

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DBMP LLC; JOHNSON & JOHNSON; PECOS)
RIVER TALC, LLC; RED RIVER TALC, LLC;)
J-M MANUFACTURING CO., INC.; THE DOW)
CHEMICAL COMPANY; ROHM AND HAAS)
COMPANY; and UNION CARBIDE)
CORPORATION,)

Plaintiffs,)

v.)

DELAWARE CLAIMS PROCESSING)
FACILITY, LLC; ARMSTRONG WORLD)
INDUSTRIES, INC. ASBESTOS PERSONAL)
INJURY SETTLEMENT TRUST; THE)
BABCOCK & WILCOX COMPANY)
ASBESTOS PI TRUST; CELOTEX ASBESTOS)
SETTLEMENT TRUST; FEDERAL-MOGUL)
ASBESTOS PERSONAL INJURY TRUST; THE)
FLINTKOTE ASBESTOS TRUST; OWENS)
CORNING FIBREBOARD ASBESTOS)
PERSONAL INJURY TRUST; OWENS-)
ILLINOIS ASBESTOS PERSONAL INJURY)
TRUST; PITTSBURGH CORNING)
CORPORATION ASBESTOS PERSONAL)
INJURY SETTLEMENT TRUST; UNITED)
STATES GYPSUM ASBESTOS PERSONAL)
INJURY SETTLEMENT TRUST; and WRG)
ASBESTOS PI TRUST,)

Defendants.)

C.A. No. 2025-0404-JTL

**BRIEF OF SOUTH CAROLINA, ALABAMA, GEORGIA, IOWA,
LOUISIANA, MISSISSIPPI, OHIO, TEXAS, UTAH, AND VIRGINIA AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS**

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Non-parties States of South Carolina, Alabama, Georgia, Iowa, Louisiana, Mississippi, Ohio, Texas, Utah, and Virginia (collectively “Amici States”), by and through their undersigned counsel, respectfully submit this *amicus curiae* brief in support of Plaintiffs.

I. STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Amici curiae are sovereign States. Through their Attorneys General, the Amici States regularly file amicus briefs in a wide variety of cases, including in cases that raise important questions of state law, that impact state citizens, and that present matters of significant public interest or concern.

Plaintiffs’ lawsuit, which raises claims regarding data and document destruction by asbestos trusts, implicates the laws of many of the Amici States, especially state asbestos trust transparency laws. Additionally, the lawsuit has the potential to significantly impact litigation in the courts of Amici States.

Amici States write to draw attention to two significant legal and policy concerns presented by Plaintiffs’ claims and Defendants’ actions.

II. STATEMENT OF FACTS RELEVANT TO THE *AMICI CURIAE*

As alleged and as explained more fully in Plaintiffs’ Amended Complaint, the Defendants in this case are ten asbestos trusts and their claims processing service company. AC ¶ 2. The trusts were created under federal bankruptcy law following the bankruptcies of prominent defendants in asbestos litigation. AC ¶¶ 39, 43. As a

general matter, any new asbestos claims against the bankrupt defendants are directed towards the trusts. Those trusts use their own claims processing company to make payments to individuals who have been injured by the bankrupt company's asbestos-containing products. AC ¶¶ 44, 50.

As part of this process, claimants submit reimbursement claims to the trusts. These claims often require the submission of various data and documents to support the claim, including a medical diagnosis of an asbestos-related disease, supporting medical records, documentation of the claimant's exposure to asbestos (which can include work history, job site records, and witness statements), and proof of product use. AC ¶ 50. The trusts themselves also generate documents and information as the claims are reviewed. *Id.*

The trust Defendants have announced new retention policies related to these materials. AC ¶ 6. As alleged in Plaintiffs' Complaint, these policies were set to become effective on April 15, 2025, and would lead to the destruction of these materials "after a certain period following resolution of" asbestos claims. *Id.* Plaintiffs allege that these policies "were specifically designed to evade the obligation to produce highly relevant information in current and future litigation proceedings, to avoid court findings similar to those made in *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014), and to otherwise compromise the ability of asbestos defendants to defend current and future asbestos-related claims."

AC ¶ 7. *See also* J. Hare & D. Ryan, Jr., *The More Things Change: Bankruptcy Trust Reform and the Status Quo in Asbestos Litigation*, IADC (Jan. 27, 2020) (discussing how leading asbestos plaintiff lawyers “exercise significant control over the decision-making of asbestos trusts” through their positions on trust advisory committees and have worked to oppose trust transparency reforms).

III. ARGUMENT

To assist this Court in its analysis of the issues presented by this case, Amici States make two points for this Court’s consideration: (1) the trusts allegedly plan to destroy data and documents that are highly relevant to ongoing and future litigation and identifying and preventing fraud, waste, and mismanagement; and (2) the trusts’ alleged plans circumvent state transparency laws. Both points raise significant legal and policy concerns for this Court to consider as it weighs Plaintiffs’ claims.

A. **The Trusts Allegedly Plan To Destroy Data And Documents That Are Highly Relevant To Ongoing And Future Litigation and Needed to Prevent Fraud, Mismanagement, and Abuse.**

Courts from around the country have concluded that data and documents held by asbestos trusts are discoverable and relevant in separate litigation. *See Willis v. Buffalo Pumps, Inc.*, No. 12CV744-BTM DHB, 2014 WL 2458247, at *1 (S.D. Cal. June 2, 2014) (“Federal and state courts have routinely held that claims submitted to asbestos bankruptcy trusts are discoverable.”); *see also* W. Shelley, J. Cohn & J. Arnold, *The Need for Transparency Between the Tort System and Section 524(g)*

Asbestos Trusts, 17 NORTON J. OF BANKR. LAW & PRAC. 257, 274 (2008) (“A growing number of courts are recognizing defendants’ legitimate interest in discovering information about plaintiffs’ trust claims.”).

These materials may be used for a wide variety of purposes, including for purposes of deciding causation and damages. *See Carroll v. John Crane Inc.*, No. 15-CV-373-WMC, 2017 WL 2912720, at *2 (W.D. Wis. July 7, 2017) (“[T]he court agrees any [bankruptcy trust] claims plaintiffs have asserted that other entities are responsible for the development of [the plaintiff’s] mesothelioma are potentially relevant for purposes of deciding causation and damages.”) (emphasis in original); *see also Shelley, The Need for Transparency between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. OF BANKR. LAW & PRAC. at 277 (“As nonbankruptcy courts are increasingly recognizing, fundamental fairness requires that tort system defendants be afforded access to claiming and payment information concerning the 524(g) trusts. From the liability perspective, tort defendants should be permitted to access and use this information to help to demonstrate that they do not bear legal liability for a plaintiff’s injuries or, where liability is established to some degree, to put into perspective their relative fault in relation to the overall culpability of all tortfeasors. Additionally (or, in some states, alternatively), defendants should be allowed dollar-for-dollar credit for the payments made (or to be made) to claimants by the 524(g) trusts.”).

Recognizing the value of such information, many state trial courts have at various times required “full disclosure of trust claims as part of their case management orders.” Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 AM. J. TRIAL ADVOC. 479, 481 (2014).

The bankruptcy court in *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71, 86 (W.D.N.C. 2014) convincingly demonstrated the relevance—and value—of these types of materials when it discussed how a defendant can successfully use trust materials in its litigation strategy. There, the court observed: “In contrast to the cases where exposure evidence was withheld, there were several cases in which Garlock obtained evidence of Trust claims that had been filed and was able to use them in its defense at trial. In three such trials, Garlock won defense verdicts, and in a fourth it was assigned only a 2% liability share.” 504 B.R. at 86.

And importantly, the absence of trust materials—whether through gamesmanship, intentional withholding, or deliberate destruction—can unfairly prejudice defendants and erode trust in the judicial process. The bankruptcy court in *Garlock* listed multiple examples of how the absence of such materials prejudiced Garlock in cases across the country. *Id.* at 85. In many of the cited examples, “some plaintiffs and their lawyers” sought 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).” *Id.* at 84. By delaying the filing of trust claims, parties and the court would necessarily not have access to information pertaining to those claims. *Id.* (“It was a regular practice by many plaintiffs’ firms to delay filing Trust claims for their clients so that remaining tort system defendants would not have that information.”). These examples led the *Garlock* court to conclude that “the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock’s settlement practices and results.” *Id.* at 85.

In addition, the deletion of the trust materials would critically undermine the ability of the trusts and others to identify and address fraud, mismanagement, or abuse in asbestos-related bankruptcy trusts. At the urging of state Attorneys General, the Department of Justice and the United States Trustee Program have taken steps to combat a “problematic lack of transparency in the operation and oversight of asbestos trusts.”¹ Those steps include objecting to bankruptcy plans “that fail to

¹ See M. Behrens & W. Northrip, *Department of Justice Combats Asbestos Trust Abuse, Defense Counsel Journal* (Jan. 20, 2020) (“In November 2017, twenty state Attorneys General wrote the United States Attorney General to express their concern with ‘the potential abuse and mismanagement of asbestos bankruptcy trusts.’”) (citing Letter from Attorneys General of Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin to Hon. Jefferson B. Sessions, III, United States Attorney General (Nov. 6, 2017)); Department of Justice Press Release, *Justice Department Files Statement of Interest Urging Transparency in the Compensation of Asbestos Claims* (Dec. 28, 2020) (“In recent years, numerous courts and commentators have recognized that many asbestos claims are based on inaccurate or even fraudulent

include critical information on how asbestos claims will be evaluated, paid, and reported or that lack sufficient safeguards to prevent fraud and abuse and to ensure that the interests of the United States will be protected.”²

As alleged in Plaintiffs’ Amended Complaint, the plans that created the trusts include provisions requiring the trusts to conduct audits regarding the propriety of trust payments. AC ¶¶ 75, 77. The purpose of these audits is to compare different exposures identified by claimants in submitting claims for payment to the various trusts and identify any ‘discrepancies’ among them. *Id.* ¶ 75 & Exhibit Z. Destruction of the trust material would critically undermine the ability to make such comparisons, opening the door to fraud, mismanagement, and abuse. *See* M. Behrens & W. Northrip, Department of Justice Combats Asbestos Trust Abuse, Defense Counsel Journal (Jan. 20, 2020) (“The Department said it may object to ‘any proposed Trust procedures that would permit claimants to file claims and receive payments in complete anonymity and in a manner that may prevent any meaningful audit of the trust claims and payments.’”) (citing DOJ Letters to States).

information,” said U.S. Attorney R. Andrew Murray for the Western District of North Carolina. ‘That lack of transparency in the compensation of asbestos claims has been a significant problem.’”).

² *Id.* (citing Letters from Hon. Jesse Panuccio, Acting Associate Attorney General of the United States, to Attorneys General of Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin (Sept. 13, 2018), available at <https://www.justice.gov/opa/press-release/file/1094021/download> (hereinafter “DOJ Letters to State AGs”).

In short, absent this Court’s intervention, the trusts allegedly plan to destroy materials that are highly relevant to lawsuits around the country and needed to prevent the fraud, mismanagement, and abuse. As the above authorities indicate, such destruction will materially prejudice parties and courts dealing with these claims.

B. The Trusts’ Alleged Plans Circumvent State Transparency Laws.

The examples discussed in *Garlock* were not unique to that case. On the contrary, subsequent research uncovered similar patterns of suppression of trust materials in cases across the country. See Mark A. Behrens, *Asbestos Trust Transparency*, 87 FORDHAM L. REV. 107, 115 (2018) (“Since the *Garlock* decision was issued, 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.’”) (quoting Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 AM. J. TRIAL ADVOC. at 488). And unsurprisingly, these attempts to circumvent the disclosure of trust materials had similar consequences for defendants. See Behrens, *Asbestos Trust Transparency*, 87 FORDHAM L. REV. at 114 (“By delaying asbestos trust filings until a personal injury case is resolved, a plaintiff can suppress evidence of trust-related exposures that defendants could use at trial, including evidence that would attach fault to a former insulation defendant. Delayed

trust claim submissions also can deny judgment defendants setoffs they would otherwise be entitled to receive for trust payments to plaintiffs.”).

In response to these problems, state legislatures around the country passed asbestos trust transparency laws. These transparency laws sought to address the problem identified by the court in *Garlock* in which plaintiffs’ firms delayed filing trust claims. As a result, many of these laws generally require trust claims “to be filed before trial and disclosed.” Behrens, *Asbestos Trust Transparency*, 87 *FORDHAM L. REV.* at 117; *see, e.g.*, Iowa Code Ann. § 686A.3 (requiring a plaintiff and plaintiff’s counsel to file a sworn statement after an asbestos action is filed “that an investigation of all asbestos trust claims has been conducted and that all asbestos trust claims that may be made by the plaintiff or any person on the plaintiff’s behalf have been filed.”); W. Va. Code Ann. § 55-7F-4(a) (“For each asbestos action filed in this state, the plaintiff shall provide all parties with a sworn statement identifying all asbestos trust claims that have been filed by the plaintiff or by anyone on the plaintiff’s behalf, including claims with respect to asbestos-related conditions other than those that are the basis for the asbestos action or that potentially could be filed by the plaintiff against an asbestos trust.”).

In mandating disclosure of these trust claims, some laws expressly specify that trust materials are presumptively discoverable. *See, e.g.*, Tenn. Code Ann. § 29-34-604(a) (“Trust claims materials and trust governance documents are presumed to

be relevant and authentic and are admissible in evidence.”). And many of the laws protect the right of defendants to seek discovery against the trusts. *See, e.g.*, Ala. Code § 6-5-694(b) (“A defendant in an asbestos action may seek discovery from an asbestos trust. The plaintiff may not claim privilege or confidentiality to bar discovery and shall provide consent or other expression of permission that may be required by the asbestos trust to release the information and materials sought by the defendant.”).

All of these laws—whether explicitly or implicitly—recognize that trust claims and trust materials are relevant to asbestos actions and generally contemplate that trust materials should be available to litigants. By destroying documents and data regarding prior claims, the trusts’ new retention policies thus necessarily circumvent the intent of these transparency laws.

And in certain cases, these policies may actually violate those laws, particularly where states mandate that trust materials be “available” to all parties. *See* W. Va. Code Ann. § 55-7F-4(b) (“The plaintiff shall make available to all parties all trust claims materials for each asbestos trust claim that has been filed by the plaintiff or by anyone on the plaintiff’s behalf against an asbestos trust, including any asbestos-related disease”).

The Defendants’ alleged policies present the real risk of frustrating state transparency laws.

IV. CONCLUSION

Given the foregoing, this Court should prevent Defendants' planned document destruction.³

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³ According to Plaintiffs' Complaint, data and documents will not be deleted under the policies if they must be retained to "comply with applicable law." AC ¶ 6. At this juncture, it is not clear to Amici States whether the Defendants consider state transparency laws to be applicable in these circumstances. As the above makes clear, Amici States firmly believe those laws are relevant to the trusts' alleged actions.

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