

## CIVIL JUSTICE RESPONSE

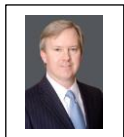
FEBRUARY 2018 – SECOND EDITION

### IN THIS ISSUE

*This article discusses legislation enacted in Texas in 2015 to bring about greater transparency between claims of asbestos exposure made by plaintiffs in asbestos personal injury lawsuits and in filings with trusts set up by former asbestos producers in bankruptcy proceedings. The legislation addressed inconsistencies regarding plaintiffs' claims of asbestos exposure in the tort and trust systems. The experience over the last two years is that concerns about undue burdens on plaintiffs and delays that were raised by opponents during debate on the legislation have not happened. The law is essentially noncontroversial today in Texas.*

## Two Years of Asbestos Trust Transparency in Texas

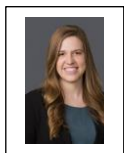
### ABOUT THE AUTHORS



**Edward Slaughter** is Partner-in-Charge of the Dallas office of Hawkins Parnell Thackston & Young LLP. He has been a trial lawyer for more than twenty years. Ed has represented corporations and individuals in high risk litigation including business litigation, product liability, toxic exposure cases and employer practices liability claims. He received his J.D. from the University of Arkansas School of Law in 1994 and B.A. from the University of Memphis in 1991. He can be reached at [eslaughter@hptylaw.com](mailto:eslaughter@hptylaw.com).



**Evelyn Fletcher Davis** is a Senior Partner in the Atlanta office of Hawkins Parnell Thackston & Young LLP. As one of the nation's leading toxic tort and product liability defense attorneys, Evelyn has tried, managed, and settled thousands of cases in complex toxic tort litigation. She has litigated cases involving asbestos, silica, mold, benzene and other chemicals, in addition to transportation and general product liability cases. She received her J.D. from the Florida State University College of Law in 1998 and B.A. from the University of California, Santa Barbara in 1994. Evelyn has been an IADC member since 2008. She can be reached at [edavis@hptylaw.com](mailto:edavis@hptylaw.com).



**Alexa Mizer** is an associate in the Dallas office of Hawkins Parnell Thackston & Young LLP. She defends corporations against complex product liability, toxic tort, and environmental litigation involving catastrophic injury, premises liability, and property damage. She received her J.D. from the University of Arkansas School of Law in 2016 and B.A. from the University of Arkansas in 2013. She can be reached at [amizer@hptylaw.com](mailto:amizer@hptylaw.com).

### ABOUT THE COMMITTEE

The Civil Justice Response Committee works to establish a nationwide information network that promotes the rapid dissemination of information about legislation, rulemaking, judicial selection, and key elections likely to affect civil litigation and liability laws, in order to give IADC members and their clients timely opportunities to participate in these processes armed with information that can affect the outcome of the debate or controversy. If prompt, concerted action is taken. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



**Phil Goldberg**  
**Vice Chair of Publications**  
Shook, Hardy & Bacon  
[pgoldberg@shb.com](mailto:pgoldberg@shb.com)

*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.*

In 2015, Texas enacted legislation to improve fairness and transparency in asbestos personal injury lawsuits, adding to a growing list that now includes a dozen states. (Tex. Civ. Prac. & Rem. Code Ann. §§ 90.051-.058). The Texas law was prompted by numerous judicial proceedings across the United States that exposed widespread manipulation of the dual compensation available to claimants through both bankruptcy trust claims and tort litigation.

For example, in a widely reported case involving gasket and packing manufacturer Garlock Sealing Technologies, a federal bankruptcy judge noted that after the major asbestos producers exited the tort system through bankruptcy, plaintiff lawyers began to focus their attention on formerly remote but still solvent defendants such as Garlock. In this new environment, the court said, Garlock's "participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers" and that "it was a regular practice by many plaintiffs' firms to delay filing trust claims for their clients so that the remaining tort system defendants would not have that information." (*In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 82, 84 (W.D.N.C. Bankr. 2014)). The case highlighted "the ease with which a plaintiff can use two different inconsistent fact patterns to receive maximum recovery from the trusts while seeking compensation for injuries against

solvent companies in tort litigation." (Peggy L. Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims*, 88 Tul. L. Rev. 1185, 1186 (2014)).

Since the enactment of the Texas legislation, attorneys representing defendants in asbestos-related personal injury lawsuits in Texas have experienced a significantly less difficult process in obtaining trust claim information from plaintiffs. This has allowed both plaintiffs and defendants to better understand and allocate fault related to plaintiffs' exposure to asbestos.

### **Emergence of the Asbestos Trust System**

The "elephantine mass" (*Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)) of asbestos-related personal injury lawsuits filed throughout the United States over the course of several decades caused most of the primary historical defendants – those most culpable for plaintiff injuries - to go bankrupt in the early 2000's. As part of their reorganization in bankruptcy, trusts were established to answer for the companies' tort liabilities. These trusts presently contain an estimated \$25 billion and operate independent of the tort system. Individuals suffering from asbestos-related injuries typically meet the necessary exposure and medical criteria to file multiple trust claims.

For instance, in *Garlock*, a typical mesothelioma plaintiff's recovery was estimated to be \$1-1.5 million, "including an average of \$560,000 in tort recoveries and about \$600,000 from 22 trusts." (504 B.R. at 96). "[I]t is much easier to collect against a bankruptcy trust than a solvent defendant." (Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 *The Advoc.* (Tex.) 80, 80 (2007)). "[B]ankruptcy trusts have emerged to give asbestos firms an almost automatic guarantee of settlements for their clients." (*Id.* at 82).

Additionally, plaintiffs are allowed to file personal injury lawsuits against solvent defendants based on the same asbestos-related injuries for which they seek compensation from asbestos trusts. As the traditional defendants became insolvent, plaintiffs sought other, more peripheral and less-culpable defendants to hold liable for asbestos-related injuries through the judicial system. The disconnect between the trust and tort recovery systems has led to inconsistent exposure statements by plaintiffs, suppression of evidence of exposure to products belonging to bankrupt companies in civil actions, and manipulation of the timing of filing trust claims to maximize their recovery from the civil action and the trust system.

### **Texas Asbestos Trust Transparency Law**

Texas responded to these issues by enacting Civil Practice and Remedies Code §§ 90.051-.058. This law requires a plaintiff who has filed an action to recover damages based on an asbestos-related injury to file trust claims against each asbestos trust that may owe compensation or damages for the asbestos-related injury. The law requires these trust claims to be filed at least 150 days before trial. Notice of each claim, along with respective trust claim materials, shall be served on each party at least 120 days before trial. The notice must state the date each claim was made, the amount of payment made, and whether a request for individual or enhanced review or for a deferral, delay, suspension, or tolling of the claim was submitted. Plaintiffs have a duty to supplement the notice and trust claim materials within 15 days if they discover any incompleteness or inaccuracy.

The law also states that the centralized court that handles pre-trial matters for Texas state court asbestos cases may not remand an action to a trial court, and a trial court may not commence trial in the action, unless the plaintiff has made each trust claim and served the notice of and trust claim material relating to those trust claims. If a defendant has a good faith belief that a plaintiff could make an additional successful trust claim, the defendant may file a motion requesting a stay of the proceedings that includes information supporting the additional trust

claim. The court must grant the motion if the court determines the motion is timely filed and the claimant is likely to receive compensation from a trust identified in the motion. If a trial results in a judgment against a defendant for an injury that also resulted in compensation from a trust that was undisclosed to the defendant, a trial court may, on motion, impose appropriate sanctions.

Prior to the enactment of the legislation during the public hearing held by the legislature, some raised concerns that the requirements placed on plaintiffs by this legislation would cause significant delays in litigation, essentially denying plaintiffs' their day in court. For example, Bryan Blevins, Jr., a partner with asbestos plaintiffs' law firm Provost\*Umphrey in Beaumont, testified that the legislation "would force the plaintiff to file a claim form with a trust and until they do that the court won't allow them to proceed with trial . . . it will prevent dying mesothelioma victims from having their day in court." Since the law's enactment, however, no cases of significant delays have been noted. At a September 2017 panel discussion about Texas asbestos litigation held by the University of North Texas at Dallas College of Law, Charles Siegal, a partner in the Dallas office of asbestos plaintiffs' firm Waters Kraus & Paul, stated, "It doesn't really bother me that the act exists." He added, "The [law] is supposed to correct a perceived flaw in not having to disclose bankruptcy filings at the same time

you file your tort claim—we do that as a matter of course. I think any conscientious plaintiffs' lawyer does it.... I'm ok with [the legislation]." Jeffrey Simon, a founding partner in the Dallas asbestos plaintiffs' firm Simon Greenstone Panatier Bartless, PC, described the impact of the Texas law on the resolution of cases as "largely inconsequential." (<http://www.unsettledthemovie.com/>).

Concerns also were raised during the public hearing that the legislation would require plaintiffs to create evidence for defendants to use against plaintiffs later in litigation. However, the information contained in bankruptcy trust claim forms is information that the plaintiff is required to provide defendants during various periods of litigation. Plaintiffs provide defendants with all known information about the locations where they worked and what products they worked with and around, and the settlement information is provided and used if a defendant loses a trial and is entitled to a set-off based on the amount of settlement compensation already received by the plaintiff.

## Conclusion

The Texas asbestos trust transparency legislation has greatly improved the functionality of the dual compensation systems in Texas. Plaintiffs are now able to obtain recovery of all available compensation from asbestos trusts prior to



the initiation of trial proceedings. This provides plaintiffs with monetary recovery very early in the process. Defendants are now able to better understand a plaintiff's complete exposure history, which allows for more accurate and equitable assessments of fault between all known sources of exposure. This transparency has prompted more amenable settlement agreements between plaintiffs and defendants and has not resulted in any significant delays or disputes. Two years of trust transparency in Texas has ensured a smooth and fair process for both plaintiffs and defendants in asbestos-related personal injury litigation.

## Past Committee Newsletters

Visit the Committee's newsletter archive online at [www.iadclaw.org](http://www.iadclaw.org) to read other articles published by the Committee. Prior articles include:

### FEBRUARY 2018

Finding and Closing Judicial Hellholes  
Molly Jones and Sherman Joyce

### NOVEMBER 2017

State Court Class Actions? Not in Mississippi  
Stephanie M. Rippee

### SEPTEMBER 2016

Transparency Needed as Third-Party Litigation Funding Enters the Mainstream  
Lisa A. Rickard and Mark Behrens

### JUNE 2016

Controversial ABA Alternative Business Structures Proposal Stalls...Again  
Mark Behrens and Christopher Appel

### APRIL 2016

It is Time to Amend Federal Rule of Evidence 702  
David E. Bernstein and Eric G. Lasker

### MARCH 2016

Reptile Mediation? Washington Federal Court Considers, Then Rejects, Proposal to Disadvantage Insurers in Mediation  
Mark Behrens and Cary Silverman

### FEBRUARY 2014

Federal Rules Revisions - Make Your Voice Heard  
J. Mitchell Smith and Pat Long-Weaver