Sunlight Is the Best Disinfectant

Solutions to the Concealment of Asbestos Trust Filings in Tort Litigation

By John J. Hare and Daniel J. Ryan

Existing and proposed reforms are in place but the authors contend that more needs to be done to ensure transparency and invest fairness in the two-track system, and they offer recommendations.

Scholars, litigators, and other commentators have paid much attention in recent years to the two-track system of compensation available to those injured by asbestos exposure. Under that system, claimants and their attorneys can recover compensation from two sources—bankruptcy trusts and tort litigation—for the same harm. The trusts pay claims relatively quickly and easily, and contrary to the arguments of some claimants' attorneys, the trusts pay substantial compensation, which, on average, exceeds the recoveries in tort litigation.

But the trust system is also plagued by inadequate oversight and flawed procedures that allow claimants to conceal information and take inconsistent positions designed to maximize recoveries from multiple trusts at the expense of full disclosure and honesty. Indeed, a new study of 100 trust claims undertaken by the U.S. Chamber Institute for Legal Reform (ILR) concluded that 69 percent of claimants failed consistently to identify their places of employment in applications with different trusts, and 55 percent had date-of-employment discrepancies across claim forms. U.S. Chamber Institute for Legal Reform, *Insights & Inconsistencies: Lessons from the Garlock Trust Claims* 9 (Feb. 19, 2015), available at http://www.instituteforlegalreform.com/uploads/sites/1/InsightsAndInconsistencies_Web.pdf. More worrisome to the ILR, however, were the 21 percent of claim forms that had "serious inconsistencies," including different diseases (such as lung cancer and mesothelioma) claimed by the same individual, identification of simultaneous employment at different (and sometimes distant) locations, inconsistent job descriptions, and implausible exposure allegations (such as an allegation that the claimant's exposure began in the year of his birth). *Id*. at 10–11. Clearly, the trusts must be reformed to prevent claimants from "gaming" the system with inconsistent and even fabricated claims.

This article, however, focuses on another and perhaps more significant flaw in the

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two-track system of compensation for asbestos claimants. In particular, while trust filings are themselves troublesome, the problems compound at the intersection between the trust and tort systems because claimants have been routinely permitted to conceal or delay the disclosure of their trust claims once they file a lawsuit. The result is that claimants can make certain allegations to recover trust compensation and then make other allegations to recover tort compensation for the same harm, yet the systems do not communicate to ensure that the averments are consistent and that payments made by the trusts are accounted for in the tort litigation.

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The lack of transparency in the trust system for the tort system, and the double recoveries that result, have been sharply criticized by judges, commentators, and the national media. Indeed, less than a year ago, *Forbes* called the routine practice of "double-dipping" in asbestos litigation "one of the longest-running and most lucrative schemes in the American litigation business." Daniel Fischer, *A Stubborn Manufacturer Exposes The Asbestos Blame Game*, Forbes, Apr. 15, 2015. This article describes the problem, reviews existing and pending reforms, and describes a preferred solution that should be enacted across the country.

The Problem and the Consequences of Double Recoveries

Over the past three decades, 56 personal injury trusts have been established from the remnants of companies driven into bankruptcy by asbestos claims. *See* Lloyd Dixon and Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* 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*. 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 six-figure compensation from the trusts based primarily on the claimant's own word that he or she was exposed to the products of the bankrupt entities. While claimants routinely downplay the amount of money available in the trust system, the federal judge presiding over the highly publicized bankruptcy of a gasket manufacturer, Garlock Sealing Technologies, Inc., found that "[t]he total recovery by a typical [mesothelioma] claimant was estimated to be between $1 and $1.5 million, including an average of $560,000 in tort recoveries and about $600,000 from 22 Trusts." *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 72–73, 96 (W.D. N.C. Bankr. 2014).

Having achieved these substantial recoveries from the trusts, asbestos claimants also 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, asbestos filings in the Philadelphia County Court of Common Pleas, a national hotbed for asbestos litigation, have risen nearly every year since 2010, and approximately 300 new cases are filed each year. 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. In 2013 and 2014, asbestos lawsuits constituted 74.6 percent of all civil filings in Madison County. The pace of asbestos litigation is expected to continue unabated for the foreseeable future.

Because lawsuits continue to be filed and the two-track system of compensation permits substantial recoveries, courts and commentators have increasingly emphasized the need for trust transparency to prevent abuses. As noted, such abuses 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 they 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, but the most well-publicized concerns emerged from the Garlock bankruptcy noted above. After asbestos claims forced it into bankruptcy, Garlock succeeded in convincing a federal judge, George L. Hodges, to order the disclosure of voluminous trust filings and related documents. Having reviewed many of those documents, Judge Hodges 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[.]" *In re Garlock Sealing Techs.,* 504 B.R. at 82. 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)." *Id*. at 84. With regard to the trust claim forms and related evidence that he reviewed, Judge Hodges 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." *Id*. at 85 (emphasis in original). Judge Hodges also found that the conduct of the plaintiffs' lawyers exhibited a "startling pattern of misrepresentation." *Id*. at 86.

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 percent 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 21 other trust claims alleging asbestos exposure.

Judge Hodges 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 20 trust claims, and the allegations supporting 14 of those claims contradicted the plaintiff's representations in the tort suit.

As a result of such conduct, which dramatically inflated Garlock's payments in past cases, Judge Hodges reduced Garlock's estimated aggregate future liabilities from the $1–1.3 billion sought by claimants to $125 million, a 90 percent reduction. Garlock's experience highlights that double-dipping dramatically inflates the liabilities of solvent companies, depletes the resources that 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. The fallout from Garlock's bankruptcy garnered national attention, renewed existing reform efforts, and spurred new efforts.

Existing and Pending 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 have made a significant difference, combining their best features provides a roadmap for the reforms that are necessary to finally solve the problem of double recoveries.

To date, six states—Texas, Arizona, West Virginia, Wisconsin, Oklahoma, and Ohio—have enacted transparency statutes. Four of these statutes have been enacted since Judge Hodges' *Garlock* decision on January 10, 2014. Although they differ in the particulars, these statutes impose a common core of provisions that require disclosure of trust filings early in tort litigation. In addition to these six statutes, transparency bills are pending in Congress and at least seven 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 and 2015. On January 6, 2016, the bill passed in the House of Representatives, but Senate passage is doubtful (the 2013 bill stalled in the Senate), and a veto by President Obama is a near certainty even if the bill survived the Senate. H.R. 526 (2015). Unlike the state statutes and bills, which impose duties primarily on the 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 with "any information related to payment from, and demands for payment from, such trust." H.R. 982, §§2 (8)(A) and (B).

In addition to these 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), 42 Pa.C.S. §7102(a.1) (recovery against joint defendant; contribution), 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, Pennsylvania law previously required pro rata apportionment in strict liability cases—meaning that liability was assigned equally to strict liability defendants. *See Baker v, AC & S,* 755 A.2d 664, 669 (Pa. 2000) ("In strict liability actions, liability is indeed apportioned equally among joint tortfeasors."). But the FSA requires the jury to assign individual percentages to strict liability defendants, as was always done with negligence defendants. 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* 42 Pa. C.S. §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."). Second, contrary to prior Pennsylvania law, the FSA allows juries to apportion liability against nonparties that have been released by plaintiffs. *Id*.

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The common-sense meaning of these provisions is that juries must assign individual percentages of liability to both culpable defendants *and nonparties that 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." *See Reed v. Honeywell Int'l*, 40 A.3d 184, 2011 Pa. Super. Lexis 4797, at *26 (Pa. Super. Ct. Dec. 6, 2011) ("Further, we find the [Uniform Contribution Among Tortfeasors Act, 42 Pa.C.S. §§8321, *et seq*.,] clearly allows the joint tortfeasors' 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 Pennsylvania Superior Court did not apply the FSA.)

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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. (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).)

Taken together, the transparency statutes and bills and the state laws overruling joint and several liability, provide a roadmap for trust transparency and ending double recoveries. Unfortunately, too many bills have stalled and too few statutes have been enacted to undermine the widespread concealment of trust claims and resulting double recoveries meaningfully. 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 followed the Garlock bankruptcy, too few courts have taken steps to address transparency issues. (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, Apr. 8, 2015.)

These steps that trial courts currently take consist primarily of issuing case management orders (CMOs) and ad hoc decisions in individual cases. CMOs are in place in jurisdictions in California, Delaware, Illinois, Massachusetts, Michigan, Missouri, New York, Ohio, Pennsylvania, Texas, and West Virginia. Other courts, including trial courts in Connecticut, Delaware, Maryland, Nevada, New York, Pennsylvania, Rhode Island, Texas, and Washington, have addressed the lack of transparency in ad hoc decisions. However, similar to the legislative reforms, these CMOs and ad hoc decisions have been too sporadic to have a meaningful effect.

A Preferred Solution

Although they have failed to achieve broad success, the above reforms contain the seeds from which a comprehensive solution could emerge. Combining their best features, an effective measure would (1) require the filing and disclosure of all viable trust claims before a tort case proceeds to trial; (2) authorize stays of trial until the required filings or disclosures are made; (3) provide for the general admissibility of trust filings and documents despite claims of privilege or confidentiality; (4) provide that trust claims constitute evidence of both exposure and causation; (5) authorize defendants to pursue discovery directly from the trusts and require the plaintiffs to provide the necessary consents or authorizations; (6) authorize defendants to identify additional claims that plaintiffs can file; (7) permit the amount of trust recoveries to be set off against tort judgments or allow apportionment of liability directly against the trusts or both; and (8) authorize sanctions for the violation of disclosure requirements. Such provisions create the necessary flow of information between the trust and tort systems that would prevent double recoveries and discourage the type of conduct uncovered in the Garlock bankruptcy.

Many of these features are included in a proposed uniform CMO drafted by Peggy Ableman, a former Delaware Superior Court judge who had a first-hand opportunity to assess the need for transparency as a trial judge handling asbestos cases. (*See* Ableman, *supra*, for a more detailed discussion of the proposed CMO.) Judge Ableman's proposed CMO, the most comprehensive existing proposal, has a number of provisions that would make it especially effective in ensuring the transparency of trust filings. For instance, similar to the bills pending in Louisiana and North Carolina and the CMOs in Delaware and California, Judge Ableman would require disclosure of trust filings shortly after a tort suit is commenced and in fact before depositions could occur. This requirement would both ensure that the 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. Judge Ableman's CMO also adds a new requirement that plaintiffs must identify other law firms that have filed trust claims on their behalf, which

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would discourage 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 of Judge Ableman's proposed CMO is directed at so-called "take home exposure" cases in which a 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' claims 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 requirement of the proposed CMO allowing trial courts to retain jurisdiction for two years after judgment is entered 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 the plaintiffs delay or conceal trust filings until after a judgment is entered.

In the absence of federal legislation or a broadly adopted uniform state statute, a CMO of the type proposed by Judge Ableman is the best hope for meaningful reform.

Conclusion

Although the existing and pending reforms are steps in the right direction, more needs to be done to ensure transparency and invest fairness in the two-track system of asbestos compensation. Until widespread change occurs, double recoveries will continue to undermine the integrity of the system and diminish resources that must remain available to pay legitimate future claims. FD