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by
Daniel J. Ryan, Esq.
and
John J. Hare, Esq.

Marshall Dennehey Warner Coleman & Goggin
Philadelphia, Pennsylvania

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Commentary

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Daniel J. Ryan, Esq.
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John J. Hare, Esq.

[Editor's Note: Daniel J. Ryan is a Shareholder and Chair, Asbestos and Mass Tort Litigation Practice Group, in the Philadelphia office of Marshall Dennehey Warner Coleman & Goggin. John J. Hare is a Shareholder and Chair, Appellate Advocacy and Post-Trial Practice Group, in the Philadelphia office of Marshall Dennehey Warner Coleman & Goggin. Any commentary or opinions do not reflect the opinions of Marshall Dennehey Warner Coleman & Goggin or LexisNexis, Mealey's. *Responses are welcome.]*

Asbestos has spawned the most enduring mass tort litigation in history. In turn, the litigation has spawned what *Forbes* recently called "one of the longest-running and most lucrative schemes in the American litigation business."[1] That "scheme" is the practice in which claimants and their attorneys recover compensation from two sources—bankruptcy trusts and tort litigation—for the same harm. Such double recoveries have been sharply criticized by judges, commentators, and the national media because they are routinely obtained by concealing the trust payments from disclosure in civil litigation.

The practices gained national attention during the recent bankruptcy of a gasket manufacturer, Garlock Sealing Technologies. After ordering the disclosure of an unprecedented volume of trust filings, the federal judge presiding over the case found such conduct so pervasive and longstanding that it helped to drive Garlock into insolvency. The court's remarkable findings have been described as a "wake up call" for judges handling asbestos cases.[2]

While Garlock's experience was hardly unique among asbestos defendants, it has reinvigorated reform efforts designed to foster the disclosure of bankruptcy trust claims in civil litigation. This article describes the lack of transparency in the current litigation environment and surveys the legislative and judicial reforms that have been undertaken thus far. While these measures are important steps toward restoring fairness in asbestos litigation, they are too sparse and inconsistent to fully address the lack of transparency. Ultimately, only the wholesale adoption of a uniform and comprehensive approach will end the redundant recoveries that threaten solvent companies, deplete resources available to deserving future claimants, and undermine the integrity of the civil justice system. This article concludes by describing such an approach.

The Problem and Consequences of Double Recoveries

Over the past three decades, fifty-six personal injury trusts have been established from the remnants of companies driven into bankruptcy by asbestos claims.[3] Those trusts have combined assets exceeding $30 billion, and they pay asbestos claimants billions of dollars each year with little or no contest. A typical mesothelioma claimant, for instance, can recover hundreds of thousands of dollars from the trusts based primarily on the claimant's own word that he or she was exposed to the products of the bankrupt entities.

In addition to seeking recoveries from the trusts, asbestos claimants routinely sue solvent entities. The common view that asbestos litigation is waning is simply not true. The volume of diagnoses and filings has remained relatively steady in recent years, and filings have actually increased in some jurisdictions. For instance, current statistics indicate that asbestos filings in the Philadelphia County Court of Common Pleas have risen every year but one since 2010, 631 cases are pending on Philadelphia's docket, and approximately 300 new cases are filed each year.[4] In Madison County, Illinois, the forum for nearly 25 percent of all asbestos claims filed in the United States each year, the number of filings alleging asbestos-related lung cancer rose from 325 in 2006 to 1,563 in 2012 (an annual record), and 2,200 cases are currently pending on the docket.[5] In 2013 and 2014, asbestos lawsuits constituted 74.6 percent of all civil filings in Madison County.[6] Commentators have predicted that the pace of asbestos litigation will continue unabated for the foreseeable future.[7]

Given the large volume of litigation and the amount of money available from the two-track system of compensation, there has been a recent focus on ensuring trust transparency in order to avoid the potential for abuse. The abuse occurs most often when claimants allege certain facts to support their trust claims and then allege inconsistent facts to support their tort claims. For instance, claimants have alleged exposure to the products of bankrupt entities in their trust filings, but then ignore or flatly deny those exposures when they target solvent defendants in tort litigation. Claimants also attempt to shield their trust recoveries from disclosure in tort suits by concealing their trust claims or not filing the claims until the tort suit has concluded.

Courts across the country have sharply condemned these practices. For example, then-Delaware Judge Peggy Ableman was shocked at inconsistencies in a claimant's trust and tort allegations:

> 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.[8]

A Philadelphia judge described the problem as follows:

> It is not uncommon for a person who can show exposure to asbestos to make application to several, or even more bankruptcy trusts, to simultaneously sue other, non-bankrupt, manufacturers, often more than one, in civil court proceedings. Thus, one individual or estate has two avenues of recovery; the bankruptcy trusts administrative procedure, as well as civil lawsuits. This has led to the potential of double recovery, as there has only been haphazard reporting, if at all by plaintiffs of funds received from bankruptcy trusts, despite recoveries also received at trial.[9]

Similar criticism by an Ohio judge prompted the *Wall Street Journal* to editorialize that the judge's opinion should be "required reading for other judges" to provide "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts."[10]

But the most well-documented concerns emerged from the bankruptcy of gasket manufacturer Garlock Sealing Technologies. After asbestos claims forced it into bankruptcy, Garlock succeeded in convincing a federal judge to order the disclosure of voluminous trust filings and related documents. Having reviewed many of those documents, the court issued a scathing opinion in 2014, finding that the litigation that drove Garlock into bankruptcy had been "infected by the manipulation of exposure evidence by plaintiffs and their lawyers[.]"[11] In particular, to ensure that evidence of exposure to the products of bankrupt entities "disappeared" in the tort litigation, plaintiffs and their counsel undertook "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)."[12] With regard to the trust claim forms and related evidence it reviewed, the court found:

> the fact that *each and every one of them* contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock's settlement practices and results.[13]

The court also found that the conduct of the plaintiffs' lawyers exhibited a "startling pattern of misrepresentation."[14]

To illustrate Garlock's experience, the judge pointed to a California case in which Garlock was hit with a $9 million verdict. The plaintiff in that case claimed that 100% of his asbestos exposure resulted from Garlock gaskets, and he specifically denied that he was exposed to amphibole products, including insulation manufactured by Pittsburgh Corning. His lawyer even fought to keep Pittsburgh Corning off the verdict sheet by arguing that the plaintiff never worked with or around its products. However, it was ultimately revealed that, seven months before the verdict, the plaintiff had filed a claim in the Pittsburgh Corning bankruptcy certifying "under penalty of perjury" that he had been exposed to Pittsburgh Corning's insulation. He also filed twenty-one other trust claims alleging asbestos exposure.[15]

The court also described a Philadelphia case that Garlock settled for a substantial sum. In that case, the plaintiff had filed written discovery answers claiming "no personal knowledge" of exposure to the asbestos products of any bankrupt entity. In fact, the plaintiff had filed twenty trust claims, and the allegations supporting fourteen of those claims contradicted the plaintiff's representations in the tort suit.[16]

As a result of such conduct, which dramatically inflated Garlock's payments in past cases, the court overseeing Garlock's bankruptcy reduced its estimated aggregate future liabilities from the $1-1.3 billion sought by claimants to $125 million, a 90% reduction.[17] The fallout from the bankruptcy has garnered national attention.[18]

Although plaintiffs have attempted to dismiss Garlock's experience as anecdotal and unrepresentative, the types of conduct described by Garlock are, in fact, routine. A sample of our own firm's files makes this point. At any given time, we handle more than one thousand asbestos lawsuits in Pennsylvania, we represent dozens of defendants in those suits, and we have about three hundred and fifty asbestos lawsuits listed for trial in Philadelphia County every year. We recently examined a random universe of twenty-one asbestos suits in which we sent out discovery requests asking whether plaintiffs had filed trust claims. In responding to those discovery requests, plaintiffs denied that any trust claims were filed, and the civil lawsuits were then resolved by settlement or verdict. Following the resolution of the cases, we sent inquiries to the Johns Manville Trust. Of the twenty-one civil lawsuits we examined, the Johns Manville Trust responded that seventeen claims had been both filed and paid and one claim was pending. Therefore, of the twenty-one original lawsuits where plaintiffs had denied filing trust claims, they ultimately filed claims in eighteen of those cases. And those were claims with only one trust. Obviously, claims can be filed with many trusts.[19]

This is only a small sample of the double recoveries that can occur in asbestos litigation. Plaintiffs conceal or delay their trust filings until after they recover in a lawsuit and thereby prevent use of the trust recovery in the lawsuit.[20] As in the Garlock case, this double-dipping dramatically inflates the liabilities of solvent companies, depletes resources they could use to fund research, expansion and job creation, and ultimately threatens their survival. It also reduces the resources available to pay legitimate claimants.

Legislative and Judicial Solutions

Legislatures and judges in a number of jurisdictions have responded to the lack of trust transparency with remedial measures, and commentators have offered comprehensive proposals. Although these measures have been too limited and inconsistent to make a significant impact, combining their best features provides a roadmap for the reforms that are necessary to finally solve the problem of double recoveries.

Legislative Reforms

Statutes. To date, six states have enacted transparency statutes. Four of these statutes have been enacted since the Garlock decision on January 10, 2014. All six impose a common core of disclosure requirements, but they differ in certain particulars.

Most recently, on June 16, 2015, Texas enacted a comprehensive reform statute that applies to actions pending on or commenced after September 1, 2015. The statute requires asbestos plaintiffs to file all trust claims at least one hundred and fifty days before trial, unless the court approves an exception on the basis that the cost of filing the claim would exceed the reasonably anticipated recovery. This initial requirement that plaintiffs must file all claims before trial is an attempt to prevent delaying trust claims until after trial is over. Plaintiffs must then serve on each party "notice of, and trust claim material relating to, each

trust claim" not later than one hundred and twenty days before trial unless the court modifies that deadline. If plaintiffs later file an additional claim, they must disclose that filing and the other required information within fifteen days after the filing or on the trial date, whichever is earlier. If the information supporting an existing claim is incomplete or inaccurate, plaintiffs must file supplemental disclosures within fifteen days after discovering the inadequacy. Trial may not begin until all of the required disclosures are made. A plaintiff's failure to satisfy the disclosure requirements can result in sanctions, including vacating a judgment and awarding a new trial. If a defendant identifies a trust not named by the plaintiff but against whom the plaintiff may file a claim, the defendant can move the court to stay trial and order the plaintiff to file a claim. If the court determines that the plaintiff is likely to receive compensation from the trust and that the cost of the claim will not exceed the recovery, trial will be stayed until the plaintiff files the claim and makes the required disclosures. Trust claim materials are deemed relevant and admissible at trial, notwithstanding claims of confidentiality or privilege.[21]

Five weeks earlier, on April 9, 2015, Arizona enacted its own reform statute. That statute requires plaintiffs to identify, within forty-five days after the filing of the defendants' answers, all filed or "reasonably anticipated" trust claims. While the Texas statute attempts to prevent delayed trust filings by requiring that all filings occur before trial, its Arizona counterpart discourages delayed claims by requiring plaintiffs to identify all anticipated claims before trial. Within sixty days after the defendant's answer, the plaintiff must provide a copy of the final executed proof of claim, relevant trust documents, and, if the claim is paid, all documents relating to the payment. The plaintiff must also update the disclosures within thirty days after filing an additional claim or receipt of information concerning a pending claim. If the plaintiff identifies an anticipated trust claim, the trial court must stay all proceedings until the plaintiff files the claim and provides a copy of the final executed proof of claim. No trial may be scheduled until at least one hundred and eighty days after the plaintiff makes all of the required disclosures. Trust documents are generally admissible in the tort action and are not subject to claims of privilege. The submission of a claim constitutes sufficient evidence from which a jury may find exposure and causation of a plaintiff's disease. Importantly, defendants may pursue discovery directly from the trusts and the plaintiff must provide any consent required by the trusts to release information. If a defendant identifies a trust not named by the plaintiff but against whom the plaintiff may file a claim, the defendant can move the court to order the plaintiff to file a claim. If the trial occurs before the plaintiff receives payment on one or more trust claims, the payment(s) shall be credited against any judgment. Finally, the plaintiff's failure to disclose any of the required information can result in sanctions.[22]

On March 18, 2015, West Virginia enacted the Asbestos Bankruptcy Trust Claims Transparency Act. In a preamble, the statute declares that its purpose is to: "(1) Provide transparency for claims made in the asbestos bankruptcy trust claim system and for claims made in civil asbestos litigation; and; (2) Reduce the opportunity for fraud or suppression of evidence in asbestos actions." To achieve these goals, the statute requires disclosure of trust claims that have been filed "or that potentially could be filed" no less than one hundred and twenty days before the start of trial and supplemental statements must be filed within ninety days after the plaintiff files an additional claim, submits further information in support of an existing claim, or receives information related to a claim or potential claim. The plaintiff must also file a certification that he or she has undertaken "a good faith investigation of all potential claims against asbestos trusts." Trial may be delayed and sanctions may be imposed if the plaintiff does not fulfill the disclosure requirements. Trust claim materials are deemed admissible at trial, notwithstanding any claim of privilege, and defendants may seek discovery directly against the trusts. Defendants may also identify other potentially liable trusts and move the court to compel the plaintiff to file claims, and trust payments must be offset against tort judgments.[23]

On March 27, 2014, Wisconsin enacted a similar statute, although it requires disclosure of all claims that the plaintiff "has filed or reasonably anticipates filing" within forty five days after the issues are joined. The statement for each claim must include the name, address, and contact information for the asbestos trust, the amount claimed by the plaintiff, the date that the plaintiff filed the claim, the disposition of the claim, and whether there has been a request to defer,

delay, suspend, or toll the claim against the trust. Within sixty days after the issues are joined, the plaintiff must produce an executed proof of claim for all filed claims, all trust documents, payment information, if any, a list of claims the plaintiff reasonably anticipates filing with the trust information, and the anticipated amount of the claim. Supplemental disclosures must be made within thirty days after the filing of a new claim or receipt of information related to an existing claim. Trust claim materials are admissible in evidence, defendants may pursue discovery directly from the trusts, and defendants may identify additional trusts with which the plaintiff may file claims and move the court to order the filing of such claims. Notably, the statute also provides that, if the defendant is found to be 51 percent or more causally negligent, the plaintiff may not collect any damages until after the plaintiff assigns all *pending, current, or future* trust claims to the defendant(s). If the defendant is found to be less than 51 percent causally negligent, the plaintiff may not collect until after he or she assigns all *future* claims.[24]

Two other states, Oklahoma and Ohio, passed statutes before the Garlock decision, but those statutes were no doubt prompted by the types of conduct later revealed in Garlock's bankruptcy. Oklahoma's statute, The Personal Injury Trust Fund Transparency Act, was enacted on May 7, 2013. It requires disclosure of actual or anticipated trust claims within ninety days after the tort action is filed. Unlike other transparency statutes, Oklahoma's version applies the disclosure requirements to all personal injury trusts, not merely asbestos trusts. Like the Wisconsin statute, it requires supplemental disclosures within thirty days after the plaintiff files an additional claim, supplements an existing claim, or receives additional information or materials. Like the Arizona statute, it also provides that no trial may be scheduled until at least one hundred and eighty days after the plaintiff makes all of the required disclosures and further provides that, if the plaintiff identifies an anticipated trust claim, the trial court must stay all proceedings until the plaintiff files the claim and provides a copy of the final executed proof of claim. Unlike its counterparts in other states, however, the Oklahoma statute provides that, if trial occurs before a trust claim is resolved, a rebuttable presumption arises that the plaintiff will receive the value specified in the trust governance document applicable to the plaintiff's claim at the time of trial. That presumed value will then be setoff against any verdict for the plaintiff.[25]

In December of 2012, Ohio became the first state to enact a transparency statute, which became effective on March 27, 2013. The statute requires a sworn statement identifying all actual claims within thirty days after the commencement of discovery and a supplemental statement within thirty days after the filing of additional claims. It also provides that, if the plaintiff recovers on a trust claim that was submitted after a judgment was entered in the tort action, the court may reopen the judgment and adjust it by the amount of the trust recovery or award other appropriate relief. Unlike the later statutes, however, the Ohio law does not require disclosure of anticipated claims or the amount of any claims.[26]

Bills. In addition to these six statutes, transparency bills are pending in Congress and at least six states, including California, Illinois, Louisiana, Mississippi, North Carolina, and Pennsylvania. The federal bill, entitled The Fairness in Claims and Transparency (FACT) Act, was initially introduced in the House of Representatives in 2012 and reintroduced in 2013. On November 13, 2013, it passed the House by a vote of 221-199[27] but then stalled in the Senate. It was reintroduced on January 25, 2015, and is currently pending.[28] Unlike the state statutes and bills, which impose duties primarily on plaintiffs and trial courts, the federal bill directs each trust to publish reports on the docket of the bankruptcy court that created it. The reports must identify "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." Upon written request, the trust must also provide the parties in asbestos litigation "any information related to payment from, and demands for payment from, such trust."[29]

The California bill, which was most recently amended in the California Assembly on April 14, 2015, contains the same basic provisions as the state statutes discussed above, with several variations. First, while a defendant may file a motion asking the trial court to compel the plaintiff to file additional trust claims, only one such motion may be filed unless new evidence of exposure surfaces. If the plaintiff successfully opposes the motion, the court may award fees against

the defendant. Also, no less than sixty and no more than one hundred and twenty days after a judgment, the plaintiff must file a sworn statement identifying each trust claim, specifying the amount of money the plaintiff has received or requested from each trust, and verifying that the plaintiff has filed all viable claims and will not file further claims. Finally, the trial court retains jurisdiction for four years after the entry of judgment to address matters related to trust claims or other recoveries by the plaintiff.[30]

The Illinois bill was introduced on January 14, 2013, and has been stalled in the state House since December of 2014. Largely modeled on the Ohio statute, the bill requires a sworn statement identifying all "existing claims" within thirty days after the commencement of discovery and a supplemental statement within thirty days after the filing of additional claims. No trial date can be assigned until the required disclosures are made, and the disclosures are deemed relevant and admissible at trial, notwithstanding claims of confidentiality or privilege. A defendant may also seek discovery directly from the trusts. If the plaintiff recovers on a trust claim that was submitted after a judgment was entered in the tort action, the court may reopen the judgment and adjust it by the amount of the trust recovery or award other appropriate relief.[31]

In Louisiana, a trust transparency bill was introduced in 2011 and reintroduced in 2012 and 2013, but it has not yet passed. The bill requires a sworn statement identifying existing claims within thirty days after the action is commenced and a supplemental statement within thirty days after the filing of additional claims. No trial date can be assigned until the required disclosures are made, and the disclosures are deemed relevant and admissible at trial, notwithstanding claims of confidentiality or privilege. If a defendant identifies a trust not named by the plaintiff but against whom the plaintiff may file a claim, the defendant can move the court to stay trial and order the plaintiff to file a claim. If the plaintiff recovers on a trust claim that was submitted after a judgment was entered in the tort action, the court may reopen the judgment and adjust it by the amount of the trust recovery or award other appropriate relief. A defendant may also seek discovery directly from the trusts. Finally, the plaintiff's failure to disclose any of the required information can result in sanctions.[32]

The Pennsylvania bill, introduced on April 8, 2013, shares the name of the federal bill, The Fairness in Claims and Transparency (FaCT) Act. It has not been voted upon and remains stalled in the state House. Notably, unlike other states' bills and statutes, the Pennsylvania bill allows the fact-finder to apportion liability directly against a trust with which the plaintiff has filed a claim or has a reasonable basis to file a claim. Apportionment of liability against the trust therefore reduces the defendants' liability. If a verdict is rendered before the plaintiff receives payment from a trust, there is a rebuttable presumption that the plaintiff will receive the maximum possible value of the claim, as published in the trust's governance documents. The plaintiff must file a sworn statement at least ninety days before trial identifying all filed or potential trust claims, the actual or anticipated filing dates, and the amounts or expected amounts of the claims. The disclosure must include a certification that the plaintiff has conducted a reasonable investigation and has disclosed all claims the plaintiff has filed or has a reasonable basis to file. The plaintiff must also disclose all submissions to and communications with each trust, including work histories, exposure allegations, affidavits, depositions and trial testimony of the plaintiff and others knowledgeable about the plaintiff's exposure history, all medical documentation supporting the claims, and trust governance documents. The plaintiff has an ongoing duty to supplement these disclosures, and sanctions may be imposed in the event of a default. Trial may not begin until at least thirty days after the plaintiff has made all required disclosures. A defendant may also seek discovery directly from a trust identified by the plaintiff, and the plaintiff must provide any required consents or authorizations.[33]

Bills in Mississippi and North Carolina failed and are no longer pending. The Mississippi bill, which failed in the Senate judiciary committee on February 5, 2013, identified its intent, in relevant part, as follows:

> Asbestos claimants often seek compensation for alleged asbestos-related conditions from civil defendants that remain solvent in civil court tort actions and from trusts or claims facilities formed in asbestos bankruptcy proceedings.
>
> There is limited coordination and transparency between these two (2) paths to recovery. The courts have already experienced the

> problem of instances of claimants failing to provide information and materials regarding asbestos trust claims that they have commenced.
>
> It is in the interest of justice that there be transparency for claims made in the bankruptcy system and for claims made in civil asbestos litigation.[34]

Like the Ohio statute and the Illinois bill, the Mississippi bill required a sworn statement identifying all existing claims within thirty days after the commencement of discovery and a supplemental statement within thirty days after the filing of additional claims. No trial date could have been assigned until the required disclosures were made, and the disclosures were deemed relevant and admissible at trial, notwithstanding claims of confidentiality or privilege. If a defendant identified a trust not named by the plaintiff but against which the plaintiff may file a claim, the defendant could have moved the court to stay trial and order the plaintiff to file a claim. The court then could have directed the filing of the claim unless it determined that the attorneys' fees and costs associated with filing the claim would have exceeded the anticipated recovery. A defendant could also seek discovery directly from the trusts. If the plaintiff recovered on a trust claim that was submitted after a judgment was entered, the court was empowered to reopen the judgment and adjust it by the amount of the trust recovery or award other appropriate relief, so long as a defendant's motion requesting such relief was filed within one year after the judgment. Finally, the plaintiff could have been sanctioned for failing to disclose any of the required information.[35]

A North Carolina bill that was introduced in April of 2013 originally contained asbestos trust transparency provisions in addition to other, unrelated provisions. However, the transparency provisions were deleted from the bill when it was passed in the North Carolina Senate on June 11, 2014. The original bill required a sworn statement within thirty days after the plaintiff filed suit identifying all filed or potential trust claims. Like the Arizona and Oklahoma statutes, the bill prohibited trial until at least one hundred eighty days after the required disclosures. In addition to allowing a defendant to move the court to compel the plaintiff to file a claim, the bill also provided that, if trial occurred before a claim was resolved, there would be a rebuttable presumption that the plaintiff was entitled to and would have received the compensation specified in the trust governance document. A setoff against any judgment would have been applied in the amount of any prior trust recovery plus the amount specified in the trust governance documents for any unresolved trust claims.[36]

Other Legislation. In addition to the aforementioned statutes and bills aimed directly at trust transparency, other recent statutes in a number of states could foster transparency. For instance, Pennsylvania and Oklahoma eliminated joint and several liability in 2011, and Tennessee did so in 2013. The Pennsylvania statute, enacted on June 28, 2011, and known as the "Fair Share Act" (FSA),[37] provides a typical example of how statutes eliminating joint and several liability could be used to foster transparency. The FSA has two provisions that should alter the apportionment of liability in asbestos cases. First, while Pennsylvania law previously required pro rata/per capita apportionment in strict liability cases (meaning that liability was assigned equally to strict liability defendants),[38] the FSA requires the jury to assign individual percentages to strict liability defendants, as was always done with negligence defendants.[39] Second, contrary to prior Pennsylvania law, the FSA allows juries to apportion liability against nonparties who have been released by plaintiffs.[40]

The common-sense meaning of these provisions is that juries must assign individual percentages of liability to both culpable defendants *and nonparties who have settled with plaintiffs*. Applying this approach to asbestos litigation, there is simply no principled basis on which to treat bankruptcy trusts differently from other settled nonparties that pay compensation to resolve allegations of liability. Indeed, even before the FSA took effect, Pennsylvania appellate case law defined asbestos trusts as "joint tortfeasors" and payments from those trusts as "settlement monies."[41] Therefore, it comports with both logic and case law to treat paying asbestos trusts as settled or released nonparty joint tortfeasors. This straightforward construction of the FSA can and should reduce the liability of solvent defendants by the amount of liability apportioned to the trusts. Therefore, if properly applied, the FSA and similar statutes in other states would help remedy the unfairness caused by double recoveries.[42]

Taken together, the transparency statutes and bills, and state laws overruling joint and several liability, provide a legislative roadmap for trust transparency and ending double recoveries. Effective legislation should: (1) require sworn statements and supporting documents regarding both actual and anticipated claims; (2) require supplemental disclosures identifying additional claims; (3) authorize stays of trial until the required filings or disclosures are made; (4) provide for the general admissibility of trust filings and documents despite claims of privilege or confidentiality; (5) provide that trust claims constitute evidence of both exposure and causation; (6) authorize defendants to pursue discovery directly from the trusts and require plaintiffs to provide the necessary consents or authorizations; (7) authorize defendants to identify additional claims that plaintiffs can file; (8) permit the amount of trust recoveries to be setoff against tort judgments and/or allow apportionment of liability directly against the trusts; and (9) authorize sanctions for the violation of disclosure requirements. Such provisions create the necessary flow of information between the trust and tort systems that prevent double recoveries and discourage the type of conduct uncovered in the Garlock bankruptcy.

Unfortunately, while the legislation contains the seeds of a solution, statutes have been enacted in only six states, bills have stalled or failed in other states, and laws eliminating joint and several liability have not yet been employed to prevent the prevalent concealment of trust claims. Unless and until legislative reforms succeed more broadly, litigants must look to trial courts, which possess special authority to uphold the integrity of the judicial process. Here, too, however, despite the notoriety that has followed the Garlock bankruptcy, only some courts have taken steps to address transparency issues.[43]

Judicial Reforms

The efforts of courts to address the lack of communication between the trust and tort systems usually have consisted of Case Management Orders (CMOs) and ad hoc decisions in individual cases.

Case Management Orders. In 2006, a California appellate court in *Volkswagen of America, Inc. v. Superior Court*[44] rendered what has been described as the "bellwether" decision in the cause of trust transparency.[45] That decision, which held that documents submitted to bankruptcy trusts are discoverable in tort litigation, spawned similar decisions elsewhere and ultimately led to standard case management orders (CMOs) that formalized certain disclosure requirements in some jurisdictions.

Even before *Volkswagen*, however, three jurisdictions had standing CMOs applicable to asbestos litigation. For instance, since 1996, a CMO governing New York City asbestos cases has authorized standard discovery regarding trust claims. The CMO was amended in 2003 to require plaintiffs to produce "all documents relating to claims made to asbestos bankruptcy trusts." Further amendments require plaintiffs to identify all trust claims that a plaintiff "intends to make[.]"[46] These requirements have been upheld despite arguments by the plaintiffs' bar that discovery is prohibited by confidentiality provisions in trust governance documents and that compelling the disclosure of anticipated claims is unconstitutional because it frustrates the time limitations in the governance documents.[47]

In a CMO dated December 9, 2003, which also preceded *Volkswagen*, a West Virginia court required asbestos plaintiffs to submit affidavits at least sixty days before the discovery deadline identifying the trusts with whom the plaintiffs have filed or will file claims. Upon request from a defendant, the plaintiff must also disclose the documents supporting the trust claim. The plaintiff's affidavit "shall be used [for] any purpose by the parties," and the trial court is authorized to compel a plaintiff to disclose the total amount received or expected to be received from the bankruptcy proceedings.[48] The 2003 CMO was amended on March 3, 2010, to impose additional requirements, many of which would be incorporated into the West Virginia transparency statute enacted on March 18, 2015. The 2010 CMO is perhaps the most comprehensive effort in the country to ensure full trust transparency.[49] It requires all trust claims to be disclosed no later than one hundred and twenty days before trial, the plaintiff must identify "when a claim was made or will be made," and the plaintiff must certify that he or she has undertaken "a good faith investigation of all potential claims against asbestos trusts." The plaintiff must also produce documents supporting each trust claim and submit supplemental disclosures within thirty days after

receiving information that could support additional trust claims. Sanctions may be imposed for noncompliance. Trust claims and documents are deemed relevant and discoverable, and discovery may not be defeated by a claim of privilege. Defendants may seek discovery directly from the trusts, and the plaintiff must provide the necessary consents. Trust payments will be setoff against any judgment. Any payments not received by the time a judgment is entered must be assigned to the defendants.[50]

On July 29, 2004, a trial court in Harris County, Texas promulgated Master Discovery to All Plaintiffs that requires disclosure of information submitted in support of trust claims.[51] That discovery was incorporated into an amended CMO dated April 5, 2007, which requires plaintiffs to identify each trust with which a claim has been or will be filed, the amount paid or agreed to be paid, and the date and status of each claim. Plaintiffs must also produce documents supporting each claim and execute authorizations allowing the defendants to seek discovery from the trusts.[52] On January 16, 2009, the judge presiding over the state multidistrict asbestos litigation in Texas issued a letter ruling that trust claim applications are admissible to create a fact question on exposure, and they will demonstrate a prima facie case of causation if they allege causation, but not otherwise.[53]

A handful of other states followed the early lead of the New York, West Virginia and Texas courts in promulgating CMOs. On March 19, 2007, a trial court in Jackson County, Missouri issued an "Order of the Discovery Commissioner Relating to Bankruptcy Claims" that authorized interrogatories concerning existing or anticipated claims with any of forty-six identified bankruptcy trusts, supporting documentation, and the amounts or expected amounts of the claims. The amount of "binding promises or actual payments" is then offset against a judgment.[54]

On May 8, 2007, a trial court in Cuyahoga County, Ohio issued a CMO requiring the plaintiff to serve applications for trust claims and supporting documents within seven days after a case group is listed for trial. The plaintiff must also serve authorizations allowing the defendants to seek discovery directly from the trusts.[55]

On December 21, 2007, the Superior Court of New Castle County, Delaware issued a CMO requiring the plaintiffs to disclose trust claims and "all materials related to" such claims within thirty days after filing suit. Plaintiffs must also supplement the trust disclosures as new claims are filed. More recently, on October 10, 2013, the same court issued a new Standing Order requiring the production of trust claims and supporting documents. "Such materials shall be supplemented seasonably up to the time of trial."[56]

On March 27, 2009, a trial court in Wayne County, Michigan issued a CMO requiring plaintiffs to submit all trust claim forms at least forty-eight hours before trial and providing that "this is a continuing obligation until the conclusion of a trial or settlement."[57]

On February 22, 2010, a trial court in Montgomery County, Pennsylvania issued a CMO providing bluntly that "[n]o later than one hundred twenty (120) days before trial, each plaintiff shall have filed any and all Asbestos Bankruptcy Trust claims available to him or her." By referencing "available" claims, this provision discourages the practice of delaying trust filings until after trial. Plaintiffs must also serve documents related to the filings "[c]ontemporaneous with all such filings[.]"[58] Six weeks later, on April 5, 2010, the Philadelphia, Pennsylvania trial court issued a CMO requiring the plaintiffs to serve responses to the defendants' trust claim discovery on the deadline that other discovery responses are due.[59] On December 14, 2011, a federal judge in the asbestos multidistrict litigation pending in the Eastern District of Pennsylvania adopted standardized bankruptcy trust interrogatories and procedures for production of documents from trusts.[60]

On January 26, 2011, the trial court in Madison County, Illinois issued a comprehensive CMO that, inter alia, authorizes standard interrogatories requiring a plaintiff to identify each trust with which a claim has been filed, the claim filing date, status of the claim, and the amount of money received from or pledged by the trust.[61]

On May 26, 2011, a New York trial court issued a CMO requiring plaintiffs to file trust claims no later

than ten days after a trial listing and in no event less than ninety days before trial.[62]

On June 27, 2012, a trial court in Middlesex County, Massachusetts issued a detailed CMO applicable to all asbestos cases in the state. Although the CMO sharply limits the use of trust claim information outside of asbestos litigation, it requires plaintiffs to produce product exposure information in trust claim forms within ninety days of trial, with an ongoing duty to supplement. Within thirty days of trial, plaintiffs must also file a certification that all known trust claims have been filed. Like the 2010 Montgomery County, Pennsylvania CMO, this provision seeks to prevent plaintiffs from waiting until after trial to file trust claims. Trust payments will be setoff on a dollar-for-dollar basis against any subsequent verdict. Once a verdict occurs, plaintiffs must assign any additional trust claims to defendants and cooperate in the filing and collection of those claims.[63]

On June 29, 2012, a San Francisco County, California trial court issued a CMO that requires plaintiffs to serve answers to standard trust claim interrogatories within twenty-one days of serving a complaint. The standard interrogatories require plaintiffs to identify, inter alia, each trust that paid a claim, the date on which each claim was filed, and the total amount of payments received from the trusts and other sources. Plaintiffs must also produce or sufficiently describe documentation supporting the claims.[64]

Most recently, effective May 27, 2015, the Los Angeles Superior Court issued a comprehensive CMO that incorporated a prior CMO dated August 11, 2014, and supplemented it with additional interrogatories and requirements. In broad terms, the CMO requires plaintiffs to "produce all documents sent to, received from, shown to, exchanged with, or otherwise disclosed to any established or pending asbestos trust funds . . . for any purpose[.]" Such production must occur at the same time that the plaintiffs serve answers to the standard interrogatories, and it shall be supplemented no later than five days before trial if new witnesses or documents have been discovered. The CMO further emphasizes that facts relating to alleged asbestos exposures are not privileged and are discoverable, and that the plaintiffs must "disclose all facts relating to all of their alleged exposures to asbestos, whether to the products or premises attributable to the named defendants, or to bankrupt or other entities, and regardless of whether those facts have been, or ever will be, included in a claim to a third party for the purpose of obtaining compensation for an asbestos-related injury." Nor may plaintiffs object or refuse to produce information on the basis that it also appears in otherwise privileged trust documents. The CMO also includes a form bankruptcy trust authorization. Notably, despite a significant challenge from plaintiffs' lawyers, the CMO applies its disclosure requirements to counsel as well as the parties. These requirements apply to cases in which a complaint or amended complaint was filed on or after May 27, 2015. Although initially subject to a six-month "trial period," the requirements will remain in effect unless and until they are amended, vacated, or superseded.[65]

Ad Hoc Decisions. While legislation and CMOs provide a more thorough and uniform remedy for the lack of trust transparency, some courts have also dealt with the issue in individual cases. For instance, in 2011, a Pennsylvania appellate court upheld trial court rulings that allowed discovery of "affidavits, claims forms, releases, and other materials related to the 524(g) bankruptcy trusts" and also allowed trusts that paid the plaintiff to be considered "as tortfeasors for purposes of reducing the verdict."[66] A similar decision by a Maryland appellate court allowed discovery of trust information and payments because they were relevant to apportioning damages.[67] Two Pennsylvania federal courts and a New York trial court permitted the discoverability of trust information, and the Pennsylvania decisions also rejected the plaintiffs' arguments that trust claims are confidential settlement communications that are protected from discovery.[68] In an insurance coverage dispute, a Maryland federal court allowed an insurance company to obtain discovery directly from trusts.[69] Nevada and Delaware courts have rejected objections to discovery interposed by the trusts themselves.[70]

While courts generally agree that trust information is discoverable, even that issue has been the subject of

conflicting decisions. For instance, a Rhode Island court prohibited the discovery of certain trust information except for the limited purpose of locating impeachment evidence,[71] and a Texas court refused to compel production of trust claims because, in part, the legislature failed to pass the then-pending transparency statute (which was later enacted).[72] Moreover, while courts generally agree that *filed* trust claims are discoverable, at least two courts, in Connecticut and Delaware, have refused to compel the production of *anticipated* claims.[73] Two courts in Washington have also refused to allow setoffs for amounts that the plaintiffs could receive from trusts after a verdict.[74]

A Proposed Uniform CMO

Because of the limited number of transparency statutes and CMOs, and because the case law is sporadic, commentators have proposed model CMOs for adoption nationwide. The most comprehensive of these proposals was drafted by Peggy Ableman, the former Delaware Superior Court judge who had a first-hand opportunity to assess the need for transparency in *Montgomery* (discussed above) and other cases.[75] Judge Ableman's proposed CMO adopts many of the best features of the above statutes and CMOs and adds important new requirements. The proposed CMO is set forth as follows:

> Asbestos Bankruptcy Trust Claim Disclosures
>
> (a) Within 30 days after an asbestos action is filed (or within 30 days after entry of this Order, whichever is later) and before any evidence is preserved by deposition -
>
> (1) The Plaintiff shall provide the Court and the parties with a sworn statement signed by Plaintiff and Plaintiff's counsel, under penalties of perjury, indicating that an investigation of all asbestos-related bankruptcy trust claims ("trust claims") has been conducted, that all trust claims that can be made have been filed, and, if applicable, that to the best of their information and belief there are no other law firms representing Plaintiff with respect to trust claims.
>
> (2) Plaintiff shall indicate whether there has been a request to defer, delay, suspend, or toll any trust claim, and provide the disposition of each trust claim;
>
> (3) Plaintiff shall provide all parties with all trust claims materials, including for conditions other than those that are the basis for the immediate asbestos action, and with respect to all law firms connected to Plaintiff relating to exposure to asbestos, including anyone at a law firm involved in the asbestos action, any referring law firms, and any other firm that has filed trust claims on the Plaintiff's behalf. "Trust claims materials" includes all documents and information related to trust claims, including final executed proof of claim forms, supplementary materials, affidavits, deposition and trial testimony, work history, medical and health records, correspondence and documents reflecting the status of a trust claim, and if the trust claim has settled, all supporting documents and information relating to the settlement of the trust claim; and
>
> (4) If Plaintiff's trust claim is based on exposure to asbestos through another person (so-called "take home exposure"), Plaintiff shall produce all trust claims materials submitted by the directly exposed person to an asbestos-related bankruptcy trust if available to Plaintiff. The presumption is that Plaintiff has access to and shall provide all trust claims materials filed by his or her spouse, parent, or child.
>
> (b) No initial trial date will be set until the requirements of paragraph (a) are met. Plaintiff has a continuing obligation to supplement the information and materials required under paragraph (a).
>
> (c) If a Defendant believes that Plaintiff is eligible to file one or more additional trust claims, then a Defendant may move the Court for an Order to require Plaintiff to file said trust claims.
>
> (1) Within 10 days of receiving a Defendant's motion, Plaintiff shall file the trust claims identified by the Defendant and produce all trust claims materials or file a written

response with the Court stating why there is insufficient evidence to file the trust claim(s).

(2) If the Court determines that Plaintiff is eligible to file the trust claim(s) identified by Defendant, the Court shall stay the civil action until Plaintiff files the trust claim(s) and produces all trust claims materials.

(d) Not less than 30 days prior to trial, the Court shall enter into the record a document identifying each trust claim Plaintiff has made to an asbestos bankruptcy trust.

(e) Trust claims materials are presumed to be relevant and authentic, and are admissible in evidence. No claims of privilege apply to any trust claims materials.

(f) Trust claim materials that are sufficient for payment under the applicable trust governance documents may support a jury finding that Plaintiff was exposed to products for which the trust was established to provide compensation and that such exposure may be a substantial factor in causing Plaintiff's claimed injury that is at issue in the civil action.

(g) To ensure compliance with this Order, and as an exercise of its inherent authority to administer justice, this Court will retain jurisdiction over all asbestos personal injury cases and the parties thereto for a period of two years following resolution or entry of judgment. Counsel for Plaintiff is ordered to serve notice to the Court and all parties of record of the resolution of each case within 30 days of resolution. The Court reserves the right to impose any and all remedies allowed by law in the event of noncompliance with this order, upon noticed motion.

(h) [For jurisdictions that allow set-offs] If a Plaintiff proceeds to trial before a trust claim is resolved, there is a rebuttable presumption that Plaintiff is entitled to, and will receive, the compensation specified in the trust governance document applicable to the claim at the time of trial. The Court shall take judicial notice that the trust governance document specifies compensation amounts and payment percentages and shall establish an attributed value to Plaintiff's trust claims.[76]

This proposed CMO has a number of features that would make it especially effective in ensuring the transparency of trust filings. By requiring disclosure shortly after the tort suit is commenced, the proposed CMO is like the Louisiana and North Carolina bills and the Delaware and California CMOs, but the requirement of disclosure before depositions is an important new feature. This requirement would both ensure that tort defendants have information about trust filings before the depositions and encourage honesty in deponents because they will know that the defendants already have trust claim information.[77] By adding a new requirement that plaintiffs must identify other law firms who have filed trust claims on their behalf, the proposed CMO also discourages the common practice in which plaintiffs retain different lawyers for the trust and tort claims so that the tort lawyers can claim ignorance about trust filings.

Another important new feature is directed at so-called "take home exposure" cases in which the plaintiff claims exposure through contact with a family member or the family member's clothing. In such cases, plaintiffs must disclose not only their own trust filings but their family members' as well. This will prevent the plaintiffs in "take home" cases from shielding relevant exposure information that might appear in the trust filings of family members. The provision allowing trial courts to retain jurisdiction for two years after a judgment finds a precedent only in the California bill (which authorizes trial courts to retain jurisdiction for four years). These provisions allow defendants to receive credit for post-judgment trust recoveries and, therefore, provide a remedy for cases in which plaintiffs delay or conceal trust filings until after a judgment is entered.

Conclusion

While the conduct exposed in Garlock's bankruptcy has been addressed so far by statutes in six states, CMOs in approximately a dozen jurisdictions, and individual rulings in a handful of cases, more needs to be done. Although these measures are laudable steps in the right direction, they fall short of the comprehensive, uniform reform that is necessary to

ensure transparency and restore fairness in asbestos litigation.

Unlike the existing measures, the CMO proposed by Judge Ableman creates a system of checks and balances in which plaintiffs must self-disclose, defendants can communicate directly with the trusts to verify the existence of filed or potential claims, and the trusts will provide the necessary information. More importantly, uniform procedures will facilitate the flow of information between the trust and tort systems, with the result that juries will have more information on which to render fair decisions about the causes and value of plaintiffs' harm.

Until that occurs, double recoveries will continue to undermine the integrity of the judicial system and deplete resources that would otherwise be available to pay legitimate claims. Garlock's bankruptcy revealed widespread deception, generated national attention, and spurred interest in remedies, but more needs to be done to finally end double recoveries in asbestos litigation.

Endnotes

1. Daniel Fischer, *A Stubborn Manufacturer Exposes The Asbestos Blame Game*, Forbes, Apr. 15, 2015. Other national media outlets also covered the "scam" and "racket" uncovered in the Garlock bankruptcy proceedings. *See e.g.*, Daniel Fisher, *Manufacturer's Lonely Quest To Open Asbestos Files Gains Strength*, Forbes, Mar. 27, 2014; Opinion, *Busting the Asbestos Racket*, Wall Street Journal, Feb. 7, 2014; Michael Tomsic, *Case Sheds Light On The Murky World Of Asbestos Litigation*, available at http://www.npr.org/2014/02/04/271542406/case-sheds-light-on-the-murky-world-of-asbestos-litigation, Feb. 4, 2014; Joe Nocera, *The Asbestos Scam, Part 2*, New York Times at A27, N.Y. edition, Jan. 14, 2014.

2. Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 AM. J. TRIAL ADVOC. 479, 486, 488 (2014) ("Notwithstanding the uncertain impact of the Garlock case, judges should view the decision as a wake-up call to acknowledge the very real possibility that asbestos lawsuits on their own dockets may be similarly comprised by the withholding of the same information in the court cases that is used to gain recoveries from the trusts.").

3. *See* Lloyd Dixon and Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, p. 1 (RAND Institute for Civil Justice, 2011). As part of a reorganization plan under Chapter 11 of the United States Bankruptcy Code, a debtor with outstanding asbestos liabilities may establish a trust to fund present and future settlements of claims and lawsuits. 11 U.S.C. 524(g). Once a company has established a trust and emerges from bankruptcy protection, all liabilities for asbestos exposure are assigned to the trust. *Id*.

4. *See* P.J. D'Annunzio, *Shifts Seen in Asbestos Case Filings in Phila., Pittsburgh*, The Legal Intelligencer, May 26, 2015.

5. *See* Bill Wilt and Alan Zimmermann, *A Third Wave In Asbestos Liabilities Lies Ahead: Actuarial Models Are Systematically Underestimating Exposures*, LexisNexis Legal Newsroom Litigation, 7, Feb. 19, 2014, available at http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2014/02/19/a-third-wave-in-asbestos-liabilities-lies-ahead-actuarial-models-are-systematically-underestimating-exposures.aspx.

6. Record News, *Asbestos Claims in Madison County Account for Big Fraction of Major Cases – 75 Percent*, The Madison-St. Clair Record, June 4, 2015 ("In 2013 and 2014, asbestos plaintiffs filed 2,978 suits at law in Madison County circuit court, and other plaintiffs filed approximately 1,015 suits in the Law division. That's 74.6 percent for asbestos.").

7. *See* News Release, *Asbestos Losses Fueled by Rising Number of Lung Cancer Cases*, A.M. Best Company, Inc., October, 2013, available at http://www3.ambest.com/ambv/bestnews/presscontent.aspx?altsrc=)&refnum=20451 ("[I]t is likely that asbestos

losses will continue unabated for many years to come."); Wilt and Zimmermann, *A Third Wave In Asbestos Liabilities*, *supra* n. 7 at 1 ("Much more persuasive, in our view, is the confluence of the evolving body of medical literature and shifting societal and media trends that, when combined, point to a third wave of serious asbestos claims that will likely stain the financial results of insurers for years to come.").

8. *Montgomery v. Am. Steel & Wire Corp.*, 09C-11-217 (Del. Sup. Ct. 2009).

9. *Reed v. Allied Signal*, 20 Pa. D&C 5th 385, 400 (Phila. CCP 2010), *aff'd*, 40 A.3d 184 (Pa. Super. 2011)(unpublished), *app. den'd*, 51 A.3d 839 (Pa. 2012).

10. *See* Editorial, *Cuyahoga Comeuppance*, Wall St. J., at A14, Jan. 22, 2007, referring to the opinion of the Honorable Harry Hanna in *Kananian v. Lorillard Tobacco Co.*, No. CV 442750 (Ohio Ct. Com. Pl. Cuyahoga Cnty., 2007), in which the judge barred plaintiff's counsel from practicing before the court based on glaring fraud and inconsistencies between allegations made in asbestos trust claim forms and the pending civil litigation.

11. *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 82 (W.D. N.C. Bankr. 2014).

12. *Id*. at 84.

13. *Id*. at 85 (emphasis in original).

14. *Id*. at 86.

15. *Id*. at 84.

16. *Id*. at 84-85.

17. *Id*. at 97.

18. *See* n. 3.

19. This question cannot be answered with precision because, although a number of trusts provide information regarding claims filed and/or paid, they will provide such information only to existing defendants in pending lawsuits. Because the cases we examined were concluded, we could not obtain information from these other trusts.

20. This conduct is aided by the procedures of the trusts themselves. In fact, 65% of the asbestos trusts have included confidentiality procedures in their distribution plans that prevent production of claims information. *See* Lloyd Dixon, *et al.*, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, p. 25 (RAND Corporation, 2010).

21. Texas Civil Practice and Remedies Code, Chapter 90, §§ 90.001 et seq.

22. 2015 Ariz. ALS 246.

23. W. Va. Code §§ 55-7G-1 et seq. (2015).

24. Wis. Stat. § 802.025 (2015).

25. Oklahoma Statutes, Title 76, § 81.

26. Ohio Revised Code, §§ 2307.951 – 2307.954.

27. H.R. 982 (2013).

28. H.R. 526 (2015).

29. H.R. 982, §§ 2 (8)(A) and (B).

30. California Assembly Bill 597.

31. Illinois House Bill 0153.

32. Louisiana House Bill 481.

33. Pennsylvania House Bill 1150.

34. Mississippi Senate Bill 2373, §§ 7(d)-(f).

35. Mississippi Senate Bill 2373.

36. North Carolina Senate Bill 648.

37. 42 Pa.C.S. § 7102(a.1)(recovery against joint defendant; contribution).

38. *See Baker v, AC & S*, 755 A.2d 664, 669 (Pa. 2000)("In strict liability actions, liability is indeed apportioned equally among joint tortfeasors.").

39. 42 Pa.C.S. § 7102(a.1)(1) ("[W]here liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2)."); *see also*, *id*. § 7102(a.1)(2) ("[T]he court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.").

40. *Id*. at § 7102(a.2) (Apportionment of responsibility among certain nonparties and effect)("For purposes of apportioning liability only, the question of liability of any defendant *or other person who has entered into a release with the plaintiff with respect to the action and who is not a party* shall be transmitted to the trier of fact upon appropriate requests and proofs by any party.")(emphasis added).

41. *See Reed*, *supra* n. 12, 40 A.3d 184, 2011 Pa. Super. LEXIS 4797, at *26 ("Further, we find the [Uniform Contribution Among Tortfeasors Act, 42 Pa.C.S. §§ 8321, *et seq*.,] clearly allows the joint tort-feasors' settlement monies received by Reed [from asbestos bankruptcy trusts] to reduce the verdict against Honeywell."). The FSA applies to causes of action arising on or after June 28, 2011. In asbestos cases, the cause of action is deemed to accrue on the date of diagnosis of an asbestos-related condition. Because the diagnosis in *Reed* was made before June 28, 2011, the Superior Court did not apply the FSA.

42. Pennsylvania courts have not yet applied the FSA to prevent such double recoveries. In a 2014 case, for instance, a Philadelphia trial judge ruled that no bankruptcy trusts may appear on the verdict sheet, despite the FSA. *See Hogan v. John Crane, Inc. et al.*, No. 2323 August Term 2012 (Pa. Ct. Com. Pl. Phila. Cnty. 2014).

43. For a critique of trial courts' responses to the transparency crisis, *see* Peggy Ableman, *The Time Has Come For Courts To Respond To The Manipulation Of Exposure Evidence In Asbestos Cases: A Call For The Adoption Of Uniform Case Management Orders Across The Country*, 30:5 MEALEY'S LITIG. REP.: ASBESTOS, April 8, 2015. In it, Judge Ableman sets out the context for why more effective reforms are necessary:

> What is surprising, and even troubling, however, is the limited response or reaction from courts to date, even in the face of powerful, documented examples of the ease with which plaintiffs have been able to conceal asbestos exposure evidence in tort litigation, while asserting exposures in order to receive additional compensation from the bankruptcy trusts.
>
> Given the broad media reporting following *Garlock*, and the protracted efforts to achieve legislative reform, it is incumbent upon the courts to promulgate procedural mechanisms to eliminate the abuses described in *Garlock*.
>
> In the face of increasing instances of specious claiming, and growing evidence of the illegitimacy of these practices, the failure of lawyers, disciplinary boards, and the courts to enforce fundamental ethical rules, and to ensure that procedures are administered fairly and even-handedly, stands as a glaring indictment not only of the legal profession, but also of the judges who are ultimately responsible for the administration of justice and adherence to the rule of law. Asbestos litigation does not have to continue along this trajectory if courts will take action to end this continued threat to the soundness of their legal processes created by the lack of transparency between the two compensation regimes.

Id. at 1, 2, 8 (citations omitted).

44. 43 Cal. Rptr. 3d 723 (Cal. App. 2006).

45. *See* William P. Shelley, Jacob C. Cohn, & Joseph A. Arnold, *Perspectives On Mass Tort Litigation, Part II*, 23 Widener L.J. 675, 702, *citing* 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, 273 (2008).

46. *In re N.Y. City Asbestos Litig.*, 966 N.Y.S.2d 347, 349-350 (N.Y. Sup. Ct., N.Y. Cnty., Nov. 15, 2012).

47. *See* Shelley, *et al.*, *supra* n. 48, *Perspectives On Mass Tort Litigation, Part II*, 23 Widener L.J. 675, at 708; *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). These arguments were rejected by order dated November 15, 2012, which directed plaintiffs to comply with the discovery requests. *In re N.Y. City Asbestos Litig.*, 966 N.Y.S.2d at 349-350.

48. *In re Asbestos Pers. Injury Litig.*, Master File Civil Action No. 03-C-9600 (W. Va., Kanawha Cnty. Cir. Ct., Dec. 9, 2003).

49. *See* Shelley, *et al.*, *supra* n. 48, *Perspectives On Mass Tort Litigation, Part II*, 23 Widener L.J. at 708 ("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.").

50. *In re Asbestos Pers. Injury Litig.*, Master File Civil Action No. 03-C-9600, Sec. 22 (W. Va., Kanawha Cnty. Cir. Ct., Mar. 3, 2010).

51. *In re Asbestos Litig.*, No. 2004-03964 (Tex. Dist. Ct., Harris Cnty., July 29, 2004).

52. *In re Asbestos Litig.*, No. 2004-03964, Sec. VII (Tex. Dist. Ct., Harris Cnty., Apr. 5, 2007).

53. *In re Asbestos Litigation*, MDL No. 2004-03964 (Tex. Dist. Ct., Harris Cnty., Jan. 16, 2009).

54. *Alvey v. 999 Quebec, Inc.*, No. 04CV200183, at 8, 10-12 (Mo. Cir. Ct., Jackson Cty., Mar. 19, 2007).

55. *In re All Asbestos Cases*, No. CV-073958, Sec. 18, 20(f) (Ohio Ct. Com. Pl., Cuyahoga Cnty., May 8, 2007).

56. *In re Asbestos Litig.*, No. 77C-ASB-2 (Del. Super. Ct., New Castle Cnty., Oct. 10, 2013)(Standing Order No. 1).

57. *In re All Asbestos Personal Injury Cases*, No. 03-310422-NJP (Mich. Cir. Ct., Wayne Cnty., Mar. 27, 2009).

58. *Thibeault v. Allis Chalmers Corp. Prod. Liab. Trust*, No. 07-27545, Sec. 10 (Pa. Ct. Com. Pl., Montgomery Cnty., Feb. 22, 2010).

59. *In re Asbestos Litigation*, No. 0001 (Pa. Ct. Com. Pl., Philadelphia Cnty., Apr. 5, 2010).

60. *In re Asbestos Prods. Liab. Litig. (No. VI), MDL 875*, No. 01-00875 (E.D. Pa., Dec. 14, 2011).

61. *In re All Asbestos Litig. Filed in Madison Cnty.*, (Illinois Cir. Ct., Madison Cnty., Jan. 26, 2011) (Standing Case Management Order for All Asbestos Personal Injury Cases at § III(A)(7), incorporating Standard Asbestos Interrogatories Directed to Plaintiffs, Nos. 26, 28).

62. *In re New York City Asbestos Litigation*, No. 40000/88, Sec. XV(E)(2)(1)(N.Y. Sup. Ct., N.Y. Cnty., May 26, 2011).

63. *In re Massachusetts State Court Asbestos Litigation*, Amended Pre-Trial Order No. 9, Sec. XIII(c)(7)(o) (Mass. Super. Ct., Middlesex Cnty., June 27, 2012).

64. *In re Complex Asbestos Litigation*, No. CGC-84-828684, Sec. 6(B), Exhibit C, Secs. 49, 53 (Cal. Super. Ct., San Francisco Cnty., June 29, 2012).

65. Coordinated Proceeding Special Title (Rule 3.550), LAOSD Asbestos Cases, JCCP Case No. 4674, Los Angeles Superior Court, Central Civil West (May 27, 2015).

66. *Reed*, *supra* n. 12, 2011 Pa. Super. LEXIS 4797, at *28.

67. *Scapa Dryer Fabrics, Inc. v. Saville*, 16 A.3d 159 (Md. App. 2011).

68. *See Lyman v. Union Carbide Corp. (In re Asbestos Prod. Liab. Lit. (No. VI)*, 2009 U.S. Dist. LEXIS 129920, *8 (E.D. Pa. 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."); *Shepherd v. Pneumo-Abex, LLC, MDL 875*, 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."); *Drabczyk v. Amchem Products, Inc.*, Index No. 1583/2005 (N.Y. Sup. Ct. Erie Cnty., Jan. 18, 2008)("Pretrial disclosure of inadmissible documents and other evidence that may lead to disclosure of admissible proof is required. . . . [T]hus even if what the bankruptcy trust defendant seeks should not be received in evidence, they must be disclosed.")(citations omitted).

69. *National Union Fire Ins. Co. v. Porter Hayden Co.*, 2012 U.S. Dist. LEXIS 23716, *15-*17 (D. Md. 2012).

70. *See Congoleum Corp. v. Ace Am. Ins. Co.*, No. 09M-01-084 (Del. Super. Ct., New Castle Cnty. 2009); *Congoleum Corp. v. Ace Am. Ins. Co.*, No. CV09-00548 (Nev. Dist. Ct., Washoe Cnty., Nov. 9, 2009).

71. *Sweredoski v. Alfa Laval, Inc.*, 2013 R.I. Super. LEXIS 128, *30 (R.I. Super. Ct. 2013).

72. *Brumley v. Azko Nobel, Inc.*, No. 17509-2010 (Tex. Dist. Ct., Harris Cnty. Feb. 12, 2012).

73. *See Ouellette v. A.W. Chesterton Co.*, No. CV05-4009802 (Conn. Super. Ct. 2012); *McGhee v. AT&T, Inc.*, No. 10C-12-114, at *106-07 (Del. Super. Ct. 2012).

74. *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. 2010).

75. *See Montgomery v. Am. Steel & Wire Corp.*, 09C-11-217 (Del. Sup. Ct. 2009). Judge Ableman's proposed CMO is discussed in Ableman, *supra*. n. 46, *The Time Has Come*, 30:5 MEALEY'S LITIG. REP.: ASBESTOS.

76. *Id*. at 4-5.

77. *Id*. at 5. ■

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