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ON BEHALF OF U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
IN SUPPORT OF SENATE BILL 73, RELATING TO
ASBESTOS BANKRUPTCY TRUST CLAIMS TRANSPARENCY

Originally and for many years, the asbestos litigation was focused on actions by "dusty trades" workers against manufacturers of asbestos-containing insulation. Mass asbestos personal injury filings led to a wave of bankruptcies in the early 2000s.

Pursuant to the federal bankruptcy code, the former insulation defendants were able to reorganize in bankruptcy, channel their pending and future asbestos-related liabilities into individual trusts, and emerge from bankruptcy with immunity from asbestos-related tort claims. The trusts created in bankruptcy are responsible for paying for injuries caused by exposures to those companies' products. According to a 2011 U.S. Government Accountability Office report, there are now 60 different asbestos bankruptcy trusts; collectively, these trusts hold about *$36.8 billion* to pay for harms caused by the reorganized historical defendants.

The asbestos litigation did not end when the primary historical defendants went into bankruptcy. Instead, plaintiffs' lawyers responded by targeting new or formerly peripheral defendants, such as manufacturers of products in which asbestos was encapsulated, distributors of products containing asbestos, and owners of premises that contained asbestos. The asbestos litigation became an "endless search for a solvent bystander," according to one plaintiffs' lawyer.

The asbestos litigation has morphed into a two-tiered system of bankruptcy trust claims and tort claims against still-solvent defendants. For example, in a recent bankruptcy case involving gasket and packing manufacturer Garlock Sealing Technologies, LLC, 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.

The lack of transparency between the bankruptcy trust and tort systems has led to abuses. A widely-reported early example occurred in Cleveland. Lorillard was sued over an asbestos-containing filter in a brand of cigarettes sold for a short time many decades ago. When the judge allowed Lorillard's lawyers to obtain copies of asbestos bankruptcy trust claims filed by the plaintiff, Lorillard's lawyers discovered inconsistencies between allegations made by the plaintiff in the court case and in his trust claims. The *Cleveland Plain Dealer* reported that the judge's decision to order the plaintiff to produce his trust claim forms "effectively opened a Pandora's box of deceit." The judge later told the *Cleveland Plain Dealer*, "I never expected to see lawyers lie like this…. It was lies upon lies upon lies."

In a January 2014 ruling involving Garlock (*In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014)), a federal bankruptcy judge in Charlotte described how Garlock became a target defendant after asbestos plaintiffs' lawyers bankrupted the primary historical insulation defendants. According to the federal judge, Garlock's participation in the tort system became "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." Evidence that Garlock needed to attribute plaintiffs' injuries to the insulation companies' products "disappeared." The judge said 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)."

For example, in a California case that Garlock settled for $450,000, a former sailor denied that he ever saw anyone installing or removing pipe insulation on his ship. After the plaintiff settled with Garlock, however, the plaintiff's lawyers filed 11 trust claims on his behalf, 7 of which were based on declarations that the plaintiff "personally removed and replaced insulation and identified, by name, the insulation products to which he was exposed."

The judge in Garlock provided many other examples and said that Garlock's tort litigation was infected by a "startling pattern of misrepresentation" that unfairly inflated plaintiffs' recoveries against Garlock following the surge of asbestos bankruptcies by insulation defendants in the early 2000s.

The *Garlock* case has "laid bare the massive fraud that is routinely practiced in mesothelioma litigation," says Lester Brickman, a Cardozo Law School professor who has researched asbestos litigation for more than 20 years. Together with other documented instances of evidentiary abuses in asbestos cases, it is becoming increasingly clear that the problems described by Judge Hodges are not rare outliers.

A recent analysis of the discovery data from Garlock's bankruptcy case in relation to asbestos defendant Crane Co. shows "a similar pattern of systemic suppression of trust disclosures that was documented on the Garlock bankruptcy." (Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 30:19 Mealey's Litig. Rep.: Asbestos 1 (Nov. 4, 2015)). The analysis examined 1,844 mesothelioma lawsuits resolved by Crane Co. from 2007 to 2011 that could reliably be matched to the public Garlock discovery data. The data revealed the following:

- "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."*

Even more recently, in December 2015, the U.S. Chamber Institute for Legal Reform issued a report detailing additional case examples from the Garlock discovery data that "further expose the inconsistent claiming behavior and allegations between the tort and trust systems." (U.S. Chamber Inst. for Legal Reform, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* 8 (Dec. 2015)).

Legislatures are responding to these problems by providing defendants with greater access to asbestos bankruptcy trust claim submissions by plaintiffs. These materials contain important exposure history information, giving tort defendants a tool to identify fraudulent or exaggerated exposure claims, and to establish that trust-related exposures were partly or entirely responsible for the plaintiff's harm.

Disclosure of asbestos trust claims is useful because information found in trust claims is not always obtainable through other sources. For instance, a deceased plaintiff cannot be deposed about exposures. A living deponent may not recall all of that person's exposures. Unscrupulous plaintiffs' lawyers may coach clients not to identify trust-related exposures. Also, the trusts themselves have become resistant to discovery and disclosure. For example, the Manville Trust cooperated with parties seeking discovery when it first opened its doors, but that has changed. Many trusts now have restrictive provisions that preclude or substantially limit the trusts' cooperation with tort defendants.

Since 2012, a growing number of states—Tennessee and Utah (2016), West Virginia, Texas and Arizona (2015), Wisconsin (2014), Oklahoma (2013), and Ohio (2012)—have enacted laws that provide a mechanism to compel plaintiffs to file and produce all available asbestos trust claim forms before trial in a personal injury cases.

The legislation does not impose financial caps on a claimant's ability to gain full compensation nor limit the number of trusts against which claimants may file. Plaintiffs do not face new burdens; the legislation simply changes the timing of the filing of asbestos trust claims. Trust claims now routinely submitted after trial would have to be filed before trial to promote honesty and fairness. Claimants would not endure delays if timely disclosures are made.