

Asbestos Lawsuits and Bankruptcy Trusts: *Garlock* Updates and the Latest Findings from RAND

Wednesday, November 18, 2015

Presented By the IADC Business Litigation Committee, Civil Justice Response Committee, Insurance and Reinsurance Committee, Product Liability Committee, and Toxic and Hazardous Substances Litigation Committee

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Where Are We Now?

Asbestos Litigation Landscape

Estimated nearly **1,000,000** asbestos claims filed to date

Over **6,000** defendants have been identified in asbestos litigation

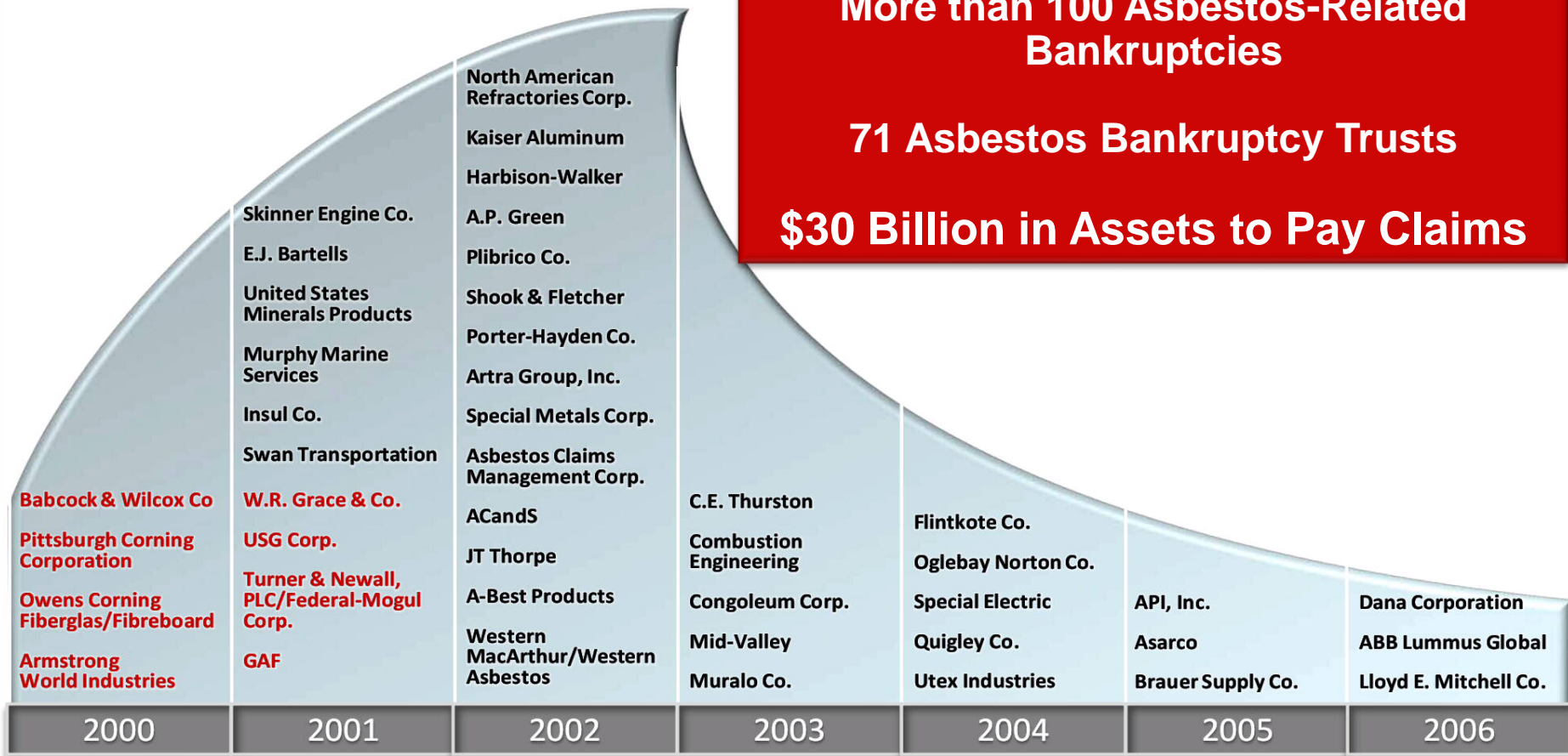
177 defendants have gone to verdict in more than 480 cases since 2008 resulting in **\$2.8 billion** in damages awarded to plaintiffs

“The net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.”

Wall Street Journal

The Bankruptcy Wave

More than 100 Asbestos-Related Bankruptcies
71 Asbestos Bankruptcy Trusts
\$30 Billion in Assets to Pay Claims



■ Top Tier Defendants

■ Additional Bankruptcies

In re Garlock Sealing Techs. LLC, No. 10-31607, 504 B.R. 71 (Bankr. W.D.N.C. 2014). GST-8027

Asbestos Bankruptcy Trusts


- **Most asbestos defendants that have filed for bankruptcy seek to confirm plans under Section 524(g) of the Bankruptcy Code**
- **When a plan is confirmed under Section 524(g), a company is permanently cleansed of asbestos-related liability; all such liabilities are “channeled” to a trust for payment**
- **Section 524(g) plans are funded with significant assets provided by debtors and/or their parent companies, all available insurance, and often stock of the reorganized debtor**
- **Some trusts were funded with hundreds of millions of dollars; some were funded with more than \$1 billion**
- **Asbestos plaintiff attorneys serve on the committees that control the trusts and make the trust rules**

Trust Advisory Committees (TAC)

Summary of Claim Payments for Largest TAC Firms

TAC Member Firm/Affiliation	No. of Trusts	2013 Claim Payments	2006-2013 Claim Payments
 Kazan, McClain, Lyons, Greenwood & Harley A PROFESSIONAL LAW CORPORATION	20	\$1,360,000	\$14,360,000
 BARON BUDD®	16	\$1,150,000	\$13,140,000
 MotleyRice® ATTORNEYS AT LAW LLC	12	\$1,130,000	\$12,830,000
 COONEY & CONWAY	15	\$1,180,000	\$11,360,000
 WEITZ & LUXENBERG P.C.	15	\$1,090,000	\$12,230,000

 BELLUCK & FOX
JUSTICE. ONE FAMILY AT A TIME.

 SIMON GREENSTONE PANATIER BARTLETT
TRIAL LAWYERS

 L · S · C
SHEIN LAW CENTER, LTD.

 THE LAW OFFICES OF
PETER ANGELOS
A PROFESSIONAL CORPORATION

Scarcella, Marc and Kelso, Peter, *A Reorganized Mess: The Current State Of The Asbestos Bankruptcy Trust System* (February 2015)

- Filed for bankruptcy in the Western District of North Carolina in June 2010
- Judge George Hodges had never overseen an asbestos bankruptcy
- More than 100,000 cases pending at the time of bankruptcy
- Court allowed discovery and hearing on trust estimation which uncovered information about bankruptcy trust claims never before available to defendants in the tort system
- Trust discovery revealed new exposure and claims information which would dramatically affect settlement values in cases

“Most significant to Garlock ... was the 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.”

- playbook-type directions plaintiffs’ attorneys gave their clients on how to testify in discovery
- trust claims with new and different exposures were filed days and hours after verdicts and settlements
- sworn exposure statements by counsel, who months earlier argued no exposure to the exact same product in jury trials

The court found exposure evidence was withheld in “each and every” case in which bankruptcy discovery was conducted.

RICO Cases Filed Against Plaintiffs’ Firms

Belluck & Fox (NY)
Simon Greenstone (IL)
Waters & Kraus (CA)
Williams Kherkher (TX)
Shein Law Center (PA)

Garlock Affects on the Litigation Landscape

- Gives Credibility to Defense Argument for Trust Transparency
- Provides Grounds for Trust Information Production to Reduce Case Values in Tort System
- Checks and Balances for Exposure and Medical Information
- Chilling Effect on Fraudulent Filings
- Provides Foundation for Case-Specific Discovery

The possible resolution of the Garlock bankruptcy case does not and should not change the ability of defendants to utilize the conclusions drawn by Judge Hodges to advance trust transparency in litigation.

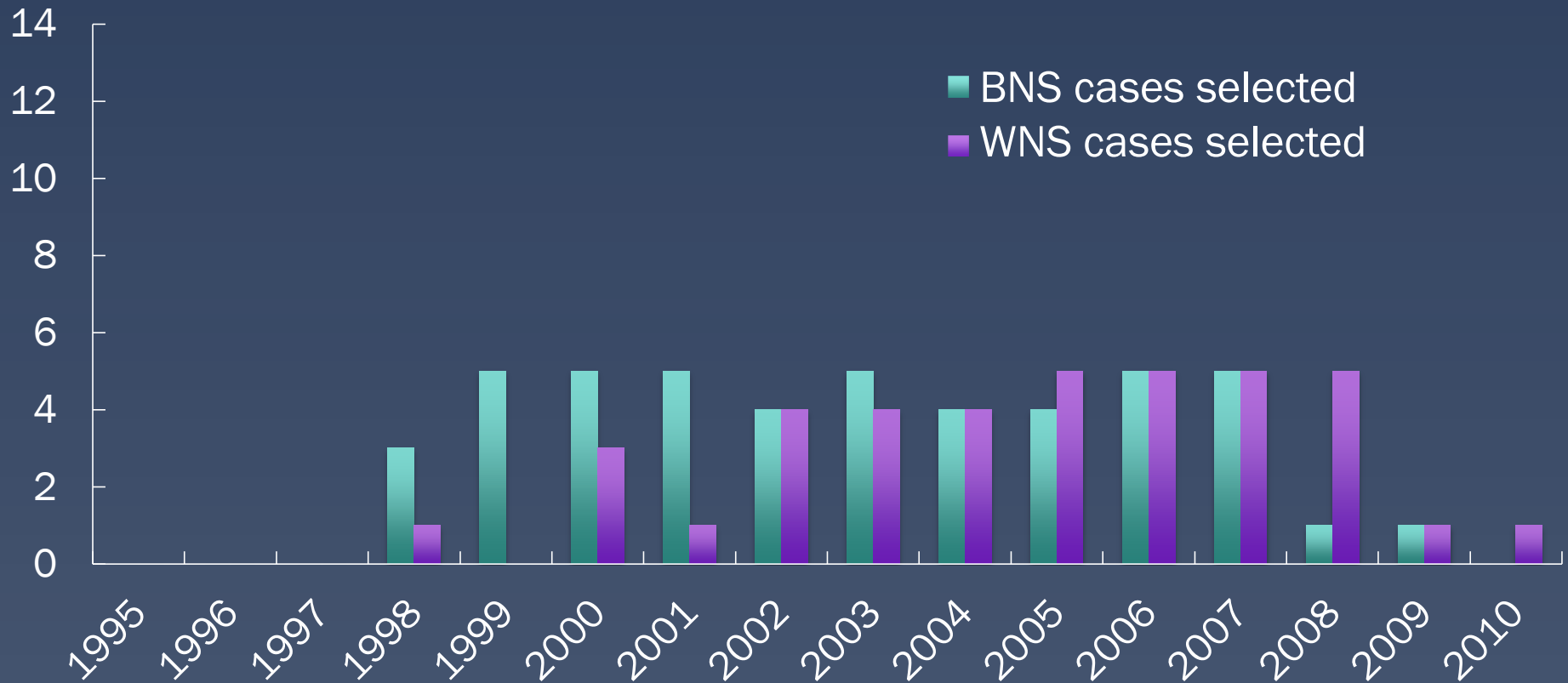
Research Question

- How does bankruptcy affect the products that are identified in interrogatories and depositions?
 - Interrogatories typically prepared by plaintiffs' counsel
 - Deposition questions asked by the defense and answered by the plaintiff, family members, or co-workers

Selected Two Sets of Cases

- 52 Brooklyn Naval Shipyard (BNS) cases
 - Plaintiffs who worked at BNS sometime between 1940 and 1949
 - Cases filed in New York state courts in 1998 later
- 48 West Coast Navy (WCN) cases
 - Plaintiffs who were in the Navy and stationed on the West Coast between 1950 and 1964
 - Cases filed in California states courts in 1998 or later

Sample Constructed So Filing Dates Vary

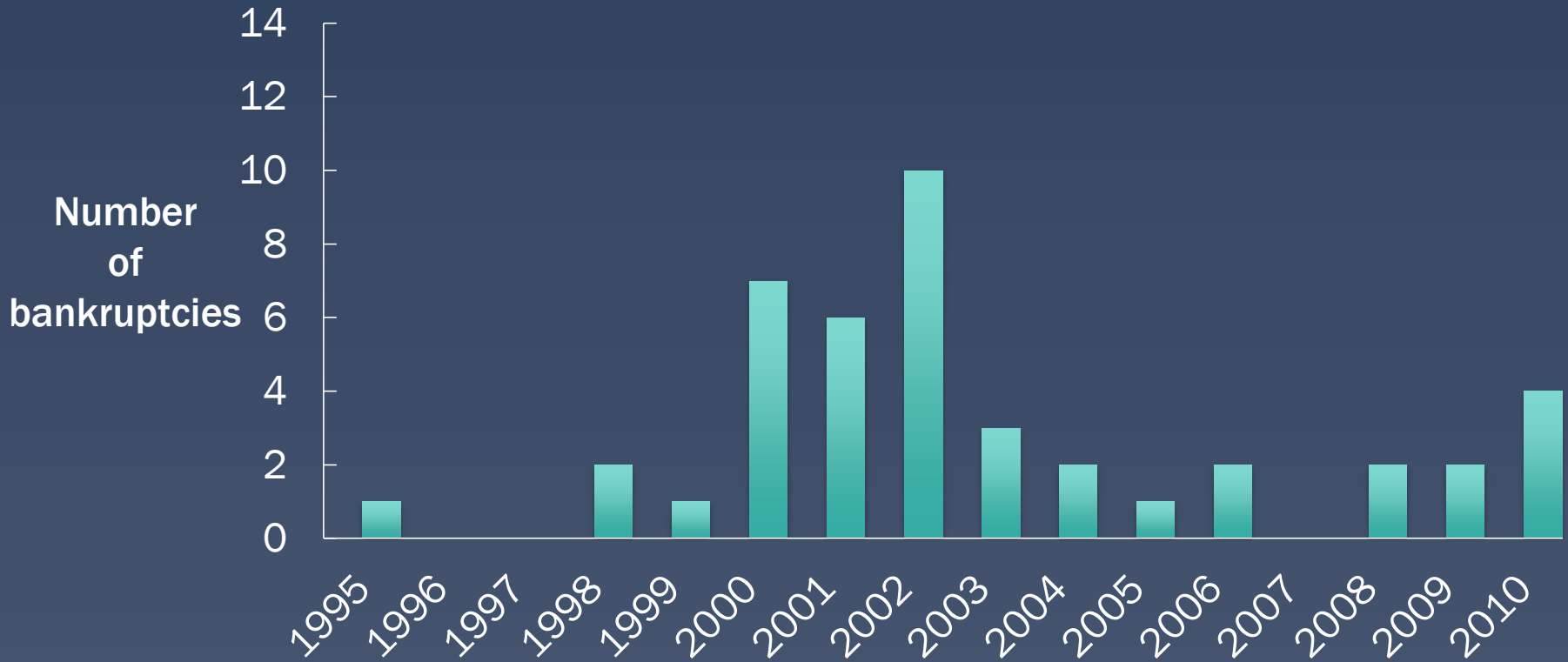


Number of Cases for Which Documents Coded

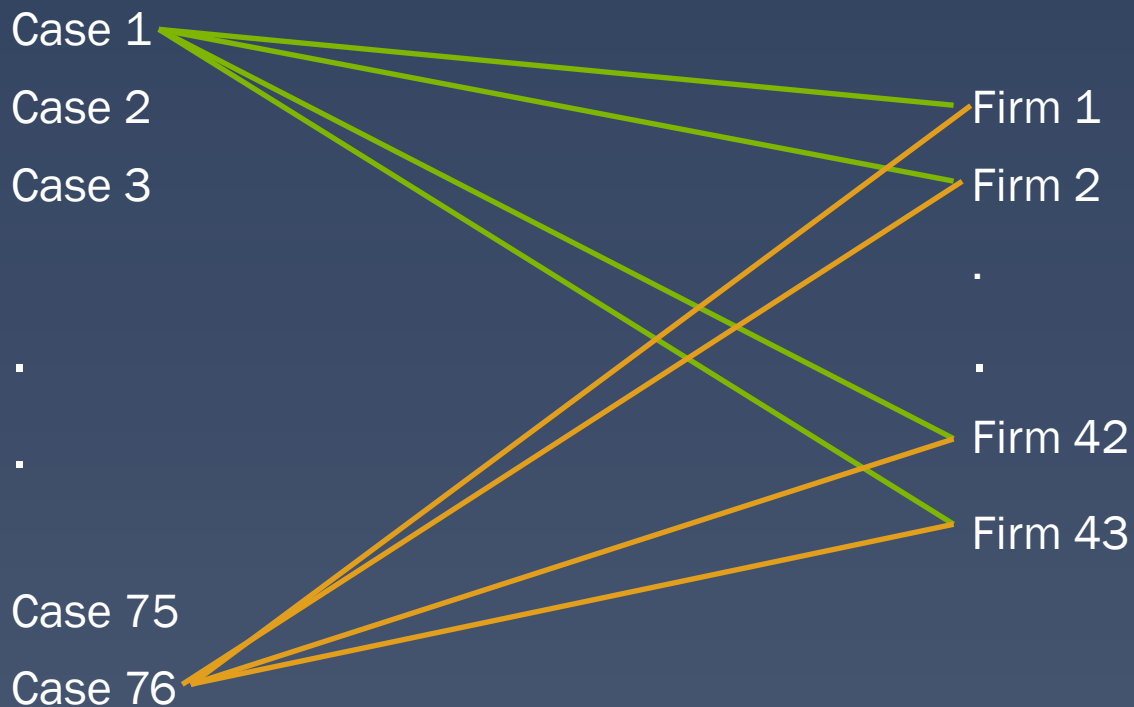
Document Type	BNS Cases	WCN Cases	Total Cases
Interrogatories	38	38	76
Depositions	28	31	59
Interrogatories and depositions	19	30	49

- 293 interrogatories and 295 depositions coded

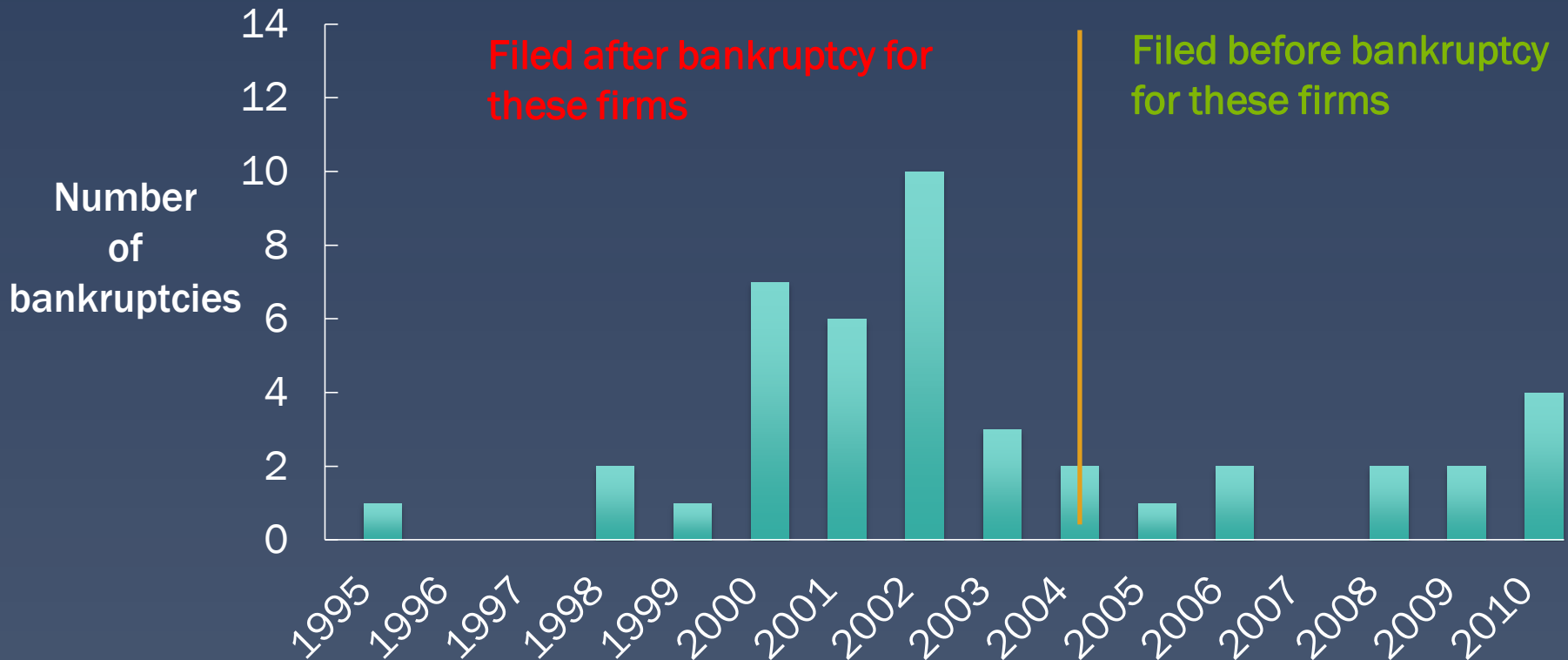
43 Firms that Went Bankrupt Between 1995 and 2010 Examined



Examined the Frequency that Each Firm Identified in Each Case



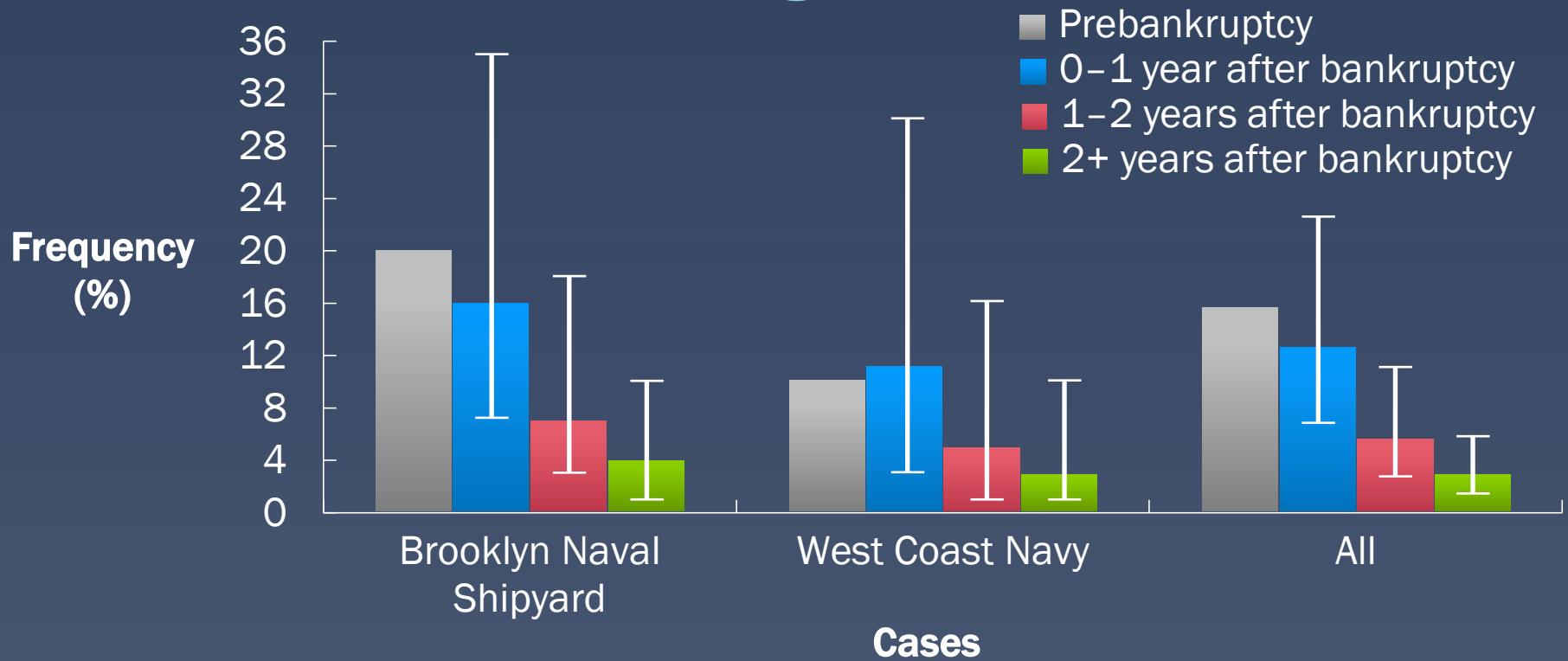
For a 2004 Case, Some of the 43 Firms Went Bankrupt Before Case Filing, Others After



Statistical Techniques Used to Isolate the Effect of Bankruptcy from Changes in Case Mix

- “Fixed effects” for plaintiff characteristics included
 - Controls for differences in occupation or legal strategy pursued by plaintiff attorney
- “Fixed effects” for bankrupt firms included
 - Controls for differences in the market penetration of their products

Frequency of Product Identification in Interrogatories



Adding Depositions Had Little Effect on the Results

- One might expect additional products to be identified in depositions if fewer products identified in interrogatories
- Although some additional products identified in depositions, increases not associated with bankruptcy

Little Evidence of More Aggressive Questioning in Depositions in Face of Lower Identification Rates

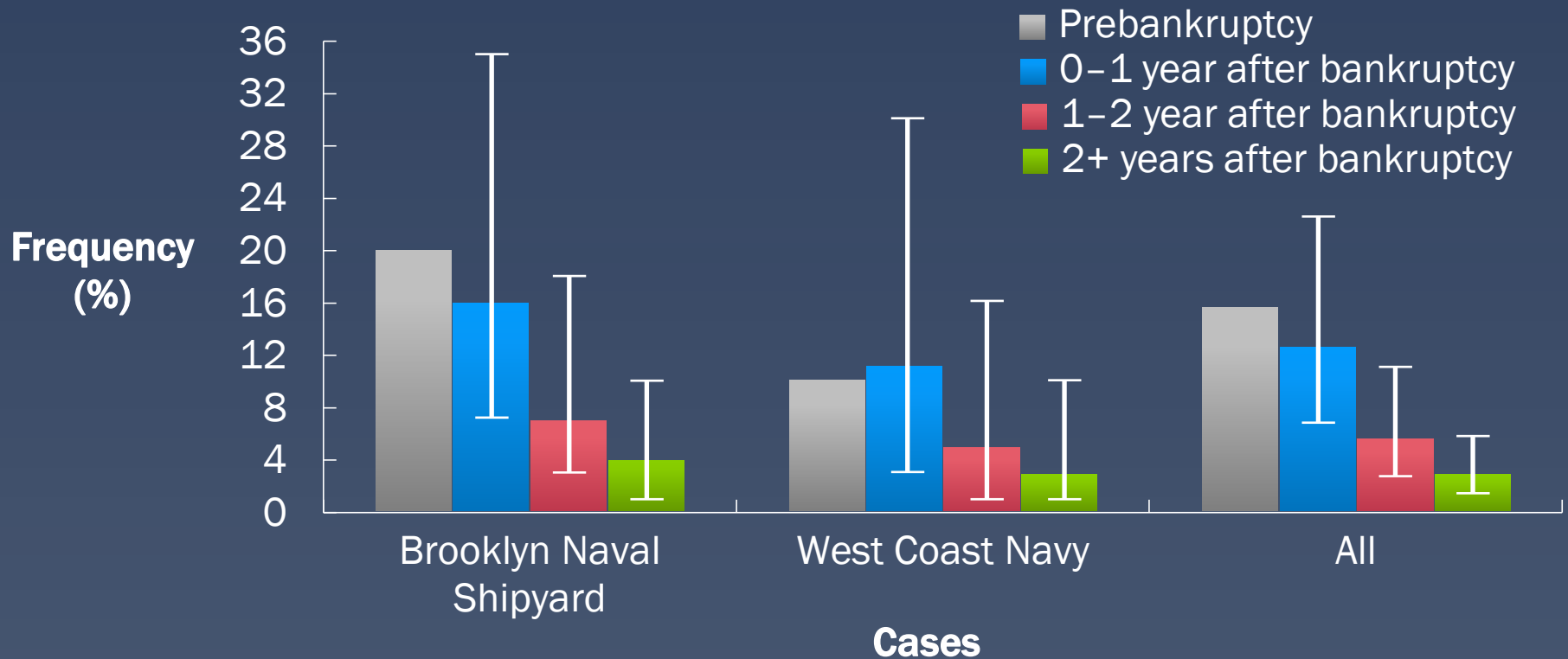
(percentage of case-firm combinations)

	BNS Cases		WCN Cases	
	Case filed pre-bankruptcy	Case filed post-bankruptcy	Case filed pre-bankruptcy	Case filed post-bankruptcy
Exposure affirmed	16	13	13	8
Don't know or unsure	0.6	0	8	3
Exposure denied	0.3	0.6	5	2
Any mention of firm	16	13	19	11

Discussion

- Potential explanations for findings
- Differing perspectives on importance to findings
- Implications for case outcomes

What Could Explain the Gradual Response?



What Could Explain the Gradual Response?

- In contrast to the pattern for interrogatories, bankrupt firms dropped from complaints right away
- Gradual response could be explained by ongoing personnel turnover at major plaintiffs' law firms

Plaintiffs' Attorneys Do Not View These Findings as a Cause for Concern

- Appropriate for plaintiffs to focus on solvent defendants
- Defendants have many options for introducing exposures to products of bankrupt firms
 - All exposures could end up being identified if the case proceeds to verdict

Defendants Believe Falling Identification Rates Are a Major Concern

- Defendants believe that exposure evidence they introduce is less persuasive than a plaintiffs' acknowledgment of exposure
- Variety of factors discourage defendants from pursuing identification in depositions
- Defendants may be better off paying higher settlements than litigating around missing exposure evidence

Our Previous Research Indicated the Lack of Exposure Information Could Affect Case Outcomes

- Payments by remaining solvent defendants could be higher than they would be if all exposure evidence were developed
- Plaintiff compensation from trust and tort combined may be higher than it would be if all exposure evidence developed
- Outcomes depend on liability regime and court rules

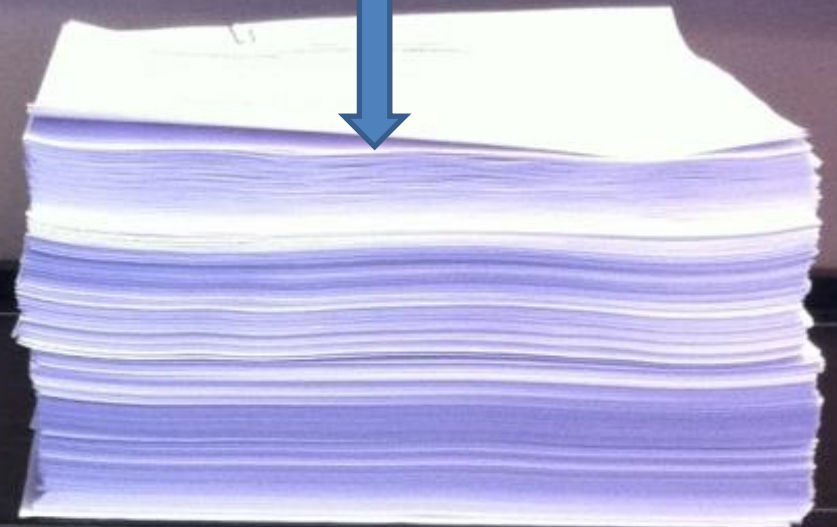
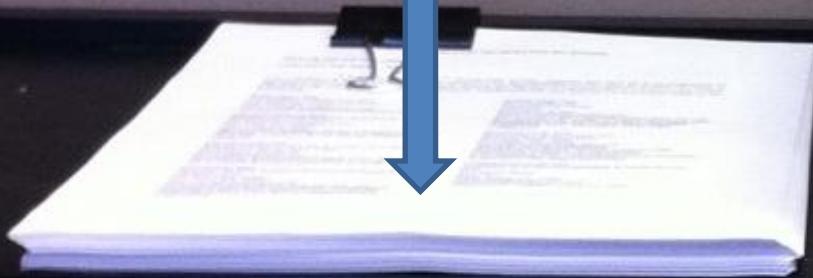
Trust Transparency Strategy

- Know and Understand the Garlock Order and Stay up to Date on Garlock Developments
- Global Utilization of Bankruptcy Authorization
- Demand Available Trust Information
- Inclusion of Bankruptcy Discovery Language in Standing Orders, CMOs and Scheduling Orders
- Push for Additional Rulings Allowing Bankruptcy Discovery
- Cost Sharing of Costs for Collection Among All Defendants in a Case
- Use Trust Value Estimations in Settlement and Verdict Evaluations
- Coordinate Collection and Management of Information Received for Use in Legislative Change

Educating Defense Counsel On Available Trust Information

What Plaintiff's
Counsel Produced
(Information on 8
trust claims)

Collected with an
Authorization
Directly from the
Trusts



Manville Claim Produced By Plaintiff's Counsel

Claim: 1549686

Page 1 of 1 Exposure Information for Claimant: 1184707

Page 1 of 1

Claim

Viewable:

Claimant Information

Claimant ID: 1184707
Name: Philip Thibodeau
SSN: [REDACTED]
Date of Birth: 09/13/1943

Claim Information

Claim ID: 1549686
Trust: Manville
Claim Status: Settled Paid
SOE: Yes

** Alleged Disease: L8

If injured party is DECEASED

Date of Death: _____ Was death asbestos related? yes no
Last state of residence of injured party: _____

Representative

Lawfirm Information

Levy, Phillips & Konigsberg, LLP

*Attorney: Audrey Raphael
Contact: James Plastiras
Phone: (212) 6056200
Facsimile: (212) 6056290
E-Mail: jplastiras@lpklaw.com

Co-Counsel Information

Law Firm:
Attorney:
Phone:
Facsimile:
E-Mail:

Exposure Information

Describe employment period during which the injured party was exposed:

*From: 01/1985 *Formatted Example: MM/YYYY*
*To: 12/1989 *Formatted Example: MM/YYYY*

*Occupation:
33 - Seaman - engine room only

*Industry:

110 - Maritime

*Exposure Type:

iii - Altered, repaired or worked w/ an asbestos product

Country:

UNITED STATES

Exposure Site:

No approved sites found

Cancel

Save

Delete Exposure

Clear

**Bankruptcy Trust Values Assessment Report**

Case Reference: John Smith

Jurisdiction: New York

Disease/Date of Diagnosis: Mesothelioma / May 2013

KNOWN TRUST CLAIMS**TABLE 1***Includes claims identified from discovery and trust proof of claim forms provided.**The applicable payment percentage is determined by the filing date noted on claim forms.**For individual review claims, payment amounts are based on the disease level, the applicable payment percentage, and the average claim value (if no average claim value, the scheduled claim value is applied).**For expedited review claims, payment amounts are based on the disease level, the applicable payment percentage, and the scheduled claim value.*

Trust Name	Claim Type	Scheduled Claim Value	Average Claim Value	Payment Percentage	Payment Amount	Payment Range
ASARCO	Expedited	\$170,000.00	\$280,000.00	22.00%	\$37,400.00	\$37,400 - \$198,000
Babcock & Wilcox	Individual	\$80,000.00	\$120,000.00	7.50%	\$8,000.00	\$8,750 - \$30,000
Combustion Engineering	Individual	\$75,000.00	\$95,000.00	33.00%	\$31,350.00	\$24,750 - \$132,000
DII Industries -- Halliburton Claims	Individual	\$57,200.00	\$76,400.00	35.60%	\$27,198.40	\$20,363.20 - \$91,136
DII Industries -- Harbison-Walker Claims	Individual	\$136,500.00	\$182,000.00	35.60%	\$84,792.00	\$48,504 - \$217,160
H.K. Porter	Individual	\$20,000.00	N/A	4.00%	\$800.00	\$800 - \$1,600
Manville Trust (JM)	Matrix	\$350,000.00	N/A	7.50%	\$26,250.00	\$26,250 - \$56,250
National Gypsum (NGC)	Individual	\$22,500.00	\$45,000.00	18.00%	\$8,100.00	\$4,050 - \$8,100
Owens Corning	Individual	\$215,000.00	\$270,000.00	8.80%	\$23,760.00	\$18,920 - \$57,200
T. H. Agriculture and Nutrition, L.L.C.	Individual	\$150,000.00	\$238,000.00	30.00%	\$71,400.00	\$45,000 - \$270,000
United States Gypsum (USG)	Individual	\$155,000.00	\$225,000.00	20.00%	\$45,000.00	\$31,000 - \$90,000
Total Payment Amount for Known Claims					\$345,050.40	

Detailed Worksite-Trust Analysis

Total Worksite Matches = 9 Worksites
 Number of Trusts Identified = 7 Trusts

Confident Match = Match Type "C"
 Potential Match = Match Type "P"

1. Bethlehem Steel Shipyard 1958-1961 (laborer/helper) Brooklyn, NY

Trust Name	Worksite	City	State	Approved Exposure Years	Site Code	Match Type
APG Asbestos Trust	BETHLEHEM STEEL	NEW YORK	NY	05/12/1959 – 12/31/1982	7923	P
DII Industries, LLC Asbestos Personal Injury Trust - Halliburton Claims	Bethlehem Steel Corporation	Brooklyn	NY	01/01/1945 - 12/31/1982	3100456	C
Eagle-Picher Industries, Inc. Personal Injury Settlement Trust	Bethlehem Steel Shipyard	Brooklyn	NY	No Approved Exposure Years Provided	No Site Code Provided	C
Keene Creditors Trust	Bethlehem Steel Shipyard	Brooklyn	NY	1941 - 1971	No Site Code Provided	C
Owens Corning/Fibreboard Asbestos Personal Injury Trust - Fibreboard Sub-account	Bethlehem Steel Shipyard	Brooklyn	NY	Ending 12/31/1982	10024583	C

2. Unidentified Bowling Alleys Timeframe unknown (mechanic) Brooklyn, NY

Insufficient Information for Search

3. Metropolitan Life Insurance Building 1969-1991 (painter) New York, NY

Trust Name	Worksite	City	State	Approved Exposure Years	Site Code	Match Type
Babcock and Wilcox Asbestos Settlement Trust	METROPOLITAN LIFE INS BUILDING	NEW YORK CITY	NY	08/01/1902 - 12/31/1982	33026852	C
Babcock and Wilcox Asbestos Settlement Trust	METROPOLITAN LIFE INS. BUIDLING	NEW YORK CITY	NY	08/01/1902 - 12/31/1982	33026854	C
Babcock and Wilcox Asbestos Settlement Trust	METROPOLITAN LIFE INSURANCE COMPANY	NEW YORK CITY	NY	Ending 12/31/1982	33026855	P
Owens Corning / Fibreboard Asbestos Personal Injury Trust - Owens Corning Sub-account	METROPOLITAN LIFE INS. CO.	NEW YORK	NY	Ending 12/31/1982	10014494	P

Bankruptcy Legislative Initiatives

- Georgia (enacted in 2007)
- Ohio (effective March 27, 2013)
- Oklahoma (effective August 22, 2013)
- Wisconsin (effective March 29, 2014)
- West Virginia (effective June 9, 2015)
- Arizona (passed April 9, 2015)
- Texas (passed May 11, 2015)

Court Orders On Bankruptcy Discovery

Case Management Orders	Alabama	Bessemer Cnty.
	California	Los Angeles, Alameda, San Francisco
	Delaware	New Castle Cnty.
	Massachusetts	Middlesex Cnty.
	Michigan	Wayne Cnty.
	Minnesota	Dist. Ct., 2 nd Jud. Dist., Ramsey Cnty.
	Missouri	Cir. Ct., 22 nd Jud. Cir., City of St. Louis
	New Jersey	Middlesex Cnty.
	New York	Sup. Ct, Counties of City of New York
	Ohio	Court of Common Pleas, Cuyahoga Cnty.
	Pennsylvania	Ct. of Com. Pleas of Philadelphia Cnty.
	MDL 875	
	Texas	Harris Cnty. – State MDL
	West Virginia	Cir. Ct., Kanawha Cnty.

Court Orders On Bankruptcy Discovery

<u>California</u>	<i>Seariver Maritime, Inc. v. Super. Ct. of San Francisco</i> , No. A113235, 2006 WL 2105431 (Cal. Ct. App. 2006) <i>Volkswagen of America, Inc. v. Super. Ct. of San Francisco</i> , 139 Cal. App. 4 th 1481 (Cal. Ct. App. 2006) <i>Willis v. Buffalo Pumps, Inc.</i> , No. 3:12-cv-007744-BTM-DHB (S.D. Cal. June 2, 2014)
<u>Illinois</u>	<i>Cardella v. A.W. Chesterton, Inc.</i> , No. 09-L-434 (Ill. Cir. Ct. Madison County Apr. 18, 2011) <i>Skonberg v. Owens-Corning Fiberglas Corp.</i> , 576 N.E.2d 28 (Ill. Ct. App. 1 st Dist. 1991)
<u>Indiana</u>	<i>Casper v. Dow Chem. Co.</i> , No. 49D02-9801-MI-001-295 (Ind. Super. Ct. Marion County Oct. 5, 2005)
<u>Maryland</u>	<i>Scapa Dryer Fabrics, Inc. v. Saville</i> , 16 A.3d 159, 179 (Md. 2011) <i>Nat'l Union Fire Ins. Co. of Pitts., PA v. Porter Hayden Co.</i> , No. CCB-03-3408, 2012 WL 628493 (D. Md. Feb. 24, 2012)
<u>Missouri</u>	<i>Alvey v. 999 Quebec, Inc.</i> , No. 04CV200183 (Mo. Cir. Ct. Jackson County Mar. 19, 2007) <i>Bergstrom v. 84 Lumber</i> , No. 1322-CC09325 (Mo. Cir. Ct. City of St. Louis Aug. 6, 2014) <i>Twisselman v. Borgwarner Morse Tec Inc.</i> , No. 1322-CC01233 (Mo. Cir. Ct. City of St. Louis July 23, 2014)
<u>New Jersey</u>	<i>Szostak v. A-B Elec. Supply Co.</i> , No. L-9151-02 (N.J. Super. Ct. Middlesex County Nov. 15, 2006)
<u>New York</u>	<i>Drabczyk v. Amchem Prods., Inc.</i> , No. 2005/1583 (N.Y. Sup. Ct. Erie County Jan. 18, 2008) <i>Romann v. A.O. Smith</i> , No. 601183/13 (N.Y. Sup. Ct. Nassau County Aug. 20, 2014) <i>Gambetti v. Burns Int'l Servs.</i> , No. 2089-04 (N.Y. Sup. Ct. Rockland County July 22, 2014) <i>Carmody v. Amchem Prods., Inc.</i> , No. 190060/13 (N.Y. Sup. Ct. New York County July 10, 2014)
<u>Pennsylvania</u>	<i>Reed v. Honeywell Int'l, Inc.</i> , 51 A.3d 839 (Pa. 2012)
<u>Rhode Island</u>	<i>Sweredoski v. Alfa Laval, Inc.</i> , C.A. No. PC-2011-1544 (RI Super. Ct. Providence County Jan. 30, 2014)
<u>Texas</u>	Texas MDL Letter Ruling Regarding Bankruptcy Trust Claims, <i>In re: Asbestos Litigation</i> (Jan. 16, 2009)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Product Liability
Litigation (No. VI)

Civil Action No. MDL 875

**SPECIAL BANKRUPTCY TRUST INTERROGATORIES, REQUESTS FOR
PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO
PLAINTIFFS**

INTERROGATORIES

**Standard Bankruptcy Discovery
Sanctioned in MDL 875 and by
various other courts**

Identify every lawyer, including any referring lawyers, or entities that have filed, or intend to file, a lawsuit or claim for compensation against any company, Bankrupt Trust or 524(g) Trust based on Plaintiff's or Plaintiff's Decedent's alleged exposure to

2. Have you filed any claim for compensation with any 524(g) Trust or Bankrupt Entity as a result of your alleged exposure to asbestos?

ANSWER:

3. If the answer to Interrogatory Number 2 is anything other than "No," state whether you have made, filed, or submitted a claim with or against any 524(g) Trust or other Bankrupt Entity seeking compensation for any alleged injury related to Plaintiff's asbestos or silica exposure. For each claim state the following:

- (a) the full identity of each entity and/or 524(g) Trust with or against whom such claim was made or filed, and the date where each such claim was made;
- (b) the name and nature of the entity with which the claim was made;
- (c) any identifying number, such as a docket, file, or petition number, for each claim;
- (d) the amount, if any, paid or agreed to be paid, in compensation for the claim of the plaintiff/decedent;
- (e) the nature of and basis for the claim; and

How Are Plaintiffs & Trusts Responding?

- ❖ **Production of Partial Claims Information**
- ❖ **“No” vs. “I Don’t Know”**
- ❖ **Deferral of claim**
- ❖ **Filing blank “placeholder” claims**
- ❖ **Withdrawal of claims**
- ❖ **Confidentiality provisions**
- ❖ **Objecting to trust production**
- ❖ **Failing to locate information**



Utilizing Bankruptcy Information In Cases

Recent Oregon Case (applying Washington law)

“Complete” bankruptcy trust submissions supported by affidavit produced in discovery

\$3.8 Million Verdict

Court allows “Reasonableness hearing” to determine proper offsets obtained by settling parties and non-parties

Plaintiff ordered to sign authorizations allowing defendants to obtain bankruptcy trust claims files directly from the trusts

Utilizing Bankruptcy Information In Cases

Oregon Case (choice-of-law purposes)

“At the time of Mr. Golik’s diagnosis, the Goliks lived in Dickinson, North Dakota. There is no evidence Mr. Golik lived anywhere else but Washington during the time he was exposed to asbestos...”

Bankruptcy Trust Claim File

12. As the Injured Party ever been a resident of the state of California?
If yes, during what years?
13. As the Injured Party ever been a resident of the state of Minnesota?
If yes, during what years?
14. As the Injured Party ever been a resident of the state of North Dakota?
If yes, during what years?

ASARCO Exposure Identified in Discovery

ASARCO Exposure Identified in Records from Trust

Exposure Site : 1

Start Date (mm/dd/yyyy)	End Date (mm/dd/yyyy)	Occupation	ApprovedSiteID
01/01/1965	12/31/1965		

Site of Exposure (facility, plant or site name)

LONGVIEW FIBRE COMPANY

Industry in which exposure occurred (e.g., shipyard, construction, etc.)

Insulation

Name

Is Secondary Exposure? False

Describe the circumstances of asbestos exposure (Max 1000 Characters)

Exposure Site : 2

Start Date (mm/dd/yyyy)	End Date (mm/dd/yyyy)

Country

United States

If Other, please specify:

Is Other party was exposed

Is Secondary Exposure? False

Describe the circumstances of asbestos exposure (Max 1000 Characters)

Claimant worked at the above site below deck on vessels with a number of other trades such as pipefitters, boilermakers and welders. The conditions were extremely dusty from the work being performed by all the trades. George Watts was a pipefitter who personally installed, removed, and replaced Garlock Gaskets at the shipyard. He also testifies to the Garlock gaskets being ubiquitous in these shipyards.

➤ Request additional offset

➤ Discredit credibility

➤ Move to re-examine ruling

➤ Move to dismiss on public damages

Court Grants New Trial!

➤ Move for sanctions

Trust Transparency Strategy Summary

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Questions for Presenters?



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Asbestos Lawsuits and Bankruptcy Trusts: *Garlock* Updates and the Latest Findings from RAND

Wednesday, November 18, 2015

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