

Illinois Asbestos Trust Transparency

The Need to Integrate Asbestos Trust Disclosures with the Illinois Tort System

Mark A. Behrens, Esq.
Marc C. Scarcella, MA
& Peter R. Kelso

A Study Sponsored By:



Illinois Civil Justice League

Forwarded by John Pastuovic, President, Illinois Civil Justice League

Illinois is “ground zero” for asbestos-related personal injury (“tort”) lawsuits filed by plaintiffs recruited through television and Internet advertisements running across the county. In fact, only a small percentage of the plaintiffs that file asbestos cases in Illinois are residents of the state.¹ From a national standpoint, Madison County received almost one-third of all new asbestos cases filed in 2016, and almost one-half of the highest value cases involving a type of cancer called mesothelioma.² Cook and St. Clair Counties also receive significant numbers of asbestos cases.³

The disproportionate volume of asbestos cases in Illinois has an enormous impact on trusts that were created when the major asbestos producers declared bankruptcy years ago. These trusts exist to compensate individuals harmed by exposure to asbestos-containing thermal insulation and other products manufactured or sold by the historically most culpable companies. Through bankruptcy, the companies themselves are now exempt from asbestos-related lawsuits.

The asbestos claims environment today thus involves two separate systems for compensating people with asbestos-related harms. Individuals can file claims for compensation with the trusts to recover for exposures tied to the major asbestos producers and also bring tort claims against still-solvent, but increasingly remote defendants.⁴ Many of today’s asbestos defendants used to be peripheral players in the litigation or are newer defendants, including small businesses.

Plaintiffs’ lawyers learned to exploit a disconnect that exists between the asbestos trust and tort systems. By intentionally delaying the filing of asbestos trust claims until after a personal injury case is resolved, plaintiffs can withhold information that, if disclosed, could lead a jury to conclude that a bankrupt entity was the sole proximate cause of the plaintiff’s alleged harm. Delayed trust claim filings also deny judgment defendants the verdict reductions (called set-offs) they are entitled to receive for amounts paid to the plaintiff by asbestos trusts. This leads to “double dipping,” where the plaintiff receives both a tort award and payments from multiple

¹ See Illinois Civil Justice League, *Litigation Imbalance III* (Apr. 2015), at http://www.instituteforlegalreform.com/uploads/sites/1/ICJL_Litigation_Imbalance_III_Study.pdf?phpMyAdmin=ixWosBsjNazOMF-nz%2CnxfwkrbH2; Ann Maher, *Two of 207 Asbestos Claims Set for Trial This Week are On Behalf of Madison County Plaintiffs*, Madison-St. Clair Record, Dec. 9, 2014, at <http://madisonrecord.com/stories/510557170-two-of-207-asbestos-claims-set-for-trial-this-week-are-on-behalf-of-madison-county-plaintiffs>.

² Ann Maher, *Asbestos Report Shows Madison County Remains ‘Preeminent Mature’ Jurisdiction*, Madison-St. Clair Record, Mar. 19, 2017, at <http://madisonrecord.com/stories/511096033-asbestos-report-shows-madison-county-remains-preeminent-mature-jurisdiction> (“the number of new cases filed in Madison County...represent 28 percent of all new cases filed in the nation in 2016.... Madison County’s 2016 mesothelioma claims represented 47 percent of all filed in the country.”); U.S. Chamber Inst. for Legal Reform, *Litigating in the Field of Dreams: Asbestos Cases in Madison County* (Dec. 2013), at <http://www.instituteforlegalreform.com/uploads/sites/1/LitigatingintheFieldofDreams-update.pdf>.

³ See, e.g., U.S. Chamber Inst. for Legal Reform, *A Docket on the Brink: Asbestos Litigation in Cook County* (Dec. 2013), at http://www.instituteforlegalreform.com/uploads/sites/1/AsbestosLitigationInCookCounty_WEB.pdf.

⁴ See also Heather Istringhausen Gvillo, *Database Provides Insight Into How Much Asbestos Claims Are Worth*, Madison-St. Clair Record, May 14, 2015 (database from recent Garlock Sealing Technologies, LLC bankruptcy case shows that asbestos claimants represented by a dominant plaintiffs’ law firm in Madison County received on average \$804,207, with approximately 41% from an average of 13 bankruptcy trusts and the rest from an average of 13 solvent companies).

asbestos trusts for same exact injury.⁵ In addition, the lack of transparency between the asbestos trust and tort systems makes it hard to police inconsistent and potentially fraudulent claiming that may deplete defendant or trust assets and rob future claimants of compensation they deserve.⁶

Recently, the issue of inconsistent tort and trust claiming was at the center of a North Carolina federal bankruptcy court case involving gasket and packing manufacturer Garlock Sealing Technologies, LLC.⁷ The judge said that after the major asbestos producers filed bankruptcy and exited the tort system, the focus of plaintiffs' attention turned to formerly peripheral defendant Garlock. In this new environment, evidence of plaintiff exposures to the asbestos products of the bankrupt major asbestos producers—evidence that Garlock needed to mount a defense—often “disappeared.”⁸ The judge said that this “occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants).”⁹ The judge concluded, “The withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock....”¹⁰ The court estimated that Garlock paid approximately 10 times the amount it otherwise would have paid in the tort system had all relevant trust-related exposures been disclosed to the fact-finder in its civil cases.

This paper illustrates that, similar to the findings in the Garlock case, the failure by plaintiffs and their counsel to produce trust-related exposure evidence in a timely fashion in asbestos cases filed in Illinois appears to be systemic. The paper highlights the need to address the disconnect that exists between the asbestos trust and tort compensation systems in Illinois.

⁵ See Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 25, 2014, at A12 (describing “‘double-dipping’—in which lawyers sue a company and claim its products caused their clients' disease, even as they file claims with asbestos trusts blaming other products for the harm. This lets them get double or multiple payouts for a single illness, with a huge cut for the lawyers each time.”).

⁶ As commentators have explained:

[C]laimants 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.

Daniel J. Ryan & John J. Hare, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock's Bankruptcy*, 15:1 Mealey's Asbestos Bankr. Rep. 1, 2 (Aug. 2015); see also Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1088 (2014) (“In cases where defendants have been able to overcome the attempts to suppress evidence of other exposures, it has become apparent that the product exposures set forth in multiple trust claims differ markedly from, and are inconsistent with, the exposures being asserted by plaintiffs in the tort system.”).

⁷ *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014).

⁸ *Id.* at 86.

⁹ *Id.* at 84.

¹⁰ *Id.* at 86.

Introduction

In recent years, a growing national debate over “trust transparency” has risen to the forefront of asbestos litigation and is currently a prominent issue facing the Illinois judiciary and legislature. The debate centers on the emergence of asbestos trusts as a substantial, alternative compensation system for asbestos claimants, and the failure of the tort and trust systems to integrate. Each year, the asbestos trust system pays out billions of dollars to thousands of asbestos plaintiffs—more than \$20 billion since 2006.¹¹ Typically, claimants also file asbestos-related tort actions. Public data suggest that plaintiffs in asbestos cases in Illinois could receive as much as half of their total asbestos-related compensation from asbestos trusts.

The significant overlap between Illinois asbestos lawsuits and the trust compensation system necessitates legislation to ensure a reasonable level of disclosure with regard to claims made by plaintiffs in the tort and trust systems.

What is an asbestos trust?

Asbestos trusts are typically established through the bankruptcy reorganization of companies with asbestos-related personal injury lawsuits that are either pending or anticipated to be filed against the company in the future. As such, creditor classes of “current” and “future” asbestos claimants need to be compensated as part of the reorganization process. Bankruptcy plans formed under the federal Bankruptcy Code (11 U.S.C. § 524(g)) involve the creation of trusts that are often funded with cash, reorganized debtor stock, insurance, and other assets provided by the debtor or parent company. In return, the trust assumes the legal responsibility for the predecessor company’s present asbestos-related claims and for future asbestos-related claims that would have been filed against the company in the tort system but for the bankruptcy.

Beginning with the codification of § 524(g) in 1994 and predominantly during the years 2000-2003, nearly seventy companies filed for bankruptcy protection in what is commonly referred to as the “asbestos bankruptcy wave.”¹² Today, many of these companies have emerged from the bankruptcy reorganization process, leaving in their place dozens of trusts funded with tens of billions in assets to pay claims.¹³ As one commentator explained, “These trusts answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades.”¹⁴ As a result of their

¹¹ Figures based on information gathered from § 524(g) trust annual reports.

¹² Mark D. Plevin et al., *Where Are They Now, Part Eight: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 16 Mealey’s Asbestos Bankr.Rep. 1 (Sept. 2016), at <http://www.lexislegalnews.com/articles/11288/where-are-they-now-part-eight-an-update-on-developments-in-asbestos-related-bankruptcy-cases>.

¹³ According to a report by the U.S. Government Accountability Office, asbestos trusts collectively held \$36.8 billion as of 2011. See U.S. Gov’t Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (Sept. 2011); see also Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011).

¹⁴ William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 675-76 (2014).

substantial funds, from 2006 through 2015 the trust system paid out approximately \$20 billion to asbestos claimants.

Trusts compensate for conditions caused by bankrupt entities

It would be rare to find an individual asbestos plaintiff in Illinois whose injuries were caused by the actions of just one company. More often than not, plaintiffs were exposed to asbestos fibers in occupational settings where the asbestos-containing products and operations of multiple companies were present. As such, most asbestos claimants pursue compensation from multiple asbestos trusts and dozens of tort system defendants.

During the first few decades of the litigation, asbestos lawsuits were largely predicated on alleged exposures to asbestos-containing thermal insulation products in industrial settings. Defendants responsible for the manufacturing and distribution of such products were considered the most culpable sources of plaintiff exposure and compensation.

Even after the largest manufacturer of asbestos-containing thermal insulation products, Johns-Manville, filed for bankruptcy protection in 1982, dozens of other thermal insulation defendants such as Armstrong World Industries, Owens-Corning, Fibreboard, and Pittsburgh Corning remained and continued to be primary sources of plaintiff compensation in the tort system. In 2000, the litigation environment experienced a significant shift when these four primary defendants filed for bankruptcy reorganization along with Babcock & Wilcox, a leading boiler and power generation defendant. Following the asbestos bankruptcy wave, dozens of other primary thermal insulation defendants also filed for bankruptcy protection, initiating a substantial shift in the claiming and settlement patterns for those asbestos defendants that remained in the tort system.¹⁵

Today, asbestos litigation looks vastly different than it did prior to the asbestos bankruptcy wave. As thermal insulation companies filed for bankruptcy, plaintiff attorneys shifted their litigation strategy towards peripheral and new defendants responsible for asbestos products such as gaskets, pumps, automotive friction products, and residential construction products.¹⁶ On a relative risk basis, the products manufactured by the remaining tort defendants are marginal compared to the thermal insulation products of the trust predecessor companies.¹⁷ With plaintiff attorneys no longer able to target the trust predecessor companies in the tort system, the relative contributions of today's peripheral defendants often represent a dramatic divergence from their

¹⁵ For a detailed list of all the Bankruptcy Wave debtors, see Plevin et al., *Where Are They Now, Part Eight, supra*.

¹⁶ See Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27 Mealey's Litig. Rep.: Asbestos 1 (Oct. 10, 2012), at http://www.smsm.com/assets/htmldocuments/Phila.%20Paper%20re_%20Asbestos%20Bankruptcies.PDF.

¹⁷ See *Becker v. Baron Bros., Coliseum Auto Parts, Inc.*, 649 A.2d 613, 620 (N.J. 1994) (noting that "asbestos-containing products are not uniformly dangerous and thus that courts should not treat them all alike."); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985) ("[A]sbestos-containing products cannot be lumped together in determining their dangerousness."); *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985) ("Asbestos products...have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others.").

true causal share and legal liability.¹⁸ This inequity in plaintiff contribution leads to overpayment by today's defendants in the tort system.¹⁹

The procedural disconnect between the asbestos trusts and tort system

At the core of the disconnect between the trust and tort systems is the longer time period in which a claimant has to file a claim with an asbestos trust as compared to filing a tort lawsuit. Asbestos trusts generally allow claimants a minimum of three years from the date of their disease diagnosis to file compensation claims, and those time limits can often be extended. In contrast, Illinois requires personal injury lawsuits to be filed within two years from the date the cause of action accrued, meaning when the plaintiff knew or should have known that he or she had an asbestos-related disease and knew or should have known that the disease was caused by exposure to asbestos or asbestos-containing products.²⁰ As Professor Lester Brickman of Cardozo Law School in New York, an expert on asbestos litigation, explains:

Most [trust distribution procedures] have a three-year statute of limitations requiring that trust claims be filed within three years of diagnosis of an asbestos-related disease or, if later, within three years after the 'initial claims filing date' or the date of the asbestos-related death. This allows plaintiffs to file and resolve many tort actions before filing trust claims. In the event that plaintiffs are unable to resolve their tort claims within the allowed time period, most [trusts] . . . allow a claimant to file a trust claim to meet the applicable statute of limitations first and then to withdraw the claim "at any time . . . and file another claim subsequently without affecting the status of the claim for statute of limitations purposes."²¹

Further, a claimant may ask the trust to defer processing a claim for up to three years without affecting the status of the claim.²² The impact of these provisions is that "a plaintiff suing in the tort system can have filed trust claims, then withdrawn or deferred them, completed the tort suits during which they testified that they had not filed any trust claims, and then immediately refile or revive the trust claims asserting product exposures that controvert the plaintiff's testimony in the tort action."²³

¹⁸ See *Moeller v. Garlock Sealing Technologies, LLC*, 660 F.3d 950 (6th Cir. 2011) (describing the assertion of plaintiff's expert that exposure to Garlock gaskets was a substantial cause of plaintiff's harm as "akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume.").

¹⁹ See *In re Garlock Sealing Technologies*, 504 B.R. at 86.

²⁰ 735 Ill. Comp. Stat. 5/13-202; *Nolan v. Johns-Manville Asbestos*, 421 N.E.2d 864, 868 (Ill. 1981); see also 740 Ill. Comp. Stat. 180/2(d) (wrongful death).

²¹ Furthering Asbestos Claim Transparency Act, Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 114th Cong. (Feb. 4, 2015) (statement of Lester Brickman), at 2015 WLNR 3578295 (quoting standard trust distribution procedures).

²² See *id.*

²³ *Id.*

By delaying the filing of asbestos trust claims while the tort case is pending, a plaintiff's lawyer can deprive tort defendants of critical information they need to try to prove that bankrupt entities were the sole proximate cause of the plaintiff's harm. Further, by delaying trust filings until after the tort case is tried, plaintiffs can deprive trial defendants of set-offs that would reduce the size of any verdict by the amount of the plaintiff's trust recoveries. This allows plaintiffs to receive payments from both the trust and tort systems for the same exact injury. This practice is known as "double dipping."

As a result, plaintiff law firms have little economic incentive to pursue trust claims during the pendency of the tort lawsuit, which in turn renders basic discovery procedures in Illinois courts ineffective. Plaintiff attorneys are not required to disclose trust claims that they have not yet filed. Essentially, cases are intentionally bifurcated by plaintiffs' counsel to create two sets of claims: one against tort defendants and the other against bankruptcy trusts.

Due to this disconnect between the tort and trust systems, in recent years there has been a growing level of concern from defendants, legislators, and members of the judiciary over the lack of timely disclosure of trust claims and corresponding payments during the pendency of underlying tort lawsuits. In fact, many current tort defendants contend that there is an intentional delay of trust filings and suppression of trust disclosures by plaintiffs and their counsel in the underlying tort proceedings. These contentions are supported by federal bankruptcy court findings in the bankruptcy reorganization of Garlock Sealing Technologies LLC (Garlock), among many other cases and reports that have recently come to light.²⁴

Judicial Findings from the Garlock Bankruptcy

The negative impact of having two disjointed compensation systems was at the core of the 2014 Garlock estimation order of U.S. Bankruptcy Judge George Hodges in the Western District of North Carolina involving gasket and packing manufacturer Garlock. As a peripheral asbestos defendant in the 1990s, Garlock argued that its own bankruptcy filing in 2010 was the result of overpayment in the tort system following the asbestos bankruptcy wave and due in large part to the concealment of trust-related exposures by plaintiffs and their attorneys. After allowing for extensive discovery on historical case files, plaintiff law firm disclosures, asbestos trust discoveries, and prior bankruptcy voting ballots, Judge Hodges determined that:

Garlock's evidence at the present hearing demonstrated that the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers. That tactic, though not uniform, had a

²⁴ See Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 30:19 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 4, 2015); *John Crane, Inc. v. Simon Greenstone Panatier Bartlett, APC*, 2017 WL 1093150 (N.D. Ill. Mar. 23, 2017); U.S. Chamber Institute for Legal Reform, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* (Dec. 2015); U.S. Chamber Institute for Legal Reform, *Insights and Inconsistencies: Lessons from the Garlock Trust Claims* (Feb. 2016).

profound impact on a number of Garlock's trials and many of its settlements such that the amounts recovered were inflated.²⁵

Judge Hodges found that Garlock had repeatedly settled cases in which it had little to no legal liability. This was due in part to the increased trial risk and litigation costs Garlock faced when trust-related exposures were withheld. Based on such findings, Judge Hodges ruled in favor of Garlock's expert, who estimated Garlock's present and future legal liability to be no more than \$125 million, an amount that was over a billion dollars less than the estimates asserted by experts representing current and future asbestos claimants.²⁶

As Judge Hodges found, if trust claims and related exposures are not pursued or otherwise disclosed in a timely manner, critical information is kept from defendants regarding the sources of potential plaintiff compensation as well as exposures tied to the major asbestos producers that are now exempt from tort claims because of their bankruptcies. As a result, current tort defendants, the court, and jury do not have full information regarding a plaintiff's entire exposure history. The jury may be misled to find liability against a solvent defendant. Further, the solvent defendant is denied the ability to reduce any verdict by the amount of the plaintiff's compensation from the asbestos trusts, allowing the plaintiff to "double dip" (i.e., recover more than once for the same exact injury). In fact, Garlock's estimation expert found that historically Garlock paid nearly double what it otherwise would have when trust filings were delayed until after the plaintiff settled with Garlock.

Illinois and the public release of the Garlock record

Perhaps even more significant than Judge Hodges's ruling in the Garlock bankruptcy is the fact that the underlying claims data, discovery data, and trial transcripts (collectively the "Garlock Data") were ultimately made public. The Garlock Data consist of the company's pre-bankruptcy claim and settlement data, supplemented by an extraordinary level of discovery. Ultimately, Garlock was granted court-ordered access to a robust level of data, which included (1) Personal Information Questionnaires (PIQs) submitted by plaintiff law firms on behalf of mesothelioma plaintiffs with pending lawsuits against Garlock at the time of the bankruptcy filing, (2) a PIQ Supplemental Settlement Payment Questionnaire, (3) claim-level filing and payment data from certain asbestos bankruptcy trusts, and (4) voting ballots from a number of confirmed and pending bankruptcy reorganizations.

For claimants filing asbestos cases in Illinois the Garlock Data showed the following:

- According to 820 PIQ submissions, plaintiffs filed an average of nineteen trust claims and voted in four additional bankruptcy cases.
- The subset of 198 PIQs that submitted a Supplemental Settlement Payment Questionnaire disclosed an average of ten trust payments for a total average recovery of more than \$350,000 at the time of the Garlock discovery response.

²⁵ *In re Garlock Sealing Technologies LLC*, 504 B.R. at 82.

²⁶ *Id.* at 72.

- Moreover, when Garlock’s estimation expert accounted for the fact that most of the claimants would continue to recover from outstanding trust claims beyond the date of the Garlock discovery response, it was estimated that plaintiffs would recover from an average of 20 trusts for a total average recovery of more than \$660,000.
- In comparison, the Supplemental Settlement Payment Questionnaire disclosed an average plaintiff recovery from tort defendants of just over \$700,000.

These data suggest that a minimum of 35 percent—but likely closer to 50 percent—of the total asbestos-related compensation of asbestos plaintiffs filing in Illinois comes from the asbestos trusts. To the extent such payments and corresponding claims of exposure are not integrated into the underlying lawsuit then tort outcomes will continue to be inflated per the conclusions of Judge Hodges in the Garlock case.

The trust compensation process and Illinois

Asbestos trusts are designed to pay claims expeditiously with minimal administrative and transactional costs.²⁷ If a claimant meets a trust’s criteria for payment—criteria which are less rigorous than the tort system—the claimant will receive a payment.²⁸ A properly completed claim form with required supporting documentation can be evaluated quickly by experienced trust claim reviewers.²⁹ Once a claim has been approved for payment, an offer is sent and, upon the trust’s receipt of a signed release, payment is normally sent rapidly.³⁰ It is common for claimants to receive multiple trust payments since each trust operates independently and workers were often exposed to different asbestos products.

To meet the presumptive exposure qualification criteria for many trusts, the claimant must demonstrate meaningful and credible exposure to asbestos-containing products supplied, specified, manufactured, installed, maintained, or repaired by the trust predecessor company.³¹

²⁷ “Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.” Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1, at <http://www.wsj.com/articles/SB10001424127887323864304578318611662911912>.

²⁸ See U.S. GAO, *supra*, at 21; see also Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 *The Advoc.* (Tex.) 80, 80 (2007) (“it is much easier to collect against a bankruptcy trust than a solvent defendant.”).

²⁹ See Deposition of John Lawrence Mekus, *Shields v. Allis-Chalmers Corp. Prod. Liab. Trust*, No. CGC-08-274740 (Del. Superior Ct. New Castle County Jan. 13, 2010), at 46.

³⁰ See Deposition of Jared Garelick, *Cummings v. General Elec. Co.*, No. 13-CI-006374 (Ky. Cir. Ct. Jefferson County Dec. 14, 2015), at 36:13-16 (“Q. Because as you just indicated, payment can be made within days or an offer can be made within days of a submission? A. Right.”) (Mr. Garelick is general counsel for Claims Resolution Management Corp., which process claims for the Manville Trust and several other similar trusts).

³¹ See, e.g. The Babcock & Wilcox Company Asbestos PI Settlement Trust Distribution Procedures, § 5.7(b)(3), revised Dec. 2, 2015, at <http://www.bwasbestostrust.com/wp-content/uploads/2015/12/BW.-Amended-TDP.12.2.2015-C0463536x9DB18.pdf>.

Similar to tort assertions of exposure, the necessary evidentiary support for the claimant’s alleged trust exposures can be established through affidavits or other sworn statements asserting specific product or operations exposure. In the event that the claimant is no longer living, the exposure support can be provided by a family member or a co-worker.

As an alternative to sworn statements of exposure, some trusts allow allegations of exposure to be supported by evidence that the claimant worked at a trust Approved Site. Trust Approved Sites are locations where a trust presumes qualifying exposures based on historical corporate records and prior plaintiff testimony that establish that the trust predecessor company’s products or operations were present at the location for a specified period of time.³² The purpose of these Approved Site lists is to further expedite the review process by not requiring additional product identification. Not all trusts have Approved Site lists, and those Approved Site lists that do exist can have sites appended periodically.³³ The following table summarizes the number of Illinois locations that appear on various trust Approved Site lists.

Number of Illinois locations that appear on various trust Approved Site lists

Trust	# Sites	Trust	# Sites
Babcock & Wilcox Company	1,998	United States Mineral Products	60
United States Gypsum	1,292	A-Best	44
A.P. Green	1,114	Kaiser Aluminum & Chemical	38
Owens Corning	934	Dresser Industries (Harbison-Walker)	33
Fibreboard	467	AC&S	32
Dresser Industries (Halliburton)	329	North American Refractories	31
Eagle-Picher Industries	302	ABB Lummus (Design & Construction)	19
Combustion Engineering	270	Turner & Newall	15
W.R. Grace	202	JT Thorpe	6
Keene (Baldwin Ehret Hill)	133	ABB Lummus (Feedwater Heater)	6
Plibrico	101	Raytech (Raymark)	2
G-I Holdings (GAF/Rubberoid)	86	Burns and Roe	1
Armstrong World Industries	77	Shook & Fletcher	1

In total, there are more than 1,000 sites in Illinois that appear on at least one trust Approved Site list. Exposures at certain industrial locations such as the Shell Oil Refinery in Wood River/Roxana can qualify for as many as thirteen trust claims. The table that follows lists these trusts along with a brief description of each Reorganized Defendants’ general asbestos-related products and operations.

These thirteen qualifying trust payments identified through Approved Site matches represent a minimum number of trust claims that a plaintiff will likely assert for the Wood River/Roxana

³² See, e.g. The United States Mineral Products Company Asbestos Personal Injury Settlement Trust, Protocol for Adding a Site to the Trust’s List of Qualified USM Worksites.

³³ In addition to Approved Site lists, certain Trusts also provide an Approved Industry/Occupation list of approved occupations and/or industries where the formerly bankrupt defendant’s products or operations were presumed to be present.

site. Exposures stemming from such industrial settings can often yield twenty or more trust claims.³⁴ For example, Johns-Manville and Celotex both have long-standing trusts that have each paid approximately 800,000 and 500,000 individual claims, respectively, as of year-end 2015. Neither trust has a public Approved Site list, but given the extensive settlement history of each trust and the broad distribution of each predecessor company's asbestos-containing industrial products, it is likely that plaintiffs exposed at industrial locations such as the Wood River/Roxana site would have a compensable claim against both trusts. Moreover, in addition to current active trusts, plaintiffs that were exposed in industrial locations such as the Wood River/Roxana site will likely have future claims against trusts for companies that are either awaiting bankruptcy confirmation or have been confirmed but are not yet paying claims.³⁵

Trusts that have Shell Oil in Wood River/Roxana as an approved site and the related products

Trust	General asbestos-related product and operations description
AC&S	Installation and distribution of thermal and mechanical insulation established in 1958
A.P. Green	Refractory products, insulating cement, and pipe covering
Armstrong World Industries	Installation and distribution of various products including pipe insulation and coverings, also manufactured spray insulation and pipe covering
Babcock & Wilcox	Boilers and industrial power generation systems
Combustion Engineering	Design and construction of power-generation facilities, and servicing of large steam boilers and related equipment for electrical power generation
Dresser Industries (Halliburton)	Pumps, compressors, and turbines plus construction contracting
Eagle-Picher Industries	Pipe coverings and insulation cement
JT Thorpe	Installation and distribution of thermal insulation
Fibreboard	Pipe covering, block insulation, cement (Pabco product line)
Keene (Baldwin Ehret Hill)	Spray insulation and pipe covering (Pyrospray, Monospray)
North American Refractories	Refractory products and insulating cement
Owens Corning	Pipe covering, block insulation, cement (Kaylo product line)
US Gypsum	Thermal spray and block insulation. US Gypsum also compensates claimants for exposure to A.P. Green refractory products prior to 1968.

In fact, a collection of more than 400 complaints filed prior to the asbestos bankruptcy wave shows that a majority of the named defendant companies are either currently compensating claimants through successor trusts or have proposed trusts pending. The following fifteen trust predecessor companies were named in more than fifty percent of the 400 complaints.

Trust predecessor companies that were named in more than 50% of historical asbestos lawsuits

▪ Pittsburgh Corning (PPG/Cohart)	▪ A.P. Green	▪ Quigley (Pfizer)
▪ G-I Holdings (GAF/Rubberoid)	▪ U.S. Gypsum	▪ Rockwool
▪ National Gypsum	▪ Keene (Baldwin Ehret Hill)	▪ Eagle-Picher
▪ Fibreboard	▪ Armstrong World Industries	▪ H.K. Porter (Southern Asbestos)
▪ Owens Corning	▪ Flintkote	▪ Celotex (Carey)

³⁴ *In re Garlock Sealing Technologies LLC*, 504 B.R. at 96.

³⁵ Initial liquidation procedures include disease valuation as well as the initial trust Payment Percentage parameters.

The complaint data illustrates the significant role that trust predecessor companies played in the tort system prior to bankruptcy, and the significant role they continue to play as a major source of plaintiff compensation through successor trusts.

Current lack of trust disclosures in Illinois courts

The findings in Garlock prove that the lack of consistent and timely trust disclosures by plaintiff law firms is not only systemic but impactful in terms of inequitable tort outcomes. Given the fact that roughly one-third of asbestos lawsuits and almost one-half of mesothelioma lawsuits in the United States are filed each year in Illinois, the trust transparency issue may be more pronounced in Illinois than in any other state.

As part of this study, the law firm Maron Marvel Bradley Anderson & Tardy, LLP (Maron Marvel) conducted an asbestos trust review and analysis on a sample of 100 asbestos cases recently filed in Illinois. The results of the review are similar to those uncovered in the Garlock Data. On average, plaintiffs in the sample could have made sixteen trust claims; thirty-seven plaintiffs could have made more than twenty trust claims. More significantly, of the 100 cases sampled, only eight disclosed having made trust claim submissions. Perhaps the most critical finding of the Maron Marvel review was their comparative analysis of asbestos trust disclosures in states that currently lack trust transparency legislation, such as Illinois, with states that have adopted such legislation in recent years. In their experience, cases filed in states with trust transparency legislation disclose an average of ten to fifteen trust claims, whereas more than ninety percent of plaintiffs in the Maron Marvel sample of 100 Illinois cases failed to identify or disclose even one trust claim submission.

To help illustrate the aggregate findings in both the Garlock Data and the Maron Marvel review, we have detailed two contemporary Illinois case examples.

Robertson case

On December 18, 2014, asbestos plaintiff law firm Gori Julian & Associates filed a complaint in the Madison County Circuit Court on behalf of Dennis and Leona Robertson seeking damages from over 130 defendants. The complaint alleged that Mr. Robertson's mesothelioma was caused by exposure to asbestos products primarily from his brief employment at car dealerships and secondary exposure from his stepfather, who was a mechanic.³⁶

The deposition testimony of Robertson's co-workers and younger brother concentrated on asbestos exposures from his work cleaning up and handling automotive friction products and his secondary exposure to automotive friction products from his stepfather's work as a shade tree and dealership mechanic. The testimony and related case disclosures, however, largely discounted Robertson's forty-year career in the U.S. Steelworkers union and potential exposures to non-friction asbestos-containing products while working as a laborer and crane operator at Granite City Steel in Granite City, Illinois, from 1973-2014.

³⁶ *Robertson v. 5 Star Constr. Co.*, No. 14 L 1727 (Ill Cir. Ct. Madison County Jan. 15, 2015).

The Granite City facility is a trust Approved Site during periods within Mr. Robertson's tenure for ten trusts, many of which manufactured or distributed refractory and thermal insulation products.

And while the testimony of Robertson's co-workers at the Granite City plant centered on Robertson's alleged exposure to brake and engine products at the facility, they acknowledged that Robertson worked in close proximity to asbestos-containing refractory and thermal insulation products too. Below is an excerpt from a co-worker at the Granite City plant that identifies the prevalence of asbestos insulation and refractory product exposures at the facility:

Q: Do you remember if Denny [Robertson] was around this insulation?

A: Well, doing this -- you know, if he was a crane operator he was eating it big time.

Q: Okay.

A: Because it all came in that open window right there.

Q: Do you know if Denny had a mask on when he was doing any of this work with insulation?

A: They didn't tell anybody to wear a mask. They didn't say come and get one or anything.³⁷

Later excerpts further describe the dusty and toxic environment at the Granite City facility.

Q: What were you sweeping up?

A: Dust, the whole place was dusty.

Q: Was this dust from tear outs or dust from just the process of steel making or both?

A: Both, I guess. You want to see something dusty, the BOF (Basic Oxygen Furnace), I mean, everything had an inch of dust on it.³⁸

In fact, the testimony of Robertson's co-worker specifically recalled Robertson working with and around A.P. Green refractory products, which would qualify him for compensation from an additional trust. In total, Robertson is more likely than not to qualify for at least eleven trust claim payments based on co-worker product identification testimony and trust Approved Site matches. Moreover, as previously noted, exposures at industrial facilities such as Granite City

³⁷ Discovery Deposition of Bob Yancey, *Robertson v. 5 Star Constr. Co.*, No. 14 L 1727 (Ill Cir. Ct. Madison County Mar. 17, 2016), at 148:12-22.

³⁸ *Id.* at 55:12-18.

create a reasonable basis for claims against additional trusts such as Manville and Celotex, neither of which have public Approved Site lists. In fact, the aforementioned Garlock Public Data indicate that Robertson may have a basis to claim against upwards of twenty trusts. Yet despite the direct and obvious links to at least eleven trusts, the Robertson case progressed through discovery and was set for trial absent any disclosure of trust claim filings.

Lauve case

On June 10, 2016, asbestos plaintiff law firm Gori Julian & Associates filed a complaint in the Madison County Circuit Court on behalf of Beverly Swaim, the daughter and Special Administrator of the Estate of Donald B. Lauve. The complaint was brought against more than 100 tort defendants seeking damages for Mr. Lauve's diagnosis of mesothelioma. Mr. Lauve was a union insulator for more than four decades, working at a number of industrial and commercial facilities. Plaintiff's Answers to Interrogatories listed dozens of specific jobsites, an overwhelming majority of which were in Texas where Mr. Lauve lived. Mr. Lauve's only work in Illinois was at the Mobil facility in Joliet during the early 1970s.³⁹ In fact, a separate personal injury lawsuit was filed by the Provost Umphrey Law Firm on Mr. Lauve's behalf in Jefferson County, Texas, a decade earlier, alleging occupationally-induced hearing loss as a result of excessive noise levels at his various jobsites.

Given Mr. Lauve's work and exposure profile, the findings from the Garlock Public Data suggest that upwards of twenty or more trust claims can be filed on Mr. Lauve's behalf. In fact, case disclosures identified insulation manufactured by trust predecessor companies Owens Corning, Pittsburgh Corning/Unarco, and Johns Manville. Case disclosures also identified trust predecessor companies J.T. Thorpe, Johns Manville, and MW Kellogg (i.e. Halliburton/Dresser Industries) as specific employers of Mr. Lauve during his career as an insulator.⁴⁰ When combined with a review of more than thirty trust Approved Site lists, Mr. Lauve would have a basis for a qualifying claim for twenty-three individual trust payments.

As of September 2016 (less than two weeks before the closing of discovery), however, no trust claims had been disclosed in the underlying tort case, even though the plaintiff's own allegations and publically available trust information regarding Approved Site lists provide an obvious link to a multitude of qualifying trust payments.

Conclusion

The Illinois cases and evidence from the Garlock bankruptcy provide further examples of the clear need to integrate trust claims into the Illinois civil justice system. Illinois judges and juries should have full information as to the totality of a plaintiff's exposures to asbestos to decide if trust-related exposures were the sole proximate cause of the plaintiff's harm. Further, trust claim submissions should be required before trial to preserve the integrity of the set-off mechanism to prevent double recoveries.

³⁹ Plaintiff's Answers and Objections to Defendants' Standard Asbestos Interrogatories, *In re Lauve v. John Crane, Inc.*, No. 15-L-1349 (Ill. Cir. Ct. Madison County).

⁴⁰ *Id.*

Given the magnitude of Illinois' role in the resolution of asbestos cases from a national standpoint, the passage of Illinois legislation to compel the timely production of all relevant exposure evidence is crucial to protecting the integrity of the state's civil justice system.

To date, a dozen states have passed asbestos trust transparency legislation to cure the disconnect that exists between the asbestos tort and trust compensation systems. Currently, Illinois courts operate absent a similar uniform process to compel timely production of trust exposure evidence. As the evidence demonstrates, creating more transparency between the tort and trust compensation systems would foster a fairer and more efficient legal environment in Illinois. Further, dying claimants would obtain trust recoveries much more quickly than today.

Authors

Mark A. Behrens

Partner & Co-Chair, Public Policy Group
Shook, Hardy & Bacon, LLP

Mark has been working to address and improve the asbestos litigation environment for over fifteen years through legislation, amicus briefs, legal scholarship, and judicial education.

Mark has helped enact asbestos bankruptcy trust transparency laws in many states. These laws require plaintiffs to file and disclose asbestos trust claims before trial, allowing juries to reach more fully informed decisions when apportioning fault and effectuating the application of set-offs where available. In 2015, Mark received the U.S. Chamber Institute for Legal Reform's Individual Achievement Award for his work.

Mark has also helped enact state laws that require asbestos claimants to demonstrate present physical impairment in order to bring an asbestos-related lawsuit. These laws give priority to deserving claimants while preserving the claims of the unimpaired. These laws produced a sea-change in the asbestos litigation landscape. As explained in a *South Texas Law Review* article discussing a medical criteria law that fundamentally changed asbestos litigation in Texas, the authors noted that the law was patterned after a model "developed by Mark Behrens" and published in "the Texas Tech Law Review."

Apart from his legislative work, Mark is counsel to the Coalition for Litigation Justice, Inc., a nonprofit formed by insurers to improve the asbestos litigation environment in the courts. The CLJ has filed almost 150 amicus briefs in cases impacting the asbestos litigation environment.

In addition, Mark frequently lectures and writes about asbestos litigation trends and issues. His articles have been cited by a number of courts. He has also served as an expert at trial.

Marc C. Scarcella, MA

Principal and Practice Lead
Economic & Complex Analytics Practice
Roux Associates, Inc.

Marc has fifteen years of experience as an economic consultant for mass tort litigation, specializing in quantitative methods and their applications in dispute resolution and strategic litigation management. He has extensive experience estimating litigation risk and economic damages associated with latent personal injury claims due to environmental and product liability.

Marc has developed forecasting models used to evaluate the impact of litigation and legacy liability on corporate financial management, transactions, and restructuring. His work has been leveraged in corporate financial disclosures for SEC reporting, bankruptcy reorganization, and due diligence for structured financial transactions.

He has acted as consulting or testifying expert on a number of complex insurance coverage cases and has developed economic models for estimating potential insurance recoveries due to environmental and product liability claims. He has applied his expertise in forecasting future loss and litigation risk to the areas of asbestos, silica, pharmaceutical, medical device, water contamination, sports-related head trauma, tobacco litigation, and various deleterious substances.

Prior to joining Roux Associates, Inc., Marc was a Principal at Bates White and before that a Managing Director at Analysis Research Planning Corporation (ARPC), where he provided economic analyses and consultative services in § 524(g) bankruptcy reorganization in the areas of asbestos liability estimation and insurance allocation. This experience has made Marc a recognized expert on claim processing management and valuation for § 524(g) asbestos trusts. He has testified on matters of trust transparency and potential plaintiff recoveries at both the state and federal levels. Marc has also consulted on issues of process and policy management for other Qualified Settlement Funds (QSF) established from non-asbestos product liability litigation.

Peter R. Kelso

Principal

Economic & Complex Analytics Practice

Roux Associates, Inc.

Peter has been at the forefront of identifying emerging litigation trends for over fifteen years. He is an expert on mass tort and product liability litigation and advises clients on identifying and finding solutions for risks associated with emerging litigation. Pete specializes in developing strategies to quantify, estimate, and mitigate potential damages and provides clients with expertise in product liability litigation, insurance coverage negotiations, mergers and acquisitions, liability ring fencing activities and bankruptcy reorganizations. He has led and helped support numerous public policy initiatives to effectuate judicial and legislative reform at the state and federal levels.

Pete advises Fortune 100 companies, international insurers and reinsurers, and consults with many of the top investment firms on Wall Street on quantifying current and future potential costs associated with litigation outcomes. He has given numerous presentations for the financial and legal communities at conferences hosted by the Brookings Institute, Goldman Sachs, Citigroup, Bank of America Securities, Bear Stearns, and LexisNexis.

Prior to joining to Roux Associates, Pete was a Director at Bates White and consulted on several large asbestos bankruptcy cases including Garlock Sealing Technologies, Inc. and Specialty Products Holding Corp. (Bondex). Pete has testified before the Pennsylvania legislature on asbestos bankruptcy trust transparency issues and published several commentaries on asbestos bankruptcy trends. Prior to joining Bates White, he was a Vice-President with Litigation Resolution Group (LRG).

About the Illinois Civil Justice League

The Illinois Civil Justice League is a coalition of Illinois citizens, small and large businesses, associations, professional societies, not-for-profit organizations and local governments that have joined together to work for fairness in the Illinois civil justice system.

Created in late 1992, the League currently represents more than 500,000 Illinois residents directly, and additional hundreds of thousands indirectly. Members and supporters include many of the major business and professional associations and societies in Illinois.