

Asbestos Transparency Laws Can Stop Double Recovery

By **Scott Hunsaker and Karl Borgsmiller** (July 13, 2018, 4:12 PM EDT)

Individuals with asbestos-related injuries have recovered more than \$50 billion from lawsuits in the past few decades. Asbestos liabilities have caused more than 100 domestic companies to file for Chapter 11 bankruptcy. In 1994, in response to the number of companies filing for bankruptcy, the United States Congress amended the bankruptcy code to establish a trust-based system for future claimants with an asbestos injury.

Section 524(g) of the bankruptcy code provides for an injunction to channel claims to a trust established by the reorganization plan for future claimants. Plaintiffs do not need to name the bankrupted entities in their lawsuits against viable defendants in order to file trust claims. But as a result, the common tactic is to withhold filing the bankruptcy trust claims, and to deny any present knowledge of asbestos exposure from bankrupted entities.

This leads to “double recovery”: Plaintiffs can obtain full recovery from viable defendants in the lawsuits while simultaneously, or later, recovering more money for the same injury from asbestos bankruptcy trust claims. Recognizing that the tort system has been infected, many states have turned to asbestos transparency laws as a solution.

The Section 524(g) Process

An overview of the Section 524(g) process is crucial to understanding why states have turned to asbestos transparency laws. For a bankruptcy application and reorganization plan to be approved, Section 524(g) requires approval from 75 percent of the asbestos creditor class. The asbestos creditor class is represented by the asbestos claimants committee, which is comprised primarily of the law firms representing plaintiffs with a significant number of lawsuits against the company.

The asbestos claimants committee has a strong influence on the bankruptcy process, even controlling terms of the bankruptcy reorganization plan. The bankruptcy court also appoints a future claims representative, who protects the interests of future claimants. The claimants committee and future claims representative both represent the interests of future claimants, but the process of negotiating and estimating the future asbestos liabilities of a company can be problematic. The claimants committee may seek to maximize payment distribution for present claimants, while the future claims representative may seek to manage the trust funds to ensure compensation for future claimants.



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In order to reach a fair resolution, the claimants committee and future claims representative have to compromise to protect the interests of present and future claimants. If the bankruptcy court approves the terms of the reorganization plan, a trust is formed, and funded by the debtor (the bankrupted entity) and insurers, if any. The trust funds are managed by a board of trustees, who are advised by the claimants committee and future claims representative. Collectively, this group is known as the trust advisory committee.

After a company creates a Section 524(g) trust, a trust distribution process is created to satisfy claims against the company. The trust distribution process is a no-fault application process, which only requires the claimant to complete a claim form with background information and asbestos exposure history, along with submission of a medical report confirming the medical diagnosis. The trust makes a fixed amount offer to the claimant simply based on the claim form and medical diagnosis.

If the fixed amount offer is accepted, the claim process is completed within a few weeks, with payment from the trust distributed immediately. If the fixed amount offer is not accepted, the claimant may engage in negotiations with the trust, including possibly mediation or arbitration. The trust distribution process is overseen by the trust advisory committee, who ensure claimants are timely and fairly compensated.

There are two primary benefits of the Section 524(g) trust. First, the company is able to exit bankruptcy and maintain control of its business operations with potentially a healthy economic state. Second, there is a channeling injunction. The present and future claimants are barred from filing a lawsuit against the bankrupted entity. Instead, the injunction channels all asbestos claims to a trust created by the reorganization plan.

The trust is established to distribute payment by fixed amounts to claimants simply based on a confirmed occupational disease. Moreover, the channeling injunction protects future claimants, whose symptoms do not manifest until years after funds have been depleted by earlier claimants that obtained "double recovery."

In recent years, many concerns have been raised about the timing and nature of bankruptcy trust claims. Those concerns were substantiated in the landmark case of *In re Garlock Sealing Technologies LLC*.^[1] In June 2010, Garlock, a producer of asbestos-containing gaskets, filed for Chapter 11 bankruptcy after exhausting its insurance coverage during roughly 30 years of asbestos litigation.

To value the company's future asbestos liabilities, Garlock argued, the "settlement approach" was unreliable, because the company was manipulated into higher settlements when asbestos exposure evidence was withheld by plaintiffs and their lawyers. The court allowed discovery into 15 closed asbestos cases against Garlock, which revealed inconsistent and conflicting information about asbestos exposure history in plaintiffs' discovery answers and the subsequently filed bankruptcy trust claims.

The court held a 17-day hearing with 29 witnesses and hundreds of exhibits. The court agreed with Garlock, finding "the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers."^[2] That tactic, although not uniform, "had a profound impact on trials and settlements such that the amounts recovered are inflated."^[3]

The company's future asbestos liabilities were limited to \$125 million under the "legal liability approach," instead of \$1.25 billion estimated by the lower court under the "settlement approach." But

the tort system at large has been similarly infected by the withholding of exposure information.

Asbestos Transparency Laws as a Solution to Double Recovery

Since the Garlock decision, many states have taken proactive steps to mandate disclosure of bankruptcy trust claims during litigation. The enacted laws vary from state to state, with disclosure deadlines ranging from 30 to 120 days after the filing of an asbestos lawsuit. Currently, 15 states have enacted asbestos transparency laws, while another 8 states have proposed legislation at various stages in the legislative process.

In Missouri, House Representative Bruce DeGroot introduced Missouri House Bill 1645, known as the “Asbestos Bankruptcy Transparency Act.” The legislation would mandate disclosure of all bankruptcy trust claims within 30 days of filing an asbestos lawsuit. If a plaintiff fails to timely disclose the bankruptcy trust claims, the party may be subject to sanctions or the lawsuit may be dismissed. The bankruptcy trust claims would be subject to full discovery without protection based on a claim of privilege or confidentiality. This proposed legislation is part of the effort made for tort reform in Missouri.

The importance of asbestos transparency laws has been recognized at the federal level as well. In February 2017, former House Representative Blake Farenthold introduced a bill entitled “Furthering Asbestos Claim Transparency (FACT) Act of 2017.” The FACT Act is currently on the Union Calendar in the House of Representatives, where it will be brought to a vote. The FACT Act would amend the bankruptcy code to mandate that asbestos bankruptcy trusts file quarterly reports with information about submitted claims and the amount of payment distributed. The quarterly reports would be available for discovery by companies facing asbestos lawsuits.

Asbestos transparency laws have received pushback from plaintiffs lawyers. The common criticism is that the asbestos transparency laws protect big corporations at the expense of the “little guy.” Also, the asbestos transparency laws would delay the litigation process and trial date, including for those diagnosed with mesothelioma, who on average only have 12 to 18 months to live.

This may seem like a fair criticism, but it is often misplaced, because the asbestos transparency laws in fact protect future claimants with asbestos injuries. The timely disclosure of bankruptcy trust claims allow the defendants in asbestos litigation to develop plaintiffs’ full asbestos exposure history. The full asbestos exposure history is necessary to properly allocate fault to all responsible parties. If the allocation of fault is not based on the full asbestos exposure history, the potential “double recovery” reduces or depletes the funds available for future claimants, whose symptoms do not manifest until years after earlier claimants obtained recovery for an asbestos injury.

Asbestos transparency laws promote fairness and balance the playing field. The discovery of all asbestos exposure, and proper allocation of fault, prevents defendants from being manipulated into overpaying in settlements. Also, the asbestos transparency laws protect the available funds for future claimants. At the same time, present claimants are able to seek full recovery from viable defendants and bankrupted entities. The disclosure of bankruptcy trust claims will not delay the litigation process if handed properly by plaintiffs lawyers.

Accordingly, many states have enacted or introduced asbestos transparency laws to mandate disclosures of bankruptcy trust claims. The following charts provide an update on enacted and proposed state legislation for asbestos transparency laws.

Enacted Legislation			
State	Name	Description	Year Enacted
Arizona	AZ Rev. Stat. §12-782	Plaintiff must disclose all claims against asbestos trusts within 45 days of filing	2015
Iowa	I.C.A. § 686A	P must disclose all claims against asbestos trusts within 90 days of filing	2017
Mississippi	2017 MS H. B. 1426	P must disclose all claims against asbestos trusts within 30 days of filing	2017
North Dakota	2017 ND H. B. 1197	P must disclose all claims against asbestos trusts within 30 days of filing	2017
Ohio	2011 OH H. B. 380	P must disclose all claims against asbestos trusts within 30 days of filing and before trial date set	2011
Oklahoma	76 Okl. St. Ann. §83	P must disclose all claims against asbestos trusts within 30 days of filing	2012
South Dakota	2017 SD S. B. 138	P must disclose all claims against asbestos trusts within 120 days of filing	2017
Tennessee	T.C.A. §29-34-603	P must disclose all claims against asbestos trusts within 120 days of filing	2016
Texas	2015 TX H. B. 1492	P must disclose all claims against asbestos trusts within 150 days of filing	2015
Utah	2016 UT H. B. 403	P must disclose all claims against asbestos trusts within 120 days of filing	2016
West Virginia	W. Va. Code, § 55-7F	P must disclose all claims against asbestos trusts within 120 days of filing	2015
Wisconsin	2013 WI Assembly B. 19	P must disclose all claims against asbestos trusts within 45 days of filing	2014
Michigan	M.C.L.A. 600.30A	P must disclose all claims against asbestos trusts within 180 days of filing	2018

Georgia	Ga. Code Ann., §51-14	P must disclose all claims against asbestos trusts at the time of filing. If complaint fails to include asbestos trust claims, it will be dismissed. P can cure this by filing asbestos trust claims between service of the motion to dismiss and 30 days after any order of dismissal.	2007
North Carolina	2017 NC S. B. 470	P must disclose all claims against asbestos trusts within 30 days of filing	2018

Proposed Legislation				
State	Name	Description	Year Proposed	Status
New Hampshire	2017 NH S. B. 335	P must disclose all claims against asbestos trusts within 30 days of filing	2017	In committee (as of 4/26/18)
Missouri	2018 H.B. 1645	P must disclose all claims against asbestos trusts within 30 days of filing	2017	Placed on informal calendar (as of 5/3/18)
New York	NY S. B. 2511	P must disclose all claims against asbestos trusts within 45 days of filing	2017	In committee (as of 3/16/18)
Pennsylvania	2017 PA H. B. 238	P must disclose all claims against asbestos trusts within 90 days of filing	2017	In committee (as of 1/31/17)
South Carolina	SC General Assembly B. 452	P must disclose all claims against asbestos trusts within 120 days of filing	2017	In committee (as of 2/21/17)
Colorado	CO S.B. 18-123	P must disclose all claims against asbestos trusts within 120 days of filing	2018	Engrossed in the House
Idaho	2017 ID H.B. 177	P must disclose all claims against asbestos trusts within 45 days of filing	2017	In committee (as of 2/15/17)
Kentucky	KY H.B. 293	P must disclose all claims against asbestos trusts within 30 days of filing	2018	In committee (as of 3/15/18)

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[1] 504 B.R. 71 (Bankr. W.D.N.C. 2014).

[2] *Id.* at 82.

[3] *Id.*