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ON BEHALF OF THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
IN SUPPORT OF H.B. 2457, ASBESTOS BANKRUPTCY TRUST CLAIM TRANSPARENCY

Originally and for many years, asbestos lawsuits involved "dusty trades" workers alleging personal injuries caused by the major asbestos producers, such as Johns Manville. Hundreds of thousands of lawsuits forced virtually all of these companies (the so-called "asbestos industry") to declare bankruptcy by the early 2000s.

Pursuant to federal bankruptcy law, the major asbestos producers were able to reorganize, channel their asbestos-related liabilities into trusts, and emerge from bankruptcy with immunity from future asbestos-related tort claims. Since 2004, asbestos trusts have paid nearly $24 billion to claimants. The 60 or so trusts now in operation hold about $25 billion to pay future claimants.

The asbestos litigation did not end when the major asbestos producers went into bankruptcy and formed trusts to pay claimants harmed by their products. New or formerly peripheral defendants, including many small businesses, became litigation targets. The asbestos litigation became an "endless search for a solvent bystander," according to one plaintiffs' lawyer.

Consequently, asbestos plaintiffs today have two independent sources for recoveries. They can file claims with the asbestos trusts to recover for exposures connected to the major asbestos producers, and they can bring personal injury lawsuits against still-solvent, but increasingly remote defendants. In a widely reported 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. For instance, in Garlock's bankruptcy case (*In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014)), the federal judge described how Garlock became a target defendant after asbestos plaintiffs' lawyers bankrupted the major asbestos producers. Garlock's tort litigation became "infected by the manipulation of exposure evidence by plaintiffs and their lawyers," the judge said. Evidence that Garlock needed to attribute plaintiffs' injuries to bankrupt companies "disappeared." The judge said this was the result of an effort by plaintiff 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, his 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. He said that Garlock was the victim of a "startling pattern of misrepresentation" that unfairly inflated plaintiffs' recoveries.

Since the Garlock decision, it has become clear that the abuses described by the judge are not outliers. For instance, an analysis of over 1,800 mesothelioma lawsuits resolved by Crane Co. from 2007-2011 showed "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 Mealey's Litig. Rep.: Asbestos 1 (Nov. 4, 2015)). The data revealed that plaintiffs suing Crane Co. filed an average of 18 trust claims; 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."*

In March 2017, additional examples of inconsistent claiming surfaced in federal Racketeer Influenced and Corrupt Organizations Act (RICO) litigation by defendant John Crane, Inc. against a major asbestos plaintiffs' personal injury firm with offices in Texas and California.

An April 2017 sample of 100 asbestos cases filed in Illinois revealed that only 8 disclosed having made trust claim submissions, though, on average, plaintiffs in the sample could have made 16 trust claims, and 37 plaintiffs could have made more than 20 trust claims.

Legislatures are responding to these problems by providing defendants with greater access to asbestos trust claims by plaintiffs. These materials contain exposure history information, giving defendants a tool to identify fraudulent or exaggerated 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. 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. Many trusts have restrictive provisions that preclude or substantially limit the trusts' cooperation with tort defendants.

Since 2012, 12 states—Texas, Ohio, Wisconsin, Iowa, Tennessee, Utah, West Virginia, Arizona, North Dakota, South Dakota, Oklahoma, and Mississippi—have enacted laws that compel plaintiffs to file and produce their asbestos trust claims before trial. The National Conference of Insurance Legislators (NCOIL) adopted similar model legislation in July 2017.

The legislation simply accelerates the timing of trust claim filings. Trust claims now routinely submitted after trial would have to be filed early in a case. The purpose is to ensure disclosure of relevant information that will promote honesty and consistency in claiming activity.

Claimants would not experience delays if timely disclosures are made. A 2017 U.S. Chamber Institute for Legal Reform report found that Ohio's 2012 trust transparency law has not imposed significant burdens on plaintiffs. In fact, because the legislation streamlines discovery, the experience in other states has been that asbestos cases proceed more quickly and efficiently. There will be fewer time-consuming discovery battles over trust-related exposure evidence. Accelerating the filing of trust claims means that claimants will receive trust payments more quickly. This is especially important to people with mesothelioma. In February 2018, Texas practitioners with an active asbestos defense firm described the experience of Texas after two years of trust transparency as follows:

> 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.

Finally, juries will have better information about all of a plaintiff's exposures to asbestos, allowing them to make fully informed decisions. This will help allow the Kansas "fair share" liability law to work as intended. The bill will close the "asbestos loophole" that can exist when juries are misled about the totality of a plaintiff's exposures to asbestos and lack key information needed to assign blame. Wrongdoers will remain fully accountable.