

# Asbestos

## **What's New In 2017? Filing Trends And Developments In Asbestos Litigation**

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# Commentary

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### Introduction

Asbestos litigation defense is primarily a “micro” endeavor for companies and their counsel, focusing on the plaintiff's exposure allegations, the product at issue, the applicable law, and the particular judge and plaintiff's counsel in the case. Individual cases, however, comprise the fabric of the most expensive and enduring mass tort litigation in history. This article explores that “macro” context.

The article begins by analyzing the key findings of a new report on asbestos litigation trends by corporate risk management firm KCIC.<sup>1</sup> The report reflects three years of data and is believed to be inclusive of over ninety percent of all asbestos-related lawsuits

nationwide. KCIC's findings tell us a lot about the current state of asbestos litigation. Next, this article discusses important legal developments with respect to general and specific jurisdiction that may affect the asbestos litigation environment by breaking up the traditional concentration of cases in certain magnet jurisdictions. The article also discusses other recent developments in the litigation as to causation standards and asbestos bankruptcy trust claim transparency, among other issues that affect the scope and direction of asbestos litigation. It concludes with a brief discussion highlighting recent developments in a few states where asbestos-related filings are significant.

### Filing Trends in Asbestos Litigation

**Concentration of Cases in Certain Forums.** The KCIC report confirms that the vast majority of asbestos cases are filed in a small number of jurisdictions.

In 2016, 4,637 asbestos lawsuits were filed in 171 jurisdictions across the United States. Almost seventy-two percent (3,322) of those lawsuits were filed in just ten jurisdictions: the City of St. Louis, Madison and Cook (Chicago) Counties in Illinois, Baltimore City, New York City, Philadelphia, Detroit (Wayne County), Wilmington (New Castle County), Newport News, and Los Angeles.<sup>2</sup> Many of these jurisdictions have been labeled Judicial Hellholes by the American Tort Reform Foundation.<sup>3</sup> Madison County—known as “ground zero” for asbestos litigation<sup>4</sup>—was home to a

remarkable twenty-eight percent of all asbestos-related lawsuits filed in 2016.<sup>5</sup>

Eight of the top ten jurisdictions in 2016 were also in the top ten jurisdictions for asbestos filings in 2015 and 2014, the other years for which KCIC compiled data. In 2015, sixty-nine percent of all asbestos lawsuits were filed in the top 10 jurisdictions. In 2014, seventy-one percent of all asbestos lawsuits were filed in those jurisdictions.

When the focus is confined to mesothelioma, the disease generally associated with the highest case values, the concentration of filings is even more extreme. The top ten jurisdictions were home to almost seventy-seven percent of mesothelioma filings in 2016, seventy-six percent of such filings in 2015, and seventy-four percent of the cases in 2014. Madison County alone received forty-seven percent of all mesothelioma filings in 2016 and 2015, up from forty-two percent in 2014. The number of mesothelioma filings in Madison County in 2016 (1,078) was nearly ten times that of the next most active jurisdiction, the City of St. Louis (119).<sup>6</sup>

**Out-Of-State Filings.** In many of the busiest jurisdictions, a significant percentage of asbestos cases are filed by out-of-state plaintiffs. For instance, in 2016, over eighty-three percent of asbestos plaintiffs in Madison County were out-of-state filers. In Illinois as a whole, seventy-two percent of filers in 2016 were nonresidents. In Delaware, ninety-two percent of asbestos plaintiffs in 2016 lived outside of the state.<sup>7</sup>

**Concentration of Plaintiffs' Firms.** The KCIC report also confirms that the vast majority of asbestos cases are filed by a small number of plaintiff law firms. In 2016, just ten law firms filed nearly sixty-two percent of all asbestos lawsuits in the United States. Four of those firms accounted for over forty-one percent of the filings. When the focus is limited to mesothelioma, the top ten firms filed almost fifty-nine percent of the cases.<sup>8</sup>

**Increasing Number of Defendants.** In 2016, 10,000 different companies were named as asbestos defendants, the most that KCIC has recorded in a single year. The average number of defendants named in asbestos cases climbed from fifty-nine in 2014 to sixty-six in 2015 and 2016. The maximum number of defendants named in a single complaint in 2016 was a remarkable 458, up from 361 in 2015 and 317 in 2014.<sup>9</sup>

While the total number of defendants has increased, certain companies are named in virtually every complaint. For instance, in 2016, at least one of the top ten most commonly sued defendants was named in almost ninety-nine percent of new asbestos lawsuits, and the single most commonly sued defendant was named in almost eighty-eight percent of the cases. Six other defendants were named in at least fifty percent of new asbestos lawsuit complaints.<sup>10</sup>

The average number of defendants named varies significantly by jurisdiction. In Delaware's New Castle County (Wilmington), the eighth busiest asbestos venue in 2016, there were an average of twenty-seven asbestos defendants in each case, yet that number was 117 in Michigan's Wayne County (Detroit), the sixth busiest venue, and 212 in West Virginia's Kanawha County (Charleston), the eleventh busiest venue.

The wide disparity in the average number of defendants named in asbestos lawsuits in each of the jurisdictions obviously reflects strategic choices made by asbestos plaintiff law firms rather than the facts of individual cases. For instance, among the top ten plaintiff firms for asbestos filings, one named an average of nineteen defendants in 2016 while another named an average of 150 defendants.<sup>11</sup>

**Secondary Exposure Claims.** The traditional asbestos plaintiff is a male allegedly exposed to asbestos in an occupational setting. Increasingly, however, asbestos plaintiffs include persons exposed off-site through "take-home" exposure to asbestos through contact with occupationally exposed family members and their clothes. These "secondary exposures" represent an increasing share of the nation's asbestos dockets. In 2016, for instance, almost twenty-two percent of asbestos cases alleged both primary and secondary exposure. This was somewhat higher than in 2015 (19.3%) and significantly higher than in 2014 (15.2%), reflecting a growing trend of secondary exposure claims. The plaintiffs were split evenly between men and women. In cases that alleged secondary exposure only, ninety percent of the plaintiffs were women.<sup>12</sup>

### **Recent Issues in Asbestos Litigation**

**Personal Jurisdiction.** Asbestos lawsuits are often filed in jurisdictions where the plaintiffs do not live, the alleged exposures did not occur, and the defendants are not "at home." Courts have traditionally rejected

jurisdictional challenges to such lawsuits, enabling plaintiff counsel to forum-shop and file their cases in jurisdictions that are viewed as advantageous to plaintiffs. Recent case law, however, has rejected the broad “doing business” formulation of jurisdiction and confirmed the existence of constitutional safeguards for defendants.

This trend stems primarily from the United States Supreme Court’s 2014 decision in *Daimler AG v. Bauman*,<sup>13</sup> which significantly clarified and narrowed the standard for general jurisdiction under the Due Process Clause of the Fourteenth Amendment. Because state courts generally exercise jurisdiction to the limits of the federal due process standard, and all federal courts do, *Daimler* applies in every hotbed of asbestos litigation. Rejecting the common perception that general jurisdiction exists so long as a corporate defendant has “continuous and systematic” contacts with the forum, *Daimler* held that general jurisdiction may not be exercised unless such a defendant is regarded as “at home” in the forum.<sup>14</sup> “At home” includes a corporate defendant’s state of incorporation, the state of its principal place of business, or other “exceptional” contacts that the Supreme Court did not define.<sup>15</sup> Although the *Daimler* Court emphasized that it merely explained what the law had always been, its decision has significantly raised the standard for exercising general personal jurisdiction, and its impact has been felt in subsequent federal and state cases.

For example, in 2016, the U.S. Second Circuit Court of Appeals in *Brown v. Lockheed Martin Corp.*<sup>16</sup> held that general jurisdiction did not exist in Connecticut with respect to an asbestos personal injury lawsuit against a major aerospace manufacturer that is both incorporated and maintains its principal place of business in Maryland. The court found that the defendant’s business in Connecticut, while not insubstantial, constituted only a small part of its global portfolio.<sup>17</sup> “[G]iven that it is common for corporations to have presences in multiple states exceeding that of [the defendant] in Connecticut,” the court explained, “general jurisdiction would be quite the *opposite* of ‘exceptional’ if such contacts were held sufficient to render the corporation at home in the state.”<sup>18</sup> Further, the court said that it would not interpret Connecticut’s “run-of-the-mill registration and appointment statute” as providing a basis for general jurisdiction over the defendant.<sup>19</sup>

In 2016, the Delaware Supreme Court in *Genuine Parts Co. v. Cepec*<sup>20</sup> similarly held that having a registered agent in the state was not sufficient to subject a non-resident defendant to the general jurisdiction of Delaware courts in a case brought by residents of Georgia. The court said, “*Daimler* rejected the notion that a corporation that does business in many states can be subject to general jurisdiction in all of them.”<sup>21</sup>

In 2017, the United States Supreme Court reaffirmed *Daimler* in *BNSF Railway Co. v. Tyrrell*.<sup>22</sup> The case involved consolidated Federal Employers’ Liability Act (FELA) actions filed in Montana state court by nonresidents against a railroad that did business in Montana but was incorporated and had its principal place of business elsewhere. The Court reversed a Montana Supreme Court opinion finding that the railroad’s extensive contacts with Montana meant that it was “doing business” and “found within” the state, such that general jurisdiction could be exercised.<sup>23</sup> The United States Supreme Court specifically rejected the Montana high court’s focus on the scale of the railroad’s business in the state. The Court held that the railroad’s in-state business did “not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in Montana.”<sup>24</sup>

This year, the United States Supreme Court also clamped down on forum-shopping in patent infringement actions, providing further evidence of the Court’s intent to curb “litigation tourism.”<sup>25</sup>

*Daimler* and *Tyrrell* have special relevance to the large volume of asbestos lawsuits filed in particular states. In such cases, *Daimler* and *Tyrrell* preclude the exercise of general jurisdiction unless the defendant is incorporated in the forum, has a principal place of business there, or has such overwhelming contacts with the forum that it is essentially “at home” there.<sup>26</sup>

A recent case on point from the New York City Asbestos Litigation (NYCAL) is *Trumbull v. Adience, Inc. (Matter of New York City Asbestos Litig.)*, decided in March of 2017.<sup>27</sup> In *Trumbull*, a New York resident allegedly exposed to asbestos in Missouri commenced suit in New York City against a Delaware corporation with its principal place of business in Massachusetts. The court emphasized, and plaintiff conceded, that “defendant is not subject to general jurisdiction based on *Daimler*, as it cannot be considered ‘at home’ in

New York since it is neither incorporated nor maintains its principal place of business within the state.”<sup>28</sup>

Other recent asbestos decisions have held likewise. For instance, in *MacCormack v. Adel Wiggins Group*,<sup>29</sup> decided in April 2017, a plaintiff alleging asbestos exposure in Massachusetts commenced suit in the City of St. Louis against a defendant that is incorporated and has its principal place of business outside of Missouri. The plaintiff argued that the defendant, a large global corporation, has such extensive contacts in Missouri that general jurisdiction existed. Following removal, a St. Louis federal court “disagree[d] as *Daimler* precludes that conclusion.”<sup>30</sup> The court said that given the scope of the defendant’s activities worldwide “it cannot be considered at home in Missouri.”<sup>31</sup> The court also found support in a 2017 Missouri Supreme Court decision, *State ex rel. Norfolk Southern Railway Co. v. Dolan*,<sup>32</sup> which held that compliance with Missouri’s foreign corporation registration statute does not constitute consent to the exercise of general jurisdiction by Missouri courts.

Another St. Louis federal court reached a similar conclusion in June of 2017 in *Everett v. Aurora Pump Co.*<sup>33</sup> Following removal from a Missouri state court, the court held that based on the “high threshold of business activity required” under *Daimler*, general jurisdiction did not exist over defendants that were incorporated in other states and had their principal places of business outside of Missouri.<sup>34</sup>

In *Clark v. Lockheed Martin Corp.*,<sup>35</sup> the plaintiff brought suit for alleged asbestos-related injuries against ten defendants that were not incorporated in Illinois and did not have their principal places of business there. A Chicago federal court ruled that it lacked general jurisdiction over these defendants pursuant to *Daimler*.<sup>36</sup> The court reached the same conclusion in *Surita v. AM General LLC*,<sup>37</sup> a case involving a Minnesota resident allegedly exposed to asbestos-containing products sold by a Wisconsin company with its principal place of business in Wisconsin while plaintiff served in the United States Army in Kentucky.

The U.S. District Court for Southern Illinois has dismissed a number of asbestos cases on jurisdictional grounds following removal from the active Madison County Circuit Court. For example, in *Perez v. Air & Liquid Systems Corp.*,<sup>38</sup> the federal district court held

that general jurisdiction could not be asserted over a global manufacturer in Illinois because the company is incorporated in New York and has its principal place of business in Massachusetts. The court held that, while the defendant has a presence in Illinois, when compared to its worldwide presence, its Illinois activities did not make it “at home” in the state.<sup>39</sup>

In *Hodjera v. BASF Catalysts LLC*,<sup>40</sup> a Seattle federal court dismissed asbestos-related claims against Canadian and German corporations with their principal places of business outside the United States and against a Virginia corporation with its principal place of business in Ohio in an action brought by a plaintiff who alleged exposure to asbestos in Toronto. The court held that general jurisdiction was lacking over the defendants because they were not “at home” in Washington.<sup>41</sup>

Other recent non-asbestos decisions have reinforced *Daimler*’s holding. For example, in *Barrett v. Union Pacific Railroad Co.*,<sup>42</sup> a FELA case brought by a railroad worker injured while using a machine that sets spikes, the Oregon Supreme Court held that Oregon courts did not have general jurisdiction over a railroad incorporated in Delaware with its principal place of business in Nebraska, notwithstanding the fact that Oregon formed a significant part of the railroad’s business. “Given *Daimler*,” the court held, “Oregon may not exercise general jurisdiction over the [defendant].”<sup>43</sup> The Oregon Supreme Court explained:

Paraphrasing the [United States Supreme] Court’s reasoning in *Daimler*, if Oregon can exercise general jurisdiction over Union Pacific because that company’s activities in this state are substantial and continuous, then every state in which Union Pacific has engaged in similar activities can assert general jurisdiction over it, and the Court was clear that a rule of decision that results in multiple jurisdictions simultaneously asserting general jurisdiction over an out-of-state defendant is at odds with the Due Process Clause.<sup>44</sup>

The Alabama Supreme Court in *Hinrichs v. General Motors of Canada, Ltd.*<sup>45</sup> held that general jurisdiction did not exist over a foreign automobile manufacturer. The court explained:

As *Daimler* makes clear, the inquiry as to general jurisdiction . . . is not whether GM

Canada's contacts with Alabama are in some way 'continuous and systematic,' but whether its contacts with Alabama are *so* 'continuous and systematic' that it is essentially 'at home' here. GM Canada is not incorporated here; its principal place of business is in Canada. It manufactures, assembles, and sells its product in Canada. There is simply no evidence in this case indicating that GM Canada had contacts with Alabama that could be considered so continuous and systematic that would render it 'at home' in Alabama. Therefore, the trial court correctly concluded that it did not have general jurisdiction over GM Canada.<sup>46</sup>

The United States Court of Appeals in *Whitener v. Pliva, Inc.*<sup>47</sup> dismissed a product liability action against an Israeli pharmaceutical manufacturer for the same reasons.<sup>48</sup>

In June 2017, the Wisconsin Supreme Court in *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans*<sup>49</sup>—echoing the opinions of the Delaware Supreme Court in *Cepec*, Missouri Supreme Court in *Dolan*, and Second Circuit Court of Appeals in *Brown*—held that the defendant's compliance with a Wisconsin statute requiring foreign corporations doing business in the state to maintain a registered office and registered agent did not, on its own, confer general jurisdiction.

The courts in these recent cases recognized and applied *Daimler's* bright-line rule that general jurisdiction does not exist where a defendant is not incorporated and does not have its principal place of business in the forum state and where the plaintiff has not satisfied other "exceptional" circumstances (none of which any court identified or found to exist). *Tyrrell's* resounding reaffirmation of *Daimler* removes any doubt that these standards govern the exercise of general jurisdiction in both state and federal court.

*Daimler* and *Tyrrell* also reveal another principle that has received far less attention but is equally important. In particular, while widely viewed as general jurisdiction cases, they also clarified the standard for specific jurisdiction. For such jurisdiction to exist, a defendant's activities in the forum generally must be "continuous and systematic" and give rise to the cause of action.<sup>50</sup>

*Tyrrell* made this point expressly by explaining that, while the defendant's contacts with Montana were not sufficient to vest general jurisdiction there, they were sufficient to vest specific jurisdiction if they gave rise to the plaintiffs' injuries. As the Court explained, "In short, the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana."<sup>51</sup> This statement indicates that, while the amount of business contacts necessary for specific jurisdiction is less than the amount required for general jurisdiction, significant contacts are still usually required for specific jurisdiction.

In June 2017, the United States Supreme Court further analyzed specific jurisdiction in a manner beneficial to mass tort and other defendants. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*<sup>52</sup> involved eight lawsuits filed by more than 600 plaintiffs, most of whom were not California residents, against, inter alia, the manufacturer of a blood thinning drug that allegedly caused harm. General jurisdiction was not at issue; the California Supreme Court below unanimously agreed that general jurisdiction could not be exercised over the defendant, Bristol-Myers Squibb (BMS), because the company is headquartered in Delaware, headquartered in New York, and maintains substantial operations in New York and New Jersey. Applying a "sliding scale approach," approach, however, the California Supreme Court concluded that BMS's "wide ranging" contacts with California were sufficient to support specific jurisdiction over the claims brought by nonresident plaintiffs. The United States Supreme Court reversed.

Just as *Daimler* had reined in broader interpretations of general jurisdiction and returned the analysis to fundamental principles, the *BMS* Court held that settled principles precluded California's exercise of specific jurisdiction. To exercise such jurisdiction, the Court emphasized, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State."<sup>53</sup> When such a connection is lacking, specific jurisdiction may not be exercised "regardless of the extent of the defendant's unrelated activities in the [s]tate."<sup>54</sup>

Courts have thus found specific jurisdiction lacking in asbestos cases where plaintiffs have sued in states that

have no connection to the plaintiffs' alleged exposures to asbestos. For example, the Seattle federal court in *Hodjera* ruled that a plaintiff's history of working with asbestos-containing products in Toronto that were similar to those sold by the defendants in Washington failed to establish specific jurisdiction.<sup>55</sup> The NYCAL trial court in *Trumbull* held that a plaintiff's alleged injury from exposure to asbestos-containing floor tile in Missouri would not support the exercise of specific jurisdiction in New York, even though the products were marketed nationwide (including in New York).<sup>56</sup> In *MacCormack*, the case involving a plaintiff exposed to asbestos in Massachusetts, the St. Louis federal court held that because none of the alleged acts occurred in Missouri, specific personal jurisdiction did not exist.<sup>57</sup> In *Perez*, the Southern Illinois federal district court held that specific jurisdiction did not exist in Illinois where plaintiff was exposed to asbestos in California and Hawaii and did not allege any injuries that arose out of or related in any way to the defendant's activities in Illinois.<sup>58</sup>

Additionally, in June 2017 the Washington Supreme Court in *Noll v. American Biltrite, Inc.*<sup>59</sup> held that Washington courts did not have specific jurisdiction over a Wisconsin-based company which supplied asbestos to an asbestos cement pipe manufacturer in Santa Clara, California, even though the purchaser's asbestos-cement pipe was sold on a national scale. The court held, "Showing only that an out-of-state manufacturer sold a component part to another out-of-state manufacturer who then sold the finished product into Washington is not enough to confer specific personal jurisdiction in Washington."<sup>60</sup>

Taken together, *Daimler*, *Tyrell*, and *BMS* provide a rational, cohesive framework for analyzing general and specific jurisdiction. *Daimler* and *Tyrell* rejected the previously held common view that general jurisdiction exists so long as the defendant has "continuous and systematic" contacts with the forum. It is now crystal clear that, to satisfy due process, the defendant must be essentially "at home" in the forum state to be subject to general jurisdiction there. The cases further suggested that specific jurisdiction generally requires that "a corporation's in-state activities are not only 'continuous and systematic, but also give rise to the liabilities sued on."<sup>61</sup> *BMS* completed the jurisdictional analysis by emphasizing that specific jurisdiction is lacking unless the lawsuit arises from the defendant's contacts with the

forum, even if the defendant's unrelated activities in the forum are extensive. These rulings necessarily limit the ability of plaintiff attorneys to continue to file asbestos lawsuits in the small number of national asbestos litigation epicenters.<sup>62</sup>

**Causation Standards.** In the current asbestos litigation environment, the issue of causation is often highly contentious.<sup>63</sup> On one hand, plaintiff counsel emphasize the difficulty of proving the exact amount of asbestos that causes disease generally or in a particular case. As a result, they favor lax standards that typically allow submission of a case to the jury upon a combination of evidence that plaintiff was exposed to a product that contained asbestos, the type of asbestos in the product is known to cause disease, use of the product emitted dust, and expert testimony that virtually any exposure, however small, to the product caused or increased the risk of plaintiff's disease. Defendants, on the other hand, urge a traditional tort standard that requires evidence of exposures that were of sufficient quality and quantity to create a reasonable inference of causation. This standard generally includes a showing that the defendant's product is capable of releasing respirable asbestos fibers, some evidence of dose, and a discussion of epidemiological literature indicating that disease has been known to arise from like exposures.<sup>64</sup>

New York's First Department appellate court, which handles NYCAL appeals, addressed these competing causation standards this year in *Juni v. A.O. Smith Water Products Co. (Matter of New York City Asbestos Litig.)*<sup>65</sup> At trial, an automobile mechanic with mesothelioma presented evidence that some of the brakes he worked with contained chrysotile asbestos and emitted dust when changed. Plaintiff's experts in occupational and environmental medicine and epidemiology testified that chrysotile asbestos is known to cause mesothelioma, the visibility of dust from changing brakes indicates exposures that are sufficient to cause disease, and, therefore, plaintiff's cumulative exposures caused his disease. On cross-examination, however, the experts conceded that they could not quantify plaintiff's exposures to asbestos from brake pads and that ninety-nine percent of the dust emitted from brake wear does not contain asbestos. The experts also acknowledged that the heat generated by the braking process transforms most chrysotile fibers in brake pads into a harmless mineral known as forsterite. Following a verdict for plaintiff, the trial court held that



plaintiff's expert testimony was insufficient to support the jury's finding of causation. The trial court therefore vacated the verdict.<sup>66</sup>

By a vote of three-to-one, the appellate court affirmed. The First Department began by emphasizing that the New York Court of Appeals in *Parker v Mobil Oil Corp.*<sup>67</sup> had required plaintiffs in other toxic tort cases to provide a "scientific expression of exposure" that went beyond mere proof that the plaintiff was exposed to a product that contained a toxin. While that standard does not require precise quantification of the exposure, causation nonetheless must be established "through some scientific method, such as mathematical modeling based on a plaintiff's work history, or comparing the plaintiff's exposure with that of subjects of reported studies."<sup>68</sup> The *Juni* majority applied the same standard to asbestos cases and, in doing so, it rejected the contention of plaintiff and the dissent that the standard would be insurmountable for asbestos plaintiffs. As the court explained, "there is no valid distinction to be made between the difficulty of establishing exposure to, say, benzene in gasoline and exposure to asbestos. In each type of matter, a foundation must be made to support an expert's conclusion regarding causation."<sup>69</sup> Henceforth, the NYCAL causation standard requires "at least *some* quantification or means of assessing the amount, duration, and frequency of exposure to determine whether [the] exposure was sufficient to be found a contributing cause of the disease[.]"<sup>70</sup>

While New York has strengthened its causation standard, California courts have gone in the opposite direction. In its landmark 1997 decision in *Rutherford v. Owens-Illinois, Inc.*,<sup>71</sup> the California Supreme Court held that asbestos plaintiffs, like other plaintiffs in products liability cases, must establish causation "under traditional tort principles," which includes "substantial factor" causation.<sup>72</sup> While this burden does not require "medical exactitude," the plaintiff must nonetheless demonstrate exposure at a quantifiable level; merely showing exposure to a product that contained asbestos is insufficient.<sup>73</sup> In the two decades since *Rutherford*, however, California courts have diluted the "traditional tort" standard of causation by embracing the theory that "every exposure" contributes to a plaintiff's cumulative exposure and is thus causative of disease.<sup>74</sup> Commentators have noted that the *Rutherford* causation standard has been cited by California courts nearly 100 times in the past twenty years, yet each of those

subsequent cases found that evidence of exposure alone, without quantification, was sufficient to create a jury question regarding the defendants' liability.<sup>75</sup> The subsequent case law has essentially read out of *Rutherford* any requirement that a plaintiff must quantify, even approximately, the exposure to, or dose of asbestos from, a defendant's product before a jury is permitted to decide that defendant's liability. Despite numerous requests by defendants, the California Supreme Court has been unwilling to review these decisions.

A similar situation may be developing in Pennsylvania. Three times in the past decade, the Pennsylvania Supreme Court rejected as insufficient the testimony of plaintiff experts that "each and every breath" of asbestos is causative of disease.<sup>76</sup> Each of these decisions rejected a plaintiff's effort to loosen the causation standard and, like the *Juni* decision in New York, each held that plaintiff must make a scientific showing of exposures that were of sufficient quality and quantity to cause disease. This showing may include a consideration of dose and relevant literature, a comparative assessment of plaintiff's exposures to different products, and other evidence suggestive of specific causation.

In, 2016, however, following an election that significantly changed the Pennsylvania Supreme Court's composition to favor plaintiff interest, the court in *Rost v. Ford Motor Co.*<sup>77</sup> upheld a plaintiff's verdict based on expert testimony that the plaintiff's cumulative exposures to asbestos, as set forth in hypothetical questions, caused his mesothelioma. The court did not expressly overrule the prior decisions but its new opinion paid scant attention to additional causation factors such as dose, scientific studies or literature, and a comparative assessment of plaintiff's exposures. The extent to which the causation standard has been diluted will be addressed in future cases, but the *Rost* case is a significant development.

**Asbestos Bankruptcy Trust Transparency.** Over the past three decades, scores of personal injury trusts holding many billions of dollars in assets have been established from the remnants of companies driven into bankruptcy by asbestos claims.<sup>78</sup> A typical mesothelioma claimant can recover hundreds of thousands of dollars from the trusts and obtain additional compensation in the tort system by suing solvent entities. In the Garlock Sealing Technologies, LLC bankruptcy case, for example, 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.”<sup>79</sup>

Given the amount of money available from the two-track system of compensation, it is perhaps not surprising that some claimants allege certain facts to support their tort claims then allege inconsistent facts to support their trust claims. For instance, claimants may allege exposure to the products of bankrupt entities in their trust filings, while not admitting to those exposures when they target solvent defendants in tort litigation. In fact, an examination of over 1,800 mesothelioma lawsuits resolved by Crane Co. from 2007-2011 revealed that plaintiffs filed an average of eighteen asbestos trust claims, and “80% of these claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceeding.”<sup>80</sup> In March 2017, additional allegations of inconsistent claiming surfaced in federal Racketeer Influenced and Corrupt Organizations Act (RICO) litigation John Crane, Inc. against major asbestos plaintiff personal injury firms.<sup>81</sup>

Claimants may also attempt to shield their trust recoveries from disclosure in tort suits by concealing the trust claims or not filing those claims at all until the tort suit has concluded. For instance, a December 2016 study of trust claiming activity in wrongful death cases in Newport News found that asbestos plaintiffs there 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 as many as twenty-five different trusts and obtain trust payments that have exceeded \$1 million.<sup>82</sup> An April 2017 Illinois Civil Justice League study of 100 asbestos cases in Illinois revealed that plaintiffs in ninety-two of the cases failed to identify or disclose a single trust filing in tort litigation, despite the fact that the plaintiffs were eligible to file an average of sixteen trust claims, and thirty-seven plaintiffs could have filed more than twenty trust claims.<sup>83</sup>

The result in either situation is that the tort system is unable to account for trust recoveries, which can allow plaintiffs to “double dip” and recover more than once for the exact same injury. This system of concealment and double compensation has been called “one of the longest-running and most lucrative schemes in the American litigation business.”<sup>84</sup>

These issues received widespread attention as a result of the bankruptcy of gasket and packing manufacturer Garlock Sealing Technologies.<sup>85</sup> The federal judge presiding over the case explained that evidence of plaintiffs’ trust-related exposures often “disappeared” in tort litigation against Garlock, because plaintiffs and their counsel undertook “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).”<sup>86</sup> The court also found that the conduct of the plaintiffs’ lawyers exhibited a “startling pattern of misrepresentation.”<sup>87</sup> These remarkable findings have been described as a “wake up call” for judges handling asbestos cases.<sup>88</sup>

A Delaware judge was likewise shocked at inconsistencies in a claimant’s trust and tort allegations:

This is really seriously egregiously bad behavior. This is misrepresenting. This is trying to defraud. I don’t like that in this litigation. And it happens a lot. And I’m trying to put an end to it. This is an example of the games that are being played.<sup>89</sup>

A Philadelphia judge described the problem as follows:

It is not uncommon for a person who can show exposure to asbestos to make application to several, or even more bankruptcy trusts, to simultaneously sue other, non-bankrupt, manufacturers, often more than one, in civil court proceedings. Thus, one individual or estate has two avenues of recovery; the bankruptcy trusts administrative procedure, as well as civil lawsuits. This has led to the potential of double recovery, as there has only been haphazard reporting, if at all by plaintiffs of funds received from bankruptcy trusts, despite recoveries also received at trial.<sup>90</sup>

Similar criticism by an Ohio judge prompted the *Wall Street Journal* to editorialize that the judge’s opinion should be “required reading for other judges” to provide “more scrutiny of ‘double dipping’ and the rampant fraud inherent in asbestos trusts.”<sup>91</sup>

These judicial findings and the resulting media coverage have spawned new reforms and boosted existing efforts, which have consisted primarily of so-called

“trust transparency” statutes and judicially-imposed case management orders (CMOs). To date, twelve states have passed asbestos bankruptcy trust transparency statutes, CMOs exist in many others, and a handful of courts have issued individual rulings addressing the abuses.

The state statutes provide a mechanism to compel plaintiffs to file and disclose their trust claims before their tort cases proceed to trial so that trust recoveries can be accounted for in the tort system. The statutes generally share a few key elements: (1) plaintiffs must investigate, file, and disclose all eligible trust claims, with supporting documents; (2) plaintiffs have an ongoing duty to supplement their disclosures as additional trust claims are filed; (3) defendants may seek court intervention to require plaintiffs to file additional eligible claims; (4) defendants may seek discovery directly from the trusts; (5) cases may not proceed to trial until the statutory requirements are met; (6) trust materials are admissible at trial to establish exposure and causation with respect to trust-related products; and (7) courts may impose sanctions if the statutory requirements are not met.

By providing more information about the trust filings, the reforms ensure that judges and juries can render fair decisions about the causes and value of a plaintiff's harm. Where reforms have been implemented, they have worked and been fair.

Ohio provides an example. In 2013, Ohio became the first state to enact trust transparency reform.<sup>92</sup> The three-plus year impact of the Ohio law was assessed in a May 2017 report by the U.S. Chamber Institute for Legal Reform.<sup>93</sup> The report looked at cases pending in 2010, 2012, and 2014 in the Cuyahoga County (Cleveland) Court of Common Pleas, Ohio's busiest asbestos jurisdiction.<sup>94</sup> The report concludes that, when plaintiffs comply with the statute by disclosing their asbestos trust claims in litigation, there is no appreciable delay in the prosecution of cases.<sup>95</sup> Further, despite earlier concerns voiced by opponents, there is no evidence that defendants are using the trust transparency provisions to deliberately delay cases. Instead, it is more often the plaintiffs' counsel's trial strategy that causes the longest delays.<sup>96</sup> Thus, the report concludes that the statute “appears to have accomplished its goal: to ensure transparency and fairness without imposing significant burdens on plaintiffs.”<sup>97</sup>

Given the success of trust transparency legislation in Ohio and behaviors exposed in *Garlock* and other cases, the enactment of such statutes has spread. Similar reforms have now been enacted in Texas, Wisconsin, Iowa, Tennessee, Utah, West Virginia, Arizona, North Dakota, South Dakota, Oklahoma, and Mississippi.<sup>98</sup> In 2017 alone, reform statutes have been enacted in four states. In July 2017, the National Conference of Insurance Legislators (NCOIL) adopted model asbestos bankruptcy trust transparency legislation patterned after the bipartisan West Virginia law.<sup>99</sup>

At the federal level, the Furthering Asbestos Claims Transparency (FACT) Act passed out of the U.S. House of Representatives in March 2017 and remains pending in the Senate. The FACT Act would require asbestos trusts to produce publicly available quarterly reports that would describe the name and exposure history of each person filing a trust claim and the basis for any payment made by the trust. Further, the trusts would have to provide asbestos defendants with claims materials submitted by claimants.

**Advertising.** No discussion of trends in asbestos litigation would be complete without mentioning the unprecedented role of advertising in driving so much of the litigation into the hands of so few plaintiffs' firms. Perhaps more than any other national litigation, asbestos litigation is defined by aggressive marketing and recruitment. In 2004, plaintiffs' firms spent about \$5 million on television advertising. Since 2009, that number has topped \$30 million annually. Only four firms have accounted for more than fifty percent of that spending. And nearly two-thirds of the spending has funded national rather than local television advertising, yet another indication of the national reach of those who shape the litigation.<sup>100</sup> Cardozo Law School Professor Lester Brickman, a legal ethicist and expert on asbestos litigation, has called lawyer advertising for asbestos claimants “the most extensive recruitment process since World War II, when Uncle Sam wanted you.”<sup>101</sup>

Television advertising is only one aspect of the marketing push. Plaintiffs' firms have also dramatically expanded their Internet profiles through numerous online platforms, including Google, Facebook, Twitter, YouTube, and blogs. For example, to ensure that they receive priority when potential plaintiffs search Google, plaintiffs' firms spend an astonishing \$50 million per year on Google keyword advertising (known as Google

AdWords). By comparison, Apple paid Google only about \$20 million a year during the same time frame to advertise its iPhones and iPads. “Mesothelioma” is now the most expensive keyword for Google AdWords. The current cost-per-click of the phrase “mesothelioma lawyer” in the most active asbestos jurisdiction, Illinois, was over \$300. By comparison, the cost for the phrase “smart phone” was only \$6.<sup>102</sup>

These costly efforts to solicit asbestos claimants reflect the potential recoveries, which have exceeded \$15 billion from bankruptcy trusts alone in the last decade.<sup>103</sup> Bringing asbestos cases through the door can be so lucrative that some of the leading advertisers among the plaintiffs’ firms serve essentially as brokers, securing clients and passing them along to other firms to actually litigate the cases. Given the stakes, it is not surprising that advertising expenditures have increased so dramatically, and there is no reason to expect that the pace will slow in the near future.

### **Recent Developments in Some Key States**

**New York.** The New York City Asbestos Litigation (NYCAL) is in a period of change. Recently, NYCAL Administrative Judge and Coordinating Justice Peter Moulton and NYCAL trial court judge Cynthia Kern were elevated to the First Department appellate court.

On Justice Moulton’s last day in the trial court, he issued a revised CMO and accompanying Decision and Order.<sup>104</sup> The history of NYCAL and procedural mechanisms in the revised CMO, as well as the effect of plaintiffs’ firm advertising on case valuation in NYCAL, are thoroughly discussed in an August 2017 report published by the U.S. Chamber Institute for Legal Reform.<sup>105</sup> Here are some highlights of the new CMO:

- **Punitive damages allowed:** Justice Moulton’s predecessor opened the door to ending the long-standing NYCAL practice of deferring punitive damages awards. Under the new CMO, punitive damages are no longer deferred for cases put on a trial calendar as of the CMO’s effective date.
- **Limits on joinder of jury trials:** Trial judges shall join no more than two cases for jury trial, or a maximum of three cases for jury trial upon the plaintiffs demonstrating certain criteria. Two cases may be joined where plaintiff demonstrates that joinder is warranted pursuant to the factors

set forth in *Malcolm v. National Gypsum Co.*,<sup>106</sup> a 1993 federal court case that is considered by New York state courts to be the seminal decision concerning the consolidation of asbestos cases for trial. A judge may join three cases if consolidation is warranted under two or more of the *Malcolm* factors and all three plaintiffs share the “same disease” (i.e., pleural mesothelioma, non-pleural mesothelioma, lung cancer, or other cancers). When a plaintiff asserts a punitive damages claim, that case may not be joined with any other plaintiff’s case for jury trial absent stipulation of the parties. There are no limits on joinder in non-jury (bench) trials.

- **Use at Trial of Nonparty Interrogatories and Depositions:** The new CMO permits the limited use of nonparty (including settled party) interrogatory responses at trial to prove that the nonparty’s product contained asbestos or that asbestos was used in conjunction with the nonparty’s product, and any failure to warn by the nonparty concerning asbestos. Justice Moulton declined to uniformly permit the use of nonparty depositions for Article 16 purposes. The CMO simply states: “Nonparty depositions may be used where allowed by the CPLR.”
- **Asbestos Bankruptcy Trust Claims:** The new CMO retains the prior CMO’s requirements that a plaintiff who “intends” to file a proof of claim form with any bankrupt entity or trust shall do so no later than ninety days before trial in *In Extremis* cases and no later than ten days after the case is designated in an Active Trial Cluster. The CMO contains new language requiring plaintiffs to report to the court and defense counsel any post-deadline asbestos trust claims and confer with the court before filing such claims.

Effective August 1, Justice Lucy Billings took over as the NYCAL Coordinating Judge. As of this writing, it remains to be seen what she will do with respect to enforcing or modifying the revised CMO. Those determinations may impact a pending appeal regarding the new CMO. In a July 2017 order, Appellate Division, First Department, Justice Ellen Gesmer generally granted various defendants’ motion seeking a temporary stay of the implementation of the new CMO

pending a decision by the full bench. The defendants argued that the revised CMO violates their constitutional and statutory rights because it purports to override the New York Civil Practice Law and Rules (CPLR), while ending the deferral of punitive damages claims in NYCAL.<sup>107</sup>

**Illinois.** Filings are down significantly in Cook County (Chicago) from 2014 through 2016. There were 143 asbestos cases (94 mesothelioma) filed in Cook County in 2016, down from 187 cases (116 mesothelioma) in 2015, and 181 cases (124 mesothelioma) in 2014.<sup>108</sup> It appears that Chicago-based asbestos plaintiff firms are shifting cases to Madison County.

The Illinois Fifth District Appellate Court is reviewing Ford Motor Co.'s claim that Illinois courts lack general jurisdiction over the company in light of the U.S. Supreme Court's decision in *Bauman*.<sup>109</sup> Oral argument was heard in December 2016.

**California.** In 2016, the California Supreme Court decided two asbestos cases relating to the duties of material suppliers, *Ramos v. Brenntag Specialties, Inc.*<sup>110</sup> and *Webb v. Special Elec. Co.*<sup>111</sup> Both cases resulted in narrow decisions for plaintiffs. In 2017, the California Supreme Court in *Kesner v. Superior Court*<sup>112</sup> held that take-home asbestos exposure claims could proceed against employers and premises owners. The court was very specific, however, in limiting the duty recognized in *Kesner* to persons living in the occupationally exposed worker's household.<sup>113</sup>

In July 2017, the Second District Court of Appeal in *Petitpas v. Ford Motor Co.*<sup>114</sup> chose not to expand *Kesner* to accommodate a plaintiff who alleged exposure to asbestos through contact with a service station worker, who later became her husband, but was not married or living with him at the time of her exposure. The appellate court said that her claim "appears to be exactly what the [California] Supreme Court was attempting to avoid with [its] bright-line rule."<sup>115</sup>

Further, the Court of Appeal said that defendant Ford Motor could not be liable for asbestos emitted from replacement brake parts manufactured by third parties, even though in the 1960s and much of the 1970s replaceable brake linings almost universally contained asbestos. In 2012 in *O'Neil v. Crane Co.*,<sup>116</sup> the California Supreme Court reaffirmed that a product

manufacturer generally may not be held liable for harm caused by another manufacturer's product. In a footnote, the court said a stronger case for liability might be made in the case of a product that required the use of an asbestos-containing part in order to operate. The Court of Appeal in *Petitpas* said that plaintiff presented no evidence that the very design of Ford cars from the relevant time period *required* brakes that contained asbestos. The court also noted the enormous cost and unfairness that would result if every vehicle manufactured before nonasbestos friction materials became generally available would be considered a defective product simply by "virtue of incorporation or, or specification of, asbestos-containing materials in third party component parts."<sup>117</sup>

**Pennsylvania.** As explained, the Pennsylvania Supreme Court recently upheld a verdict that was supported by a "cumulative exposure" theory of causation.<sup>118</sup>

The situation in Pennsylvania has been further confused by uncertainty regarding the scope of the Pennsylvania Supreme Court's landmark decision in *Tincher v. Omega-Flex*.<sup>119</sup> *Tincher*, which was not an asbestos case, completely revamped Pennsylvania products liability law by importing consumer expectations and risk-utility tests from other states to determine whether a product is defective. *Tincher* also rejected Pennsylvania's longstanding and rigid preclusion of negligence principles from products liability cases.<sup>120</sup>

As relevant to asbestos cases, Pennsylvania's intermediate appellate court, the Superior Court, has struggled with whether *Tincher* even applies in the failure-to-warn context, which is how asbestos claims are commonly asserted in Pennsylvania. The Superior Court has recently rendered conflicting decisions on this question.<sup>121</sup> Thus, it is not clear whether asbestos cases are even subject to Pennsylvania's new regime of products liability law.

**Missouri.** Last year, the American Tort Reform Foundation ranked the City of St. Louis the nation's #1 Judicial Hellhole. Plaintiffs were drawn to St. Louis by a permissive standard for expert causation testimony, favorable juries, and a liberal Missouri Supreme Court that routinely issues decisions benefitting plaintiffs, such as by striking down the state's cap on punitive damages.

Significant changes have occurred over the past year. Democrat Governor Jay Nixon was termed out in 2016. Voters elected pro-business Republican Eric Greitens to succeed him. Republicans kept control of the Missouri legislature last November.

In 2017, under Governor Greitens' leadership, Missouri codified the heightened federal court *Daubert* standard for the admissibility of expert testimony in Missouri courts and limited awards for medical expenses to the amount actually paid by the plaintiff or that person's insurer. Both bills had been vetoed by the previous administration at the urging of plaintiff lawyers.

The legislature started work this year on venue and joinder reform legislation to address mass filings by nonresident plaintiffs and on asbestos bankruptcy trust transparency reform. Both issues are likely to continue to be priorities for the Missouri business community, among other reforms.

**West Virginia.** Transformational change occurred in West Virginia in November 2014 when Republicans committed to ending the state's Judicial Hellhole image gained control of the legislature.

As stated, West Virginia enacted asbestos bankruptcy trust claim transparency legislation to provide a mechanism to require plaintiffs to file and disclose their asbestos bankruptcy trust claims before trial. West Virginia also enacted legislation to require plaintiffs to have a present physical impairment to bring or maintain an asbestos or silica personal injury action so that the truly sick do not have to compete with the non-sick for judicial and defendant resources.

In addition, West Virginia capped punitive damages at the greater of four times the plaintiff's compensatory damages or \$500,000. The evidentiary burden for recovery of punitive damages was raised, requiring plaintiffs to establish by "clear and convincing evidence" that the defendant acted with "actual malice or a conscious, reckless, and outrageous indifference to the health, safety, and welfare of others." Also, punitive damages trials may be bifurcated at any defendant's request to prevent the jury from hearing evidence relevant only to punitive damages in the compensatory damage phase of a trial.

West Virginia also replaced its modified joint liability approach with pure several liability. Fault can be

apportioned to nonparties and settled parties. If a defendant is unable to pay its share of a judgment, the plaintiff can petition the court to reallocate that part of the judgment to the solvent defendants, but such reallocation is limited to each defendant's percentage of fault.

In 2017, the pace of progress slowed because so much has been done, but the legislature did lower the pre- and post-judgment interest rates on awards.

### **Conclusion**

Asbestos litigation typifies the old adage that change is the only constant. Asbestos litigation has been supported by strategies that actively solicit plaintiffs, steer their cases into jurisdictions believed to be favorable, concentrate those cases in the hands of relatively few plaintiffs' firms that exert disproportionate influence over the litigation, identify and sue more defendants, and formulate new causes of action. These strategies play out in jurisdictions that are continuously shaped by important national and state legal developments involving jurisdiction, burdens of proof, trust reform, and other significant matters. Asbestos litigants and their counsel must be aware of these myriad changes as they continue to participate in litigation that has proven to be both unique and enduring.

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### **Endnotes**

1. See KCIC, *Asbestos Litigation: 2016 Year in Review* [hereinafter "KCIC"] (on file with authors).
2. *Id.* at 4.
3. See American Tort Reform Foundation, *Judicial Hellholes: 2016-2017* [hereinafter "ATRA Report"], available at <http://www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf>.
4. *Id.* at 31.
5. KCIC, *supra*, at 4.
6. *Id.* at 5-6.
7. *Id.* at 20-22.
8. *Id.* at 10-11.

9. *Id.* at 16-17.
10. *Id.*
11. *Id.* at 17.
12. *Id.* at 19-20.
13. 134 S. Ct. 746 (2014).
14. *Id.* at 751, 759-760.
15. *Id.* at 760-761.
16. 814 F.3d 619 (2d Cir. 2016).
17. *Id.* at 629.
18. *Id.* at 630 (emphasis in original).
19. *See id.* at 637.
20. 137 A.3d 123 (Del. 2016).
21. *Id.* at 143-44.
22. 137 S. Ct. 1549 (2017).
23. *Id.* at 1552.
24. *Id.* at 1559.
25. *See TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017).
26. *See In re Asbestos Prods. Liab. Litig. (No. VI) (Coward v. Various Defendants)*, 2014 WL 5394310, at \*5 (E.D. Pa. Oct. 23, 2014) (granting motions to dismiss by defendants in cases originally filed in the Virgin Islands where defendants' contacts unrelated to plaintiff's claims were not so substantial and continuous with the Virgin Islands as to make the companies "essentially at home" as if they were incorporated or had their principal place of business there); *see also Walashek v. Air & Liquid Sys. Corp.*, 2014 WL 12461325 (S.D. Cal. Dec. 29, 2014); *Ricks v. Armstrong Int'l, Inc.*, 2014 WL 2873189 (E.D.N.C. June 24, 2014).
27. 2017 WL 914632 (N.Y. Sup. Ct., N.Y. County Mar. 6, 2017).
28. *Id.* at \*7.
29. 2017 WL 1426009 (E.D. Mo. Apr. 21, 2017).
30. *Id.* at \*4.
31. *Id.*
32. 512 S.W.3d 41 (Mo. 2017).
33. 2017 WL 2778091 (E.D. Mo. June 27, 2017).
34. *Id.* at \*3.
35. 2016 WL 67265 (S.D. Ill. Jan. 6, 2016).
36. *Id.* at \*2.
37. 2015 WL 12826471 (N.D. Ill. Nov. 4, 2015).
38. 2016 WL 7049153 (S.D. Ill. Dec. 2, 2016).
39. *See also Denton v. Air & Liquid Sys. Corp.*, 2015 WL 682158, at \*2 (S.D. Ill. Feb. 17, 2015) ("DuPont undoubtedly has several facilities in Illinois; however, the Supreme Court has made clear that the mere presence of a defendant in the forum does not subject it to all-purpose jurisdiction in that forum."); *Begin v. Air & Liquid Sys. Corp.*, 2016 WL 4543180 (S.D. Ill. Jan. 19, 2016); *Rozumek v. Union Carbide Corp.*, 2015 WL 12831301 (S.D. Ill. July 1, 2015).
40. 2017 WL 2179040 (W.D. Wash. May 17, 2017); 2017 WL 2212785 (W.D. Wash. May 17, 2017); 2017 WL 2263653 (W.D. Wash. May 23, 2017); 2017 WL 2263654 (W.D. Wash. May 23, 2017).
41. 2017 WL 2179040, at \*2; 2017 WL 2212785, at \*2; 2017 WL 2263653, at \*2; 2017 WL 2263654, at \*2.
42. 390 P.3d 1031 (Or. 2017).
43. *Id.* at 1036.
44. *Id.*
45. - So. 3d -, 2016 WL 3461177 (Ala. June 24, 2016), *cert. denied*, 2017 WL 2722434 (U.S. June 26, 2017).
46. *Id.* at \*10 (internal citation omitted).

47. 606 F. App'x 762 (5th Cir. 2015).
48. *See also Sioux Pharm., Inc. v. Summit Nutritionals Int'l, Inc.*, 859 N.E.2d 182 (Iowa 2015) (totality of defendant's contacts with Iowa fell short of making it essentially at home in that state).
49. 898 N.W.2d 70 (Wis. 2017).
50. *Daimler*, 134 S. Ct. at 754 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (jurisdiction can be asserted where a corporation's in-state activities are not only "continuous and systematic, but also give rise to the liabilities sued on")). *International Shoe* also recognized that "some single or occasional acts of the corporate agent in a state . . . , because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." 326 U.S. at 318.
51. *Tyrrell*, 137 S. Ct. at 1559.
52. 137 S. Ct. 1773 (2017).
53. *Id.* at 1781 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).
54. *Id.*
55. *Hodjera*, 2017 WL 2179040, at \*2; *Hodjera*, 2017 WL 2212785, at \*2; *Hodjera*, 2017 WL 2263653, at \*2; *Hodjera*, 2017 WL 2263654, at \*2.
56. *Trumbull*, 2017 WL 914632, at \*13.
57. *MacCormack*, 2017 WL 1426009, at \*5.
58. *Perez*, 2016 WL 7049153, at \*6.
59. 395 P.3d 1021 (Wash. 2017).
60. *Id.* at 1028.
61. *Daimler*, 134 S. Ct. at 761 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945); *see also id.* ("[T]he words 'continuous and systematic' were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate.")).
62. *See* Gary A. Isaac, *Does Daimler v. Bauman Portend an End to Madison County's Reign as a Top 'Magnet Jurisdiction'?*, 37 No. 19 Westlaw J. Asbestos 2 (2015).
63. *See* Joseph Sanders, *The 'Every Exposure' Cases and the Beginning of the Asbestos Endgame*, 88 Tul. L. Rev. 1153 (2014); Megan A. Ceder, Comment, *A Dose of Reality: The Struggle With Causation in Toxic Tort Litigation*, 51 Hous. L. Rev. 1147 (2014).
64. *See* William L. Anderson et al., *The "Any Exposure" Theory Round II: Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 Kan. J.L. & Pub. Pol'y 1 (2012); Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. U. L. Rev. 479 (2008).
65. 48 N.Y.S.3d 365 (N.Y. App. Div. 1st Dep't 2017).
66. *Id.* at 369.
67. 857 N.E.2d 1114 (N.Y. 2006).
68. *Juni*, 48 N.Y.S.3d at 368.
69. *Id.* at 370.
70. *Id.* (emphasis in original).
71. 941 P.2d 1203 (Cal. 1997).
72. *Id.* at 1206.
73. *Id.*
74. *See Phillips v. Honeywell, Inc.*, 9 Cal. App. 5th 1061 (5th Dist. 2017) (expert testimony that every exposure to asbestos increases the risk of mesothelioma was not unduly speculative); *Davis v. Honeywell Int'l, Inc.*, 245 Cal. App. 4th 477 (2d Dist. 2016); *Izell v. Union Carbide Corp.*, 231 Cal. App. 4th 962 (2d Dist. 2014); *Hernandez v. Amcord, Inc.*, 215 Cal. App. 4th 659 (2d Dist. 2013); *Jones v. John Crane, Inc.*, 132 Cal. App. 4th 990 (1st Dist. 2005).
75. *See* Jason Litt et al., *Returning To Rutherford: A Call to California Courts to Rejoin the Legal Mainstream and*



- Require Causation be Proved in Asbestos Cases under Traditional Torts Principles*, 45 Sw. L. Rev. 989 (2016).
76. See *Howard ex rel. Estate of Ravert v. A.W. Chesterton, Inc.*, 78 A.3d 605 (Pa. 2013); *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (Pa. 2012); *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216 (Pa. 2007).
77. 151 A.3d 1032 (Pa. 2016).
78. See Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* 1 (RAND Corp. 2011); U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011) (estimating the trust system held \$36.8 billion as of 2011). As part of a reorganization plan under 11 U.S.C. 524(g) of the United States Bankruptcy Code, a debtor with outstanding asbestos liabilities may establish a trust to fund present and future settlements of claims and lawsuits. Once a company has established a trust and emerges from bankruptcy protection, all liabilities for asbestos exposure are assigned to the trust.
79. See *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014); see also Heather Isringhausen Gvillo, *Database Provides Insight Into How Much Asbestos Claims Are Worth*, Madison-St. Clair Record, May 14, 2015 (Garlock database shows that asbestos claimants represented by a dominant plaintiffs' law firm in Madison County, Illinois, have received on average \$804,207, with approximately 41% from an average of 13 bankruptcy trusts and the rest from an average of 13 solvent companies).
80. See 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, 1 (Nov. 4, 2015), available at <https://www.lexislegalnews.com/articles/3583/commentary-a-look-behind-the-curtain-public-release-of-garlock-bankruptcy-discovery-confirms-widespread-pattern-of-evidentiary-abuse-against-crane-co>.
81. See *John Crane Inc. v. Simon Greenstone Panatier Bartlett, APC*, 2017 WL 1093150 (N.D. Ill. Mar. 23, 2017), appeal filed; *John Crane Inc. v. Shein Law Ctr., Ltd.*, 2017 WL 1105490 (N.D. Ill. Mar. 23, 2017), appeal filed.
82. See Mark A. Behrens, *Disconnects and Double-Dipping: The Case for Asbestos Bankruptcy Trust Transparency in Virginia* (U.S. Chamber Inst. for Legal Reform Dec. 2016), available at <http://www.instituteforlegalreform.com/research/disconnects-double-dipping-the-case-for-asbestos-bankruptcy-trust-transparency-in-virginia>.
83. Mark A. Behrens et al., *Illinois Asbestos Trust Transparency: The Need to Integrate Asbestos Trust Disclosures with the Illinois Tort System* (Ill. Civil Justice League Apr. 2017), available at <http://www.icjl.org/IllinoisAsbestosTrustTransparencyReport.pdf>.
84. Daniel Fischer, *A Stubborn Manufacturer Exposes The Asbestos Blame Game*, Forbes, Apr. 15, 2015. Other national media outlets have also covered the "scam" and "racket." See e.g., Opinion, *Busting the Asbestos Racket*, Wall St. J., Feb. 7, 2014, at A16; Michael Tomsic, *Case Sheds Light On The Murky World Of Asbestos Litigation*, Nat'l Pub. Radio, All Things Considered, Feb. 4, 2014, available at 2014 WLNR 3168502, and <http://www.npr.org/2014/02/04/271542406/case-sheds-light-on-the-murky-world-of-asbestos-litigation>; Joe Nocera, Editorial, *The Asbestos Scam, Part 2*, N.Y. Times, Jan. 14 2014, at A27, available at [http://www.nytimes.com/2014/01/14/opinion/nocera-the-asbestos-scam-part-2.html?\\_r=0](http://www.nytimes.com/2014/01/14/opinion/nocera-the-asbestos-scam-part-2.html?_r=0).
85. See *Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, 2015 WL 4773425, at \*5 (W.D. Pa. Aug. 12, 2015) ("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."); see also Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071 (2014); Daniel J. Ryan & John J. Hare, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock's Bankruptcy*, 15:1 Mealey's Asbestos Bankr. Rep. 1, 2 (Aug. 2015).
86. *In re Garlock Sealing Techs.*, 504 B.R. at 84.
87. *Id.* at 86.
88. Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos*

- Cases*, 37 Am. J. Trial Advoc. 479, 486, 488 (2014) (“Notwithstanding the uncertain impact of the Garlock case, judges should view the decision as a wake-up call to acknowledge the very real possibility that asbestos lawsuits on their own dockets may be similarly comprised by the withholding of the same information in the court cases that is used to gain recoveries from the trusts.”).
89. William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 691 (2014) (citing Pre-trial Hearing Transcript at 3, *In re Asbestos Litig.: Montgomery v. Am. Steel & Wire Corp.*, No. 09C-11-217 ASB (Del. Super. Ct. New Castle Cnty. Nov. 7, 2011)); see also Asbestos Claims Transparency, Hearing Before The Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 113th Cong. (Mar. 13, 2013) (statement of Hon. Peggy L. Ableman), available at 2013 WLNR 7440143.
  90. *Reed v. Allied Signal*, 20 Pa. D&C 5th 385, 400, 2010 WL 8347050 (Pa. Com. Pl. Phila. Cnty. Dec. 22, 2010), *aff'd*, 40 A.3d 184 (Pa. Super. 2011) (table), *appeal denied*, 51 A.3d 839 (Pa. 2012) (table).
  91. See Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14, referring to the opinion of Hon. Harry Hanna in *Kananian v. Lorillard Tobacco Co.*, No. CV 442750 (Ohio Com. Pl. Cuyahoga Cnty., 2007), in which the judge barred plaintiff’s counsel from practicing before the court based on glaring fraud and inconsistencies between allegations made in asbestos trust claim forms and the pending civil litigation.
  92. See Ohio Rev. Code §§ 2307.951 to 2307.954.
  93. U.S. Chamber Institute for Legal Reform, *Watching it Work: The Impact of Ohio’s Asbestos Trust Transparency Law on Tort Litigation in the State* (May 4, 2017), available at [http://www.instituteforlegalreform.com/uploads/sites/1/WatchingItWorkpaper\\_Web.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/WatchingItWorkpaper_Web.pdf).
  94. *Id.* at 3.
  95. *Id.* at 11-12, 17.
  96. *Id.* at 13, 17.
  97. *Id.* at 17.
  98. See Ariz. Rev. Stat. § 12-782; Ohio Rev. Code §§ 2307.951 to 2307.954; Okla. Stat. tit. 76, §§ 81 to 89; Tenn. Code Ann. §§ 29-34-601 to 609; Tex. Civ. Prac. & Rem. Code Ann. §§ 90.051-.058; Utah Code Ann. §§ 78B-6-2001 to 2010; W. Va. Code §§ 55-7F-1 to 55-7F-11; Wis. Stat. § 802.025; Iowa Code §§ 686A.1 to 9; Miss. Code §§ 11-67-1 to 15; N.D. H.B. 1197 (2017); S.D. Codified Laws § 21-66-1 to 11; see also Ga. Code Ann. § 51-14-7(a)(9).
  99. See National Conference of Insurance Legislators, Asbestos Bankruptcy Trust Claims Transparency Model Act, available at <http://ncoilo.org/wp-content/uploads/2017/07/FINAL-asbestos.pdf>.
  100. See Chris Monahan, *Why You’re Seeing More Advertising by Asbestos Plaintiff Firms*, Risky Bus., Mar. 24, 2015, available at <http://riskybusiness.kcic.com/why-youre-seeing-more-advertising-by-asbestos-plaintiff-firms/>.
  101. Professor Brickman’s comments, made during a telephone interview, are quoted in *Lawsuit Assembly Line: Asbestos Plaintiffs are Burned by the Litigation Industry’s Manufacturing Model*, available at <http://www.triallawyersinc.com/asbestos/asb03.html#notes>.
  102. See Monahan, *supra*.
  103. *Id.*
  104. See Mark K. Hsu et al., *What’s New in the Latest NYCAL Case Management Order?* (Hawkins Parnell Thackston & Young June 2017), available at <http://www.hptylaw.com/media-publications-new-york-city-asbestos-litigation-whats-new-in-the-latest-nycal-case-management-order.html>.
  105. See James L. Stengel & C. Anne Malik, *On the Edge: New York County Asbestos Litigation at a Tipping Point* (U.S. Chamber Inst. for Legal Reform Aug. 2017), available at [http://www.instituteforlegalreform.com/research/on-the-edge-new-york-county-asbestos-litigation-at-a-tipping-point?utm\\_source=website&utm\\_medium=carousel\\_2\\_LM\\_20170803TW](http://www.instituteforlegalreform.com/research/on-the-edge-new-york-county-asbestos-litigation-at-a-tipping-point?utm_source=website&utm_medium=carousel_2_LM_20170803TW).
  106. *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993).

107. See Andrew Denney, *Asbestos Case Management Rules Delayed by Court*, N.Y.L.J., July 20, 2017. A copy of the court's order is available at <http://asbestoscasetracker.com/wp-content/uploads/2017/07/Order.pdf>.
108. See KCIC, *supra*.
109. See *Jeffs v. Ford Motor Co.*, 50 N.E.3d 1137 (Ill. 2016) (directing appellate court to allow Ford Motor's petition for leave to appeal).
110. 63 Cal.4th 500 (2016) (component parts doctrine only protects suppliers of parts that are incorporated into finished products).
111. 63 Cal.4th 167 (Cal. 2016) (adopting sophisticated intermediary defense, but finding it not to apply where a broker of raw asbestos did not establish that it reasonably relied on Johns-Manville to convey warnings to users).
112. 384 P.3d 283 (Cal. 2016).
113. See *id.* at 289.
114. 2017 WL 2859760 (Cal. Ct. App. 2d Dist. Div. 4 July 5, 2017).
115. *Id.* at \*7.
116. 266 P.3d 987 (Cal. 2012).
117. *Petitpas*, 2017 WL 2859760, at \*19.
118. See *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016) (physician's testimony that cumulative exposures contributed to worker's disease was not inadmissible as testimony that "each and every breath" of asbestos was substantially causative of mesothelioma).
119. 104 A.3d 328 (Pa. 2014).
120. *Tincher's* sweeping consequences are addressed in an excellent new law review article, James M. Beck, *Rebooting Pennsylvania Product Liability Law: Tincher v. Omega Flex and the End of Azzarello Super-Strict Liability*, 26 Widener L.J. 91 (2017).
121. Compare *Amato v. Bell & Gossett*, 116 A.3d 607, 617 (Pa. Super. 2015) (holding that *Tincher* applies in the failure-to-warn context), and *Am. Honda Motor Co., Inc. v. Martinez*, 2017 WL 1400968 (Pa. Super. Apr. 19, 2017) (unpublished) ("[T]he applicability of *Tincher* to warning defect claims remains unsettled."). ■





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