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Asbestos

Illinois Asbestos Litigation: Common Sense Reforms For The Nation's Leading State For Asbestos Filings

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Commentary

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Two southern Illinois counties, Madison County and St. Clair County, have the highest concentration of asbestos cases in the United States. Madison County tops the list of asbestos jurisdictions nationally with almost one-third of all new asbestos personal injury filings. Many asbestos cases are filed in Cook County too. Illinois as a whole was home to 47% of all asbestos filings nationally in 2020, though "only 3% of all plaintiffs in 2020 listed an address in Illinois."

Given the importance of the Land of Lincoln to the overall asbestos litigation environment, it is critical that Illinois adopt two common sense reforms that find support in other states: asbestos bankruptcy trust transparency and exposure history disclosures to address "over-naming." These changes could be accomplished through legislation or case management orders issued by courts.

Trust Transparency

Illinois should follow 16 states—Alabama, Arizona, Iowa, Kansas, Michigan, Mississippi, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin—that have enacted legislation to fix a disconnect between the tort and asbestos bankruptcy trust systems. Under this reform, asbestos bankruptcy trust claims that are now routinely submitted after trial would have to be filed and disclosed before trial.

Over 130 companies have been forced into bankruptcy due at least in part to asbestos-related liabilities, including virtually all of the so-called "asbestos industry." As part of their reorganization in bankruptcy, the major asbestos producers created trusts to pay for harms they caused. Over 60 trusts in operation today collectively hold some $30 billion to pay claimants. The reorganized companies are immune from asbestos lawsuits.

Plaintiffs typically file claims with asbestos trusts to recover for exposures related to the major asbestos producers and bring personal injury lawsuits against still-solvent, but increasingly remote defendants. Many of today's defendants used to be peripheral or are newer defendants, including small businesses.

Plaintiffs that delay asbestos trust claim filings until a personal injury case is resolved have been able to suppress evidence of their exposures to bankrupt companies' asbestos-containing products. This phenomenon is well-documented and ongoing. By suppressing such evidence, plaintiffs can thwart attempts by solvent defendants to attach fault to a bankrupt

entity at trial. Further, by delaying the filing of trust claims until after trial, plaintiffs can deny judgment defendants of their right to obtain set-offs for any payments already received by the plaintiff. Plaintiffs are thus able to obtain a full recovery in the tort case and then obtain additional payments for the same injury from asbestos trusts—a practice known as "double dipping."

In *In re Garlock Sealing Technologies* (2014), a federal bankruptcy judge in North Carolina described how gasket and packing manufacturer Garlock became a "focus of plaintiffs' attention" after the major asbestos producers filed bankruptcy. 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 bankrupt companies "often disappeared." The judge said that plaintiffs and their lawyers "withh[e]ld evidence of exposure to other asbestos products and [delayed] filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)." The missing evidence "had the effect of unfairly inflating" recoveries against Garlock.

A Pennsylvania federal judge remarked, "The evidence uncovered in the *Garlock* case arguably demonstrates that asbestos plaintiffs' law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system."

Since the *Garlock* decision, numerous reports have confirmed that "[w]e are now past the time when [the case examples in *Garlock*] can be referred to as mere anomalies."

For instance, an examination of over 1,800 mesothelioma lawsuits resolved by Crane Co. from 2007-2011 revealed that "80% of [trust] claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings."

A 2017 study of 100 asbestos cases in Illinois found that only 8 plaintiffs disclosed that they had filed trust claims, even though the average plaintiff in the sample could have made 16 trust claims and 37 of the plaintiffs could have made more than 20 trust claims. The study provides further proof that "the failure by plaintiffs and their counsel to produce trust-related exposure evidence in a timely fashion in asbestos cases . . . appears to be systemic."

In 2019, a Georgia federal judge said, "anecdotal evidence that indicates that fraud and abuse in the system does exist…."

In 2020, an Oregon appellate court ordered a new trial in an asbestos action after the defendant learned post-trial that plaintiff's counsel suppressed material information submitted to asbestos trusts.

In 2020, the United States said in Bestwall's bankruptcy:

> [B]oth courts and commentators have observed that a significant number of asbestos claimants in the tort system and in Chapter 11 proceedings have provided conflicting and/or inaccurate information regarding the asbestos products to which they were exposed. Some claimants improperly have claimed exposure to one set of products in one case while claiming exposure to a different set of products in a subsequent case. In addition, some claimants have delayed filing subsequent claims in order to conceal the fact that they intend to make inconsistent allegations regarding product exposure in a subsequent case.

The United States also said that "problems that have been identified with respect to the compensation of asbestos claims" have led legislatures "to increase transparency and allow for more appropriate compensation of claims." Further, "There is a growing recognition that such procedures are critical in order to ensure appropriate allocation of scarce resources and ensure transparency in asbestos compensation."

By requiring plaintiffs to file and disclose all asbestos claims at the commencement of an asbestos tort action, Illinois would promote honesty in trust claiming and civil litigation by policing the potential for plaintiffs to give inconsistent exposure histories in court and in trust claims. Eliminating fraud and abuse, as documented above, will help preserve tort defendant assets for deserving claimants. Juries would have more complete information about a plaintiff's

exposures to asbestos so they may hold culpable parties responsible. Judgment defendants would receive setoffs for trust recoveries obtained by plaintiffs before trial, eliminating the potential for plaintiffs to "double dip." Further, trust transparency would speed payments to claimants by ensuring that asbestos trust claims are filed and paid sooner than typically occurs today, and by streamlining discovery to make asbestos litigation more efficient.

Plaintiffs have not experienced undue burdens or delays in any of the 16 states with trust transparency laws. The smooth operation of these laws has been well-documented.

Over-Naming

Illinois should also ensure that plaintiffs are suing defendants with an actual connection to the plaintiff.

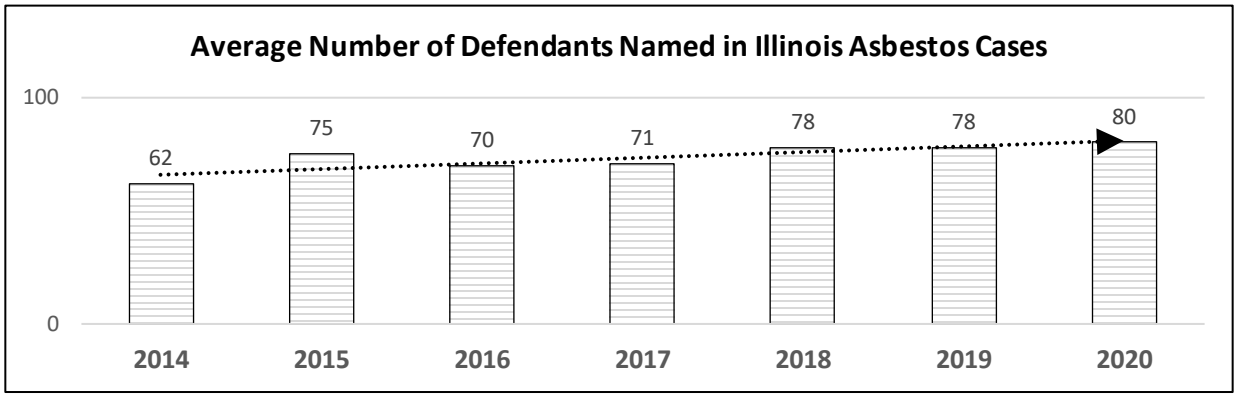
There has been a dramatic rise in the number of defendants named in asbestos personal injury lawsuits. The first asbestos lawsuit filed over a generation ago named less than a dozen defendant manufacturers of asbestos-containing thermal insulation products. This changed following a "bankruptcy wave" in the early 2000s that included virtually the entire asbestos industry. A search for new targets led plaintiff lawyers to shift their focus towards peripheral and new defendants. The litigation became an "endless search for a solvent bystander."

The number of companies named in asbestos lawsuits has grown exponentially, now totaling over 11,000 unique defendants. Over 900 unique defendants have been named in Illinois asbestos cases.

An analysis of asbestos filings by the KCIC and Bates White consulting firms in 2016 showed that "one of the major players in the nation's busiest asbestos jurisdiction" named almost 60 defendants per case, on average, and named as many as 204 defendants in a single asbestos lawsuit. Another firm based in Edwardsville, Illinois, named as many as 252 defendants in one case and averaged 118 defendants per case.

Our review of 122 cases filed in Illinois by 12 different law firms between 2014-2020 reveals that the average asbestos complaint named 70 defendants. The number of named defendants has been steadily increasing. An average of 80 defendants were named in Illinois asbestos cases in 2020. The companies named are varied and include many Illinois-based businesses. See Table 1.

Table 1.



A 2021 report by KCIC revealed that St. Clair County asbestos cases had an average of 113 named defendants in 2020—the fourth highest number of average defendants named per complaint in the country.

It must be remembered that defendant lists do not include the over 130 companies that have filed bankruptcy at least partly due to asbestos-related liabilities and are the most likely cause of plaintiff illness. Immune companies include the "big dusties" that comprised the "asbestos industry."

Plaintiff lawyers cast a wide net to capture solvent defendants, ensnaring many innocent companies in the process. This type of lawsuit abuse is known as "over-naming." Some companies find themselves named in nearly every asbestos case filed in Illinois

without regard to the plaintiff's actual work history or exposure. Eventually, these erroneously named companies are dismissed, often without any payment to the plaintiff.

The pattern of over-naming followed by dismissal is clear. One company, Avocet, was named in approximately 400 asbestos personal injury claims in Madison County between 2008-2018, incurring more than $720,000 in defense costs. In virtually all of the cases, the claims against Avocet were ultimately dismissed without a payment. In fact, Avocet only made settlement payments in four cases—1% of its entire inventory of claims.

Our review of 122 asbestos cases filed in Illinois between 2014-2020 shows that, of the 70 defendants named in the average asbestos complaint, 60% were dismissed with no payment or finding of fault. An astounding 20% of the defendants were dismissed in 100% of the cases in which they were named. The high dismissal rates are illustrated by the following cases:

- *Carol Spindle vs. Advanced Composites* (Madison County, No. 14-L-1368) filed in 2014 included a 5 page list of 181 defendants. It appears that 178 of those companies were dismissed with no pay and no finding of liability.

- *Delbert Wayne Arthaud vs. Aerco, Inc.* (Madison County, No. 15-L-1345) filed in 2015 included a similar multi-page list of 175 named defendants. It appears that 107 were dismissed with no pay and no finding of fault.

- *Linda Caldwell vs. ABB, Inc.* (Madison County, No. 15-L-1400) filed in 2015 named 164 company defendants. Every defendant appears to have been dismissed with no verdict or finding of liability.

Over-naming of companies in Illinois asbestos complaints is a big problem, especially when one considers the large number of asbestos-related lawsuits that are filed. Dismissed defendants bear the expensive, ongoing costs of litigation for years. Litigation costs start on day one and continue for possibly years until such defendants are dismissed with no fault.

Defendant companies can collectively spend many thousands of dollars in defense costs and loss of productivity to be released from individual cases in which there was never proof of exposure. In situations where defense costs are paid throughout insurance, higher premiums may result and there is potential erosion of policies that may be needed to pay future plaintiffs with legitimate claims.

The cost associated with improper naming of defendants in asbestos actions has contributed to employer bankruptcies.

For example, in the January 2020 bankruptcy filing of DBMP LLC, the holding company for the legacy asbestos liabilities of CertainTeed, DBMP notes that more than half of "claims filed against [CertainTeed] after 2001 were dismissed—usually because the plaintiff could provide no evidence of exposure to a [CertainTeed] asbestos containing product."

According to ON Marine, another company that filed bankruptcy related to asbestos liabilities in 2020, 95% of the over 182,000 asbestos personal injury claims filed against it since 1983 were dismissed without payment to a plaintiff.

Data submitted in Garlock's bankruptcy showed that the company was sued in more than 700,000 asbestos personal injury cases—and "was dismissed in 150,000 claims without payment, while another 75,000 claims were abandoned." Garlock "resolved another 445,000 cases for an average of less than $3,000 per case."

Iowa passed a first-of-its-kind law in 2020 to help ensure that there is an evidentiary basis for each claim against each defendant named in an asbestos tort action. The Iowa law requires asbestos plaintiffs (and silica plaintiffs) to provide a sworn information form with the initial complaint providing detailed information as to the plaintiff's exposures and their connection to each defendant with supporting documentation. The court must dismiss the action without prejudice as to any defendant

whose product or premises is not identified in the required disclosures.

Momentum is growing for disclosure legislation to address over-naming. So far in 2021, West Virginia,[30] North Dakota,[3] and Tennessee[3] have enacted legislation that is substantially similar to Iowa's 2020 law.

Illinois should likewise ensure that there is an evidentiary basis for each claim against each defendant in an asbestos action. This reform would cut down on unnecessary litigation and wasted defense costs, facilitate settlements, and focus judicial resources on claims with evidentiary support.

Endnotes

1. KCIC, *Asbestos Litigation: 2020 Year in Review 6* (2021).

2. *Id*. at 16.

3. Combined asbestos bankruptcy trust transparency and over-naming reform legislation has been introduced in Illinois. *See* Ill. S.B. 40 (2021), Ill. H.B. 3926 (2021).

4. *In re* Garlock Sealing Tech., LLC., 504 B.R. 71 (Bankr. W.D.N.C. 2014).

5. *Id.* at 73.

6. *Id.* at 82.

7. *Id.* at 73; *see also id*. at 84, 86

8. *Id.* at 84.

9. *Id.* at 86; *see also id*. at 94 (stating that withholding of exposure evidence by asbestos plaintiffs' counsel was "widespread and significant").

10. Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp., 2015 U.S. Dist. LEXIS 105890, 2015 WL 4773425, at *5 (W.D. Pa. Aug. 12, 2015).

11. Peggy L. Ableman, *The* Garlock *Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 Am. J. Trial. Advoc. 479, 488 (2014).

12. 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 (Nov. 4, 2015).

13. Mark A. Behrens, et al., Ill. Civil Justice League, *Illinois Asbestos Trust Transparency: The Need to Integrate Asbestos Trust Disclosures with the Illinois Tort System* 3 (2017).

14. *In re* The Fairbanks Co., 601 B.R. 831, 843 (N.D. Ga. Bankr. 2019).

15. Golik v. CBS Corp., 472 P.3d 778 (Or. App. 2020).

16. Statement of Interest on Behalf of the United States of America Regarding Estimation of Asbestos Claims, *In re* Bestwall LLC, No. 17-31795, at 1-2 (Bankr. W.D.N.C. Dec. 28, 2020).

17. *Id*. at 10.

18. *Id*.

19. Eric D. Carlson, et al., *Wisconsin Asbestos Bankruptcy Trust Legislation,* Int'l Ass'n of Def. Counsel Newsl., Oct. 2018; Jon B. Orndorff, et al., *A Three Year Retrospection on West Virginia's 2015 Asbestos Litigation Reform,* Int'l Ass'n of Def. Counsel Newsl., Sept. 2018; Edward Slaughter, et al., *Two Years of Trust Transparency in Texas,* Int'l Ass'n of Def. Counsel Newsl., Feb. 2018.

20. KCIC, *supra* note 1, at 13.

21. Mark Behrens & Christopher Appel, *Over-Naming of Asbestos Defendants: A Pervasive Problem in Need of Reform,* 36 Mealey's Litig. Rep.: Asbestos (Mar. 24, 2021) (quoting Jessica Karmasek, *W.V. Firm Blames Almost 300 Companies In Each Asbestos Lawsuit,* FORBES.COM, June 28, 2016).

22. *Id.*

23. KCIC, *supra* note 1, at 13. Cook County and Madison County asbestos cases had an average of 61 and 58 named defendants, respectively, in 2020. *Id.*

24. James Lowery, *The Scourge of Over-Naming in Asbestos Litigation: The Costs to Litigants and the Impact on Justice,* 32 Mealey's Litig. Rep.: Asbestos (Jan. 24, 2018).

25. *See* Informational Brief of DBMP LLC, In re DBMP LLC, No. 20-30080, at 1-2 (Bankr. W.D. N.C. Jan. 23, 2020).

26. *See* Declaration of Kevin J. Whyte in Support of Chapter 11 Petition of Marine Service Company LLC, *In re* ON Marine Servs. Co. LLC, No. 20-20007, at 5 (Bankr. W.D. Pa. Jan. 2, 2020).

27. Lowery, *supra* note 24.

28. *Id.*

29. Iowa Code § 686B.3.

30. *See* W.Va. H.B. 2495 (2021), *available at* http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HB2495%20SUB%20ENR.htm&yr=2021&sesstype=RS&i=2495.

31. *See* N.D. H.B. 1207 (2021), *available at* https://www.legis.nd.gov/assembly/67-2021/documents/21-0434-05000.pdf.

32. *See* Tenn. S.B. 873 (2021), *available at* https://www.capitol.tn.gov/Bills/112/Amend/SA0177.pdf ■

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