed the critical question as follows: "Are documents submitted to bankruptcy trusts by a plaintiff's attorney in support of claims for compensation for alleged asbestos-related injuries discoverable in similar litigation against another entity?"⁹² The court answered that question in the affirmative, ruling that claim forms and supporting factual information such as medical records submitted to bankruptcy trusts are within the scope of discovery in California.

In *Volkswagen*, the plaintiff, Buddy Rusk, Sr., sued Volkswagen and 66 other defendants. During discovery, Volkswagen requested the production of "all documents submitted to a bankruptcy trust administering assets of" any of 72 designated companies.⁹³ After Rusk failed to produce any responsive documents, Volkswagen brought a motion to compel the production of documents submitted to the Manville Trust and in the *Kaiser* bankruptcy, as well as "all documents related to plaintiff's submissions to bankruptcy trusts for his alleged asbestos-related disease."⁹⁴ In opposition, Rusk characterized the information as "confidential settlement information packets" and argued that "all documents relating to plaintiff's claims filed with these Trusts contain both plaintiff's and the Trust's efforts to negotiate a settlement."⁹⁵

The trial court ordered the disclosure of all settlement amounts and declarations signed by the trust claimant (or the real party in interest). Volkswagen sought a writ of mandate from the appellate court to reverse the portion of the trial court's decision that deemed documents signed by Rusk's attorneys not discoverable.⁹⁶ The court of appeal granted the writ and directed the trial court to vacate its prior order. Emphasizing that discoverability is not dependent on ultimate admissibility of the information sought but on whether the requested discovery "appears reasonably calculated to lead to the discovery of admissible evidence," the court of appeal held that the trial court erred in allowing Rusk to withhold documents signed by his attorneys.⁹⁷ While acknowledging that "a heightened standard of discovery may be justified when dealing with

information which, though not privileged, is sensitive or confidential,” there was no need for “heightened protection” here, the court opined, because Rusk’s work history and medical condition were “plainly relevant and not confidential” and had been placed “directly at issue.”⁹⁸ Moreover, “Volkswagen has good reason to ascertain what Rusk has told others about these issues.... Since each party who shares responsibility for any asbestos-related disease from which a claimant suffers is liable only for its proportionate share of non-economic damages, each will understandably be concerned to determine whether the claimant has overstated its share of responsibility.”⁹⁹

A growing number of courts are recognizing defendants’ legitimate interest in discovering information about plaintiffs’ trust claims. In New York, a court ordered that claim submissions be produced to defendants remaining in the tort system:

[W]hile the proofs of claims are partially settlement documents, they are also presumably accurate statements of the facts concerning asbestos exposure of the plaintiffs. While they may be filed by the attorneys, the attorneys do stand in the shoes of the plaintiffs and an attorney’s statement is an admission under New York law. Therefore, any factual statements made in the proofs of claim about alleged asbestos exposure of the plaintiff to one of the bankrupt’s products should be made available to the defendants who are still in the case.¹⁰⁰

A number of trial court judges in Ohio have ordered asbestos claimants to produce trust information to the defendants.¹⁰¹ Likewise, Texas trial courts are granting motions to compel responses to interrogatories directed to asbestos claimants regarding claims and settlements made or expected to be made with any bankruptcy trust.¹⁰² In New Jersey, a discovery master for the court overseeing that state’s consolidated asbestos docket recommended that production of claim forms be directed, explaining that, whether or not ultimately admissible in evidence, such documents reveal discoverable factual information regarding plaintiffs’ alleged exposure to asbestos-containing products.¹⁰³

B. MANDATORY DISCLOSURES BY CLAIMANTS

Several jurisdictions have gone even further, establishing standing case management orders governing all asbestos cases filed within a county or a state and requiring plaintiffs to disclose certain bankruptcy-related information as a matter of course. The Circuit Court of Kanawha County, West Virginia (where the state-wide asbestos docket is administered) issued an amended global case management order on December

9, 2003, to govern all asbestos personal injury litigation in the State of West Virginia. The order provides:

Section VIII: Bankruptcy Proceeding Affidavit

Each Plaintiff or his/her personal representative shall execute a sworn affidavit at least (60) days before the discovery deadline identifying those Defendants against which he/she or his/her estate has or will be filing the necessary documents in any bankruptcy proceeding to seek compensation for his/her asbestos-related personal injury.... When requested, the Plaintiff shall provide the documents filed in any or all bankruptcy proceedings. These affidavits shall be used by any purpose by the parties...When appropriate, the Court can require each Plaintiff to disclose the total amount received or expected to be received from the bankruptcy proceedings.¹⁰⁴

Similarly, in Delaware, the Superior Court of New Castle County issued an amended case management order requiring asbestos plaintiffs to automatically disclose, within 30 days of initiating an action, all claim forms and related information submitted to bankruptcy trusts. The relevant provision requires the following disclosures:

Copies of all claim forms and related materials related to any claims made by plaintiff to any insurance carrier, employer, governmental agency, trust, entity or person related to or in any way involved with asbestos claims, or other agency, entity or person wherein plaintiff directly or indirectly asserts, suggests, advocates, or requests investigation into potential entitlement to compensation or benefits of any type as a result of such exposure to and/or injury related to asbestos. This shall include, but is not limited to, copies of all materials related to applications for Social Security benefits, worker's compensation benefits, military service benefits, disability benefits, and claims made to trusts for bankrupt asbestos litigation defendants.¹⁰⁵

Claimants must continue to supplement the disclosure up until the date of trial.

Ohio's case management order requires plaintiffs to produce claim forms and supporting documentation presented to any bankruptcy trust and further requires plaintiffs to furnish authorizations permitting defendants to seek information directly from the trusts.¹⁰⁶ In Texas, the Master Discovery to All Plaintiffs in asbestos cases throughout the state requires production of claiming information submitted to the trusts.¹⁰⁷ Massachusetts and Jefferson County, Kentucky are also examples of

jurisdictions with master interrogatories and document requests that require the production of claims information.¹⁰⁸

C. DISCOVERY FROM THE TRUSTS

Defendants also seek discovery of plaintiffs' trust submissions directly from the trusts themselves. Frequently, this requires requesting and obtaining commissions to serve out-of-state subpoenas and obtaining the cooperation of sister states in issuing the requested subpoenas. Dominated as they are by asbestos claimants' attorneys, some trusts have resisted these efforts.

The Celotex Asbestos Settlement Trust, for example, takes the position that all documents submitted to it by claimants are confidential.¹⁰⁹ The Trust resists production of electronically stored claims information, claiming that it is proprietary and that responding to individual requests for information is unduly burdensome.

Certain trusts have resisted discovery in bankruptcy cases as well. In connection with proceedings to estimate W.R. Grace's liabilities for asbestos personal injury claims, the debtor sought discovery of claims submitted to a number of trusts by claimants who also asserted exposure to W. R. Grace's products. Several trusts, including the Celotex Trust, opposed the debtor's subpoenas.¹¹⁰ Based on the language in the Celotex Claims Resolution Procedures purporting to provide that "[a]ll materials, records and information submitted by claimants... are confidential, submitted solely for settlement purposes" and asserting both attorney-client privilege and work product immunity, the Celotex Trust refused to produce any documents.¹¹¹ The Dresser Trust also refused to produce any documents requested by Grace, in part, relying on similar confidentiality language in [section 8.4] of the Dresser TDPs. The court ruled that Grace was entitled to production of such information, subject to confidentiality restrictions, for use in connection with the estimation of W.R. Grace's asbestos personal injury liability for plan feasibility purposes.¹¹²

A singular exception is the Manville Trust. Its new TDPs (in effect since 2002) provide that the Trust shall provide verification of settlement information in response to a codefendant request. No later than the start of jury selection in the trial of an action by the claimant against the codefendant, the Trust will verify the fact of any settlement or any filing by the claimant of a claim with the Trust and shall provide information regarding the amount and terms of any such settlement at the time and with the detail required by applicable law.¹¹³

Viewing the practices uncovered in *Kananian* as the exception rather than the rule, peripheral defendants still may be able to discover more complete and accurate information from the individual trusts than from

the parties themselves. However, pursuant to the confidentiality provisions of various trusts' TDPs and the trusts' general unwillingness to release individual claims information, many trusts will refuse to produce such information absent a court order.¹¹⁴

IV. PRACTICAL STEPS TO RESTORE FAIRNESS BY ENSURING TRANSPARENCY BETWEEN THE TRUST AND TORT SYSTEM

Under the comparative fault rules now prevalent in a substantial majority of states, defendants' access to evidence of the existence and culpability of other responsible but insolvent parties and recoveries from 524(g) trusts is crucial, especially where states allow solvent asbestos defendants to effectively bring bankrupt entities before the jury for purposes of allocating comparative responsibility. This is especially so both because these absent defendants may well bear paramount culpability for the claimant's injuries and because the claimant has a right to monies from their bankruptcy trusts. Indeed, if juries are prevented from meaningful consideration of the culpability of bankrupt entities, solvent defendants might unfairly be assigned liability exceeding the joint and several thresholds of some states. Moreover, even in the remaining joint and several liability states, defendants generally are entitled to judgment reduction credits for a claimant's settlements with joint tortfeasors.¹¹⁵

As nonbankruptcy courts are increasingly recognizing, fundamental fairness requires that tort system defendants be afforded access to claiming and payment information concerning the 524(g) trusts. From the liability perspective, tort defendants should be permitted to access and use this information to help to demonstrate that they do not bear legal liability for a plaintiff's injuries or, where liability is established to some degree, to put into perspective their relative fault in relation to the overall culpability of all tortfeasors. Additionally (or, in some states, alternatively), defendants should be allowed dollar-for-dollar credit for the payments made (or to be made) to claimants by the 524(g) trusts.

To restore integrity to the claiming processes in both the trust and tort systems, 360-degree disclosure of trust claiming and payment information both to tort defendants and the trusts will provide much-needed illumination of the entire claiming process. Peripheral defendants will be able to better establish their correct liability in the tort system, and the unseemly claiming abuses against the trusts, epitomized by the *Kananian* case, will be discouraged. Certainly, neither system should tolerate, much less encourage, the compensation of claimants based upon shifting or contradictory accounts of their asbestos exposure or of the seriousness of their claimed diseases.

A. MANDATORY DISCLOSURES BY ALL ASBESTOS PLAINTIFFS

When an asbestos claimant files a lawsuit in the tort system, by definition he places at issue his medical condition and employment/exposure history. Likewise, the compensation that he has received or may receive from other allegedly responsible parties is placed at issue by his filing suit. It is only fair, therefore, that such a claimant be required to provide full disclosure and facilitate full access to relevant information at the outset of any lawsuit. It is not unusual for courts to require an asbestos plaintiff to provide a detailed work history and statement of products to which he claims to have been exposed, along with evidence of medical diagnoses. While this may be a good start, it does not go nearly far enough.

Whether by statute, court rule, or standing order, asbestos plaintiffs should be required to make the following automatic mandatory disclosures at the outset of any tort case:

1. The plaintiff should be required to identify all 524(g) trusts against which the plaintiff has made or intends to assert¹¹⁶ a claim for compensation.¹¹⁷ This should specifically include any claims that were submitted to a trust but subsequently were withdrawn.¹¹⁸
2. The plaintiff should be required to identify all sums received from each 524(g) trust to which the plaintiff has made a claim. In addition, the plaintiff should be required to identify all recoveries that he anticipates receiving from any trust.
3. The plaintiff should be required to identify and produce copies of all claims submissions and other communications sent by or on behalf of the plaintiff to any 524(g) trust.
4. The plaintiff should be required to produce all communications concerning the payment, nonpayment, or status of claims submitted to a 524(g) trust.
5. The plaintiff should be required to identify all pending bankruptcies in which the plaintiff has asserted or plans to assert a claim against one or more debtors. This should include identification of all cases in which the plaintiff's interests are being represented by any law firm together with production of copies of any statements filed by such counsel pursuant to Fed. R. Bankr. P. 2019.¹¹⁹
6. The plaintiff should be required to identify any other entities from which he has recovered or expects to recover money for his alleged injuries. For example, certain companies have "inventory deals" with certain plaintiff lawyers pursuant to which they

privately pay to settle claims on the basis of pre-agreed criteria and are not named as defendants in the plaintiff's lawsuits.

7. The plaintiff should be required to identify any other attorney or law firm other than counsel of record that represents or previously has represented him in connection with efforts to recover for his alleged injuries.

Both the plaintiff (or legal representative if deceased) and his counsel should be required to verify under oath the accuracy and completeness of the disclosures. To prevent evasion, courts should take such steps as conditioning a plaintiff's ability to commence discovery or to secure a trial listing upon compliance with plaintiff's disclosure obligations.

Plaintiffs also should be required to provide the defendants with blanket written authorizations to facilitate the production of potentially relevant information from sources that otherwise are likely to resist on confidentiality grounds. In addition to authorizing access to medical, hospital, and employment records, such an authorization would permit defendants to obtain claims submission and payment information from 524(g) trusts (as well as any other nondefendant from which the plaintiff had sought or obtained compensation for his alleged injuries).

B. TRUSTS SHOULD BE SUBJECT TO THE SAME OBLIGATIONS TO PROVIDE EVIDENCE AS ANY ENTITY

First-party discovery is normally the primary focus in any case. Third-party discovery is also important, both as a source of discovery of additional potentially relevant information and as a means of testing the completeness and accuracy of a party's discovery responses. If anything, third-party discovery takes on added importance in asbestos litigation where plaintiffs themselves frequently rely on third-party discovery to reconstruct work histories and the presence of a defendant's products at a work site.

Section 524(g) trusts are fertile sources of potentially relevant information regarding claims made by trust beneficiaries who also are suing solvent defendants in the tort system. Accordingly, the trusts, like any other entity, should be subject to the law's demands for the production of "every man's evidence."¹²⁰ Like any other third party subject to a subpoena, there are rules and procedures in every court to ensure that the trusts are not subject to undue burden and expense. Likewise, whatever confidentiality concerns may exist can be addressed by stipulation or order.

Thus there is no justification for trusts to incorporate into trust agreements or TDPs artificial barriers to such discovery. Moreover, attempts

to provide for continuing bankruptcy jurisdiction over discovery requests directed toward 524(g) trusts are improper and, indeed, in our view, exceed the extremely limited subject matter jurisdiction of bankruptcy courts postconfirmation. Each of the trusts is a creature of state (usually Delaware) law. Just like the reorganized corporate debtor, upon confirmation of the plan of reorganization, bankruptcy court jurisdiction over it shrinks dramatically.¹²¹ It shrinks still further once the plan is consummated.¹²²

Whatever limited jurisdiction may properly be reserved to the bankruptcy courts to continue to oversee matters of trust governance, bankruptcy courts may not properly meddle in matters such as discovery subpoenas issued by a state court to a trust organized under state law.¹²³ “A court cannot write its own jurisdictional ticket.”¹²⁴ Yet this is exactly what bankruptcy courts are attempting to do when they approve TDPs, such as the proposed Federal Mogul TDPs (quoted above) and similarly worded TDPs, that purport to require anyone seeking trust discovery to obtain subpoenas from the bankruptcy court. Bankruptcy courts should refuse to place their imprimatur on such naked, and improper, attempts to stymie legitimate legal process issued by state courts that, unlike the bankruptcy courts, have general jurisdiction. Fortunately, in light of the above-described success of the Federal Mogul objectors in obtaining modifications to such TDP provisions, the authors foresee tort system defendants raising additional challenges to efforts by the asbestos claimants to insert similar provisions into TDPs in other bankruptcy cases.

Moreover, trusts clearly are on notice that their beneficiaries are likely to be suing tort system defendants for the same injuries for which they collected from the trusts. Indeed, some are doubtless represented by the law firms whose partners sit on the trusts’ TACs. Trusts therefore should be subject to the same obligations as anyone else to preserve potential evidence and should be subject to the same sanctions for spoliation. Courts also should take a dim view of any trust that is found to have improperly instituted opportunistic document/data destruction policies.

C. TRUSTS AND THEIR TDPS SHOULD BE REFORMED TO ENCOURAGE TRANSPARENCY AND GUARD AGAINST IMPROPER CLAIMING

Trustees of the 524(g) trusts owe a fiduciary duty to deny improper claims that dilute the payments to the true beneficiaries and diminish assets available to pay future claimants. As shown, the 524(g) trusts currently are ill-suited to combat dubious claims submissions. It would behoove the trusts to establish a clearinghouse for sharing information about the disease and exposure information being submitted to the trusts

by each claimant. Such a clearinghouse would permit trusts to quickly identify and weed out claimants such as Harry Kananian, whose false claims induced hundreds of thousands of dollars in improper trust payouts. Likewise, it is within the power of the trustees to amend TDPs on a trust-by-trust basis to require claimants to submit information concerning their claims against other trusts. Failure to establish such simple checks on inconsistent claiming merely invites continued abuses.

Due at least in part to the opacity of the trust claiming system, trusts for years paid tens of thousands of dubious claims on the basis of x-ray reports signed by a small group of “B-reader” doctors that attested that claimants had asbestos-related diseases. It was not until a number of these doctors and the attorneys and “screening” firms that paid them branched out into “diagnosing” silicosis in massive numbers of claimants (many of whom were repeat customers, having previously recovered from asbestos trusts by claiming to suffer from asbestosis)¹²⁵ that a federal court judge, Judge Janis Jack, carefully scrutinized their conduct. In a scathing 249-page opinion, Judge Jack concluded that there was no growing silicosis epidemic but instead an “epidemic” of plaintiffs’ lawyers, “medical screening” companies, and complicit doctors “diagnosing for dollars” to manufacture spurious silicosis claims on a grand scale.¹²⁶

The broad media reporting of Judge Jack’s exposure of widespread bogus claiming sparked criminal and congressional inquiries at which the suspect doctors refused to testify, invoking their Fifth Amendment rights.¹²⁷ In the wake of all this, some trusts finally have begun their own crackdown on claims submitted on the strength of B-reads performed by the discredited doctors.¹²⁸ Claims Resolution Management Corporation, the manager of the Manville Personal Injury Settlement Trust, announced in September 2005 that it would no longer accept medical reports prepared by the suspect doctors and screening companies. Several other trusts, including the Eagle-Picher, Celotex, Halliburton (DII Industries), and Keene Creditors Trusts, later followed Manville’s lead.¹²⁹ Such actions are welcome news. Yet one cannot help but wonder whether these bogus claiming patterns might have been ferreted out years earlier had a mechanism existed for the sharing of claims information among the trusts, preventing untold millions from being diverted from the truly sick to pay spurious claims.

Bankruptcy courts must also do their part to avoid the creation of structural impediments to legitimate inquiries by tort system defendants into the claiming histories of the plaintiffs who are suing them. Bankruptcy courts should refuse to approve plan provisions that purport to

interfere with legitimate state court discovery efforts directed toward the 524(g) trusts. Further, bankruptcy courts should strike provisions that artificially attempt to define trust claim submissions as “settlement communications” in an effort to shield them from discovery and admissibility against the plaintiffs in the tort system.

D. PLAINTIFFS SHOULD NOT BE PERMITTED TO PROFIT IN THE TORT SYSTEM BY MANIPULATING THE TIMING OF TRUST SUBMISSIONS

While the evidence is only anecdotal at this point, there most certainly is at least some incentive for plaintiffs to delay their submission of claims to trusts while they pursue solvent defendants in the tort system. The goal is to maximize the damage recovery from tort defendants by preventing a judgment reduction on account of recoveries from 524(g) trusts. Along with arguments of privilege, delaying trust submissions is the other primary method used by plaintiffs’ attorneys to prevent tort defendants and the courts from discovering trust submissions and recoveries.¹³⁰ There is no legitimate reason, however, why courts cannot account for these recoveries, which are highly predictable on the basis of the TDPs of the various 524(g) trusts.

Even including the trusts that are anticipated to be formed in the pending bankruptcies, the number of 524(g) trusts will number fewer than 100. Each has TDPs that are publicly available, many on the Internet. While the specific disease and product identification criteria vary somewhat from trust to trust, it is generally possible to identify the trusts against which a plaintiff qualifies for compensation by comparing information gleaned from his claimed exposure and illness and supporting work and medical records. If the evidence supports a finding that a plaintiff qualifies for a payment from a trust, the tort defendants that he is suing should be entitled to a judgment reduction in the amount of the presumptive payment from that trust whether or not the plaintiff has asserted a claim. Courts therefore should permit defendants to obtain judgment reductions by submitting appropriate evidence of a plaintiff’s entitlement to compensation from a trust.¹³¹

Moreover, in situations where tort defendants have not been permitted to adjust their liability to account for trust recoveries, those defendants should be subrogated to the plaintiff’s rights to future recoveries from 524(g) trusts. Such subrogation rights should be declared in any judgment such that the defendants can notify each of the 524(g) trusts of their interest in any future claim by that plaintiff.

CONCLUSION

Substantial strides have been made through state tort reform legislation toward establishing tort compensation systems that more closely match the financial liability of a tort defendant to its relative culpability for a claimant's injuries. Such reforms are especially appropriate in asbestos litigation because large numbers of the most culpable defendants have exited the tort system through bankruptcy. Further, as more and more trusts come online, a parallel compensation system now exists through which these bankrupt entities are in fact paying significant amounts.

As has been shown, open communication between the two systems is necessary on a number of levels. First, discovery of claiming information against trusts provides an important source of potential evidence for defendants in comparative liability jurisdictions. Second, discovery of trust payments provides defendants with a basis for seeking judgment reduction credits, even in those states retaining joint and several liability rules. Third, as “[s]unlight is said to be the best disinfectant,”¹³² transparency discourages claimants from falsifying their exposure histories in an effort to expand the number of tort defendants and 524(g) trusts against which they assert claims. Preventing such efforts to game the system will provide an important disincentive to efforts to impose grossly disproportionate liability upon ever more peripheral defendants in the tort system. Further, it will help to prevent “double-dipping” in the trust system which unfairly reduces compensation to meritorious present and future claimants.

NOTES

1. Stephen J. Carroll et al., *Asbestos Litigation* xxvii (RAND Inst. for Civil Justice 2005), available at <http://www.rand.org/publications/MG/MG162> [hereinafter RAND Rep.] (“Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades”). Enacted by Congress in 1994, 11 U.S.C.A. §524(g) authorizes companies plagued by mass asbestos claims to establish and fund a trust to address and pay all present and future claims while the reorganized company is discharged from further liability to the claimants.

2. See Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29; see also *In re Combustion Engineering, Inc.*, 391 F.3d 190, 201, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), as amended, (Feb. 23, 2005) (“For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy”).

3. Am. Acad. of Actuaries’ Mass Torts Subcomm., *Overview of Asbestos Claims and Trends 5* (Aug. 2007), at http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf [hereinafter Am. Acad. of Actuaries’ Mass Torts Subcomm.].

4. These debtors include Armstrong World Industries (Armstrong), Federal Mogul, G-I Holdings, Kaiser Aluminum, Owens Corning Corp./Fibreboard (OCF), Pittsburgh-Corning, USG Corp. (USG), W.R. Grace, and Babcock & Wilcox Co. For an in-depth review of these and other companies that have sought bankruptcy protection, see Mark D. Plevin et al., *Where Are They Now, Part Four: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, 6:4 Mealey’s Asbestos Bankr. Rep. (Feb. 2007).

5. For example, in 2006, courts confirmed plans for OCF, USG, and Babcock & Wilcox, establishing trusts with estimated values of \$4.99 billion, \$4 billion and \$2.11 billion, respectively, while Babcock & Wilcox's plan, confirmed in December 2005, resulted in a trust worth approximately \$1 billion. See Plevin, 6:4 Mealey's Asbestos Bankr. Rep. (Feb. 2007) at 5-6.

6. Mesothelioma claimants paid at the payment percentage of the scheduled value will receive the following payouts: \$86,000 from the OCF Asbestos Personal Injury Settlement Trust, see <http://www.ocfbasbestostrust.com/default.asp> (follow "More Downloads" and "Instructions for Filing a Claim"); \$69,750 from the USG Asbestos Personal Injury Trust, see <http://www.usgasbestostrust.com/> (follow "More Downloads" and "Instructions for Filing a Claim"); \$30,600 from the Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust, see <http://www.bwasbestostrust.com/> (follow "Instructions for Filing"); \$26,750 from the Kaiser Asbestos Personal Injury Trust, see <http://www.kaiserasbestostrust.com/> (follow "Resources" and "Instructions for Filing a Claim"); \$22,000 from the Armstrong Asbestos Trust, see <http://www.armstrongworldasbestostrust.com/> (follow "Instructions for Filing"). Claimants filing an Individualized Review Claim under the Celotex Asbestos Settlement Trust can receive a scheduled value of \$100,000 and a maximum allowed claim of \$250,000, subject to a 12% payment percentage. See <http://www.celotextrust.com/default.asp> (follow "Resources" and "Downloads" and "Instructions for Filing a Claim"). The average value for mesothelioma claims under the Individualized Review Claims process in the DII Industries, LLC Asbestos Personal Injury Trust is \$28,700 for Halliburton entities and \$68,400 for Harbison-Walker entities. The maximum values are \$95,700 and \$228,000, respectively. See <http://www.diiasbestostrust.org/> (follow "IR Claim Values").

7. Indeed, some economists have suggested that the 524(g) trusts collectively may provide full compensation to asbestos claimants. See Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating It Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006) ("For the first time ever, trust recoveries may fully compensate asbestos victims").

8. See Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat'l Legal Center for the Pub. Interest June 2002); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

9. See, e.g., *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 4 Envtl. L. Rep. 20133 (5th Cir. 1973) (landmark case allowing construction workers injured by asbestos exposure to file product liability suits against manufacturers in addition to workers compensation claims against their employers). The targeting of peripheral defendants in recent years has resulted in substantial jury verdicts in asbestos personal injury claims. In November 2006, a New York jury awarded \$25 million in damages to a brake repairman who contracted mesothelioma as a result of exposure to asbestos while stripping and relining brakes in an auto repair shop. *D'Ulisse v. DaimlerChrysler*, No. 113838/04 (N.Y. County Sup. Ct.). In *Hernandez v. Kelly-Moore Paint Co. Inc.*, No. 2000-3559 (Tex. El Paso County Dist. Ct. Aug. 30, 2001), a Texas jury ordered a paint manufacturer to pay a mesothelioma plaintiff \$55.5 million, which included \$15 million in punitive damages. In *Hutcheson v. Shell Wood River Refining Co.*, No. 99L450 (Ill. Dist. Ct. May 19, 2000), an Illinois jury ordered Shell Oil to pay \$34.1 million to a roofer who developed mesothelioma from exposure to asbestos contained in roofing materials on Shell-owned buildings. A popular asbestos defendant in recent years, John Crane Inc.—a former manufacturer of asbestos pump and valve packing and a distributor of asbestos gaskets—has suffered notable verdicts of \$5.5 million (of a \$9 million total verdict) and \$3.4 million (of a \$10.4 million total verdict) in Virginia (see *Oney v. John Crane, Inc.*, No. 00301TF (Va. Newport News Cir. Ct. Apr. 2007) and *John Crane, Inc. v. Jones*, No. 062164 (Va. Newport News Cir. Ct. July 2006), respectively) and \$22 million in New York, see *In re New York Asbestos Litigation*, 28 A.D.3d 255, 812 N.Y.S.2d 514 (1st Dep't 2006) (affirming December 2004 verdict but finding award excessive).

10. For example, important tort reforms were passed in 2003 in Ohio (see Ohio Rev. Code §2307.22) and Texas (see Tex. Civ. Prac. & Rem. Code §33.013), in 2004 in Mississippi (see Miss. Code Ann. §85-5-7), and in 2005 in West Virginia (see W. Va. Code Ann. §55-7-24). These and other reforms that eliminated or modified joint and several liability are discussed in

more detail in section II, *infra*. For a general discussion of improvements in the tort system over the past several years, see Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 Conn. Ins. Law J. 477 (2006).

11. *Kananian v. Lorillard Tobacco Company*, No. CV 442750 (Ohio Cuyahoga County Com. Pl. Jan. 18, 2007).

12. See Thomas J. Sheeran, *Ohio Judge Bans Calif. Lawyer in Asbestos Lawsuit*, Cin. Post, Feb. 20, 2007, at A3, available at 2007 WLNR 3452493; see also Editorial, *Going Too Far*, Columbus Dispatch, Feb. 7, 2007, at 8A, available at 2007 WLNR 2355381.

13. See Peter Geier, *Allegations of Conflicting Claims in Tobacco Case*, 28:34 Nat'l L.J. 6 (May 1, 2006); Kimberly Strassel, Editorial, *Trusts Busted*, Wall St. J., Dec. 5, 2006, at A18, abstract available at 2006 WLNR 21034229; Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14, abstract available at 2007 WLNR 1291484; Matthew Hirsch, *Judge: Firm Submitted Fraudulent Claim Forms*, 235: 14 Legal Intelligencer 4 (Jan. 22, 2007).

14. Actual payments are based upon a fractional payment percentage, which may be varied periodically, and is designed to ensure that the corpus of the trust is not depleted prematurely, leaving future claimants with nothing. By way of example, if a mesothelioma claim is valued by a trust at \$100,000 and the trust's payment percentage is 40%, the claimant will receive \$40,000 in satisfaction of his claim against the trust.

15. While a claimant theoretically could wind up suing a trust in the tort system, as a practical matter, this rarely happens because a claimant must first go through multiple layers of claims evaluation by the trust and then faces significant limitations on his ability to actually collect on any eventual verdict.

16. These problems are particularly acute in "pre-packaged" bankruptcies, as critiqued in detail in Mark D. Plevin et al., *Pre-Packaged Asbestos Bankruptcies, A Flawed Solution*, 44 S. Tex. L. Rev. 883 (2003); cf. Ronald Barliant, Dimitri G. Karczas & Anne M. Sherry, *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 Am Bankr. Inst. L. Rev. 441 (2004).

17. Deposition Transcript of Perry Weitz dated September 2, 2003, p. 309, *Congoleum Corp. v. ACE Am. Ins. Co.*, No. MID-L-8908-01 (N.J. Super. Ct. Law Div.) (on file with authors).

18. Lawyers with the plaintiffs' law firm of Baron & Budd sit on at least nine bankruptcy trusts and the New York firm Weitz & Luxenberg are involved in at least seven. See Daniel Fisher, *Double-Dippers*, Forbes, Sept. 4, 2006, at 136, available at 2006 WLNR 14713659.

19. In practice, the FCR is nominated by the claimant and debtor constituencies. This is "problematic because having a weak futures representative is in the interest of both the debtor and the current claimants." Francis E. McGovern, *Asbestos Legislation II: Section 524(g) Without Bankruptcy*, 31 Pepp. L. Rev. 233, 248 (2004); see also Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 Chap. L. Rev. 43, 60 (2000). This also creates a due process problem, as another commentator aptly noted in the class action context: "If, as was implicit in *Amchem* and fleshed out expressly in *Ortiz*, the normal adversarial processes are an important guarantor of noncollusion in binding class action settlements, then the absence of a truly adversarial relation between the parties dooms this important guarantee that representation will be adequate." Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 388 (1999); see also Mark D. Plevin et al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. Ann. Surv. Am. L. 271 (2006).

20. Deposition Transcript of Perry Weitz dated June 25, 2004, pp. 73-82, *In re Congloem Corp.*, No. 03-5124 (Bankr. D.N.J.) (on file with authors); see generally Victor E. Schwartz et al., *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14:1 J. Bankr. L. & Prac. 61 (2005).

21. The current TDPs for the Johns Manville Trust are at least a partial exception to the rule. Approved by the supervising judge in 2002, these TDPs replaced far laxer TDPs that attracted tens of thousands of claims annually, many of dubious provenance, that threatened to exhaust the trust's assets decades prematurely. The adoption of the 2002 TDPs was followed by a drop in annual claims against the trust from 100,900 in 2003 (the last year claimants could rely upon the

prior 1995 TDPs) to 14,600 claims in 2004. See <http://www.mantrust.org> (follow “State of the Trust—Summary of the Quarterly Filings to the Court,” and “Year Ended December 31, 2004”). This decline continued in subsequent years. See <http://www.mantrust.org> (follow “State of the Trust—Summary of the Quarterly Filings to the Court,” and “Year Ended December 31, 2005”).

22. Section 6.5 of the proposed Federal-Mogul TDPs (on file with authors).
23. Section 6.5 of the proposed Federal-Mogul TDPs (on file with authors).
24. Section 6.5 of the proposed Federal-Mogul TDPs (on file with authors).
25. These include the TDPs of Babcock & Wilcox, DII Industries, LLC (f/k/a Dresser Industries, Inc.) (Dresser), USG, and Armstrong.
26. Section 6.5 of the final Federal-Mogul TDPs (on file with authors). Additional helpful modifications were made to clarify that the TDPs are not intended to shield asbestos plaintiffs from compliance with their own discovery obligations in the tort system: “Nothing in the TDP, the Plan, or the Trust Agreement expands, limits or impairs the obligation under applicable law of a claimant to respond fully to lawful discovery in an underlying civil action regarding his or her submission of factual information to the Trust for the purpose of obtaining compensation for asbestos-related injuries from the Trust.” Section 6.5 of the proposed Federal-Mogul TDPs (on file with authors).
27. *Kananian v. Lorillard Tobacco Company*, No. CV 442750 (Ohio Cuyahoga County Com. Pl. Jan. 18, 2007).
28. *Kananian v. Lorillard Tobacco Company*, No. CV 442750 (Ohio Cuyahoga County Com. Pl. Jan. 18, 2007).
29. *Kananian v. Lorillard Tobacco Company*, No. CV 442750 (Ohio Cuyahoga County Com. Pl. Jan. 18, 2007), slip op. at 9-10.
30. *Kananian v. Lorillard Tobacco Company*, No. CV 442750 (Ohio Cuyahoga County Com. Pl. Jan. 18, 2007), slip op. at 5-9.
31. This statement was recorded in a March 22, 2006 e-mail from Brayton Purcell lawyer Christopher Andreas to partner Alan Brayton. See Fisher, *Forbes*, Sept. 4, 2006, at 136, available at 2006 WLNR 14713659; see also James F. McCarty, *Judge Becomes National Legal Star*, *Cleveland Plain Dealer*, Jan. 25, 2007, at B1, available at 2007 WLNR 1527886. Indeed, internal e-mails between Kananian’s counsel reflected their knowledge that their client had accepted payments from entities to which he was not exposed. See E-mail from Brayton Purcell’s Ohio counsel, Bruce Carter, to Brayton Purcell lawyer Christopher Andreas, in Exhibit 3 to *Lorillard’s Motion to Dismiss, or in the Alternative, to Disqualify Chris Andreas and the Brayton Purcell Firm* (Ohio Cuyahoga County Com. Pl.) (motion filed Nov 13, 2006) (on file authors).
32. *Kananian*, slip op. at 18-19. Ohio’s Eighth District Court of Appeals and the Ohio Supreme Court dismissed Brayton Purcell’s appeal as moot. See *Kananian v. Lorillard Tobacco Co.*, No. 89528 (Ohio Ct. App. July 13, 2007), review denied, No. 2007-16770 (Ohio Dec. 26, 2007).
33. In the latest twist, the Kananian estate has sued Brayton Purcell and Early Ludwick and Sweeney for malpractice, alleging that the estate’s claims against Lorillard were devalued as a result of the submission of fraudulent trust claims by these law firms. See *Kananian v. Brayton Purcell, LLP*, CV 07 637691 (Ohio Cuyahoga County Com. Pl.).
34. In another example of a mesothelioma claimant’s asserting inconsistent exposure stories to trusts and in court, James Dunford, represented by Weitz & Luxenberg of New York, claimed in a lawsuit against auto parts manufacturers that his disease was caused by exposure to auto friction products during a two-year stint working at gas stations. Earlier, however, Dunford had recovered from several bankruptcy trusts of former building-supplies manufacturers by claiming that his disease was due to his exposure as a construction worker. After discovering that Dunford and his counsel had improperly failed to disclose his claiming history against the trusts, a Loudoun County, Virginia, judge threw out Dunford’s suit. See Fisher, *Forbes*, Sept. 4, 2006, at 136, available at 2006 WLNR 14713659.
35. The Congressional Budget Office observed that asbestos suits have expanded “from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities.” Congress of the United States, Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003). Many of these defendants

are familiar household names. See Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, abstract available at 2000 WLNR 2042486. Other defendants include small businesses facing potentially devastating liability. See Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1. At least one company in nearly every U.S. industry is now involved in asbestos litigation. See Am. Acad. of Actuaries' Mass Torts Subcomm., at http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf, at 5. Nontraditional defendants now account for more than half of asbestos expenditures. See RAND Rep., available at <http://www.rand.org/publications/MG/MG162>, at 94. One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." 'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz, *Mealey's Litig. Rep.: Asbestos*, Vol. 17, No. 3, at 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

36. In explaining the historical development of claims against peripheral defendants in asbestos litigation, one commentator opined that the "key for [plaintiffs' lawyers] has been to focus on the bad acts of culpable parties like *Manville* to establish liability against new defendants while simultaneously avoiding any reduction in awards that would reflect the 'absence' of these dominant defendants." James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 237 (2006).

37. See, e.g., *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004), *aff'd*, 424 F.3d 488, 2005 A.M.C. 2425, 2005 FED App. 0400P (6th Cir. 2005) (rejecting single fiber theory as inconsistent with prevailing scientific evidence); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007) (rejecting single fiber theory as insufficient to satisfy "substantial factor" requirement for imposition of liability).

38. See Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 *Pepp. L. Rev.* 203 (2004).

39. Indeed, the departure of defendants from the tort system via bankruptcy has created a vortex dragging more and more defendants into bankruptcy and ever more peripheral companies into the tort system as defendants. See Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 *Harv. J. on Legis.* 383, 392 (1993) (each time that a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited").

40. See Ohio Rev. Code §2307.22.

41. For additional information concerning tort reforms in these and other states, see Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 *Loy. L.A. L. Rev.* 1121, 1147-50 (2005) [hereinafter Hantler et al.].

42. Prior to the enactment of tort reform, Mississippi had been a highly popular jurisdiction for asbestos claimants. More than 13% of all asbestos claims around the country were filed in Mississippi from 1998 to 2000, and the "prospect of hitting the jackpot in Mississippi had reportedly attracted over 49,000 plaintiffs to the state by 2002." Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 550-52 (2007) [hereinafter Hanlon & Smetak].

43. See Miss. Code Ann. §85-5-7. The relevant provisions state:

Section 85-5-7(2)—"the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tortfeasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault."

Section 85-5-7(5)—"In actions involving joint tortfeasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tortfeasor is immune from damages. Fault allocated under this subsection to an immune tortfeasor or a tortfeasor whose liability is limited by law shall not be reallocated to any other tortfeasor."

44. *Brown v. N. Jackson Nissan, Inc.*, 856 So.2d 692, 697 (Miss. App. 2003).

45. For further discussion of the impact of tort reform in Mississippi, see Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal*

Climate, 24 Miss. C. L. Rev. 393 (2005); David Maron & Walker W. (Bill) Jones, Taming an Elephant: A Closer Look at Mass Tort Screening and The Impact of Mississippi Tort Reforms, 26 Miss. C.L. Rev. 253 (2007); James A. Henderson, Jr., Asbestos Litigation Madness: Have the States Turned a Corner?, 3:7 Mealey's Tort Reform Update 23 (Jan. 18, 2006).

46. Ohio Rev. Code Ann. §2307.22.

47. Ohio Rev. Code Ann. §2307.23(A)(2).

48. Ohio Rev. Code Ann. §2307.23(C).

49. Transcript of January 29, 2007 argument and ruling by Judge Leo M. Spellacy at 33-35, Chester Link v. A-Best Prods., Co., CV-56305 (Ohio Cuyahoga County Com. Pl.) (on file with authors).

50. Ohio Rev. Code Ann. §2307.23(C) states as follows:

For purposes of division (A)(2) of this section, it is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the tortious conduct that proximately caused the injury or loss to person or property or the wrongful death is attributable to one or more persons from whom the plaintiff does not seek recovery in this action. Any party to the tort action from whom the plaintiff seeks recovery in this action may raise an affirmative defense under this division at any time before the trial of the action.

51. Transcript of January 29, 2007 argument and ruling by Judge Leo M. Spellacy at 33-35, Chester Link v. A-Best Prods., Co., CV-56305 (Ohio Cuyahoga County Com. Pl.) (on file with authors).

52. Texas historically has been a popular jurisdiction for asbestos claimants. During the time period from 1993 through 1997, a staggering 44% of all asbestos claims were filed in Texas. See Hanlon & Smetak, 62 N.Y.U. Ann. Surv. Am. L. at 550.

53. This state's 2003 tort reform further helped to level the scales of justice in what previously had been a highly unfavorable system for solvent asbestos defendants. While 1995 amendments to Texas tort law instituted a 50% minimum liability threshold for imposition of joint and several liability, an exception was made for toxic tort claims. Toxic tort defendants could be held jointly and severally liable if found more than 15% liable. See Former Tex. Civ. Prac. & Rem. Code §33.013(c)(2). Moreover, while a jury could consider "responsible third parties" when apportioning liability, bankrupt entities and worker's compensation employers were expressly ineligible for inclusion on the verdict sheet. See Former Tex. Civ. Prac. & Rem. Code §33.011(6). Thus, solvent asbestos defendants were placed at a serious disadvantage in trying to appropriately limit their share of liability.

54. See Tex. Civ. Prac. & Rem. Code §33.013 (stating in relevant part: "(a) Except [when a defendant is jointly and severally liable], a liable defendant is liable to a claimant only for the percentage of damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed").

55. Tex. Civ. Prac. & Rem. Code §33.013. The Texas statute is unique in that it also sets out the procedure for a defendant to identify responsible nonparties. Solvent asbestos defendants may file a motion for leave to designate a responsible third party "on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date" and establishes a presumption that the motion should be granted. See Tex. Civ. Prac. & Rem. Code §33.004.

56. See Tex. Civ. Prac. & Rem. Code §33.012 ("(a)... the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility; (b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements").

57. Roberts v. Williamson, 111 S.W.3d 113, 123 (Tex. 2003).

58. Roberts v. Williamson, 111 S.W.3d at 123 n.7.

59. W. Va. Code §55-7-24. Relief from joint and several liability does not apply to: (1) alleged intentional tortfeasors; (2) alleged co-conspirators, (3) defendants who caused “the unlawful emission, disposal or spillage of a toxic or hazardous substance,” or (4) defendants found strictly liable for the manufacture and sale of a defective product. W. Va. Code §55-7-24(b)(1)-(4).

60. W. Va. Code §55-7-24(c)(4)(B).

61. W. Va. Code §55-7-24(c)(6).

62. W. Va. Code §55-7-24(a)(1).

63. See *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911, 927 n.14 (1996); *Bowman v. Barnes*, 168 W. Va. 111, 282 S.E.2d 613 (1981).

64. See *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796, 59 Ed. Law Rep. 1179 (1990).

65. See *Smith v. Monongahela Power Co.*, 189 W. Va. 237, 429 S.E.2d 643 (1993) (citing *Cline v. White*, 393 S.E.2d 923 (W. Va. 1990)).

66. CPLR §1601(1).

67. See *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, *Prod. Liab. Rep. (CCH) P 13245* (2d Cir. 1992) (claimants lacked jurisdiction over the responsible bankrupt entities due to the automatic stay provision of the Bankruptcy Code). See also *Matter of New York City Asbestos Litigation*, 175 Misc. 2d 819, 670 N.Y.S.2d 735 (Sup 1998).

68. *In re New York City Asbestos Litigation*, 194 Misc. 2d 214, 750 N.Y.S.2d 469, 479 (Sup 2002), order aff'd, 6 A.D.3d 352, 775 N.Y.S.2d 520 (1st Dep't 2004).

69. *New York City Asbestos Litigation*, 750 N.Y.S.2d at 471, 473-74.

70. New York General Obligations Law §15-108 provides, in relevant part:

a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

71. *Didner v. Keene Corp.*, 188 A.D.2d 15, 593 N.Y.S.2d 238 (1st Dep't 1993), aff'd as modified, 82 N.Y.2d 342, 604 N.Y.S.2d 884, 624 N.E.2d 979 (1993); *New York City Asbestos Litigation*, 188 A.D.2d 214, 593 N.Y.S.2d 43 (1st Dep't 1993), order aff'd, 82 N.Y.2d 821, 605 N.Y.S.2d 3, 625 N.E.2d 588 (1993).

72. Act of June 19, 2002, P.L. 394 (Act 57). The Act sought to amend the Comparative Negligence Act, 42 Pa. C.S. §7102. Under the Fair Share Act, a trial court would have had to enter a separate judgment against each defendant for the defendant's proportionate share of the total damages. The Fair Share Act also provided that a jury could be requested to apportion some liability to non-parties that had already entered into a release with the claimant.

73. See *DeWeese v. Weaver*, 880 A.2d 54 (Pa. Commw. Ct. 2005), order aff'd, 588 Pa. 738, 906 A.2d 1193 (2006). The court found the Act unconstitutional on the ground that it violated a requirement of the Pennsylvania Constitution that legislative enactments be limited to a single subject (here, the changes to the comparative negligence provision were added as an amendment to a bill addressing DNA testing of sex offenders).

74. Pennsylvania does not appear to be attracting significant numbers of new cases “migrating” from tort reform states, perhaps owing to the fact that Pennsylvania long has barred compensation to asymptomatics. *Giffear v. Johns-Manville Corp.*, 429 Pa. Super. 327, 632 A.2d 880, 884, *Prod. Liab. Rep. (CCH) P 13704* (1993), judgment aff'd, 543 Pa. 664, 674 A.2d 232, *Prod. Liab. Rep. (CCH) P 14600* (1996), and to the judgment reduction rules next described. Pennsylvania's pure joint and several liability neighbor to the south, tiny Delaware, on the other hand, reportedly has experienced a significant upswing in cases filed by plaintiffs with no nexus to that state. See American Tort Reform Foundation, *Judicial Hellholes 2006*, at 25-26, available at <http://www.atra.org/reports/hellholes/report.pdf> (reporting on surge of asbestos personal injury filings in Delaware beginning in 2005) [hereinafter *Judicial Hellholes Rep.*].

In November 2007, the Delaware State Chamber of Commerce issued a letter to the President Judge of the Delaware Superior Court expressing growing concern over the alarming number of toxic-tort personal injury cases being filed in Delaware Superior Court by out-of-state law firms on behalf of out-of-state plaintiffs having no connection to Delaware. In response, the judge appointed a Special Committee on Superior Court Asbestos Litigation to examine the Chamber's concerns, review the current procedures for toxic tort claims, provide all interested parties an opportunity to provide input, and ultimately make recommendations to the court. That process has been underway since December 2007. (Correspondence and filings regarding these developments in Delaware are on file with the authors.)

75. The relevant provision is found in Pennsylvania's Uniform Contribution Among Tortfeasors Act, 42 Pa.C.S. §§8321-27 (UCATA), at §8326. The Pennsylvania Supreme Court identified three set-off scenarios provided by UCATA. *Baker v. ACandS*, 562 Pa. 290, 755 A.2d 664, 667-68, Prod. Liab. Rep. (CCH) P 15841 (2000). "First, if the settlement agreement is silent, the set-off mechanism defaults to a pro tanto set-off and the nonsettling defendant is entitled to have the verdict reduced by the amount of consideration paid by the settling tortfeasor." *Baker v. ACandS*, 562 Pa. 290, 755 A.2d at 667-68. Second, UCATA will always enforce a designation in the settlement agreement for a pro tanto set-off. Third, where the agreement specifies a form of set-off other than pro tanto, such as a pro rata set-off, the non-settling defendant would be entitled to reduce the verdict in accordance with the settling defendant's apportioned share of liability. However, the pro rata election will only apply if it would yield a higher set-off than the actual settlement paid. *Baker v. ACandS*, 562 Pa. 290, 755 A.2d at 667-68. Because a claimant and a settling tortfeasor have the option to designate a pro rata set-off, courts have noted that a jury must consider the proportional share of damages of settling defendants. See *Herbert v. Parkview Hosp.*, 2004 PA Super 287, 854 A.2d 1285, 1289-90 (2004).

76. *Baker v. ACandS*, 562 Pa. 290, 755 A.2d at 668. Pennsylvania defaults to a pro rata set-off, meaning the remaining defendants must reallocate among them any shortfall of the settling defendant's proportionate share.

77. *Andaloro v. Armstrong World Industries, Inc.*, 2002 PA Super 112, 799 A.2d 71 (2002). In *Andaloro*, the trial court molded the verdicts to reflect the dismissal or absence of certain defendants, divided the verdict equally among the remaining defendants, and apportioned a pro rata share to the Manville Trust. Plaintiff appealed the assignment of verdict shares to non-settling defendants who were either dismissed pretrial or unrepresented, and argued for a pro tanto set-off for the share assigned to the Manville Personal Injury Settlement Trust. The Superior Court agreed, holding that "where the Manville Trust has not settled a plaintiff's claim prior to entry of a verdict against other joint tortfeasors, the value of the set-off available to the joint tortfeasors based on the Trust's unliquidated contribution, shall be calculated under the... TDP and applied to the verdict pro tanto." *Andaloro*, 2002 PA Super 112, 799 A.2d at 82; see also *Donoughe v. Lincoln Elec. Co.*, 2007 PA Super 309, 936 A.2d 52 (2007) (reiterating that settlement with Manville Trust results in pro tanto set-off).

78. See 735 Ill. Comp. Stat. 5/2-1117-1118. That statute provides that all defendants are jointly and severally liable for all past and future medical and medically related expenses. However, "[a]ny defendant whose fault, as determined by the trier of fact, is less than twenty-five percent of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff's employer, shall be severally liable for all other damages."

79. See *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 106 Ill. Dec. 422, 505 N.E.2d 1213, Prod. Liab. Rep. (CCH) P 11402 (1st Dist. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989). Under *Lipke*, if the plaintiff presents evidence that creates a jury question regarding exposure to the defendant's product, the court may presume as a matter of law that the exposure caused the plaintiff's injury, and any evidence of other exposure is irrelevant and inadmissible.

80. See *Nolan v. Weil-McLain*, 365 Ill. App. 3d 963, 303 Ill. Dec. 383, 851 N.E.2d 281, 293 (4th Dist. 2006), appeal allowed, 222 Ill. 2d 577, 308 Ill. Dec. 326, 861 N.E.2d 657 (2006) (Steigmann, J., dissenting) ("only in Illinois would evidence of the other asbestos exposures in this case be precluded").

81. The American Tort Reform Foundation's annual Judicial Hellholes report evaluating "America's most unfair jurisdictions" consistently ranks various Illinois counties in the top five. See *Judicial Hellholes Rep.*, at 25-26, available at <http://www.atra.org/reports/hellholes/report.pdf>.

82. For a detailed discussion of the travails of tort defendants in Madison County, Illinois, see Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge*

Ahead, 16 Wash. U. J. L. & Pol. 235 (2004); Hanlon & Smetak, , 62 N.Y.U. Ann. Surv. Am. L. at 552-55. Illinois' plaintiff-friendly reputation and, more particularly, that of Madison County makes it a desired destination for forum-shopping asbestos claimants from around the country. See Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 8 (2003).

83. 740 Ill. Comp. Stat. 100/2(c). See *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 167 Ill. Dec. 1063, 588 N.E.2d 1193 (4th Dist. 1992) (allowing a set-off of a judgment against the Manville Trust based on earlier settlements entered into between the plaintiff's estate and other tortfeasors).

84. The contribution provisions are usually found in section 5.5 or 5.6 of the various TDPs, including those of USG, Babcock & Wilcox, Armstrong, Federal-Mogul, Congoleum, OCF, Pittsburgh Corning, and Kaiser.

85. See Manville TDPs, §I, pp. 18-26. (the Manville TDPs can be accessed at <http://www.manitrust.org/FTP/C&DTDP.pdf> (last visited Dec. 5, 2007)).

86. See Manville TDPs, §I(1)(c).

87. Manville TDPs, §I(1)(d). In addition to conceding its liability for the plaintiff's injuries, the Manville Trust will comply with applicable rules of discovery and disclose the amount that the plaintiff recovered from the Trust. See Manville TDPs, §I(1)(e), (f).

88. See Manville TDPs, §I (2)(a).

89. See Manville TDPs, §I (2)(a). The Manville TDPs contain detailed provisions regarding the calculation of the contribution claims. See Manville TDPs, §I (3)(a) to (f).

90. Indeed, it is not unusual for an asbestos claimant to assert claims against 60 to 70 different defendants and bankruptcy trusts based on exposure to asbestos-containing products. See Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra Law Rev. 833, 895 (2005); see also Hantler et al., 38 Loy. L.A. L. Rev. at 1151 (since 1982, number of asbestos defendants had increased from 300 to over 8,500).

91. *Volkswagen of America, Inc. v. Superior Court*, 139 Cal. App. 4th 1481, 43 Cal. Rptr. 3d 723 (1st Dist. 2006).

92. *Volkswagen*, 139 Cal. App. 4th at 1485.

93. *Volkswagen*, 139 Cal. App. 4th at 1486. Volkswagen's request was based on knowledge that Rusk had submitted a claim to the Manville Trust and in the Chapter 11 proceedings involving Kaiser.

94. *Volkswagen*, 139 Cal. App. 4th at 1486.

95. *Volkswagen*, 139 Cal. App. 4th at 1486.

96. The trial court reasoned that the documents signed by the attorneys were confidential settlement documents that would not be admissible at trial.

97. *Volkswagen*, 139 Cal. App. 4th at 1490. Volkswagen's request "encompass[ed] all materials submitted on Rusk's behalf to the trust, including the amount of his claim, information concerning his work history and medical condition... and settlement proposals and statements that may have been made in connection with settlement negotiations." *Volkswagen*, 139 Cal. App. 4th at 1489-90.

98. *Volkswagen*, 139 Cal. App. 4th at 1492. The court also rejected any arguments that putative privacy concerns of the trusts themselves existed to justify restricting the scope of the requested discovery, stating that "in this case no one has suggested that the bankruptcy trusts have any independent privacy concerns other than protecting the privacy interests of the claimants themselves, and the materials that Volkswagen seeks relate solely to Rusk." *Volkswagen*, 139 Cal. App. 4th at 1492, n.9.

99. *Volkswagen*, 139 Cal. App. 4th at 1495. Finally, the court ruled that because true settlement proposals are inadmissible, "any such materials are subject to discovery only if Volkswagen can articulate another basis for admissibility or for reasonably believing they may lead to the discovery of evidence that is admissible." *Volkswagen*, 139 Cal. App. 4th at 1496. The parties would have to make a specific showing on an itemized basis as to whether such proposals are discoverable.

Shortly after issuing the *Volkswagen* decision, the Court of Appeal again faced a petition for a writ of mandate from an asbestos defendant seeking to compel the production of trust information. *Seariver Maritime, Inc. v. Super. Ct.*, 2006 Unpub. LEXIS 6596 (Cal. Ct. App. July 28, 2006). In *Seariver*, the trial court granted *Seariver's* motion to compel claim forms

that the plaintiff had submitted to eight bankruptcy trusts but ruled that “unverified” documents were privileged and constituted “inadmissible settlement information.” Relying on Volkswagen, the court of appeals ruled that the claim forms were admissible, and the trial court had no basis to distinguish between verified and unverified claim forms. Because Seariver is unpublished, however, it is not citable in California state courts.

100. *Negrepont v. A.C.&S., Inc.*, No. 120894/01 (NY Sup. Ct., Dec. 11, 2003) (on file with authors); see also *Drabczyk v. Amchem Prods., Inc.*, No. 2005/1583 (NY Sup. Ct., Jan. 18, 2008) (ordering the plaintiff to produce proof of claims forms submitted to bankruptcy trusts and holding that, regardless of their admissibility at trial, proof of claims forms are likely to lead to the discovery of admissible facts); *Malcolm v. A.W. Chesterton Co.*, No. 2002-10666 (NY Sup. Ct. Dec. 30, 2005) (on file with authors).

101. *Link v. Ahlstrom Pumps, LLC*, No. CV-05-565305 (Ohio Cuyahoga County Com. Pl. Dec. 1, 2006); *In re Asbestos/Tireworker Litig. (Rachel Walk)*, No. ACV-90-02-0630 (Ohio Summit County Com. Pl.) (on file with authors). Judge Hanna also ordered proof of claim forms to be produced in *Kananian v. Lorillard Tobacco Company*, No. CV 442750.

102. *Duncan v. A.W. Chesterton*, No. 2004-07671 (Tex. Harris County Dist. Ct. Dec. 14, 2006) (“the information and documents related to plaintiff’s bankruptcy claims are discoverable”); *Brassfield v. Alcoa*, No. 2006-08035 (Tex. Harris County Dist. Ct. Nov. 22, 2006) (oral ruling that “[t]he Defendants are entitled to production of the applications from the trusts in order to introduce them into evidence at the trial of the case”) (on file with authors).

103. *In re Stark: Frankowski v. A-B Elec. Supply Co.*, No. L-12453-97 (N.J. Middlesex County Super. Ct. Nov. 15, 2006) (on file with authors). Trial courts from other states have also ordered the production of trust submissions in asbestos exposure civil tort cases. See *Miller v. PECO Energy Co.*, No. 50-07034450, 51-07014451 (Pa. Ct.Comm.Pl. April 16, 2007); *Alvey v. 999 Quebec, Inc.*, No. 04CV200183 (Mo. Circuit Ct. March 19, 2007); *Casper v. Dow Chemical Co.*, Cause No. 49D02-9801-MI-001-295 (Ind. Marion Superior Ct. Oct. 5, 2005); *Poole v. ACandS, Inc.*, No. 24X04000077 (Md. Circuit Ct. Jan. 6, 2005) (on file with authors).

104. *In re Asbestos Pers. Injury Litig.*, Master File Civil Action No. 03-C-9600 (W. Va. Kanawha County Cir. Ct.) (on file with authors).

105. *In re Asbestos Litig.*, No. 77C-ASB-2, Standing Order No. 1, ¶ 7(l) (Del. Newcastle County Super. Ct.) (on file with authors).

106. *In re All Asbestos Cases*, CV-073958 (Ohio Cuyahoga County Com. Pl., May 8, 2007).

107. *In re Asbestos Litig.*, No. 2004-03964 (Tex. Harris County Dist. Ct.) (on file with authors). Texas also has a procedural rule requiring the disclosure of settlement agreements. Texas Rule of Civil Procedure 194.2(h): a party may request disclosure of “any settlement agreements described in Rule 192.3(g).” Rule 192.3(g) defines the scope of discovery and provides: “(g) Settlement agreements. A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.”

108. See *In re Asbestos Pers. Injury Litig.*, March 6, 2002 Master Order (Ky. Jefferson County Cir. Ct.); *In re Massachusetts State Court Asbestos Litig.*, Special Master Order of April 12, 1994, overruling plaintiff’s objections to Standard Interrogatories and Request for Production of Documents which included production of claim forms (on file with the authors).

109. Motion Transcript at 32-33, *Chester Link v. Ahlstrom Pumps, LLC*, 06M-10-061 MMJ (Del. New Castle County Super. Ct. Dec. 7, 2006).

110. The Manville Trust/Claims Resolution Management Corporation and W.R. Grace agreed to a protective order under which the Manville Trust provided certain electronic files to Grace on the condition that such material only be used by W.R. Grace in its bankruptcy case and otherwise be kept confidential (on file with authors).

111. *Celotex Claims Resolution Procedures*, §VI, pp. 18-19. The *Celotex Claims Resolution Procedures* can be accessed at <http://www.celotextrust.com/default.asp> (follow “Claims Resolution Procedures”).

112. *In re W.R. Grace & Co.*, No. 01-01139 (Bankr. D. Del. Oct. 3, 2007) (on file with authors).

113. *Manville TDP* §I (1)(f). In light of the historical ubiquity of Manville’s products, the Manville trust concedes exposure. See *Manville TDPs*, §I(1)(d). In addition to conceding its liability for the plaintiff’s injuries, the Manville Trust will comply with applicable rules of

discovery and disclose the amount that the plaintiff recovered from the Trust. See *Manville TDPs*, §1(1)(e), (f).

114. Not only will the Trusts themselves resist discovery, but plaintiffs may also try to prevent a defendant from serving a subpoena on a Trust by filing a motion to quash. In at least one notable jurisdiction, a court concluded that, absent a claim of privilege, a plaintiff has no standing to object to the subpoena of a non-party. *Brothag v. A.W. Chesterton, Inc.*, No. 582979 (Ohio Cuyahoga County Com. Pl. Jan. 23, 2007) (on file with authors).

115. Likewise, a defendant is entitled to assert indemnity/contribution claims against other jointly responsible parties. However, as discussed in section III, defendants will encounter numerous difficulties in the pursuit of contribution claims against trusts (other than Manville).

116. See *In re Asbestos Pers. Injury Litig.*, Master File Civil Action No. 03-C-9600 (W. Va. Kanawha County Cir. Ct.) (on file with authors), revealing that West Virginia's asbestos case management order already requires plaintiffs to "identif[y] those Defendants against which he/she or his/her estate... will be filing... in any bankruptcy proceeding."

117. The duty of disclosure should be continuing such that a plaintiff must update his disclosures in the event that subsequent discovery reveals grounds to assert claims against additional trusts. Moreover, the disclosures should not be limited to 524(g) trusts but should encompass "true and complete copies of any application(s) for compensation for any alleged pneumoconiosis and/or any asbestos-related disease that have been filed by or behalf of the Plaintiff with any bankruptcy trusts." See Ohio's recent amendment to the asbestos case management order, *In re All Asbestos Cases*, CV-073958 (Ohio Cuyahoga County Com. Pl. May 8, 2007). As evidenced by the findings and conclusions of Judge Janis Graham Jack in the Texas federal court silica MDL proceedings, the extent of fraudulent claiming practices is not limited to the asbestos context. See *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563 (S.D. Tex. 2005). Among various disturbing findings, Judge Jack noted that the same physician who had diagnosed scores of plaintiffs with asbestosis (and not silicosis) in connection with prior asbestos litigation now diagnosed those same plaintiffs, years later, with silicosis. In *re Silica Products Liability Litigation*, 398 F. Supp. 2d at 608 ("This volume of reversals... simply cannot be explained as intra-reader variability"); see also *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) (many X-ray interpreters (called "B Readers") hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable"); American Bar Association Commission on Asbestos Litigation, Report to the House of Delegates (2003), available at http://www.abanet.org/leadership/full_report.pdf (litigation screening companies find X-ray evidence that is "consistent with" asbestos exposure at a "startlingly high" rate, often exceeding 50% and sometimes reaching 90%); Joseph N. Gitlin et al., Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes, 11 *Acad. Radiology* 843 (Aug. 2004) (B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in 95.9% of the X-rays sampled, but independent B Readers found abnormalities in only 4.5% of the same X-rays).

118. Absent express detailed requirements, claimants and their lawyers will continue to avoid disclosing their trust claiming histories and to resist their admissibility at trials in the tort system. In *Bakkie v. Union Carbide Corp.*, No. A116231 & A116462, 2007 Cal. App. Unpub. LEXIS 9622 (Cal. App. Nov. 29, 2007), the defendant subpoenaed the Manville Trust seeking discovery of information submitted to the Trust. In the wake of the then newly-decided Volkswagen case, Bakkie (who, like the plaintiffs in Volkswagen and Kananian, was represented by the Brayton Purcell firm) withdrew the claim that he had submitted to the Manville Trust in an effort to avoid discovery of the claiming information. Although the defendant obtained the claim information, the trial court refused to admit the withdrawn claim into evidence. Unfortunately, the appellate court affirmed, invoking the deferential harmless error standard to avoid a principled discussion of the evidentiary point or the plaintiff's efforts to manipulate the discovery process.

119. Bankruptcy Rule 2019 requires any law firm representing more than one creditor to "file a verified statement setting forth [inter alia] (1) the name and address of the creditor or equity security holder; [and] (2) the nature and amount of the claim." This rule (along with the requirement that creditors file proofs of claim pursuant to 11 U.S.C.A. §502(a)), has been honored mainly in the breach in asbestos bankruptcies where asbestos plaintiffs' attorneys typically have filed neither Rule 2019 disclosures nor proofs of claim for their clients. In recent years, in response to objections by certain parties in interest, Rule 2019 statements have been required by some courts, most notably in the numerous cases pending in Delaware and the

Western District of Pennsylvania presided over by Judge Judith Fitzgerald. In those cases, however, Judge Fitzgerald has permitted these firms to shield the details of their Rule 2019 disclosures by instructing the clerk of court not to permit access to anyone other than the debtor without leave of court which, to the authors' knowledge, has yet to be granted despite a number of requests by diverse parties in several of Judge Fitzgerald's cases.

120. "For more than three centuries it has now been recognized as a fundamental maxim that the public... has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." *Jaffee v. Redmond*, 518 U.S. 1, 9, 116 S. Ct. 1923, 135 L. Ed. 2d 337, 44 Fed. R. Evid. Serv. 1 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 J. Wigmore, *Evidence* §2192, p. 64 (3d ed. 1940))).

121. "[A]ll courts that have addressed the question have ruled that once confirmation occurs, the bankruptcy court's jurisdiction shrinks." *In re General Media, Inc.*, 335 B.R. 66, 73, 45 Bankr. Ct. Dec. (CRR) 271 (Bankr. S.D. N.Y. 2005) (citing *North Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938, 940 (2d Cir. 1944)); see also *Falise v. American Tobacco Co.*, 241 B.R. 48, 58 (E.D. N.Y. 1999) ("bankruptcy jurisdiction is extremely limited after a plan has been confirmed").

122. "[C]onfirmation and substantial consummation of the Debtor's Joint Plan means that this Debtor's estate no longer exists." *In re Atlantic Computer Systems, Inc.*, 163 B.R. 704, 706, 25 Bankr. Ct. Dec. (CRR) 333 (Bankr. S.D. N.Y. 1994). "Because there is presently no bankruptcy estate, there can be no continuing jurisdiction over that non-existent estate." *Falise v. American Tobacco Co.*, 241 B.R. at 58.

123. "Ordinarily, bankruptcy courts do not have jurisdiction over disputes between non-debtor parties where the dispute does not involve property of the estate, does not affect administration of the estate, or will not affect recovery of creditors under a confirmed plan." *In re Schwinn Bicycle Co.*, 210 B.R. 747, 754 (Bankr. N.D. Ill. 1997), *aff'd*, 217 B.R. 790 (N.D. Ill. 1997)).

124. *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164, 25 Bankr. Ct. Dec. (CRR) 965, 30 *Collier Bankr. Cas.* 2d (MB) 1763, *Bankr. L. Rep.* (CCH) P 75862 (7th Cir. 1994).

125. It has been reported that 72% of the claimants before Judge Jack had filed asbestos-related claims, see Editorial, *Trial Bar Cleanup*, *Wall St. J.*, Feb. 11, 2006, at A8, abstract available at 2006 WLNR 2515792; see also *Asbestos: Mixed Dust and FELA Issues*, Hearing Before the Senate Comm. on the Judiciary, 109th Cong. (Feb. 2, 2005) (statement of Professor Lester Brickman) (stating that 60% of silica MDL claimants had filed asbestos claims with the Manville Trust), even though it is "statistically speaking, nearly impossible" to suffer from both asbestosis and silicosis. Carlyn Kolker, *Spreading the Blame: The So-Called Phantom Epidemic of Silicosis Has Become a Hot Potato for the Plaintiffs' Bar*, 27:10 *Am. Law.*, Oct. 2005, at 24.

126. *In re Silica Products Liability Litigation*, 398 F. Supp. 2d at 632 ("the court is confident that Dr. Friedman was correct when he testified that the 'epidemic' of some 10,000 cases of silicosis 'is largely the result of misdiagnosis'").

127. Grand juries in New York and Texas were convened to consider criminal charges arising out of the federal court silica litigation. See Jonathan D. Glater, *Civil Suits Over Silica in Texas Become a Criminal Matter in New York*, *N.Y. Times*, May 18, 2005, at C5, abstract available at 2005 WLNR 7889661; Jonathan D. Glater, *Lawyers Challenged on Asbestos*, *N.Y. Times*, July 20, 2005, at C1, available at 2005 WLNR 11332864; Peter Geier, *Silica Cases Drawing Resistance; Fallout From Key Texas Case Continues with Grand Jury, Legislation*, 28:16 *Nat'l L.J.*, Dec. 19, 2005, at 7. The United States House of Representatives Energy & Commerce Subcommittee on Oversight & Investigations also held hearings on the subject in 2006. See Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, *N.Y. Times*, Mar. 8, 2006, at C3, abstract available at 2006 WLNR 3870056. According to *The Wall Street Journal*, several doctors and the owners of two screening companies refused to answer congressional questions, invoking their Fifth Amendment rights. See Editorial, *Silicosis Clam-up*, *Wall St. J.*, Mar. 13, 2006, at A18, abstract available at 2006 WLNR 4210261; see also *Doctors Refuse to Testify at Silicosis Hearing; Others Recount Diagnoses 'Manufactured for Money'*, *US Fed. News*, Mar.

9, 2006, available at 2006 WLNR 4049125; Lawyers Questioned Over Faulty Silicosis Claims, US Fed. News, July 26, 2006, available at 2006 WLNR 13106184.

128. Dr. Ray Harron reportedly diagnosed disease in 51,048 Manville claims and supplied 88,258 reports in support of other claims. In one day, Dr. Harron reportedly diagnosed 515 people, or the equivalent of more than one a minute in an eight-hour shift. Dr. James Ballard provided 10,700 primary diagnoses and another 30,329 reports in support of asbestos claims. See Editorial, Silicosis Clam-up, Wall St. J., Mar. 13, 2006, at A18, abstract available at 2006 WLNR 4210261. According to Manville Trust records, Dr. Jay Segarra “participated in almost 40,000 positive diagnoses for asbestos-related illnesses over the last 13 years, or about eight per day, every day, including weekends and holidays. There were about 200 days on which Dr. Segarra rendered positive diagnoses for more than 20 people, and 14 days with more than 50.” Adam Liptak, Defendants See a Case of Diagnosing for Dollars, N.Y. Times, Oct. 1, 2007, at A 14, available at 2007 WLNR 19170105.

129. See Behrens & Goldberg, 12 Conn. Ins. Law J. 477 (2006), at 494. Judge Jack’s findings have impacted, and will continue to impact, asbestos litigation. Judge Jack’s decision also has had repercussions in the tort system. For example, an Ohio trial court dismissed all asbestos cases supported solely by doctors who refused to testify before Congress, on the ground that they “are currently unlikely to testify at any hearing or trial in these matters.” In re Cuyahoga County Asbestos Cases, Special Docket No. 73958 (Ohio Cuyahoga County Com. Pl. Mar. 22, 2006) (on file with authors); see also Lester Brickman, On the Applicability of the Silica MDL Proceeding to Asbestos Litigation, 12 Conn. Ins. L.J. 289 (2006).

130. The New York Supreme Court recently rejected efforts by Weitz & Luxenburg to delay filing bankruptcy claims on behalf of its clients until after their state court cases have concluded. *Cannella v. Abex*, No. 1037729/07 (NY Sup. Ct. Jan. 24, 2008) (on file with authors). The operative case management order requires plaintiffs to file all bankruptcy claims that they intend to file within 90 days of the commencement of trial. The plaintiffs’ lawyers argued that they could not comply because they did not know which trusts they intended to make claims against. The court was unpersuaded by their explanation and threatened to vacate any resulting trial verdict if the court discovered that a plaintiff thereafter had filed claims against 524(g) trusts following the conclusion of trial.

131. However, in *Garcia v. Duro Dyne Corp.*, 2007 Cal. App. LEXIS 1715 (Cal. Ct. App. Oct. 16, 2007), the California Court of Appeals recently refused to allow a setoff of the economic damages portion of a jury verdict (California does not allow setoffs for noneconomic damages because it follows a pure proportional liability rule) where the settlement monies had not been actually tendered to the plaintiff. Instead, the court amended the judgment to include a reservation of jurisdiction to award future credits in the event that settlement payments were made. The court’s decision is distinguishable from the authors’ point above, as the uncertainty of collecting settlement monies is not at issue with prospective trust recoveries, which are both ascertainable and recoverable. Thus the *Garcia* decision does not run contrary to the entitlement of a peripheral tort defendant to setoffs for unclaimed trust recoveries, especially in light of some claimants’ efforts to recover a windfall by delaying trust submissions.

132. Louis D. Brandeis, What Publicity Can Do, Other People’s Money, Ch. 5 at 92 (1932) (first published in Harper’s Wkly., Dec.20, 1913).