

This Week's Feature

2018 Progress Report: Asbestos Trust Transparency Legislation

By Sarah Beth Jones, Mary Margaret Gay, and Kimberly P. Mangum

The pursuit for greater transparency between the civil tort and bankruptcy trust systems, the two compensation systems available to asbestos plaintiffs, continues to gain momentum with 15 states now having enacted legislation designed to help achieve transparency. Just this year, legislation passed in three states—Kansas, Michigan, and North Carolina.

Back in 2014, a decision in the *Garlock Sealing Technologies* bankruptcy case in North Carolina uncovered a “startling pattern of misrepresentation” by plaintiffs in the tort system and their lawyers, who were failing to disclose claims to asbestos bankruptcy trusts for the same asbestos-related injuries at issue in their tort cases. *In re Garlock Sealing Techs.*, 504 B.R. 71, 85 (W.D.N.C. Bankr. 2014). *Garlock* 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.

Asbestos plaintiffs are in a unique position in that there are two separate systems of compensation available to them for their asbestos-related injuries. They can file a lawsuit to recover for their asbestos-related injuries in the civil tort system, and they can also file claims with the bankruptcy trusts, which have been set up to administer and pay claims for companies forced to file bankruptcy due to asbestos liabilities. While information regarding trust claims is routinely requested by defendants in discovery, before *Garlock* and the movement for trust transparency, defendants and the courts were often unable to determine if a plaintiff had filed bankruptcy trust claims, what exposure information was contained in those claims, and how much money the plaintiff was paid for those claims. *Garlock* revealed that this information is not only relevant to, but necessary for, litigating plaintiffs’ claims in the civil tort system. The courts, the parties, and especially juries need this information for the proper and just resolution or adjudication of plaintiffs’ asbestos lawsuits in the tort system.

At the time of the *Garlock* decision, trust transparency legislation had been enacted in two states: Ohio and Oklahoma. After *Garlock* and its revelations, legislation was enacted by 13 other states: Wisconsin (2014), Arizona (2015), Texas (2015), West Virginia (2015), Tennessee (2016), Utah (2016), Iowa (2017), Mississippi (2017),

North Dakota (2017), South Dakota (2017), Kansas (2018), Michigan (2018), and North Carolina (2018).

The enacted 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:

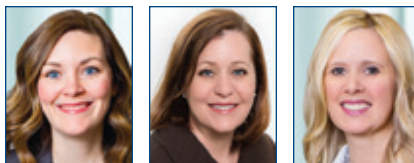
- Within a specified number of days from filing a case, plaintiffs must provide a signed sworn statement identifying all filed and potential bankruptcy trust claims and indicating the current status of any filed claims.
- Within a specified number of days from filing a case, plaintiffs must disclose 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.
- 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 vary 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.

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. When plaintiffs fail to cooperate, defendants should take note of those refusals and file motions to compel the information when necessary. Plaintiffs' refusals also provide support and illustrate the very need for legislation.

While progress has been made on the legislative front, the struggle to apply that legislation and expose plaintiffs' complete exposure histories persists. Let's not lose momentum; defendants should continue to demand the information that they are entitled to—the information needed for the fair and equitable resolution of a case.



[Sarah Beth Jones](#),
[Mary Margaret Gay](#),
and [Kimberly P.
Mangum](#) are attor-
neys at Maron Marvel

Bradley Anderson & Tardy LLC in Jackson, Mississippi, where they focus their practice on asbestos litigation defense. As leaders of the firm's Trust Transparency and Strategic Counsel Practice Group, they work with defendants, their counsel, and insurers nationwide to maximize the development of alternative exposures and asbestos trust claims in litigation. They have substantial experience coordinating asbestos litigation joint defense projects and developing innovative defense strategies. They also serve as local counsel for asbestos defendants in the Southeast. They are members of the DRI Toxic Torts and Environmental Law Committee.