

## UPDATE ON ASBESTOS TRUST TRANSPARENCY LEGISLATION FOR DEFENSE COUNSEL

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June 4, 2019

By: Mary Margaret Gay & Sarah Beth Jones

As much as asbestos litigation stays the same, it also changes. As we move through the third decade of the litigation, nearly 10,000 companies have been named as defendants, and more than 100 companies have filed for asbestos related bankruptcy. With all of this comes change in the litigation – new lawyers, new laws and increased access to information not previously available. One of the biggest evolutions in the litigation was in direct response to the landmark ruling regarding the value of trust claims information in the Garlock bankruptcy proceedings. The court's ruling confirmed what defendants in asbestos litigation had long suspected, namely, that plaintiffs often tell one story of their exposures in their tort lawsuits and another in their claims to bankruptcy trusts. Courts across the country and legislators have taken note, and information related to bankruptcy trust claims and payments that was once inaccessible to defendants is now becoming available.

Last month, Alabama became the 16<sup>th</sup> state to enact bankruptcy trust transparency legislation in less than four years. States with trust legislation now include Ohio, Oklahoma, Wisconsin, Arizona, Texas, West Virginia, Tennessee, Utah, Iowa, Mississippi, North Dakota, South Dakota, Kansas, Michigan, North Carolina and Alabama. These trust transparency laws vary from state to state, but they all are designed to create, or at a minimum improve, transparency between the tort and asbestos bankruptcy trust systems by providing parties and the courts with more information about plaintiffs' bankruptcy trust claims.

A majority of the enacted trust transparency laws include variations of the following key components:

- Within a specified number of days from filing a case, plaintiffs must provide a signed sworn statement identifying all filed and potential bankruptcy trust claims and indicating the current status of any filed claims.
- Within a specified number of days from filing a case, plaintiffs must disclose trust claim documents, including the claim forms and supporting documents such as medical records, affidavits, work history, deposition testimony, and discovery responses.
- Plaintiffs have an ongoing duty to supplement bankruptcy trust claim information and disclosures.
- No trial date may be scheduled until plaintiffs have provided a sworn statement and the required disclosures.
- Defendants can move to stay a case if they have a good-faith basis to believe that there are additional, potential trust claims that a plaintiff could file, and the court can stay the case and postpone the trial date until such a time as those additional claims have been filed and processed.

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- Trust claims materials are discoverable (plaintiffs cannot claim privilege or confidentiality) and admissible evidence.
- Bankruptcy trusts are considered for apportionment and allocation of fault, or verdict award setoffs are available for trust payments.

Trust transparency laws do differ from state to state, and some states have more stringent requirements than others. For instance, some states' trust transparency laws give courts the ability to reopen and adjust a judgment if a plaintiff files bankruptcy trust claims after judgment in an asbestos action. About half of the states' trust transparency laws apply retroactively to cases pending at the time that legislation was enacted, while the other half of the states' trust transparency laws apply only to actions filed after the effective date of the legislation. Additionally, nearly half of the states' trust transparency laws include a provision that before a trial, the court must enter into the record a trust claims document identifying each claim that a plaintiff has filed against an asbestos bankruptcy trust. A handful of states include a provision that a court may dismiss an action for failure to make the required disclosures pursuant to the trust transparency laws.

The most recent trust transparency law, Alabama's "Asbestos Trust Claims Transparency Act," was signed into law by the Governor on May 28, 2019, and becomes effective August 1, 2019. Alabama's law requires the plaintiff in an asbestos action to comply with one of two disclosure options: "to file a sworn statement disclosing information regarding the plaintiff's exposure to asbestos **or, alternatively**, file available asbestos trust claims and produce all trust claims materials before trial."

We have seen a number of new filings in Alabama this year and are expecting a steady influx of asbestos filings in the next few months leading up to the August effective date. It should be noted that courts in Alabama have already addressed the need for production of trust materials and that trust information is still accessible in cases filed prior to the legislative effective date based on requirements set out in case management and discovery orders.

As noted above, the legislation lays out in detail two options for a plaintiff to comply with this trust transparency law. The first option allows for a plaintiff to provide an exposure affidavit within 90 days of filing of the asbestos action. The affidavit requires plaintiff to provide specific exposure information and the specific connection of each defendant to the alleged asbestos exposure, including, confirmation that all potential sources of plaintiff's asbestos exposure have been investigated and identifying *with specificity* each and every source of exposure from both bankrupt and non-bankrupt entities. If plaintiff fails to provide the required information or fails to supplement the exposure affidavit, the court shall dismiss the case without prejudice.

Alternatively, the second option requires plaintiff file all available claims with asbestos bankruptcy trusts and provide to the parties all trust claims information and the related claim materials within 90 days of filing the case. The plaintiff has a continuing duty to supplement the trust claim information and materials as additional information or materials related to trust claims are received or if plaintiff files additional trust claims. Alabama's law allows defendants to file a motion to stay not less than 60 days prior to trial to require plaintiff to file additional trust claims.

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Alabama's legislation creates a rebuttable presumption that trust claim materials and trust governance documents are relevant, authentic, and admissible in evidence, and it allows defendants to seek discovery from asbestos bankruptcy trusts requiring plaintiff to provide consent or permission for the trusts to release information sought by defendants.

In the four years since *Garlock* provided tangible proof of the need for greater transparency between the tort and bankruptcy trust systems, progress has certainly been made. Each year more states are considering and passing legislation aimed to improve bankruptcy trust transparency. In states with trust transparency laws, defendants must hold plaintiffs accountable and hold them to their obligations and duties under the trust transparency laws.

As for defendants in states without trust transparency laws, those defendants should actively seek bankruptcy trust information in discovery and press plaintiffs to provide signed authorizations, so that records may be obtained directly from the bankruptcy trusts. Court across the country, including the recently closed Federal Asbestos MDL in the Eastern District of Pennsylvania, have required production of trust information in cases prior to trial. Courts are finding over and over again that exposure and claims information from the bankruptcy trust system is invaluable to all parties and the court.

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