

PRODUCT LIABILITY

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This article presents the recent legislation passed in Iowa, Mississippi and Texas in an attempt to force a full disclosure of a plaintiff's asbestos exposure in asbestos litigation.

What a Tangled Web We Weave When First We Practice to Deceive*: Transparency in Asbestos Trusts

ABOUT THE AUTHORS



Kay Baxter is a partner at Cosmich, Simmons & Brown, PLLC, and manages its recently opened New Orleans, Louisiana office. She is a 1994 graduate of Loyola University's School of Law; and is admitted to practice in Louisiana, Arkansas, Mississippi and Texas. Kay has successfully practiced in many areas of the law, and is a career-long litigator. In recent years she has specialized in toxic tort and environmental law in both state and federal courts. Her litigation practice focuses on the defense of toxic torts, occupational disease and environmental claims alleging personal injury, property damage, as well as issues involving various areas of construction litigation. These matters include individual claims as well as mass torts and class actions. Kay's defense in these areas has encompassed a wide range of industries, including public utilities, shipyards, chemical facilities, refineries, as well as local manufacturing and construction. As a result of her reputation and extensive experience in her field of practice, one of the largest insurance companies in the United States asked Kay to defend the first Chinese Drywall claim accepted for defense. She can be reached at kay@cs-law.com.



Justin Glenn is an associate attorney with Cosmich Simmons & Brown, PLLC and practices in its Jackson office. He attended Delta State University in Cleveland, Mississippi, where he played varsity golf while earning a Bachelors of Business Administration Degree. After college, Justin attended Mississippi College School of Law where he served as an Articles Editor for the Law Review and graduated *Magna Cum Laude*. Justin is licensed to practice in all Mississippi state and federal courts. His litigation practice focuses primarily on Commercial Litigation, Mass and Toxic Tort, and Insurance defense. He can be reached at jglenn@cs-law.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

The Garlock bankruptcy trial was the beginning of the untangling of the web of deception practiced by some plaintiffs and some plaintiffs' firms in asbestos litigation. That trial brought to light a practice that had long been suspected by defendants – that plaintiffs alleging injuries due to exposure to asbestos were not completely honest in their depositions and discovery responses when they either denied recognizing the names of and /or exposure to asbestos containing products that have long since filed for bankruptcy due to the unrelenting onslaught of thousands of asbestos related lawsuits. This practice by plaintiffs and their counsel led to a double recovery by plaintiffs. Claims to established asbestos trusts can result in payouts to plaintiffs of hundreds of thousands of dollars, which the solvent defendants may never know about or receive a credit for. The “outing” of this deceptive practice by some plaintiff firms has lead some states to take action. The following is a discussion of some of the legislation being passed to bring about transparency in asbestos litigation.

Mississippi: “Asbestos Bankruptcy Trust Claims Transparency Act” Effective July 1, 2017.

The overall goal is to require plaintiffs who file asbestos lawsuits to disclose as much information regarding their ability to pursue a claim with a bankruptcy trust as possible. The Act sets out rigorous requirements plaintiff's must meet to continue with their asbestos lawsuit. To encourage disclosure, Mississippi

has enacted the following rules as they relate to bankruptcy trusts.

Once an asbestos lawsuit is filed a plaintiff has thirty (30) days to provide the court and all parties involved with a sworn statement indicating that all asbestos trust claims that can be made have been made. In the sworn statement a plaintiff must include: (1) An investigation of all asbestos trust claims; (2) A list identifying each asbestos trust claim that has been filed by the plaintiff; (3) A list identifying each asbestos trust claim that could be made by the plaintiff, which has not been filed for the sole reason that the expected recovery would be exceeded by the cost of filing the claim; and (4) Whether there has been a request to defer, delay, suspend, toll, withdraw, or otherwise alter the standing of any asbestos trust claim.

If the plaintiffs claim is based on secondary exposure through another individual, the plaintiff must produce all trust materials submitted by the other individual if available. A plaintiff has a continuing duty to supplement trust materials when or if the plaintiff receives additional information. If the plaintiff does not comply with the above requirements the court may dismiss the action altogether. An asbestos action may not be set for trial until at least one-hundred-eighty (180) days after the required disclosures by plaintiff are met. Once they are met, the court must, no less than thirty (30) days prior to trial, enter into the record a document identifying all of plaintiff's asbestos trust claims.

A defendant may file a motion to stay the trial on or before the sixtieth (60) day prior to the trial date or at any other time in which the defendant has a good faith reasonable basis to believe that the Plaintiff and/or the Plaintiff counsel have failed to fully comply with the trust transparency act requirements. In this motion, the defendant must state the trust claims not previously filed and must identify all claims the defendant believes the plaintiff can file. Upon receipt of the motion, the plaintiff has ten (10) days to file the trust claims or provide the court with documentation showing that the cost to file a claim would exceed the recovery. If the court finds merit in the motion to stay it will grant the motion and require the plaintiff to file the trust claim.

As it relates to discovery, a claim of privilege does not apply and a defendant may seek discovery from an asbestos trust. If after the plaintiff obtains a judgment, he or she files an asbestos trust claim the trial court has the authority to reopen the judgment and adjust it by an amount that is just and proper. Any motion filed, must be filed within a reasonable time, but not more than one (1) year after the judgment was entered.

Iowa: "Asbestos Bankruptcy Trust Claims Transparency Act" Effective July 1, 2017.

Like Mississippi, Iowa has enacted legislation that sets out the steps a plaintiff must take once they have filed an asbestos lawsuit. A plaintiff must, within ninety (90) days of filing an asbestos lawsuit make certain disclosures. Similar to Mississippi, a plaintiff must provide

the court and parties with a sworn statement, signed by the plaintiff and plaintiffs' counsel, under penalty of perjury, indicating that an investigation into all applicable asbestos trusts has been made and that all claims to asbestos trusts that could be made on plaintiff's behalf have been made. The plaintiff must provide all parties with all trust claim materials. If plaintiff's exposure is based on exposure through another individual, the plaintiff must provide all trust claim materials submitted by that individual.

The plaintiff has an ongoing duty to supplement materials and information regarding trust claims. An asbestos action shall not be set for trial until at least one-hundred-eighty (180) days after the disclosure requirements are met. A defendant can request a stay of proceedings on or before the sixtieth (60) day before trial or within fifteen (15) days after the defendant obtains information supporting additional trust claims. If the defendant files a motion to stay, the plaintiff has ten (10) days to do one of the following: (1) File the asbestos trust claim; (2) File a written response detailing the reasons there is insufficient evidence to file the claim; or (3) File a written response requesting a determination that the cost to file exceeds anticipated recovery.

If the court finds sufficient grounds for the plaintiff to file a claim with an asbestos trust, the court will stay the proceedings until the plaintiff files the asbestos trust claim. However, if the court determines the cost of filing exceeds the anticipated recovery, the court will stay the asbestos action until the

plaintiff files the appropriate paperwork with the court. An asbestos action shall not be set for trial until at least sixty (60) days after the plaintiff provides the appropriate documentation. As it relates to discovery, a claim of privilege or confidentiality does not apply to trust claim materials. Further, a defendant in an asbestos action may seek discovery from an asbestos trust.

Once a case is set for trial, the court, thirty (30) days prior to trial shall enter into the record a document that identifies every asbestos trust claim made by the plaintiff or on the plaintiff's behalf. A defendant is entitled to a setoff or credit in the amount the plaintiff has been awarded from an asbestos trust. The court may impose sanctions for failing to comply and may reopen a judgment if the plaintiff files a claim with an asbestos trust after it has received an award at trial. A defendant, within a reasonable time, not to exceed one (1) year, may file any motion applicable under the act.

Texas: "Asbestos Trust Claims Act" Effective September 1, 2015.

As Mississippi and Iowa have, Texas has enacted its own trust transparency act. While the end goal of the act is similar it has several slight differences as illustrated below. A plaintiff must make each trust claim no later than one-hundred-fifty (150) days before trial is set to commence or a date provided by the court. Plaintiff may file a motion seeking relief from filing a trust claim if he can show that the expenses involved in filing are reasonably anticipated to exceed recovery. If a plaintiff

makes a trust claim, he or she must provide each party with notice of the claim and any material relating thereto. The notice must: (1) Identify each trust claim made by or on behalf of each exposed person; (2) State the amount of any trust claim payment made; and (3) State the date each trust claim was made.

The notice must be served on all parties not later than one-hundred-twenty (120) days before the trial date or a date provided by the court. If a plaintiff submits a trust claim after one-hundred-fifty (150) days before trial, the claimant must provide all trust claim material to all parties not later than the fifteenth (15) day after the trust claim was made or the date trial commences. An MDL pretrial court cannot remand a case to a trial court unless the claimant has made each trust claim as required, and has served notice of the trust claims and relating material on opposing parties. If a party recovers from an asbestos trust and receives a judgment against a defendant the court may impose sanctions or order a new trial.

A defendant may file a motion to stay the proceedings no later than sixty (60) days before the action is set to commence or fifteen (15) days after the defendant learns of information that could support an additional filing of an asbestos trust claim. The motion must include a list of asbestos trusts not disclosed by the plaintiff, which defendant believes in good faith the plaintiff may make a successful claim towards and any information supporting the additional trust claim.

The plaintiff must respond to the motion to stay no later than the fourteenth (14) day after the date the defendant files the motion. The response must include a statement and proof that the claimant has made a trust claim identified in the defendant's motion. Additionally, he or she must serve the trust claim material on the defendant, or in the alternative, a determination must be made by

the court that the cost of filing a claim would exceed the claimants reasonably anticipated recovery. A motion to stay shall be granted if it was timely filed and the claimant is likely to receive compensation. Trust claim material is presumed to be authentic, relevant, and discoverable and is not covered under a privilege unless a confidentiality agreement exists.

Procedural Similarities and Differences

Procedure	Mississippi Requirements	Iowa Requirements	Texas Requirements
Sworn Statement to Court Upon Filing Lawsuit	30 days	90 days	Not Applicable
Time to Make Each Trust Claim	Not Applicable	Not Applicable	Not later than 150 days before trial is set to commence
Trust Claim Made After Time Allowed	Not Applicable	Not Applicable	Must provide notice of claim within 15 days of making it
Timeliness of Motion to Stay	On or before 60 days before trial or any other time in which a good faith basis exists	60 days before trial or within 15 days of receiving information to make additional trust claims	60 days before trial or within 15 days of receiving information to make additional trust claims
How Long to Respond to Motion to Stay?	Plaintiff has 10 days	Plaintiff has 10 days	Plaintiff has 14 days
When can an Action be set for Trial?	At least 180 days after required disclosures by plaintiff	At least 180 days after required disclosures by plaintiff	Not Applicable
When must Court Enter Document into Record	30 days prior to trial	30 days prior to trial	Not Applicable

Identifying all Claims?			
Notice to Opposing Party of Trust Claim	Not Applicable	Not Applicable	120 days before trial

Conclusion

As illustrated above, the overarching goal and purpose behind each trust transparency act is the same. Each varies in the slightest way. Each aims to deter and prevent plaintiffs from recovering twice for one set of injuries. The successfulness of each act is yet to be determined and the tangled web may never be fully untangled. However, the willingness of the various states to recognize and try to eliminate the deceptive practice is encouraging.

Turn the page to see our first monthly in-house attorney interview. This month features IADC member John Unice.

Each month, we plan to provide our readers with insights from in-house attorneys on various topics. This month, we have spoken with John Unice, Senior Counsel-Litigation & Environmental Law, Intellectual Property & Compliance for Covestro, LLC (formerly Bayer MaterialScience LLC). John graduated from the University of Richmond (B.A.) and University of Pittsburgh (J.D.). He practiced at Jones Day for 10 years and spent a short time at Eckert Seamans, before joining Bayer Corporation's Law Department in 2009. In early 2015, John left Bayer to join Covestro.

Covestro is a world-leading supplier of high-tech polymer materials, which are used in a variety of areas including the automotive, construction, leisure, and electronics industries. Covestro is an international corporation, and John deals with international issues on a daily basis. What follows summarizes some of the issues we discussed.

John was asked to describe what he viewed as important developments or trends in litigation. He mentioned several "hot buttons" that outside counsel should be prepared to address in litigation:

1. The 2015 amendments to the Federal Rules of Civil Procedure related to discovery. Although the rules now seem to focus more (and rightfully) on proportionality, how are the Courts applying the "proportionality" language? Will it make a difference to in-house counsel's pre-amendment litigation hold practices? Staying apprised of decisions interpreting

these changes will be important to developing appropriate hold policies for a company.

2. Privilege issues in global litigation are a major issue for an international corporation. There are many variations in laws, which impact how a company runs its business and how advice is to be given. Having a good understanding of privilege issues is critical to international operation.
3. Along with privilege issues, data privacy is a serious issue. There are variations in international laws and some laws provide greater protection than others. This has a practical impact on providing advice such as, where should the server be physically located? What types of data should be stored on the server? Add in the recent changes to the European Union's "safe harbor" provision, and the complexity and uncertainty have only increased.
4. Finally, legal fees are always an issue, and despite all the talk about alternative fee arrangements, it's often rare for an outside firm to provide a proposal including an alternative fee. Be brave! Include this in your proposal.

Additionally, John was asked what we should know as outside counsel that would better assist him in his role. John advised that expectation management is extremely important to gaining the trust of senior corporate leadership. As an in-house attorney, there are different stakeholders,



with varying needs and perspectives, that the in-house attorney reports to – these potentially include the Board, President, CFO, insurance colleagues, and others. Many times, one or more of these stakeholders needs to sign off on litigation strategy, including settlement. To those ends, having a timely and honest assessment about the case is critical. It isn't always easy to get the requisite authority or other necessary buy-in from management, so frank advice and timeliness are important.

Thank you, John for your guidance!

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