

Asbestos

The Effrontery Of The Asbestos Trust Transparency Legislation Efforts

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Commentary

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For more than eighty years corporations that produced and distributed asbestos-containing products — and their insurance companies — have attempted to avoid responsibility for the deaths and injuries of millions of American workers and consumers caused by those products. Since before 1930, they have hidden the dangers of asbestos and lied about their knowledge of those dangers, lobbied to make it harder for workers to sue for their injuries, fought to weaken protective legislation, and to this day continue to deny responsibility. Most recently, these asbestos litigation defendants have created a myth of plaintiff wrongdoing — which they call “double-dipping” — as a pretext for so-called settlement trust “transparency” legislation. This is not what it pretends to be — an effort to make the tort system more responsive — but merely their latest affirmative effort to evade responsibility for their own malfeasance.

It is a fundamental principle of American law that an injured person can recover damages from every entity that has harmed him, and as litigation progresses can settle his claim against one or another of the wrongdoers as he and they may agree. His compensation for his injury is, then, the sum of all the settlements reached. Only in the very rare case that goes to verdict,

judgment, and payment (where the payment amount is reduced by an amount determined by the relevant state law to account for payments by settling co-defendants or bankruptcy trusts), is the victim's claim fully satisfied. Only if after verdict, judgment, and payment were a plaintiff to recover from a bankruptcy trust could he be overcompensated and be said to have “double-dipped.” Out of the millions of trust claims filed and considered by trusts since 1988, defendants have identified just one case where a trust claim was filed by a plaintiff after judgment and paid by a trust. In that case the judgment was on appeal and had not yet been paid when the trust claim was filed. There is no “double-dipping” problem that needs to be fixed.

To fix this non-problem, front organizations for asbestos defendants have proposed “transparency” laws and regulations at both the federal and state levels. One such law was recently adopted in Ohio. While these proposals masquerade as mechanisms designed to advance evenhanded justice, they are, in fact, obvious efforts by asbestos litigation defendants to do an end-run around uniform rules of discovery in the tort system and reverse principles of tort law established hundreds of years ago, including the principle that the plaintiff is the master of his case and may choose which of multiple wrongdoers to sue and with which to settle.

These front organizations include the American Legislative Exchange Council (“ALEC”) and the U.S. Chamber of Commerce Institute for Legal Reform. ALEC is funded by a variety of corporations, including

those facing liability for injuries and deaths caused by their asbestos-containing products. ALEC is also busy advancing the interests of the tobacco industry, health insurance companies, and private prisons — the latter particularly through legislation requiring expanded incarceration of immigrants. While ALEC purports to be a nonprofit, it is little more than a group of corporate lobbyists who write model legislation and then fund free trips for state legislators to luxury resorts, seeking to have them introduce model anti-civil justice legislation in their home legislatures.¹ Outrageously, ALEC is funded as a tax-exempt charity, although the IRS has recently received formal complaints challenging the group's nonprofit tax status on the basis that ALEC's primary purpose is to provide a vehicle for its corporate members to lobby state legislators and to deduct the costs of such efforts as charitable contributions.²

The supposed “transparency” sought by asbestos defendants is centered on claims plaintiffs make against trusts established to compensate asbestos victims. These asbestos personal injury trusts were created to resolve the bankruptcies of asbestos defendants overwhelmed by their provable tort liabilities to the people they injured. The trusts are crafted to distribute settlement payments to individuals injured by their bankrupt predecessors' products in amounts reflecting the historic tort system settlement share paid by the relevant predecessor. Because of the hopeless insolvency of their predecessors, the trusts are only able to pay a small percentage of that historical settlement share to each deserving claimant, present and future.

Supporters of these recent proposals claim that “transparency” is necessary to prevent “double-dipping” on the part of plaintiffs — that is, fraudulent multiple recoveries for the same injury, through lawsuits against remaining solvent defendants and trust claims. This assertion is deliberately misleading. Because of the ubiquitous presence of asbestos in industry, multiple companies are almost always at fault for asbestos-related diseases and deaths. Think of the shipyard worker, for example, assisting in the repair of countless U.S. Navy warships. The asbestos-containing products which were causes of his injury included boilers, pipe and thermal insulation, gaskets, and many others. A person so injured can legally recover from every company responsible, including both those he sues in the tort system and the trusts that stand in the shoes of bankrupt defendants. The current efforts by ALEC and its members

are nothing more than an attempt to shift solvent defendants' share of responsibility to the insolvent defendants and leave the innocent victims with the resulting shortfall in recovery.

I. Tort System Asbestos Defendants And Their Insurers Come With Especially Unclean Hands

a. General Background — Asbestos Disease And Litigation

Asbestos is a naturally occurring mineral that was widely used during the twentieth century for industrial, commercial, and residential purposes.³ Because of its tensile strength, flexibility, durability, and acid- and fire-resistant capacities, asbestos was used extensively in industrial settings and in a wide range of manufactured goods.⁴ Diseases caused by exposure to asbestos kill thousands of Americans every year because asbestos is inherently dangerous. Whenever materials containing asbestos are damaged or disturbed, microscopic fibers become airborne, and can be inhaled into the lungs and cause disease.⁵ The most serious asbestos-related disease is mesothelioma, a virulent cancer of the lining of the lungs that can be caused by even a short period of exposure, and is inevitably painfully fatal, often within months of diagnosis.⁶ Other illnesses caused by asbestos include lung cancer, asbestosis, and pleural diseases.⁷ The bulk of asbestos liabilities are for mesothelioma and other asbestos-related cancers.

Tens of millions of American workers have been exposed to asbestos; more than 27 million people were occupationally exposed between 1940 and 1979.⁸ Millions of those exposed have fallen ill, or will fall ill in the future; many have died and many more will die as a result of their exposure. Manufacturers — but not workers — were for decades well aware of the significant health hazards posed by asbestos, but production and distribution of new asbestos-containing products continued virtually unabated until the 1970s,⁹ and in some cases until 2000.¹⁰ Asbestos diseases have long latency periods; a person exposed while working may not fall ill for forty years or fifty years, or even longer.¹¹ Thus, even though asbestos production and use has declined, the epidemic of asbestos-related illnesses is expected to continue for decades into the future.

By the early 1900s, medical scientists and researchers had uncovered “persuasive evidence of the health

hazards associated with asbestos.”¹² Manufacturers and insurers knew this, and even as evidence mounted they continued to hide these findings and deny responsibility. In 1918, a Prudential Insurance Company report revealed excess deaths from pulmonary disease among asbestos workers, and noted that life insurance companies generally declined to cover asbestos workers because of the “assumed health-injurious conditions of the industry.”¹³ For decades, asbestos manufacturers were well aware of the dangers of asbestos, but did not protect their workers or the end-users of their products. In a thorough discussion of the history of asbestos use and litigation in the United States, District Judge Jack Weinstein noted:

Reports concerning the occupational risks of asbestos, including the incidence of asbestosis and lung cancer among exposed workers, have been substantial in number and publicly available in medical, engineering, legal and general information publications since the early 1930s. There is compelling evidence that asbestos manufacturers and distributors who were aware of the growing knowledge of the dangers of asbestos sought to conceal this information from workers and the general public.¹⁴

As workers and others who had been exposed to asbestos began to get ill in large numbers, litigation began in the 1960s. Of particular importance was evidence uncovered by plaintiffs’ attorneys — “[t]hrough persistence, vigorous discovery and creative efforts” — establishing that “manufacturers . . . knew that asbestos posed potentially life-threatening hazards and [chose] to keep that information from workers and others who might be exposed.”¹⁵ Angered by evidence that information about the dangers of asbestos had been suppressed, juries began awarding large punitive damages.¹⁶ As a result of the plaintiffs’ success in asbestos suits in the tort system, and the overwhelming number of claims, the point was reached long ago where most workers who fall ill from exposure to asbestos “recover substantial sums through settlement or jury awards.”¹⁷

b. Evolution Of Filings In The Tort System

Asbestos personal injury litigation began in earnest in 1973 after the Fifth Circuit’s decision in the benchmark case of *Borel v. Fibreboard Paper Products Corp.*¹⁸ *Borel*

established that manufacturers and distributors of asbestos products are liable to persons injured as a result of using their products because of their failure to warn regarding the danger of those products.¹⁹ Recognizing that many persons have been exposed to a variety of asbestos products made by a large number of manufacturers, under circumstances that make it impossible to ascribe resulting disease to one particular product or exposure, the *Borel* court found that each and every exposure to asbestos could constitute a substantial contributing factor in causing asbestos diseases, and that each and every defendant who contributed to the plaintiff’s aggregate asbestos exposure is legally responsible for the plaintiff’s asbestos-related injuries.²⁰ The overwhelming majority of courts throughout the country have accepted the legal principles set out in *Borel*.²¹

With this development in the law, the thousands of people killed and maimed by exposure to asbestos and asbestos-containing products began to sue the manufacturers and distributors of those products. So many people had been injured or killed by asbestos that twenty-five thousand lawsuits were commenced in the next decade,²² and the number of lawsuits continued to rise dramatically through the 1990s.²³

c. Trust Formation

Epidemiology makes clear that thousands of people each year for decades to come will fall ill as a result of asbestos exposure, and experience teaches us that most will seek compensation from the manufacturers of the asbestos products that caused their injuries. Attempts to achieve settlements that would provide for the treatment and payment of these future claims are hampered by the difficulty of ensuring that any such settlement agreements would “provide for all future claimants who come forward, so that all who are eligible for compensation are properly compensated and all who are required to pay compensation have taken into account this responsibility in their business planning.”²⁴ The overwhelming numbers of people who have been made sick and who are dead or dying from asbestos exposure and the large numbers of future claims have led dozens of asbestos manufacturers to choose bankruptcy to deal with these claims. Asbestos personal injury trusts were created during these bankruptcies to ensure that the tens of thousands of people who are currently sick and dying and the tens of thousands more who science tells us will sicken and die in the

future as a result of their asbestos exposure can receive some compensation for their injuries.

1. Manville

The Johns-Manville Corporation was the largest manufacturer and distributor of asbestos products in the twentieth century. Manville officers and directors knew of the dangers of asbestos since at least 1934, and kept this knowledge secret to prevent workers from learning that their exposure to asbestos could kill them. As evidence of Manville's responsibility became known, it was faced with tens of thousands of lawsuits, and, to deal with this liability, filed its Chapter 11 petition for reorganization in August of 1982.²⁵ To solve the problem of future claims, the Manville plan of reorganization pioneered the use of a trust dedicated to the resolution and payment of asbestos claims. The Manville Trust assumed the debtors' present and future asbestos liabilities, and all asbestos claims against the debtors (including those in the future) were directed to the Trust by an injunction — a “cornerstone” of the plan²⁶ — channeling all asbestos claims from the reorganized Manville Corporation to the Manville Trust. The channeling injunction was issued pursuant to the bankruptcy court's general equitable powers.²⁷

2. Congress Acts

A substantial portion of the assets conveyed to the Manville Trust from which it would pay claims were equity and debt interests in the reorganized Manville Corporation, which, shorn of its asbestos liabilities, was a profitable forest products and industrial company. The public markets were skeptical about the validity of the channeling injunction, depressing the value of the Trust's holdings. To alleviate concerns about the *Manville* injunction, and to foster reorganization of asbestos debtors, in 1994 Congress enacted Bankruptcy Code Section 524(g), which statutorily validates the trust and channeling injunction mechanisms pioneered in the *Manville* case.²⁸ As Senator Brown explained, “[w]ithout a clear statement in the code of a court's authority to issue such injunctions, the financial markets tend to discount the securities of the reorganized debtor. This in turn diminishes the trust's assets and its resources to pay victims.”²⁹

Section 524(g) obviates due process concerns with respect to future claimants by providing for appointment of a legal representative to protect their interests.³⁰ The

statute gives a debtor the right to propose and have confirmed a plan that will create a trust to which all of the debtor's present and future asbestos personal injury liabilities will be transferred, or channeled, for post-confirmation claims evaluation and resolution.³¹ The debtor is freed of asbestos claims, in return for funding the trust, and present and future asbestos claimants have recourse to the assets of the trust.

There were not many other asbestos-driven bankruptcies of note in the 1990s — the largest was likely the bankruptcy of the Celotex Corporation and Carey Canada Incorporated (a subsidiary that had been engaged in the mining, milling, and processing of asbestos fiber), which filed for bankruptcy protection in 1990. The Celotex Asbestos Settlement Trust was formed in 1998.

This changed in the next decade, however. In 2000 there were sixteen asbestos personal injury trusts; by 2011, there were nearly sixty, with trusts formed by many large asbestos defendants, including Armstrong World Industries, the Babcock & Wilcox Company, Halliburton (Dresser Industries), Owens Corning, and United States Gypsum.³²

3. Status Of Corporations Following Bankruptcies

ALEC and its members would like people to believe that the asbestos reorganizations have crippled businesses and put thousands out of work, suggesting that if the claims of victims are not somehow reduced, more corporate disasters will follow. Nothing could be further from the truth. Chapter 11 asbestos bankruptcies rarely result in lost jobs or diminished pensions. Instead, the Chapter 11 bankruptcy procedures allow a company to receive an “automatic stay,” which stops all payments to creditors (including payments owed through settlements) and all pending lawsuits, and lets the company reorganize and then prioritize payments.³³

Under Chapter 11 and section 524(g), therefore, a company can stop all pending asbestos lawsuits against it and set up a fund to settle all present and future asbestos claims. The automatic stay provision and the injunction available under section 524(g) can also extend to parent and subsidiary companies and protect them from future asbestos lawsuits derived from their affiliated debtor's torts.³⁴ This protection has enabled most companies that have sought bankruptcy

protection due to asbestos liabilities to recover and remain economically healthy. For example:

- Owens-Corning filed for bankruptcy protection in 2000, emerged from bankruptcy in 2006, and by 2011, it had sales of \$5.3 billion and 15,000 employees in 28 countries on five continents.³⁵
- The Babcock & Wilcox Company, which also sought bankruptcy protection in 2000 and confirmed a plan of reorganization in 2006, is now a company specializing in engineering, manufacturing and construction solutions in the renewable energy, clean coal, nuclear power and national security areas, employs approximately 12,000 people, as well as approximately 10,000 joint venture employees, and had 2011 revenues of almost \$3 billion.³⁶
- Halliburton, which formed the DII Industries, LLC, Asbestos PI Trust in 2004, when it emerged from bankruptcy protection, is “one of the world’s largest providers of products and services to the energy industry,” has more than 70,000 employees in roughly 80 countries, and had \$25 billion in annual revenue in 2011.³⁷
- Armstrong World Industries, Inc. is a global leader in the design and manufacture of floors, ceilings and cabinets. AWI exited bankruptcy protection in 2006, and by last year had consolidated net sales of approximately \$2.9 billion and had approximately 9,300 employees worldwide.³⁸
- Even Johns-Manville remains an active company. Owned by Berkshire Hathaway, it is a “leading manufacturer and marketer of . . . products for building insulation, mechanical insulation, commercial roofing, and roof insulation, as well as fibers and nonwovens for commercial, industrial and residential applications.” It has annual sales of approximately \$2.5 billion, “employs approximately 7,000 people and operates 45 manufacturing facilities in North America, Europe and China.”³⁹

II. Asbestos Trusts And Victim Compensation

According to the GAO, as of 2011 there were sixty asbestos personal injury trusts.⁴⁰ Most of these trusts

work the same way. Pursuant to the mandate of 11 U.S.C. § 524(g), an asbestos trust must treat all similar claimants in substantially the same manner.⁴¹ When it is formed, therefore, a trust will project the number of claims it expects to receive and determine the historic settlement value of those claims — what its predecessor would have paid to settle the claims had they been brought in the tort system.⁴² The trust has fixed assets that will be insufficient to pay the full historic settlement value of all claims; it therefore sets a payment percentage, and each present and future claimant is paid the liquidated value of his or her claim discounted by the payment percentage.⁴³ The functioning of the trusts approximates the process through which lawsuits in the tort system are settled.

An asbestos trust is governed by a document containing a series of trust distribution procedures (“TDP”), approved by the bankruptcy court when confirming a plan of reorganization providing for creation of the trust.⁴⁴ The TDP sets forth procedures for the administration of the trust and establishes a process for assessing and paying valid claims. The TDP also includes the settlement amounts that the trust will offer a claimant with an asbestos-related disease who meets the exposure and medical criteria set out in the TDP, and thus can presumptively establish the trust’s liability.⁴⁵ Claimants who believe that they are entitled to a larger payment from a trust because, for example, they have higher than normal damages, or manifested illness at an early age, can reject the standard settlement and seek “individual review” of their claims, which may or may not result in a higher settlement.⁴⁶ In either case, the trust is designed to value claims at the tort-system settlement share of its debtor — not the joint and several total value of the claim against all responsible parties that would be fixed by a jury.

For a claimant to recover from an asbestos trust, he or she must provide medical evidence demonstrating that the claimant has an asbestos-related disease, and evidence satisfactory to the trust that it has responsibility for the claimant’s injuries.⁴⁷ The evidence required depends on the nature of the claimant’s disease. A claimant with mesothelioma, for example, must provide a diagnosis of that disease by a physician who physically examined the claimant, or a diagnosis by a board-certified pathologist or a pathology report prepared at or on behalf of an accredited hospital, as well as

appropriate evidence of product identification as noted above.⁴⁸

These criteria are combined with audit programs to ensure that the trusts do not pay fraudulent claims.⁴⁹ The trusts do not pay every claim that is filed, but routinely reject those that are deficient.⁵⁰ And while there is no guaranteed method to completely prevent attempts to abuse the trust system, there is simply no evidence that such practices are widespread. Moreover, the simple fact that a claimant sues a solvent defendant while filing claims against (and potentially receiving payment from) multiple trusts is not significant. Most asbestos victims were exposed to asbestos-containing products from multiple defendants and, unless there is an adjudication of liability and award and payment of damages, each defendant or trust remains responsible.

The asbestos personal injury trusts replace insolvent defendants, and are a settlement vehicle. The trusts are not tort defendants; rather, they settle claims created by the liability of their insolvent predecessors. Unlike solvent defendants, a trust does not contest liability when a plaintiff proves exposure to products for which the trust is liable.

Given the fact that the trusts pay a percentage of the settlement value of a claim, the amounts being paid to claimants vary widely from trust to trust, but are low compared to results in the tort system. The GAO survey found the median payment percentage across trusts is 25%.⁵¹ The scheduled values for a claim, which reflect each defendant's historical settlement averages, vary widely as well, reflecting the share of total settlements paid by each defendant in the tort system. The following table shows some of these results.

TABLE 1 — Sample Trust Recoveries⁵²

| Trust | Payment % | Scheduled Value — Mesothelioma | Paid to Claimant |
|-------------|-----------|--------------------------------|------------------|
| AWI | 20% | \$110,000 | \$22,000 |
| Burns & Roe | 25% | \$60,000 | \$15,000 |
| B&W | 7.5% | \$90,000 | \$6,750 |
| Fibreboard | 7.6% | \$135,000 | \$10,260 |
| Kaiser | 35% | \$70,000 | \$24,500 |
| Manville | 7.5% | \$350,000 | \$26,250 |
| OC | 8.8% | \$215,000 | \$18,920 |
| USG | 20% | \$155,000 | \$31,000 |

As shown, the trusts do not have the funds to pay the full scheduled value to all present and future claimants, and most recoveries are quite small. For example, recovering from all of the trusts listed above would yield a claimant roughly \$155,000, a very small portion of the damages routinely awarded by juries to mesothelioma victims.

III. Asbestos Trust Transparency Legislation — Unnecessary And Unfair

a. Background

Asbestos defendants and insurance companies, under the guise of creating increased “transparency,” are introducing proposed legislation around the country to grant solvent asbestos defendants new rights and advantages to be used against asbestos victims in court. Some of these bills would also burden the asbestos trusts with unnecessary reporting requirements, slowing their ability to pay claims, and further draining them of the resources needed to make their already diminished payments. In general, the bills are an attempt to change the rules of the tort system to provide defendants with an advantage, using the existence of the trusts and claims of a lack of “transparency” as a subterfuge.

The “tort reform” community began attacking asbestos plaintiffs through the asbestos bankruptcy trust system in 2005, when Victor Schwartz and Mark Behrens coauthored a law review article claiming there was rampant fraud in the system.⁵² While no systemic fraud has ever been found, more papers were published by these authors and others. The U.S. Chamber Institute for Legal Reform released a report criticizing asbestos litigation in Madison County, Ill., and submitted a proposed new bankruptcy rule to “reform” the trust system to the Judicial Conference (the rule was rejected).⁵³

These so-called studies were also used to support proposed federal action on the asbestos bankruptcy trust system, which included the “Furthering Asbestos Claim Transparency (FACT) Act of 2012,” which was introduced in the U.S. House of Representatives. In addition, ALEC drafted the “Asbestos Claims Transparency Act,” which has been introduced in some state legislatures.⁵⁴

Before analyzing these bills, it is helpful to understand how the tort system works on the ground. This understanding makes the flaws in and underlying motivations for the bills easier to see.

1. The Tort System And State Laws Are Functioning Properly

Asbestos victims are usually exposed to asbestos from the products of many manufacturers. In the tort system, a plaintiff is entitled to recover from any defendant whose products were a “substantial contributing factor” to his illness or injury.⁵⁵ Accordingly, plaintiffs often sue numerous defendants, and can assert claims against, and recover from, multiple asbestos trusts. The litigation and the trust resolutions usually proceed side-by-side.

The so-called problem of “double-dipping,” therefore, as defined by the proponents of trust transparency, does not exist. When an asbestos victim recovers from each defendant whose product contributed to his or her disease, that victim is not “double-dipping,” but recovering a portion of his or her damages from each of the corporations that caused the harm. In the case of asbestos litigation, some of those defendants will be held responsible through the tort system and others, now insolvent, will address their responsibility through the operation of their trusts. Until there is a paid jury verdict, a plaintiff’s claim is not satisfied.

In the tort system, if a party wants to assign liability for wrongdoing to another, it has to prove that liability – that is, it bears the burden of proof. The plaintiff has the burden of proof only against defendants it sues. And if a defendant believes another entity such as a bankrupt is also at fault, and this matters to that defendant in the way the verdict might be apportioned, that defendant has the freedom to assert and the burden to prove this additional alleged fault.

2. Liability Regimes And Insolvent Defendants

States have different tort liability regimes, a situation not caused by or related to the existence of asbestos trusts. The principal difference between so-called several-only and joint-and-several jurisdictions is whether the plaintiff or defendant bears the risk of another responsible tortfeasor’s inability to pay. An individual defendant’s share of the liability for an injury is its “several” liability. In states that apply several-only liability rules, when a responsible defendant cannot pay, the plaintiff cannot recover that defendant’s liability share from co-defendants; the plaintiff bears the loss.⁵⁶ With joint-and-several liability, each defendant the jury finds at fault can be required to pay the entire judgment and then seek contribution from others jointly responsible, whether another tort system defendant or a trust, bearing the risk that one or more of those jointly responsible cannot pay. The nature of each state’s regime is a public policy choice of its legislature.

Underlying all of these systems is the fact that each defendant is assigned a share of liability. When verdicts are molded, courts typically reduce the verdict amount before entering judgment so as to reflect settlement payments a plaintiff has recovered from other tort system defendants and trusts.⁵⁷

b. Defendants Have Created A Fictional Narrative In Which The Existence Of Trusts Is Somehow Unfair To Them And Requires A Legislative Solution

In recent bankruptcy filings, such as the Garlock case, and in sweeping statements that purport to justify the need for trust “transparency” defendants have created a narrative in which the existence of trusts is somehow unfair to them while presenting asbestos victims with an opportunity to commit fraud. Repeatedly invoking *one* case⁵⁸ (out of hundreds of thousands of asbestos claims filed) and the fact that asbestos victims seek compensation from solvent defendants in the tort system and insolvent defendants through the trusts they formed, asbestos defendants have justified these legislative initiatives on the grounds that this may somehow “result in businesses . . . being unfairly penalized and deprived of their rights.”⁵⁹

1. Federal Legislation — The FACT Act

An example of one such bill on the federal level was last year’s H.R. 4369, the misleadingly-named “Furthering

Asbestos Claim Transparency (FACT) Act of 2012.” The “FACT Act” would have forced trusts to report publicly highly private, individual claimant data. This would have included “the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant.”⁶⁰ In addition, it would have required the trusts to “provide in a timely manner any information related to payment from, and demands for payment from, such trust, subject to appropriate protective orders, to any party to any action in law or equity if the subject of such action concerns liability for asbestos exposure.”⁶¹ Section 3 of the bill made the bill’s provisions retroactive so that a trust would have had to report on every claim it had ever paid.⁶² Asbestos trusts have paid more than 2.4 million claims since 1988; in 2010 alone asbestos trusts paid more than 461,000 claims.⁶³ This bill would have hobbled the trusts in order to provide defendants with information that, in the aggregate, they had no right to, and which they could get when needed on a case-by-case basis (albeit at their own expense) through normal everyday discovery in the tort system.

This bill has not been enacted. However, asbestos defendants and their allies, under the purview of organizations such as ALEC, are attempting to pass equally troublesome legislation at the state level. So far, the proponents have not sought disclosure of the same information (or “transparency”) from their co-defendants in the tort system.

2. State Efforts — Ohio Asbestos Claims Transparency Act

In Ohio, the legislature recently enacted Ohio H.B. 380 (originally drafted by ALEC), which shifts control of key elements of the plaintiff’s case to defendants while simultaneously shifting significant burdens to the plaintiff. This new Ohio law requires plaintiffs to identify all trust claims and material pertaining to those claims, and update those identifications when new claims are made.⁶⁴ Defendants can delay trial and force plaintiffs to make claims against other trusts.⁶⁵ Then, trust claims are presumed to be relevant and discoverable and can be introduced to prove causation and allocate responsibility.⁶⁶

By forcing plaintiffs to make all trust claims and turn over that information, then making it presumptively admissible and relevant, the new Ohio law shifts the burden for a defendant seeking to claim that another

party is liable from that defendant to the plaintiff. While not all judges will admit the trust claim information, when one does allow a jury to see the claims (which may or may not provide proof of exposure) the jury may well assign fault to the insolvent defendants.

Responsibility for liability between joint tortfeasors in Ohio is limited; unless a tortfeasor is more than 50% liable it will not have to pay the several share of other entities which were allocated responsibility.⁶⁷ Under the circumstances created by the new Ohio law, it is less likely that a guilty tortfeasor — already found liable of causing the injury and maybe death of the plaintiff — will have to bear the risk of its co-defendants’ insolvency; instead, an innocent asbestos victim will not be able to recover fair compensation.

So, in addition to delay — which is always helpful to defendants — a defendant can force the plaintiff to file trust claims, even with limited information. The defendant can use those filed claims as evidence that the plaintiff was exposed to other sources of asbestos — *even if the trusts deny the claims* — and potentially reduce the defendant’s share of liability.⁶⁸ And, as Ohio has a hybrid system of liability, even if each trust claim reduces a defendant’s liability incrementally, the defendant can limit the plaintiff’s recovery by at least those amounts and, if its liability falls below 50%, significantly.

Whether a solvent defendant found liable for a victim’s injuries is liable for the shares of other tortfeasors is a question of public policy. So if a state’s legislature wants to have open debate and change a fundamental rule of public policy, it can, of course, do so. Trust “transparency” subverts that process. Rather than making an informed decision, the Ohio legislature has changed public policy under the guise of so-called transparency, on the basis of largely anecdotal and unproven allegations only for asbestos plaintiffs. It is an effort to facilitate the defense against asbestos claims by forcing plaintiffs to assist in the defendant’s efforts to shift responsibility to other entities.

3. Defendants Could Utilize Discovery To Obtain The Information They Seek, But Do Not

The pretextual nature of these bills is particularly clear when one considers that the information that

“transparency” legislation seeks to make public is already available to defendants who need it. Asbestos personal injury litigation has been going on for more than thirty years. Many of the same lawyers are still involved; those that represent defendants have witnessed all the discovery that plaintiffs — hundreds of thousands of plaintiffs — have produced, and have been at the trials. It is highly likely that there are very few job sites for which defendants do not have a library of data demonstrating which other defendants’ products were present.

Often, this information does not come from plaintiffs. An individual plaintiff rarely knows what corporation provided the asbestos products present at a site where he worked. He is usually a sick or dying worker, or the widow of such a person, and he (or his widow) will only know where he worked and the kinds of materials he worked with, though not necessarily the materials his co-workers worked with. Proof of the identity of the supplier of the asbestos at those locations usually comes through discovery of suppliers and sales records, and depositions of co-workers, not the plaintiffs’ memories. And the evidence is widely available. Without it, plaintiffs’ lawyers would not have proved liability so many times that corporations worth billions of dollars had to file for bankruptcy protection.

For defendants to claim that transparent claim filings would solve a problem, therefore, is false. Should a defendant wish to lay off liability on an absent insolvent tortfeasor, the tort system allows it to do so. In addition to their institutional knowledge, the remaining defendants in the tort system have the same discovery devices available to them as plaintiffs do, and can prove the fault of the absent insolvent tortfeasors as easily as plaintiffs originally could. Defendants can obtain, for example, the plaintiffs’ work history, employer records, and depositions of the plaintiffs and co-workers to determine the asbestos-containing products to which the plaintiffs were exposed. Defendants can also consult the trusts’ websites, which generally contain searchable lists of sites where the products for which the trusts have responsibility were concededly used, and which are easily compared to a plaintiff’s work history.⁶⁹

4. Defendants Are Trying To Change The Rules Of Litigation Without Admitting That Is Their Purpose

Under the rubric of arguing that “transparency” is necessary to prevent supposed fraud, defendants are

trying to change the law to receive whatever benefit they can from the existence of the trusts. With a law like Ohio’s H.B. 380, defendants shift their burden — to prove fault on the part of other entities — to plaintiffs, while simultaneously lessening plaintiffs’ control of their own lawsuits. The plaintiff now has to make claims at a defendant’s behest, and then produce claims forms and supporting materials to that defendant, who may be able to use it to get insolvent entities on the verdict sheet. This reduces both the work required by the defendant to acquire evidence and the amount of that evidence it needs to limit its liability. It has nothing to do with reducing fraud; instead, it is a gift to the asbestos industry, which continues to try and avoid accountability and decrease compensation to the victims of its past wrongs — wrongs that it successfully hid for decades, causing years of unwitting worker exposure.

IV. Conclusions

Laws that seek to enforce disclosure and regulate the timing of trust claims, such as Ohio H.B. 380, are unjust and unfair to asbestos victims. These laws are not designed — or intended — to address fraud in the trust system. Indeed, there is not a scintilla of evidence of any such problem. The real purpose of these laws is to allow solvent defendants to take advantage of the bankruptcies of their co-tortfeasors by shifting to plaintiffs the burdens of the shortfalls caused by the bankruptcies, as well as the burdens of discovery and proof of the bankrupt tortfeasors’ responsibility. These laws are simply the latest stratagem by corporations that produced and distributed asbestos-containing products to avoid responsibility for the deaths and injuries of millions of Americans caused by those products. Legislators should not allow public policy to be hijacked by special interests, and should be vigilant to protect the rights of injured workers and their families.

Endnotes

1. Am. Ass’n for Justice, *ALEC: Ghostwriting the Law for Corporate America* 3 (May 2010), http://www.justice.org/cps/rde/xbcr/justice/ALEC_Report.pdf.
2. Letter from Marcus S. Owens, Clergy VOICE, to Douglas Shulman, Comm’r. of the IRS, Regarding Violations of the Internal Revenue Laws by the Am. Legis. Exch. Council (EIN: 52-0140979), (June 18,

- 2012), <http://www.scribd.com/doc/98828514/A-LEC-IRS-Complaint>; Submission to the Internal Revenue Service Under the Tax Whistleblower Act, 26 U.S.C. § 7623(b) Regarding Underreporting of Lobbying and Operation in Furtherance of Private Corporate Interests in Contravention of 26 U.S.C. § 501(c)(3) Tax-Exempt Charitable Status, Common Cause (Apr. 20, 2012), http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/ALEC_FINAL_SUBMISSION_IRS_WHISTLEBLOWER.PDF.
3. U.S. Government Accountability Office, GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 6 (September 23, 2011) (“GAO Report”).
 4. Agency for Toxic Substances & Disease Registry, U.S. Department of Health & Human Services, Asbestos Fact Sheet 1 (2001).
 5. EPA, *Learn About Asbestos*, <http://www.epa.gov/asbestos> (last visited Jan. 8, 2013).
 6. National Cancer Institute, NIH, *Malignant Mesothelioma*, <http://www.cancer.gov/cancertopics/types/malignantmesothelioma> (last visited Jan. 11, 2013).
 7. See Antti Tossavainen et al., *Consensus Report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution*, 23 *Scandinavian Journal of Work Environment & Health* 313 (1997) (“All 4 major histological types [of lung cancer] (squamous, adeno-, large-cell and small-cell carcinoma) can be related to asbestos.”); World Health Organization, *Elimination of Asbestos-Related Diseases* 1-2 (2006) (“All types of asbestos cause cancer in humans No threshold has been identified for the carcinogenic risk of chrysotile.”). See also American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Disease Related to Asbestos*, 170 *American Journal of Respiratory and Critical Care Medicine* 692, 697 (2004).
 8. See William J. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality — 1980-2030*, 3 *American Journal of Industrial Medicine* 259, 259 (1982); see also American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 *American Review of Respiratory Disease* 363, 363 (1986).
 9. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 737-38 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993) (“**Manville I**”).
 10. See Enpro Industries Inc. Form 10-K (Mar. 3, 2009) at 84.
 11. Muriel L. Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 *British Journal of Industrial Medicine* 261, 265 (1965) (latency period can be as long as 55 years); C. Bianchi et al., *Latency Periods In Asbestos-Related Mesothelioma of the Pleura*, 6 *European Journal of Cancer Prevention* 162, 162 (1997) (the latency period in one case was 72 years).
 12. *Manville I*, 129 B.R. at 737.
 13. Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 5-6 (Aspen Pub. 5th ed. 2005). See also *Manville I*, 129 B.R. at 737 (internal citation omitted).
 14. *Manville I*, 129 B.R. at 737-38 (internal citation omitted). See also *id.* at 739 (noting that reports of mesothelioma among asbestos workers had emerged in journals of industrial medicine and hygiene in the late-1940’s).
 15. *Id.* at 743 (citing Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985) (“**Brodeur**”).
 16. *Id.* at 745-46.
 17. *Id.* at 749.
 18. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).
 19. See *id.* at 1089.
 20. See *id.* at 1095.
 21. See, e.g., *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214 (Cal. 1997) (plaintiff may meet the burden of proving exposure to defendant’s product caused lung cancer by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff’s or decedent’s risk of developing cancer); *Jones v. John Crane, Inc.*, 350 Cal. Rptr. 3d 144, 151

- (Ct. App. 2005) (“The testimony of the experts provided substantial evidence that Jones’s lung cancer was caused by cumulative exposure, with each of many separate exposures having constituted substantial factors contributing to his risk of injury.”); *John Crane, Inc. v. Linkus*, 988 A.2d 511, 531 (Md. Ct. Spec. App. 2010) (“We conclude that lay testimony describing the amount of dust created by handling the products in question, coupled with expert testimony describing the dose response relationship and the lack of a safe threshold of exposure (above ambient air levels), was sufficient to create a jury question [as to whether the plaintiff’s mesothelioma was caused by defendant’s asbestos-containing products].”); *John Crane, Inc. v. Wommack*, 489 S.E.2d 527, 532 (Ga. Ct. App. 1997) (“Expert testimony showed that it is universally agreed that asbestos fibers are intrinsically dangerous and that the respiration of each fiber is cumulatively harmful”); *Blancha v. Keene Corp.*, Civ. A. No. 87-6443, 1991 WL 224573, at *6 (E.D. Pa. Oct. 24, 1991) (every occupational exposure to asbestos “is a substantial factor in bringing about mesothelioma”); *Held v. Avondale Indus., Inc.*, 672 So. 2d 1106, 1109 (La. Ct. App. 1996) (medical evidence showed “no known level of asbestos [exposure] which would be considered safe . . . any [asbestos] exposure, even slight exposures, to asbestos . . . [found to be] a significant contributing cause of the [decedent’s] malignant pleural mesothelioma”); *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684 (Wash. Ct. App. 1997) (any exposure to asbestos above background contributes to development of mesothelioma); *Kurak v. A.P. Green Refractories Co.*, 689 A.2d 757, 766 (N.J. Super. Ct. App. Div. 1997) (“Where there is competent evidence that one or a *de minimis* number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff’s injury.”); *ACandS, Inc. v. Abate*, 710 A.2d 944, 989 (Md. Ct. Spec. App. 1998), *abrogated by, John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002) (expert medical witness testified that “each and every [asbestos] exposure that [the decedent] had was a substantial contributing factor in the causation of his disease”); *Caruolo v. ACandS, Inc.*, No. 93 Civ. 3752 9RWS, 1999 WL 147740, at *9 (S.D.N.Y. Mar. 18, 1999) *aff’d in part, vacated in part*, 226 F.3d 46 (2d Cir. 2000) (expert medical witness testimony that “[T]here is no way one can say [each asbestos exposure] didn’t contribute. To the contrary. All of his exposures contributed to his mesothelioma, including this one.”).
22. Brodeur at 73.
 23. Jennifer L. Biggs et al., American Academy of Actuaries, *Overview of Asbestos Claims Issues and Trends*, Mass Tort Subcommittee at 3 (Aug. 2007) available at http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf.
 24. Stephen J. Carroll et al., RAND Institute for Civil Justice, *Asbestos Litigation* 46 (2005) (“**RAND Asbestos Litigation Study**”).
 25. *See In re Johns-Manville Corp.*, 68 B.R. 618, 620 (Bankr. S.D.N.Y. 1986), *aff’d*, 78 B.R. 407 (S.D.N.Y. 1987), *aff’d*, 843 F.2d 636 (2d Cir. 1988).
 26. *See id.* at 624.
 27. *See id.*
 28. *See, e.g., In re Combustion Eng’g, Inc.*, 391 F.3d 190, 235 n.47 (3d Cir. 2004). *See also* H.R. Rep. No. 103-835 at 3 (1994) (explaining that Section 524(g) is intended to emulate the “creative solution to help protect the future asbestos claimants, in the form of a trust into which would be placed stock of the emerging debtor company and a portion of future profits, along with contributions from [the debtor’s] insurers” devised in the *Manville* case). Section 524(h), which was enacted at the same time, makes clear that the channeling injunction in *Manville* is deemed retroactively to comply with Section 524(g), and thus is valid.
 29. Bankruptcy Amendments Act of 1993, Amendment No. 1633, 140th Cong. (2d Sess. 1994) (*amending* 11 U.S.C. § 524).
 30. *See* 11 U.S.C. § 524(g)(4)(B)(i).
 31. *See id.*
 32. GAO Report at 3.
 33. *See* 11 U.S.C. § 362(a)(1); 2 William L. Norton, Jr. & William L. Norton, III, *Norton Bankruptcy Law & Practice* § 43:5 (3d ed 2012); 5 William L. Norton, Jr. & William L. Norton, III, *Norton Bankruptcy Law & Practice* § 91:1 (3d ed. 2012).
 34. *See* 11 U.S.C. § 524(g)(2)(B)(i).

35. See *Investor Relations Home*, OwensCorning.com, <http://investor.owenscorning.com> (last visited Jan. 4, 2013).
36. See *Corporate Profile*, The Babcock & Wilcox Company, <http://phx.corporate-ir.net/phoenix.zhtml?c=236851&p=irol-IRHome> (last visited Jan. 4, 2013); Babcock & Wilcox Company Form 10-K at 38, filed Feb. 29, 2012.
37. See *Corporate Profile*, Halliburton.com, <http://www.halliburton.com/AboutUs/default.aspx?navid=966&pageid=2458> (last visited Jan. 4, 2012).
38. See *Overview*, Corporate Profile, Armstrong World Industries, Inc., <http://phx.corporate-ir.net/phoenix.zhtml?c=98651&p=irol-IRHome> (last visited Jan. 4, 2012).
39. See *About Us*, JM.com, <http://www.jm.com/corporate/263.htm> (last visited Jan. 4, 2012).
40. GAO Report at 3. This number may not be accurate, as some trusts are dormant and other bankruptcy cases which were expected to lead to new trusts are still active.
41. See 11 U.S.C. § 524(g)(2)(B)(i)(III).
42. See, e.g., *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 722 (D. Del. 2005); see also United States Gypsum Asbestos Personal Injury Settlement Trust, Trust Distribution Procedures §§ 2.3, 4.2 (revised Mar 29, 2010), <http://www.usgasbestos.com/files/USGTDP.pdf> ("USG TDP").
43. See USG TDP §§ 2.3 and 4.2; see also *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 114, 136 (D. Del. 2006).
44. See, e.g., *In re Burns & Roe Enters., Inc.*, 08-4191(GEB), 2009 WL 438694, at *32, *37 (D.N.J. Feb. 23, 2009).
45. See, e.g., USG TDP § 5.3(a).
46. See, e.g., *id.* § 5.3(b).
47. See, e.g., *id.* §§ 5.3(a)(3); 5.7(a), (b).
48. See, e.g., *id.*
49. GAO Report at 29.
50. GAO Report at 19.
51. GAO Report at 21.
52. Victor E. Schwartz et al., *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. Bankr. L. & Prac. 61 (2005).
53. See James L. Stengel, U.S. Chamber Inst. For Legal Reform, *Litigating in the Field of Dreams: Asbestos Cases in Madison County, Illinois*, (Oct. 2010), available at <http://www.instituteforlegalreform.com/sites/default/files/asbestoscasesinmadisoncountyllinois.pdf>; Letter from Lisa A. Rickard, U.S. Chamber Inst. for Legal Reform, to Peter G. McCabe, Sec'y of Comm. on Rules of Practice & Procedure, Judicial Conference of the U.S. (Nov. 22, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Suggestions%202010/10-BK-H-Suggestion-Rickard.pdf>.
54. The Asbestos Claims Transparency Act has been introduced in Louisiana, Ohio, Oklahoma, Texas, and West Virginia. H.B. 477, 2012 Leg., 38th Reg. Sess. (La. 2012); Amended Substitute H.B. 380, 129th Gen. Assem., 2012 Sess. (Ohio 2012); S.B. 1792, 53d Leg., 2d Reg. Sess. (Okla. 2011); H.B. 2034, 82d Leg. (Tex. 2011); S.B. 1202, 82d Leg. (Tex. 2011); S.B. 43 & 56, 80th Leg., Reg. Sess. (W.Va. 2011). The Ohio bill is the only one to have been enacted and is discussed later in this paper.
55. See supra notes 18-21 and accompanying text.
56. See *Bondex Int'l v. Ott*, 774 N.E.2d 82, 86-87 (Ind. Ct. App. 2002); *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 172 P.3d 410, 413 (Ariz. 2007).
57. See Paul D. Kheingold, *Litigating Mass Tort Cases* § 10:65 (2012).
58. *Kananian v. Lorillard Tobacco Co.*, No. CV 442750 (Ct. Com. Pl., Cuyahoga Cnty. Ohio, 2001).
59. Amended Substitute H.B. 380 § 4(G).

60. Furthering Asbestos Claim Transparency (FACT) Act of 2012, H.R. 4369, 112th Cong. § 2(8)(A)(i) (2012).
61. *Id.* § 2(8)(B).
62. *Id.* § 3(b).
63. GAO Report at 16-17.
64. Amended Substitute H.B. 380 § 1 (amending § 2307.952(A)(1)(a)).
65. *Id.* (amending § 2307.953(A)).
66. *Id.* (amending § 2307.954(B)).
67. Ohio Rev. Code Ann. § 2307.22(A)(1) (West 2013).
68. Amended Substitute H.B. No. 380 § 4(I).
69. *See, e.g., USG Approved Site List*, usgasbestostrust.com (updated June 7, 2012), <http://www.usgasbestostrust.com/files/USG%20Site%20List%206-7-12.xls>. ■

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