

Asbestos

Raising the Bar in Asbestos Litigation

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and Madeline Kuluz, J.D. Candidate 2018*

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COLUMNS

July 2017 • Vol. 17, No. 7

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HarrisMartin's *COLUMNS-Asbestos* is published monthly by HarrisMartin Publishing LLC, 30 Washington Ave., Ste. D-3 Haddonfield, NJ 08033
\$975 print & online annual subscription
\$595 print & online 6-month subscription

Questions or subscription requests can be directed to service@harrismartin.com or call (610) 647-5500.

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

A Commentary by Kay Baxter, Esq., Justin Glenn, Esq. & Madeline Kuluz, J.D. Candidate 2018

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What A Tangled Web We Weave When First We Practice to Deceive¹: *Transparency in Asbestos Trusts*

A Commentary by Kay Baxter, Esq., Justin Glenn, Esq. & Madeline Kuluz, J.D. Candidate 2018
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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 defendants had long suspected – that asbestos plaintiffs were not completely honest in their depositions and discovery responses when they denied recognizing the names of companies that have long since filed for bankruptcy under the unrelenting onslaught of thousands of asbestos related lawsuits. This practice by plaintiffs and their counsel lead to a double recovery by the plaintiffs as claims submitted to established asbestos trusts can result in payouts to plaintiffs of hundreds of thousands of dollars, which solvent defendants may never know about, or receive a credit for. The “outing” of this deceptive practice by some plaintiff firms has led some states to take action. The following is a discussion of some of the legislation, recently passed with the goal of bringing transparency to asbestos litigation.

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

The overall goal of the Mississippi legislation 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 plaintiffs 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 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 plaintiff's 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 180 days after the required disclosures by the plaintiff are met. Once the requirements have been met, the court must, no less than 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 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's counsel – has failed to fully comply with the act's 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 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

the plaintiff files an asbestos trust claim after obtaining a judgment, 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 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 plaintiffs must take once they have filed an asbestos lawsuit. A plaintiff must, within 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 180 days after the disclosure requirements are met. A defendant can request a stay of proceedings on or before the sixtieth day before trial or within 15 days after the defendant obtains information supporting additional trust claims. If the defendant files a motion to stay, the plaintiff has 10 days to do one of the following: (1) file the asbestos trust claim; (2) file a written response detailing why 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.

“This practice by plaintiffs and their counsel lead to a double recovery by the plaintiffs as claims submitted to established asbestos trusts can result in payouts to plaintiffs of hundreds of thousands of dollars, which solvent defendants may never know about, or receive a credit for.”

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 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 – 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 year, may file any motion applicable under the Act.

***Texas: “Asbestos Trust Claims Act”
Effective Sept. 1, 2015.***

Two years prior to the enactment of legislation in Mississippi and Iowa, Texas passed 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 150 days before trial is set to commence or by a date provided by the court. The plaintiff may file a motion seeking relief from filing a trust claim if he or she 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 120 days before the trial date or a date provided by the court. If a plaintiff submits a trust claim after 150

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days before trial, the claimant must provide all trust claim materials to all parties no later than the fifteenth 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 60 days before the action is set to commence or 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, to which defen-

dant 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 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

Procedure	Mississippi Requirements	Iowa Requirements	Texas Requirements	North Dakota Requirements
Sworn Statement to Court Upon Filing Lawsuit	30 days	90 days	Not Applicable	30 days
Time to Make Each Trust Claim	Not Applicable	Not Applicable	Not later than 150 days before trial is set to commence	30 days
Trust Claim Made After Time Allowed	Not Applicable	Not Applicable	Must provide notice of claim within 15 days of making it	Must provide notice of additional claims within 30 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	75 days before trial or within 15 days of receiving information to make additional trust
How Long to Respond to Motion to Stay?	Plaintiff has 10 days	Plaintiff has 10 days	Plaintiff has 14 days	Plaintiff has 10 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	At least 180 days after required disclosures by plaintiff
When Must Court Enter Document into Record Identifying all Claims?	30 days prior to trial	30 days prior to trial	Not Applicable	30 days prior to trial
Notice to Opposing Party of Trust Claim	Not Applicable	Not Applicable	120 days before trial	Not Applicable

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 claimant’s 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.

North Dakota: “Asbestos Claims Transparency Act” Effective April 14, 2017

North Dakota’s new legislation was enacted with the overarching goal of requiring plaintiffs to engage in full dis-

closure of asbestos bankruptcy trust claims. This Act mandates strict requirements and procedural barriers that plaintiffs must cross to file a true and equitable asbestos exposure claim.

For a plaintiff in North Dakota to bring an asbestos lawsuit, the plaintiff must, within 30 days of filing, provide the court and all parties involved with a sworn statement signed by both the

Utah Requirements	West Virginia Requirements	Wisconsin Requirements	Ohio Requirements	Arizona Requirements
120 days prior to the date set for trial	120 days prior to the date set for trial	45 days	30 days	45 days
90 days	90 days	60 days	30 days	60 days
Must be supplemented no later than 30 days before trial	Must be supplemented no later than 90 days after the additional trust claim	30 days	30 days	30 days
Not less than 90 days before trial	Not less than 90 days before trial	The court will determine a deadline that gives adequate opportunities to investigate	75 days before trial with notice to the claimant	The court will determine a deadline that gives adequate opportunities to investigate
Plaintiff has 10 days	Plaintiff has 10 days	Court determined	Plaintiff has 14 days	Court determined
Not Applicable	Not Applicable	Not Applicable	Not Applicable	At least 180 days after required disclosures by plaintiff
Not applicable	30 days prior to trial	30 days prior to trial	30 days prior to trial	30 days prior to trial
Not applicable	Not Applicable	Court Determined	75 days before trial	Not Applicable

plaintiff and plaintiff's counsel indicating a thorough investigation into all possible asbestos claims. This sworn statement must indicate whether a request was made to defer, delay, suspend, or toll any asbestos trust claim as well as provide the disposition of each asbestos trust claim.

Within the first 30 days, the plaintiff must supplement any information and materials related to secondary exposure; this includes any material from law firms connected to the plaintiff in relation to the plaintiff's exposure to asbestos. Further, the plaintiff must produce all available trust claims materials submitted to any asbestos trusts by other individuals if the plaintiff's asbestos trust claim is based on exposure to asbestos through those individuals. Failure to comply may result in a dismissal of the asbestos action. Additionally, an asbestos action may not proceed to trial until at least 180 days after the requirements have been met by the parties.

Defendants can also offer alternative information in asbestos litigation. A defendant may file a motion requesting to stay the trial on, or before, the seventy-fifth day prior to the trial date or the fifteenth day after the defendant first obtains information supporting additional trust claims by the plaintiff. The defendant is required to produce or describe documentation the defendant possesses or was made aware of in support of the motion for stay. Before the filing of the motion, the defendant is, however, required to confer with the plaintiff to discuss any suspected additional trust claim. If the court finds merit in the defendant's motion, it will be granted and the plaintiff must file the trust claim.

However, plaintiffs and/or plaintiff's counsel have 10 days to file the trust claims or provide the court with a written response stating why the defendant's motion does not have sufficient evidence to support any additional claims. The plaintiff can also file a written response

with the court requesting a determination that the cost to file the asbestos trust claims exceed the plaintiff's reasonably anticipated recovery. Even if the court finds the cost of submitting an asbestos trust claim exceeds the plaintiff's reasonably anticipated recovery, the court will stay the asbestos action until the plaintiff files with the court, a verified statement of his or her history of exposure, usage, or other asbestos connection to the asbestos trust.

Utah: "Asbestos Bankruptcy Trust Claims Transparency Act" Effective May 10, 2016

Utah is another state to mandate and enact legislation promoting the disclosure and prevention of fraudulent claims. In the Beehive State, plaintiffs can bring an asbestos action, but only after a sworn statement indicating all asbestos trust claims that can be made, have been made. The plaintiff has up to 120 days prior to the date set for trial to file the statement including (1) identifying all asbestos trust claims that have been filed by the plaintiff or by anyone on the plaintiff's behalf and (2) the plaintiff must include all names, addresses and contact information for the asbestos trust as well as the amount claimed or to be claimed by the plaintiff.

If supplementation of claims is necessary, the plaintiff has 90 days to include any additional asbestos claim to the original suit. The defendants are, however, allotted no less than 90 days before trial to file a motion to stay the proceedings. Before a motion to stay is granted, the defendant must prove merit in the claim by producing and describing documentation in support of the motion, as well as meet and confer with the plaintiff to discuss the additional asbestos claim. After these steps are conducted the defendant can move the court for an order to require the plaintiff to file the additional asbestos trust claim. If a motion to stay is filed, the plaintiff has 10 days to respond

to the motion to stay. The plaintiff can respond by (1) filing the asbestos trust claim (2) filing a written response with the court spelling out the insufficiency of the defendant's claim, or (3) filing a written response spelling out the defendant's motion exceeds recovery originally anticipated. The court will order the plaintiff to file the asbestos trust claim and provide all parties with the trust claims materials no later than 30 days before trial.

One of the most important aspects of asbestos litigation is discovery and, in Utah, the defendant may seek discovery from an asbestos trust and the plaintiff is unable to claim privilege or confidentiality with the intention of barring discovery. Further, the plaintiff must provide consent and permission to the asbestos trust, allowing any relevant information to pass to the defendant.

West Virginia: "Asbestos Bankruptcy Trust Claims Transparency Act" Effective June 2015

In June 2015, West Virginia enacted bankruptcy trust transparency litigation. The legislature cited the U.S. Supreme Court opinion *Amchem Prods., Inc. v. Windsor*, where the court described asbestos litigation as a *crisis*.² The West Virginia legislature appointed the West Virginia Mass Litigation Panel, which created a new order in an attempt to coordinate the path to recovery for Plaintiffs under the civil court system and the asbestos bankruptcy trust claim system to actively prevent potential fraud.

The panel introduced multiple requirements for plaintiffs, the first of which is a common theme in bankruptcy trust transparency claims legislation; the plaintiff must provide all parties with a sworn statement no later than 120 days before the date set for any asbestos trial action. This sworn statement must include the name, contact information for the

“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.”

asbestos trust, the amount claimed or to be claimed by the plaintiff, the date the claim was filed, the disposition of the claim, and if there has been a request to defer, delay, suspend or toll the claim.

In West Virginia, if the defendant identifies an additional or alternative asbestos trust not previously claimed by the plaintiff, the defendant has 90 days to meet and confer with the plaintiff to discuss the claim. The defendant must also provide documentary proof and/or support to substantiate their motion for stay. The plaintiff has 10 days after receiving the motion to either file the asbestos trust claim, or to file a written response with the court setting forth the insufficiency of the claim. No later than 30 days before trial, the court must enter a trust claims document into the record identifying each claim the plaintiff has made against an asbestos trust.

As related to discovery, all trust claims materials and trust governance documents are relevant, authentic and admissible in West Virginia asbestos cases. A defendant in an asbestos action may seek discovery from an asbestos trust and the plaintiff cannot claim privilege or confidentiality as a bar.

Wisconsin: “2013 Wisconsin Act 154” Effective March 29, 2014

In Wisconsin, within 45 days of commencing a personal injury claim the plaintiff must provide a sworn statement identifying each personal injury claim he

or she filed or reasonably anticipated filing against an asbestos trust. The statements must include the name, address, and contact information of the asbestos trust as well as the amount claimed by the plaintiff, the date the plaintiff filed the claim, the disposition of the claim, and if there has been a request to defer, delay, suspend or toll the claim against the asbestos trust.

The plaintiff has 60 days to provide information for each personal injury claim. This information includes (1) any claim filed against an asbestos trust, (2) a copy of the final executed proof of claim, (3) all trust documents, including trust claim materials, and (4) trust governance documents or any documents reflecting the status of the claim. The plaintiff has 30 days after the additional claim is filed to supplement the information and materials they provided.

A motion to stay the proceedings can be filed by the defendant after the defendant identifies an asbestos trust not originally named by the plaintiff, which the defendant reasonably believes that the plaintiff should have included. After the defendant provides the court with the necessary proof and documentation in support of the motion, the court will decide whether the claim is meritorious. There is no set deadline for the motion for stay because the courts in Wisconsin will determine and establish a deadline for the motion that ensures both parties an adequate opportunity to investigate the defendant’s claims. If the court orders the plaintiff to file the defendant’s suspected

claim with the asbestos trust, the court will stay the immediate action until the plaintiff affirms he is filing the claim against the asbestos trust. The court must enter a trust claims document identifying each injury claim made against the asbestos trust into the record no less than 30 days before trial.

Like most states that have adopted bankruptcy trust transparency legislation, Wisconsin allows a defendant in a personal injury claim to seek discovery against an asbestos trust identified by the plaintiff in the sworn statement or discovered by the defendant during the investigation of original claims. The plaintiff cannot claim privilege or confidentiality to bar any discovery, and the plaintiff shall provide consent and permission required by the asbestos trust to release any information sought by the defendant, to the defendant.

Ohio: “Asbestos Claim Transparency Act” Effective March 27, 2013

After similar bankruptcy trust transparency legislation was deemed unconstitutional in 2006, the Ohio legislature modified four sections of the current Revised Code requiring asbestos tort action plaintiffs to make certain disclosures and submit additional information to asbestos trust entities before the plaintiff is ever heard by a court of law and compensated.

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Within the first 30 days of the commencement of the asbestos case and discovery and in addition to all required documentation and disclosures, the plaintiff must provide a sworn statement, bound by penalty and perjury, identifying all existing asbestos trust claims made by or on behalf of the claimant and all trust claims materials related to each identified asbestos trust claim. The sworn statement must also disclose the date on which each asbestos claim against the relevant asbestos trust was made and whether any request for deferral, delay, suspension, or tolling of the asbestos trust claims process has been submitted.

The plaintiff must provide any amendment to the sworn statement within 30 days of filing an additional asbestos trust claim, or submitting any additional asbestos trust claims to an asbestos trust. All amendments are bound to the same standards as the original sworn statement and the statement must be supplemented accordingly. In Ohio, a defendant who discovers or suspects an additional trust claim not mentioned by the plaintiff has up to 75 days before the trial to file a motion to stay the proceedings with the court, but this can only occur after the plaintiff is notified. The defendant's motion to stay the proceedings must set forth all credible evidence and be made in good faith.

If the claimant produces an additional asbestos trust claim, the defendant may file a motion to stay the proceedings within seven days of receiving the additional asbestos exposure information. However, the defendant can also file a motion to stay the proceedings if the plaintiff neglected to include a potential asbestos trust in the original filing. The plaintiff has 14 days to answer the defendant's motion by either, (1) submitting the trusts identified and file accordingly, (2) filing an order modifying the motion if insufficient information is present, or (3) filing an order that the proceedings exceed the claimant's reasonably anticipated recovery from the asbestos trust claim. After all relevant claims are included, the court must enter the document identifying all claims into the court record no later than 30 days before trial is set to begin.



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In reference to discoverable information, the Ohio legislature classified "noncancer asbestos trust claims" and "cancer asbestos trust claims" differently. Noncancer asbestos trust claims are only subject to discovery disclosure under the Revised Code if they are related to the current asbestos tort action in which the defendant seeks discovery. If the plaintiff previously filed a noncancer asbestos trust claim subject to the subsequent asbestos tort action in question, the information is discoverable to the defendant. The plaintiff cannot claim confidentiality or privilege regarding any asbestos trust claim because the information is automatically presumed to be relevant, authentic and admissible.

Arizona: "Asbestos Trust Claim Disclosure and Evidence Statute" Effective July 3, 2015

In Arizona, any action commenced involving a personal injury claim must be accompanied with a sworn statement filed within 45 days of the defendant's

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answer to the complaint. The sworn statement must identify each personal injury claim that the plaintiff has filed or anticipates to file against an asbestos trust. The statement must be thorough and include the name, address and contact information for the asbestos trust in question, the amount claimed by the plaintiff, the date the plaintiff filed the claim, the disposition of the claim, and whether there has been a request to defer, delay, suspend or toll the claim against the asbestos trust.

After the defendant answers the complaint, the plaintiffs are afforded 60 days to make each trust claim. The plaintiff must provide (1) a copy of the final executed proof of claim, (2) all trust documents, (3) trust governance documents, (4) any documents reflecting the status of the claim, (5) and all documents relating to the settlement of the claim. The plaintiff must also include the name, address, and contact information for all asbestos trusts and the amount that the plaintiff anticipates claiming. Additionally, the plaintiff must supplement the information within 30 days of filing an additional claim. Further, the court will direct the parties to enter a trust claims document into the record identifying each personal injury claim brought by the plaintiff against an asbestos trust no later than 30 days before trial is set to commence.

If the defendant identifies an asbestos trust not named by the plaintiff that the defendant reasonably believes the plaintiff should file, the defendant can file a motion to stay the proceedings. The court, after reviewing all documentation in support of the motion will determine whether the plaintiff should file a claim against the additional asbestos trust. The defendant has a responsibility to produce and describe all evidence required to file an additional valid claim with the asbestos trust and the amount of money the asbestos trust should pay. Further, the court will determine a deadline for

filing a motion under this section and any deadline that is afforded must give the plaintiff an adequate opportunity to investigate any claims brought by the defendant.

To the extent permitted in Arizona, trust materials and trust governance documents are admissible into evidence and the plaintiff may not claim privilege or confidentiality to bar discovery against an asbestos trust. An action for trial can be set no later than 180 days after all required information has been disclosed by the plaintiff.

The Failure to Act and The FACT Act of 2017

Although some states have opted out of bankruptcy trust transparency legislation and some states have created their own, the federal government is actively pursuing another form of regulation. One example is the Furthering Asbestos Claims Transparency (FACT) Act of 2017. The FACT Act of 2017 was sponsored by Congressman Blake Farenthold (R-Texas), but the Act has long been supported by the asbestos industry and the U.S. Chamber of Commerce. The proponents of the Act argue without it, claimants can take advantage of the justice system because some can claim their injury, not once, but twice in a court of law. Those in opposition of the Act argue that the bill deters and inhibits asbestos plaintiffs from bringing a claim and recovering damages resulting from asbestos exposure. Further, those against the enactment argue the Act could lead to multiple violations of privacy due to a requirement of openly disclosing personal information on a public website. On Feb. 17, 2017, the FACT Act passed the House Judiciary Committee by a vote of 19 to 11. The FACT Act is currently awaiting a full vote by the House of Representatives.

Conclusion

As illustrated above, the overarching goal and purpose behind each trust transparency act is the same. While each varies in the slightest way, they aim 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.

Footnotes

¹ Walter Scott, Marmion (1513).

² *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 589 (1997).