Disconnects and Double-Dipping:
The Case for Asbestos Bankruptcy Trust Transparency in Virginia

DECEMBER 2016
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Executive Summary

Asbestos litigation has existed for over four decades. For years, the litigation was focused on the major asbestos producers until those companies were overwhelmed with asbestos claims and forced into bankruptcy. In 1982, Johns Manville became the first asbestos-producing company to file bankruptcy. A flood of claims over the next 20 years forced dozens of other companies to file Chapter 11 bankruptcies. The companies reorganized under a special asbestos provision of the Bankruptcy Code and are now exempt from asbestos personal injury lawsuits. Trusts approved by bankruptcy courts have been set up to pay people with asbestos-related injuries caused by exposure to their products. Today, billions of dollars are held in these privately managed trusts to pay asbestos claimants.1

Despite the exit of the major asbestos producers from the tort system, asbestos litigation shows no signs of abating. Asbestos personal injury lawsuits continue to be filed by the thousands against still-solvent companies. The targets in the litigation today are often newer defendants or those remote from asbestos production, such as makers of pumps, valves, gaskets and automotive friction (brake) products. These products were associated with a type of fiber (chrysotile) that is far less potent than the highly toxic amphibole asbestos-containing thermal insulation sold by the major asbestos producers—and arguably not potent at all, except in very large doses not present in most occupations.

Thus, asbestos claimants have two separate avenues to obtain recoveries: (1) settlements or judgments in asbestos personal injury lawsuits against still-solvent companies; and (2) payments from asbestos trusts for exposures to the products of the historically most culpable companies. Claimants do not have to pick one or the other; they can obtain money from both systems for the exact same injury.

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1 Connects and Double-Dipping
By manipulating the timing of when trust claims are filed—specifically, by delaying the filing of asbestos trust claims until after an asbestos personal injury case is settled or goes to verdict—plaintiffs can withhold information regarding alternative exposures from tort system defendants, potentially increasing the amount they receive in recovery from those defendants.

These abuses were documented in a watershed opinion by a North Carolina federal bankruptcy judge in 2014 in a case called *In re Garlock Sealing Technologies, LLC.* The judge found that gasket and packing manufacturer Garlock’s settlements of mesothelioma (asbestos-related cancer) claims in the tort system were “infected by the manipulation of exposure evidence by plaintiffs and their lawyers.” The judge described an effort by 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 (and other viable defendants).” The court noted that “while it is not suppression of evidence for a plaintiff to be unable to identify exposure in the tort case, but then later (and in some cases previously) to be able to identify it in Trust claims.”

Recent studies described in this report have confirmed the systemic nature of the abuses described by the judge in *Garlock.*

This study examines trust claiming activity in wrongful death cases in Newport News. Newport News was chosen because it is the epicenter of asbestos litigation in Virginia—home to seven of every ten asbestos cases filed in the Commonwealth—and it has the most robust data of any jurisdiction within Virginia. Wrongful death cases were chosen because payments from asbestos trusts, along with other settlements, are publicly available in such cases pursuant to Virginia statute. Though the findings comprise a portion of all asbestos cases filed in Newport News, they are believed to be representative of Newport News asbestos cases in general.
This study finds that Virginia has not escaped the problems that were documented in *Garlock* and elsewhere. Rather, it reveals the delayed filing of asbestos trust claims by Newport News claimants to deny personal injury defendants access to alternative exposure history information contained in the submissions. Further, Newport News asbestos plaintiffs routinely deny or are unable to recall many trust-related exposures during personal injury cases—when it would be helpful to defendants to establish other causes for the person’s injury—but later file claims with numerous trusts (sometimes as many as 25 different trusts) and obtain trust payments that have exceeded $1 million.

To address these discrepancies, Virginia law should require plaintiffs to file and produce all asbestos trust claims before trial. A growing number of states have enacted such asbestos bankruptcy trust transparency legislation, including regional competitors Tennessee and West Virginia. This common sense reform would speed up trust system recoveries for plaintiffs, allow juries to reach more fully informed decisions regarding the cause of a plaintiff’s asbestos-related disease, provide fairness to defendants, and restore the integrity of the civil justice system.
Disconnect Between Asbestos Bankruptcy Trust and Personal Injury Lawsuit Systems

In most states, there is limited coordination and transparency between the asbestos bankruptcy trust and civil personal injury systems. The disconnect between these two compensation systems has resulted in tactics by plaintiffs’ lawyers that disadvantage tort defendants while inflating plaintiffs’ recoveries.

Evolution of Asbestos Litigation

Asbestos use in the U.S. was once widespread, especially during and after World War II, and before the promulgation of regulations by the federal Occupational Safety & Health Administration in the early 1970s.

In earlier years, asbestos litigation was focused on “the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant’s work site or other exposure location.”8 Target defendants often included manufacturers of thermal insulation containing potent amphibole asbestos fibers.

Asbestos litigation expanded significantly in the late 1990s as hundreds of thousands of cases began to be filed, including by plaintiffs who were not sick. The U.S. Supreme Court referred to the litigation as a “crisis.”9 Mass filings pressured many traditional defendants into bankruptcy.

“The litigation became an ‘endless search for a solvent bystander,’ and that continues today.”

After the exit of the major asbestos producers from the tort system, the litigation shifted away from the bankrupt companies and “towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as valves, pumps, gaskets, automotive friction products, and residential construction products.”10

The litigation became an “endless search for a solvent bystander,”11 and that continues today. As one commentator has explained: “Defendants who were
once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.”

**Proliferation of Bankruptcy Trusts**

Over 115 companies with asbestos-related liabilities have filed bankruptcy. The U.S. Bankruptcy Code provides a mechanism for these companies to reorganize their asbestos liabilities into court-approved, privately managed trusts, and emerge from bankruptcy with immunity against asbestos-related personal injury lawsuits.

There are presently over 60 asbestos trusts in existence to “answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades.” As of 2011, these trusts collectively held $36.8 billion to pay asbestos claims independent of the civil tort system.

Asbestos trusts are designed to settle claims quickly. As the Wall Street Journal has explained:

> Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.

Control of trust governance and payment criteria generally rests with trustees who are plaintiffs’ lawyers. If a claimant meets a trust’s criteria for payment—criteria which are less rigorous than the civil tort system—the claimant will receive a payment.

It is common for claimants to receive multiple trust payments because each trust operates independently and workers were often exposed to many companies’ products.

Trust recoveries are separate from personal injury settlements or judgments a person may obtain for the exact same injury. In one recent case, a typical mesothelioma plaintiff’s total 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.”

**Asbestos Bankruptcy Trust Claims: Manipulation and Abuse**

A disconnect and lack of transparency exist between the asbestos trust and civil personal injury compensation systems. These factors have led to well-documented abuses, including the withholding of evidence of trust-related exposures by plaintiffs and delaying of trust claim
filings to deny defendants access to such information. As commentators have explained:

[C]laimants have alleged exposure to the products of bankrupt entities in their trust filings, but then ignore or flatly deny those exposures when they target solvent defendants in tort litigation. Claimants also attempt to shield their trust recoveries from disclosure in tort suits by concealing their trust claims or not filing the claims until the tort suit has concluded.\(^{23}\)

For example, in testimony before Congress, an attorney discussed an asbestos case from Loudon County, Virginia, that the judge called the “worst deception used in discovery” that he had seen in his “22 years on the bench.”\(^{24}\) The plaintiff claimed that his illness was caused by asbestos-containing friction products, but he “made numerous trust claims certifying exposure to products made by many of the traditional defendants and had even filed a separate tort suit against the traditional defendants.”\(^{25}\) After hearing the evidence, the judge dismissed the case as a fraud on the court.\(^{26}\)

In a widely reported case in Cleveland, Ohio,\(^ {27}\) documents from multiple bankruptcy trust submissions revealed that the plaintiff’s lawyers “presented conflicting versions of how [the plaintiff] acquired his cancer.”\(^ {28}\) Emails and other documents from the plaintiff’s attorneys showed that their client had accepted monies from entities that produced products to which he was not exposed and one settlement trust form was “completely fabricated.”\(^ {29}\) The judge said, “In my 45 years of practicing law, I never expected to see lawyers lie like this.”\(^ {30}\) “It was lies upon lies upon lies.”\(^ {31}\)

Another example occurred in Maryland,\(^ {32}\) where defendants were forced to file motions to compel production of a plaintiff’s trust claims despite the fact that prior rulings required the materials to be produced.\(^ {33}\) “At a hearing on the matter, plaintiff’s counsel explained that he had been slow in producing the trust materials because he disagreed with the court’s prior ruling, some two years previously, and went on to complain that the court had ‘opened Pandora’s Box’ by requiring their disclosure.”\(^ {34}\) When the materials were finally produced on the eve of trial, the “reasons for counsel’s reluctance to produce the trust materials were made clear. There were substantial and inexplicable discrepancies between the positions taken in [c]ourt and the trust claims.”\(^ {35}\)
In testimony before Congress, Delaware Superior Court Judge (ret.) Peggy Ableman discussed an asbestos case she presided over involving 22 defendants. The plaintiff claimed exposure to asbestos solely through laundering her husband’s work clothes. The plaintiff’s lawyer “emphatically reported” that no bankruptcy submissions had been made and no monies had been received. Two days before trial, however, plaintiff’s counsel reported the existence of two bankruptcy trust settlements—a disclosure that was “directly inconsistent with [counsel’s] unequivocal representations to the Court and to opposing counsel at the pretrial conference.” By late afternoon of the following day, the day before trial, it was learned that 20 asbestos trust claims had been filed. Further, the “representations to the bankruptcy trusts painted a much broader picture of exposure to asbestos than either plaintiff or any of plaintiff’s attorneys had acknowledged during the entire course of the litigation.”

As discussed further in the study, these examples have proven to be just the tip of the iceberg with respect to plaintiffs (1) delaying trust claim filings to deny defendants access to exposure history information in the submissions; (2) withholding of trust-related exposures during asbestos personal injury litigation; and (3) providing exposure history statements in personal injury cases that are inconsistent with subsequent trust claiming activities. These are serious problems nationally and in the Commonwealth.
Garlock and Other Recent Reports Expose Widespread Asbestos Trust Claims Manipulation

In 2014, a North Carolina federal bankruptcy judge issued a watershed opinion documenting how plaintiffs’ lawyers delay asbestos trust claim submissions and withhold evidence of trust-related exposures to gain an unfair litigation advantage in personal injury cases. The judge found that the mesothelioma claim settlements of gasket and packing manufacturer Garlock Sealing Technologies, LLC in the tort system were “infected by the manipulation of exposure evidence by plaintiffs and their lawyers.”41 Recent studies described below have confirmed the judge’s findings as to the systemic nature of asbestos trust claims manipulation and abuse.

The Garlock Bankruptcy Decision

Prior to the bankruptcies of most major asbestos producers in the early 2000s, gasket and packing manufacturer Garlock Sealing Technologies, LLC had been a relatively minor defendant in asbestos litigation.

When “the focus of plaintiffs’ attention turned more to Garlock as a remaining solvent defendant,” however, “evidence of plaintiffs’ exposure to other asbestos products often disappeared.”42 This “occurrence was a 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 (and other viable defendants).”43

The court found that “[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock ....”44
Importantly, in a sampling of personal injury cases that Garlock settled or tried to verdict before it entered bankruptcy, “Garlock demonstrated that exposure evidence was withheld in each and every one of them.”45

For example, in a California case that resulted in a $9 million verdict against Garlock, the plaintiff “did not admit to any exposure from amphibole insulation … and claimed that 100% of his work was on gaskets.”46 Discovery in Garlock’s bankruptcy case, however, revealed that the plaintiff’s lawyers filed 14 asbestos trust claims post-verdict, including several against amphibole insulation manufacturers.

In a Philadelphia case that Garlock settled for $250,000, the plaintiff “did not identify any exposure to bankrupt companies’ asbestos products” in his tort lawsuit.47 Further, in answers to written interrogatories, the plaintiff’s lawyers said the plaintiff had “no personal knowledge” of such exposure.48 Discovery in Garlock’s bankruptcy case showed, however, that “this plaintiff’s lawyer failed to disclose exposure to 20 different asbestos products for which he made Trust claims.”49 The court added, “Fourteen of these claims were supported by sworn statements, that contradicted the plaintiff’s denials in the tort discovery.”50

It was more of the same in a Texas case that resulted in a $1.35 million verdict against Garlock. The plaintiff denied knowing the name Babcock & Wilcox and his lawyers told the jury in his tort case that there was “no evidence that [the

plaintiff’s] injury was caused by exposure to Owens Corning insulation.”51 But discovery in Garlock’s bankruptcy case showed that the day before the plaintiff denied any knowledge of Babcock & Wilcox, his lawyers had filed a claim against that trust on his behalf. After the verdict, the lawyers also filed a claim with the Owens Corning trust. The court noted, “[b]oth claims were paid—upon the representation that the plaintiff had handled raw asbestos fibers and fabricated asbestos products from raw asbestos on a regular basis.”52

The court in Garlock acknowledged that the sampling of cases was just a portion of the thousands that were resolved by Garlock in the tort system, but the “fact that each and every one of them contain[ed] demonstrable misrepresentation [wa]s surprising and persuasive.”53 The court said it appeared “certain that more extensive discovery would show more extensive abuses.”54
Subsequent Studies Confirm Widespread Patterns of Abuse

The Garlock bankruptcy provided “the most extensive database about asbestos claims and claimants that has been produced to date ....” The Garlock Discovery Database was made publicly available in 2015 and has enabled further study of the pervasiveness of asbestos claims manipulation.

A November 2015 study examined 1,844 mesothelioma lawsuits resolved by asbestos defendant Crane Co. from 2007 to 2011 that could reliably be matched to the Garlock Database. The data showed “a similar pattern of systemic suppression of trust disclosures that was documented in the Garlock bankruptcy.” The analysis revealed:

- In cases where Crane was a codefendant with Garlock, plaintiffs eventually filed an average of 18 trust claim forms.
- On average, 80% of these claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings.
- Overall, nearly half of all trust claims were filed after Crane had already resolved the tort case.

In February 2016, the U.S. Chamber Institute for Legal Reform (ILR) followed up with an analysis of 100 randomly sampled trust claims within the Garlock Database. ILR found that 69% of claimants “did not list every place of employment at which they alleged exposure with every trust.” Additionally, 15% “did not list specific products or brands to which they alleged exposure,” and of the remaining 85% of claimants that provided at least one brand of asbestos-containing material, “all provided only the products applicable to a particular trust on that trust’s claim form rather than every product to which they claimed exposure.” Fully 55% of claimants had “date discrepancies across claim forms.”

The principal takeaways are that delayed filings of asbestos trust claims to deny defendants access to the information in those submissions, withholding of trust-related exposures in tort cases, and exposures history statements by asbestos plaintiffs that are inconsistent with subsequent trust claiming activities are pervasive. These practices and variances cannot simply be attributed to a few bad actors or clerical errors, but appear to be the “norm” in asbestos litigation.
Asbestos Trust Claims Manipulation in Virginia

Newport News is home to many asbestos cases because it is a major shipbuilding center; asbestos was widely used in that industry. High win rates and large payouts are also a big draw to the Circuit Court for the City of Newport News. Virginia has not escaped the systemic problems that were revealed in Garlock regarding asbestos trust claim manipulation and abuse.

The Circuit Court for the City of Newport News received 513 asbestos case filings from January 2013 through April 2015—“seven of every ten asbestos cases filed in the entire Commonwealth.”66 128 more asbestos cases were filed from May through December 2015 (205 filings for the year). In 2016, 91 additional asbestos cases were filed in Newport News through September.67

Asbestos plaintiffs in Newport News enjoy the nation’s highest win rate at trial—85%—and multi-million-dollar verdicts are common.68 Plaintiffs in Newport News benefit from “legal and evidentiary rulings that lower the bar for plaintiffs while tying defendants’ hands,”69 leading the American Tort Reform Foundation (ATRF) to label Newport News a “Judicial Hellhole.”70

The causation instruction that Newport News judges have historically given to juries in ship repair cases is an “example of the imbalance that occurs in that jurisdiction and a key reason that asbestos plaintiffs do well there.”71 Ship repair cases are generally governed by maritime law,72 which requires a plaintiff to show that exposure to the defendant’s product was a “substantial factor” in causing the person’s alleged harm.73 Decisions from the U.S. Court of Appeals for the Sixth Circuit and the manager of the federal asbestos multi-district litigation, among others, hold that “mere ‘minimal exposure’ to a defendant’s product is insufficient to establish

“Asbestos plaintiffs in Newport News enjoy the nation’s highest win rate at trial—85%—and multi-million-dollar verdicts are common.”
causation.”74 Instead, proof of substantial exposure is required ….”75 In contrast, Newport News juries have been instructed that a plaintiff only needs to show that exposure to the defendant’s product “was not an imaginary or possible factor or having only an insignificant connection with the harm.”76 Newport News has been outside the mainstream.

Further, defendants in Newport News are “categorically prohibited from presenting dose reconstruction evidence to show that their low-dose products were not dangerous, so no warning was required.”77 Newport News judges justify this prohibition by relying on Virginia case law regarding excluding the opinions of car accident reconstruction experts, a very different situation.78 There do not appear to be other jurisdictions that consistently exclude all dose reconstruction evidence; rather, the admissibility of such evidence turns on its reliability.79

In addition, the ban on presenting “dose reconstruction” evidence appears to apply only to defendants, as Newport News judges “allow frequent witness stand appearances by a particular plaintiffs’ expert who testifies about comparable work practice studies.”80

Because of the lax causation standard and limitations placed on asbestos defendants in Newport News, the “critical evidence often comes down to the testimony and documentations about the products and materials to which the plaintiff was allegedly exposed.”81

Plaintiff testimony about the types and brands of products they remember working around has evolved to fit the landscape.82 Plaintiffs typically identify solvent defendants, but not most asbestos producers that exited the tort system through bankruptcy, except perhaps Johns Manville.83

The typically-named solvent defendant is more often a low-dose chrysotile defendant without access to documents from half a century ago that would allow it to refute directly the contention that its product was present at a particular jobsite. Moreover, there are practical challenges to finding former co-workers who are willing (even if able) to contradict the testimony of a former colleague dying of mesothelioma.

 Defendants, therefore, rely upon third-party (often government) documents and expert testimony “either to call into question whether their product was present at a plaintiff’s worksite or to prove the presence of alternative and more potent sources of exposure, such as amphibole-containing thermal insulation.”84 In a typical case involving a Navy sailor in another jurisdiction, this evidence would include ship drawings, specifications, and other government documents, as well as the testimony of a Navy expert “to demonstrate the vast amount of asbestos-containing insulation throughout the vessel.”85

For Newport News defendants, however, “the admissibility of this evidence has been subject to an absurdly exacting requirement of direct proof that these other asbestos-containing products were being used in the plaintiff’s workspace while the plaintiff was working in that compartment—proof that decades later simply does not exist.”86 Circumstantial evidence is excluded as speculative.87
This same standard does not apply to plaintiffs’ witnesses. To the contrary, again using a Navy case as an example, these witnesses will often testify that there were numerous brands of a particular product onboard a ship. They will also testify that they did not work with the plaintiff every day, and will admit that they cannot say they have a specific recollection of seeing the plaintiff work with the defendant’s product. Nevertheless, testimony from these co-workers is permitted as circumstantial evidence to corroborate the plaintiff’s testimony about products he used.88

Newport News is also an outlier in its categorical ban against the admissibility of Navy/employer knowledge.89 The circuit court prohibits such evidence for purposes of a “sophisticated purchaser” defense, although the issue is debatable as a matter of Virginia law.90 Other courts have allowed defendants to argue that the Navy was the sole cause of a harm because enlisted persons had to use the products.91 The information is also relevant to issues for which it should be admissible, such as the “state of the art.”92

Finally, as documented later, “Newport News asbestos cases lack transparency with respect to alternative sources of exposure.”93

A Deeper Dive into Newport News

To explore the extent of these issues in Newport News, a review was conducted of asbestos wrongful death cases tried in Newport News from 2006 to 2014. The sampling is believed to be representative of Newport News asbestos cases in general. The study focused solely on product identification by plaintiffs.

The case analysis revealed that asbestos trust claims are routinely filed post-verdict in Newport News actions, undoubtedly to disadvantage personal injury defendants. As others have found, “[p]ublicly available data indicates that millions of dollars of asbestos bankruptcy trust payments have been recovered post-verdict by asbestos plaintiffs in Newport News.”94

In maritime cases, this practice can mislead juries by diverting blame away from immune former insulation defendants, placing it solely on the still-solvent but more remote defendants in the trial. In cases decided under Virginia law, post-verdict filing of trust claims prevents judgment defendants from obtaining setoff credits for those payments,95 allowing plaintiffs to ‘double dip.’

“\textit{In cases decided under Virginia law, post-verdict filing of trust claims prevents judgment defendants from obtaining setoff credits for those payments, allowing plaintiffs to ‘double dip.’}”
The analysis also revealed that plaintiffs in Newport News asbestos cases routinely deny or are unable to recall most trust-related exposures during discovery in personal injury cases—when such information could be helpful to defendants—but then file claims with those and many other trusts post-verdict and obtain payments that can be substantial in the aggregate.

Following are several case examples:

**CHAPMAN v. JOHN CRANE, INC.**

In April 2014, Earl Chapman filed a civil action in the Circuit Court for the City of Newport News. He alleged that he developed mesothelioma from exposure to asbestos as a machinist mate on several U.S. Navy ships from July 1950 to December 1953 and from 1960 through 1974. After leaving the Navy, Mr. Chapman worked for several months at a private company doing ship repair, where he also described being exposed to asbestos.

During his depositions, Mr. Chapman recalled the names of solvent pump, valve, and gasket manufacturers named as defendants in his case—admitting that his attorneys had shown him photos to refresh his recollection.

Mr. Chapman also recalled working around some trust-related products (i.e., Johns Manville, Flexitallic (T&N Subfund of Federal-Mogul asbestos trust), Eagle-Picher, Leslie Controls, Worthington pumps (DII Industries), Owens Corning, and Armstrong World Industries), but did not recall exposure to Raybestos-Manhattan brand sheet gaskets.

Nevertheless, Mr. Chapman’s estate eventually filed a claim with and received a $1,137 payment from the trust responsible for claims involving Raybestos-Manhattan brand sheet gasket material (i.e., Raytech Corp. asbestos trust), among many others.

So far, Mr. Chapman’s estate has received almost $265,000 in settlements with 16 asbestos trusts—many more trust-related products than Mr. Chapman recalled during three days of depositions.
All of the Chapman trust claim filings appear to have been delayed until after defendant John Crane, Inc. was found liable in a bench trial and the parties stipulated to damages of $300,000 in October 2015.¹⁰⁰

### Chapman Trust Claims

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*Rounded to nearest dollar

**FARMER v. OWENS-ILLINOIS, INC.**

In another recent case, plaintiff Thomas Farmer alleged that he developed mesothelioma from exposure to asbestos as a machinery installer and quality inspector doing commercial ship repair and Navy vessel construction from 1956 to 1974 at the Newport News shipyard.¹⁰¹

“All of the Chapman trust claim filings appear to have been delayed until after defendant John Crane, Inc. was found liable in a bench trial and the parties stipulated to damages of $300,000 in October 2015.”
During his depositions, Mr. Farmer was able to recall the names of solvent defendants in his case—though he admitted that his attorneys had shown him photos of those products to refresh his recollection.\textsuperscript{10}

In contrast, Mr. Farmer’s recollection was limited regarding immune former insulation manufacturers whose asbestos-containing products were likely prevalent on the ships he repaired and constructed. Mr. Farmer’s attorneys apparently did not need to refresh his recollection as to those nonparty exposures.

\textbf{5/24/11}  
\textit{Deposition of Thomas Farmer}  
pp. 273-74

\textbf{Q:} Okay. What you recall is being shown photos of valves of the defendants to the lawsuit; is that correct?  
\textbf{[Objection]}  

\textbf{Q:} Is that correct?  

\textbf{A.} Yeah.

\textbf{5/24/11}  
\textit{Deposition of Thomas Farmer}  
pp. 133

\textbf{Q:} Okay. And your counsel asked you this morning about some product photographs. You were shown, for example, a—gasket photographs. I understand that you haven’t had the benefit of seeing photographs of any of these insulation products. Is that a fair statement?  
\textbf{[Objection]}  

\textbf{A.} Of the insulation—  

\textbf{Q.} Yes, sir.  

\textbf{A.} —itself? No.
For instance, Mr. Farmer admitted that piping and steam lines were everywhere on his ships—miles and miles of pipes—and were covered with asbestos insulation. When repairs were being conducted, asbestos dust was created “[m]ost of the time.” He said, “I’ve seen where it looked like snow coming down in there.” And he admitted that he would have been breathing dust daily from those tasks. Yet, he was unable to recall the names of the manufacturers of those products, with the exception of “Owens.”

Mr. Farmer also recalled using asbestos cloth as a “pillow many a time” and to “make jackets out of it to wrap around us to keep us warm.” He admitted that asbestos cloth was prevalent throughout his ships, but could not recall ever seeing any names associated with that material.

In addition, Mr. Farmer testified that making a gasket from sheet gasket material would create dust and “[s]ometimes it’d make [him] start coughing.” He recalled exposures to gaskets and packing from solvent defendant John Crane, Inc. as well as Garlock and Johns Manville, but could not recall other materials used at the shipyard.

Mr. Farmer was specifically asked about a number of products to try to refresh his recollection about possible trust-related exposures. He denied seeing any Eagle-Picher, A.P. Green, Fibreboard, or Keene products, among others.

He was not familiar with Raybestos-Manhattan and was unable to recall C.E. Thurston as a major supplier of asbestos to the shipyard where he worked.
Further, in response to Requests for Admission, Mr. Farmer’s attorneys specifically denied exposure to “asbestos fibers from asbestos-containing refractory material”\textsuperscript{115} and various trust-related exposures,\textsuperscript{116} including exposures to Eagle-Picher, Keene, Fibreboard, Raybestos-Manhattan, and U.S. Gypsum products.\textsuperscript{117}

Nevertheless, Mr. Farmer’s estate eventually filed and settled claims with the North American Refractories Co. ($75,000), U.S. Gypsum ($31,000), Eagle-Picher ($15,592), A.P. Green ($5,885), Fibreboard ($10,260), Keene ($1,000), Raytech Corp. ($1,050), and C.E. Thurston ($6,250) asbestos trusts, among many others.

In total, Mr. Farmer’s estate has obtained settlements with 25 asbestos trusts totaling over $405,000.

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**Total Trust Payments** $405,979

*Rounded to nearest dollar
These claim filings appear to have been delayed until after defendant John Crane, Inc. was found liable in a bench trial and the parties stipulated to damages of $600,000 in September of 2013.118

**HERMAN v. OWENS ILLINOIS, INC.**

In 2013, a Circuit Court for the City of Newport News awarded $1 million to the estate of John Herman following a jury trial on liability.119 Mr. Herman alleged exposures to asbestos while working on ships in Norfolk as a machinist mate in the U.S. Navy and Reserves from 1955 through the late 1970s.120

During the personal injury case, Mr. Herman testified that he recalled various solvent defendants’ products and some trust-related exposures, including Johns Manville, Flexitallic, Leslie Controls, and Worthington pumps.121 Mr. Herman did not recall other trust-related exposures, including Armstrong, Amatex, Porter, and Raybestos.122 His estate, however, filed claims with and obtained settlements with all of these trusts.

Further, in response to specific discovery requests, Mr. Herman stated that he did not have sufficient information to admit or deny many trust-related exposures, including Celotex, Owens Corning and Eagle-Picher.123

### Herman Trust Claims

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<tr>
<th>Bankruptcy Trust</th>
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<th>Date Recorded</th>
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<td>9 Babcock &amp; Wilcox Company Asbestos PI Trust</td>
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<tr>
<td>20 Leslie Controls, Inc. Asbestos Personal Injury Trust</td>
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<td>2/9/2016</td>
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</tbody>
</table>

**Total Trust Payments**  
$250,299

*Rounded to nearest dollar
After the tort suit was resolved, however, Mr. Herman’s estate obtained settlements with every one of these trusts.

In all, Mr. Herman’s estate has obtained settlements with 20 trusts totaling over $250,000. All or virtually all of the trust claims appear to have been filed post-verdict.124

MORTON v. GARLOCK SEALING TECH., LLC
In November 2008, a Circuit Court for the City of Newport News jury returned a defense verdict in an asbestos case brought by the family of a former shipyard worker, Stanley Morton.125 Mr. Morton alleged that he developed mesothelioma from exposure to asbestos while working as an electrician and maintenance worker for over three decades, including repairing Exxon oil tankers.126 Exxon countered that there was no firm evidence that Mr. Morton was exposed to asbestos on the Exxon ships and that the shipyard was responsible for worker safety.127

Though Exxon ultimately prevailed, courthouse records indicate that Mr. Morton reached settlements with multiple defendants totaling over a half a million dollars. Presumably, these settlements were influenced by the representations made regarding Mr. Morton’s asbestos exposures.

Publicly available records indicate that asbestos trust claims that had been filed early in the case were withdrawn, presumably to deny defendants access to the information. For instance, in February 2008—months before Mr. Morton’s discovery and de bene esse depositions—claims against the U.S. Gypsum, Armstrong World Industries, Babcock & Wilcox, Owens Corning/Fibreboard, and DII Industries asbestos trusts were withdrawn.

These trust claims were re-filed shortly after the verdict. For instance, in early December 2008, less than two weeks after the verdict, trust claims were filed on Morton’s behalf with the Owens Corning/Fibreboard and Babcock & Wilcox trusts. These claims resulted in payments of roughly $114,000 (Owens Corning), $50,000 (Babcock & Wilcox), and almost $36,000 (Fibreboard). Approximately a week after those trust claims were filed, additional trust claims were filed with the U.S. Gypsum and Armstrong World Industries trusts. These claims resulted in payments of almost $95,000 and $25,000, respectively.
In all, after the verdict, Morton’s estate recorded settlements with 28 asbestos trusts totaling nearly $1.1 million.

In his personal injury case, Mr. Morton could not recall trust-related exposures such as UNARCO, Celotex, Amatex, Porter Hayden, U.S. Gypsum, Raytech, and Combustion Engineering, among others.128

<table>
<thead>
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<th>Bankruptcy Trust</th>
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<th>Date Recorded</th>
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**Total Trust Payments**

$1,095,782

*Rounded to nearest dollar
Despite Mr. Morton’s failure to recall such trust-related exposures, Mr. Morton’s estate obtained settlements with trusts established by each of these companies after his trial.
Oney v. Garlock Sealing Tech., LLC

In April 2007, a Circuit Court for the City of Newport News jury awarded $9.25 million to the widow of a shipyard worker who allegedly developed mesothelioma from exposure to asbestos at the Newport News shipyard. Vaughn Oney, the decedent, was employed at the shipyard from mid-1962 to early 1963 in the main machine shop and from February 1963 to February 1994 as an outside machinist and supervisor.

After the verdict, Mr. Oney’s estate recorded settlements with 23 asbestos trusts totaling almost $728,000. It appears that all or virtually all of these trust claims were filed post-trial.

For example, the estate filed claims in June 2008—a little more than a year after the verdict—with the U.S. Gypsum, Babcock & Wilcox Company, and Owens Corning/Fibreboard asbestos personal injury trusts on the same day, and with the DII Industries

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### Oney Trust Claims

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**Total Trust Payments**

$727,904

*Rounded to nearest dollar
trust, resulting in payments of approximately $103,000 (U.S. Gypsum), $75,000 (Babcock & Wilcox), $29,000 (Owens Corning), $16,000 (Fibreboard), $68,000 (DII/Harbison-Walker) and over $32,000 (DII/Halliburton).

At Mr. Oney’s deposition, however, he could not recall the names of any of the manufacturers of pipe covering, cloth, cement, or related boxes or bags of such products he may have worked around while constructing submarines. Mr. Oney also said that he had “no idea” who supplied the insulation that was used on an aircraft carrier he serviced.

He recalled working with some trust-related products, including Johns Manville, Flexitallic, Worthington pumps, and Leslie Controls, but these were only a few of the many asbestos trust claims he filed.

If all of Mr. Oney’s almost two dozen trust-related claims had been available at trial, so the jury could have learned about the totality of his exposures to asbestos, the outcome in the tort case might have been different. Instead, because the trust claim filings were delayed until after the tort case, and only a fraction of Mr. Oney’s trust-related exposures were identified in discovery, the defense was put at a disadvantage.

It appears that Mr. Oney’s estate ultimately obtained a full recovery in the tort case, plus another three-quarters of a million dollars from asbestos trusts that was not offset against his tort case damages.

“If all of Mr. Oney’s almost two dozen trust-related claims had been available at trial, so the jury could have learned about the totality of his exposures to asbestos, the outcome in the tort case might have been different.”
The Case for Asbestos Trust Claim Transparency

As the Newport News sampling indicates, Virginia’s courtrooms have not been immune from the product identification abuses that have plagued other courts. A number of states have enacted legislation requiring claimants to file and disclose their asbestos trust claims before trial in a personal injury case. Virginia should also enact asbestos bankruptcy trust claim transparency legislation to fix the disconnect and address the routine manipulation of trust claims to disadvantage defendants. Such a law would promote the integrity of the civil justice system.

Newport News Plaintiffs’ Lawyers Game the System to Disadvantage Tort Defendants

The analysis and case examples reflect a strategy by Newport News plaintiffs’ lawyers to disadvantage defendants and maximize funds obtained from the tort and trust systems, as documented in the Garlock bankruptcy and other reports. The opaqueness of the current system is what has enabled such activities to go undetected for so long. If more information is available regarding other asbestos claimants—not just the recorded trust settlements in wrongful death cases—it is possible other patterns or practices would be discovered. Based on the limited information available, however, there is enough evidence to demonstrate problems in Virginia’s asbestos litigation that need to be addressed.
Legislatures Have Responded to Abuse With Trust Transparency Reform

Since 2012, a growing number of other states, including regional competitors Tennessee and West Virginia, have enacted laws that fix the disconnect and lack of transparency between the asbestos trust and personal injury systems. These laws provide a mechanism to compel plaintiffs to file and produce all asbestos trust claim forms before trial.134

For example, the West Virginia and Tennessee laws provide that “the plaintiff shall provide all parties with a sworn statement identifying all asbestos trust claims that have been filed by the plaintiff or by anyone on the plaintiff’s behalf … or that potentially could be filed by the plaintiff against an asbestos trust.”135 Further, “the plaintiff shall make available to all parties all trust claims materials for each asbestos trust claim that has been filed by the plaintiff ….”136 If the defendant believes there are additional trust claims that could be filed by the plaintiff, the defendant “may move the court for an order to require the plaintiff to file the asbestos trust claim.”137

The recent laws also generally provide that trust claims materials are presumed to be relevant and admissible in evidence.138

Trust transparency laws diminish opportunities for inconsistent claiming behavior by plaintiffs and enable defendants to assess cases based on more accurate and reliable exposure information. Trust claims materials contain important exposure history information that can help identify fraudulent or exaggerated exposure claims; establish that a nonparty was solely responsible for the plaintiff’s harm; and allow judgment defendants to obtain set-off credits for trust claim payments received by the plaintiff.139

Further, transparency has not been shown to burden personal injury claimants.140 All that is sought is information and a change in the timing of trust claim filings. Claims that are routinely filed post-settlement or post-verdict would simply need to be filed earlier.

There has been no showing that reforms requiring asbestos trust claims to be filed earlier in a case either close courthouse doors or result in delays for claimants. As commentators have explained, “tort lawsuits continue to be filed in jurisdictions that have enacted reforms. Compensation has been neither delayed nor denied in those jurisdictions.”141

“Trust transparency laws diminish opportunities for inconsistent claiming behavior by plaintiffs and enable defendants to assess cases based on more accurate and reliable exposure information.”
In fact, requiring trust claims to be filed earlier in a case “helps, not hurts, people suffering from asbestos disease because it puts money in their pockets more quickly than delaying the claims until after trial.”

Veterans, in particular, would benefit from such laws. For this reason, “although the support is not unanimous, mainstream veterans organizations like AMVETS have supported reforms” that would bring about greater transparency between the asbestos trust and personal injury tort systems.

Virginia Should Enact Trust Transparency Reform

Virginia law should require plaintiffs to file and produce all asbestos trust claims before trial. This common sense reform would speed trust system recoveries for claimants, allow juries to reach more fully informed decisions regarding the cause of a plaintiff’s asbestos-related disease, provide fairness to defendants, and restore the integrity of the civil justice system. Legislation to fix the current disconnect between the personal injury and asbestos trust systems also would protect solvent Virginia employers from the types of abuses described in Garlock and help preserve resources needed to compensate honest asbestos claimants.
Endnotes


3. Id. at 82.

4. Id. at 84.

5. Id. at 86.


7. See Va. Code Ann. § 8.01–55; see also Perreault v. The Free Lance-Star, 666 S.E.2d 352, 358 (Va. 2008) (requiring “a party seeking approval of a compromise settlement of a wrongful death claim to file in the court a written petition that includes the complete and unredacted terms of the compromise settlement.”).


16. See U.S. Gov’t Accountability Office, supra.

Disconnects and Double-Dipping


19 See U.S. GAO, supra, at 21.


21 See Lloyd Dixon & Geoffrey McGovern, Bankruptcy’s Effect on Product Identification in Asbestos Personal Injury Cases iii (Rand Corp. 2015) (“Plaintiffs now often receive compensation both from the trusts and through a tort case.”), http://www.rand.org/pubs/research_reports/RR907.html; see also U.S. GAO, supra, at 15 (“Although 60 companies subject to asbestos-related liabilities have filed for bankruptcy under Chapter 11 and established asbestos bankruptcy trusts in accordance with § 524(g), asbestos claimants can also seek compensation from potentially liable solvent companies (that is, a company that has not declared bankruptcy) through the tort system.”).

22 In re Garlock Sealing Technologies, LLC, 504 B.R. at 96.


25 Id.

26 See Daniel Fisher, Double-Dippers, Forbes, Aug. 19, 2006, http://www.forbes.com/forbes/2006/09/04/136.html: “In 2004 a Loudoun County, Va. judge threw out James Dunford’s mesothelioma suit against Ford and other automotive parts makers because Dunford’s lawyers failed to disclose claims they’d made against bankruptcy trusts in other states. In the lawsuit, Dunford said he got sick after working in gas stations for two years in the early 1980s. What he didn’t say was that he’d already collected money from building-products trusts based on his claims of being a construction worker. Medical studies have shown construction workers are far more likely to contract asbestos-related cancer than car mechanics are.”


30 McCarty, supra (quoting Judge Harry Hanna).

31 Id.


Id.


Id.

See id.

In re Garlock Sealing Technologies, LLC, 504 B.R. at 82.

Id. at 73.

Id. at 84.

Id. at 86; see also id. at 94 (withholding of exposure evidence by asbestos plaintiffs’ counsel was “widespread and significant.”).

Id. at 84 (emphasis in original).

Id.

Id.

Id. at 85.

Id.

Id.


68 See Behrens, A ‘Perfect Storm’ Confronts Asbestos Defendants in Newport News, supra.


70 See id.

71 Id.


76 Exxon Mobil Corp. v. Minton, 737 S.E.2d 16, 26 (Va. 2013). In the most recent asbestos trial in Newport News, the [Parker] case from early 2016, the court gave a different instruction than the one given to juries over the past decade. The new instruction needs to be improved, but is a step in the right direction for defendants. [See Parker v. John Crane, Inc., No. CL14-02913F-15 (Va. Cir. Ct. Newport News City 2016)].


82 See Lloyd Dixon & Geoffrey McGovern, Bankruptcy’s Effect on Product Identification in Asbestos Personal Injury Cases (Rand Corp. 2015) (finding bankruptcy reduces the likelihood that trust-related exposures will be identified by plaintiffs in interrogatories and depositions), http://www.rand.org/pubs/research_reports/RR907.html; Marc C. Scarcella et al., The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010, 27:19 Mealey’s Litig. Rep.: Asbestos 1, 11 (Nov. 7, 2012) (stating “while exposures to thermal insulation products remain prevalent among today’s plaintiff population, the identification of exposure to those products is greatly diminished compared to the claims filed prior to the Bankruptcy Wave that had comparable (or even identical) exposure histories.”).
83 See Ableman et al., A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co., supra.


85 Id.

86 Id.

87 See Pretrial Hr’g Trans., Sanders v. John Crane, Inc., No. CL800724PT (Va. Cir. Ct. Newport News City), May 26, 2009, at 272:21-25 (plaintiff’s counsel: “You can’t get an inference of exposure simply because you are on a ship…. I can’t come in here and say, my client was on a ship and John Crane’s product was on a ship. Therefore, he was exposed. I can’t – you can’t connect those dots.”); Pretrial Hr’g Trans., Minton v. Exxon-Mobil Corp., No. CL09-D1505F-15 (Va. Cir. Ct. Newport News City), Feb. 15, 2011, at 98:8 (granting plaintiff’s motion to exclude defense expert who intended to testify about the amount of insulation aboard Navy aircraft carriers).

88 See John Crane, Inc.’s Motion in Limine to Exclude Passage of Testimony From James T. Lassiter Regarding Pneumatic Wire Brush, Herman v. John Crane Inc., No. CL10-00800F-15 (Va. Cir. Ct. Newport News City), Mar. 29, 2013 (motion to exclude co-worker’s testimony that did not place plaintiff “anywhere in the vicinity when a pneumatic wire brush was in use” to remove gasket material); Email from Hon. Timothy S. Fisher to Counsel, Herman v. John Crane Inc., No. CL10-00800F-15 (Va. Cir. Ct. Newport News City), Apr. 3, 2013 (denying the motion).

89 See Behrens, A ‘Perfect Storm’ Confronts Asbestos Defendants in Newport News, supra.


94 Id. at 32.


98 See id. at 147.


102 Deposition Upon Oral Examination of Thomas E. Farmer, *Farmer v. Owens-Illinois, Inc.*, No. CL11-00102P-03 (Va. Cir. Ct. Newport News City), May 2, 2011, at 64 (stating that apart from seeing photos of Johns Manville, John Crane and Garlock gaskets plaintiff had not seen photographs of any other gasket material); Deposition Upon Oral Examination of Thomas E. Farmer, *supra*, May 24, 2011, at 273-74 (plaintiff shown photos of only select valve companies named as defendants in the lawsuit).


108 Deposition Upon Oral Examination of Thomas E. Farmer, *supra*, May 2, 2011, at 49 (“Owens is all I remember.”).

109 Id. at 54.

110 Id.; see also Deposition Upon Oral Examination of Thomas E. Farmer, *supra*, May 24, 2011, at 134.


113  Deposition Upon Oral Examination of Thomas E. Farmer, supra, May 3, 2011, at 183-85; see also id. at 190.

114  Deposition Upon Oral Examination of Thomas E. Farmer, supra, May 2, 2011, at 99, 188.


116  Id. at 8.

117  Id. at 6-7.


122  See Deposition Upon Oral Examination of John J. Herman, supra, Aug. 11, 2010, at 436, 483-85.


124  Plaintiff’s discovery responses filed roughly two years after the complaint and just a few months before trial indicate that no trust claims had been filed with any trusts at that time. See Plaintiffs’ Responses to John Crane Inc.’s Second Requests for Admissions, Interrogatories and Requests for Production of Documents, Herman v. Owens-Illinois, Inc., No. CL10-00800F-15 (Va. Cir. Ct. Newport News City), Feb. 19, 2013, at 12.


126  See Dujardin, supra.

127  See id.


Id. at 171-72.

Id. at 74, 168, 1179-81, 185, 205-208, 223, 237.


At the federal level, the Furthering Asbestos Claims Transparency Act (FACT) passed out of the U.S. House of Representatives in January 2016. The Act would require asbestos trusts to file publicly available quarterly reports describing “each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant.” To protect claimant privacy, “any confidential medical record or the claimant’s full social security number” is to be excluded from the report. Trusts shall provide any information related to payment from, and demands for payment from, the trust, subject to appropriate protective orders, to any party in an asbestos-related action. The trust may demand payment for any reasonable cost incurred by the trust to comply with the request.


Id. at 3.

Id. at 2.

Id.

Alternatively, Virginia Circuit Courts should enter case management orders to address transparency issues, “including mandatory disclosure of all trust claims, the timing of filing of claims, the evidentiary issues regarding admissibility at trial and presumptions attributed to them, the responsibility of attorneys to monitor and disclose claims filed by other counsel, and the procedures for challenging non-submission of claims.” Peggy L. Ableman, The Time Has Come for Courts to Respond to the Manipulation of Exposure Evidence in Asbestos Cases: A Call for the Adoption of Uniform Case Management Orders Across the Country, 30:5 Mealey’s Litig. Rep.: Asbestos 1 (Apr. 8, 2015), http://www.mccarter.com/files/Uploads/Documents/Mealeys_Ableman_4-8-15.pdf. This approach is a less preferable than legislation because it would not cover all courts in the Commonwealth and could be undermined by forum-shopping.