THE NEED FOR FURTHER TRANSPARENCY BETWEEN THE TORT SYSTEM AND SECTION 524(G) ASBESTOS TRUSTS, 2014 UPDATE – JUDICIAL AND LEGISLATIVE DEVELOPMENTS AND OTHER CHANGES IN THE LANDSCAPE SINCE 2008

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I. INTRODUCTION

In 2008, we published *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*.[1] There, we explored the disconnect between the tort system and 524(g) asbestos trusts established to address the asbestos liabilities of former asbestos tort defendants that have reorganized through bankruptcy.[2] These trusts answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several

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[1] William P. Shelley, Jacob C. Cohn, & Joseph A. Arnold, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. OF BANKR. L. & PRACTICE 257 (2008).

[2] *Id.* at 260.

decades.[3] Collectively, these trusts pay billions of dollars each year to claimants, many of whom are also suing solvent defendants in the tort system.[4] As the "main players" have exited the tort system through bankruptcy, asbestos plaintiffs have turned to targeting an ever-growing number of "peripheral" defendants that have comparatively lower degrees of culpability for the claimant's injuries.[5] Our 2008 article detailed several reasons why disclosure of trust claiming materials, as well as data regarding amounts recovered by tort claimants from the 524(g) trusts, is crucial to ensure that the remaining tort system defendants are not forced to pay more than their fair share of a plaintiff's claim, and that plaintiffs are not receiving a double recovery, to the detriment of solvent defendants in the tort system and future claimants in the trust system.[6]

In many jurisdictions, the tort defendants need trust claiming information in order to apportion fault to bankrupt entities to reduce their own liabilities.[7] As we previously explained, tort reform legislation has largely eliminated pure joint and several liability in favor of systems that impose liability based upon the comparative fault of each defendant.[8] Many of these systems continue to permit the imposition of joint and several liabilities

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[3] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 2 (2011) [hereinafter GAO REPORT] (noting how these trusts allow a company to transfer its liabilities to an asbestos personal injury trust, which in turn compensates present and future claimants).

[4] *See id.* at 16 (explaining that from 1988 through 2010, the 524(g) asbestos trusts paid about $3.3 million claimants approximately $17.5 billion); *see also* Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 MEALEY'S ASBESTOS BANKR. REP. 1, 10 (June 2013) (noting that the trusts collectively paid out approximately $1.25 billion in 2012).

[5] Shelley, Cohn & Arnold, *supra* note 1, at 259, 265.

[6] *Id.* at 259, 277-78.

[7] *Id.* at 266-67, 288 n.53.

[8] *See generally id.* at 270, 277 (discussing how the majority of the states have comparative fault rules in an effort to remedy the inherent unfairness imposed on defendants from joint and several liability).

solely with respect to economic damages,[9] while some states continue to permit the imposition of overall joint and several liability, but only with respect to defendants whose comparative fault is shown to exceed some minimum benchmark, such as fifty or sixty percent fault.[10] In addition, a number of jurisdictions, in establishing the comparative fault of the tort system defendants, permit bankrupt entities to be included on jury verdict sheets and allow juries to apportion a percentage of fault to such bankrupt entities.[11] Requiring disclosure of plaintiffs' trust claiming materials provides both identification of bankrupt entities to which a jury may appropriately apportion a degree of fault, as well as potential evidence tending to indicate that the tort defendants' degree of comparative fault is relatively less once the bankrupt entities' shares of fault are taken into account.[12]

Trust transparency also is needed to assure that tort defendants receive appropriate judgment reduction credits.[13] Whether or not states permit juries to assign comparative fault to bankrupt entities, tort defendants generally are entitled to judgment reduction credits or setoffs reflecting a plaintiff's recoveries from other sources, including 524(g) trusts.[14] Given that a typical mesothelioma claimant may recover hundreds of thousands of dollars from 524(g) trusts, disclosure of these trust recoveries to tort defendants may significantly reduce a tort defendant's proportional share of fault.[15]

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[9] *See generally id.* at 270 (noting that Pennsylvania has retained joint and several liability except for "intentional torts and environmental hazards").

[10] *Id.* at 270.

[11] *See, e.g.*, Shelley, Cohn & Arnold, *supra* note 1, at 266-68 (discussing how courts in Mississippi, Ohio, and Texas all allow juries to apportion fault on a form so that no defendant is liable for more than its proportionate share of liability).

[12] *See generally id.* at 277 (noting that disclosure allows defendants to have access to evidence of recoveries from asbestos trusts of the plaintiff's existence and culpability).

[13] *Id.* at 272.

[14] *Id.* at 264-65, 272, 283.

[15] *See id.* at 277 (discussing how disclosure can help peripheral defendants establish their correct liability and protect themselves from abuses).

The disclosure of trust claiming information also serves as an important check against fraudulent claiming practices both in the tort system and among the trusts themselves.[16] In our prior article, we highlighted the case of *Kananian v. Lorillard Tobacco Co.*,[17] where the plaintiff asserted claims in the tort system that were inconsistent with, and in some cases contradicted, numerous prior trust system claims (which were themselves inconsistent and contradictory).[18] Contrary to claims from the plaintiffs' bar, including their bankruptcy counsel, that such abuses are largely unproven,[19] such conduct on a much broader scale was recently exposed in a January 10, 2014 opinion in the bankruptcy of Garlock Sealing Technologies, LLC (Garlock).[20] That court, in an opinion estimating Garlock's current and future liability for mesothelioma claims, concluded that "the last ten years of [Garlock's] participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers."[21] As discussed below, that court detailed numerous instances of claimants and their counsel intentionally delaying their trust claims to falsely minimize their true asbestos exposure histories in the tort system.[22] These same claimants filed numerous trust claims post-litigation, alleging exposure to the products of bankrupt manufacturers, that, in their court cases, they testified under oath did not exist.[23]

As we explained in our 2008 article, these trusts, which are heavily influenced by the same plaintiffs' lawyers whose clients are

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[16] *Id.* at 258.

[17] Kananian v. Lorillard Tobacco Co., No. CV 442750, at 1 (Ohio Ct. C.P. Cuyahoga Cnty. 2007).

[18] *Id.* at 1-2 (noting the allegations of dishonesty and fraud).

[19] Elihu Inselbuch et al., *The Effrontery of the Asbestos Trust Transparency Legislation Efforts*, 28:2 MEALEY'S LITIG. REP. ASBESTOS 7 (Feb. 20, 2013), *available at* www.capdale.com/files/8122_ASB022013cm.pdf.

[20] *In re* Garlock Sealing Techs., LLC, 504 B.R. 71, 84 (Bankr. W.D.N.C. 2014).

[21] *Id.* at 82.

[22] *See generally id.* at 84-85 (noting how the court identified a pattern of non-disclosure by fifteen plaintiffs and five major firms, where plaintiffs withheld evidence during disclosure and even denied exposure to the products).

[23] *Id.* at 84.

seeking payments from both the trusts and tort defendants, are purposely structured in a manner intended to shield trust submissions from scrutiny.[24] In addition, the trusts actively oppose discovery efforts to obtain claiming information from them.[25] Likewise, the plaintiffs and their counsel in the tort system continue to fight disclosure of their own trust claiming information.[26]

The purpose of this article is to update the evolving landscape of the transparency debate in the six years since our original article was published. The need for disclosure requirements and their vigilant enforcement has by no means diminished. Notwithstanding efforts by the plaintiffs' bar to portray the abuses unmasked in *Kananian* as an isolated situation, instances of trust claiming abuses and efforts to hide trust claiming histories from tort system defendants continue to be exposed. As the *Garlock* bankruptcy court only recently confirmed, claimants continue to delay their trust filings in an effort to deny tort defendants the benefit of allocating fault to bankrupt entities and obtaining judgment reduction credits.[27] Claimants continue to make trust submissions based upon alleged exposure histories that are at stark variance from the tales they tell in the tort system. Moreover, the trusts themselves, dominated by many of the same law firms who have been caught "hiding the ball" in the tort system, continue to do nothing to coordinate among themselves to ferret out potentially fraudulent claims such as those exemplified by *Kananian* and *Garlock*. Equally troubling, future claimant representatives, whose duty it is to protect future claimants from the improper dissipation of trust assets by current claimants, have remained mute on the bankruptcy transparency front.

There has been substantial activity on bankruptcy transparency since our article was published in 2008. In 2012 and 2013, two states, Ohio and Oklahoma, enacted legislation mandating full disclosure of trust claiming information by claimants, requiring

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[24] Shelley, Cohn & Arnold, *supra* note 1, at 262.
[25] *Id.*
[26] *Id.*
[27] *In re Garlock Sealing Techs., LLC*, 504 B.R. at 84.

claimants to file all known trust claims in advance of any trial against solvent defendants, and declaring the presumptive admissibility at trial of trust submissions.[28] Similar bills have been introduced in several other states.[29] In other jurisdictions, case management orders now mandate disclosure by plaintiffs of trust claiming information.[30] On the federal level, the Furthering Asbestos Claim Transparency (FACT) Act (FACT Act), which would amend section 524(g) to require regular public reporting by 524(g) trusts of trust payments and claimant exposure histories,[31] has been passed by the United States House of Representatives (although further progress in this Congress is doubtful, given the current administration's stated opposition to the bill).[32]

In addition, in 2011 the Delaware bankruptcy court rebuffed efforts by several 524(g) trusts to shield their claims data and limit subpoena power by invoking "confidentiality" provisions built into trust distribution procedures (TDP) by the asbestos creditors committees to enjoin enforcement of such subpoenas.[33] In our 2008 article, we argued that enforcement of such provisions exceeded the post-confirmation jurisdiction of bankruptcy courts.[34] In two related opinions, that court agreed, and held that whatever those TDP provisions might purport to provide, it was beyond the

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[28] OHIO REV. CODE ANN. §§ 2307.951-54 (2013); OKLA. STAT. tit. 76, §§ 81-89 (2013).

[29] Rachel Reynolds, *Following in Ohio's Footsteps: The Expansion of Asbestos Transparency Legislation*, SEDGWICK L. (May 2013), http://www.sdma.com/following-in-ohios-footsteps-the-expansion-of-asbestos-transparency-legislation-05-13-2013/.

[30] Shelley, Cohn & Arnold, *supra* note 1, at 267, 277, 279 (noting how courts, including those in Ohio and California, are now requiring plaintiffs to disclose information prior to commencing discovery).

[31] OFF. OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STATEMENT OF ADMINISTRATIVE POLICY: H.R. 982 – FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2013 (Nov. 13, 2013) [hereinafter Statement of Admin. Policy]; H.R. 982, 113th Cong. (2013).

[32] *Id.*

[33] *In re* ACandS, Inc. v. Hartford Accident Indem. Co., No. 10-53721, 2011 WL 3471243, at *1-2, *4-5 (Bankr. D. Del. 2011).

[34] Shelley, Cohn & Arnold, *supra* note 1, at 279-80.

authority of the court to interfere with valid discovery subpoenas to the trusts issued from state and federal courts.[35]

II. EXAMPLES OF CLAIMANT EFFORTS TO MANIPULATE THE SYSTEM CONTINUE TO MOUNT

In our 2008 article, we highlighted the *Kananian* case in Ohio.[36] There, the plaintiff's estate, represented by two prominent plaintiffs' asbestos firms, recovered hundreds of thousands of dollars from numerous trusts by making wildly inconsistent, and often entirely untrue, claims regarding Mr. Kananian's work history.[37] They then went to great lengths to conceal this claiming history from Lorillard, which Kananian's estate had sued in the tort system claiming that Mr. Kananian contracted mesothelioma solely from smoking cigarettes tipped with asbestos-containing filters.[38] Post-*Kananian* examples of gaming the system continue to emerge, further highlighting the need for strong trust disclosure requirements and their vigilant enforcement.[39] Several themes emerge from these latest examples.

First, different plaintiffs' law firms contract with each other to divide responsibility for submitting trust claims and conducting civil litigation.[40] Trial counsel is not informed by trust counsel about claims that have been submitted on the plaintiff's behalf,[41] and trial counsel pleads ignorance when the plaintiff's failure to disclose his trust submissions is unmasked.[42]

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[35] *Id.* at 263, 276 (discussing how in both the *Federal Mogul* bankruptcy case and the *Celotex Asbestos* settlement trust, the court held that it was beyond the scope of the bankruptcy jurisdiction to interfere in issues concerning state court discovery and issuance of subpoenas).

[36] *Id.* at 263.

[37] *Id.* at 264.

[38] *Id.* at 263.

[39] *See, e.g.*, *id.* at 273 (discussing the similar case of *Volkswagen of America, Inc. v. Superior Court*).

[40] *See* Shelley, Cohn & Arnold, *supra* note 1, at 261, 264.

[41] *See generally id.* at 264 (noting how trust submissions were made by trusts to the estate).

[42] *See id.* at 264 (showing that attorneys often knowingly deceive the court and, in at least one example, admitted to submitting claims that are "rife with

Second, when the suppression of the existence of trust claims is exposed, plaintiffs and their counsel continue to downplay the importance of trust submissions, arguing, *inter alia*, that deferred and/or unsigned claims are not evidence of exposure to the bankrupt entities' products.[43]

Third, plaintiffs are purposely delaying submission of trust claims until after the conclusion of their tort claims, suggesting a calculated strategy by the plaintiffs' bar to withhold information about a plaintiff's true exposure history during litigation to unfairly shift the blame to less-culpable, solvent tort system defendants.[44]

A. The Garlock *Bankruptcy Court Finds that Suppression and Manipulation of Exposure Evidence by Leading Plaintiffs' Firms Improperly "Infected" and "Inflated" Garlock's Tort Liabilities*

Recently, Judge George R. Hodges, the bankruptcy judge overseeing the *Garlock* bankruptcy, issued an opinion concluding that Garlock's asbestos liabilities since 2000 had been grossly inflated as a result of plaintiffs' manipulation of exposure evidence in the tort system.[45] Garlock had proposed a plan of reorganization that would provide $270 million to fund the resolution of current and future asbestos claims.[46] To evaluate the feasibility of this plan or any competing plans, the court undertook to estimate Garlock's liabilities to current and future mesothelioma claimants.[47]

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outright fabrications."); *see also* Kananian v. Lorillard Tobacco Co., No. CV 442750, at 1, 9-10 (Ohio Ct. C.P. Cuyahoga Cnty. 2007) (showing how the attorney knowingly attempted to deceive the court by pleading ignorance regarding the submission of claim forms to the courts, but evidence shows he did so "while knowing that his firm and Early Ludwick had received money on behalf of Mr. Kanian from all of the trusts").

[43] *See generally* Shelley, Cohn & Arnold, *supra* note 1, at 258, 262, 282 (discussing how plaintiffs and their attorneys try to prevent defendants from obtaining information from trust submissions).

[44] *Id.* at 282.

[45] *In re* Garlock Sealing Techs., LLC, 504 B.R. 71, 86-87 (Bankr. W.D.N.C. 2014).

[46] *Id.* at 74 (noting Garlock's $270 million to fund the proposed Plan of Reorganization).

[47] *Id.* at 73 (noting Garlock's estimated liability as $125 million).

Garlock was a manufacturer of gaskets containing relatively less dangerous chrysotile asbestos, which itself was encapsulated in other materials.[48] The gaskets themselves were installed within closed piping systems that were "generally wrapped with asbestos thermal insulation produced by other manufacturers."[49] Garlock's gaskets released asbestos only when they were disturbed during sporadic maintenance activities that first required "the removal of the thermal insulation products which caused a 'snowstorm' of asbestos dust."[50] "It is clear," Judge Hodges found, "that Garlock's products resulted in a relatively low exposure to asbestos to a limited population and that its legal responsibility for causing mesothelioma is relatively de minimus."[51]

Garlock previously had been successful in minimizing asbestos liabilities.[52] But, Garlock's experience changed profoundly beginning in the early 2000s, when the great bulk of asbestos insulation manufacturers exited the tort system for bankruptcy, and Garlock became a "target" defendant.[53] Due to "[c]ertain plaintiffs' law firms" causing evidence of a plaintiff's exposure to other asbestos products to "disappear," Garlock's asbestos liabilities increased drastically.[54] The "disappearance" of evidence of exposure to thermal insulation products produced by now-bankrupt entities, the court found, "was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."[55]

The court's observations were drawn directly from its review of fifteen of Garlock's prior settled cases:

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[48] *Id.*

[49] *Id.*.

[50] *Id.*

[51] *In re Garlock Sealing Techs., LLC*, 504 B.R. at 73.

[52] *See id.* at 73, 75 (discussing how in the past Garlock settled cases with "relative success" and even after filing bankruptcy, its liability should remain small).

[53] *See id.* at 82.

[54] *Id.* at 71, 73.

[55] *Id*. at 84.

> In 15 settled cases, the court permitted Garlock to have full discovery. Garlock demonstrated that exposure evidence was withheld in *each and every one* of them. These were cases that Garlock had settled for large sums. The discovery in this proceeding showed what had been withheld in the tort cases – on average plaintiffs disclosed only about 2 exposures to bankruptcy companies' products, but after settling with Garlock made claims against about 19 such companies' Trusts.[56]

To illustrate the problem, the court gave several striking examples. In a California case in which Garlock suffered a $9 million verdict, the plaintiff, a former navy machinist, claimed that 100% of his work was on gaskets and denied any exposure to surrounding asbestos insulation.[57] "[T]he plaintiff's lawyer fought to keep Pittsburgh Corning," the manufacturer of Unibestos, off the verdict form and represented to the jury that there was no Unibestos present on the ship.[58] After the verdict, however, the plaintiff's lawyer filed fourteen trust claims, including several against insulation manufacturers.[59] "And most important, the same lawyers who represented to the jury that that there was no Unibestos insulation exposure had, seven months *earlier*, filed a ballot in the Pittsburgh Corning bankruptcy that certified 'under penalty of perjury' that the plaintiff had been exposed to Unibestos insulation."[60]

In Philadelphia, Garlock settled a shipyard case for $250,000.[61] In answers to written interrogatories, the plaintiff claimed to have "no personal knowledge" of exposure to asbestos from the products of any bankruptcy entities.[62] Yet, the plaintiff's lawyers previously had filed a sworn statement in the Owens Corning bankruptcy case claiming that the plaintiff "frequently,

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[56] *Id.* (emphasis in original).
[57] *In re Garlock Sealing Techs., LLC*, 504 B.R. at 84.
[58] *Id.*
[59] *Id.*
[60] *Id.* (emphasis in original).
[61] *Id.*
[62] *Id.* at 84-85.

regularly and proximately breathed asbestos dust emitted from Owens Corning Fiberglas's Kaylo asbestos-containing pipe covering."[63] Of twenty undisclosed trust claims made by this plaintiff, fourteen contradicted the plaintiff's denials in the tort discovery.[64]

Garlock paid $450,000 to a former Navy electronics technician who denied that he ever saw anyone installing or removing pipe insulation on his ship.[65] But, after settling, the plaintiff filed eleven trust claims.[66] In seven, the plaintiff claimed not only "that he personally removed and replaced insulation . . . [but he also] identified, by name, the insulation products to which he was exposed."[67]

Garlock paid $250,000 to settle a New York case where the plaintiff denied any exposure to insulation products.[68] Yet, the plaintiff later filed twenty-three trust claims—eight within twenty-four hours of the settlement.[69]

Garlock suffered a $1.35 million verdict in Texas in which the plaintiff claimed that his only asbestos exposure was to Garlock gasket material.[70] Although the plaintiff specifically denied knowledge of the name "Babcock & Wilcox," his lawyers filed a claim against Babcock & Wilcox's trust the day before the plaintiff gave this testimony.[71] Moreover, while the plaintiff's counsel told the jury that there was no evidence that his injury was caused by exposure to Owens Corning insulation, after the verdict, his lawyers filed a claim with the Owens Corning Trust.[72] Both trust claims represented that the plaintiff had both regularly handled raw

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[63] *In re Garlock Sealing Techs., LLC*, 504 B.R. at 85.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *In re Garlock Sealing Techs., LLC*, 504 B.R. at 85.
[70] *Id.*
[71] *Id.*
[72] *Id.*

asbestos fibers and had fabricated asbestos products from raw asbestos.[73]

In addition to the fifteen settled claims, Garlock identified 205 other cases where the claimant's discovery responses conflicted with the claimant's submissions to trusts or participation in balloting in bankruptcy cases where no trust had yet been established.[74] And, of 161 cases where Garlock paid judgments or settlement in excess of $250,000, "[t]he limited discovery allowed by the court demonstrated that almost half of those cases involved misrepresentation of exposure evidence. It appears certain that more extensive discovery would show more extensive abuse."[75]

The court contrasted these results with situations where Garlock was able to obtain evidence of trust claims and use that evidence to defend itself at trial.[76] "In three such trials, Garlock won defense verdicts, and in a fourth it was assigned only a 2% liability share."[77]

Garlock's Asbestos Claimants' Committees (ACC) and Future Claims Representative (FCR) had argued, based upon Garlock's experience trying and settling cases in the tort system after 2000, that Garlock's liabilities should be estimated at $1.0-1.3 billion.[78]

> The court rejected their experts' estimates, however, finding that the last ten years of [Garlock's] participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers. That tactic, though not uniform, had a profound impact on a number of Garlock's trials and many of its settlements such that the amounts recovered were inflated.[79]

Instead, the court estimated Garlock's liability to current and future mesothelioma claimants at $125 million, the amount estimated by

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[73] *Id.*
[74] *Id.* at 85-86.
[75] *In re Garlock Sealing Techs., LLC*, 504 B.R. at 86 (emphasis omitted).
[76] *Id.*
[77] *Id.*
[78] *Id.* at 74.
[79] *Id.* at 82.

Garlock's experts.[80] Nearly simultaneously with the release of Judge Hodges' estimation ruling, Garlock filed four adversary complaints against several leading plaintiffs' law firms and attorneys, including Waters & Kraus LLP, Belluck & Fox LLP, and the Shein Law Center Ltd., alleging conspiracy, fraud, and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).[81]

B. Additional Examples of Claim Manipulation Continue to Accumulate in the Tort System

The compelling evidence uncovered by Garlock with the aid of only limited discovery issued by its bankruptcy court is by no means unique. While uncovering such abuses is much more difficult without access to the kinds of discovery allowed to Garlock by Judge Hodges, examples of claiming abuses continue to be exposed in state after state.

In one Maryland case, the plaintiff explained that he ignored the court's order compelling disclosure of trust claims to the defendants because the judge had opened Pandora's Box.[82] When finally produced shortly before trial, the trust claiming documents revealed "substantial and inexplicable discrepancies between the positions" taken in court and before the trusts.[83] Despite explicit discovery requests, the plaintiff had failed to disclose nine trust claims.[84] In addition, the exposure period alleged in the litigation was materially different from the exposure period alleged in the

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[80] *Id*. at 73.

[81] *See* Daniel Fisher, *Embattled Gasket Maker Sues Asbestos Lawyers for Fraud*, FORBES, (Jan. 10, 2014, 10:47 AM), http://www.forbes.com/sites/danielfisher/2014/01/10/embattled-gasket-maker-sues-asbestos-lawyers-for-fraud/.

[82] Warfield v. AC&S, Inc., No. 24X06000460, Consolidated Case No. 24X09000163 (Md. Cir. Ct. Balt. City Jan. 11, 2011); *see also* Mark Behrens, Esq., Testimony Before the Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association's Tort Trial and Insurance Practice Section, at 8-9 (June 6, 2013), *available at* http://www.americanbar.org/groups/tort_trial_insurance_practice/asbestos_task_force.html.

[83] Behrens, *supra* note 82, at 9.

[84] *Id.*

trust claims.[85] In the tort system, the plaintiff claimed under oath that he was only exposed to asbestos between 1965 and the mid-1970s,[86] thereby focusing the alleged liability on the solvent defendants in the case while conveniently avoiding application of Maryland's statutory damages cap that would apply to later exposures.[87] In the trust system, however, the plaintiff claimed exposure from 1947 to 1991,[88] exposures that were different in scope and would have triggered the statutory damages cap.[89] It is also noteworthy that eight of the improperly-withheld claim forms were submitted to trusts *before* the plaintiff gave contradictory exposure testimony in the civil action.[90]

In another Maryland case, the plaintiffs filed twenty-three asbestos trust claims in the weeks and months after losing a trial during which the plaintiff alleged exposure to just two types of asbestos-containing products manufactured by only three solvent companies.[91] CertainTeed Corporation, which had obtained the defense verdict, learned of the plaintiff's previously undisclosed exposure history only after the Court of Special Appeals of Maryland reversed the verdict and ordered a retrial,[92] which led CertainTeed to seek discovery of the post-trial trust submissions.[93] In one of those trust submissions, the plaintiff signed a sworn statement alleging exposure to National Gypsum asbestos-containing products, despite having expressly denied any such exposure during litigation.[94] Plaintiff's counsel, the Law Offices of Peter G. Angelos, responded to CertainTeed's subsequent motion for sanctions by contending that Gonzalez was unlikely to obtain recovery from twenty-two of the twenty-three bankruptcy trusts

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[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Behrens, *supra* note 82, at 9.
[89] *Id.*
[90] *Id.*
[91] Defendant CertainTeed Corporation's Motion for Sanctions and Request for Hearing, Luther Beverage v. ACandS, Inc., No. 24X08000439, at 2 (Md. Cir. Ct. Balt. City Aug. 26, 2013).
[92] *Id.* at 14-15.
[93] *See id.* at 15.
[94] *Id.* at 2.

and the information submitted to the trusts was consistent with the evidence presented during discovery.[95] Before the hearing on the motion for sanctions, the case resolved.[96]

In a third Maryland case, Union Carbide made similar allegations against the Angelos firm before Maryland's highest court.[97] In discovery responses served in August 2008, the plaintiff denied making trust claims related to his mesothelioma.[98] In October 2010, just ten days before trial, the plaintiff served amended discovery responses identifying twenty-two trust claims, including at least thirteen that were filed *before* the August 2008 discovery responses.[99] The plaintiff's survivors ended up winning a judgment against Union Carbide in excess of $2.2 million.[100] In November 2013, Union Carbide sought review from the Court of Appeals of Maryland to remedy what Union Carbide characterized as "a pattern of delay, deception and disobedience" that in effect resulted in a trial by ambush.[101]

In New Jersey, the asbestos judge recently admonished plaintiffs' counsel during a pre-trial conference for concealing "deferred" and actual trust claims.[102] Throughout discovery, the plaintiffs denied making any trust claims.[103] However, counsel for Georgia-Pacific learned through separate discovery from the

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[95] *See CertainTeed Withdraws Sanction Motion Challenging Trust Submission Testimony*, 28:20 MEALEY'S LITIGATION REPORT: ASBESTOS 23 (Nov. 20, 2013).

[96] *Id.*

[97] *See* Memorandum of *Amici Curiae* Chamber of Commerce of the United States of America and American Tort Reform Association in Support of Petition for Review, Union Carbide Corp. v. Pittman, 83 A.3d 780, 2013 WL 6143256, at 2 (Md. 2014).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Union Carbide Seeks Review Addressing "Massive" Discovery Violations*, 28:21 MEALEY'S LITIG. REP: ASBESTOS 1 (Dec. 4, 2013). On January 27, 2014, the Maryland Court of Appeals advised that it would not hear the appeal. Union Carbide Corp. v. Pittman, 83 A.3d 780 (Md. 2014).

[102] Pre-Trial Conference Transcript, Barnes & Crisafi v. Georgia Pacific, MID-L-5018-08, MID-L-316-09, at 128-29 (N.J. Super. Ct. Middlesex Cnty. June 12, 2012) [hereinafter Pre-Trial Conference Transcript].

[103] *See id.*

Johns-Manville Trust that one of the plaintiffs indeed had submitted a deferred claim.[104] When confronted by the court, the plaintiff argued that he was not obligated to disclose deferred claims because they were filed to preserve the statute of limitations but were not actual demands for trust compensation.[105] The court, unsatisfied with plaintiff's excuse,[106] ordered for the disclosure of all deferred claims.[107] The plaintiff's attorney was unable to answer because a different law firm, Motley Rice, handled the trust claims pursuant to a contract between the two firms.[108] The court issued a strong admonition that counsel could not be "blind, deaf and dumb," and that he had an independent obligation to provide accurate answers to discovery.[109] Remarkably, the plaintiff's counsel contended that the trust submissions were a mistake because he asked Motley Rice to refrain from filing trust claims where a case was still in litigation.[110] The court continued the trial to allow the defendant to conduct a full investigation into these other potential exposures.[111]

In Delaware, the Superior Court voiced its consternation over the failure to disclose trust submissions in the case of *Montgomery v. American Steel & Wire Corp.*,[112] calling the plaintiffs' behavior

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[104] *Id.* at 126.

[105] *Id.* at 127-28.

[106] The court stated: "I don't see the difference between a claim and a deferral claim, in terms of what I have ordered to be produced. At the very least, it means that a defendant may want to do additional discovery, at the very least." *Id.* at 133.

[107] *Id.*

[108] Pre-Trial Conference Transcript, *supra* note 102, at 128-29.

[109] *Id.* at 129-30. Counsel subsequently admitted that one client had made a claim to the Johns-Manville Trust and deferred claims to three other trusts, while his other client made deferred claims against seven trusts. *Id.* at 126-30.

[110] *Id.* at 144-45. In response, the Court stated that it was powerless to prevent delayed trust claims but noted that the defendants would succeed to plaintiff's rights against those trusts. *Id*. at 148-49.

[111] *Id.* at 152.

[112] Pretrial Hearing Transcript at 3, *In re* Asbestos Litig.: Montgomery v. Am. Steel & Wire Corp., No. 09C-11-217 ASB (Del. Super. Ct. New Castle Cnty. Nov. 7, 2011); *see also Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the Comm. on the Judiciary*, 113th Cong. 39,

dishonest.[113] In *Montgomery*, the plaintiffs alleged that the decedent suffered household asbestos exposure from her husband, whose clothing was covered with asbestos dust from his work as an electrician.[114] The plaintiffs denied various alternative exposures throughout discovery and represented to the court just a week before trial that the plaintiffs had not made any trust submissions or recovered any trust settlements.[115] But, on the Saturday before a Monday trial, Foster Wheeler, the sole remaining defendant, learned that the plaintiffs had settled with two trusts.[116] By Sunday, the plaintiffs' Delaware trial counsel disclosed *twenty* additional trust claims,[117] blaming the prior nondisclosure on the failure to communicate with the plaintiffs' trust-claiming counsel, the Texas firm of Brent Coon & Associates.[118] Superior Court Judge Peggy Ableman responded: "This is really seriously egregiously bad behavior. This is misrepresenting. This is trying to defraud. I don't like that in this litigation. And it happens a lot. And I'm trying to put an end to it. This is an example of the games that are being played."[119] At oral argument following formal motion practice, Judge John Parkins gave Foster Wheeler two choices: (1) take additional discovery to get to the root cause of the potential fraud in order to further support its motion to dismiss, with the plaintiffs to pay reasonable

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at 52 (2013) (statement of Hon. Peggy L. Albeman) [hereinafter Albeman Statement].

[113] Albeman Statement, *supra* note 112, at 52.

[114] *Id.* at 48.

[115] *See generally id.* (noting that the plaintiffs identified no other contract with asbestos-containing products).

[116] *Id.* at 50.

[117] *Id.*

[118] Pretrial Hearing Transcript at 10, 13, *In re* Asbestos Litig.: Montgomery v. Am. Steel & Wire Corp., No. 09C-11-217 ASB (Del. Super. Ct. New Castle Cnty. Nov. 7, 2011). Counsel also argued that the plaintiffs did not sign any affidavits in connection with the trust submissions, suggesting his clients were not at fault for not knowing the exposure history that their trust lawyers were submitting to trusts around the country. *Id.* at 16.

[119] *Id.* at 7-8. Judge Ableman recently testified about this case before a House of Representatives subcommittee. *See* Albeman Statement, *supra* note 112, at 45.

costs, or (2) take additional discovery necessary to prove the liability of the bankrupt defendants, also to be paid for by the defendants.[120] The case was dismissed, however, before any further proceedings occurred.

In Louisiana, an asbestos plaintiff provided deposition testimony that directly contradicted information provided to sixteen asbestos bankruptcy trusts about his father's exposure history.[121] Specifically, the decedent's son testified that his father was a smoker, that he had no knowledge of his father's asbestos exposure history, and that his attorneys had never spoken with his father.[122]

In an Oklahoma asbestos bodily injury case, the plaintiff neglected to identify nineteen bankruptcy trust claims until the court compelled disclosure on the eve of trial.[123] Strikingly, the trust claims were supported by eleven co-worker affidavits, many of which were signed prior to the plaintiff's verified discovery responses.[124] The trust claims and affidavits revealed allegations of exposure to almost thirty-five *additional* asbestos products that were not disclosed during discovery.[125] One of the critical co-worker witnesses who had signed affidavits for the plaintiff as early as 2005 had since died and was unavailable to be re-deposed (he provided deposition testimony in the civil case that was

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[120] Motions Hearing Transcript at 43-45, *In re* Asbestos Litig.: Montgomery v. Am. Steel & Wire Corp., No. 09C-11-217 ASB (Del. Super. Ct. New Castle Cnty. Jan. 30, 2012). Judge Parkins later clarified that Foster Wheeler could take depositions of all attorneys associated with the plaintiffs' cases, and plaintiff must waive the attorney-client privilege to facilitate that discovery or face ultimate sanction of dismissal. *Id.* at 48.

[121] *See Furthering Asbestos Claim Transparency (FACT) Act of 2012: Hearing on H.R. 4369 Before the Subcomm. on Courts, Commercial and Adm. Law of the H. Comm. on the Judiciary*, 112th Cong. 120, at 16 (2012) (written Statement of Leigh Ann Schell) [hereinafter Schell Statement]. Ms. Schell was referring to the January 24, 2011 deposition of David Thomas Robeson in *Robeson v. Amatek, Inc. Id.*

[122] *Id.*

[123] *See id*. at 17 (discussing *Bacon v. Ametek, Inc.*).

[124] *Id.*

[125] *See id.*

inconsistent with the trust affidavit).[126] The plaintiff defended a motion in limine to preclude the witness' testimony by arguing that he could be questioned at trial, *despite the fact the witness had been dead for fifteen months*.[127] The sole remaining defendant also discovered that the plaintiff had recovered $185,000 from five of those trusts but deferred the remaining fourteen trust claims.[128] The defendant's subsequent motion to delay trial argued that the plaintiff, who stood to recover a minimum of $313,000 from her deferred claims, intentionally deferred those claims to avoid judgment reduction in the tort system.[129] The case settled prior to resolution of the motions.

C. The Lack of Internal Trust Policing

The lack of internal trust policing also appears to be persistent. Both the Government Accountability Office (GAO) and RAND Corporation issued reports analyzing the asbestos trusts subsequent to our initial article.[130] The 2010 RAND Study concluded that the publicly available information from the trusts is "limited in many important ways," with "perhaps the most-significant limitation of the publicly available data [being] the inability to link payments across trusts to the same individual."[131] The GAO interviewed eleven trusts during its investigation.[132] None of these trusts, which collectively had paid nearly $17.5 billion to claimants through 2010, had identified a single instance of fraud in any of their audits.[133] According to Professor S. Todd Brown, "given the history of asbestos litigation and global compensation systems

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[126] *Id.*

[127] Shell Statement, *supra* note 121.

[128] *Id.*

[129] *Id.*

[130] GAO REPORT, *supra* note 3; LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS AND TORT COMPENSATION (2010), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf.

[131] DIXON, ET AL., *supra* note 130, at 45.

[132] GAO REPORT, *supra* note 3, at 4.

[133] *Id.* at 16, 23.

generally, the trusts' representations to the GAO that they have uncovered no fraud are more suggestive of weaknesses in their internal controls than evidence that the trust system has managed to avoid fraud and abuse."[134] Indeed, it is a truism that victim compensation systems with lax claiming standards attract fraudulent claims, even when those funds are not effectively dominated by the plaintiffs' bar, as is the case with the asbestos trusts.[135] Recent examples include the 9/11 Victim's Compensation Fund and BP's Gulf oil-spill fund, where instances of fraudulent claiming were repeatedly detected and prosecuted.[136] As Professor Brown has observed, in his testimony in support of the FACT Act, "either asbestos trusts are somehow magically different from every other grid and matrix compensation scheme in history, or the audits are not what they appear to be," that is such audits have insufficient internal controls to effectively ferret out instances of fraudulent claiming.[137]

In 2013, the *Wall Street Journal* reported on a review of 850,000 claims made to the Johns-Manville Trust, the original asbestos bankruptcy trust, from the late 1980s to 2012.[138] The review uncovered a significant number of apparent anomalies, including over 2,000 applicants who claimed vocational exposure to asbestos from working in industrial jobs before they were twelve

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[134] S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 571 (2013). While Professor Brown suggests that "some trusts have become more vigilant in testing the intrinsic merits" of trust claims, *id.* at 557, he nonetheless concludes that "the audit provisions at many bankruptcy trusts appear to be more of an afterthought than a vital component of preserving trust assets." *Id.*

[135] *See generally* Karen Marshall, *Spring Ushers in Increased Momentum for Asbestos Trust Legislation*, ABESTOS.COM, http://www.asbestos.com/blog/2013/05/10/momentum-for-asbestos-trust-legislation/ (last visited Mar. 31, 2014) (discussing the possibility of lax trust procedures leading to fraudulent compensation).

[136] Brown, *supra* note 134, at 569.

[137] *See Furthering Asbestos Claim Transparency (FACT) Act of 2012: Hearing on H.R. 4369 Before the Subcomm. on Courts, Commercial and Adm. Law of the H. Comm. on the Judiciary*, 112th Cong. 120, at 24-25 (2012) (testimony of Professor S. Todd Brown).

[138] Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J., Mar. 11, 2013, at A1, A14.

years old.[139] Hundreds more claimants asserted claims for lesser cancers to other trusts or in court cases, but told the Johns-Manville Trust that they had mesothelioma.[140]

III. LEGISLATIVE AND JUDICIAL RECOGNITION OF THE NEED FOR TRUST CLAIMING TRANSPARENCY

Efforts to break down the information barrier between the tort and trust systems have become more widespread. There have been some significant advances through state courts and state legislatures to compel disclosure of trust-claiming information and to discourage tactics such as deferring trust claim submissions while the claimant pursues solvent defendants in the tort system.[141] In the courts, formerly "peripheral" defendants have led the charge in demanding access to claimants' trust filings.[142] These efforts have resulted in a number of court rulings compelling plaintiffs to produce trust claims information, as well as a number of amendments to case management orders calling for the mandatory disclosure of such information.[143]

But, the tort system defendants are not alone. Companies such as Garlock, that are operating under bankruptcy protection, are seeking discovery from existing trusts to use in bankruptcy

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[139] *Id.* at A1.

[140] *Id.* at A14.

[141] *See infra* Part III.A.1. (discussing the recently enacted trust transparency legislation in Ohio and Oklahoma).

[142] *See generally* Lois Kapila, *Asbestos Defendants Want Automatic Access to Info in Bankruptcy Trusts*, LEGAL NEWSLINE, http://legalnewsline.com/in-the-spotlight/230231-asbestos-defendants-want-automatic-access-to-info-inbankruptcy-trusts (last visited Mar. 31, 2014) (discussing the unfair advantage the lack of transparency has had on "peripheral" defendants).

[143] *See generally* Santo Borruso, John J. Weinboltz, & John S. Stadler, *Products: Class Action, Trade & Industry Representation Alert*: *New York Asbestos Judge Rules Bankruptcy Claims Materials Must Be Disclosed*, NIXON PEABODY, LLP, http://www.nixonpeabody.com/files/153599_Products_Alert_11_19_2012.pdf (last visited Mar. 31, 2014) (discussing a recent ruling in New York mandating that "plaintiffs must disclose to defendants all materials submitted in connection with any claims filed with asbestos-related bankruptcy trusts").

proceedings where the court is undertaking to estimate the aggregate value of current and future claims against such debtors.[144] Like Garlock, these companies seek to ensure that such estimates take into account the billions of dollars already available from existing trusts to pay asbestos claimants.[145] Insurance companies who are being asked to indemnify asbestos defendants and trusts have also entered the fray by seeking claims information from trusts to ensure that their insureds are not paying disproportionate settlement amounts to claimants based on claimants providing inconsistent exposure histories.[146]

A. Legislative Efforts to Address Lack of Transparency

i. Ohio and Oklahoma Have Recently Enacted Trust Transparency Legislation

In our 2008 article, we advocated for the enactment of statutes, court rules, and/or standing orders mandating broad disclosure by asbestos plaintiffs and their counsel of trust claiming information, including, *inter alia*, identification of all trusts to which the plaintiff has made or intends to make a claim for compensation, disclosure of all amounts received from the trusts, production of all trust claim submission materials, and identification of all law firms that represent or previously represented the plaintiff in seeking recovery for asbestos

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[144] *See generally* Philip Bentley and David Blabey Jr., *Asbestos Estimation In Today's Bankruptcies: The Central Importance Of The New Trusts*, 26:24 MEALEY'S LITIG. REP.: ASBESTOS 5-6 (Jan. 18, 2012), *available at* http://www.kramerlevin.com/files/Publication/4478475a-e530-49df-8e26-863611a38f0f/Presentation/PublicationAttachment/309d372e-318b-4566-a624-9130672d2600/Asbestos%20Estimation%20in%20Today's%20Bankruptcies.pdf (discussing the nature of Garlock's discovery request).

[145] *See generally* Sindhu Sundar, *Garlock Ruling Gives Asbestos Defendants Discovery Hammer*, LAW 360, http://www.law360.com/articles/508160/garlock-ruling-gives-asbestos-defendants-discovery-hammer (last visited Mar. 31, 2014) (discussing inflated settlements by plaintiffs who concealed claims against other trusts and defendants).

[146] *See, e.g.*, Nat'l Union Fire Ins. Co. v. Porter Hayden Co., No. CCB-03-3408, 2012 U.S. Dist. LEXIS 23716, at *2-4 (D. Md. Feb. 24, 2012) (discussing defendants seeking trust claim information from plaintiffs).

injuries.[147] Since then, transparency advocates have made progress, including the enactment of transparency legislation in two states, Ohio and Oklahoma.[148]

In December 2012, Ohio Governor Kasich signed asbestos transparency legislation into law, effective March 27, 2013.[149] Under the law, an asbestos claimant is required, within thirty days of the commencement of discovery, to provide to all parties a statement, sworn under penalty of perjury:

> identifying all existing asbestos trust claims made by or on behalf of the claimant and all trust claims material pertaining to each identified asbestos trust claim. The sworn statement shall disclose the date on which each asbestos trust claim against the relevant asbestos trust was made and whether any request for a deferral, delay, suspension, or tolling of the asbestos trust claims process has been submitted.[150]

The statute further imposes a continuing obligation upon the asbestos claimant to supplement his initial disclosure within thirty days of the filing of any additional trust claims by identifying such additional trust claims, and "provid[ing] to all of the parties in the asbestos tort action all trust claims material pertaining to each additional asbestos trust claim identified in that amendment."[151] To enforce compliance with the disclosure requirements, the statute provides that a claimant's failure to disclose and produce all trust claims material "shall constitute grounds for the court to decline to assign an initial trial date or extend the date set for trial in the action."[152]

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[147] *See* Shelley, Cohn & Arnold, *supra* note 1, at 274-76 (discussing the need for mandatory disclosures of trust claims by claimants).

[148] OHIO REV. CODE ANN. §§ 2307.951-.954 (West 2013); OKLA. STAT. tit. 76, §§ 81-89 (2013).

[149] §§ 2307.951-.954.

[150] *Id.* § 2307.952(A)(1)(a).

[151] *Id.* § 2307.952(A)(2)-(3).

[152] *Id.* § 2307.952(B).

The Ohio statute also contains a mechanism to allow defendants to move to stay the proceedings if there is evidence that the plaintiff has delayed the submission of meritorious trust claims.[153] Specifically, the statute authorizes defendants to move to stay the proceedings if they can show "credible evidence" that there are trusts against which the claimant has not claimed, "but against which the defendant in good faith believes the claimant may make a successful asbestos trust claim."[154] In response to a motion to stay, a claimant may do one of three things: (1) file claims with the trusts identified in the defendant's motion and submit proof of such filings; (2) request a determination from the court that the information identified by the defendant is insufficient to support further trust claims, or that the information supplied by the defendant "should be modified prior to the filing of [the additional] asbestos trust claim[s]" identified by the moving defendant; or (3) request that the court determine that the attorney's fees and expenses required to submit the additional asbestos trust claims "exceed the claimant's reasonably anticipated recover[ies] from the asbestos trust claim[s]."[155] If the court determines that a good faith basis exists to file claims with the trusts identified in the defendant's motion, the court is required to stay the proceedings until the claimant submits claims to the additional trusts.[156]

Importantly, the Ohio statute rejects arguments by the asbestos plaintiffs' bar and the trusts that trust claim submissions are privileged or otherwise inadmissible at trial.[157] Trust claim submissions "are presumed to be authentic, relevant to, and discoverable in an asbestos tort action."[158] Moreover, such materials may be introduced at trial

> to prove alternative causation for the exposed person's claimed injury, death, or loss to person, to prove a basis to allocate responsibility for the claimant's claimed injury,

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[153] *Id.* § 2307.953(A)(1)-(3).
[154] *Id.* § 2307.953(A)(1)-(3).
[155] OHIO REV. CODE ANN. § 2307.953(C)(1)(a-c) (West 2013).
[156] *Id.* § 2307.953(E).
[157] *Id.* § 2307.954(B).
[158] *Id.*

> death, or loss to person, and to prove issues relevant to an adjudication of the asbestos claim, unless the exclusion of the trust claims material is otherwise required by the rules of evidence.[159]

The Ohio statute additionally authorizes discovery regarding the claimant's asbestos trust claims directly from the asbestos trusts involved in addition to the claimant's own mandatory disclosures.[160]

As an additional backstop to the above-described safeguards, the Ohio statute expressly authorizes a judgment debtor to file a motion for sanctions or other relief for up to a year following entry of the judgment in the event that the asbestos claimant thereafter files additional claims with asbestos trusts that were in existence at the time the judgment was rendered.[161] In such an event, courts are authorized to reopen the judgment and either "(a) [a]djust the judgment by the amount of any subsequent asbestos trust payments obtained by the claimant; [or] (b) [o]rder any other relief to the parties that the court considers just and proper."[162]

On May 7, 2013, Oklahoma Governor Mary Fallin signed into law that state's Personal Injury Trust Fund Transparency Act.[163] Substantially similar to the Ohio statute, Oklahoma's version extends disclosure requirements beyond 524(g) asbestos trusts to encompass claims made against all personal injury trust funds.[164] The Oklahoma statute also contains more robust enforcement mechanisms.[165] Trial dates shall be set no earlier than 180 days after a claimant makes the required disclosures.[166] Moreover, if the claimant identifies yet-to-be-filed trust claims, courts are required

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[159] *Id.*

[160] *Id.* §2307.954(C).

[161] OHIO REV. CODE ANN. §2307.954(F) (West 2013).

[162] § 2307.954(E).

[163] OKLA. STAT. tit. 76, § 81 (2013).

[164] *Id.* § 83(A).

[165] *See id.* (explaining that false statements are punishable under penalties of perjury).

[166] *Id.* § 85(A).

to stay all proceedings until the claimant submits such claims and produces all related documentation to the defendants.[167]

In addition, in the event that the claimant proceeds to trial before all his trust claims have been resolved, the Oklahoma statute permits courts to attribute value to submitted, but unpaid, trust claims.[168] Specifically, the statute establishes "a rebuttable presumption that the plaintiff is entitled to, and will receive, the liquidated value specified in the trust governance document applicable to his or her claim at the time of trial."[169] The trial court is authorized to take judicial notice of the compensation amounts and payment percentages established by the respective TDPs "and shall establish an attributed value to the plaintiff's personal injury trust claim."[170] A defendant is then entitled to a setoff or credit against any adverse judgment in the amount of any trust fund payments plus the attributed value of then-pending trust fund claims.[171] If multiple defendants are found liable, the credit is to be distributed proportionately among the defendants according to their respective percentages of fault.[172] And, while the Ohio statute authorized discovery directly from trusts, Oklahoma's version goes further, requiring claimants to "provide consent or other expression of permission that may be required by the personal injury trust to release information and materials sought by the defendant."[173]

In addition to Ohio and Oklahoma, similar transparency measures have been introduced in the legislatures of Illinois, Louisiana, Mississippi, Pennsylvania, Texas, West Virginia, and Wisconsin.[174] Hearings on these bills have been held in some

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[167] *Id.* § 83(B).
[168] *Id.* § 7.
[169] tit. 76, § 81.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Asbestos*, TAKE JUST. BACK, http://www.takejusticeback.com/Asbestos (last visited Mar. 20, 2014).

states, and Wisconsin's bill passed the state assembly in May 2012,[175] but stalled in that state's senate.[176]

ii. The FACT Act Passes the U.S. House, But Stalls in the Senate

On the federal front, the FACT Act, introduced in 2012 in the United States House of Representatives,[177] and reintroduced in 2013,[178] seeks to mandate periodic public reporting by the trusts themselves.[179] The FACT Act bill proposes to amend 11 U.S.C. § 524(g) to add a subsection requiring each trust to publicly file quarterly reports with the bankruptcy court that authorized its creation.[180] The reports would be required to disclose "each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant."[181] In addition, the FACT Act would require the trusts, upon payment of reasonable costs, to promptly provide to parties in asbestos tort cases "any information related to payment from, and demands for payment from, such trust, subject to appropriate protective orders."[182]

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[175] *Wisconsin Assembly Disappoints Military Order of the Purple Heart by Passing Bill Delaying and Denying Justice to Asbestos Victims*, WIS. ASBESTOS VICTIMS NETWORK (May 8, 2013), http://www.wisconsinasbestosvictims.org/wisconsin_assembly_disappoints_military_order_of_the_purple_heart_by_passing_bill_delaying_and_denying_justice_to_asbestos_victims.

[176] *Assembly Bill 19*, WIS. LEGIS. DOCUMENTS (documenting the history of Assembly Bill 19 which was in the Wisconsin Senate from May 2013 until March 2014); *WMC Praises Senate for Passing Asbestos Trust Transparency Bill*, WIS. MANUFACTURING & COM. (Mar. 12, 2014, 1:03 PM), http://www.wmc.org/news/wmc-praises-senate-for-passing-asbestos-trust-transparency-bill/ (since this article was written, Assembly Bill 19 was passed by the Wisconsin Senate on March 12, 2014).

[177] H.R. REP. NO. 112-687, at 1 (2012).

[178] H.R. 982, 113th Cong. (2013).

[179] *Id.*

[180] *Id.* at § 2.

[181] *Id.* at § 2(8)(A)(i).

[182] *Id.* at § 2(8)(B).

Following hearings, the FACT Act was passed by the United States House of Representatives on November 13, 2013.[183] The Act was referred to the Senate Judiciary Committee, where it is considered unlikely to proceed further, at least in part because the White House issued a statement in opposition to the bill.[184]

B. Compelling Trust Discovery Since Volkswagen *– Trust Claims Are Generally Discoverable in the Tort System*

In our 2008 article, we discussed the Court of Appeals of California's "bellweather" decision in *Volkswagen of America, Inc. v. Superior Court*,[185] in which the court held that documents submitted by plaintiffs to bankruptcy trusts were discoverable in the tort system.[186] The *Volkswagen* decision served as a launching pad for a series of orders on the discoverability of trust claims issued in various jurisdictions in 2007 and 2008.[187] Since then, numerous courts have ordered discovery of trust claims and supporting information, rejecting plaintiffs' arguments that trust claims are (1) not relevant to their tort claims; (2) deemed confidential by the trusts' TDPs; and (3) constitute confidential settlement discussions.[188]

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[183] *H.R. 982 – Furthering Asbestos Claim Transparency (FACT) Act of 2013*, CONGRESS.GOV, http://beta.congress.gov/bill/113th-congress/house-bill/982 (last visited Mar. 20, 2014).

[184] *See* Statement of Admin. Policy, *supra* note 31.

[185] Volkswagen of Am., Inc. v. Superior Court, 43 Cal. Rptr. 3d 723 (Cal. Dist. Ct. App. 2006).

[186] *Id.*

[187] Shelley, Cohn & Arnold, *supra* note 1, at 292 n.100-03; Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 552 (2009).

[188] Scapa Dryer Fabrics, Inc. v. Saville, 16 A.3d 159, 175 (Md. 2011); Decision and Order at 19, *In re* N.Y. City Asbestos Litig., 966 N.Y.S.2d 347, 2012 N.Y. Misc. LEXIS 5646 (N.Y. Sup. Ct., N.Y. Cnty. Nov. 15, 2012); Andrucki v. Aluminum Co. of Am., No. 190377/10 (N.Y. Sup. Ct. N.Y July 27, 2011); Nat'l Union Fire Ins. Co. v. Porter Hayden Co., No. CCB-03-3408, 2012 U.S. Dist. LEXIS 23716, at *4 (D. Md. Feb. 24, 2012); Watts v. Alfa Laval, Inc., No. 06-3322, at 394 (Mass. Super. Ct. Middlesex Cnty. Mar. 16, 2009) ("[Plaintiff] is ordered to surrender [information] to the extent it relates to a claim, the existence of a claim against some other asbestos producer or trust or insurer that some other product caused his injury."); Order, Richards v. Armstrong Int'l, Inc., No. BCD-WB-CV-10-019 (Me. Bus. & Consumer Ct.

The Pennsylvania state and federal courts have produced a number of recent decisions in this arena. In *Reed v. Honeywell International, Inc.*,[189] the Superior Court of Pennsylvania ruled that "affidavits, claims forms, releases and other materials related to the 524(g) bankruptcy trusts at issue were indeed 'otherwise discoverable' " in order to allow a defendant to establish its entitlement to post-verdict setoffs.[190] Similarly, in the District Court for the Eastern District of Pennsylvania, home of the federal asbestos Multidistrict Litigation (MDL) docket, the court rejected plaintiffs' arguments that trust claims are shielded from discovery as confidential settlement communications,[191] or based on the confidentiality provisions of the TDPs.[192] The court also rejected

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Sagadahoc Cnty. Jan. 10, 2011) ("Plaintiff shall produce for the Defendants copies of the forms filed on behalf of Plaintiff with any bankruptcy-related trust."); Order on Motion to Compel Disclosure of Claims Submitted to and Payments Received From Asbestos Bankruptcy Trusts at 4, Cardella v. A.W. Chesterton, Inc., No. 09-L-434, at 4 (Ill. Cir. Ct. Madison Cnty. Apr. 18, 2011); Letter Ruling, *In re* Asbestos Litig., MDL No. 2004-03964 (Tex. Dist. Ct. Harris Cnty. Jan. 16, 2009) ("I have consistently received into evidence BTFs [bankruptcy trust forms] . . . as a statement of a party opponent as proof of exposure to the product of an alleged RTP [Responsible Third Party] . . . . I will continue to find a written statement by a Plaintiff to a bankruptcy trust as evidence of exposure.").

[189] Reed v. Honeywell Int'l, Inc., 2011 Pa. Super. LEXIS 4797 (Pa. Super. Ct. 2011).

[190] *Id.* at *24-28.

[191] Shepherd v. Pneumo-Abex, LLC, MDL 875, No. 09-91428, 2010 U.S. Dist. LEXIS 90122, at *4-5 (E.D. Pa. Aug. 30, 2010) ("I agree that a claim made to a bankruptcy trust is more analogous to a complaint than an offer of settlement or compromise. Thus, I find that Rule 408 does not bar production of certain information contained in the claim."). *See also In re* Asbestos Prods. Liab. Litig. (No. VI), MDL 875, 2009 WL 6869437, at *1 (E.D. Pa. Sept. 18, 2009) ("The court overrules plaintiffs' objections that the Bankruptcy Trust Documents are not relevant or otherwise not discoverable under the Federal Rules of Civil Procedure").

[192] Ferguson v. Lorillard Tobacco Co., MDL 875, No. 09-91161, 2011 U.S. Dist. LEXIS 135183, at *6-7 (E.D. Pa. Nov. 22, 2011) (holding that the plaintiff did not show that compliance with discovery requests would violate the terms of the bankruptcy trusts).

the claimants' "burden" argument that defendants should seek discovery from the trusts rather than the plaintiffs.[193]

Judicial reception to trust transparency efforts has not been uniform, however. In *Sweredoski v. Alfa Laval, Inc.*,[194] a Rhode Island trial court initially ruled that a plaintiff's submissions to asbestos trusts were *not* discoverable because 524(g) trusts are not "joint tortfeasors" under Rhode Island's joint tortfeasor act, thus rendering evidence of exposure to bankrupt entities' products irrelevant.[195] The court stated that "[e]vidence regarding Sweredoski's exposure to other defendants' asbestos products . . . is not relevant to the causation analysis" because the plaintiff only had to present evidence of exposure to Crane Company products.[196] On November 18, 2013, the court partially retreated from its initial ruling and ordered an *in camera* review of the plaintiff's trust submissions,[197] but ruled that these forms would only be produced to Crane to the extent they contained discoverable evidence bearing on the plaintiff's exposure to Crane's products.[198] After conducting an *in camera* review, the court issued a third opinion on January 30, 2014.[199] The court found no evidence in the trust submissions bearing on the plaintiff's exposure to Crane products and reaffirmed that trust submissions are not admissible for purposes of establishing non-party liability under Rhode Island's joint and several regime.[200] The court did, however, rule that the trust claim forms were discoverable for the limited purpose of finding admissible impeachment evidence.[201]

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[193] *In re Asbestos Prods. Liab. Litig. (No. VI)*, 2009 WL 6869437 at *1-2; Certain Plaintiffs v. Certain Defendants, MDL 875, 02-875 (E.D. Pa. Apr. 18, 2012) (rejecting plaintiffs' argument that defendants should obtain bankruptcy trust forms from the trusts rather than plaintiffs because it would be unduly burdensome and duplicative to make plaintiffs produce them).

[194] Sweredoski v. Alfa Laval, Inc., No. PC-2011-1544, 2013 R.I. Super. LEXIS 128 (R.I. Super. Ct. July 15, 2013).

[195] *Id.* at 18.

[196] *Id.* at 17.

[197] *Id.* at 1.

[198] *Id.* at 7-8.

[199] *Id.* at 1, 7.

[200] *Sweredoski*, 2013 R.I. Super. LEXIS 128 at 1.

[201] *Id.* at 6.

Although the court still appeared hostile to the idea of trust discovery, Crane Company was successful in convincing the court to depart from its earlier ruling.[202]

C. Courts Are Increasingly Mandating Trust Claim Disclosure by Claimants Through Standing Case Management Orders

As courts across the country increasingly acknowledge the discoverability of asbestos trust claims in discovery rulings, more courts have formalized trust discovery obligations in their standard case management orders (CMO).[203] In our prior article, we cited to case management orders in West Virginia, Delaware, Ohio, Texas, Massachusetts, and Kentucky, which either contained express provisions requiring the disclosure of trust claims forms and supporting information or, at the very least, adopted standard written discovery that included requests about trust claims.[204] Courts in Pennsylvania, New York, and Michigan also require mandatory disclosure of trust claims,[205] while courts in the

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[202] *Id.* at 1.

[203] Shelley, Cohn & Arnold, *supra* note 1, at 247.

[204] Amended Case Management Order, *In re* Asbestos Pers. Injury Litig., No. 03-C-9600 (W. Va. Cir. Ct. Kanawha Cnty. Mar. 3, 2010); Standing Order No. 1–Amended Oct. 10, 2013, *In re* Asbestos Litig., No. 77C-ASB-2, ¶ 7(k) (Del. Super. Ct. Newcastle Cnty. Oct. 10, 2013); Amendment to Case Management Order, *In re* All Asbestos Cases, No. CV-073958, ¶¶ 18, 20(f) (Ohio Ct. C.P. Cuyahoga Cnty. May 8, 2007) (requiring plaintiffs to produce trust claims and supporting documentation within seven days of the case being grouped for trial); Third Amended Case Management Order, *In re* Asbestos Litig., MDL No. 2004-03964, § VII (Tex. Dist. Ct. Harris Cnty. Apr. 5, 2007) (incorporating master discovery to all plaintiffs, July 29, 2004, which includes Request No. 46 to produce documents "[w]ith respect to any lawsuit, claim, or settlement made or anticipated (including but not limited to a claim made to a settlement trust in conjunction with a bankruptcy proceeding such as those for Johns Manville, UNARCO, and Celotex) regarding the plaintiff/decedent's alleged asbestos related disease."); Amended Pre-Trial Order No. 9, *In re* Mass. State Court Asbestos Litig. (effective June 27, 2012); March 6, 2006 Master Order, *In re* Asbestos Pers. Injury Litig. (Ky. Cir. Ct. Jefferson Cnty. Mar. 6, 2006).

[205] Amended Case Management Order at § XV.E.l, *In re* N.Y. City Asbestos Litig., No. 40000/88 (N.Y Sup. Ct. N.Y. Cnty. May 26, 2011); Master Case Management Order For Asbestos-Related Personal Injury Claims at § III,

asbestos litigation hotbeds of San Francisco and Illinois have adopted more limited measures requiring plaintiffs to answer standard interrogatory questions and produce documents reflecting bankruptcy trust claims.[206]

Recent amendments and challenges to pre-existing CMOs also have strengthened the trust disclosure obligations in certain jurisdictions.[207] In October 2013, the Superior Court of Delaware issued a new Standing Order No. 1 that requires plaintiffs to produce trust submissions:

> As to asbestos trust claims, compliance with this provision requires production of executed proofs of claim together with all materials used to support such claim, all trust claims and claim material, and all documents or information relevant or related to such claims, including but not limited to work histories, depositions, testimony of plaintiff and others, and medical records and

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In re Asbestos Litig., No. 0001 (Pa. Ct. C.P. Phila. Cnty. Dec. 1, 2010) (stating that "Plaintiffs shall serve answers to Defendants' Master Interrogatories and Requests for Production Directed to Plaintiffs, including information relating to Bankruptcy Trust Filings" 180 days prior to jury selection); Pretrial Order, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL 875, No. 01-00875 (E.D. Pa. Dec. 14, 2011) (adopting standardized bankruptcy trust interrogatories and procedure for production of documents from trusts); Order No. 16 (Case Management Order) Requiring Service of Bankruptcy Claims Forms in Malignancy and Nonmalignancy Cases, *In re* All Asbestos Pers. Injury Cases, No. 03-310422-NP (Mich. Cir. Ct. Wayne Cnty. Mar. 27, 2009).

[206] Case Management Order at ¶ 6(B), Exhibit C ¶¶ 49, 53, *In re* Complex Asbestos Litig., No. CGC-84-828684, (Cal. Super. Ct. S.F. Cnty. June 29, 2012); Standing Case Management Order for All Asbestos Personal Injury Cases at § III(A)(7), *In re* All Asbestos Litig. Filed in Madison Cnty. (Cir. Ct. Madison Cnty. Jan. 26, 2011) (incorporating Standard Asbestos Interrogatories Directed to Plaintiffs, Interrogatory Nos. 26, 28).

[207] *See* Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. OF TRIAL ADVOC. 1, 16-20 (2012) (discussing the "recent, major development" of asbestos bankruptcy trusts and efforts to promote greater transparency between the trust and tort systems).

> documentation. Such materials shall be supplemented seasonably up to the time of trial.[208]

The most notable recent changes involve efforts to address the phenomenon of claimants delaying submission of trust claims while they pursue solvent defendants in the tort system. In 2012, the Superior Court of Massachusetts issued Amended Pre-Trial Order No. 9 which requires plaintiffs to "produce the product exposure section of bankruptcy claim forms that have been filed within ninety (90) days of a determined trial date" *and* requires plaintiffs to certify that they have filed all known bankruptcy claims within thirty days before trial.[209] Likewise, in 2010, the Montgomery County Court of Common Pleas of Pennsylvania, which borders Philadelphia County, issued a ruling that requires asbestos plaintiffs in the county to "file[] any and all Asbestos Bankruptcy Trust claims available to him or her," "no later than one hundred twenty (120) days prior to trial[.]"[210]

New York City, which historically has been ahead of the curve on asbestos trust discovery, recently rejected an effort by the plaintiffs' bar to invalidate provisions of that court's long-standing CMO requiring disclosure of asbestos bankruptcy trust submissions.[211] Since 1996, the CMO governing all New York City Asbestos Litigation (NYCAL) cases has required plaintiffs to disclose trust claims in standard discovery responses. The NYCAL CMO was amended again in 2003 to require plaintiffs to disclose "all knowledge and information available to them relating to their

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[208] Standing Order No. 1 – Amended Oct. 10, 2013 at ¶ 7(k), *In re* Asbestos Litig., No. 77C-ASB-2 (Del. Super. Ct. Newcastle Cnty. Oct. 10, 2013); For a detailed history of Delaware's CMO, *see generally* Peter S. Murphy, *Asbestos Trust and Tort Litigation Compensation in Delaware: A Call For Transparency*, 27:22 MEALEY'S LITIG. REP.: ASBESTOS 8-9 (Dec. 19, 2012) (explaining the need for CMOs and Delaware's Standing Order No. 1).

[209] Amended Pre-Trial Order No. 9, *In re* Mass. State Court Asbestos Litig. (effective June 27, 2012). The amendments were the product of a joint motion from liaison counsel for the plaintiffs and defendants.

[210] Thibeault v. Allis Chalmers Corp. Prod. Liab. Trust., No. 07-27545, ¶ 10 (Pa. Ct. C.P. Montgomery Cnty. Feb. 22, 2010).

[211] *In re* N.Y. City Asbestos Litig., 966 N.Y.S.2d 347, 2012 N.Y. Misc. LEXIS 5646, at *1 (N.Y. Sup. Ct., N.Y. Cnty. Nov. 15, 2012).

exposure, including all documents relating to claims made to asbestos bankruptcy trusts."[212] The 2003 CMO was further amended to require plaintiffs to identify within a designated period of time prior to trial all trusts against which the claimant "intends to make a claim."[213]

After a group of defendants complained of plaintiffs' non-compliance, the NYCAL Special Master issued a December 12, 2011 ruling reaffirming the CMO's mandate that all plaintiffs produce trust submissions, including affidavits, sworn statements, and proofs of diagnosis.[214] Weitz & Luxenberg, a leading asbestos plaintiffs' firm, moved to vacate the Special Master's recommendation, arguing that: (1) trust submissions are protected from discovery by the confidentiality provisions of the TDPs, and any challenges to those provisions can only by lodged in the bankruptcy courts; (2) trust submissions are confidential settlement communications with the trusts; and (3) the CMO provision requiring disclosure of "intended" claims is unconstitutional because it interferes with the time limitations in the TDPs.[215] On November 15, 2012, Judge Heitler rejected the plaintiffs' arguments and ordered the plaintiffs to comply with all outstanding discovery requests.[216]

Finally, West Virginia's 2010 amendments to the CMO represent the most progressive and comprehensive steps toward ensuring full transparency between the tort and trust systems.[217]

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[212] *Id.* at *6-7.

[213] *Id.* at *7.

[214] *Id.* at *8; *see also* Mark Behrens et al., *Asbestos Litigation "Magnet" Courts Alter Procedures: More Changes on the Horizon*, 27:8 MEALEY'S LITIG. REP.: ASBESTOS 1, 8-9 (May 16, 2012).

[215] *In re N.Y. City Asbestos Litig.*, 2012 N.Y. Misc. LEXIS 5646 at *9.

[216] *Id.* at *31-32. The Court rejected the jurisdictional argument, finding that the civil court discovery dispute did not fall within the bankruptcy court's "related to" jurisdiction. *Id.* at *11-13. The court also disagreed with the "confidential settlement discussions" argument, citing to prior decisions such as Andrucki v. Aluminum Co. of Am., No. 190377/10 (July 27, 2011) (Shulman, J.) and Drabczyk v. Amchem Prods., Inc., No. 1583/2005 (N.Y. Sup. Ct. Erie Cnty. Jan 18, 2008) (Lane, J.). *Id.* at *13-20.

[217] Amended Case Management Order at § 22, *In re* Asbestos Pers. Injury Litig., No. 03-C-9600 (W. Va. Cir. Ct. Kanawha Cnty. Mar. 3, 2010).

Section 22, titled "Claims Against Bankruptcy Trusts" mandates plaintiffs to provide

> (2)[A] statement of any and all existing claims that may exist against asbestos trusts. In addition, the statement shall also disclose when a claim was or will be made, and whether there has been any request for deferral, delay, suspension or tolling of the asbestos trust claims process. The statement must contain an Affidavit of the Plaintiff or Plaintiff's counsel that the statement is based upon a good faith investigation of all potential claims against asbestos trusts.
>
> (3)As to any claims already asserted against asbestos trusts, the claimant shall produce final executed proofs of claim together with any supporting materials used to support such claim against the asbestos trusts, all trust claims and claims material, and all documents or information relevant or related to such claims asserted against the asbestos trusts, including but not limited to, work histories, depositions, and the testimony of the claimant and others as well as medical documentation.[218]

D. Discovery from the Trusts: Insurance Companies' and Newer Bankrupt Entities' Successful Pursuit of Trust Data

Consistent with the plaintiffs' overarching opposition to disclosing trust submissions and payments to tort defendants, plaintiffs have also vehemently opposed efforts by insurers to audit settlement payments made by 524(g) trusts. An illustration of this is found in the long-running insurance coverage litigation in the Maryland federal district court between National Union Fire Insurance Company of Pittsburgh, PA and Porter Hayden, a defunct distributor/installer of asbestos-containing insulation products.[219] Porter Hayden entered bankruptcy in 2005, its plan of

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[218] *Id.*

[219] Nat'l Union Fire Ins. Co. v. Porter Hayden Co., No. CCB-03-3408, 2012 U.S. Dist. LEXIS 23716, at *8 (D. Md. Feb. 24, 2012).

reorganization was approved in 2006, and its asbestos trust began paying claims in 2007.[220] Throughout this time period, National Union and Porter Hayden were embroiled in litigation regarding National Union's insurance coverage obligations for the asbestos claims.[221] In 2010, National Union issued subpoenas to various claims processing facilities and bankruptcy trusts seeking claims submissions made by claimants who also made claims to the Porter Hayden trust.[222] National Union sought this information because the "Porter Hayden trust gathers no information about its claimants' submissions to other trusts and has no process in place to verify the consistency of claimants' submissions."[223]

In April of 2011, the court approved a protective order between National Union and the claims processing facilities, with National Union agreeing to accept limited amounts of information barely sufficient to endeavor to root out potential inconsistent claims practices: claimant name, disease and date of diagnosis, and the claimants' alleged work and exposure history.[224] The plaintiffs' bar, led by Weitz & Luxenburg and the Law Offices of Peter G. Angelos (Objectors), moved to quash the subpoenas. First, the Objectors argued that the submissions made to other bankruptcy trusts are shielded from discovery by the confidentiality provisions in the TDPs, which prohibit the trusts from sharing information with third parties in the tort system.[225] The Objectors asserted that

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[220] PORTER HAYDEN BODILY INJURY TRUST, www.porterhaydentrust.com (last visited May 27, 2014).

[221] *Porter Hayden Co.*, 2012 U.S. Dist. LEXIS 23716 at *4-5.

[222] *Id. at* *5-6.

[223] *Id.* at *14-15.

[224] *Id.* at *6.

[225] *Id.* at *7-8. The Objectors cited to the Porter Hayden TDP as an example of the confidentiality obligations of the various trusts. The Porter Hayden TDP states that "[e]vidence submitted to establish proof of exposure to Porter Hayden Asbestos is for the sole benefit of the Trust, not third parties or defendants in the civil system." *Trust Distribution Procedures*, PORTER HAYDEN CO. 36, http://www.porterhaydentrust.com/Files/BALTIMORE-1744639-v1-FIRST_AMENDED_PORTER_HAYDEN_TDP%20_2_.pdf (last visited May 27, 2014). The confidentiality section further states that submissions to the Trust "shall be treated as made in the course of settlement discussions between the

such confidentiality, even if not expressly included in the TDPs, nevertheless is implicit in *every single* TDP.[226] The court rejected this argument, holding that a confidentiality agreement between two parties does not bar discovery of information that is relevant to a pending dispute.[227] The Objectors next challenged the relevance of their clients' submissions to trusts other than Porter Hayden.[228] Again, the court agreed with National Union's position that evidence of claims submitted to other trusts were relevant because the claims would allow National Union to verify that it was only reimbursing the Porter Hayden trust for valid claims.[229]

The Objectors further contended that the various trusts and claims processing facilities should not respond to National Union's subpoenas because their clients' trust submissions constitute privileged settlement communications.[230] Once again, the court rejected the Objectors' argument, observing that:

> Several courts have permitted discovery of information contained in asbestos-related claims when limited to work history, job duties, evidence of asbestos exposure, and medical history. In those cases, the courts found that because, as here, the subpoenaed information did not include settlement figures or evidence of negotiations or compromise, it did not warrant protection from discovery.[231]

Accordingly, the court denied the Objectors' motions to quash the subpoenas and allowed National Union to obtain discovery from the trusts in accordance with the court-approved protective order.[232]

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holder and the Trust and intended by the parties to be confidential and to be protected by all applicable state and federal privileges[.]" *Id.* at 41.

[226] *Porter Hayden Co.*, 2012 U.S. Dist. LEXIS 23716 at *8.

[227] *Id.* at *8-9.

[228] *Id.* at *13.

[229] *Id.* at *14-16.

[230] *Id.* at *9.

[231] *Id.* at *12-13.

[232] *Porter Hayden Co.*, 2012 U.S. Dist. LEXIS 23716 at *16-17.

In the insurance coverage litigation between Congoleum Corporation, which filed for bankruptcy in 2003, and its liability insurers, two insurers obtained commissions from the presiding judge in New Jersey to issue out-of-state subpoenas to certain asbestos bankruptcy trusts in Nevada[233] and Delaware.[234] The insurers sought to discover whether any of the potential 122,000 Congoleum claimants had also made claims to these other trusts, ostensibly in an effort to ensure that plaintiffs were not defrauding Congoleum into paying inflated settlements.[235] In this instance, it was the trusts, rather than the plaintiffs' bar, that objected to the subpoenas. The Delaware and Nevada courts, however, rejected the trusts' identical arguments regarding relevance, privilege, and undue burden, and ordered them to respond to the subpoena.[236] The insurers were able to overcome the trusts' burden arguments by offering to fund the creation of a computer program that would capture the claims submissions made only by those claimants who also made claims against Congoleum.[237]

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[233] First State Insurance Company and Twin City Insurance Company subpoenaed the JT Thorpe Settlement Trust and the Western Asbestos Settlement Trust. Recommendation for Order at 2, 4, Congoleum Corp. v. Ace Am. Ins. Co., No. CV09-00548 (Nev. Dist. Ct. Washoe Cnty. Nov. 9, 2009) [hereinafter *Nevada Ruling*].

[234] The insurers subpoenaed seven trusts in Delaware, including Babcock & Wilcox, Celotex, OCF, Kaiser and USG. Memorandum Opinion at 1, Congoleum Corp. v. Ace Am. Ins. Co., No. 09M-01-084 (Del. Super. Ct. New Castle Cnty. Aug. 4, 2009) [hereinafter *Delaware Ruling*].

[235] The insurers issued the commissions subject to a ruling by the discovery master that overruled the plaintiffs' objections. The master observed that "[t]here is more than anecdotal support that some trust claimants have filed inconsistent factual information with trust administrators . . . .There is nothing more pertinent to the question of coverage for an individual claim than whether the claimant was exposed to an insured's product during a given period of coverage provided by an insurer." Letter Opinion, Congoleum Corp. v. ACE Am. Ins. Co., No. MID-L-8908-01 (N.J. Super. Ct. Dec. 12, 2008).

[236] *Nevada Ruling*, *supra* note 233, at 10-17; *Delaware Ruling*, *supra* note 234, at 10-11, 13, 17-18. The courts also ruled that their respective concerns about claimant privacy could be addressed by an appropriate protective order in the New Jersey insurance coverage action.

[237] *Nevada Ruling*, *supra* note 233, at 10-17; *Delaware Ruling*, *supra* note 234, at 10-11, 13, 17-18; *see also* Report and Recommendation of Special Discovery Master at 40-44, Fed. Mogul Prod., Inc. v. AIG Cas. Co., No. MRS-

Efforts to discover claims data from the trusts has taken center stage in more recent asbestos-related bankruptcies. Companies such as Garlock, General Motors Corporation, and Specialty Products Holding Corporation (Bondex) aggressively sought claimant information from other trusts to use in estimating the amount of money they would need to set aside to cover asbestos liabilities.[238] Garlock, in particular, filed motions in twelve asbestos bankruptcies presided over by now-retired Bankruptcy Judge Judith Fitzgerald in which Garlock sought access to Bankruptcy Rule 2019 statements and supporting exhibits filed by attorneys for asbestos claimants.[239] Garlock argued, in part, that the 2019 statements were relevant for purposes of evaluating whether Garlock historically paid inflated settlements based on claimants' inconsistent or incomplete exposure history.[240] Judge Fitzgerald denied every motion, holding that Garlock lacked standing to intervene in the bankruptcies.[241]

The United States District Court for the District of Delaware reversed, holding that Garlock had standing to appear in the bankruptcies and that the appellees failed to rebut the presumption of public access afforded to the 2019 exhibits.[242] While the court questioned the evidentiary value and the purpose for which

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L-002535-06 (N.J. Super. Ct. Morris Cnty. July 20, 2011) (granting insurers' motion to compel response to subpoena issued to Verus Claims Services, which processes claims for various bankruptcy trusts, but limiting production to Verus' Claimant Grid and Printable Claims Forms, subject to various confidentiality protections).

[238] *See* Philip Bentley & David Blabey Jr., *Asbestos Estimation In Today's Bankruptcies: The Central Importance Of The New Trusts*, 26:24 MEALEY'S LITIG. REP.: ASBESTOS 1-2 (Jan. 18, 2012); Mark D. Plevin, et al., *Where Are They Now, Part Six: An Update On Developments In Asbestos-Related Bankruptcy Cases*, 11:7 MEALEY'S ASBESTOS BANKR. REP. 2-5 (Feb. 2012).

[239] *In re* Motions for Access of Garlock Sealing Techs. LLC (*Garlock*), 488 B.R. 281, 290 (D. Del. 2013). Bankruptcy Rule 2019 requires law firms representing more than one creditor in a Chapter 11 bankruptcy to file a verified statement disclosing the identity of each creditor the firm represents and the nature and amount of the creditor's claim. *See* FED. R. BANKR. P. 2019(b)-(c).

[240] *Garlock*, 488 B.R. at 290.

[241] *Id.* at 290. For an example of one of Judge Fitzgerald's opinions, see *In re* ACandS, Inc., 462 B.R. 88 (Bankr. D. Del. 2011).

[242] *Garlock*, 488 B.R. at 299-300.

Garlock sought the information, ultimately the court exercised its discretion to permit Garlock access to the information subject to certain safeguards to protect confidential information.[243] The court also granted Garlock's motion to take judicial notice of proposed transparency legislation, stating that "[t]hese legislative proposals have arguable relevance to issues in this appeal, including at least whether there is public interest in transparency."[244] Although Garlock's discovery efforts are not directly linked to the tort system, Garlock's need for trust claiming data is analogous and the district court's ruling is indicative of courts' growing awareness and sensitivity to the secrecy inherent in the trust claiming process and the legitimate need for transparency. Indeed, as noted above, the bankruptcy judge presiding over Garlock's bankruptcy case in North Carolina relied in part upon information contained in these 2019 disclosures in concluding that claimants against Garlock had been improperly 'disappearing' evidence of alternative asbestos exposures in the tort system.[245]

IV. ATTEMPTS TO ENGINEER STRUCTURAL IMPEDIMENTS TO OBTAINING DISCOVERY FROM 524(G) TRUSTS HAVE BEEN RULED TO BE BEYOND THE POST-CONFIRMATION JURISDICTION OF BANKRUPTCY COURTS

We have previously criticized attempts by asbestos claimants and their counsel to build discovery barriers into trust TDPs during the bankruptcy process, such as requiring those seeking discovery from trusts to seek subpoenas from the bankruptcy courts that oversaw the cases leading to the creation of the trusts.[246] We cited as an example the Federal Mogul TDPs, which as initially proposed, purported to direct that the trust only produce information in response to a subpoena obtained from the Delaware bankruptcy court.[247] In response to objections by certain tort system defendants, this language was broadened to include

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[243] *Id.* at 299-302.
[244] *Id.* at 302.
[245] *See id.* at 296.
[246] Shelley, Cohn & Arnold, *supra* note 1, at 280.
[247] *Id.*

subpoenas from the United States District Court for the District of Delaware or from a Delaware state court – but not validly issued subpoenas from any other state or federal court outside of Delaware.[248] These TDPs were incorporated by reference into the orders confirming and affirming Federal Mogul's final plan of reorganization.[249]

We argued that such putative discovery immunities were both inappropriate and unenforceable.[250] These precise issues have since been litigated before the Delaware Bankruptcy Court, when several trusts (including Federal Mogul's) and related constituencies asked the bankruptcy court to enforce these purported discovery limitations contained in TDPs to enjoin third-party discovery subpoenas served upon certain of their contractors by non-Delaware state and federal courts.[251] In two 2011 opinions, that court confirmed that the bankruptcy court's post-confirmation jurisdiction did not extend to protecting the trusts from responding to valid discovery subpoenas issued by any court, and that even if such jurisdiction existed, the bankruptcy court should and would abstain in favor of permitting the trusts to litigate their objections before the issuing courts themselves.[252]

Specifically, trusts created by ACandS, Kaiser Aluminum, US Gypsum, and OCF, with the cooperation of their respective post-confirmation trust ACCs and FCRs, initiated adversary actions in each case asking the Delaware Bankruptcy Court to quash numerous subpoenas that had been served in two contexts.[253] First, several insurers served subpoenas on the trusts from the federal district courts in Maryland and New Jersey and the Superior Court

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[248] *Id.* at 263.

[249] *Id.*

[250] *Id.* at 282.

[251] *See* ACandS Asbestos Settlement Trust v. Hartford Accident Indem. Co. (*In re* ACandS, Inc.) (*ACandS Settlement Trust*), 2011 Bankr. LEXIS 609, *31-38 (Bankr. D. Del. Feb. 22, 2011); *In re* ACandS, Inc. v. Hartford Accident Indem. Co. (*In re ACandS*), 2011 Bankr. LEXIS 2962, *30-33 (Bankr. D. Del. August 8, 2011).

[252] *See ACandS Settlement Trust,* 2011 Bankr. LEXIS 609, at *31-38; *In re ACandS*, 2011 Bankr. LEXIS 2962, at *30-33.

[253] *In re ACandS*, 2011 Bankr. LEXIS 2962 at *14-15 & n.4; *ACandS Settlement Trust*, 2011 Bankr. LEXIS 609 at *38-42 & n.11.

of New Jersey in connection with coverage litigation involving the Federal Mogul and Porter Hayden trusts.[254] Second, two debtors involved in their own asbestos bankruptcies served subpoenas for information in connection with proceedings in their bankruptcies to estimate their asbestos liabilities for purposes of establishing their own asbestos trusts.[255]

After analyzing the limited scope of bankruptcy jurisdiction after a plan has been confirmed and consummated, and the bankruptcy estate has ceased to exist, the court concluded that it lacked continuing jurisdiction under Third Circuit precedent to quash or otherwise limit the scope of subpoenas served in other jurisdictions in matters that were not pending before the bankruptcy court: "this court has no jurisdiction to create a 'one size fits all' peremptory rule of discovery" with respect to the trusts.[256] As the court emphasized, "we are not the appropriate forum in which to address any issues related to a subpoena which was not issued in our jurisdiction."[257]

The court did, however, direct further briefing on the court's authority over certain of the insurers who consented to and received 524(g) injunctive protection through ACandS's reorganization plan.[258] The ACandS TDP's "confidentiality" provision purports to prohibit the trust from responding to non-Delaware-issued subpoenas, which the trust argued constituted an enforceable forum-selection provision with respect to subpoenas to that trust.[259] Following supplemental briefing, the court reaffirmed its prior conclusion that it lacked post-confirmation bankruptcy jurisdiction even over the insurers that had consented to the ACandS plan.[260] Moreover, the court held, alternatively, that even if it had jurisdiction to adjudicate the issues, it was either required to abstain from exercising such jurisdiction pursuant to 28 U.S.C. § 1334(c)(2) because the issues were pending and could be timely

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[254] *In re ACandS*, 2011 Bankr. LEXIS 2962, at *16-17 n.4.
[255] *ACandS Settlement Trust*, 2011 Bankr. LEXIS 609, at *40-43 & n.11.
[256] *Id.* at *43-44.
[257] *Id.* at *31.
[258] *See id.* at *25-28.
[259] *In re ACandS*, 2011 Bankr. LEXIS 2962 at *17.
[260] *Id.* at *18.

adjudicated before the Superior Court of New Jersey, or it would exercise its discretion to abstain because the district courts of Maryland and New Jersey are "certainly capable and, in this instance, more appropriate to determine the issues related to these discovery subpoenas."[261]

V. USING TRUST CLAIMS INFORMATION TO UPHOLD THE INTEGRITY OF THE JUDICIAL PROCESS AND LEVEL THE PLAYING FIELD FOR THOSE DEFENDANTS IN THE ASBESTOS LITIGATION

Courts are generally receptive to the relevance of trust filings, but uncertainty remains from jurisdiction to jurisdiction as to (1) how defendants can use that information to ensure that they only pay a fair share of liability; and (2) how to account for trust recoveries that post-date the plaintiffs' tort system settlements or trials.[262]

Our 2008 article summarized tort reform in key jurisdictions such as Mississippi, Ohio, Texas, and West Virginia, in which the legislature had either eliminated or modified the traditional joint and several liability rules.[263] We also discussed certain states' approaches to apportioning liability and/or obtaining setoffs and judgment reductions to reflect recoveries from bankruptcy trusts.[264] In 2011, the RAND Institute for Civil Justice published a detailed study on the liability rules and setoff procedures relevant to asbestos bankruptcy trusts in six states, revealing that the liability rules and procedures with respect to asbestos litigation are jurisdiction specific and far from uniform.[265]

To illustrate, courts in Maryland and Pennsylvania recently tackled the issue of how to apply setoffs for asbestos trust recoveries, but reached different conclusions. The Court of Appeals of Maryland recently observed that "[n]o appellate state court . . . has rendered an opinion about the proper handling of § 524(g) Trust settlement agreements in concert with state laws

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[261] *Id.* at *32-33.
[262] Shelley, Cohn & Arnold, *supra* note 1, at 278, 283.
[263] *Id.* at 265-68.
[264] *Id.* at 270.
[265] DIXON ET AL., *supra* note 130, at app. B, 61 (2011).

implementing the Uniform Contribution Among Joint Tort-feasors Act."[266] In *Scapa Dryer Fabrics v. Saville*,[267] the court reversed an asbestos bodily injury judgment against Scapa because the trial court failed to properly account for the plaintiff's trust recoveries.[268] The court remanded the case to permit discovery of plaintiff's settlements with all section 524(g) trusts in order to determine the appropriate amount of setoffs, but also held that Scapa could only reduce the judgment where the releases identified the trust as a joint tortfeasor and/or permitted setoffs.[269] Thus, if a trust release contained 'no admission' language (as many of them do) and did not include a provision for treatment of the trust as a joint tortfeasor, Scapa was not entitled to a setoff.[270]

Just nine months after Maryland's highest court cited a complete lack of appellate jurisprudence around the country, the Superior Court of Pennsylvania affirmed a trial court's use of its equitable powers to set-off a $492,007 asbestos bodily injury verdict against Honeywell to account for nearly $150,000 in recoveries from five trusts.[271] The plaintiff argued against a setoff for her settlements with the Armstrong, U.S. Gypsum, and National Gypsum trusts (totaling nearly $105,000 or 20% of the entire verdict) because the releases did not have the specific setoff language often found in settlements with the Johns-Manville Trust.[272]

The trial court rejected the plaintiff's argument as "without merit on its face" because the plaintiff accepted bankruptcy trust money "based on the fundamental contention that they were liable for [Reed's] decedent's mesothelioma" and "[Reed] cannot now come before this court and argue that there was no evidence of exposure to asbestos from said manufacturer's products presented

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[266] Scapa Dryer Fabrics, Inc. v. Saville, 16 A.3d 159, 174 n.12 (Md. 2011).

[267] Scapa Dryer Fabrics, Inc. v. Saville, 16 A.3d 159 (Md. 2011).

[268] *Id.* at 181.

[269] *Id.*

[270] *Id.* at 180-81; *see also* John Crane, Inc. v. Linkus, 988 A.2d 511, 530 (Md. 2010).

[271] Reed v. Honeywell, Int'l, Inc., Nos. 3022 EDA 2010, 3023 EDA 2010, 2011 Pa. Super. LEXIS 4797 *4-6 (Pa. Super. Ct. Dec. 6, 2011).

[272] *Id.* at *19, *21-22.

at trial in order to effect a double recovery."[273] The Pennsylvania Uniform Contribution Among Tortfeasors Act defines a "joint tortfeasor" as "two or more persons jointly or severally liable in tort for the same injury to persons or property, *whether or not judgment has been recovered against all or some of them*."[274] Although defendants are not permitted to include bankrupt entities on the verdict form in Pennsylvania, the trial court molded the verdict to reflect *all* trust recoveries, regardless of the language contained in the trust settlement agreements.[275] The court reviewed the claims forms and supporting affidavits the plaintiff submitted to the trusts and subsequently determined that the trusts were joint tortfeasors.[276] The Superior Court of Pennsylvania affirmed Honeywell's entitlement to a *pro tanto* (dollar-for-dollar) setoff for each of the trust recoveries, finding that "a combined reading of the claims forms, affidavits and trust distribution process for the subject bankrupt entities . . . provides a sufficient basis" to have those entities deemed joint tortfeasors.[277]

Pennsylvania also made substantial strides in leveling the playing field for asbestos defendants with passage of the Fair Share Act, which eliminated joint and several liability in favor of a modified rule that imposes joint and several liability on defendants held more than sixty percent liable.[278] Oklahoma and Tennessee meanwhile codified the elimination of joint and several liability in 2011 and 2013, respectively.[279]

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[273] *Id.* at *24 (alteration in original).

[274] 42 PA. CONS. STAT. § 8322 (2011) (emphasis added).

[275] *Reed*, 2011 Pa. Super. LEXIS 4797 at *23-25.

[276] *Id.* at *23-25.

[277] *Id.* at *26.

[278] tit. 42, § 7102(a.1)(3)(iii) (applying to injuries that occur or are discovered after the June 28, 2011 effective date).

[279] Oklahoma passed Senate Bill 862 in 2011 (codified at OKLA. STAT., tit. 23, § 15.1 (2011)), and Tennessee adopted Senate Bill 56 on April 29, 2013 (codified at TENN. CODE ANN. § 29-11-107 (2013)). The Tennessee statute contains an exception, stating that joint and several liability remains in effect "[a]mong manufacturers only in a product liability action . . . but only if such action is based upon a theory of strict liability or breach of warranty." § 29-11-107(b)(2).

Illinois has been portrayed in the past as perhaps the worst state for asbestos defendants because of the state's joint and several liability rules applicable to asbestos claims, and because of the *Lipke* Rule, which made Illinois the only state in the country to preclude defendants from introducing evidence of alternative product exposures.[280] In 2009, however, the Supreme Court of Illinois rejected the *Lipke* Rule, stating that

> [t]he single paragraph in *Lipke* from which the exclusionary rule of other-exposure evidence is derived neither suggested nor held that a defendant should be barred from introducing evidence of other potential causes of injury where it pursues a sole proximate cause defense, nor that juries should be deprived of evidence critical to a causation determination.[281]

Despite *Lipke*'s demise, Madison County, Illinois remains a constant on the "judicial hellhole" list.[282]

The discoverability of trust submissions and the ability to allocate liability or obtain appropriate setoffs to account for the culpability of, and payments made on behalf of, bankrupt entities is of little value to defendants if plaintiffs routinely delay their trust claims until after litigation. The Maryland and New Jersey cases discussed above demonstrate that certain plaintiffs' firms intentionally delay the filing of trust claims to make it more difficult for defendants to construct the plaintiffs' true exposure history for a jury. Indeed, according to the RAND study, "[a]

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[280] Lipke v. Celotex Corp., 505 N.E.2d 1213, 1221 (Ill. App. Ct. 1987), *appeal dismissed*, 536 N.E.2d 71 (Ill. 1989).

[281] Nolan v. Weil-McClain, 910 N.E.2d 549, 564 (Ill. 2009).

[282] "Despite having only .008 % of the U.S. population, Madison County now accounts for one in four asbestos lawsuits filed in the U.S. Only 1 in 10 of the lawsuits filed in Madison County is filed by a plaintiff who ever worked or lived in the county." AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2013/2014 22-23 (2013), *available at* http://www.atra. org/reports/hellholes.

prominent California plaintiffs' attorney said that he typically will delay filing [trust claims] until after trial."[283]

Very few jurisdictions have attempted to close this loophole through amendments to the standard CMOs that require plaintiffs to make all trust claims prior to trial. Notably, Massachusetts' Amended Pre-Trial Order No. 9 requires plaintiffs to file "all known bankruptcy claims" prior to trial.[284] The Montgomery County Court of Common Pleas of Pennsylvania requires plaintiffs to "file[] any and all Asbestos Bankruptcy Trust claims available to him or her" 120 days prior to trial.[285] The NYCAL CMO was amended in 2003 to require plaintiffs to identify trust claims they "intend" to file, though one plaintiffs' attorney does not believe the requirement is legally enforceable,[286] and Judge Heitler recently suggested that the CMO does not require plaintiffs to identify "claims they may or may not *anticipate* filing."[287]

Besides the trust transparency legislation recently enacted in Ohio and Oklahoma,[288] West Virginia's 2010 CMO offers the most

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[283] DIXON ET AL., *supra* note 130, at 62. In Texas, "[p]laintiffs' attorneys indicated that they would delay filing [trust claims] if they believed that the information would assist the defendants in assigning liability to RTPs" because of the worry that "defense attorneys will misconstrue the information in a trust claim filing in order to inappropriately increase the share of fault assigned to bankrupt firms." *Id.* at 77.

[284] Amended Pre-Trial Order No. 9 at XIII(C)(7)(o)(2), *In re* Mass. State Court Asbestos Litig. (effective June 27, 2012).

[285] Order at ¶ 10, Thibeault v. Allis Chalmers Corp. Prod. Liab. Trust., No. 07-27545 (Pa. Ct. C.P. Montgomery Cnty. Feb. 22, 2010).

[286] DIXON ET AL., *supra* note 130, at 68-69 & n.24. This stands in contrast with a case cited in our 2008 article, Cannella v. Abex, No. 1037729/07 (N.Y. Sup. Ct. N.Y. Cnty. Jan. 24, 2008) (on file with authors), in which Judge Kornreich warned Weitz & Luxenburg that she would vacate a verdict if they filed post-verdict trust claims.

[287] *In re* N.Y. City Asbestos Litig., 966 N.Y.S.2d 347, 2012 N.Y. Misc. LEXIS 5646, at *30 (N.Y. Sup. Ct., N.Y. Cnty. Nov. 15, 2012) (emphasis in original). Despite the uncertainty caused by that particular comment, the end result – the court rejecting Weitz & Luxenburg's request to strike the provision as unconstitutional – cannot be ignored. *See* Recommendation of Special Mater Shelley Rossoff Olsen, *In re* New York City Asbestos Litig., Index No. 40000/988 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 12, 2013).

[288] *See supra* Part III.A.i.

comprehensive solution, requiring plaintiffs to provide a statement identifying all trust claims that exist or may exist with an affidavit "that the statement is based upon a good faith investigation of all potential claims against asbestos trusts."[289] Non-compliance can result in sanctions.[290] The CMO also contains a "Set-offs and Assignments" provision allowing for a *pro tanto* setoff for the "paid liquidated value of the trust claims," and requiring plaintiffs to assign unpaid claims to the defendant and "cooperate with and assist the defendants" with those assigned claims.[291]

Outside of these CMOs, other courts are resistant to compel plaintiffs to disclose anticipated trust claims or to actually make all trust claims prior to trial. In the Eastern District of Pennsylvania asbestos MDL, the court has sustained objections to discovery asking plaintiffs to identify trust claims that they intend to file.[292] Judge Davidson, who presides over the Texas asbestos MDL, would not compel plaintiffs to submit trust claims, citing to both the absence of proof that plaintiffs intentionally delay the filing of trust claims, and the legislature's refusal to act on the proposed Asbestos Claims Transparency Act.[293] Courts in Delaware and Connecticut similarly have refused to compel plaintiffs to disclose yet-to-be-filed trust claims.[294]

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[289] 2010 Asbestos Case Management Order with Attached Exhibits at 26, *In re* Asbestos Pers. Injury Litig., No. 03-C-9600 (W. Va. Cir. Ct. Kanawha Cnty. Mar. 3, 2010).

[290] *Id.* at 27.

[291] *Id*. at 28.

[292] Pretrial Order at 1-2, *In re* Asbestos Prod. Liab. (No. VI), MDL 875 (E.D. Pa. Aug. 4, 2011) (Strawbridge, M.J.) (relating to all cases in which the Cascino Vaughan Law Office is listed as plaintiffs' counsel).

[293] Hearing on Motion to Compel at 16-18, Brumley v. Azko Nobel, Inc., No. 17509-2010 (Tex. Dist. Ct. Harris Cnty. Feb. 12, 2012). The Asbestos Claims Transparency Act was introduced in 2011, where it remains pending. *Bill: HB 2034*, TEX. LEGIS. ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB2034 (last visited May 27, 2014); *Bill: SB 1202*, TEX. LEGIS. ONLINE http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB1202 (last visited May 27, 2014).

[294] McGhee v. AT&T, Inc., No. 10C-12-114, *106-07 (Del. Super. Ct. June 7, 2012) (acknowledging the "potential for abuse" with respect to delayed trust claims but stating that "you could find out, in my courtroom anyway, whether the plaintiff was exposed to asbestos in connection with other entities which are

Finally, in Washington, courts have rejected defendants' attempts to obtain setoffs for amounts that plaintiffs *could* receive from various trusts post-verdict.[295] In the *Barabin v. Astenjohnson, Inc.*[296] case, the defendants sought a setoff based on an expert affidavit that identified certain trusts to which the plaintiff could have made claims based on his exposure history (and valued those claims under the trusts' respective TDPs and payment schedules).[297] The court, however, ruled that the Revised Code of Washington precluded offsets for unconsummated settlements and although "risk [for double recovery] is inherent in the system, that issue is for the legislature and not for this Court to resolve."[298] The court also credited Alan Brayton's testimony at the fairness hearing that his firm does not delay trust claims.[299]

VI. CONCLUSION

While much has been accomplished since 2008, much more remains to be done. As the *Garlock* experience demonstrates, transparency exposes abuses.[300] Indeed, that court was convinced, even from the limited discovery it permitted, that the problems of evidence manipulation and concealment in the tort system are inconsistent and contradictory claiming in the trust system is widespread. As Judge Hodges wrote, "[t]he limited discovery

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now in bankruptcy, but beyond that, I don't think I can force them to say whether they contemplate making a claim, and in fact, they may not know"); Ouellette v. A.W. Chesterton Co., No. CV05-4009802 (Conn. Super. Ct. Mar. 19, 2012) (denying motion to compel plaintiffs to disclose future trust claims, stating that defendants should be able to learn exposure history during discovery and demanding disclosure of future claims involves disclosure of trial strategy).

[295] Coulter v. Asten Grp., Inc., 230 P.3d 169, 174 (Wash. Ct. App. 2010); Barabin v. Astenjohnson, Inc., No. C07-1454RSL, 2010 U.S. Dist. LEXIS 102397, at *11-13 (W.D. Wash. Sept. 13, 2010).

[296] Barabin v. Astenjohnson, Inc., Case No. C07-1454RSL, 2010 U.S. Dist. LEXIS 102397 (W.D. Wash. Sept. 13, 2010).

[297] *Id.* at *11, *13.

[298] *Id.* at *15.

[299] *Id.* at *17-18.

[300] *In re* Garlock Sealing Techs., LLC, 504 B.R. 71, 86 (Bankr. W.D.N.C. Jan. 10, 2014).

allowed by the court demonstrated that almost *half* of those cases involved misrepresentation of exposure evidence. It appears certain that more extensive discovery would show more extensive abuse."[301]

Judge Hodges' decision in *Garlock* should be a wakeup call to courts, legislatures, and trust fiduciaries alike. As we advocated in 2008, if claiming abuses are to be effectively countered, 360 degree transparency between the tort system and the section 524(g) trust system, and among the section 524(g) trusts themselves, is needed.[302] Claimants should be required to self-disclose in the tort system, but tort defendants also should be able to obtain confirmatory discovery from the trusts.[303] Moreover, the trusts themselves should be required to disclose payment and exposure information to prevent the sort of "disappearance" of alternative exposure evidence uncovered by the *Garlock* court, both for the sake of the formerly peripheral tort-system defendants and for the protection of bona fide current and future trust claimants whose payouts from the trusts are being diluted by payments extracted by claimants providing false, contradictory, and/or unsupportable exposure claims.[304]

Beyond the specific abuses of the asbestos claiming process, the revelations in *Garlock* and other cases raise fundamental questions about the integrity of a litigation process in which false claiming testimony has become widespread. As in other areas of human endeavor, in the tort litigation process "[s]unlight is said to be the best of disinfectants."[305]

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[301] *Id.* (emphasis in original).

[302] Shelley, Cohn & Arnold, *supra* note 1, at 277.

[303] *Id.* at 272.

[304] *Id.* at 279-81.

[305] Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, at 10, *reprinted in* Louis D. Brandeis, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).